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The Framers' Aims: Heller, History, and the Second Amendment

The Second Amendment reads: "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."[1] When the Supreme Court rendered its decision in the *District of Columbia v. Heller* this past summer (2008), the Court interpreted the right to bear arms in a vastly different light than it had throughout history.[2] What had been a hegemonic judicial embrace of a militia-based interpretation of a collective right was shattered. In its stead, for the first time ever, emerged a constitutionally protected individual right to use and possess firearms outside of military service.[3] While *Heller* was certainly a success for gun rights advocates, it was not an unconditional victory. The *Heller* decision raises an essential question—what is the scope of this newfound individual right? This question is largely left for lower courts. Harvard Law School Professor and preeminent Constitutional scholar Cass Sunstein suggests that the right to keep and bear arms enshrined in *Heller* will likely develop as did the right to privacy protected by *Griswold v. Connecticut*, in "a long series of case-by-case judgments, highly sensitive to particulars . . . upholding most of the laws now on the books and invalidating only the most draconian limitations."[4] Sunstein also considers *Heller* as possibly being analogous to *Lochner v. New York*, a decision widely regarded as "a mistake and even a disgrace," grounded more in the Court's "own, controversial view of public policy" than on legal grounds.[5]

Part I of this paper explains the basis of the Court's holding in *Heller*, specifically how the majority opinion's aberrant framework of interpretation undergirds its landmark conclusion. Part II discusses Sunstein's comparison of *Heller* and *Griswold*. His hypothesis that *Heller* will have little effect on existing gun control laws is tested against how lower federal courts have actually applied *Heller* since it was decided. Sunstein's minimalist view of the decision is staked in the limitations and ambiguities of the Court's holding. In Part III, the

Max Yavno
American, 1912–1985
Mural, East Los Angeles
Gelatin silver print
Gift of Albert A. Dorskind, Class of 1943
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Photograph courtesy of the Herbert F. Johnson Museum of Art, Cornell University

view of *Heller* as *Lochner* is elucidated. Here some of the historical inadequacies and methodological inaccuracies of *Heller* are highlighted. Finally, Part IV argues that if Sunstein's analogy of *Heller* with *Griswold* does not stand the test of time, *Heller* will be seen instead as comparable to *Lochner*, a mistake.

I. Structure of Majority Opinion

Dick Heller is a special police officer in the District of Columbia. On duty he is authorized to carry a handgun. He had applied for a permit to register a handgun for private possession. The District, as is customary, denied Mr. Heller's application. By federal law in the District of Columbia, it is illegal to carry an unregistered firearm, and registration of handguns is prohibited. In *District of Columbia v. Heller*, Mr. Heller filed a lawsuit on Second Amendment grounds in order "to enjoin the city from enforcing the bar on registration of handguns."[6]

In interpreting the Second Amendment for the majority, Justice Scalia rejects intentionalism for originalism, or textualism; that is, he "rejects the original intention in favor of the original meaning."[7] Looking primarily at the text of the Amendment, Scalia finds that "the Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause."[8] He contends that as a matter of 18th-century grammar, prefatory clauses, or preambles, are subordinate to operative clauses. Prefatory clauses merely act as statements of purpose, while the scope of the operative clauses often extends beyond the preamble. It is only when the operative clause is ambiguous that the preamble may play an explanatory role, to resolve an ambiguity. "But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."[9]

It is through this prism that the rest of Scalia's opinion follows. Because the Court finds that the operative clause, "the right of the people to keep and bear Arms, shall not be infringed," unambiguously "guarantee[s] the individual right to possess and carry weapons,"[10] Scalia approaches the rest of the evidence regarding the meaning of the Second Amendment seeking to assess whether it is consistent with this finding. In other words, rather than holistically deriving the Amendment's overall meaning—from the Founders' intentions, the Court's previous interpretations, the prefatory clause, the operative clause, and pre- and post-ratification history—the *Heller* Court starts instead with its originalist conception of the Second Amendment's

operative clause and looks to the rest of the above indicators to validate or repudiate its conclusion.[11]

In keeping with this approach, Scalia recognizes that the precedent set in *United States v. Miller* limits the right to keep and bear arms.[12] Scalia interprets *Miller* within the same framework he does *Heller*. Contrary to the conception of *Miller* on which "hundreds of judges have relied" since it was decided, Scalia argues that what the Court's decision in *Miller* turned on was the meaning of "arms" in the Second Amendment.[13] Because, prima facie, the term "arms" is unclear in the operative clause, the *Miller* court turned to the prefatory clause for clarity. The *Miller* court concluded that only firearms which are "ordinary military equipment" are protected.[14] During the Founding era, militias were prevalent. In these militias, "men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[15] Therefore, Justice Scalia "read[s] *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."[16] Because law-abiding citizens "overwhelmingly" choose handguns for the lawful purposes of self defense, the District of Columbia's outright ban on handguns violates the Second Amendment.[17]

II. *Heller* as *Griswold*

If the *Heller* decision ended with its discussion of the *Miller* limitation, then the newly espoused individual right to keep and bear arms would be a robust one. Unfortunately for gun-rights advocates, this was not the only gun restriction the *Heller* court recognized as legitimate. In an odd departure from his uniquely originalist methodology, Justice Scalia provides what constitutional law expert Adam Winkler calls a "Laundry List of Second Amendment exceptions."[18] This list includes such "longstanding prohibitions" as bans "on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[19] Moreover, Scalia even goes further, stating that the Laundry List only enumerates *some* of the "lawful regulatory measures," and that it "does not purport to be exhaustive."[20]

A. Sunstein's Hypothesis

It is partially based on the fact that the individual right to keep and

bear arms espoused in *Heller* is so narrow, open to so much restriction, that Sunstein argues that *Heller* is comparable to *Griswold*.[21] The similarities between these two landmark decisions do not stop there, however. Also like *Heller*, *Griswold* overturned a draconian law banning the use of contraceptives by married couples, a law that was vastly out of sync with American public opinion.[22] It is no coincidence, Sunstein argues, that the *Heller* decision was rendered when it was. Increasingly over the last several decades, more and more Americans believe that they have a right to use and possess firearms. Moreover, they believe that they have a robust right to own a firearm, one comparable those essential liberties enshrined in our First Amendment.[23]

The implication of this understanding of the *Heller* decision is that it will result in an age of Second Amendment minimalism. "Minimalists," Sunstein explains, "favor small steps, and they reject wide rulings and theoretical ambition."[24] The law in a particular case will be overturned, but this precedent will not be aggressively used to overturn many other statutes. Numerous questions are left unanswered. Lower courts are left to sort through the particulars and flesh out the scope of the right on a case-by-case basis: "Many judges will speak in originalist terms, but contemporary reason and sense, as the judges understand them, will play crucial roles."[25]

B. Since *Heller*: Is Sunstein on Target?

Since the Supreme Court rendered its decision this past summer, "*Heller* [has] led to an avalanche of challenges to gun control laws. Every person charged with a gun crime saw *Heller* as a Get Out of Jail Free Card."[26] There have been over eighty cases in lower federal courts dealing with the groundbreaking ruling's implications. Despite a motley mix of cases, in almost all of them "the courts have upheld federal laws banning gun ownership."[27] Most of the lower courts have relied upon the Laundry List exceptions to justify upholding the challenged gun restrictions. Additionally, some have even expanded on upon the exceptions enumerated. In fact, the Laundry List has been expanded so far that it is difficult to fathom a gun control measure that would not meet constitutional muster under *Heller*.[28] So far, it seems Sunstein's prediction has been on target.

III. *Heller* as Lochner

In the course of his essay, Sunstein considers a comparison

of *Heller* to *Lochner*. In *Lochner v. New York*, the Supreme Court rejected a maximum hour law.[29] The decision was rendered on the flimsy grounds that freedom of contract is protected under the Due Process Clause; and therefore, states did not have the authority to pass maximum hour legislation. Today, it is widely viewed as an abject legal failure, rooted in more political ideology than on any legal principle.[30] On this view, the Supreme Court in *Heller* simply misread and misapplied the Second Amendment. This Lochner reading is supported by a consideration of problems with and errors within Justice Scalia's interpretive methodology.

A. Problems With Scalia's Methodology

To grant Scalia the benefit of the doubt, he adopted his framework of interpretation in order to appeal to an objective standard by which to derive the meaning of the Second Amendment, an inquiry that has historically been mired in fierce partisan squabbles. He presumed that basing his fundamental assumption[31] on a matter of 18th-century grammar is more objective than relying on something as subjective as the Framers' intent.[32] However, it is not by any means clear that Scalia's assumption is correct. Conservative federal Judge J. Harvie Wilkinson, a Reagan appointee, is critical of the majority on this point, noting that it is wrong for Scalia to assume that his standard is "any less subject to judicial subjectivity and endless argumentation as any other."[33]

Justice Scalia cites an article written by UCLA law professor Eugene Volokh as evidence for his contention that by the rules of 18th-century grammar, the explanatory roles of prefatory clauses are subordinate to rights espoused in operative clauses.[34] Yet this is not a universally held view in legal scholarship. David C. Williams, an Indiana University law professor, offers a response to Volokh's article. He argues that both clauses of the Amendment must be considered, and that the operative clause cannot stray from the prefatory clause. Williams further demonstrates that there is even dispute as to how the operative clause alone should be interpreted. He disagrees with Volokh's reading of the "the people."[35] The Volokh-Williams debate makes it apparent that how the Second Amendment would have been read grammatically during the Founding is not a settled question.

B. Problems Within Scalia's Methodology

In addition to the problems with Scalia's methodology that might

indicate *Heller* is best read as *Lochner*, Scalia's opinion also has inconsistencies within its structure. By this criticism, the *Heller* court is not mistaken in adopting an originalist approach, but rather it is incorrect in its originalist analysis. Specifically, it appears that the *Heller* court is inaccurate in its finding that its individual-rights reading of the Second Amendment is in accordance with the Framer's intentions and the Amendment's pre-ratification history. Indeed, Sunstein notes "many historians have concluded and even insisted that the Second Amendment did not create an individual right to use guns for nonmilitary purposes."[36] Distinguished historians such as Saul Cornell reach this conclusion largely by considering two historical indications of what the Founder's intended the Second Amendment to mean: early state constitutions and the early drafts of the Amendment. Given the historical evidence, it appears that the best reading of the Second Amendment reflects neither an individual or collective right, but rather a civic obligation.[37]

States began drafting their own constitutions "in the period between independence and the ratification of the *Bill of Rights*."[38] Of these, three stand out in the history of the Second Amendment, the Pennsylvania, Massachusetts, and Virginia constitutions. The Pennsylvania Constitution (1776) explicitly stated: "that the people have a right to bear arms for the *defence of themselves*, and the state; and as standing armies in the time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by the civil power."[39] To individualists who read the Second Amendment as protecting an individual's right to bear arms—like Justice Scalia in the majority opinion—this provision, in conjunction with another provision which protects the use of guns for hunting, is proof that the preamble of the Second Amendment announces one of many protected uses of firearms.[40] Collectivists, who endorse a reading of the Second Amendment as protecting the *states'* ability to arm their *militias*—like dissenting Justice Stevens—retort that the Framers did not intend to protect an *individual* right because in the Second Amendment they did not use an unambiguous individualist formulation.[41]

The Massachusetts Constitution was significant because it "added one crucial new word: 'The People have a right to *keep* and bear arms for the common defence.'" The word "keep" has the connotation that most citizens would be expected to provide their own weapons for

militia service and keep them in their homes (as opposed to collectively in a local garrison).[42] The addition of the word "keep," which made its way into the Second Amendment, fits with the civic responsibility[43] and individualist readings but is problematic for collectivists, who generally contend that the state governments would furnish militiamen with arms.[44]

Lastly, the Virginia Declaration of Rights provides key insight into the intent of the original Second Amendment. George Mason played a major role drafting the declaration, which read in part:

> That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.[45]

Although this was the final language adopted, it did not satisfy all Virginians. Mason was not in favor of the "body of the people" provision. To him, this imprecise language asked for anarchy. He originally proposed that militia membership be contingent on property ownership, to prevent the "rabble" from creating a mob instead of a well-regulated militia.[46] On the other end of the spectrum, Thomas Jefferson felt firearm ownership and the obligation to the militia should be two separately protected rights. In other words, Jefferson wanted non-militia based gun ownership and use to be protected.[47]

The wide range of opinions regarding gun rights in the Virginia Declaration of Rights is enlightening, not only because James Madison used it as model for the United States Bill of Rights,[48] but also because in the debates over the final language the individualist, collectivist, and civic obligation readings of the Second Amendment are all represented. Jefferson's views fit with the individualist perspective. Mason's desire to have a select militia comports with the collectivist interpretation. The final language, especially the inclusion of the "body of the people," corresponds with the militia being a general militia, which is endorsed by a civic responsibility reading of the Second Amendment. It is telling that the final formulation of the Virginia Declaration of Rights rejected the Mason and Jefferson proposals, while accepting militia/civic obligation phraseology.

Years later, states debated whether to ratify the Constitution. Many

did so only on the condition that a bill of rights would later be established. In fact, many states offered proposed amendments for the First Congress to consider. James Madison was tasked with filtering through the proposals and devising a list of sensible additions to the Constitution. Contrary to the individualist reading of the Second Amendment, of the candidate amendments that dealt with the right to bear arms, "the right to keep or use firearms outside the context of the militia . . . did not appear on Madison's comprehensive list of possible amendments."[49] Similarly, a proposal supported in the Virginia, North Carolina, and Harrisburg conventions, one that comported with the states' rights perspective, was also rejected. This suggested amendment would have ensured "that each state respectively shall have the power to provide for organising, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same."[50]

Madison instead decided to model his initial formulation of the Bill of Rights after Virginia's 1776 Declaration of Rights. Originally, Madison envisioned that the amendments would be woven into the text of the Constitution. Specifically, he imagined that they would be inserted in Article I, section 9.[51] Those who endorse the Second Amendment as an individual right assert that the fact Madison would have put the Second Amendment—as well as the First, Third, Fourth, Eighth, and Ninth Amendments (all "substantive rights")—in Article I, section 9 is "of significance," because this portion of the Constitution concerns limitations of federal power vis-a-vis individuals.[52] The original text of the right to bear arms that Madison introduced in the House of Representatives read:

> The right of the people to keep and bear arms shall not be infringed: a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.[53]

Madison's proposed conscientious objector clause survived House revisions, but not the Senate's debates. Unfortunately, records of the Senate's deliberations over the Bill of Rights did not survive, so it is difficult to determine why the conscientious objector clause was stricken. During the House debates the conscientious objector clause caused some consternation. Some feared the federal government using it as a loophole to disqualify individuals from militia service. Others worried

that citizens would "turn Quaker" in order to shirk the responsibility of serving their country.[54]

Despite its ultimate omission from the Second Amendment, the initial inclusion of a conscientious objector clause bolsters the civic obligation interpretation of the Second Amendment. In *Heller*, Justice Scalia unpersuasively attempts to downplay the importance of this militia duty. He argues, "It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process."[55] Scalia further contends that "Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever." Therefore, it is arbitrary for Justice Stevens to imply that the conscientious objector clause exempted Quakers from only military firearm usage, because they morally opposed both military and nonmilitary gun violence.[56] The key distinction Scalia overlooks is that there was no civic or legal obligation for anyone to bear arms for nonmilitary purposes, but every citizen was expected to fulfill his republican role of serving in a militia.

IV. Conclusion

Although Cass Sunstein rejects the analogy of *Heller* as *Lochner*, he acknowledges that both cases interpreted unclear texts in order to overturn statues that were ideologically opposed by a majority of justices. Ultimately, he concludes that *Lochner* was decided on far more blatantly political grounds. However, he further notes that "no member of the Court is a trained historian, and much of its [*Heller*'s] opinion sounds like advocacy or law office history."[57] Indeed, it appears that the *Heller* court made many historical missteps. Justice Scalia fails to account for what appears to be the most accurate reading of the right to bear arms: the view that the "original understanding of the Second Amendment was neither an individual right of self-defense nor a collective right of the states, but rather a civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia."[58] Although *Heller* might have been a *Lochner*-like misreading of an ambiguous text, Professor Sunstein appears to be correct that *Heller* will not, unlike *Lochner*, be widely considered an abject legal failure. The reading of *Heller* as *Griswold* will likely remain the most apt one, provided that the lower courts continue to treat the right to bear arms minimalistically. If, on the other hand, lower federal courts break with their current trend and

begin rejecting sensible gun control laws, it is likely that *Heller* will be seen as a *Lochner*-like "triumph of politics and a defeat for law."[59] For although Americans believe in an individual right to bear arms, public opinion polls have consistently shown that they favor commonsense gun restrictions as well.[60] Thus, if the lower courts begin to get too bold and begin striking down popular gun control laws, *Heller*, like *Lochner*, will be seen as a mistake.

Notes

[1] U.S. Const. amend. II.

[2] *District of Columbia v. Heller*, 128 U.S. 2783, 2797 (2008).

[3] Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 Harv. L. Rev. 145, 145 (2008). From early to mid-20th century, lower federal courts and most mainstream legal scholars understood the Second Amendment as a collective right. Under this view, the Amendment protects the right of the states to control their militias. Because the American militia tradition has fallen by the wayside of history, collectivists claim that the significance of the Second Amendment has also been hollowed. In response to the rise of the modern day gun control movement in the late 1960s, an individualist reading of the Amendment has reemerged. Individualists assert that the right to bear arms is unconnected to militia service. Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 203–05, 212 (2006).

[4] Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 Harv. L. Rev. 246, 269, 272 (2008).

[5] Sunstein, *supra*, at 254.

[6] *Heller*, 128 U.S. at 2787.

[7] Sunstein, *supra*, at 248. In other words, Scalia is not concerned primarily with what the Founders *intended* for the Second Amendment to mean, but rather he focuses on what the text of the Amendment would have objectively implied under 18th-century grammar.

[8] *Heller*, 128 U.S. at 2789.

[9] *Id.* at 2789.

[10] *Id.* at 2869.

[11] Sunstein, *supra*, at 248–49, 272.

[12] *United States v. Miller*, 307 U.S. 174 (1939).

[13] *Heller*, 128 U.S. at 2823; U.S. Const. amend. II.

[14] *Miller*, 307 U.S. at 178.

[15] *Id.* at 178.

[16] *Heller*, 128 U.S. at 2815–16.

[17] *Id.* at 2817.

[18] It is a departure from originalism because, as Winkler indicates, "none of these broad exception are grounded in the original meaning of the Second Amendment." Adam Winkler, *Heller*'s Catch-22, 1 UCLA L. Rev. 1, 10. (forthcoming June 2009).

[19] *Heller*, 128 U.S. at 2817–18.

[20] *Id.* at 2818.

[21] *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965).

[22] Sunstein, *supra*, at 261.

[23] *Id.* at 271.

[24] *Id.* at 276.

[25] *Id.* at 267–68, 272.

[26]Winkler, *supra*, at 14.

[27] Adam Liptak, *Few Ripples From Supreme Court Ruling on Guns*, NY Times, March 17, 2009, http://www.nytimes.com /2009/03/17/us/17bar.html.

[28] Winkler, *supra*, at 16.

[29] *Lochner v. New York*, 198 U.S. 45, 64 (1905).

[30] Sunstein, *supra*, at 254.

[31] As has been shown, Scalia's entire holding hinges on his claim that the Second Amendment is "naturally divided" into operative and prefatory clauses, with prefatory clauses only having conditional explanatory roles. *Heller*, 128 U.S. at 2789.

[32] *Id.* at 248.

[33] J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 1, 4 (forthcoming Apr. 2009).

[34] *Heller*, 128 U.S. at 2788; Eugene Volokh, The Commonplace Second Amendment, 73 N. Y. U. L. Rev. 793, 814–21 (1998).

[35] Williams contends that the proper way to read the Second Amendment is to consider both the prefatory and operative clauses equally, whereas Volokh advocates the position endorsed by Scalia, that operative clause are grammatically superior prefatory clauses. David C. Williams, *The Unitary Second Amendment*, 73 N. Y. U. L. Rev. 822, 822–24 (1998); U.S. Const. amend. II.

[36] Sunstein, *supra*, at 255.

[37] Cornell, *supra*, at 19–20.

[38] *Heller*, 128 U.S. at 2802.

[39] Stephen P. Halbrook, *The Founders' Second Amendment: Origins of The Right to Bear Arms* 136 (2008).

[40] *Heller*, 128 U.S. at 2802.

[41] *Id.* at 2835.

[42] Cornell, *supra*, at 24–25.

[43] The civic obligation interpretation reads the Second Amendment holistically, giving both clauses equal weight. *Id.* at 212. This understanding of the Amendment, in essence, says that the individualist and collectivists readings are both wrong. The fundamental failing of these views is that they are too entrenched in a modern, liberal, rights-based mindset and overlook our early republican roots. During the Founding era, a citizen's rights and obligations were intimately linked. Part of being a citizen encompassed aiming to advance the common good. According to this reading, the Second Amendment is a reflection of this republican philosophy. "The people" and "the militia" both naturally refer to a general militia, because the purpose of the Amendment was to ensure that all able citizens could keep and bear arms in order to fulfill their republican obligation of serving their country in a well-regulated militia. *Id.* at 212, 214. David C. Williams, *Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551, 575–78 (1991).

[44] Jack N. Rakove, *Symposium on the Second Amendment: Fresh Looks: The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 131 (2000).

[45] Cornell, *supra*, at 19.

[46] *Id.* at 19.

[47] *Id.* at 20.

[48] *Heller*, 128 U.S. at 2783.

[49] Cornell, *supra*, at 48.

[50] Halbrook, *supra*, at 256.

[51] Robert J. Spitzer, *The Right to Bear Arms: Rights and Liberties under the Law*, 26 (2001).

[52] Halbrook, *supra*, at 254.

[53] Spitzer, *supra* at 26.

[54] Halbrook, *supra*, at 266–67.

[55] *Heller*, 128 U.S. at 2796.

[56] *Id.* at 2796.
[57] Sunstein, *supra*, at 254, 273–74.
[58] Cornell, *supra*, at 4.
[59] Sunstein, *supra*, at 254, 273.
[60] Spitzer, *supra*, at 108.