

SYMPOSIUM

FOR WHOM IS THE *HELLER* DECISION IMPORTANT AND WHY?

by
Sanford Levinson*

While the Heller decision has already been deemed of great significance by the legal community, it is too soon to tell what its long term effects may be. Cases filed in the immediate aftermath of the Supreme Court's decision suggest that Heller will not produce significant change to the American legal landscape. Further, the importance of Heller will almost certainly be affected by the election of Barack Obama and the federal judges he appoints to the bench during his administration. Although predictions on such matters are perilous, it is the author's inclination that Heller will be relatively insignificant to the practicing bar in the long run. However, even if Heller is unimportant to the practice of law, it may have significance to other groups. It is possible, though unlikely, that Heller may be important from a "cultural literacy" perspective. Additionally, the decision may hold importance for prospective legal academics. Finally, though also unlikely, it is possible that Heller may find long term impact on prospective constitutional designers.

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I. INTRODUCTION: PROPHESYING THE FUTURE

No doubt because of an essay that I wrote almost two decades ago,¹ I tend to get phone calls whenever legal cases involving guns are decided.²

* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School.

¹ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

² I suspect it helps to explain why I was solicited to participate in this symposium itself.

So it was after the Supreme Court's decision in *District of Columbia v. Heller*,³ which provided the lead story for newspapers around the country upon the decision of the bitterly divided justices to invalidate the functional prohibition by the District of Columbia of possession of handguns even within one's own home.⁴ Most of the calls asked me not only what I thought of the decision, but, more to the point, what I thought its future importance would be. My general answer was that given in Part II below, given what almost all reporters mean by "importance." The question, though, has led me to reflect further on how we more generally use the notion of "importance," which is the topic of these brief comments.

II. IS *HELLER* LIKELY TO BE IMPORTANT TO THE PRACTICING BAR?

Not only is *Heller* widely believed to be one of the most important decisions decided during the October 2007 Term of the Supreme Court,⁵ but it has also already been singled out as one of the most significant legal events in recent years. Thus United States Court of Appeals Judge J. Harvie Wilkinson, who delivers a full-scale attack on the majority opinion in a forthcoming article in the *Virginia Law Review*,⁶ declares that *Roe v. Wade*⁷ and *Heller* "are by any measure two of the most important decisions of the modern judicial era. They now together cast a long shadow over contemporary constitutional law."⁸ Perhaps Judge Wilkinson will turn out to be right, but for now let me suggest that the correct approach to take to *Heller*, in terms of estimating its importance, is to sit back and quote Zhou En-Lai's famous answer to the question about the significance of the French Revolution: "It's too soon to tell."⁹ Or, more to the point, I believe that *Heller*, perhaps even more than most constitutional law cases,

³ 128 S. Ct. 2783 (2008).

⁴ See, e.g., Linda Greenhouse, *Justices, Ruling 5-4, Endorse Personal Right to Own Gun*, N.Y. TIMES, June 27, 2008, at A1, available at http://www.nytimes.com/2008/06/27/washington/27scotus.html?_r=1&scp=6&sq=District%20of%20Columbia%20.%20Heller&st=cse&oref=slogin.

⁵ Thus the editors of the *Harvard Law Review* selected it as the subject of no fewer than three case comments by Akhil Reed Amar, Reva Siegel, and Cass Sunstein in their annual review of the previous Term of the Court published in its November issue. 122 HARV. L. REV. (2008). And, in addition to this symposium in the *Lewis and Clark Law Review*, similar symposia have been published or are forthcoming from the *Syracuse Law Review*, Vol. 59, No. 2 (2008), the *Hastings Law Journal*, and the *U.C.L.A. Law Review*. See, e.g., Sanford Levinson, *Why Didn't the Supreme Court Take my Advice in the Heller Case? Some Speculative Responses to an Egocentric Question*, 60 HASTINGS L.J. (forthcoming 2009). There will also, no doubt, be a panoply of free-standing articles.

⁶ J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming April 2009), available at <http://ssrn.com/abstract=1265118>.

⁷ 410 U.S. 113 (1973).

⁸ Wilkinson, *supra* note 6, at 3.

⁹ See Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, 65 LAW & CONTEMP. PROBS. 7, 7 (2002).

will have differential import to different audiences who will be consulting the case for decidedly various purposes.

Let me start out with what I am most absolutely confident about, sparked by some of the reporters' specific inquiries after the Supreme Court's decision in *Heller*: I would be astonished beyond belief if there are now or will in the foreseeable future be majorities on the Fifth Circuit Court of Appeals or on the Supreme Court of the United States who will read *Heller* (or the Second Amendment, Ninth Amendment, or Privilege or Immunities Clause of the Fourteenth Amendment)¹⁰ to protect the rights of individuals to bring weapons, concealed or not, onto the grounds of the University of Texas. I say this in part because of Justice Scalia's gratuitous advisory opinion emphasizing that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or *laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . .*"¹¹ (It may also be worth mentioning that Justice Scalia appears to limit his solicitude to some version of "the sort of weapons . . . 'in common use at the time,'" which means, among other things, that it seems perfectly permissible, even under his reading of the Second Amendment, to "prohibit[] the carrying of 'dangerous and unusual weapons.'"¹² The conjunctive "and" is presumably crucial, since it is obvious that all guns are potentially "dangerous.").

Whatever else one thinks of Justice Scalia, he is not a stupid man, and he is not about to read any part of the Constitution to protect the right of someone to bring even the most garden-variety gun into the sacred environs of the Supreme Court (or, one suspects, any other venue that he might expect to inhabit, such as, say, restaurants, churches, or ballparks). No halfway competent judge would have any trouble confining *Heller* to its extremely specific facts as a case involving the total and complete ban on possession of handguns, even by otherwise impeccably law-abiding and otherwise upstanding people, within the environs of one's own home.¹³ Indeed, Cass Sunstein analyzes *Heller*

¹⁰ I name these other possibilities to signal my own agreement with Akhil Reed Amar that *Heller* would have been far more persuasive as a Ninth or Fourteenth Amendment decision than as the extraordinarily tendentious, near dishonest "Second Amendment" decision that Justice Scalia preferred to write. See Akhil Reed Amar, *Heller*, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008). My own completely unsuccessful attempt to lobby the Supreme Court can be found in Sanford Levinson, *Why Use Originalism?* NAT'L L.J., Feb. 25, 2008, at 27.

¹¹ *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008) (emphasis added).

¹² *Id.* at 2817 (quoting *U.S. v. Miller*, 304 U.S. 174, 179 (1939)).

¹³ I note the recently decided decision by a panel of the Ninth Circuit in *Nordyke v. King*, No. 07-15763, slip op. 4465 (9th Cir. April 20, 2009), which, after deciding that the Second Amendment was indeed "incorporated" and thus applicable to state and local ordinances, see n. 25 *infra*, went on to find that it provided no comfort to a gun dealer who objected to a blanket prohibition of gun shows on publicly owned property in Alameda County. *Heller* was interpreted as applying to a possession of guns in one's home. Even if one accepts the view that prohibiting gun

within his own personal favorite category of “minimalist” decisions,¹⁴ and there is, I believe, every reason to believe he is correct.

Further confidence in the potential lack of genuine importance of *Heller* to those lawyers who, as a practical matter, share Oliver Wendell Holmes’ definition of law as a prediction of the actual behavior of courts,¹⁵ is generated by some of the early cases that have been decided by “inferior” federal courts¹⁶ in which cases were filed by remarkably optimistic (or deluded) lawyers in the immediate aftermath of *Heller*. Some of them, such as the suits filed by the National Rifle Association against handgun prohibitions in Chicago and some surrounding suburbs and in public housing in San Francisco, have not yet been decided.¹⁷ But the first decided cases certainly do not suggest that *Heller* will produce significant changes in the way that Americans now live their lives. Thus, I think wholly unsurprisingly, courts have already rejected post-*Heller* challenges to felons’ possession of firearms,¹⁸ the ban on possession of

shows will make it more difficult for persons to purchase firearms for that protected use, the Court responds that “not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992),” quoted at *Nordyke*, slip op. at 4498.

¹⁴ Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008).

¹⁵ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

¹⁶ See U.S. CONST. art. III, § 1.

¹⁷ See Complaint, *McDonald v. City of Chicago*, No. 08CV3645 (N.D. Ill. June 26, 2008); Complaint for Declaratory Judgment and Injunctive Relief, *Nat’l Rifle Assoc. of Am. v. City of Chicago*, No. 08CV3697 (N.D. Ill. June 27, 2008); Complaint for Declaratory Judgment and Injunctive Relief, *Nat’l Rifle Assoc. of Am. v. City of Evanston*, No. 08CV3693 (N.D. Ill. June 27, 2008); Complaint for Declaratory Judgment and Injunctive Relief, *Nat’l Rifle Assoc. of Am. v. Vill. of Morton Grove*, No. 08CV3694 (N.D. Ill. filed June 27, 2008); Complaint for Declaratory Judgment and Injunctive Relief, *Nat’l Rifle Assoc. of Am. v. Vill. of Oak Park*, No. 08CV3696 (N.D. Ill. June 27, 2008); Complaint for Declaratory Judgment and Injunctive Relief, *Doe v. San Francisco Hous. Auth.*, No. 08-CV-3112 (N.D. Cal. June 27, 2008). See generally Wilkinson, *supra* note 6, at 32.

¹⁸ *United States v. Robinson*, No. 07-CR-202, 2008 WL 2937742 (E.D. Wis. July 23, 2008). Perhaps though, it is worth noting an absolutely fascinating case, *U.S. v. Gomez*, 92 F.3d 770 (9th Cir. 1996), in which the Ninth Circuit, through Judge Alex Kozinski, states that the defendant, a convicted felon, should be allowed to plead a “justification” defense with regard to possession of a shotgun inasmuch as his life had been put in danger by the fact that the United States had publicly revealed, in violation of its promise to him, the fact that he was a valuable informant in an important drug case. It is not a “Second Amendment case” per se, though Judge Kozinski includes a footnote, 92 F.3d at 774 n.7, reviewing the debate over the meaning of the Amendment. The two other judges on the panel, though joining Judge Kozinski’s “excellent opinion,” explicitly do not join in footnote seven. At the very least, this suggests that not all felons-in-possession are the same, and to the extent that one is sympathetic to Gomez’s claims in the cited case, then *Heller* should only strengthen the sympathy should a similar case arise in the future. Or imagine that someone convicted of an impeccably non-violent “white collar” crime involving,

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machine-guns,¹⁹ or the inability to bring firearms onto post office property.²⁰ The only really serious question is why competent lawyers might have believed such challenges would be successful in the first place or even that the probability of success was high enough, even if less than “likely,” to warrant charging their clients for the time it took to prepare the rejected motions. Perhaps it is a mixture of “hope springs eternal” and “any port in a storm.”

Indeed, on March 17, 2009, Adam Liptak published a story in the New York Times that began as follows:

About nine months ago, the Supreme Court breathed new life into the Second Amendment, ruling for the first time that it protects an individual right to own guns. Since then, lower federal courts have decided more than 80 cases interpreting the decision, *District of Columbia v. Heller*, and it is now possible to make a preliminary assessment of its impact.

So far, *Heller* is firing blanks.²¹

Liptak is in part drawing on the work of U.C.L.A. law professor Adam Winkler, who says of *Heller*, “For a landmark ruling . . . almost nothing has changed.”²² The only traceable consequence of *Heller* so far, in any reported cases, involves two federal magistrates who have invalidated a part of the Adam Walsh Child Protection and Safety Act that deprives anyone even accused (though not convicted) of child pornography of the right to possess a gun. “A year ago, I might well have taken for granted the authority of Congress to require that a person charged with a crime be prohibited from possessing a firearm,” wrote Magistrate Judge James C. Francis IV of the Federal District Court in Manhattan.²³ But now, “[t]he right to possess a firearm is constitutionally protected,” and there “is no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm.”²⁴

To be sure, it would not be insignificant if federal judges were to decide that prohibitions of handguns in Chicago or San Francisco were

say, stock fraud, is subsequently charged as a felon in possession of a gun in her own home. I am grateful to Mark Tushnet for pressing me on whether *Heller* will be as insignificant as suggested in the text.

¹⁹ *United States v. Gilbert*, No. 07-30153, 2008 WL 2740453 (9th Cir. July 15, 2008) (Mem.).

²⁰ *United States v. Dorosan*, No. 08-042, 2008 WL 2622996 (E.D. La. June 30, 2008) (Mem.).

²¹ Adam Liptak, *Few Ripples From Supreme Court Ruling on Guns*, N.Y. TIMES, Mar. 17, 2009, at A14, available at <http://www.nytimes.com/2009/03/17/us/17bar.html?hp>.

²² Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. (forthcoming 2009) (manuscript at 26), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1359225.

²³ *United States v. Arzberger*, 592 F. Supp. 2d 590, 601 (S.D.N.Y. 2008).

²⁴ *Id.* at 602.

unconstitutional, though it's worth pointing out that it is at least debatable whether any "inferior judge" could rule that the Second Amendment applies to the states and its subdivisions.²⁵ This follows from one of the more dubious rules adopted by the modern Supreme Court, by which it accords only to itself the authority to overrule prior precedents, even if courts below and detached academic analysts would correctly predict that the precedents are ripe for overruling because of intervening Supreme Court decisions that have fatally weakened them.²⁶ So anyone arguing that the Second Amendment is now "incorporated" against the States through the Fourteenth Amendment must confront two venerable precedents explicitly stating that is *not* the case.²⁷ Moreover, Justice Scalia's opinion, though only in a footnote, explicitly noted that the Court has at least twice after the initial 1875 decision in *Cruikshank* "reaffirmed that the Second Amendment applies only to the Federal Government,"²⁸ though the most recent case that he cites is an 1894 one. It is certainly reasonable to prophesy, a la Holmes, that the current majority of the Court is champing at the bit to incorporate the Second Amendment and to suggest that these earlier precedents are indeed suffering from a terminal illness.²⁹ Nonetheless, it is still the case that an "inferior judge" might be hesitant to test the Court's patience,

²⁵ I appear to have been overly cautious when writing the sentence in the text. See, e.g., *Nordyke v. King*, No. 07-15763, slip op. 4465 (9th Cir. April 20, 2009), where the Ninth Circuit panel engaged in a "selective incorporation" analysis that indeed culminated in the application of the Amendment (and, therefore, *Heller*) to Alameda County, even as it purported to follow Supreme Court case law rejecting such incorporation based on other theories. I am curious whether the other members of the Circuit will feel bound by the panel's decision or whether there will be some pressure to take the issue *en banc* for a more authoritative resolution. If, though, it is deemed as incorporated, that might spell trouble for certain gun control ordinances in San Francisco and elsewhere even, as illustrated in *Nordyke* itself, *Heller* is confined relatively closely to its facts as protecting only guns in the home. In any event, I have preferred to leave the remainder of the original text unchanged—one shower does not end a drought, after all—though the sentences in the text should be certainly read against the reality of *Nordyke*.

Given the result in the case, incidentally, I would be extremely surprised if the Supreme Court agreed to review it. However unhappy Alameda County might be at incorporation as an abstract doctrine, it obviously prevailed on the central issue, so there is no reason in the world for the County to appeal. *Nordyke*, obviously, may wish to appeal, but then he would have to find four Justices who agree that the Court should return so quickly to the volatile issue of guns and the Constitution, which seems unlikely. The situation will be different, of course, if and when another Circuit comes to the conclusion that the Second Amendment is *not* incorporated and the Supreme Court is therefore faced with a conflict between the circuits. Even that does not guarantee, as an empirical proposition, actual review, but there would obviously be a marginally greater likelihood of certiorari being granted.

²⁶ See, e.g., *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997).

²⁷ See *Presser v. Illinois*, 116 U.S. 252 (1886) and *United States v. Cruikshank*, 92 U.S. 542 (1875). See also *Miller v. Texas*, 153 U.S. 535, 538 (1894).

²⁸ *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008).

²⁹ See, e.g., Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185 (2008).

given the strong emphasis placed in relatively recent decisions that *only* the Supreme Court can declare dead even the most decrepit precedent.

One might, of course, evade the “incorporation” argument by arguing that it is not really the “Second Amendment” that is being incorporated, but, rather, a non-enumerated right, protected by the Ninth or Fourteenth Amendment, to the possession of guns for self-defense.³⁰ As already suggested,³¹ I think there is much to these arguments and that Justice Scalia could have written a far more persuasive opinion in *Heller* had he mentioned the Second Amendment only in passing. This argument, however sound, must confront the embarrassing fact that not a single word in Justice Scalia’s opinion supports such an analysis, nor, of course, did any of the dissenters offer any comfort on this point (Otherwise, they might have written concurring opinions instead of angry dissents!).

Moreover, one should recognize that the future importance of *Heller*, to the litigating bar, almost certainly is going to be strongly affected by the fact that Barack Obama won the November 2008 election and will therefore be able to nominate all future federal judges for the duration of his time in office, subject, of course, to confirmation by a currently and almost certain near-term-future Democratic Senate. One need not be a full-blown legal realist to believe that the construction of *Heller*, just as is true with the construction of the Second Amendment, is in substantial measure a function of one’s overall political ideology. The majority was composed of five conservative Republicans; the dissenters, of the two Democrats and two nominal Republicans who are almost certainly out of step with the current version of their original Party. The appointment process of “inferior” judges has become increasingly partisan, and it is hard to believe that President Obama, even given his new-found regard for the Second Amendment,³² is likely to appoint a plethora of (or perhaps any) judges who are zealously committed to an expansive view of what “the right to bear arms” might entail, even if one believes that he will not choose to appoint anyone eager actually to overrule even the “minimalist” version of *Heller*.

Two articles by the aforementioned UCLA Professor of Law, Adam Winkler, are also illuminating for those wishing to “prophesy” judicial conduct in the aftermath of the Court’s decision in *Heller*. He finds that that state judges, many of them, of course, elected and thus perhaps

³⁰ This in fact appears to be the tack chosen by the Ninth Circuit panel, which emphasizes the degree to which possession of a gun for self-defense can indeed be viewed as a “fundamental right” of all Americans. “[L]anguage throughout *Heller* suggests that the right is fundamental by characterizing it the same way other opinions described enumerated rights found to be incorporated. . . . We therefore conclude that the right to keep and bear arms is “deeply rooted in this Nation’s history and tradition.” *Nordyke*, slip op. at 4495–96.

³¹ See *supra* note 10.

³² See Nedra Pickler, *Obama Supports Individual Gun Rights*, BREITBART.COM, Feb. 15 2008, http://www.breitbart.com/article.php?id=D8UQTAS80&show_article=1.

particularly attentive to public opinion, have been quite deferential to state legislatures with regard to the regulation of firearms even in the roughly eighty percent of American states that include some version of the protection of “gun rights” in their state constitutions.³³ That is, these judges have most certainly not applied “strict scrutiny” to state legislation. It is not a contradiction in terms to say that even if most (or “enough”) of the country supports *some* right to bear arms, there is no evidence whatsoever that a majority (or even “enough”) have a very robust conception of this right.³⁴ Nor, notoriously, did the Supreme Court in *Heller*; instead, Justice Scalia avoided any and all discussion of what the operative standard of review might be, leaving it up to court’s below to read the opinion (similar, perhaps, to reading tea leaves or sheep entrails) as deciding only that the District of Columbia ordinance was so *outré* as to violate even the “minimum rationality” standard or, on the other hand, deciding, at least implicitly, that it would easily have survived such a standard but was nonetheless invalid because it didn’t meet some completely unarticulated heightened standard of review.

Though prediction is indeed perilous and sometimes out and out foolish, I am willing to say that my inclination is to believe that *Heller* will turn out to be relatively insignificant for the practicing bar, whatever the immediate prediction that it will generate a “torrent” of litigation.³⁵ Five or ten years from now, we might easily put *Heller* in the company of the much-discussed *Lopez* case,³⁶ which generated law review symposia and both cheers and wails based on the supposition that it would lead to the significant dismantling of the “New Deal Settlement” and its near absolute grant of power to Congress to regulate (and prohibit) anything that “affected” interstate commerce.³⁷ I suspect that most analysts would agree that today *Lopez* stands for the proposition that Congress must take the time to include a boilerplate paragraph specifying the jurisdictional nexus between the activity regulated and “interstate commerce” and little else. For many people, the death-knell of the hopes (or fears) generated by *Lopez* was the Supreme Court’s decision, joined by Justice Scalia, in the

³³ See Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. LAW & POL’Y REV. 597, 598, 601–02 (2006); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

³⁴ See Quinnipiac University Poll, *Guns, Polling Report* (July 8–13, 2008), <http://www.pollingreport.com/guns.htm>.

³⁵ See David G. Savage, *Supreme Court Gun Ruling Leaves Questions*, L.A. TIMES, June 28, 2008, available at <http://articles.latimes.com/2008/jun/28/nation/na-scotus28> (“The Supreme Court’s historic ruling this week that clarified Americans’ right to own a gun for self-defense left a crucial question [about ‘fundamentality’ of Second Amendment rights and thus standard of review] unanswered, one that will be resolved only after many years and a torrent of litigation, legal experts said Friday.”).

³⁶ *United States v. Lopez*, 514 U.S. 549 (1995).

³⁷ See, e.g., *Symposium: The New Federalism after United States v. Lopez*, 46 CASE W. RES. L. REV. No. 3 (1996); *Symposium: Major Issues in Federalism*, 38 ARIZ. L. REV. No. 3 (1996); *1996 University of Idaho College of Law Federalism Symposium*, 32 IDAHO. L. REV. 493 (1996).

Raich case³⁸ rendering irrelevant California's approval of non-commercially distributed marijuana for medical uses. The federalism "revolution" that was much discussed, especially by academics,³⁹ turned out to be relatively unimportant, especially inasmuch the ostensibly suspicious-of-national-power Court did nothing to limit Congress's power to put strings on federal funds or, even more to the point, to rein in its willingness to interpret federal statutes as "pre-empting" even non-contradictory (albeit supplementary) state regulations.⁴⁰

I would scarcely be so cavalier in describing the consequences for the American polity of Judge Wilkinson's "companion case" to *Heller*, *Roe v. Wade*. One can surely believe that it has had enormous consequences for American political and social life,⁴¹ even if quite different from those sought or presumed by its supporters. But, once again, I believe that it is far too early to decide whether *Heller* will really emulate *Roe* or will instead enjoy the status of *Lopez* as, relatively speaking, "much ado about nothing (or very little)." Or the correct analogy might be *National League of Cities v. Usery*,⁴² which also gained brief fame when the Court, in 1976, for the first time in four decades, invalidated an Act of Congress as going beyond its power to regulate interstate commerce; only constitutional law adepts know of the case because it was unceremoniously overruled only nine years later.⁴³ This could easily take place if President Obama has the opportunity to replace one of the Republican judges in the majority with someone who doesn't share their views as to the correct meaning of the Second Amendment. But even if *Heller* is not formally interred, the history of *Roe* itself teaches that one need not formally overrule a decision in order to "hollow out" many of its purported implications and thus effectively limit (though not eliminate) its impact.

³⁸ *Gonzales v. Raich*, 545 U.S. 1 (2005).

³⁹ See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1051-61 (2001) (offering an exaggerated account of the potential importance of said "revolution").

⁴⁰ See, e.g., Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1 (1999). An especially egregious example is *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74 (2000) (limiting Massachusetts' ability to use its spending to limit interaction with tyrannical regime in Myanmar), discussed in Sanford Levinson, *Compelling Collaboration With Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 FORDHAM L. REV. 2189, 2191 (2001).

⁴¹ Which is not the same thing as ascribing to it, or any other judicial decision, the impact that many law professors are prone to see. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 430 (2d ed. 2008) (general answer: No).

⁴² 426 U.S. 833 (1976).

⁴³ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

III. SO FOR *WHOM* IS *HELLER* “IMPORTANT”: FURTHER REFLECTIONS ON THE “CANONS” OF CONSTITUTIONAL LAW

I have argued so far that exceedingly few people involved in the practice of law—or students hoping for such a career—really need concern themselves with the *Heller* case. But, of course, what is of interest to the practicing bar—or even to practicing judges—is not the measure of what is interesting or important to others concerned with the American legal system. Legal academics especially have all sorts of non-practice-related reasons for being fascinated by given aspects of American law, even if this dismays some distinguished federal judges.⁴⁴

Several years ago my friend Jack Balkin and I wrote a piece on *The Canons of Constitutional Law*.⁴⁵ In it, we suggested that there were multiple canons, depending on specific groups and audiences that might be interested in the general topic. We emphasized the differences generated by choosing essential readings (i.e., establishing a “canon”) for (a) students striving to learn how to be effective constitutional lawyers (and paying some attention to the likely cases and doctrines that would arise in their practice); (b) lawyer-participants within general American legal culture who might be expected, especially by their non-lawyer friends, to know certain things about our constitutional past and present whether or not that knowledge was particularly relevant to the actualities of contemporary practice;⁴⁶ or (c) potential law professors, who need to know the current disputes most relevant within the legal academy and, therefore, the kinds of things they should consider writing their own articles about if they seek to impress appointments committees and enter the academy themselves. Today I would add a fourth category, which comes from treating our students less as lawyers, in any conventional sense, or legal academics than as citizens and potential public leaders who should be educated about the features of the Constitution that are most important to such persons, even if most of them are never litigated and thus are of no interest to most practicing lawyers or Court-obsessed academics.⁴⁷ One of the things such public leaders might be asked to do,

⁴⁴ Several years ago, I had a debate of sorts with United States District of Columbia Court of Appeals Judge Harry Edwards on this point. See Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and To Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389, 391 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Sanford Levinson, *Judge Edwards’ Indictment of “Impractical” Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010 (1993).

⁴⁵ Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

⁴⁶ Consider, e.g., the *Dred Scott* case, *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1856), and the more general presence of chattel slavery as a reality within the American constitutional order. See Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49 (2007).

⁴⁷ See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 5 (2006)

either within the United States or, more likely, elsewhere in the world, is to design new constitutions or, at least, modify old ones to make them more “up-to-date,” and contemporary legal education is painfully deficient in enabling our students to engage in what might be called “intelligent design.”

So our major mistake is to ask—or to express confident views—about the *general* importance of *Heller* inasmuch as that implies a non-existent close-to-monolithic audience that necessarily is asking similar questions about legal materials. Instead, it is altogether possible that even if I am correct that *Heller* will turn out to be quite unimportant for litigating lawyers, at least after a flurry of early lawsuits based on unwarranted optimism about the potential contained in the case, it may nonetheless be important for at least some of the cohorts identified above. I take them in turn.

A. “Cultural Literacy” and *Heller*

In an article written after the Supreme Court’s decision in *Bush v. Gore*,⁴⁸ Balkin and I offered the thought experiment of a legal academic at a dinner party being asked by a non-lawyer to opine about that case. Generally speaking, it would not do to say, “I don’t teach election law, so I really have no views about the case.” I’m reasonably confident that such a comment would be equally unacceptable from a practicing lawyer who explained that her field was bankruptcy instead of the Fourteenth Amendment. For better or worse, the laity expects *all* lawyers to have reasonably informed opinions on certain cases or legal issues, and one function of law teachers may be to make sure that their students don’t disgrace themselves when asked about these topics. It may be, at least in the short run, that *Heller* will be the topic of many such dinner, or cocktail-party interrogations, and that, consequently, we must make sure that our students, who are extraordinarily unlikely to need to know about the case for their professional careers, nonetheless know “enough” to satisfy their interlocutors. And *Heller*, in this context, is of course a synecdoche for some general knowledge of the role that guns (and law relating to firearms) have played in general American culture. As it happens, *Heller* is not particularly illuminating in this regard, and there are many better things to assign to our students,⁴⁹ but at least some

(offering vigorous critique of U.S. Constitution). I address some of the issues surrounding education for “citizenship” or “leadership” in Sanford Levinson, *Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 42 IND. L. REV. (forthcoming, 2009); Sanford Levinson, *What Should Citizens (as Participants in a Republican Form of Government) Know about the Constitution?*, 50 WM. & MARY L. REV. (forthcoming 2009).

⁴⁸ Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 187–88 (2001).

⁴⁹ See, e.g., SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN’T END THE BATTLE OVER GUNS* (2007); *both reviewed*

interlocutors might expect a well-informed lawyer to have read the opinion as well.

But this still doesn't add up to any great likelihood that *Heller* will (or should) be taught in our classrooms. The reason, in part, is precisely that the three opinions in the case written by Justices Scalia, Stevens, and Breyer are *very* long and, as a practical matter, close to unassignable unless one is determined to spend several days on this one case (and, of course, to decide at the same time what cases from one's previous syllabus now get excluded). The length also has specific implications for those of us who edit casebooks: Inasmuch as Justices Scalia and Stevens in particular engage in extensive debate, whether truly illuminating or not, about the historical specifics of the 18th century view of firearms and the Second Amendment, it is exceedingly difficult to edit down the opinions to "manageable" lengths. One should never underestimate the importance of Supreme Court brevity. Long cases are disliked equally by students and by casebook editors and very few survive to be taught as part of a "living canon."⁵⁰ Perhaps *Heller* will be the exception, but don't bet on it.

B. *Prospective Academics*

It is certainly possible to argue that prospective academics should read and be able to develop cogent views about the case precisely because the two major opinions in the case, those by Justices Scalia and Stevens, exemplify—one should say "for better or worse," but I believe it is distinctly and unequivocally for "the worse"—what happens when justices pretend to be historians because of their belief that the "original understanding" of the Second Amendment, however defined,⁵¹ is extremely important if not, indeed, dispositive as to its present meaning. Indeed, Professor Sunstein begins his *Harvard Law Review* article with the thundering statement that *Heller* "is the most explicitly and self-consciously originalist opinion in the history of the Supreme Court."⁵²

As a matter of descriptive fact, to be a member of the contemporary legal academy, at least if one's field is constitutional law, one *must* have a position on the status of "originalism." To say that one was both uninterested in and ignorant about the various moves in the debate would be the equivalent, were one seeking a position teaching, say, torts

in Sanford Levinson, *Guns and the Constitution: A Complex Relationship*, 36 REVS. IN AM. HIST. 1 (2008).

⁵⁰ This point is derived in part from a very helpful conversation with Mark Tushnet.

⁵¹ What counts as fidelity to original understanding is the subject of increasingly arcane disputes. Among the best entry points into these disputes is Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L. & Legal Theory Research Paper Series No. 07-24, 2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT 291 (2007).

⁵² Sunstein, *supra* note 14, at 246.

or public finance, of saying that one had never bothered to inform oneself about any of the arguments involving law and economics. One is permitted to be a critic of both originalism and of law and economics. What one is not permitted to be, at least if seeking employment within American law schools, is proudly ignorant of them.

There are, of course, many cases that purport to involve various modes of originalism, but few are so illuminating, for good and for ill, about a particular “modality” of argument⁵³ as the two principal opinions in *Heller*. My own view is that both Justices Scalia and Stevens (and, therefore, the seven other justices who signed one of these two opinions) delivered a “dismaying performance.”⁵⁴ I have not changed the views that I published the day after my initial reading of the opinions:

If one had any reason to believe that either Scalia or Stevens were a competent historian, then perhaps it would be worth reading the pages they write. But they are not. Both opinions are what is sometimes called “law-office history,” in which each side engages in shamelessly (and shamefully) selective readings of the historical record in order to support what one strongly suspects are pre-determined positions. And both Scalia and Stevens treat each other—and, presumably, their colleagues who signed each of the opinions—with basic contempt, unable to accept the proposition, second nature to professional historians, that the historical record is complicated and, indeed, often contradictory. Justice Stevens, for example, writes that anyone who reads the text of the Second Amendment and its history, plus a murky 1939 decision of the Court, will find “a clear answer” to the question of whether the Second Amendment supports a “right to possess and use guns for nonmilitary purposes.” This is simply foolish. Neither Scalia nor Stevens pays any real attention to a plethora of first-rate historical work written over the past decade that challenges this kind of foolish self-confidence.⁵⁵

⁵³ See PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11–22 (1991) (setting out six “modalities” of constitutional argument, including the “historical”).

⁵⁴ See Sanford Levinson, *DC v. Heller: A Dismaying Performance By The Supreme Court*, HUFFINGTON POST, June 26, 2008, http://www.huffingtonpost.com/sanford-levinson/dc-v-heller-a-dismaying-p_b_109472.html.

⁵⁵ *Id.* I am certainly not alone in this view. Thus, Pulitzer Prize-winning Stanford historian Jack Rakove wrote that “neither of the two main opinions in *Heller* would pass muster as serious historical writing.” See Jack Rakove, *Thoughts on Heller from a “Real Historian,”* BALKINIZATION, June 27, 2008, <http://balkin.blogspot.com/2008/06/thoughts-on-heller-from-real-historian.html>. Professor Sunstein writes that “[l]aw-office history plays a large role in the law reviews and, thanks to *Heller*, on the pages of the United States Reports. To be sure, the competing arguments by the Court and Justice Stevens are impressively detailed. But the subtlety, nuance, acknowledgement of counterarguments, and (above all) immersion in Founding-era debates, characteristic of good historical work, cannot be found in *Heller*.” Sunstein, *supra* note 14, at 256. Perhaps the most scathing critique of Justice Scalia’s purported “originalism” comes in Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, UCLA L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324757. Lund, the Patrick Henry Professor of

As should have been clear in my comments earlier in this article, it is not that I necessarily oppose the result reached by the majority. What I object to is the absurdity of Justice Scalia's claiming that the original understanding of the 1791 audience for the Second Amendment clearly and unequivocally led to his conclusions. And, of course, I am equally dismayed by Justice Stevens's contrary confidence. As I wrote elsewhere immediately after *Heller* was issued:

What is especially ironic is that the strongest support for Scalia's position comes from acknowledging that the Second Amendment, like the rest of the Bill of Rights, has been "dynamically" interpreted and has taken on some quite different meanings from those it originally had. Whatever might have been the case in 1787 with regard the linkage of guns to service in militias—and the historical record is far more mixed on this point than either Scalia or Stevens is willing to acknowledge—there can be almost no doubt that by the mid-19th century, an individual right to bear arms was widely accepted as a basic attribute of American citizenship. One of the reasons that the Court in *Dred Scott*⁵⁶ denied that blacks could be citizens was precisely that Chief Justice Taney recognized that citizens could carry guns, and it was basically unthinkable that blacks could do so. Thus, in effect, they could not be citizens. Charles Sumner, who, unlike Taney is quoted by Scalia,⁵⁷ strongly endorsed the rights of anti-slavery settlers in Kansas to have guns to protect themselves against their pro-slavery opponents. If one reads only Scalia and Stevens, one would believe that there is no dynamism to the Constitution, which is both stupid as a theory of interpretation and, more to the point, completely misleading as a way of understanding the American constitutional tradition.⁵⁸

It is possible, of course, that I (and Rakove and Sunstein, among others) am mistaken and that either Justice Scalia's or Justice Stevens's opinion *should* carry the day even for an historically-literate reader and that one therefore can have renewed confidence in the ability of Supreme Court justices, even if they are totally without formal historical training, to engage in intellectually coherent and satisfying "originalism." I, of course, don't believe that I'm mistaken, but it really doesn't matter with regard to my principal point: Any person contemplating an academic career must be able to address the methodological and theoretical issues posed by *Heller*, which involve many issues quite independent of firearms *per se*, and we, as law professors, would therefore

Constitutional Law and the Second Amendment at George Mason University, is also a well-known conservative and proponent of originalism, as well as a strong supporter of the right to bear arms, which makes his critique especially interesting.

⁵⁶ *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 417 (1856).

⁵⁷ *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2807 (2008).

⁵⁸ See Sanford Levinson, *Some Preliminary Reflections on Heller*, BALKINIZATION, June 26, 2008, <http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html>.

disserve our academically-ambitious students if we did not make sure there was a course they could take that included extensive examination of the many fascinating issues raised by the case (including, for example, the problems surrounding “incorporation” as discussed in the first part of this essay).

It is altogether possible that for theoretically-inclined legal academics, *Heller* will be an “important” case into the indefinite future. Consider once more Cass Sunstein’s contribution to the de facto symposium on *Heller* in the *Harvard Law Review*,⁵⁹ which explicitly analogizes *Heller* to *Griswold v. Connecticut*,⁶⁰ just as, he recognizes, others have suggested the presumably more unattractive analogy to *Lochner v. New York*.⁶¹ Though few practicing lawyers will have much occasion to rely on either of these historical chestnuts, they continue to be crucial references for anyone interested in contemporary debates about the role of the Supreme Court and the proper methodology to be followed by conscientious justices.

C. *Citizens and, Especially, Prospective Constitutional Designers*

Within the academy, “originalism” at the present day is offered as a method of constitutional interpretation by which we decide what meaning to assign often very old texts in the present day. It is not only that “originalism” as a theory has many well-explored theoretical problems. It is also the case that almost no lawyers and judges need actually concern themselves with it because, unless one is litigating at the Supreme Court level or working on the Court, either as a justice or as a clerk, it is basically irrelevant.⁶² The reason is simple: As already explained, the Supreme Court, ever eager to maintain its supremacy over its hierarchical inferiors, requires all of its subordinates within the judicial bureaucracy to apply Supreme Court doctrine whether or not any judge believes, perhaps altogether legitimately, that it would leave James Madison and other founders, and all members of the original audience, whirling in their collective graves. So far as potential practicing lawyers are concerned, it is simply a waste of our students’ time to spend time on the arcana of “originalist” interpretive theory, since they are spectacularly unlikely ever to have occasion to write a brief that will be structured around originalist, rather than doctrinal, argument.

However, this does not mean that delving into original source materials of the United States (or any other) Constitution cannot be

⁵⁹ Sunstein, *supra* note 14.

⁶⁰ 381 U.S. 479 (1965).

⁶¹ 198 U.S. 45 (1905).

⁶² See Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL’Y 495, 506 (1996), reprinted in revised form as Sanford Levinson, *The Operational Irrelevance of Originalism*, in LIBERTY UNDER LAW: AMERICAN CONSTITUTIONALISM, YESTERDAY, TODAY AND TOMORROW 105, 105–06 (Kenneth L. Grasso & Cecilia Rodriguez Castillo eds., 1997).

enormously helpful if we are interested in the problem of constitutional design. One might believe, as I do, that “originalism,” even in its most sophisticated and palatable forms, has relatively little to offer as a theory of constitutional interpretation and still believe that the Second Amendment is enormously interesting and worth the time of anyone seriously interested in designing constitutions in the 21st century, whether at home or abroad.⁶³

As I argued in my original essay some two decades ago, it is impossible to understand why the Second Amendment was included in the Constitution without putting it within the context of 17th and 18th century civic republican political theory that envisioned the possibility that sturdy, public-minded citizens might take up arms to overthrow a tyrannical government.⁶⁴ This was no point of idle political theory. Americans had done it; Americans had overthrown what had become the hated and ostensibly tyrannical government associated with George III and the “long train of abuses”⁶⁵ that had been visited upon the then colonists. And part of American ideology, whether objectively true or not,⁶⁶ includes an emphasis on the image of the Minuteman, ever ready to protect civic liberties. The best study of the origin of the Second Amendment, I believe, is the book by the late Richard Uviller and William Merkel, *The Militia and the Right to Bear Arms*,⁶⁷ which firmly establishes its civic republican origins. It, therefore, is no surprise that the *Federal Farmer*, opposing the Bill of Rights-less original text of the Constitution, wrote that “to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them”⁶⁸ And Justice Story, in his influential 1833 treatise on the Constitution would write that

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in

⁶³ I have elaborated these views in *Arms and Constitutional Design: An Essay for Lawrence Tribe*, 42 TULSA L. REV. 883, 885–86 (2007).

⁶⁴ See Levinson, *supra* note 1, at 647–49.

⁶⁵ See DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁶⁶ The actual role of citizen militias is a matter of some controversy, and I am more than willing to accept the argument made by Jack Rakove and others that ordinary citizens were far less important than professional soldiers and, indeed, the intervention of the French. See Sanford Levinson, *The Historians' Counterattack: Some Reflections on the Historiography of the Second Amendment*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 91 (Bernard E. Harcourt ed., 2003). See also *supra* notes 8–9. To some extent, the “reality” is irrelevant if we are talking about public ideology.

⁶⁷ H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2003), reviewed in Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel*, *The Militia and the Right to Arms*, 12 WM. & MARY BILL RTS. J. 315 (2004).

⁶⁸ LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (William H. Bennett ed., 1978).

the first instance, enable the people to resist and triumph over them.⁶⁹

There is nothing self-evidently silly in such views, especially if one is indeed fearful about the possibility of tyrannical government. The assumption of many contemporary analysts that it is simply an analytical truth that the state must possess a monopoly over the means of violence, associated with the influential writings of the German social theorist Max Weber, is certainly open to debate. Weber may be correct, as a matter of description, that “[t]he claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization,”⁷⁰ but the claim need not necessarily be accepted even by those who recognize compulsory legal jurisdiction and continuous organization. Anyone concerned with the potential for tyranny particularly against vulnerable minorities might well want to preserve some right to bear arms—or, indeed, the right to organize local militias—against the possibility that the promises so clearly made at the constitution-formation stage to protect these minorities will in fact be betrayed once the government actually gets underway.

Note well that one need not take a particularly strong position on an “individual” right to bear arms a la *Heller*. It is enough to recognize what, today, is thought to be a “soft” reading of the Second Amendment, which simply safeguards the rights of the constituent states within the Federal Union to have militias of their own. It is this “soft” reading that is basically adopted by the *Heller* dissenters, who complain that the majority misreads the Amendment in protecting Dick Heller’s entirely “individual” right to bear arms for purposes of self-defense within his own home. But the concession by the dissenters that the Second Amendment *does* protect some kind of non-national-government-controlled access to “military” weapons for what might be termed “public” purposes instead of the merely “private” purpose of self-defense against criminals is not at all trivial, at least from the perspective of someone interested in constitutional design rather than constitutional interpretation. Consider only the fact that the existence of state militias allowed, for example, the Jeffersonian governors of Pennsylvania and Virginia to issue credible threats to send their state militias to the new national capital of Washington should the Federalists not honor the electoral—even if not electoral vote—victory clearly scored by Thomas Jefferson in the election of 1800.⁷¹ Far more ominously, of course, it made secession in 1860–1861 considerably easier inasmuch as the seceding states in effect already had

⁶⁹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746 (Da Capo Press 1970) (1833), *quoted in* 5 THE FOUNDERS’ CONSTITUTION 214 (Phillip B. Kurland & R. Lerner eds., 1987).

⁷⁰ MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947).

⁷¹ See BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 89–90 (2005).

an army in being and did not have to organize a brand new one from scratch.

One can predict with close to certainty that proponents of any new centralized government being designed by a modern constitutional assembly or convention will wish to place a Weberian monopoly over the means of violence in its hands. Why shouldn't they? That's what it means to be a "proponent." The far more serious—and often unhappy—question is why everyone else should go along with such a demand if one fears those likely to hold the reins of power in the new political order. James Madison famously warned against reliance on mere "parchment barriers"⁷² within a constitution's text. The most central task facing any constitutional designer is to construct a political order that will create incentives, on the part of all members of the polity, to adhere to the basics of the constitutional bargain, which will certainly include assurances that minorities (and, for that matter, majorities) will not be oppressed. Just as possession of arms is thought to be a necessity for almost all states in the international political system in order to ward off potential invaders, so might groups within a polity believe that similar possession of arms—even if not quite the *same* kinds of arms, such as nuclear weapons—is necessary to ward off wrongdoing by the central government.

Perhaps I am wrong in the arguments made above, and we should advise all groups negotiating over the terms of a new constitution to accept the Weberian monopoly of the means of violence by the state. My real point is that there is astoundingly little discussion by those interested in "constitutional design" about this issue. There are first-rate books on election systems, federalism, presidentialism versus parliamentarianism, and other issues that will inevitably come up in any constitutional convention. There are, to my knowledge, no similar books on organizing the means of violence. Even most of the literature on federalism that I am familiar with speaks of policy domains such as education, environment, and the like, rather than the means of violence. It is time for a long overdue discussion of what constitutions should say about this issue. One might, of course, conclude that the wisest course for constitutional drafters is silence and saying nothing in the hope that the passage of time will remove the high valence of an initial decision, as may be the case, for example, with the specification of a "right of secession" within a federal system.⁷³ But it is akin to whistling past the graveyard to assume that access to, and control of, the means of violence do not raise issues of the highest constitutional importance.

⁷² THE FEDERALIST No. 48, at 274 (James Madison) (E.H. Scott ed., 1898).

⁷³ See CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 96, 105 (2001) (criticizing the inclusion of any "right to secede" in a federal constitution).

IV. CONCLUSION

So does this mean that *Heller* is truly important for constitutional designers, even if not for practicing lawyers? Not really, since none of the opinions take truly seriously the 18th century debates over the inclusion of the Second Amendment. Justice Scalia acknowledges the civic republican argument only basically to table it and go on to create an “individual rights” reading of the Amendment that would be far better rooted in the Ninth and Fourteenth Amendments. Justice Stevens uses the notion that the Amendment protects only the use of weapons within the context of militias as a club with which to beat down Scalia’s overly confident argument to the contrary. But this doesn’t mean that students of constitutional design might not be well advised to read the ever richer historical literature about the Second Amendment (and, for that matter, developments in the 19th century, as elaborated in Saul Cornell’s book)⁷⁴ even if they properly view the actual arguments set out in *Heller* as simply further evidence of the peculiar fixation, on the part of some judges, with looking to history for purportedly authoritative guidance for the present meaning of the Constitution.

⁷⁴ CORNELL, *supra* note 49.