October 27, 2009

A Caustic Critique of District of Columbia v Heller: An Extreme Makeover of the Second Amendment

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A CAUSTIC CRITIQUE OF DISTRICT OF COLUMBIA V. HELLER: AN EXTREME MAKEOVER OF THE SECOND AMENDMENT

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In an article about the Second Amendment, an author should disclose his history in owning and using firearms. The author of this article was an officer in the United States Marine Corps on active duty from May, 1963 until September, 1969. In October, 1966 he became a Naval Aviator. He flew the F4B and F4J Phantom II aircraft in Marine Fighter Attack Squadron 323 at Chu Lai, Vietnam. During his Marine Corps service, he fired virtually every weapon in the Marine Corp’s arsenal. He is an expert marksman, both with the .45 caliber semi-automatic pistol, the .38 caliber Smith & Wesson revolver, the M1 Garand and the M14 rifles. In civilian life, post-Marine Corps service, the author has possessed and today possesses a semi-automatic pistol for defense of family and for target practice. The author is a member of the National Rifle Association.

The author has not received compensation from any source for writing this article. No organization of which the author is a member has reviewed this article.
ABSTRACT OF ARTICLE

In June, 2008, in District of Columbia v. Heller, the Supreme Court of the United States (5-4) held that the Second Amendment contained a right to possess and own firearms for personal purposes, removing any vestige of the famous introductory clause by James Madison, “A well regulated militia being necessary for the security of a free State ....” In this article the author takes serious issue with the methodology of the majority’s opinion by Mr. Justice Scalia, and demonstrates that: (1) Mr. Justice Scalia’s attempt to prove that “bear arms” does not have its idiomatic meaning, “to serve as a soldier, to do military service, fight,” was unnecessary, irrelevant, and absurd; (2) Mr. Justice Scalia’s “originalist” approach was meaningless and irrelevant; (3) Mr. Justice Scalia engaged in unprofessional bullying of opponents; and (4) Mr. Justice Scalia engaged in a drive-by shooting of United States v. Miller, a 1939 precedent which held that to demonstrate a Second Amendment violation, a litigant must show that there has been an adverse effect on the militia. The author, in addition, discusses the factors which should prevent the Court from holding that the residue of the Second Amendment should be applied to the States via the 14th Amendment.

200 Words
I. Introduction: An Extreme Makeover.

Prior to June 26, 2008, the Second Amendment to the U.S. Constitution provided:

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.

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On that date, 217 years after the adoption of the Second Amendment, the Supreme Court of the United States in a 5-4 decision in *District of Columbia v. Heller*\(^1\) rewrote the Amendment as follows:

The constitutional right of the people to keep firearms for personal use shall not be infringed.

[N.B.: Readers of the Constitution may have thought the Second Amendment had something to do with protecting the Militia. They were wrong. It has nothing to do with a Militia. Hence we have deleted the former introductory phrase to avoid needless confusion. We will notify USC/West Publishing prior to next edition of U.S.C. and U.S.C.A. The Supreme Court.]

This October Term (2009-2010) or the next, it is popularly predicted that the Supreme Court will further revise the Second Amendment in one or both cases now pending on certiorari, adding a new introductory phrase in lieu of James Madison’s original:

Possession of arms being essential to life in a well-ordered society, the fundamental constitutional right of the people to keep firearms for personal use shall not be infringed, either by the Federal Government, or by the State Governments, or by any territorial government, or by any subdivision of any one of them.

In contemporary television, this degree of metamorphosis is called “an extreme makeover.” How this occurred is an interesting story.

**II. History of the Adoption of the Second Amendment.**

The starting point for Second Amendment analysis lies in the common law of our mother country, England. At common law, every Englishman had the right to possess weapons for the purpose of self-defense and for hunting. English legal

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\(^1\) ___ U.S. ___, 128 S.Ct. 2783 (2008).
treatises (Blackstone, for example) make it clear that the arms of the citizen were possessed for personal purposes.

Every first year law student is familiar with the process by which courts of the English colonies in America “received” the English common law. Rather than starting from scratch and inventing an entire jurisprudence, American courts rather regarded the entire body of English common law as having been “received” by that colony’s or state’s legal system, unless some particular principle of English common law was incompatible with the customs and mores of the American offshoot. Some principles of English common law, when “received” in America, were then restated in a State’s constitution, or in statutory provisions, or judicial decisions.

It is obvious that the common law right to possess arms for self-defense and for hunting was entirely compatible with the lives of the colonists in America. They lived in circumstances in which having weapons at hand for self-defense and hunting was an absolute necessity. I am unaware of any decision which has ever held that the common law right to possess weapons for self-defense and for hunting was not part of the received common law in any of the States or in federal law. We can take as a given, therefore, that everywhere in the United States there is a common law right to keep firearms for personal use. Forty-four of the States today have a constitutional provision providing for the right to keep arms for personal use. The remaining six have statutory provisions, or recognize the common law right by judicial decision.
A received right from English common law is subject to the regulatory power of individual States and of the Federal Government. The fact that some right was “received” from the common law in the 1700s does not mean in any way that the right is immune from legislative control or modification between the date of “reception” and the present time.

A “militia” is also a creation of the common law. When defense against some enemy was required, the common law relied on the militia, a body of able-bodied male citizens who were summoned to form an ad hoc military force, bringing their own weapons to the service of county, shire, or country. Those weapons, of course, were the weapons the citizens kept generally for their own personal use, i.e., self-defense and hunting.

There is nothing in English history to suggest that the Englishman of the 16th or 17th centuries kept weapons for personal defense or hunting separate and apart from weapons kept for use in the militia. The same is true of 18th century Americans.

In English history that was well known to the people of America, English monarchs of a tyrannical bent (Stuart Kings Charles II and James II) had attempted to nullify the militia in favor of maintaining a standing military force or a “special militia” with membership limited to men reliable to the King. The technique was to make it unlawful for Englishmen to possess weapons such as would be brought with them to serve in the militia. Those weapons, of course, were the same weapons kept for personal defense and hunting. The tyrant Kings did not send their minions from cottage to cottage with instructions to seize only
weapons that would be brought to militia service, but not weapons kept for personal defense or hunting. They were, obviously, by and large the same weapons.

When the U.S. Constitution was drafted, there was a raging debate whether the United States should maintain a standing army. After conclusion of the Revolutionary War, the soldiers of the Revolutionary Army left military service and returned to hearth and farm very quickly. By 1791, there were only 650 men serving in the army of the United States. At the end of the Revolutionary War, the colonial strength was some 8,800 Americans. The Colonial Army had simply disappeared.

Anti-federalists opposed empowering the United States to maintain a standing army. They preferred to rely on the militia. Federalists favored a standing army. A compromise was reached in the Constitution of 1787, which provided for both:

Article 1, Section 8 provided that Congress shall have the power:

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than Two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the Land and naval Force;

To provide for calling forth the Militia to execute the laws of the Union; suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers; and the Authority of training the Militia according to the discipline prescribed by Congress.”
In Article 2, Section 2, Clause 1, the President was named the “Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into actual service of the United States.”

One reason the Anti-federalists opposed the maintenance of a standing army was that they feared that a professional military force, beholden to the federal government, could be used to destroy the independence of the States. They suspected “special militias” for the same reason. The Federalists to the contrary favored some sort of standing military forces, an army and a navy. The Constitution, as quoted above, provided the Federal Government the power to maintain a standing army. The Anti-federalists, who opposed a standing army and who preferred the militia as a national fighting force, were afraid that the Federal Government would, following the steps of the tyrannical English monarchs, disarm the militia, especially given that the militia was subject to rules and regulations prescribed by Congress.

During the ratification process, it became clear that the Constitution would not be approved by the required number of States unless a “Bill of Rights” were attached. James Madison, the draftsman of the Second Amendment, had in hand several proposals submitted by State ratifying committees. Some proposals would clearly have set forth a right to possess arms for personal use. Madison’s original draft of the Amendment read:

A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms.
This was the origin of the Second Amendment. The United States would be disabled from infringing on the rights of citizens to “keep and bear arms,” and this would prevent the federal government from destroying the effectiveness of the militia.

The last phrase of Madison’s first draft -- “but no person religiously scrupulous shall be compelled to bear arms” -- makes it clear that the earlier appearance of the same phrase “the right of the people to … bear arms” refers to a military use of arms. There is no reason to believe that Madison used the phrase “bear arms” in the first clause to describe personal possession of firearms, and then switched to a different meaning of “bear arms” in the last phrase. More of this later.

The House accepted Madison’s recommendation. The House debates, which are available, contain considerable discussion of the “religiously scrupulous” phrase. Anti-federalists thought it might be used by Congress to rule out entire religious sects, reducing the number of able men who could serve in the militia, thereby weakening the militia. They argued that whether or not someone was religiously scrupulous was a question which should be determined on an individual basis and not fixed in the Constitution. The phrase survived in the House. It was, however, deleted in the Senate whose debates were not recorded.

The Second Amendment thus became:

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.
There is no reason to believe that Madison, when he deleted the “no person religiously scrupulous shall be compelled to bear arms” phrase, changed the sense in which he had earlier used “bear arms” in the preceding clause.

It is clear beyond argument that the motivating force behind the Second Amendment was to protect the effectiveness of the general militia. The Second Amendment did not create “the right to keep and bear arms.” It was a common law right already existing in the United States. Had it not been for the concern for maintaining the effectiveness of the general militia free of federal infringement, the Constitution would never have contained the phrase “the right to keep and bear arms” at all. During the House debates, there was no discussion or mention whatever of the Amendment’s containing a right to possess firearms for personal use unrelated to maintaining the effectiveness of the militia. There was similarly no discussion of enforcement of any such personal right independent from the introductory militia clause.

That is not to say that the people did not have a federal right to “keep arms” for personal use. They did and they do. It is a received right from the English common law. It existed prior to the adoption of the Second Amendment, and it existed after the adoption of the Second Amendment. It is a right outside the Second Amendment. If the District of Columbia, by its gun control ordinances, did not infringe the effectiveness of the militia, then there is no Second Amendment violation. There may, however, be a violation of the common law right of the people “to keep arms.”
III. Whatever Happened to the Militia?

Every paper that discusses the Second Amendment should contain some paragraphs which answer the question: “Whatever happened to the Militia named in the Second Amendment?”

After the ratification of the Constitution of 1787 and the Bill of Rights in 1791, the Second Congress on May 8, 1792 enacted the Militia Act pursuant to its obligation in Art. I, § 8 of the Constitution. The Act declared that able-bodied white male citizens 18 to 45 “shall be enrolled” in the Militia. Militia officers appointed by the States were to identify all qualified males and send a written notice that they were enrolled in the Militia. Within six months after that notice, the person so notified was to provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty four cartridges suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball;

*   *   *

… and shall appear, so armed, accoutered and provided, when called out to exercise, or into service …

[N.B. Notice the absence of any requirement to appear with a handgun.]

The Act then provided that within one year of its enactment, the State’s militia was to be organized by the State into divisions, brigades, regiments, battalions and companies. A brigade consisted of four regiments. A regiment

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2 Act of May 8, 1792, 1 Stat. 271.
consisted of two battalions. Each battalion consisted of five companies. A company consisted of 64 privates. Each division was to have one company of artillery and one troop of horse. The troop of horse was to be commanded by a captain and two lieutenants. The Act required these officers to arm themselves with “a sword and pair of pistols, the holsters of which to be covered with bearskin caps.” Only volunteers made up the company of artillery and the troop of horse. Only volunteers were required to furnish pistols.  

The math is simple to do:

- Five companies in a battalion: \[ 5 \times 64 = 320 \] privates
- Two battalions in a regiment: \[ 2 \times 320 = 640 \] privates
- Four regiments in a brigade: \[ 4 \times 640 = 2560 \] privates

Assume there is only a single brigade in the State’s militia division. Therefore, only six pistols (a pair for each of three officers in the troop of horse) are required for a brigade that has 2560 privates armed with flintlocks or muskets they are required to furnish themselves. Militiamen were required to bring muskets or flintlock rifles, not pistols. Pistols were only required of the few men who, having been summoned to serve in the militia, then volunteered to command the horse troop.

The Act required the adjutant-general of the state militia to make an annual report of the state of the militia to the commander-in-chief of that state militia with a copy to the President of the United States.

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3 Act of May 8, 1792, Sec. 4, 1 Stat 271, 272.
In February, 1795, Congress repealed the entire Militia Act.⁴ Although it is not clear why Congress took this action, the likely answer is that friction developed between the Federal Government and the states with respect to who was in charge of organizing the militia. The federal Militia Act probably contained too much detail for the taste of the states, and Congress accordingly repealed the entire statute and left it to the states to organize and equip their militia. The Act of February 28, 1795 authorized the President to call forth the militia into federal service to repel invasions and to suppress insurrections and cause the laws to be observed.

The yearly reports sent to the President of the condition of the various state militias indicated that flintlock or musket ownership among able bodied males of 18 to 45 was not as common as had been hoped. Congress accordingly in June, 1798 authorized the President to spend $400,000 to purchase 30,000 “stand of arms” to be distributed to the various state militias. The federal arms were to be sold to either the state militia or to members of the militia, but if the militia were called into active federal service, then the states were authorized to distribute without charge whatever arms remained from the original stands of arms to militiamen called to active service.⁵

In the War of 1812, the President called the militia to active service. Militia refused to cross the international border with Canada at Lake Champlain in preparation for an attack on Montreal. The attack had to be abandoned. In

⁵ Act of July 6, 1798, 2 Stat. 576.
1814, militia were deployed on the Bladensburg Road to stop British regulars from marching through to the Capitol. About 95,000 militia had been called to service, but only 7,000 appeared. President Madison and some cabinet members came out to watch the fight. After the militia had suffered 66 casualties, the militiamen broke and ran. The British reached Washington in time to eat a dinner at the White House which had been prepared for the President and Mrs. Madison.\(^6\)

Army regular units fighting near Niagara Falls under Winfield Scott’s command, however, distinguished themselves by stopping regular British troops on two occasions.

One result of the War of 1812 was that those who had believed that the militia was a superior military force abandoned such belief. After the War of 1812, the ability of the average militiaman to appear with his own rifle dramatically declined. Men appeared with no weapon at all, or with umbrellas, broom sticks, farm tools, and garden instruments in place of guns.\(^7\)

Abraham Lincoln once recalled his youthful experience at “militia trainings:”

We remember one of those parades ourselves here, at the head of which, on horseback, figured our old friend Gordon Adams, with a pine wood sword, about nine feet long, and a paste-board cocked hat, from front to rear about the length of an ox yoke, and very much the shape of one turned bottom upwards; and with spurs having rowels as large as the bottom of a teacup, and shanks a foot and a half long. That was the last militia muster here. Among the

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\(^7\) How the Second Amendment Fell Silent, at 136.
rules and regulations, no man to wear more than five pounds of cod-fish for epaulets, or more than thirty yards of bologna sausages for a sash; and no two men are to dress alike, and if any two should dress alike, the one that dresses most alike is to be fined (I forget how much). Flags they had too, with devices and mottoes, one of which latter is, ‘We’ll fight till we run, and we’ll run till we die.’

At the outset of the Civil War, President Lincoln called for volunteers and within two months 200,000 had enlisted. Congress voted authorization and funding for 1,000,000 volunteers. In July, 1862, Congress delegated to the President the power to implement a draft and to require 9 months of service, calling on what remained of the militia structure to produce the men. States failed to comply with the call to active service, and the effort proved a failure. The Union continued to rely on volunteers.  

From the end of the Civil War and onward, the Militia contemplated by the Second Amendment – able bodied men required to serve and bring their own arms – languished. Military service outside the standing army consisted of volunteers who came to style themselves the “National Guard.” The army provided their weapons. In 1903, at the urging of President Theodore Roosevelt, Congress divided the militia into an active militia (the National Guard) and an unorganized militia (the non-enrolled male population between 17 and 45.) See 10 U.S.C. § 311 (“Militia; composition and classes”). Congress has done nothing to implement the “unorganized militia” since the turn of the century.


9 How the Militia Fell Silent, Chapter 5 (The Era of the Volunteers), at 125-132
One scholar describes the current situation of the unorganized militia:

For reasons of efficiency and public safety, it is implausible that any member of Congress or official in the Department of Defense, army, or state adjutant general’s office should advocate a return to the policy of keeping the arms used by the unorganized militia in Guard member’s homes. Most fundamentally of all, the arms once purchased by the militiamen themselves are now government property and require the safekeeping accorded any other U.S. property – and especially dangerous property at that. In the year 2002, the militia contemplated by the Second Amendment no longer exists, and no plausible analogy to that nexus can be reconstructed.  

The militia of the Second Amendment, in short, is moribund. It exists only as on paper as described in 10 U.S.C.§ 311(b)(2). It could be – at least in theory -- reactivated.

### IV. Interpreting the Second Amendment.

The Supreme Court in *District of Columbia v. Heller* (opinion by Scalia, J., joined by C.J. Roberts and Justices Kennedy, Thomas and Alito) (5-4) held that the “keep and bear arms” phrase of the Second Amendment means to keep arms for personal use only and not for military purposes, and that the D.C. Ordinance that essentially banned the personal possession of handguns was unconstitutional. The Court further declared unconstitutional portions of the D.C. Ordinance which required that firearms kept in the home not be loaded and have trigger guards or other safety devices installed. According to the Court, these safety measures interfered with the effectiveness of using such weapons for self-defense.

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10 How the Second Amendment Fell Silent, at 144
Justice Stevens wrote a dissenting opinion joined by Justices Ginsburg, Breyer and Souter. Justice Breyer wrote a dissenting opinion joined by Justices Stevens, Ginsburg and Souter.

Justice Scalia burns through 24 pages to persuade the reader of his new interpretation of the Second Amendment. It is a difficult read. More of that later.

I suggest that it is a simple matter to interpret the Second Amendment. It takes only a couple of pages.

First: The “right” set forth in the Second Amendment is not created by the Second Amendment. Rather it is a preexisting common law right. See above discussion. The Heller Court acknowledges this. From 1791 to June 26, 2008, the date of the Heller decision, the common law right to own and keep arms for personal use has continually existed in the District of Columbia outside the Second Amendment. It exists after June, 2008 outside the Second Amendment as well. The decision in Heller could do nothing to change the fact that the “keep and bear arms” language comes from that common law right. The only reason the phrase “keep and bear arms” appears in the Constitution is in connection with the language which prevents the Federal Government from disarming the militia.

11 128 S.Ct. at 2822 (Stevens, J., dissenting).

12 128 S.Ct. at 2847 (Breyer, J., dissenting).

13 I am setting forth my interpretation of the Second Amendment not because I have any authority to do so. Against District of Columbia v. Heller, my interpretation is neither here nor there. I am setting my interpretation quickly and succinctly because it will enable the reader to understand the Second Amendment issues and what the Supreme Court did in Heller.

128 S.Ct. at 2797 (Scalia, J.: “[I]t has always been widely understood that the Second Amendment … codified a pre-existing right”).
Second: The “people” refers to all the people. It is possible to define “people” to include only such people as are eligible to serve in the militia. Or people who are now serving in the militia. In 1792, that would have been all able-bodied white males 18 to 45 years old. After 1795, the qualifications became as stated in State law. Today, the militia consists of –

all able-bodied males at least 17 years of age and, except as provided in Section 313 of title 32, under 45 years of age, who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.


Thomas Cooley in his famous work, *Treatise on Constitutional Limitations* (1868), wrote about the Second Amendment as follows:

The meaning of the provision undoubtedly is that the people, *from whom the militia must be taken*, shall have the right to keep and bear arms …

(Emphasis supplied.)

According to Prof. Cooley, therefore, there is no reason to think that the Second Amendment was to protect only citizens already in militia units from being disarmed by the Federal Government. The militia, by definition, was a very large organization (all able bodied males from 18 to 45). Only a fraction might at any moment be mustered into a militia unit and actively training, that is, be in the “well regulated militia.” It would make no sense to say that the Second Amendment protected only those enrolled and mustered in the militia from being disarmed, but not those who could be at any time summoned to the militia to begin training and discipline.
The phrase “of the people” does not textually suggest a subgroup of less than all the people. Rather than giving “people” a meaning so variable over time, it is best to give “people” a broad meaning: hence, all the people. *Heller* reaches this result. Justice Stevens in his dissenting opinion would require that the person asserting a Second Amendment violation be a member of or have some relationship to an existing Militia unit. There is no textual support in the Second Amendment for limiting “the people” to some subgroup based on relationship to the militia. Such a requirement, of course, would kill Heller’s claim dead. There are no militias now and have not been for a century or more.

**Third:** The “right” described is an individual right which can be asserted by a single person. The *Heller* Court unanimously held that a single individual may assert the right.

**Fourth:** The phrase “to keep and bear arms” is, in my view, easy to understand. “Bear arms” is an idiom now and it was an idiom in 1791. It means “to serve as a soldier, do military service, fight.” “Bear arms” must refer to the role of the well-regulated Militia set forth in the introductory clause. Therefore, it means “to bear arms in the Militia.” Madison’s first draft of the Second Amendment, with the clause exempting religiously scrupulous people from “bearing arms,” makes this clear.

The word “keep” is not part of the idiom “bear arms.” Therefore, we can move the word “keep” away from the words “and bear arms” and reword the phrase thus: “the right of the people to keep arms and to bear arms in the
militia shall not be infringed.” The meaning of the phrase is not changed. The words “to keep arms” is a sufficient description of the common law right to possess arms for any lawful purpose, such as self-defense, hunting, target shooting, etc. As indicated above, a Government which wants to disarm the militia must confiscate not just weapons kept for service in the militia, but personal weapons kept by the people and useful for militia service.

The Second Amendment thus far can be written:

A well-regulated militia being necessary to the security of a free State, the common law right of the people to keep arms for any lawful purpose (such as self-defense, hunting, target shooting, etc.) and to bear arms in the Militia shall not be infringed.

Fifth: The word “infringement” is not self-defining, as every patent lawyer or trademark lawyer knows. Its meaning must arise from context. We therefore refer to the introductory phrase about the “well-regulated Militia.” The purpose of the Second Amendment is to have the Militia protect the security of the state. “Infringement,” therefore, means any conduct of the Federal

15. The insertion of an explicit “arms” directly after “keep” is a perfectly legitimate step. Consider the following sentence: “Jack is fond of Golden Delicious and Macintosh apples.” There is an implied word “apples” after Golden Delicious, thus: “Jack is fond of Golden Delicious [apples] and Macintosh applies.” Making the implied word “apples” explicit is further legitimate: “Jack is fond of Golden Delicious apples and Macintosh applies.” The meaning of the sentence does not change.

16. In Parker v. District of Columbia, 478 F.3d 370, 385-386 (D.C. Cir. 2007), the majority had little difficulty in finding in the phrase “keep arms” a right to possess arms for personal reasons: “We think ‘keep’ is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use. Emerson, 270 F.3d at 231 & n. 3’1; accord Silveira, 328 F.3d at 573-74 (Kleinfeld, J.)”
Government which diminishes the effectiveness of a well-regulated militia, thereby jeopardizing the security of the State.
The Second Amendment in my opinion is therefore properly interpreted as follows:

►CORRECT INTERPRETATION OF SECOND AMENDMENT◄

A well-regulated Militia being necessary to the security of a free state, the existing common law right of the people to keep arms for any lawful purpose (such as self-defense, hunting, target shooting, etc.) and to bear arms in the Militia shall not be infringed by the Federal Government in a manner which diminishes the effectiveness of the militia.

It is respectfully submitted that this is the correct interpretation. There is no difference between an interpretation by a citizen of 1791 and a citizen of today. The doctrine of “originalism” is not necessary to provide this interpretation. Nothing in this interpretation is based on English analyzed circa 1791 which is different from English analyzed today.

A correct result of *Heller*, therefore, is that Heller should lose his case because there has not been a militia in the United States for over one hundred years. Heller, therefore, is unable to bear his burden of proving that there is any militia whose effectiveness could possibly be impaired by the gun regulations of the District of Columbia.

Heller could, however, still proceed on the theory that the District of Columbia gun control legislation violated his common law right to own and possess arms for personal use. Such a claim is not based on the Second Amendment. It is based on the common law of the District of Columbia.
V. The Supreme Court’s Decision in District of Columbia v. Heller

A. Role of the Supreme Court vis a vis the Second Amendment.

The Supreme Court, however, held otherwise.

Justice Scalia, at the end of his long opinion, tells us that:  

Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

(Emphasis supplied.)

Justice Scalia is clearly wrong. It is indisputably the role of the Supreme Court to hold that a Second Amendment plaintiff cannot prevail without showing that the government regulation in question diminishes the effectiveness of the militia where such a showing is required by the Second Amendment. The Supreme Court has an obligation to declare the inability of the plaintiff to satisfy a burden of proof placed on the plaintiff by the text of the Second Amendment. Whether the D.C. Ordinance in question does or does not impair the effectiveness of any militia is a simple question of fact, and the Supreme Court is as obligated to determine that fact as any other fact. If the plaintiff cannot satisfy this

\footnote{17 128 S.Ct. 2822 (Scalia, J.)}

\footnote{18 I cannot resist inserting the following in the above quote from Justice Scalia:}

“where the Militia named in the Second Amendment has not existed for almost two hundred years ….”
requirement because there is no militia to be impaired, then it is the constitutional obligation of the Supreme Court to so hold.

In any event, it is not necessary that the Court declare the Second Amendment extinct. The general militia still exists, in theory, as described in 10 U.S.C. § 311(b)(2). There are no militia units in existence today organized pursuant to that statute. It is highly improbable that the Federal Government, at some day in the future, will activate the “unorganized militia” of 10 U.S.C. §311(b)(2). It is even more improbable that citizens, summoned to serve, will be required to bring their own arms. But it is possible. Therefore, Justice Scalia does not have to declare anything extinct. The Court merely needs to hold that Heller has not satisfied the burden of proving some negative effect on the militia.

B. Justice Scalia and the Right to Keep and Bear Arms.

Justice Scalia begins his opinion by setting forth the entire Second Amendment. One writer, believe it or not, praises him for setting forth all 27 words of the Amendment, as if this is something unusual! Wheew!! All 27 words! Caution must be exercised, however, because Justice Scalia then divides the language into the introductory clause (13 words) and the following clause (14 words). He labels the introductory clause a “preamble,” the following clause the “operative clause,” and he tells us that it is not proper to resort to the preamble for help when interpreting the operative clause. He claims that resort to the preamble

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during the process of interpreting the operative clause is forbidden, and that only when an interpretation has been made is it permissible to check that interpretation against the preamble to see if there is some minimal relationship between the purpose set forth in the preamble and the interpretation made by the Court. He then all but drops the preamble from discussion, never referring to it as an aid of interpretation. His authority for treating Madison’s introductory phrase in this manner is taken from academic books on statutory and constitutional interpretation.

This is so much stuff and nonsense. Supreme Court case law has always been clear that all words which appear in the Constitution must be taken into account in any interpretation. It has always required that the introductory clause be consulted to resolve any inconsistency or uncertainty in the meaning of the operative clause. And the Supreme Court, in *Miller v. United States*, with reference to the Second Amendment involved in *Heller*, specifically instructed that the introductory clause must be consulted in the interpretation of the operative clause. Justice Scalia is so eager to ignore the introductory clause that there must be some word in the “preamble” which discomfits him. (Hint: it is the word “Militia.”)

20 “It cannot be presumed that any clause in the constitution is intended to be without effect.”: Marbury v. Madison, 1 Cranch 137, 174, 2 L.Ed. 60 (1803).


22 Obviously, the treatises of Profs. Sutherland, Dwarris, and Sedgwick cannot be used to trump the clear language of the Supreme Court in *Miller v. United States*. 
Justice Scalia then interprets the words “people” and “right” as indicated above. The dissenting opinion of Justice Stevens indicates that the entire Court agrees with the conclusion that the right is individual and can be asserted by a single person. Justice Stevens, however, disagrees that “people” is all inclusive. According to Justice Stevens, a person who asserts rights under the Second Amendment must have some connection with a militia. If the Court were to embrace this view (and it comes close, because four members agree with it), Mr. Heller would lose his case because he is 66 years old and he is not a member of or associated with any militia unit. Militias no longer exist.

Justice Scalia next takes up the phrase “the right to keep and bear arms.” Justice Scalia interprets “keep” using a dictionary definition from the late 1700s (“to retain,” “not to lose,” “to have in custody”)(Samuel Johnson, at 1095). The meaning of “keep” obviously has not changed in two hundred years. This phrase (“to keep arms”) is itself an adequate description of the common law right to possess arms for any lawful purpose, including self-defense, hunting, target shooting, etc. Justice Scalia clearly recognizes that “keep arms” means to possess firearms for personal use.23 Justice Scalia could have – should have stopped his analysis of the phrase “keep and bear arms” at this point. If “keep arms” is an adequate description of the common law right to possess firearms for personal purposes is fully established by the phrase “keep arms.”

24. Justice Scalia writes that “[k]eep arms was simply a common way of referring to possessing arms, for militiamen and everyone else.” 128 S.Ct. at 2792. He then drops a footnote and provides a two column recitation of sources in which the phrase “keep arms” indicated possession of arms by non-military people. It cannot be said, therefore, that Justice Scalia is unaware that the right to possess firearms for personal purposes is fully established by the phrase “keep arms.”
personal purposes, then it does not matter that “bear arms” is an idiom with the meaning “to serve as a soldier, to do military service, to fight.” In the next _______ pages, Justice Scalia nevertheless plows ahead and in truly tortured reasoning, attacks the phrase “bear arms” and adamantly refuses to find any military connotation in the phrase at all. To the contrary, he concludes that this phrase refers exclusively to non-military personal uses of weapons, including self-defense, hunting, and “confrontation.”24 This part of Justice Scalia’s opinion is not just weak; it is entirely irrational. And the tortured interpretation of “to bear arms” results entirely because Justice Scalia has refused to end his analysis after he has held that the simple two words “keep arms” were all that was necessary to say that the Second Amendment recognized the common law right to possess arms for personal use.25

24. Justice Stevens, in his dissent, notes that Justice Scalia’s addition of “confrontation” as one of the uses of personal arms was not argued by any party or by any of the many amici curiae.

25. It is not surprising that the phrase “keep and bear arms” would encompass possession of arms for personal use. As the Court says repeatedly, the operative clause – “the right of the people to keep and bear arms” – was a codification of the common law right. The common law right certainly included a right to own and possess firearms for personal use. Indeed, the common law right logically consisted of nothing but a right to own arms for personal reasons. In my opinion this observation standing alone is a sufficient basis to hold that the Second Amendment protects the common law right to possess arms (“to keep arms”) and the common law right to serve in the Militia (“bear arms”) from federal infringement which damages the Militia.

In my view, it has always been a very simple matter to observe that the actual text of the Second Amendment, “keep arms,” describes the common law right to possess arms for personal purposes. It is incredible that the federal courts have spent hundreds and hundreds of page of the federal reporters trying to reach this conclusion.
C. Justice Scalia and “Originalism.”

Justice Scalia in *Heller* announced that he was going to perform an “originalist” interpretation of the Second Amendment. 128 S.Ct. at _____. We will learn to fear “originalist” interpretations.

Once a Justice of the Court has completed what he claims is an “originalist” interpretation of some clause of the Constitution or its Amendments, that Justice is likely to argue that any judicial decision from 1791 to present date which did not have the benefit of his “originalist” interpretation is invalid or suspect. We must, therefore, pay very careful attention to the work product of the “originalist.” We must check his sums and his reasoning carefully.

In *Heller*, for example, Justice Scalia criticizes the Court’s opinion in *United States v. Miller* (1939) on the ground that the Court in *Miller* did not have the benefit of Justice Scalia’s “originalist”-based interpretation of the Second Amendment in *Heller* (2008). Justice Scalia does not indicate, however, what possible use the *Miller* Court could have made of his “originalist” interpretation (kindling?), or that *Heller*, if known to the Court in 1939, would have changed the unanimous *Miller* decision. It is not sufficient for Justice Scalia to make the obvious observation that the Justices of the Court in 1939 did not have available the opinion which Justice Scalia wrote in 2008. The observation, standing alone, is perfectly worthless. Why does it matter that the *Miller* Court did not have Justice Scalia’s *magnum opus*? How would the *Heller* opinion have impacted the opinions in *Miller*? Justice Scalia does not tell us.
Under Justice Scalia’s view of “originalism,” what is important in interpreting the text of the Second Amendment is not what a drafter of the language intended, and not what members of Congress in 1787-1791 intended when they adopted the language, and not what members of the state ratification committees intended when they ratified the language. “Intent” of these people actually involved in the generation of the language in question is too “subjective,” according to Justice Scalia. What is important to “originalism” is what an average person of that time (circa 1791) thought the language meant.

The idea that the “intent” of legislators is subjective and unknowable every now and then raises its ugly head. From my office window, I can see an entire wing of the State Correctional Institution in Pittsburgh (SCIP), which houses prisoners who have been sentenced to many years in prison because jurors found what their “intent” was at the time of their crimes. All lawyers recall Lord Justice Bowen’s famous observation in 1885 that “the state of a man’s mind is as much a fact as the state of his digestion.” There are, admittedly, problems in determining the “intent” of legislators involved in the creation of a statute or constitutional provision, but the existence of “problems” hardly justifies preferring the understanding of people who had nothing to do with bringing the provision into law and who merely read the provision (reader opinions) and ignoring those who participated in the legislative process.

D. Justice Scalia Wrestles With James Madison’s First Draft and Loses.
Justice Scalia gives short shrift to the views of those involved in the legislative process leading to the Second Amendment. Rather, he bounces all over the globe, both temporally and geographically, citing events centuries before and after 1791.

Let us return to the subject of James Madison’s first draft of the Second Amendment:

A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms.

During debate before the House, the anti-federalists opposed the “religiously scrupulous” clause on the ground that Congress might exempt entire categories of “religiously scrupulous” people, thereby exempting too many people from militia service and thus damaging the militia. The clause survived in the House, but during Senate debates (not recorded), the clause was deleted.

I suggested earlier that the phrase “bear arms” in the “religiously scrupulous clause” obviously meant “serve in the militia,” and that this demonstrated that the same two words, appearing earlier, also meant “serve in the militia.” I asserted that it was not possible to argue that Madison used the phrase “bear arms” twice in the same sentence, but with different meaning on each use.

This is a very, very strong argument. Justice Scalia has known of this argument for several years prior to drafting his opinion in *Heller*. He had a lot of time to think of a rejoinder. His law clerks had a lot of time to think of a rejoinder. The coterie of Gun Advocate Attorneys who have served as Second
Amendment Warriors (largely paid or sponsored by gun advocacy groups such as the NRA, Second Amendment Foundation, etc.) have spent years working on this rejoinder. The quality of the rejoinder would be the best indication of the strength or weakness of the Gun Advocates’ position. I therefore searched eagerly in Scalia’s *Heller* opinion to find the rejoinder Justice Scalia had to offer.

Here is Scalia’s rejoinder: “It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.” 128 S.Ct. at 2796. Really!!! That’s it???

I cannot disagree that in looking at deleted language while attempting to determine the meaning of surviving language, one has to be careful. The probative value of deleted language in showing the meaning of surviving language varies from nil to strongly probative. It depends on the individual case. It depends on what was deleted, and its relationship to what remained. It takes intelligence and perspective and historical understanding and unbiased reasoning to distinguish a case of “no probative value” from a case of “highly probative, perhaps conclusive, value.” In this particular case, the obvious military meaning of “bear arms” in the deleted “scrupulously religious” clause is in my view conclusive on the meaning of “bear arms” earlier in the same sentence.

Justice Scalia, to defeat this argument, advanced the theory that James Madison used the phrase “bear arms” in the “religiously scrupulous” clause to mean to serve in the militia and to engage in a “personal gunfight.” Justice Scalia cited some sources to the effect that Quakers in 1790s not only refused to
serve in the military but also avoided using violence in “personal gunfights.” Justice Scalia therefore asserted that when Madison used the phrase “bear arms” in the “religiously scrupulous” clause, he was taking into account that Quakers not only would not serve in the militia but also would not defend themselves in a personal confrontation. At this point, Justice Scalia ends his argument, as if he has said enough for the reasonably intelligent reader to finish up the point for himself and conclude that “bear arms” means not only to serve in the militia but also to participate in a “personal gunfight.” But the argument, plainly, is not finished.

Let me finish the argument for Justice Scalia: James Madison, being an intelligent person aware of his times, would have known that Quakers were reluctant to use violence in personal confrontation. Therefore they needed both an exemption from militia service and also an exemption from defending themselves in a personal gunfight. Therefore, Justice Scalia implicitly argues, James Madison, when he wrote “bear arms,” meant to include in the “religiously scrupulous” exemption a person whose religious scruples prevented him both from rendering military service AND from using violence in a “personal gunfight.” Like this:

…but no person religiously scrupulous shall be compelled to bear arms in the militia or to defend himself in a personal confrontation.

Why would Madison have done this? No explanation is offered. The only justification is that it enables Scalia to assert that Madison himself used the phrase “bear arms” to include both military service and personal confrontation. (But
remember that Justice Scalia’s ultimate conclusion is that Madison used the phrase “bear arms” to include ONLY personal confrontation, not including any military connection at all! A conscientious objector may well need an exemption from serving in the militia, but he does not need an exemption in the Second Amendment to fail to defend himself personally.

Justice Scalia then cited in a footnote a conscientious objector provision proposed by Virginia and North Carolina which read “That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.” 128 S.Ct. at 2796 n.13. Justice Scalia wrote:

Certainly the second use of the phrase (“bear arms in his stead”) refers, by reason of context, to compulsory bearing of arms for military duty. But their first use of the phrase (“any person religiously scrupulous of bearing arms”) assuredly did not refer to people whose God allowed them to bear arms for defense of themselves but not to defense of their country.

(Emphasis supplied.)

As we used to say in the military, please say again and spell slowly all words after “whose God allowed them ……”

One hallmark of an unsound argument is that the writer quickens his pace, offers hurried, incompletely set forth distinctions, and then lashes out at the reader for having troubled him to explain his reasoning. Most astute readers, when they have read the “distinction” and have not understood it, do not allow themselves to be scared away. They go back and re-read the distinction, and re-read it, and re-read it, and think about it, and ask whether it is even minimally logical.
Justice Scalia has here offered two distinctions which do not parse at all and lack even minimal logic. They are farcical. They are in fact insults to the reader’s intelligence.

First, he has argued that Madison in his “bear arms” phrase was referring to Quakers, who avoided both military service and personal gunfights. This does not wash at all. Assuming that all pacifists of the period (and not just Quakers) eschewed violence in their personal affairs, it is preposterous to say that Madison had this in mind in his use of the phrase “bear arms.” A person with religious scruples obviously does not need an exemption from the Government to enable him to refuse to defend himself in a personal confrontation.

Second, Justice Scalia has asserted that the conscientious objector clause proposed by Virginia and North Carolina could not have referred to “people whose God allowed them to bear arms for defense of themselves but not for defense of country.” What? Do you, the reader, understand what Scalia is saying? Does this make any sense to you? What does it have to do with the meaning of “bear arms?” Does this not sound like a dollop of pure nonsense, thrown out quickly in lieu of a reasoned distinction? A conscientious objector under American military law has always been allowed to obtain an exemption from military service by showing that he is religiously opposed to wars. I am unaware of any point in American history at which the conscientious objector has been required to prove, in addition, that he would not use force to defend himself if personally attacked. There have been many citizens whose God has commanded them – so they believe – not to participate in warfare, but whose
God nevertheless permits them to defend themselves when attacked. Anyway, what has this to do with the meaning of “bear arms?” Justice Scalia’s distinction is presumptuous nonsense. It is important to be able to detect, when reading legal argument, that you are having sand thrown in your eyes.

Recall that Justice Scalia, reviewing texts and studies on late 18th century English, concluded that the phrase “bear arms” has no military connotation whatever. He concluded that “bear arms” could not connote a military use unless the preposition “against” appeared after the word “arms,” as in “bear arms against an enemy.” He concluded that “bear arms” appearing alone suggested a personal confrontation, but not a military use.

Note that Madison’s first draft of the Second Amendment containing the “religiously scrupulous” clause deals clearly with military service: “A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms.” Justice Scalia himself acknowledges that the “bear arms” at the end refers in part to service in the militia. But note the absence of the word “against.” James Madison’s drafts of the Second Amendment prove that “bear arms” has a military connotation even absent the preposition “against.” So much for Justice Scalia’s assertion that the phrase “bear arms” circa 1791 never connoted military service unless “arms” were followed by the word “against.” James Madison, who knew a great deal more than Justice Scalia about the use of the English language circa 1791, obviously believed that the phrase “bear arms” sans following proposition
“against” denoted service in the militia. That is what the Linguists in their Amicus Brief thought.

Irrational arguments are a sure sign of an unsound distinction. Justice Scalia’s attempt to deal with Madison’s use of the phrase “bear arms” is extremely troublesome. In a debate, it gets minus points. It merits a zero because it is irrational. It merits minus points because it throws sand in the reader’s eyes and insults the reader’s intelligence, which Justice Scalia evidently thinks is not high. Justice Stevens in his dissent comments as follows on the weakness of Scalia’s arguments: “Perhaps the Court’s approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.” 26 I think Justice Stevens could have and should have used language of stronger condemnation.

D. Justice Scalia and “Originalism”

Let’s return to the subject of “originalism.” Given that the preferred evidence for “originalism” was to be what the average man in 1791 thought the Second Amendment meant, one would have thought that Justice Scalia would have assembled exactly that, writings by people who lived circa 1791, read English, and who had left some written record (given that they are all now dead) in which they said, “I have read the Second Amendment to the U.S. Constitution, and here is what I think it means …..” If we had one such written reader opinion, we could then proceed to the many other problems with “originalism,”

26 128 S.Ct. 2826 (Stevens, J., dissenting.)
such as: (1) how many reader opinions should we gather before placing any weight whatever on reader opinions; (2) what educational level of readers are we looking for; (3) for what prior experience with law and constitutional provisions should we look; (4) what experience with this particular provision?

The fact of the matter is that Justice Scalia has not presented one single “reader opinion” from 1791 or closely thereafter in which some person asserted that he thought the Second Amendment represented an individual right of gun ownership without regard to impairment of the militia.

Instead, Justice Scalia launched himself into a wide ranging search in an attempt to learn what the phrase “bear arms” meant in 1791. Experts told him it was an idiom, and absent any explicit reference to a non-military use, it meant to be a soldier, to serve in the military, to fight. Justice Scalia did not like that meaning, so he then went in search for non-idiomatic uses. Given the research of an historian, Prof Saul Cornell, a non-idiomatic use had only an 18% chance of being present in the Second Amendment.27 But Justice Scalia found in Prof. Cornell’s article 5 appearances of the phrase “bear arms” with other words indicating a non-military context (example: “bear arms …for the purpose of killing game.”) He concluded, therefore, that the phrase “bear arms” in the Second Amendment MIGHT mean possession of arms for personal purposes. It was possible.

The next step in Justice Scalia’s reasoning was to go from MIGHT MEAN possession of arms for personal purposes to DOES MEAN possession of arms for personal purposes. This is, of course, a total fallacy. Given Prof. Cornell’s research, there is an 96% probability that it MEANS to be a soldier, to do military service, to fight.”

But the illogic has not been exhausted. Justice Scalia then journeyed from DOES MEAN possession of arms for personal purpose to the conclusion – because this is an “originalism” exercise -- that average people circa 1791 DID IN FACT interpret the Second Amendment to protect a right to posses arms for personal purposes without regard to impairment of the militia. And this without presenting a single reader’s opinion circa 1791 that anyone so interpreted the Second Amendment.

In an amicus curiae brief, the Professors of English and Linguistics warned that it was not permissible to go from a couple or several non-idiomatic examples of the phrase “bear arms” to a conclusion that therefore the Second Amendment language was non-idiomatic and meant possession of arms for personal reasons.

We otherwise have been unable to find non-idiomatic uses of the phrase “bear arms” or “bearing arms” or “bear arms against” from the founding era in the United States. But even if one were to produce a few instances of actual non-idiomatic uses, that would not affect the meaning of the idiom in the Second Amendment.

Linguists’ Brief, at 24.
Justice Scalia’s opinion is not an exercise in the doctrine of “originalism” at all. It does not demonstrate that a single reader of the Second Amendment circa 1791 interpreted the language as describing a right to ownership of arms for personal reasons protected against infringement by the Federal Government without regard to impairment of the militia. To the extent Justice Scalia referred to dictionaries of the 1700s to determine the meaning of words in the Second Amendment, he failed to demonstrate that definitions were produced which did not square with today’s dictionaries and resources. In fact, they do.

Justice Scalia’s opinion is not an example of “originalism” at all. It is a perfect demonstration of the problems that are presented when one Justice dives into the history books and the dictionaries of the times, and emerges with a claim that he has found the “true meaning” of some Constitutional provision.

To prevent recurrences of the problems which are present in Heller, I would suggest the following:

- Whenever a member of the Court purports to perform an “originalist” interpretation of a statute or constitutional provision, he or she should explain, towards the end of the opinion, how the “originalist” interpretation differs from an interpretation which would have resulted by applying today’s English and today’s dictionaries and reference sources.

- Whenever a member of the Court purports to perform an “originalist” interpretation, he or she should explain, towards the end of the opinion, if the
“originalist” interpretation throws into doubt the continued validity of prior decisions of the Court interpreting and applying that provision.

E. Justice Scalia’s Meaningless and Unnecessary Distortion of the Phrase “Bear Arms”

Let’s look at how Justice Scalia distorts beyond recognition the phrase “to bear arms.”

Professors of linguistics and English filed an amicus brief. The professors wrote that the phrase “bear arms” in 1791 was idiomatic, and the meaning of the idiom was “to serve as a soldier, do military service, fight.” The professors say that the phrase was an idiom in 1791, and it is an idiom today, and has the same meaning today that it had in 1791. The significance of an idiom is that an intelligent writer of English, such as James Madison, is presumed to use a phrase within the idiomatic meaning, unless the context clearly indicates otherwise. There is a probability that a writer used a phrase in its idiomatic sense.

23. Brief for Professors of Linguistics and English as Amici Curiae (Linguists’ Brief). The four professors are all doctors of English or Linguistics. Justice Scalia, rather than welcoming the contribution of these experts, mocks them: “That analysis [of the professors of Linguistics] is faulty. A purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass (except, apparently, in some courses on Linguistics.)” 128 S.Ct. at 2795-2796 (emphasis supplied).

Justice Scalia should mind his manners and not insult professionals attempting to assist the Court.

I will show in a moment that this attack on the linguists is baseless.
unless the context indicates otherwise. Let us assume arguendo that there is some uncertainty whether “bear arms” was used idiomatically by James Madison. We must resort, therefore, to the “preamble” for interpretation (which Justice Scalia never does) and see whether the idiomatic use (“to serve as a soldier, do military service, fight”) is consistent with the preamble, which speaks of a “well-regulated militia” and the need to protect the “security of the free state.” The fit is “perfect,” to use Justice Scalia’s phrase.

Justice Scalia instead holds that James Madison has used the phrase “bear arms” in a non-idiomatic sense (although he does not explain how he knows that), and he goes off in search of non-idiomatic examples of the phrase in 18th century writings. The historian Saul Cornell surveyed the use of the term “bear arms” (with and without qualifying language) in books, pamphlets, broadsides and newspapers spanning the period between the Declaration of Independence and the adoption of the Second Amendment. He found 115 examples of the term “bear arms.” Of those 115 examples, 110 were idiomatic military usages. Only 5 were not. Of the five non-idiomatic uses, four were cases in which a personal, non-military use was indicated (“bear arms … for the purpose of killing game.”) On not one occasion did the phrase “bear arms” indicate personal, non-military use where the text did not explicitly indicate a non-military use. Where the phrase “to bear arms” appeared alone, the context was always military, regardless whether the word “against” followed the phrase.
According to Professor Cornell, there is an 96% chance (110 out of 115) that the phrase “bear arms” used in 1791 indicates a military use of arms. There is only an 4% (5 out of 115) chance of non-idiomatic usage.

None daunted, Justice Scalia nevertheless held that the phrase “to bear arms” referred exclusively to personal, non-military use and did not include military usage at all. This is an astonishing and indefensible conclusion.

It is clear, I suggest that Justice Scalia, in claiming that “to bear arms” in the Second Amendment referred only to personal uses (self-defense, hunting, confrontation) and not to military service at all, was driven not by logic and analysis. One wonders if the other four Justices who joined his opinion took the trouble to check Justice Scalia’s sums. Justice Scalia was motivated by the strongest possible desire to convert the Second Amendment (or at least the operative clause) into a declaration of a constitutional right to possess arms for personal purposes with total disregard for the “well-regulated militia” preamble.

A few moments thought are sufficient to show how wrong Justice Scalia was. Consider:

<table>
<thead>
<tr>
<th>Nature of Use</th>
<th>Citizen Says</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal/self-defense</td>
<td>“Last night I heard a noise downstairs, so I got the rifle I keep under my bed, went downstairs, and I bore arms against the intruder.”</td>
</tr>
<tr>
<td>Personal/hunting</td>
<td>“Tomorrow I will take my rifle to the woods and I will bear arms against the deer in the forest.”</td>
</tr>
<tr>
<td>Military/militia</td>
<td>“I have been called to the militia, and I will take my rifle with me and I</td>
</tr>
</tbody>
</table>
will bear arms against enemies of the State.”

The first two examples are obviously wrong. They are not correct English, either in 1791 or today. As one writer observed, “one does not bear arms against a rabbit.” And yet that is what Justice Scalia claims is meant in English by the phrase “bear arms.” This is “grotesque!”

It is regrettable that a Justice of the Supreme Court has found it necessary to set forth at such length this absolute absurdity. If Justice Scalia had

29 Garry Wills, To Keep and Bear Arms, N.Y. Rev. of Books, Sept. 31, 1995, at 63.

30 “Grotesque” comes from Scalia’s opinion. It is not a word a Justice of the Supreme Court should have chosen to describe an argument made by a fellow Justice.


Every Dec. 16th, the MWNFMS holds its annual meeting at Kitty Hawk, N.C., the day before Dec. 17th when thousands of deluded fools from throughout the United States arrive en masse to celebrate the anniversary of that fateful date, Dec. 17, 1903, when the bicycle mechanics from Ohio came to Kitty Hawk and fraudulently claimed to have flown a heavier than air machine.

When I flew the F4B Phantom II jet in Marine Fighter/Attack Squadron 531 at MCAS Cherry Point, N.C., I and fellow pilots would overfly the Society’s convention in a four plane formation at high speed and low altitude. The members of the MWNFMS responded, as they must, by never looking up, never waiving or otherwise acknowledging our existence.

The MSNFMS used to sponsor an essay contest. The Grand Prize went to the person who submitted the best essay proving that man will never fly. Years ago it was my pleasure to read those essays. The rules of the contest required that the entrant maintain a serious scientific tone, and never cite or refer to anything which proved the contrary. I have, therefore, some expertise in reading the work of Ph.D.s in aeronautical engineering pretending to prove a proposition each knew to be false.
recognized that the phrase “to keep arms” was entirely sufficient to describe the common law right to possess arms for any lawful personal purpose, then he could have dispensed entirely with his ____-page torture of the phrase “bear arms.”

**F. Justice Scalia’s Bullying Attacks on Opponents**

Justice Scalia at several points takes an argument made in opposition, twists and restates the argument into something his opposition did not say, and then proclaims that the Scalia-modified product is “worthy of the mad Hatter,” or “grotesque,” or “not seen this side of the looking glass.” Throughout his opinion, Justice Scalia throws out barbed criticisms of the work of other Justices of the Court.

This is arrogant and in poor taste. If Justice Scalia’s arguments are well-researched, well reasoned, and sound, he need only have set them forth. His criticisms of Brother Justices and of experts who appeared amici curiae is unprofessional, injudicial, and do not add to the value of his arguments.

In assailing the work of the Professors of English and Linguistics, for example, Justice Scalia claimed that they had stated that “bear arms” was an idiom, now and in 1791, and it meant “to serve as a soldier, do military service,

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Reading the Court’s opinion in Heller, in which Justice Scalia undertakes to prove that the phrase “bear arms,” an idiom which means “to serve as a soldier, do military service, to fight,” has no military connotation whatever, takes me back to those earlier days.
fight.” Prof. Cornell’s computer search of documents from the adoption of the Declaration of Independence to the ratification of the Second Amendment had produced 115 instances of use of the phrase “bear arms.” In 110 cases, the context was obviously military. In the remaining 5, language following the phase “bear arms” indicated that the use of “bear arms” was non-idiomatic. One such case was “bear arms … for the purpose of killing game.” The Professors specifically indicated in their Brief that in these few non-idiomatic cases, the idiom is “bent” or “broken.”  

Ignoring the warning of the Linguists not to rely on the idiom where the use is non-idiomatic and the idiom is “bent” or “broken,” Justice Scalia accused the Professors of having argued that the idiomatic meaning of the phrase “bear arms” in the Second Amendment could be coupled to a non-idiomatic use to produce absurdities such as: “serve in the militia … for the purpose of killing game.” Justice Scalia says this is “worthy of the mad Hatter” and that this sort of contradiction is “unknown this side of the looking glass.” 128 S.Ct. at 2795-2796. Very amusing.

In fact, the Professors made no such argument. Justice Scalia set up the punching bag up so he could knock it down. This is the conduct of a bully.


33 The Linguists in fact specifically dealt with the non-idiomatic use of “bear arms for the purposes of killing game.” They said that this “bends the idiom so far that it no longer is recognizable. It is decidedly unidiomatic.” Linguists Brief, at 26.
At another point, Justice Scalia takes an argument which he claims is made by Justice Stevens and proclaims it to be “[g]rotesque.” 128 S.Ct. at 2794. He says that Justice Stevens interprets the phrase “keep …. arms to mean “keep … weapons.” He then says that Justice Stevens interprets the phrase “bear arms” to mean “serve in the militia.” According to Justice Scalia, this gives the one word “arms” two different meanings in the same sentence, first as an object of “keep” (weapons) and then as an object of “bear” (arms, i.e., “serve in the militia.” This, according to Scalia, is the equivalent of interpreting the phrase (which Scalia invented) “he filled and kicked the bucket” to mean “he filled the bucket and died.” “Grotesque,” says Justice Scalia.

I earlier observed that while “bear arms” is an idiom, “keep and bear arms” is not. Therefore, “keep” can logically be moved away from bear arms” without changing meaning, and the implied “arms” after “keep” can be made explicit. I inserted the word “arms” after the word “keep,” producing “the right of the people to keep arms and to bear arms.” This becomes, using the idiom “the right of the people to keep weapons and to serve in the militia.” There is nothing wrong with that phrase. It is a correct interpretation. It is not “grotesque.” It is in fact the argument made by Justice Stevens.

What is “grotesque” is Justice Scalia’s attempt to criticize Justice Stevens on this meaningless point. Again, this is the conduct of a bully.
G. Why Did Justice Scalia Attempt Any Interpretation of “Bear Arms” at All?

One wonders why Justice Scalia would unnecessarily burn up so many pages of the U.S. Reports trying to convince us that “bear arms” means to possess firearms for personal use only and has no military connotation at all. One wonders why Justice Scalia would not simply embrace the term “to keep arms” and say that the Second Amendment included possession of arms for personal use. Why use ______ pages when a paragraph would do? I can suggest three reasons why Justice Scalia did not stop his analysis at the point that he observed that “keep arms” means to possess arms for personal reasons.

First, Justice Scalia is bound and determined to demonstrate to the legal world what a perfect exercise in “originalism” looks like. If he had proclaimed the task complete when he had observed that “keep arms” means to keep arms for personal purposes, then he is obviously not going to get any credit for having performed an exercise in “originalism.” “Keep” and “arms” have not changed meaning in two hundred years and they mean today what they meant in 1791. There would be no credit given for the obvious.

Second, it seems to represent some sort of hubris, a desire to demonstrate that not only can Justice Scalia tear the “well regulated Militia” clause right out of the Second Amendment, but he has the powerful intellect to take the “bear arms” clause, an idiom which means “to serve as a soldier, do military service, fight” and scrub it clean of any military connotation.
Third, the answer may be found in the field of magic. It is a technique called “audience misdirection.” The reader’s attention is directed to a point of little significance and held there for many pages to deflect interest away from Justice Scalia’s treatment of the core issue in the case: proof of impairment of the militia.

Although I am critical of what Justice Scalia has done with the phrase “bear arms,” I am not in disagreement with Justice Scalia at this point of development of the meaning of the Second Amendment. Compare where we are:

**Justice Scalia:**

A well-regulated militia being necessary to the security of a free state,

the common law right of the people to keep arms for personal use (such as self-defense and hunting and confrontation) shall not be infringed.

**Author’s version:**

A well-regulated militia being necessary to the security of a free state,

the common law right of the people to keep arms for personal use (such as self-defense and hunting) and to bear arms in the Militia shall not be infringed.

There is no significant difference to this point, except for the fact, perhaps, that Justice Scalia is doing what he can to make the introductory phrase, which contains the word “militia,” disappear entirely, and he is trying to bleach the phrase “bear arms” clean of any military connotation. He is extraordinarily reluctant to allow that the phrase “keep and bear arms” refer even in the smallest part to military service.

I. Justice Scalia has to this point been positively enthusiastic to define words and terms of the Second Amendment. He has applied his doctrine of “originalism” to define a number of Second Amendment terms (“right”, “people,” “keep,” “bear arms”). Suddenly, however, he loses all interest in further definition of Second Amendment terms. He attempts no definition whatever of the term “infringement.” Every patent lawyer and every trademark lawyer knows that “infringement” is a word which must be defined in context; it is not by any means self-defining.

Mr. Justice Scalia assumes without discussion that “infringement” means some prohibition of or interference with the personal ownership of a firearm kept by the people for personal use. He therefore holds unconstitutional a statute of the District of Columbia which essentially bans ownership of handguns, but without any focus whatever on the core question whether a ban on handguns has any impact of the effectiveness of the militia. It is ironic to note that if the Militia of the Second Amendment had survived in robust health into the 21st century, the D.C. Ordinances would clearly not have violated the Second Amendment. Recall that the militia never had any requirement that militiamen summoned to service bring handguns with them. A ban on handgun ownership would have been irrelevant to an active, functioning militia. Justice Scalia holds unconstitutional a part of that statute which requires that trigger locks or other safety devices be kept in place on guns kept in the home because such safety devices may interfere with the use of the weapon for self-defense. Safety locks
on triggers, of course, have no impact on the effectiveness of arms for use in the militia. Such safety devices could easily be removed before marching to a muster station. In short, Justice Scalia assumes that the purpose of the Second Amendment is to keep the Federal Government from interfering with the keeping of arms for personal purposes, and that “infringement” does not refer to impairment of the effectiveness of the Militia at all.

Mr. Justice Scalia refuses to acknowledge that the Second Amendment does not protect citizens from gun regulations which have no impact or effect on the effectiveness of a militia. To show a violation of the Second Amendment, one must show that a federal law or regulation derogates the effectiveness of the militia, thereby jeopardizing the security of the state. Justice Scalia does not deal with this point at all. This is extremely bothersome to followers of the Court. Justice Scalia has already tangled with James Madison’s first draft of the Second Amendment and lost, throwing sand into our eyes in a frivolous attempt to claim that “bear arms” does not indicate service in the militia. Now, he must deal with the requirement that the D.C. Ordinances diminished the effectiveness of the militia. Justice Scalia does not even try to explain how and why he is reading this requirement out of the Second Amendment.

It was not the purpose of the Second Amendment to regulate gun ownership and use where there could be no possible impact on the effectiveness of a militia. And yet that is exactly what the Court in *Heller* has done. It is an extreme makeover, well beyond the permissible bounds of statutory or constitutional interpretation.
I. The Drive-By Shooting of Miller v. United States.

Justice Scalia then dealt with Justice Steven’s contention that the decision of the Court in United States v. Miller. 307 U.S. 174, 59 S.Ct. 816 (1939), contained a holding squarely on point and which required that Heller demonstrate that the District of Columbia ordinances diminished the militia.

In Miller, two men had been charged in the Western District of Arkansas with transporting a sawed off shotgun across state lines in violation of the Federal Firearm Act. The District Court had held -- irrationally -- that the Second Amendment barred the prosecution. On direct appeal to the Supreme Court, a unanimous Court reversed. The Miller Court did not think it proper to divide the Second Amendment into a preamble and an operative clause, and to interpret the operative clause without reference to the preamble.

With obvious purpose to assure the continuation and render possible the effectiveness of [the militia], the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

Miller, at 128 S.Ct. ______.

The Court’s holding in Miller is:

In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”

The holding is clear. To prevail on a Second Amendment claim, plaintiff must have evidence which shows that the weapon he possessed “has some
reasonable relationship to the preservation or efficiency of a well regulated militia. … It must be shown that the “weapon is … part of the ordinary military equipment or that its use could contribute to the common defense.” This is the holding of the Miller case.

In Burton v. Sills, 394 U.S. 812, 89 S.Ct. 1486 (1969), the Court endorsed the holding of Miller thirty years later in dismissing for want of a substantial federal question an appeal from the Supreme Court of New Jersey. That court had held that “Congress, though admittedly governed by the second amendment, may regulate interstate firearms so long as the regulation does not impair the maintenance of the active, organized militia of the state.” (Emphasis supplied).

Justice Scalia evaded the holding of Miller by spewing forth a number of criticisms, all spurious. He claimed that there had been no adversary brief filed in the Supreme Court by Miller. True. But Justice Scalia did not explain what, perchance, the best lawyer in the world might have argued on Miller’s behalf. He does not indicate how a lawyer arguing on behalf of Miller could have contributed to the case. It is meaningless to point out that Miller did not file an

34 I suggest the following brief for Miller in 1939:

“Issue One: Congress should not have included sawed off shotguns in the Federal Firearms Act, as they are useful in performing bank robberies.

Issue Two: Militias do in fact use sawed off shotguns in their military exercises; or if they do not, then they should.

Issue Three: Please grant me leave to withdraw from further representation of Miller.”
adversary brief without, at the same time, explaining what would have appeared in such a brief and how it would have impacted the decision.

He said the Miller Court did not have available his opinion in Heller, setting forth historical researches into the origin of the Second Amendment. Not having to read Justice Scalia’s Heller opinion may have been an advantage to the Miller Court. There is nothing in the Heller opinion which would have caused the Miller Court to change a word of its opinion. Scalia did not explain how reading Heller would have changed the opinion in Miller.35 He claimed the Miller Court had not itself deeply researched the history of the Second Amendment. The Miller Court researched the matter sufficiently to understand that Miller (and those who follow in his steps) must show that the weapons of which they have been dispossessed by the Federal Government must

“have some reasonable relationship to the preservation or efficiency of a well regulated militia . . . . and are part of the ordinary military equipment or that its use could contribute to the common defense.”

_____ S. Ct. _____

36. Justice Scalia claims that the holding of Miller was that a sawed-off shotgun was not a common arm possessed by the people and therefore could not be possessed under the Second Amendment. End of discussion. Given that the weapon was not “common,” Justice Scalia sees no reason for the Miller Court to have discussed whether the sawed-off shotgun “has some reasonable relationship to the preservation or efficiency of a well regulated militia . . . . and it is part of the ordinary military equipment or that its use could contribute to the common defense.”

He offers no explanation why the Miller opinion discusses whether relieving Miller and his co-felon of their sawed-off shotgun has an effect on the militia if impact on the militia is irrelevant.
Justice Scalia’s real dissatisfaction with *Miller* was simply that it made a Second Amendment violation turn on whether the weapon in question, if confiscated, has an effect on the effectiveness of the militia. The failure of the *Miller* Court in 1939 was that it failed to foresee that Justice Scalia in 2008 would come along in seventy years and want to read out of the Second Amendment any issue of impairment of the militia. Therefore, Justice Scalia is displeased that the *Miller* Court in 1939 put this language into his path.

The holding of *Miller* is that a person claiming a Second Amendment violation must show that the weapon removed from his possession has “[a] reasonable relationship to the preservation of a well regulated militia…” Justice Scalia simply evades this holding.36 None of Justice Scalia’s criticisms of the

37. There are nine opinions by the circuit courts which constitute the progeny of United States v. Miller and which carefully repeat that to show a Second Amendment violation, the litigant must show an impact on the effectiveness of the Militia. I am citing all of these cases not on the theory that a 5-4 majority of the Supreme Court does not have the authority to overrule United States v. Miller, which all nine of these circuit decisions follow and apply. I am citing these decisions to show that nine circuit courts in the period 1942 to 1999 had no difficulty in understanding the holding of Miller, viz., that to show a Second Amendment violation, the litigant must show an impact on the effectiveness of the militia.

Justice Scalia attempts to deal with United States v. Miller on the theory that it held what kind of weapons could be possessed (common ones, not sawed off shotguns)(clearly wrong) and the opinion was otherwise not adequately researched or reasoned. These nine circuits had no difficulty understanding and applying Miller.

The reader must remember that the Heller Court did not overrule United States v. Miller. It simply drove by it, spraying it with irrelevant criticisms. In today’s terms, United States v. Miller was the victim of a drive by shooting, evidently a new technique in overruling cases.

Here are the nine circuit decisions which followed Miller: Silveira v. Lockyer, 312 F.3d 1052, 1066 (9th Cir. 2003)(The Amendment protects the people’s right to maintain an
Miller decision hold water. Justice Scalia does not even attempt to provide reasons why the differences he cites are relevant. Justice Scalia’s treatment of United States v. Miller is best described as overruling inconvenient precedent by performing a drive-by shooting.

The reader should appreciate the great irony in Justice Scalia’s position. He tells us that it is not the role of the Supreme Court to declare the Second Amendment extinct. He then tears the introductory clause – “well regulated effective militia, and does not establish an individual right to own or possess firearms for personal use”); Gillespie v. City of Indianapolis, 185 F.3d 693, 711 (7th Cir., 1999) (“Because Gillespie has no reasonable prospect of being able to demonstrate … a nexus between the firearms disability imposed by the statute and the operation of state militias, [the district court judge] was right to dismiss his Second Amendment claim”); United States v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997) (“[T]he Miller Court understood the Second Amendment to protect only the possession or use of weapons that is reasonably related to the militia actively maintained and trained by the states”); United States v. Bybar, 103 F.3d 273, 286 (3d Cir. 1996) (“[T]he Miller Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its possession or use and militia related activity, quoting Miller”); Love v. Peppersack, 47 F.3d 120, 124 (4th Cir. 1995) (“The Courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a reasonable relationship to the preservation or efficiency of a well regulated militia, quoting Miller”); United States v. Hale, 978 F.2d 10156, 19020 (8th Cir. 1992) (Whether the right to keep and bear arms for militia purposes is individual or collective in nature is irrelevant where, as here, the individual’s possession of arms is not related to the preservation or efficiency of a militia”); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) (“The purpose of the second amendment as stated by the Supreme Court in Miller was to preserve the effectiveness of and assure the continuation of the state militia. The [Miller] Court stated that the amendments must be interpreted and applied with that purpose in view”); United States v. Warin, 530 103, 106 (6th Cir. 1976) (“[T]he Second Amendment right to keep and bear Arms applies only to the right of the State to maintain a militia and not to individual’s right to bear arms …”); Cases v. United States, 131 F.2d 016, 923 (1st Cir. 1942) (“There is no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career”).
Militia being necessary to the security of a free state” -- entirely out of the Second Amendment and leaves behind a provision which has nothing whatever to do with militias. He abolishes any requirement that the Second Amendment plaintiff show impairment of effectiveness of the militia. For not having any role to play in determining that the Second Amendment was extinct, Justice Scalia did a thorough job of eradicating all sense of the Second Amendment’s undisputed sole purpose.

1 The D.C. Circuit could have easily decided *Heller* by citing *United v. Miller* and saying that Heller had made no showing that being denied the right to own a handgun had any impact on the militia. Historically, militiamen had never been required to bring handguns to militia exercises. The District of Columbia ban on handgun ownership could never have had an impact on the militia, even the militia of the 1790s.
V. Is *Heller* A Landmark Decision?

The consensus of opinion in legal circles seems to be that *Heller* is a landmark decision, a masterful *tour de force* for Justice Scalia’s doctrine of “originalism.” I respectfully disagree. As set forth in detail above, I believe that Justice Scalia:

1. Set forth an absolutely meritless and illogical attempt to distinguish the problem presented by James Madison’s deletion of the “scrupulously religious” phrase from the draft of the Second Amendment. His arguments on this point are so illogical as to amount to insults to the reader’s intelligence.

2. Unsuccessfully (and unnecessarily) attempted to prove that Madison’s use of the phrase “bear arms” connoted no military use of arms whatever. It does not matter whether “bear arms” has a military connotation, or both a military and a non-military connotation, or only a personal use connotation. The result is the same. The phrase “keep arms” is quite sufficient to encompass a right to own and possess firearms for personal uses. Justice Scalia’s exegesis on the meaning of “bear arms” is unnecessary and meaningless.

3. Evaded the holding of *Miller v. United States* (1939) with meaningless and illogical criticisms.\(^{37}\)

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\(^{37}\) As a practicing lawyer and non-academic, I have accumulated expertise in writing a brief where there is controlling precedent directly contra to my argument. I know the techniques. Consider not citing it at all (ethical difficulties there); cite differences, but do
4. Deleted the introductory clause “A well regulated militia being necessary to the security of a free state” from the U.S. Constitution.

If this is “originalism,” then we have a serious problem.

It is just a matter of time before serious scholars tear Justice Scalia’s handiwork in *Heller* to pieces. His work in *Heller* will certainly not add to his legacy as a judicial scholar.

The Court in *Heller* was faced with a conundrum not of its own making. For quite a number of years, there has been a conflict between gun enthusiasts, who argued that the Second Amendment contained a guarantee of personal possession of weapons which could be asserted by individuals, and those who believed in the collectivist view, i.e., that absent a relationship with a militia or membership in a militia, no Second Amendment violation could be shown. The D.C. Circuit in *Parker v. United States*, *supra*, had invalidated the D.C. handgun ban by accepting the views of the Gun Advocates and holding that the Second

not attempt an explanation of how the difference you cite bears on the case; cite the age of the case, but do not attempt an explanation of how the age bears on the case; criticize the quality of briefing by the lawyers in the case; misconstrue the holding of the case, thus removing it from the path of your argument. We lawyers practice these maneuvers daily. It is startling, however, to see the Supreme Court *use every one of these techniques of evasion* on one of its own decisions which is being consistently followed and applied in the circuit courts without difficulty. If the Court no longer respects the decision, it should forthrightly overrule it and not engage in the kind of techniques and evasions expected of lawyers.

Assume that you are one of Justice Scalia’s clerks and you have been directed to write a paragraph or two which overrules *United States v. Miller*. What would you say? You would not, of course, change the result. So you would have to focus on language in *Miller* and disapprove it. What language would you disapprove? That’s easy. Look to see what language of *Millet* Justice Scalia disapproved? What is it, exactly, that the *Miller* Court said that should be disapproved? It’s a nice problem.
Circuit contained an individual right to possess arms for personal purposes. The D.C. Circuit therefore forced the Supreme Court’s hand. The District of Columbia (i.e., the United States) was the petitioner in the Supreme Court and the Government’s certiorari petition could not easily be ignored.

The correct answer in *Heller* should have been that the Second Amendment was not violated because there was no showing of an impairment of the militia, following *United States v. Miller*. Any such holding would have produced widespread publicity and would have generated newspaper headlines such as:

**SUPREME COURT HOLDS THAT SECOND AMENDMENT DOES NOT GUARANTEE GUN OWNERSHIP RIGHT**

There would have resulted an outburst of hostility of historic dimensions against the Court by the nation’s gun advocates. The National Rifle Association would have protesters at the steps of the Supreme Court daily. The Justices would be hung in effigy. The uproar would have been deafening.

To dampen such a hostile reaction, the Court could have said in an opinion which denied relief under the Second Amendment that there was nevertheless a common law right of ownership of firearms for personal purposes in D.C. law, existing outside the Second Amendment, and that Heller was free to claim that the D.C. Ordinances violated that common law right. The Supreme Court should

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38 The D.C. Circuit could have easily decided *Heller* by citing *United States v. Miller* and saying that Heller had made no showing that being denied the right to own a handgun had any impact on the militia. Historically, militiamen had never been required to bring handguns to militia exercises. The District of Columbia ban on handgun ownership could never have had an impact on the militia, even the militia of the 1790s.
have remanded Heller’s case to the District Court to develop and decide the non-
constitutional issue whether the D.C. ordinances violated Heller’s common law
right to own firearms for personal use.

This qualifier would have been entirely lost on the gun advocates. All
states have ownership-for-personal purpose guarantees in their state constitutions,
statutes, or judicial decisions. Those guarantees have not generally operated to
insulate gun ownership from gun regulations found in states which have such
rights to possess firearms. The National Rifle Association would never be
content with being given the right to argue that a federal common law gun
ownership right is violated by federal gun regulations. That would be nothing
new. And it would apply only to the District of Columbia. The NRA has been
attacking regulation of common law gun ownership rights for many years. It
would not be placated by being given one more common law gun ownership right
to litigate, limited to the District of Columbia.

The gun advocates would be content only if the Supreme Court satisfied
their fondest dreams by holding that the Second Amendment contains a
constitutionally-guaranteed right to own firearms for personal purposes, and that
militias have nothing to do with enforcement of that right.

I suggest, therefore, that the Supreme Court decided in a 5-4 vote to throw
a bone to the gun advocates by declaring that the Second Amendment contains a
guarantee of personal ownership of firearms, and that infringement of that
guarantee can be established without any showing of impairment of militia. The
_Heller_ decision made the gun advocates of this Nation swoon in ecstasy and joy.
Polling data indicates that some 75% of Americans are in favor of gun ownership. Therefore, a 5-4 vote in favor of finding a gun ownership right for personal use in the Second Amendment would not cause any hostile reaction. The people generally would not even understand that *Heller* was anything special, because the average American has probably always thought that gun ownership was protected by the Second Amendment. *Heller*, in other words, would be received with a yawn by the people who did not understand it, and ecstatically received by the part of that percentage comprised of the gun advocates. Dissent would come from curmudgeons like the present author.

The Court should bear in mind, however, that a majority of the people also support reasonable gun regulation. Now that the NRA has prevailed on the issue of the Second Amendment’s containing a right of gun ownership, the NRA has changed its focus to the RTC (“Right-to-Carry”) issue. The argument runs: “I have a constitutional right to defend myself with my Glock 9 mm pistol within my home, as *Heller* said, but as I move around the District of Columbia, I cannot predict where or when I will find it necessary to defend myself. It may not be in my home. Therefore, the Second Amendment requires that I be permitted to carry my 9 mm semi-automatic pistol as I walk around the District. Also, the Second Amendment requires that I be permitted to carry my Glock 9 mm pistol concealed because if I carry it openly, I may be encouraging an attack on myself.” If the Supreme Court accepts arguments of this nature, Washington, D.C. may soon resemble Old Dodge City, with a multitude carrying powerful pistols both openly and concealed. The Court may find itself quickly on the wrong side of public
opinion when gunfights break out at the O.K. Corral in D.C. among the law
abiding citizens carrying semi-automatic weapons for their protection. Following
the election returns in this arena of gun ownership v. gun regulation – an arena in
which the Court has no experience --is fraught with peril for the Court.\textsuperscript{39}

The gun advocates probably believe that they now have five kindred souls
sitting on the Supreme Court, and that their black-robed brothers-in-arms will
now assist the National Rifle Association in its assault on gun regulations
nationwide. I suspect the gun advocates are very wrong.

This writer predicts that the gun advocates will find, in the years ahead,
that it is a mistake to think that five members of the Supreme Court are brothers-
in-arms in the war against gun regulation. This writer predicts that \textit{Heller} –
which granted relief against a ban on handgun ownership limited to the District of
Columbia – may well turn out to be the high water mark of invalidating gun
controls under the Second Amendment. The gun advocates will lose all the weird
weapon cases (machine guns; assault and attack rifles; hand grenades, pipe
bombs, etc.) on the ground that they are not arms “commonly” possessed by the
people. The gun advocates will lose all registration and licensing arguments on
the ground they do not unduly burden the gun ownership right. \textit{Heller} will turn
out to be a great dud in the eyes of the National Rifle Association.

\textsuperscript{39} The members of the Supreme Court must have watched \textit{Gunsmoke} in their younger
days, and will remember that when you ride into Dodge City, you are required to go
directly to Marshall Dillon’s office and check your gun belts and six shooters. Only
Marshall Dillon is permitted to walk around Dodge City with his big iron on his hip.
Some writers have predicted that the Supreme Court by its *Heller* decision has made a great deal of work for itself, and like its abortion decision in *Roe v. Wade*, it will now have a long succession of cases in which it must flesh out the extent to which gun ownership can be regulated. I submit that this will not happen. I suspect that the Supreme Court, aware of the amount of follow-on cases that *Heller* will engender, will embrace some mechanism to limit the damage.

I see two hurdles which the gun advocates must survive to turn *Heller* into a nationwide invitation to use the federal judiciary to litigate the validity of gun control litigation under the Second Amendment. The two hurdles are: (A) is the new right announced in *Heller* to be incorporated via the 14th Amendment and made applicable to the States?, and (B) what is the standard of review under the Second Amendment of the validity of gun regulation legislation?

A. 

**Does the 14th Amendment Require Incorporation of the *Heller* Decision?**

The question of incorporation of *Heller* against the States via the 14th Amendment is now pending before the Supreme Court. On the day after *Heller* was handed down, June 26, 2008, the National Rifle Association and named individual plaintiffs filed a civil action against the City of Chicago and the Village of Oak Park, Illinois, alleging that certain ordinances of the City of Chicago and the Village of Oak Park violated the newly-announced right in *Heller* to possess handguns. Another lawsuit was filed by Otis McDonald and other individuals, the Illinois State Rifle Association, and the Second Amendment Foundation against
the City of Chicago (but not the Village of Oak Park), also alleging that the Chicago ordinance restricting the possession of handguns violates *Heller*.

The District Court granted judgment on the pleadings in both cases, holding that it was bound by *Presser v. Illinois*, 116 U.S. 252 (1886) and *Quilici v. Village of Morton Grove*, 695 F.2d 262 (7th Cir. 1982), which had held that “[t]he Second Amendment declares that it shall not be infringed, but this means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government.”

Plaintiffs filed appeals to the Seventh Circuit in both cases, where they were consolidated on appeal. The Seventh Circuit affirmed, holding that the Supreme Court had refused to apply the Second Amendment to the States in three separate cases: *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); and *Miller v. Texas*, 153 U.S. 535 (1894). The Seventh Circuit held that it was not a liberty to decide that the Second Amendment should be incorporated via the 14th Amendment’s Due Process Clause because to do so might force the Supreme Court to grant certiorari earlier than it otherwise might.\(^\text{40}\)

\(^{40}\) In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), a panel of the Ninth Circuit held that it was at liberty to decide the *Heller*-Incorporation question because the older Supreme Court cases (i.e., *Cruikshank; Presser; Miller*) were not based on a 14th Amendment selective incorporation analysis, but rather on the theory that the Second Amendment by its terms was not applicable to the States. The panel then held that *Heller* is applicable against the States via the Due Process Clause of the 14th Amendment. The panel then applied *Heller* to the California gun regulation legislation alleged to violate *Heller* and

The Supreme Court granted the certiorari petition filed at McDonald et al. v. City of Chicago. See 78 U.S.L.W. Sup. Ct. 3169 (Sept. 30, 2009). The McDonald cert. petition presented two questions: (1) Whether Heller should be applied against the States via the 14th Amendment Due Process Clause; and (2) Whether Heller should be applied against the States via the 4th Amendment Privileges.\(^{41}\)

It is well settled that the 14th Amendment did not incorporate all provisions of the Bill of Rights (the first eight amendments) and make them applicable against the States. Whether or not a particular provision of the Bill of

\(^{41}\) The Supreme Court has not yet acted on the National Rifle Association et al. v. City of Chicago et al. certiorari petition. This author believes that the Supreme Court is allowing that petition to remain pending, and intends to decide the case by Order in light of the decision in the McDonald et al. v. City of Chicago et al, in which certiorari has been granted.
Rights is to be incorporated must be decided on the circumstances of the provision in question.\textsuperscript{42}

Many of the provisions of the Bill of Rights deal with procedure in criminal cases. Where the provision in question related to the accuracy of outcome in a state criminal proceeding, it was incorporated without much discussion. Declaring such provisions incorporated did not cost much in terms of federal judicial time. The states, on receipt of an incorporation decision, would simply change their procedure in all future cases. There was little that the Supreme Court would have to decide in follow-up cases (chiefly retroactivity questions.)

When the provision did not relate to accuracy of outcome of a criminal case, it may or may not have been incorporated. The requirement of an indictment in a criminal case set forth in the 5\textsuperscript{th} Amendment, for example, has never been incorporated because it cannot be said that indictment is a greater truth producer than a criminal complaint or information, or that starting a criminal case with an indictment is essential to “ordered liberty.”

Whether the Second Amendment should be incorporated must therefore stand on its own feet. It is truly a \textit{sui generis} question.

\textsuperscript{42} This author does not intend at this point to draft a brief, replete with case citations, setting forth the argument against incorporation. Rather, I intend to set forth in brief summary the principal factors which argue against incorporation.
Heller did not announce a constitutional right. Absent the concern in the late 18th century that the Federal Government might disarm the well-regulated Militia, the phrase “right to keep and bear arms” would not have appeared in the Constitution at all. The Supreme Court in Heller agrees that this is the case.

Once the Supreme Court rendered the introductory Militia clause in the Second Amendment irrelevant, the Court necessarily undercut the sole reason for the right “to keep and bear arms” to appear in the Amendment at all. It should therefore be regarded as a description of a common law right which predated the Second Amendment and which has existed for more than 200 years outside of and parallel to the Second Amendment.

What is being enforced in Heller is the common law right of the people of the District of Columbia to keep arms for personal use. It is not a constitutional right.

In June, 2008, when Heller was decided, all 50 states already recognized the right to keep arms for personal use. Forty-four states had constitutional provisions. The other six recognized the right in either statutory provisions or judicial decisions. These state provisions are very old, some pre-1791. The Supreme Court in Heller was the last to clamber aboard. Heller is, therefore, very

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It is beyond argument that the decision in Heller has deleted the phrase “a well regulated military being necessary to the security of a free state” from the Second Amendment. The deletion occurred in two steps. First, the phrase “keep and bear arms” was interpreted absurdly as not including any military use of arms. Second, the term “infringement” was not interpreted with reference to the introductory clause. After Heller, there will be no need to refer to the introductory clause at all.
much a “Johnny-Come-Lately” case. There is something in the human mind that
does not accept willingly that the Supreme Court, the very last jurisdiction to
discover a right to keep and bear arms for personal use in its own Constitution,
should climb aboard the boat and declare itself captain.

There is no need for the Supreme Court to hold that what it did to the
Second Amendment in June, 2008 should be incorporated via the selective
incorporation doctrine and made applicable to the states.

States which have had constitutional rights to keep and bear arms
provisions for one to two centuries presumably have much greater experience
than the Supreme Court in the subject of the right to possess firearms for personal
purposes. There is no reason to think that the Supreme Court, which first came to
the subject in June, 2008, only a year ago, has anything to teach to the states on
this subject.

The purpose of the doctrine of selective incorporation is to take a
provision of federal constitutional law which sets a higher standard than is
followed by the States, which involves a “fundamental right” necessary to
“ordered liberty,” and to require the States to follow that higher federal standard.
Here, there is no reason to believe that standards under the Supreme Court’s
newly-discovered right to keep and bear arms are superior to standards observed
in the 50 states under state right to keep and bear arms clauses. Indeed, given that
we have only one Second Amendment decision from the Supreme Court, we have
no knowledge of how the Supreme Court will in the future flesh out its Second
Amendment law. If one were to make a tabulation of all of the constitutional and statutory right to bear arms language from state constitutions and statues, and compare that language to what Heller left of the Second Amendment, one would find few differences. And what differences were found would merely prove that this is not an area in which federal uniformity is needed.

Here, there is no reason to believe that states are abusing the right to keep and bear arms. Here, there is no need to incorporate.

Note the peculiarity of the Nordyke v. King panel decision in the Ninth Circuit. 563 F.3d 439 (9th Circuit. 2009), discussed at footnote _____, supra. A panel of the Court of Appeals chose to take up and decide the incorporation question, held the Second Amendment was incorporated, and then, applying the Second Amendment, held that the state and municipal gun control legislation was nevertheless constitutional. The Ninth Circuit panel would have done well to avoid the Second Amendment incorporation question, to have assumed arguendo that it applied, and then to have held the gun control legislation did not violate the Second Amendment. We are unaware of any case in which a court decided a Due Process incorporation argument, held that there was incorporation, but then held the federal constitution was not violated by the state or municipal statute in question. Note that the Ninth Circuit has granted reargument and has vacated the panel opinion which announced incorporation.

In selective incorporation cases, it is common to make an examination of the historical record leading to adoption of the 14th Amendment and to try to find
something in that record that is evidence that Congress, in drafting and proposing the 14th Amendment, thought that the Second Amendment would be applicable to the States via the 14th Amendment.

Such an inquiry here is a waste of time. In 1866, legislators believed that the Second Amendment prohibited the Federal Government from disarming or destroying the Militia. They did not believe that the Second Amendment contained a right to bear arms clause that operated independently of the Militia Clause. They could not foresee *Heller* in 2008. If you were to ask an informed legislator in 1866 whether the Second Amendment would be enforceable against the states via the 14th Amendment (and assuming he was not clairvoyant and had not read *Heller*), his reply would have been –

“**Informed Legislator (IL)**

**A.** Do you mean that the States, like the Federal Government, should be prohibited from disarming or destroying the Militia, as prohibited by the Second Amendment?

**Q.** Yes, that’s the question.

**IL:**

**A.** It is clear that a State is already obligated not to disarm its Militia, but it is not a Second Amendment question.

Under the Constitution, each State is to raise, organize, and maintain a Militia, training its Militia under standards set by the Federal Government. Annual reports are supposed to be filed with the President, stating the condition of each State’s Militia, how many able bodied men are participating, and the state of the Militia’s arms. If a State were to turn its back on its obligation to maintain a well regulated Militia and was to have no Militia at all, then, yes, that would violate the Constitution. But not the Second Amendment.
The informed legislator would have added to his response:

**IL:**

“As you know, the Militia, as contemplated by the Constitution, is largely moribund today. The reason is that all the States have defaulted to some degree on the obligation to maintain a well regulated Militia under the Constitution, and the Federal Government has defaulted on its obligation to see to it that the States maintain well regulated Militias consisting of all able bodied men 18 to 45 years of age. When the Constitution was adopted in 1791, the anti-federalists believed that the Militia was a more effective fighting force than a standing army. Hence their insistence that Congress had an obligation to provide for a Militia. The scandalous performance of the Militia in the War of 1812 and on other occasions made it very clear that the Militia could not be relied on as a fighting force, and that the United States must therefore rely on a standing army and volunteers in time of trouble. Accordingly, the Militia of the Second Amendment faded away by mutual consent of the States and the Federal Government. It disappeared because of disinterest and apathy of the States and of the Federal Government.”

Since the Supreme Court first announced in June, 2008 that the Second Amendment contained a right to possess arms for personal reasons, it is only fitting that the Court examine the question whether *Heller* announced a “fundamental right” that is “essential to life in an ordered society” as of June, 2008 and thereafter. There is no purpose to be served by arguing that such a right was “fundamental” in 1791 (when no one knew the Second Amendment contained such a right) and in 1866 (when no one knew the Second Amendment contained such a right). To so assert is to embrace pure fiction. A provision cannot be “fundamental” to a people unaware of its existence. The “fundamental” nature of the right must be determined as of the date the right was first
announced: June, 2008. We have spent the first 217 years of our national existence with no awareness that the Second Amendment contained a guarantee of gun ownership for personal reasons. Given the passage of more than two centuries without any such awareness, it makes little sense to argue now in the 218th year since the adoption of the Second Amendment, that it sets forth a “fundamental right” necessary to life in an “ordered society.”

If it is essential to life in an “ordered society,” how did we manage to survive two centuries without it?

A great deal has changed in the United States since 1791 and 1866. The advocates of unbridled rights to gun ownership for personal use are today locked in public debate with those who see the need to regulate gun ownership in the public interest. Both sides of the argument are well organized and well funded. Both have ready access to the political machinery. The Supreme Court Justices have no expertise in this debate. It is increasingly clear that the struggle between gun advocates and gun regulation advocates should be left to the democratic process. It would be foolish for the Supreme Court to announce that a decision in favor of gun ownership had been made for us in 1791, and that incorporation must be decided as of 1866, and that Americans are today bound by a decision in 1791 that no one then knew had been made.

It is enough that Heller applies to the District of Columbia. Until June, 2008, no one knew that the Second Amendment even contained a fiddle. There is
no justification to say that all of the United States must now dance to the very first
tune the fiddler in *Heller* has learned to play on his brand new fiddle.
B.

Standard for Review of Gun Regulation Under the Second Amendment.

The Supreme Court in *Heller* deliberately refused to say what standard of review should be applied under the Second Amendment in reviewing the validity of the District’s gun regulation. The Court held that because the District had banned all possession of handguns, the District had violated the Second Amendment under any standard of review. And because the District required that firearms be kept disassembled, or unloaded, or with trigger locks and safeties in place, the District had violated the Second Amendment under any standard of review.

The refusal of the Court to decide the standard of review question indicates, I suggest, that at least one Justice, perhaps more, of the *Heller* majority was unwilling to join an opinion which applied the highest standard of review, “strict scrutiny,” and requiring that the regulation be “narrowly tailored to achieve a compelling governmental interest.”

Justice Breyer, in his dissenting opinion, proposed the adoption of an “interest balancing” approach, weighing the “interests protected by the Second Amendment on one side against the governmental public-safety-concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.” Justice Breyer argued, persuasively, that even if the Court were to embrace a “strict scrutiny” standard, it would make no difference because gun control regulation is always said by the
government to serve a “compelling interest,” to wit, public safety. The Court, in prior cases, has declared that public safety is a “compelling” interest. Therefore, even under a “strict scrutiny” standard, the Court would wind up in any event balancing the Second Amendment gun ownership right against a need described by the government, as “compelling.”

The gun advocates do not like an “interest balancing” approach. They want gun control regulation cases to mirror First Amendment Freedom of Expression cases in which the constitutional right is heavily weighted against a government interest limiting or restricting expression. The NRA has for years litigated the validity of gun control regulation in various courts which have applied an “interest balancing” or “reasonable basis” approach. The NRA is looking, in post-*Heller* litigation in federal courts, for something better.

As Justice Breyer says, “the question matters.”