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## Toward a Future, Wiser Court: A Blueprint for Overturning District of Columbia v. Heller

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## TOWARD A FUTURE, WISER COURT: A BLUEPRINT FOR OVERTURNING *DISTRICT OF COLUMBIA V. HELLER*

*Richard Aborn\* & Marlene Koury\*\**

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## INTRODUCTION

Justice John Paul Stevens recently bantered to *Time Magazine* that, if he could fix one thing about the American judicial system, it would be to make all of his dissents into majority opinions.<sup>1</sup> Banter aside, he stressed that if he could choose only one of his dissents to turn into a majority opinion, it would be his dissent in *District of Columbia v. Heller*.<sup>2</sup> Specifically, he said that he “would change the interpretation of the Second Amendment. The Court got that quite wrong. Gun policy should be handled by legislatures and by states, not by federal judges appointed for life.”<sup>3</sup>

With that same hope, it is rumored that, during a lecture to the Harvard Club of Washington, D.C., Justice Ruth Bader Ginsburg expressed her strong desire that Justice Stevens’ dissenting opinion in *Heller* will become the majority opinion of “a future, wiser Court.”<sup>4</sup>

*Heller* is still the subject of national debate and is one of the more controversial decisions from the Roberts Court. The Court issued its pivotal 5-4 ruling on June 26, 2008,<sup>5</sup> finding for the first time that the Second Amendment conferred an individual right to possess firearms unrelated to service in a well-regulated militia.<sup>6</sup> In its analysis, the Court concluded that “central” to the Second Amendment is the natural right to self-defense, and by extension, the right to possess handguns for self-defense within the home.<sup>7</sup> In finding so, the Court struck down a decades-old D.C. law that banned handgun possession and required that firearms in the home be stored safely.<sup>8</sup>

Justice Stevens issued one of two dissenting opinions.<sup>9</sup> In his dissent, he argued passionately that the majority rendered “a

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1. Belinda Luscombe, *10 Questions for John Paul Stevens*, TIME (Oct. 31, 2011), <http://www.time.com/time/magazine/article/0,9171,2097390,00.html>.

2. 554 U.S. 570, 636 (2008) (Stevens, J., dissenting).

3. Luscombe, *supra* note 1.

4. Chris W. Cox, *Justice Ginsburg Reminds Us What Is at Stake in November*, NAT’L RIFLE ASS’N-INST. FOR LEGISLATIVE ACTION (Feb. 13, 2012), <http://www.nra.org/news-issues/articles/2012/justice-ginsburg-reminds-us-what-is-at-stake-in-november.aspx>. As could be expected, her comment raised the hackles of the NRA.

5. *Heller*, 554 U.S. at 570.

6. *See id.* at 634-35.

7. *See id.* at 628.

8. *See id.* at 634-35.

9. *Id.* at 636 (Stevens, J., dissenting). Justice Breyer also issued a dissent. *See id.* at 681 (Breyer, J., dissenting).

dramatic upheaval in the law” and decided the case on “a strained and unpersuasive reading” of the Second Amendment.<sup>10</sup> He emphasized that the Second Amendment does not contain any “statement of purpose related to the right to use firearms for hunting or personal self-defense.”<sup>11</sup> He also stressed that the Court’s ruling overturned long-standing precedent announced in *United States v. Miller*, which held that the “obvious purpose” of the Second Amendment was to “assure the continuation and render possible the effectiveness of” the state militia.<sup>12</sup>

The decision in *Heller* raised the obvious question of its potential impact on existing gun control laws and whether they will stand up to a Second Amendment challenge.<sup>13</sup> But few have questioned whether a “future, wiser Court” will simply reverse *Heller*. Our Article provides a blueprint for how Justice Ginsberg’s hope may be realized.

In Part I, we discuss the influence and guidance that dissenting opinions may provide to future, wiser Courts. In Part II, we analyze *Heller*, paying particular attention to the tensions that the conflicting majority and dissenting opinions raise. In Part III, we analyze landmark cases from future, wiser Courts that overturned stale or decidedly wrong precedent. In Part IV, we draw from these examples in order to evaluate the conditions that lead to overturning a Supreme Court case. Finally, in Part V, we apply the framework to *Heller* and suggest possible ways to author its reversal.

### I. THE POWER OF DISSENTING OPINIONS

Justice Ginsburg’s rumored comment differs slightly from her later-published lecture on the same topic, *The Role of Dissenting Opinions*,<sup>14</sup> though it carries the same sentiment. In her published

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10. *Id.* at 639 (Stevens, J., dissenting).

11. *Id.* at 642.

12. *See id.* at 637-38; *United States v. Miller*, 307 U.S. 174, 178 (1939).

13. Thus far, many gun control laws have withstood Second Amendment challenges in *Heller*’s wake. *See, e.g.*, *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011); *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011); *People v. Montyce H.*, 959 N.E.2d 221 (Ill. App. Ct. 2011); *Perry v. State Civ. Serv. Comm’n*, 38 A.3d 942 (Pa. Commw. Ct. 2011); DAN VICE & KELLY WARD, BRADY CTR. TO PREVENT GUN VIOLENCE, HOLLOW VICTORY? GUN LAWS SURVIVE THREE YEARS AFTER *DISTRICT OF COLUMBIA V. HELLER*, YET CRIMINALS AND THE GUN LOBBY CONTINUE THEIR LEGAL ASSAULT (2011); *Post-Heller Litigation Summary*, LEGAL CMTY. AGAINST VIOLENCE, [http://www.lcav.org/content/post-heller\\_summary.pdf](http://www.lcav.org/content/post-heller_summary.pdf) (last visited Dec. 23, 2011).

14. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, Presentation to the Harvard Club of Washington, D.C. (Dec. 17, 2009), *in* 95 MINN. L. REV. 1 (2010).

lecture, Justice Ginsburg wrote that she would rank Justice Stevens' and Justice Breyer's dissents as opinions "appealing to the intelligence of a future day."<sup>15</sup> She was referring to former Chief Justice Charles Hughes's famous quote that "[a] dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."<sup>16</sup>

In her paper, Justice Ginsburg points to Justice Benjamin Curtis's dissent from the 1857 decision in *Dred Scott v. Sandford*<sup>17</sup> as an example of a decision appealing to the intelligence of a future day.<sup>18</sup> *Dred Scott* held that people of African descent whose ancestors were brought to the United States as slaves could never be citizens.<sup>19</sup> Justice Curtis wrote a pointed dissent, arguing that African Americans were "citizens of at least five States, and so in every sense part of the people of the United States," and thus "among those for whom and whose posterity the Constitution was ordained and established."<sup>20</sup> Although the case was never reversed officially,<sup>21</sup> slavery was abolished several years after the Court issued *Dred Scott* and Curtis's dissent has long since been acknowledged as the wise course the Court declined to take.<sup>22</sup>

Justice Ginsburg's declaration comes, in part, from experience: she wrote a powerful dissent in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*<sup>23</sup> that led directly—and swiftly—to Congress passing the Lilly Ledbetter Fair Pay Act of 2009.<sup>24</sup> In *Ledbetter*, the Supreme Court held that a worker could not sue his employer for equal-pay discrimination that occurred more than 180 days prior, regardless of

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15. *Id.* at 6.

16. *Id.* at 4 (quoting CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936)).

17. 60 U.S. (19 How.) 393 (1856).

18. Ginsburg, *supra* note 14, at 4.

19. *Id.* at 4 (citing *Dred Scott*, 60 U.S. (19 How.) at 393).

20. *Dred Scott*, 60 U.S. (19 How.) at 582 (Curtis, J., dissenting).

21. *Dred Scott* was superseded by the Thirteen and Fourteenth Amendments. See U.S. CONST. amends. XIII, XIV. In addition, the Court noted in the *Slaughterhouse Cases* that the Fourteenth Amendment "declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States." 83 U.S. 36, 73 (1873).

22. Ginsburg, *supra* note 14, at 4.

23. 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting).

24. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.).

whether the effects of the discrimination were ongoing.<sup>25</sup> In a rare practice, Justice Ginsburg read her dissent from the bench, stating that “[i]n our view, the Court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination.”<sup>26</sup> She continued, explaining that “[p]ay disparities often occur, as they did in Ledbetter’s case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee’s view.”<sup>27</sup> Congress quickly endorsed Justice Ginsburg’s perspective by passing the Lilly Ledbetter Fair Pay Act of 2009, which was the first bill that President Obama signed into law.<sup>28</sup>

A dissenting opinion generally aims to persuade a future court, Congress, and even future litigants, to adopt its view.<sup>29</sup> Justice Brennan wrote that “the dissent demonstrates flaws the author perceives in the majority’s legal analysis. It is offered as a corrective—in the hope that the Court will mend the error of its ways in a later case.”<sup>30</sup> Justice Scalia, too, stressed that judicial dissents are meant to point to flaws in the majority opinion and to influence future litigants.<sup>31</sup> When asked whether he views judicial dissent as a form of advocacy, he answered, “Yeah, in a way. I’m advocating for the future. Who do you think I’m writing my dissents for? I’m writing for the next generation and for law students. You know, read this and see if you want to go down that road.”<sup>32</sup>

With the guidance—and often the rallying cry—of dissenting opinions, the Supreme Court has reversed itself on occasions where, typically, conservative decisions became retrograde in the face of progressive societal change.<sup>33</sup> Several of these reversals have been influenced by strongly worded dissents in the cases being overturned.

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25. *Ledbetter*, 550 U.S. at 642-43.

26. See Robert Barnes, *Over Ginsburg’s Dissent, the Court Limits Bias Suits*, WASH. POST, May 30, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900740.html>.

27. *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

28. Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 30, 2009, <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

29. See, e.g., Ginsburg, *supra* note 16.

30. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

31. Dan Slater, *Law Blog Chats With Scalia, Part II: ‘Master of the Dissent,’* WALL ST. J. L. BLOG (May 30, 2008, 9:04 PM), <http://blogs.wsj.com/law/2008/05/30/law-blog-chats-with-scalia-part-ii-master-of-the-dissent>.

32. *Id.*

33. See, e.g., Part III, *infra*.

Although we discuss a handful of cases, the two on which we focus most closely are *Brown v. Board of Education*,<sup>34</sup> which overturned *Plessy v. Ferguson*<sup>35</sup> and the “separate, but equal” precedent announced therein,<sup>36</sup> and *Lawrence v. Texas*,<sup>37</sup> which overturned *Bowers v. Hardwick*<sup>38</sup> and other cases prohibiting same-sex sexual relations. In both of these instances, the majority opinions were strongly influenced by the dissents in their antecedents, penned by Justice Harlan<sup>39</sup> and Justice Stevens,<sup>40</sup> respectively. These vindicated dissents articulated a socially progressive position against the oppressive majority opinion.<sup>41</sup> Thus, Justice Ginsburg’s hope that Justice Stevens’ dissent will appeal to the intelligence of a “future, wiser Court” is rooted in the Court’s history.

## II. *HELLER*

*Heller* is a landmark case because it is the first case to find that the Second Amendment “right to bear arms” conferred an individual right to possess firearms unrelated to service in a well-regulated militia.<sup>42</sup>

At issue in *Heller* was a decades-old Washington, D.C. law that banned handgun possession and required that firearms in the home be stored unloaded and disassembled or bound by a locking device.<sup>43</sup> In a narrow 5-4 decision, the Supreme Court struck down the law, holding that it violated the Second Amendment.<sup>44</sup> Both the majority and dissenting opinions primarily analyzed the highly-contentious, frequently-debated Second Amendment language reading: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>45</sup> In those twenty-seven words, the Court found an individual right to keep and bear arms—unconnected to military service—in the home

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34. 347 U.S. 483 (1954).

35. 163 U.S. 537 (1896).

36. *Id.*

37. 539 U.S. 558 (2003).

38. 478 U.S. 186 (1986).

39. *Plessy*, 163 U.S. at 563 (Harlan, J., dissenting).

40. *Bowers*, 478 U.S. at 214 (Stevens, J., dissenting).

41. *See, e.g., Bowers*, 478 U.S. at 214 (1986) (Stevens, J., dissenting); *Plessy*, 163 U.S. at 563 (1896) (Harlan, J., dissenting).

42. *District of Columbia v. Heller*, 554 U.S. 570, 635-36 (2008).

43. *Id.* at 575.

44. *Id.* at 635-36.

45. U.S. CONST. amend. II.

for the purpose of self-defense.<sup>46</sup> Justice Stevens strongly disagreed in his dissent, arguing that the right to keep and bear arms applies only in connection with service to the nation in the militia.<sup>47</sup>

### A. Majority Opinion

Justice Scalia penned the majority opinion for the Court.<sup>48</sup> Broadly speaking, the Court concluded that the second clause, “the right of the people to keep and bear Arms,” is not limited by the first clause, “a well regulated Militia,” but rather refers to a pre-existing right of individuals “to possess and carry weapons in case of confrontation.”<sup>49</sup> With that “strained and unpersuasive reading,”<sup>50</sup> the Court concluded that “[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms” unconnected to service in a militia.<sup>51</sup> In doing so, the majority read this equivocal constitutional provision as creating a substantive right that had never before been found in the two hundred years since the Amendment’s enactment.<sup>52</sup>

In addition, the *Heller* majority determined that the Second Amendment shields the right to possess handguns in one’s home for the purpose of self-defense.<sup>53</sup> Justice Scalia wrote that “[t]he inherent right of self-defense has been central to the Second Amendment” and that handguns, in particular, are “overwhelmingly chosen by American society” for self-defense within the home.<sup>54</sup> The Court also struck down the safe-storage law, noting that this provision “makes it impossible for citizens to use [handguns] for the core lawful purpose of self-defense.”<sup>55</sup>

As open-ended as the majority opinion initially appears, however, the Court made clear that it did not intend for the holding in *Heller* to be boundless.<sup>56</sup> The Court recognized that the right to possess a

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46. *Heller*, 554 U.S. at 626-27.

47. *Id.* at 651-52 (Stevens, J., dissenting).

48. The majority opinion was joined by Chief Justice Roberts and Justices Alito, Kennedy, and Thomas.

49. *Heller*, 554 U.S. at 589-90 (majority opinion).

50. *Id.* at 639 (Stevens, J., dissenting).

51. *Id.* at 595 (majority opinion).

52. J. Harvie Wilkinson, III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 265 (2009).

53. *Heller*, 554 U.S. at 628-29.

54. *Id.*

55. *Id.* at 630.

56. *See id.* at 626-28.



handgun for self-defense is limited, noting that it is not “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>57</sup> Following this, the Court held that laws prohibiting the possession of guns by certain persons, including felons and the mentally ill, were “presumptively lawful.”<sup>58</sup> The Court held that certain other “presumptively lawful” limitations included restrictions on guns in certain “sensitive places,” including schools and government buildings, and conditions on the commercial sale of firearms.<sup>59</sup> The majority noted that these examples were not exhaustive.<sup>60</sup> In addition, the Court found that the Second Amendment is consistent with laws banning “dangerous and unusual weapons” that were not in common use at the time, such as M-16 rifles and other firearms that are most useful in military service.<sup>61</sup>

In forming its opinion, the Court avoided dealing properly with long-standing Second Amendment precedent announced in *United States v. Miller*, the only prior case dealing directly with the interpretation of the Second Amendment.<sup>62</sup> At issue in *Miller* was a criminal prosecution brought under the National Firearms Act of 1934 in which the Court was required to interpret the Second Amendment.<sup>63</sup> *Miller* was a unanimous decision holding that the “obvious purpose” of the Second Amendment was to “assure the continuation and render possible the effectiveness of” the state militia and must be “interpreted and applied with that end in view.”<sup>64</sup>

Rather than correctly interpreting the Amendment as *Miller* demands, the *Heller* majority limited *Miller* to the proposition that the Second Amendment right “extends only to certain types of weapons,” and in particular, to “dangerous or unusual weapons.”<sup>65</sup> The Court simply swept *Miller* under the rug, concluding that “[i]t is particularly wrongheaded to read *Miller* for more than what it said,

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57. *Id.*

58. *Id.* at 627 n.26.

59. *Id.* at 626-27.

60. *Id.* at 627 n.26.

61. *Id.* at 627.

62. In the years between *Miller* (1939) and *Heller* (2008), there were no other Supreme Court cases dealing directly with the interpretation of the Second Amendment.

63. *United States v. Miller*, 307 U.S. 174, 177-78 (1939).

64. *Id.* at 178.

65. *Heller*, 554 U.S. at 623-27.

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because the case did not even purport to be a thorough examination of the Second Amendment.”<sup>66</sup>

### B. Justice Stevens’s Dissenting Opinion

Justice Stevens issued a passionate dissent,<sup>67</sup> calling the majority’s analysis “a strained and unpersuasive reading” of the Second Amendment that resulted in “a dramatic upheaval in the law.”<sup>68</sup> In his astute dissent, Justice Stevens not only articulates how the majority failed to give proper deference to the Court’s own longstanding *Miller* decision, but also—and perhaps more importantly—he provided clues to future advocates looking to overturn *Heller*.<sup>69</sup> In particular, Stevens demonstrates how the majority’s textual interpretation is sophistic and divorced from the intentions of the framers, and he detects the carelessness of the majority’s choice to arrogate for the judiciary gun-control policy decisions that instead should be made by the legislature.<sup>70</sup>

In his dissent, Justice Stevens reads the Second Amendment as establishing the right “to keep and bear Arms” in connection with service to the nation in the militia.<sup>71</sup> In direct contradiction with the majority view, he argues that the “militia” preamble is connected to the phrase “to keep and bear Arms,” meaning that the Second Amendment applies only to state militia service—not to an individual right.<sup>72</sup> Justice Stevens concluded that the Founders would have expressly articulated an individual right to bear arms in the Amendment if they meant to confer such a right, as certain states expressly did in their own declarations of rights.<sup>73</sup> He drew on historical evidence that demonstrated that the purpose of the Second Amendment was to prevent the federal government from disarming

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66. *Id.* at 623.

67. Justice Stevens’s dissent was joined by Justices Ginsburg, Souter and Breyer (who also issued his own dissent).

68. *Heller*, 554 U.S. at 639 (Stevens, J., dissenting).

69. *Id.* at 639-40.

70. *See id.* at 678-80.

71. *Id.* at 636-37; *see also id.* at 681 (Breyer, J., dissenting).

72. *Id.* at 636-37 (Stevens, J., dissenting).

73. *See id.* at 640-44 (comparing language in Pennsylvania’s 1776 Declaration of Rights and the 1777 Vermont Declaration of Rights to the Second Amendment, Stevens states that the “contrast between those two declarations and the Second Amendment reinforces the clear statement of purpose announced in the Amendment’s preamble,” i.e., that the right conferred by the Second Amendment refers exclusively to the context of state militias).

state militias.<sup>74</sup> As to the right of self-defense, Justice Stevens argued that “there is no indication that the Framers of the [Second] Amendment intended to enshrine the common-law right of self-defense in the Constitution.”<sup>75</sup>

In addition, Justice Stevens noted that the majority provided no basis for revising the interpretation of the Second Amendment from the purpose outlined in *Miller*.<sup>76</sup> Justice Stevens argued that *Miller* should not be undermined or limited, as it interpreted the Second Amendment correctly and as Courts, legislators, and litigants have relied on it for over seventy years.<sup>77</sup> He argued that

[t]he view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment’s text and the interpretation most faithful to the history of its adoption.<sup>78</sup>

In response to the majority view that *Miller* only prohibited “dangerous and unusual” weapons, he concluded that “[t]he Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons . . . . I could not possibly conclude that the Framers made such a choice.”<sup>79</sup> Indeed, Justice Stevens concluded that “a review of the drafting history of the Amendment demonstrates that its Framers *rejected* proposals that would have broadened its coverage to include [civilian use of weapons].”<sup>80</sup>

With his impassioned dissent, Justice Stevens aimed to strike the intelligence of a future, wiser Court. He also sounded the alarm: now gun control advocates and citizens must respond. Stevens’s analysis lays the technical framework that would allow a future Court to overturn *Heller*, while outrage over the Court’s decision to take gun control policy decisions away from bodies that are elected, and better

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74. *Id.*

75. *Id.* at 637.

76. *Id.* at 637-39.

77. *Id.* at 638-39 (“Since our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there; we ourselves affirmed it in 1980. No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons.” (citing *Lewis v. United States*, 445 U.S. 55, 65-66 n.8 (1980))).

78. *Id.* at 637-38.

79. *Id.* at 680.

80. *Id.* at 639.

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equipped to study and address the problem of gun violence, has the potential to galvanize a movement that would engineer cases offering a future Court the opportunity to right the wrong of *Heller*.

### III. LANDMARK CASES FROM FUTURE, WISER COURTS

High-profile, landmark cases from future, wiser Courts, particularly those affecting liberty or equality, have a huge impact on society, and not just because they decide divisive, charged social issues. They also dictate the way in which myriad cases will be decided by lower courts. The landmark cases that reversed prior, outdated cases are remarkable, in part, because the dissents in the first cases were strongly influential to the Courts' opinions in the second cases. Often, the dissents in the antecedent cases are recognized as forward-thinking and as having been correct all along.<sup>81</sup> In this way, it is useful to consider these cases as pairs. It is unusual, for example, to consider *Brown* without a thought of *Plessy* or *Lawrence* without *Bowers*, and vice versa.

Although each of the illustrative cases discussed below has its own unique set of facts, is from a different point in history, and was issued by differently-composed Courts, they all share a common thread: the reversed decision represents a conservative, archaic interpretation of the Constitution, whereas the overruling decision reflects progressive thinking and generates social advancement.

We discuss a handful of these paired cases. We focus particularly on what is arguably the most famous pair, *Plessy*<sup>82</sup> and *Brown*,<sup>83</sup> in which Harlan's dissent in *Plessy* strongly influenced the majority in *Brown*. We also discuss one of the more recent pairs, *Bowers*<sup>84</sup> and *Lawrence*,<sup>85</sup> in which Stevens's dissent in *Bowers* essentially became the majority in *Lawrence*.

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81. Ginsburg, *supra* note 14, at 4-5.

82. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

83. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

84. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

85. *Lawrence v. Texas*, 539 U.S. 558 (2003).

## A. From Racism to Equality: *Plessy* and *Brown*

### 1. *Plessy v. Ferguson*

Famous for its embarrassing “separate, but equal” precedent,<sup>86</sup> *Plessy* is a well-known disgrace to the Supreme Court for upholding laws requiring racial segregation in public facilities. *Plessy* was decided in 1896, a time when racism was widely accepted and predominant.<sup>87</sup> In addition, it was decided by the Fuller Court, notable for its many graceless decisions over the course of a twenty-two year period.<sup>88</sup> It is a contemptible tribute to our nation’s history of racism that *Plessy* was not out of sync with prevailing societal attitudes at the time, and that it stood as good law through the first half of the twentieth century.<sup>89</sup> It was not until nearly sixty years later in *Brown* that the Supreme Court overturned *Plessy*, relying heavily on the wisdom in Justice Harlan’s dissent.<sup>90</sup> The Court’s decision in *Brown* helped to fuel the burgeoning Civil Rights Movement and promote growing equality among the races.<sup>91</sup>

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86. *Plessy*, 163 U.S. at 551 (“The underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

87. See Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 FORDHAM L. REV. 1435, 1437 (1997) (“I think the general consensus of our tradition has been that in cases like . . . *Plessy* the Supreme Court gave too much weight to the background social practices of the time and not enough weight to text, to founding commitments, and to things that have been constitutionalized.”) (citing Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115 (1994)).

88. See 8 OWEN FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 3 (1993) (“By all accounts, the Court over which Melville Weston Fuller presided . . . ranks among the worst.”); see also *Berea College v. Kentucky*, 211 U.S. 45 (1908) (forcing the separation of races in private educational institutions); *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York State law limiting bakers’ working hours, finding that it was not necessary to protect the health of workers); *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528 (1899) (extending “separate, but equal” to public schools); *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) (stating that Congress’s commerce power did not extend to manufacturing monopolies and the Sherman Act could not be used to enjoin stock transfers placing ninety-eight percent of America’s sugar refining capacity in one company).

89. *Plessy*, 163 U.S. 537 (1896), stood as good law until 1954, when the Court decided *Brown*, 347 U.S. 483 (1954).

90. Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321, 1334 (2008).

91. See, e.g., *Landmark: Brown v. Board of Education*, NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/case/brown-v-board-education> (last visited Aug. 4,

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At issue in *Plessy* was the Louisiana “Separate Car Act” that provided for separate railway carriages based on race.<sup>92</sup> The central issue in the case involved whether this law violated the Thirteenth Amendment’s outlawing of slavery or the Fourteenth Amendment’s guarantee of equal protection.<sup>93</sup> In a 7-1 opinion, the Court ruled that, although the Fourteenth Amendment was intended to create “absolute equality of the two races before the law,” such equality was limited to political and civil rights.<sup>94</sup> The Court reasoned that African Americans were socially “inferior,” and thus that equality did not extend to “social” rights.<sup>95</sup> The Court held that “[i]f one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.”<sup>96</sup>

Justice Harlan issued a lone, forward-thinking, biting dissent, famously arguing that “in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>97</sup> Justice Harlan recognized the extreme social harm inherent in dividing citizens by class, continuing that “destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.”<sup>98</sup>

As a show of confidence in the correctness of his dissent, he added that “[i]n my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.”<sup>99</sup> As history has taught us, Justice Harlan was more than correct in his foresight: *Plessy* is widely regarded as one of

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2012); see also MARK V. TUSHNETT, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 116, 151–52 (1994).

92. *Plessy*, 163 U.S. at 538-39.

93. *Id.*

94. *Id.* at 544.

95. *Id.*

96. *Id.* at 552. *Plessy*’s “separate, but equal” doctrine was later extended from public facilities to public schools by the same Court three years later in *Cumming v. Richmond County Board of Education.*, 175 U.S. 528 (1899).

97. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

98. *Id.* at 560.

99. *Id.* at 559.

the worst—if not the absolute worst—decisions in Supreme Court history.<sup>100</sup>

## 2. *Brown v. Board of Education*

Nearly sixty years later, the spirit and substance of Justice Harlan's dissent influenced the unanimous *Brown v. Board of Education* decision,<sup>101</sup> which outlawed segregation in public schools and had the effect of unearthing the “seeds of race hate” that *Plessy* planted.<sup>102</sup> In his opinion, Justice Earl Warren stated that to

separate [children in schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . . [W]e conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.<sup>103</sup>

*Brown* was strongly influenced by the strong, pointed anti-segregation movement led by the National Association for the Advancement of Colored People (NAACP) and its Legal Defense and Educational Fund.<sup>104</sup> The NAACP developed a long-term strategy, executed by Thurgood Marshall, to desegregate schools that culminated in the five lawsuits that we know today as *Brown*.<sup>105</sup> This was a powerful, multi-year attack on an outdated, harmful precedent.<sup>106</sup> Thurgood Marshall argued for the desegregation of

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100. The Supreme Court has acknowledged that *Plessy* “was wrong the day it was decided.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

101. *See* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

102. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting). In addition, Justice Harlan's dissent in *Plessy* was influential to later courts post-*Brown* and was broadened to issues of sexual orientation. In *Romer v. Evans*, for example, Justice Kennedy invoked Harlan's dissent, holding that “Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’ Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of a person are at stake.” *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

103. *Brown*, 347 U.S. at 494-95.

104. “*With an Even Hand*”: *Brown v. Board at 50*, THE LIBRARY OF CONG. EXHIBITIONS, <http://www.loc.gov/exhibits/brown/brown-brown.html> (last visited Aug. 31, 2012).

105. *Id.*

106. *See Excerpt from “The Winding Road to Brown: An LDF Chronology,”* NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/files/Excerpt%20From%20The%20Winding%20Road%20to%20Brown.pdf> (last visited Aug. 31, 2012).

schools before the Supreme Court, later becoming the first African American appointed to the Supreme Court.<sup>107</sup>

The anti-segregation movement that led to *Brown* also served as a catalyst for the civil rights movement.<sup>108</sup> Importantly, *Brown* was decided in 1954—the dawn of what became the vibrant Civil Rights Movement.<sup>109</sup> For context, *Brown* was decided a few years before the famous Greensboro sit-ins<sup>110</sup> and merely one year before Rosa Parks made history by refusing to give up her seat on a bus in Montgomery, Alabama.<sup>111</sup> The anti-segregation movement, coupled with the broader Civil Rights Movement, challenged the conventions and rhetoric that stained the Court's prior analysis, paving the way for the Court to overturn oppressive decisions.

The changing social tide is reflected in Justice Warren's majority opinion, which tells the story of the past decision that simply no longer fits the knowledge and awareness of the present day. He wrote that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that segregation has negative psychological effects] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."<sup>112</sup>

Without question, the composition of the Court had a large impact on the outcome of the decision. The Warren Court was known as a progressive court responsible for advancing civil rights and civil

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[hereinafter NAACP, *Winding Road*]; see also NAACP LEGAL DEFENSE FUND, *supra* note 91.

107. NAACP, *Winding Road*, *supra* note 106.

108. *See id.*

109. *Id.*; see also *infra* notes 112, 113.

110. Larry Copeland, *Sit-Ins Reignited The Civil Rights Movement 50 Years Ago*, USA TODAY, Feb. 1, 2010, [http://www.usatoday.com/news/nation/2010-02-01-sit-ins-civil-rights\\_N.htm](http://www.usatoday.com/news/nation/2010-02-01-sit-ins-civil-rights_N.htm).

111. Opinion, *A Medal for Rosa Parks*, N.Y. TIMES, June 18, 1999, <http://www.nytimes.com/1999/06/18/opinion/a-medal-for-rosa-parks.html>.

112. *Brown*, 347 U.S. at 494-95. *Brown's* application of the Fourteenth Amendment led to other cases that outlawed state-enforced racial separation. For example, in *Loving v. Virginia*, 386 U.S. 1 (1967), possibly the most aptly-named case in Supreme Court history, the Court overturned *Pace v. Alabama*, 106 U.S. 583 (1883), and other cases upholding anti-miscegenation laws. The *Loving* and *Pace* pair reflects instances in which the Court simply realizes, without a guiding prior dissent, that an earlier decision was grievously wrong. While there was no strong dissent in *Pace* to serve as guide, the general themes of Harlan's great *Plessy* dissent pervade the reasoning of *Loving*. Unfortunately, there were eighty years between decisions—eighty years in which laws criminalized interracial marriage—but when it was finally decided, it was another hit for the Warren Court.



liberties<sup>113</sup>—the mirror opposite of the Fuller Court.<sup>114</sup> The Warren Court issued a number of socially progressive decisions, including *Gideon v. Wainwright*,<sup>115</sup> which required that indigent criminal defendants receive publicly-funded counsel; *Miranda v. Arizona*,<sup>116</sup> which required that a person interrogated while in police custody have certain rights clearly explained to him; and *Griswold v. Connecticut*,<sup>117</sup> which affirmed a constitutionally protected right of privacy.

## B. From Repression to Sexual Freedom: *Bowers* and *Lawrence*

### 1. *Bowers v. Hardwick*

Although it remains to be seen whether his dissent in *Heller* will become the law of the land, Justice Stevens undoubtedly enjoyed watching the substance of his dissent in *Bowers*<sup>118</sup> become the majority opinion in *Lawrence*.<sup>119</sup>

At issue in *Bowers* was a Georgia law that criminalized same-sex sexual activity.<sup>120</sup> The *Bowers* Court upheld the law, finding that the Framers did not intend for there to be a “fundamental right [for] homosexuals to engage in acts of consensual sodomy.”<sup>121</sup> Like *Heller*, *Bowers* was decided by a conservative 5-4 majority.<sup>122</sup>

Justice Stevens wrote a scathing dissent, arguing that the Court should have relied on the substantive due process liberty cases<sup>123</sup> rather than the intimate-association cases.<sup>124</sup> Thus, Justice Stevens argued that the substantive due process liberty protection should be applied equally, “regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.”<sup>125</sup>

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113. EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 14 (Harry N. Scheiber ed., 2007).

114. See, e.g., FISS, *supra* note 88.

115. 372 U.S. 335 (1963).

116. 384 U.S. 436 (1966).

117. 381 U.S. 479 (1965).

118. *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting).

119. *Lawrence v. Texas*, 539 U.S. 558 (2003).

120. *Bowers*, 478 U.S. at 187-88 (majority opinion).

121. *Id.* at 192.

122. *Id.* at 187.

123. *Id.* at 216 (Stevens, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

124. *Id.* at 216 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

125. *Bowers*, 478 U.S. at 214 (Stevens, J., dissenting).

In his dissent, Justice Stevens encouraged a future, wiser Court to consider a common sense, rational view:

Although the meaning of the principle that ‘all men are created equal’ is not always clear, it surely must mean that every free citizen has the same interest in ‘liberty’ that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.<sup>126</sup>

*Bowers* was a major setback for the gay rights movement.<sup>127</sup> Although there was fairly substantial support for gay rights at the time, *Bowers* was decided at the height of the AIDS crisis, in which fear over homosexual activity was peaking.<sup>128</sup> In addition, resistance to the gay rights movement was strong as increased visibility of homosexuality led to a backlash from conservative elements in society.<sup>129</sup>

Furthermore, it was the moderate and often contradictory Burger court that decided *Bowers*.<sup>130</sup> Justice Burger himself made no attempt to hide his personal feelings about sodomy. In his concurring opinion, Justice Burger drew upon “millennia of moral teaching” and argued that sodomy was a “crime not fit to be named.”<sup>131</sup> Yet, although it leaned to the right, the Burger Court upheld and even expanded some of the decisions that came out of the Warren Court,<sup>132</sup> including those providing for racial equality.<sup>133</sup> This trend may indicate that once the Court grants individual rights, it may be difficult for future Courts to restrict those rights, as the public

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126. *Id.* at 218-19.

127. ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 98-99 (2005); CRAIG A. RIMMERMAN, *FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES* 61 (2002).

128. ANDERSEN, *supra* note 127, at 74.

129. *Id.*

130. See Editorial, *Justice Burger’s Contradictions*, N.Y. TIMES, June 27, 1995, <http://www.nytimes.com/1995/06/27/opinion/justice-burger-s-contradictions.html>.

131. *Bowers*, 478 U.S. at 197 (Burger, J., concurring).

132. See N.Y. TIMES, *supra* note 130. Despite being fairly moderate, the Burger Court can claim one of the most famous liberal Supreme Court decisions, *Roe v. Wade*, 410 U.S. 113 (1973).

133. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (promoting integration in schools).

becomes reliant on them. This is a challenge those seeking to overturn *Heller* may face.

## 2. *Lawrence v. Texas*

The Court expressly adopted Justice Stevens's dissenting opinion in *Bowers* seventeen years later in *Lawrence v. Texas*.<sup>134</sup> *Lawrence* concerned a Texas law that criminalized same-sex sodomy.<sup>135</sup> The 6-3 liberal majority led by Justice Kennedy held that the *Bowers* Court viewed liberty too narrowly and that, just as Justice Stevens had argued, intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment.<sup>136</sup> This decision had the effect of invalidating similar laws across the country.<sup>137</sup>

The *Lawrence* majority relied heavily on Justice Stevens's dissent in *Bowers*, even noting that his analysis "should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."<sup>138</sup>

*Lawrence* was decided in the later days of the Rehnquist Court.<sup>139</sup> Rehnquist himself was quite conservative, and under his leadership the Court bent conservatively on many issues.<sup>140</sup> At the time *Lawrence* was decided, however, the Court was fairly moderate, with Justice O'Connor, known as the great moderate and consensus builder,<sup>141</sup> splitting the divide between the liberal and conservative

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134. 539 U.S. 558, 578 (2003).

135. *Id.* at 562.

136. *Id.* at 578.

137. It should be noted that, despite the holding in *Lawrence*, Texas, among other states, still lists "homosexual conduct" as a criminal offense in its penal code. See Tim Murphy, *The Unconstitutional Anti-Gay Law That Just Won't Die*, MOTHER JONES, (Apr. 13, 2011, 12:01 AM), <http://www.motherjones.com/politics/2011/04/lawrence-texas-homosexual-conduct-statute>.

138. 539 U.S. at 578.

139. The Rehnquist Court ran from 1986-2005, ending just two years after *Lawrence* was decided. See *Members of the Supreme Court of the United States*, SUPREME CT. U.S., [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited Oct. 7, 2012).

140. Joan Biskupic, *Rehnquist Left Supreme Court with Conservative Legacy*, USA TODAY, Sept. 4, 2005, [http://www.usatoday.com/news/washington/judicial/supremecourtjustices/2005-09-04-rehnquist-legacy\\_x.htm](http://www.usatoday.com/news/washington/judicial/supremecourtjustices/2005-09-04-rehnquist-legacy_x.htm).

141. Editorial, *Voice of Moderation: O'Connor's Departure Removes Consensus Builder*, HOUSTON CHRON., July 2, 2005, <http://www.chron.com/opinion/editorials/article/Voice-of-moderation-O-Connor-s-departure-removes-1914784.php>.

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blocks of the Court and leading the way forward in many areas of the law.<sup>142</sup>

Importantly, in the intervening seventeen years between *Bowers* and *Lawrence*, the gay rights movement became stronger in number and force and was increasingly successful in developing social acceptance of core issues affecting gay rights. Acknowledging that changing societal attitudes can change the course of constitutional jurisprudence, Justice Kennedy stated in his majority opinion that “[t]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>143</sup>

*Brown*, *Lawrence*, and *Heller* each had strong, distinct social movements behind them that put pressure on and helped to influence the decisions in their respective Courts. There are, however, those cases in which a hot social issue is at stake, such as privacy or freedom of religion, but in which there is not a corresponding social movement.

### C. Other Illustrative Cases from Future Courts

In addition to the cases discussed thus far, there are also those cases in which strong dissents have appealed to a future Court but that do not have a corresponding social movement. For example, in *Katz v. United States*,<sup>144</sup> the Warren Court overruled *Olmstead v. United States*,<sup>145</sup> a 5-4 decision that held that there was no constitutional right to privacy and that warrantless wiretapped private telephone conversations did not violate the Fourth Amendment’s protection against unreasonable searches and seizures.<sup>146</sup>

Justice Brandeis issued a now-famous dissent, arguing that the “right to be let alone” was the most important right available to mankind.<sup>147</sup> Justice Brandeis reached out to future, wiser Courts by warning about the advancement of technology and its possible intrusion into constitutionally protected areas. He wrote:

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142. See Biskupic, *supra* note 140; see also *Kelo v. City of New London*, 545 U.S. 469 (2005); *Gonzales v. Raich*, 545 U.S. 1 (2005)(previously *Ashcroft v. Raich*); *McCormell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

143. *Lawrence*, 539 U.S. at 579.

144. *Katz v. United States*, 389 U.S. 347 (1967).

145. 277 U.S. 438 (1928).

146. *Id.* at 486.

147. *Id.* at 478 (Brandeis, J., dissenting).

[t]he progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.<sup>148</sup>

Nearly forty years later, Brandeis's dissent was adopted by a 7-1 majority in *Katz*.<sup>149</sup> The *Katz* Court concluded that electronic surveillance is unconstitutional because it violates an individual's right to be protected against unreasonable searches and seizures.<sup>150</sup>

As the cases we have discussed thus far demonstrate, the Court often moves slowly in reversing its own wrongly decided decisions. For *Plessy*, it took nearly sixty years, *Loving* took over eighty, *Olmstead*, nearly forty, and *Bowers*, seventeen years.<sup>151</sup> There are, however, a handful of cases in which the turnaround time was relatively quick. For example, in a short three-year turnaround, *West Virginia State Board of Education v. Barnette*<sup>152</sup> overruled *Minersville School District v. Gobitis*.<sup>153</sup> The Court in *Minersville* held, in an 8-1 decision, that religious freedoms must yield to state authority as long as the state was not directly restricting or promoting religion.<sup>154</sup>

Justice Stone dissented, arguing that religious freedom was outside the jurisdiction of the government.<sup>155</sup> He argued that "it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience."<sup>156</sup>

The Court reversed itself three years later in *West Virginia State Board of Education v. Barnette*, holding that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by

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148. *Id.* at 474.

149. *Katz*, 389 U.S. at 359.

150. *Id.*

151. *See supra* Part III.

152. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

153. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

154. *Id.* at 599-600.

155. *Id.* at 605-07 (Stone, J., dissenting).

156. *Id.* at 602.

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word or act their faith therein.”<sup>157</sup> *Gobitis* was reversed, in part, because Justice Stone had become the Chief Justice one year after penning his dissent; also, two new members had joined the Court, changing the composition such that *Gobitis* was overruled 6-3.<sup>158</sup>

Although these cases did not have a social movement behind them, they nonetheless dealt directly with the contentious issues of privacy and freedom of religion. Thus, the strong dissenting opinions in the antecedent cases were more likely to influence the future Court by hitting on issues of heightened social importance.<sup>159</sup>

#### IV. FACTORS LEADING TO A DECISION BEING OVERTURNED

Drawing primarily on the above real-world examples, there are a variety of factors that indicate whether a Supreme Court case is subject to reversal. These include: (a) whether the decision becomes retrograde against the tenor of society or a strong social movement; (b) the strength and guidance of a prior dissent, particularly those dissents that expose the moral or intellectual flaws in the majority opinion; (c) the degree of consensus among the Justices; and (d) the composition of the Court when the challenge is presented. These factors are discussed in detail below.

##### A. Retrograde Decision in Face of Strong Social Movement

One of the strongest indicators that a case is ripe to be overturned is when it becomes grossly out of touch with social or political advancements, particularly when there is a strong social movement brewing when the prior case is up for review.<sup>160</sup> This is obvious with *Plessy* and *Pace*, in particular, but was also a factor in the demise of *Bowers*.

The emerging civil rights movement had an enormous impact on the overturning of *Plessy*.<sup>161</sup> As discussed above, by the time *Brown* was presented to the Court, the famous lunch-counter sit-ins had begun and a substantial anti-segregation movement was swelling in America.<sup>162</sup> *Brown* reminds us that it is not just the size of a social

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157. *Barnette*, 319 U.S. at 642.

158. See Robert S. Peck, *New Supreme Court Justices and the 'Freshman Effect,'* 4 CHARLESTON L. REV. 149, 168 n.113 (2009) (noting the addition of newcomers Justices Jackson and Rutledge as part of the 6-3 majority in *Barnette*).

159. See, e.g., Ginsburg, *supra* note 14, at 7.

160. See *supra* Parts III.A.2, III.B.2.

161. See NAACP LEGAL DEFENSE FUND, *supra* note 91.

162. See *supra* Part III.A.2.

movement, in terms of the number of participants, and those who passively support its aims, but the focus, strategic savvy, and tenacity that the participants bring to a movement that can determine its ultimate ability to achieve change.<sup>163</sup> The NAACP engineered a brilliant legal strategy, built over the course of years, which culminated in persuading the Supreme Court to reject the bigotries that resulted in *Plessy*.<sup>164</sup> *Brown* was both a practical and symbolic victory for the civil rights movement, and the change it helped bring about prepared the ground for the further victory of *Loving*.

In a similar fashion, the gay rights social movement organized to overturn *Bowers*. As with the civil rights movement and *Brown*, the gay rights movement engineered a sophisticated strategy that helped achieve the result of *Lawrence*.<sup>165</sup> *Lawrence*, like *Brown*, was a practical as well as symbolic victory, and it energized a movement that subsequently picked up additional victories in the repeal of the Don't Ask, Don't Tell policy,<sup>166</sup> in the Justice Department's decision not to defend the Defense of Marriage Act,<sup>167</sup> and in changing opinions regarding the issue of gay marriage.<sup>168</sup> At the time *Lawrence* was decided, gay marriage was not legal anywhere, but, less than five months after *Lawrence*, Massachusetts legalized gay marriage (with five other states following since).<sup>169</sup> *Lawrence* helped propel the advancement of social thinking on gay rights: about half of the population currently approves of gay marriage, up from only a third of the population just before *Lawrence* was decided.<sup>170</sup>

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163. See NAACP LEGAL DEFENSE FUND, *supra* note 91.

164. See *id.*

165. See, e.g., DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012).

166. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

167. Ian Saleh, *Defense of Marriage Act: Obama Administration Will No Longer Defend Legality of Measure*, WASH. POST, Feb. 23, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022305361.html>.

168. Even President Obama recently stated in his support of gay marriage that his opinion on the subject had been "evolving." Jackie Calmes, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES, May 9, 2012, <http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html>.

169. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that denying same-sex couples marriage licenses violates the constitution of Massachusetts). Following Massachusetts, same-sex marriage became legal in Connecticut, Iowa, Vermont, New Hampshire, and New York.

170. Linda Feldman, *The Gay Marriage Paradox: As Acceptance Rises, So Do Legal Barriers*, THE CHRISTIAN SCIENCE MONITOR, May 17, 2012,

The simple lesson from both *Brown* and *Lawrence* is that a social movement that hopes to reverse a damaging precedent needs to formulate a legal strategy that will capitalize on societal opinion, and that seeks litigants and factual scenarios that provide the best vehicle for their legal arguments. In addition, the fight alone brings attention to a movement's issues, win or lose, and the ensuing public debate is worthwhile to advancing the aims of a social movement.

### B. Strength and Guidance of Prior Dissent

Certainly, the strength of a prior dissent has an impact on the future, wiser Court, particularly when that dissent exposes the moral flaws in the majority's reasoning. While the Supreme Court has reversed itself without the guidance of a dissent, such as in *Loving*, a strong dissent provides the future Court with arguments on which to reverse a challenged decision.<sup>171</sup> Sometimes, as in Harlan's dissent in *Plessy*,<sup>172</sup> a dissent can function as the Court's conscience, haunting it with a call to come back to its own best principles.<sup>173</sup> Harlan's dissent is widely recognized as one of the strongest, most forward-thinking, and inherently correct dissenting opinions in Supreme Court history.<sup>174</sup> The substance of the opinion still rings true today with its reminder that equal protection under the law means exactly that—with no caveats. While such a call can be ignored for many years, history has shown that the Court is likely to respond in time.

Other dissents, such as Justice Stevens's dissent in *Bowers*, Justice Brandeis's dissent in *Olmstead*, and Justice Stone's dissents in both *Olmstead* and *Minersville* are reasoned with such crystalline logic that the Court cannot, when given occasion to revisit the earlier decision, resist overturning the majority. Indeed, Justice Powell, who voted with the majority and wrote a concurring opinion in *Bowers*, expressed the power that a dissent can have over time when he said, four years after *Bowers* was decided: “[w]hen I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments.”<sup>175</sup>

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<http://www.csmonitor.com/USA/society/2012/0517/the-gay-marriage-paradox-as-acceptance-rises-so-do-legal-barriers>.

171. See, e.g., Ginsburg, *supra* note 14.

172. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J. dissenting).

173. See, e.g., *supra* note 100 and accompanying text.

174. *Id.*

175. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR., 530 (1994).



### C. The Composition of the Court at Time of Decision

While it is everyone's hope that the Court will decide rightly regardless of its composition, in truth, the composition of the Court is particularly important. It matters who sits on the Supreme Court, and it matters which Chief Justice is at the helm. The simplest example of this is the Warren Court, responsible for *Brown*, *Loving*, and *Katz*, three cases where the Court got it right after getting it wrong.<sup>176</sup> The Warren Court untangled stale, wrong, and shameful precedent and replaced it with fresh, progressive opinions, moving us toward a more tolerant, socially advanced society. It would be difficult to deny that the liberal orientation of a majority of the Justices on the Warren Court did not have an effect on the course of the law as well as that of the country.

If there was anyone left who still believed that the Supreme Court was a body wholly divorced from subjective beliefs and political leanings, and that the makeup of the Court does not impact outcomes, the case of *Bush v. Gore*<sup>177</sup> likely disabused the last believers.<sup>178</sup> *Bush* fashioned a unique, one-time-only reading of the Equal Protection Clause to resolve a case of bottomless political import.<sup>179</sup>

Moreover, it is obvious to even a casual observer that the Court has bent conservatively since Justice Alito, a committed conservative, replaced Justice O'Connor, a moderate.<sup>180</sup> Since then, which roughly marks the beginning of the Roberts Court, the Court not only has circumscribed the ability of legislatures to mitigate the effects of gun violence, but it has, among other things, famously become more deferential to the free speech rights of corporations at the expense of Congress's ability to regulate campaign finance<sup>181</sup> and has moved to

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176. See, e.g., discussion *supra* Part III.

177. 531 U.S. 98 (2000).

178. See, e.g., Jeffrey Toobin, *The Ten-Year Anniversary of Bush v. Gore*, NEW YORKER, Dec. 10, 2010, [http://www.newyorker.com/talk/comment/2010/12/06/101206taco\\_talk\\_toobin](http://www.newyorker.com/talk/comment/2010/12/06/101206taco_talk_toobin).

179. *Id.*

180. See, e.g., Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 24, 2010, <http://www.nytimes.com/2010/07/25/us/25roberts.html> (noting that "the data show that only one recent replacement altered its direction, that of Justice Samuel A. Alito Jr. for Justice Sandra Day O'Connor in 2006, pulling the [C]ourt to the right").

181. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 50 (2010).

make access to federal courts more difficult for litigants who seek redress for violations of individual rights.<sup>182</sup>

#### D. The Degree of Consensus Among the Court

The most likely cases subject to reversal are those decided by one vote.<sup>183</sup> This is because all it takes is one changed mind, or one new appointment, and the Court can swing in the other direction. In those instances, the Court must overcome its much-proclaimed reluctance to overturn its own precedent. Indeed, the principle of stare decisis does not compel the Court to “to follow a past decision when its rationale no longer withstands ‘careful analysis.’”<sup>184</sup>

By the time *Bowers* and *Olmstead*, both 5-4 decisions, were overruled by *Lawrence* and *Katz*, respectively, the overruling cases received more votes than necessary.<sup>185</sup> With *Lawrence*, the composition of the Court had changed such that it even had one vote more than necessary to reverse *Bowers*.<sup>186</sup> Importantly, Justice O’Connor changed her mind in the intervening years, switching from the majority in *Bowers* to a concurring opinion in *Lawrence*.<sup>187</sup> O’Connor’s shift shows that not only changes in the lineup of Justices can see-saw a 5-4 decision, but so can a change in the thinking of a sitting Justice.

It is plain that a 5-4 decision is more vulnerable than a less evenly split decision, and that a change in personnel can tip the balance neatly toward the dissenters. However, a 5-4 decision that is well-reasoned can survive a change in personnel, especially where society has come to rely on the principle of the earlier decision. For example, in 2000 the Rehnquist Court reaffirmed<sup>188</sup> the principle announced in the Warren Court’s landmark criminal procedure decision, *Miranda v. Arizona*,<sup>189</sup> a 5-4 split, despite the makeup of the Court having

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182. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

183. David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC (June 29, 2012), <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/> (noting that 5-4 decisions are most likely to be reversed).

184. *Arizona v. Gant*, 556 U.S. 332, 348 (2009) (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)).

185. See *Lawrence*, 539 U.S. at 558; *Katz v. United States*, 389 U.S. 347 (1967).

186. *Lawrence* was decided by a 6-3 majority. See *Lawrence*, 539 U.S. at 558.

187. Compare *id.*, with *Bowers v. Hardwick*, 478 U.S. 186, 187 (1986).

188. *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

189. *Miranda v. Arizona*, 384 U.S. 436 (1966).

become conservative by comparison. Where a 5-4 decision relies on faulty reasoning, however, it remains vulnerable to reversal.<sup>190</sup>

## V. BLUEPRINT FOR OVERTURNING *HELLER*

We can sketch a rough blueprint to overturn *Heller* by applying the factors of Part IV.

*First*, we must ask ourselves whether *Heller* is out of sync with societal opinions, such that we might consider its reasoning out of date. To answer this question, we must first acknowledge a problem facing gun control advocates who would seek to overturn *Heller*: the relative strength, or lack thereof, of the gun control movement.

As it stands today, the gun control movement has not been as successful—or as well-funded—as the gun rights movement and its avatar, the NRA.<sup>191</sup> Although a majority of Americans support gun control laws, typically these beliefs are held as one among many.<sup>192</sup> On the other hand, the gun rights movement, and in particular, the NRA, is simply more concentrated (both politically and financially), more strategically savvy, and more tenacious in furthering its aims.<sup>193</sup> The answer to the question of whether *Heller's* reasoning is out of date, sadly, is probably not. The reasoning behind *Heller* is intellectually flawed, but the gun rights movement remains in full force and that movement has been, unfortunately, louder than its opposition.

The challenge here is one of mobilization and advocacy. Gun control advocates need to reframe the Second Amendment debate to place more focus on the rights of innocent citizens whose lives are threatened by gun violence—and those whose lives have been touched by such violence. As it stands, much of the Second Amendment debate is framed by the NRA and its sympathizers (and

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190. See, e.g., *Bowers*, 478 U.S. 186; *Olmstead v. United States*, 277 U.S. 438 (1928).

191. See *Inside the NRA: Keys to Organizing Success*, ADVOCACY ACROSS AMERICA (Mar. 28, 2011), <http://advocacyamerica.wordpress.com/2011/03/28/interview-7-glen-caroline-nra-ila-grassroots-activism-washington-dc/>. It is important to note that the NRA receives a staggering amount of financial support from the gun industry. See, e.g., *Blood Money: How the Gun Industry Bankrolls the NRA*, VIOLENCE POLICY CTR. (Apr. 2011), <http://www.vpc.org/studies/bloodmoney.pdf>.

192. See Amanda Terkel, *Poll: Majority of Americans, Including Gun Owners, Support Tougher Restrictions*, HUFFINGTON POST (Jan. 18, 2011), [http://www.huffingtonpost.com/2011/01/18/poll-americans-gun-owners-stronger-laws\\_n\\_810069.html](http://www.huffingtonpost.com/2011/01/18/poll-americans-gun-owners-stronger-laws_n_810069.html).

193. See *Inside the NRA*, *supra* note 191.

corporate sponsors), who focus exclusively on the rights of gun owners to the exclusion of the rights of all other citizens.

It is appalling that in the United States, hundreds of thousands of people are the victims of crimes committed with guns; approximately 100,000 people are shot and 30,000 people are killed by guns each year.<sup>194</sup> Since *Heller*, a gunman shot Congresswoman Gabrielle Giffords and seventeen other people at a shopping center in Arizona;<sup>195</sup> two men, both dressed as Santa Claus, killed a total of fifteen people in two separate incidents in Texas and California;<sup>196</sup> a seventeen-year-old killed three fellow students with a handgun at a school in northeast Ohio;<sup>197</sup> and another seventeen year-old, Trayvon Martin, was killed with a handgun by an overzealous neighborhood watch guard.<sup>198</sup> These deaths, along with more than a hundred thousand others in the United States since June 26, 2008,<sup>199</sup> are simply unacceptable and, worse, largely avoidable.

Despite the high rate of gun violence gripping America, the NRA continues to rout the gun control movement and to win public relations and policy battles. In order to push *Heller* out of odds with public sentiment, the gun control movement needs to ratchet up its public engagement and publicly articulate how *Heller* undermines public safety by reading an individual right to handguns into the

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194. *Web-Based Injury Statistics Query and Reporting System Non-Fatal Injury Reports, 2009*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (select cause "Firearm" for year 2009, the last year in which data was available) (last visited Aug. 31, 2012) [hereinafter *Non-Fatal Injury Reports*]; *Web-Based Injury Statistics Query and Reporting System Fatal Injury Reports, National and Regional, 1999-2008*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_us.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html) (select cause "Firearm" for year 2008, the last year in which data was available) (last visited Aug. 31, 2012) [hereinafter *Fatal Injury Reports*].

195. Mark Lacey & David M. Herszenhorn, *In Attack's Wake, Political Repercussions*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/us/politics/09giffords.html>.

196. Daniel Gilbert & Timothy Martin, *Man Dressed as Santa Believed to Shoot Six*, WALL ST. J., Dec. 27, 2011, <http://online.wsj.com/article/SB10001424052970203391104577122873933879132.html>.

197. Christina Ng, *Ohio School Shooting Suspect T.J. Lane Competent to Stand Trial, Judge Rules*, ABC NEWS, May 2, 2012, <http://abcnews.go.com/blogs/headlines/2012/05/ohio-school-shooting-suspect-t-j-lane-competent-to-stand-trial-judge-rules/>.

198. Dan Barry et al., *Race, Tragedy and Outrage Collide After a Shot in Florida*, N.Y. TIMES, Apr. 1, 2012, <http://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html>.

199. See *Fatal Injury Reports*, *supra* note 195 (averaging 30,000 deaths per year over the past four years).

Constitution. We deserve to have legislatures address the problem of gun violence without being encumbered by a specious reading of the Second Amendment. The Supreme Court is ill-equipped to make these types of policy decisions.

A key challenge for gun-control advocates after *Heller* is swaying public opinion against it and, more generally, against opposition to reasonable gun-control legislation that is meant not to disarm gun owners, but rather to ensure the safety of *all* citizens, gun owners included.

*Second*, the powerful dissent in *Heller* supports its overturning. Justice Stevens's dissent is strong and well-reasoned. He stresses two critical, glaring flaws in the majority opinion that may be exposed by future Courts (or future litigants): (i) that the majority concocts a substantive right into the Constitution from near nothingness; and (ii) that the majority ignores that the resolution of the case has harmful, real-world consequences, stripping away the right to regulate guns from the states and legislatures.<sup>200</sup>

As to the reading of the Second Amendment, in particular, Justice Stevens provides a textual analysis,<sup>201</sup> examines the historical context of the debates surrounding the Amendment's adoption, particularly why the Framers were interested in guaranteeing the right of state militias to bear arms,<sup>202</sup> and shows why the majority's historical sources are insufficient to bear the weight of the conclusions Justice Scalia hangs on them.<sup>203</sup> Litigants may use Justice Stevens's dissent as a guide to exploit the holes in the majority's reasoning in future cases presented to wiser Courts.

In concluding his arguments, Stevens provides powerful language that shows why the case is not only poorly reasoned and incorrect, but also harmful to the established system of placing guncontrol policy in the hands of elected officials rather than the Court:

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding . . . . The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials

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200. *District of Columbia v. Heller*, 554 U.S. 570, 678-80 (Stevens, J. dissenting).

201. *Id.* at 640-52.

202. *Id.* at 652-62.

203. *Id.* at 662-71.

wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun-control policy . . . . I could not possibly conclude that the Framers made such a choice.<sup>204</sup>

*Third*, the implications of the future Court's composition, while obviously important, are also at this time unknowable. Observers of the Court will always ponder the intersection of presidential politics with the Justices' health, longevity, and willingness to continue serving, but we can only speculate at this point. Certainly, the next presidential election could have a large impact on the future of *Heller*, particularly if President Obama wins the reelection and has the opportunity to appoint additional Justices to the Supreme Court.<sup>205</sup> Should that occur, litigants would be wise to act swiftly to present a challenge to *Heller* while the Court would be responsive to such a challenge.

*Finally*, the fourth factor, the degree of consensus, favors the overturning of *Heller* simply given the narrowness of the decision. Although it would be pure speculation as to who might have a change of heart, the narrow 5-4 split, coupled with Justice Stevens's strong dissent, leaves *Heller* on a fairly precarious perch. All it would take is one changed mind. One.

### CONCLUSION

Although we provide a blueprint for overturning *Heller*, in truth *Heller* has not been the wild success that the NRA hoped it would be. In the wake of *Heller*, litigants hoping to strike down gun control laws using a *Heller*-based Second Amendment argument have been largely unsuccessful.<sup>206</sup> Judges across the country, including Republican-appointed judges, have rejected many Second Amendment challenges to reasonable gun control legislation.<sup>207</sup> This movement may be

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204. *Id.* at 679-80.

205. With four Justices in their seventies: Ginsburg (79), Scalia (76), Kennedy (75), and Breyer (73), the winner of the race for President is likely to have the opportunity to appoint one or more Supreme Court justices. See Sheryl Gay Stolberg, *Future of an Aging Court Raises Stakes of Presidential Vote*, N.Y. TIMES, June 27, 2012, <http://www.nytimes.com/2012/06/28/us/presidential-election-could-reshape-an-aging-supreme-court.html>.

206. See Vice & Ward, *supra* note 13.

207. *E.g.*, *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011) (rejecting challenge to a New York law regarding the concealed carry licensing scheme); *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011) (rejecting challenge to a Georgia law prohibiting firearms in places of worship); *People v.*

evidence that judges are taking to heart Justice Stevens's criticism about judicial overreach into legislative territory.

Despite its lack of force thus far against many gun control laws, *Heller* remains wrongly decided and thus is vulnerable to the wisdom of a future Court and to the rallying cry of the gun control movement. If Justice Ginsburg's vision is realized and *Heller* is overturned, such a case rightfully would take its place next to *Brown*, *Loving*, *Katz*, *Barnett*, and *Lawrence* in the pantheon of cases where the Supreme Court got it right after getting it wrong.

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Montyce H., 959 N.E.2d 221 (Ill. App. Ct. 2011) (rejecting challenge to an Illinois law prohibiting carrying a loaded firearm in public); *Perry v. State Civ. Serv. Comm'n*, 38 A.3d 942 (Pa. Commw. Ct. 2011) (rejecting challenge to a Pennsylvania law prohibiting guns in the workplace); see also *Post-Heller Litigation Summary*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/wp-content/uploads/2012/07/Post-Heller-Summary-8.1.12.pdf> (last updated Aug. 1, 2012).