

2nd Amendment Still Undecided, Hiding In Plain View

Law360, New York (January 11, 2016, 11:54 PM ET) --

With America on guard over Thanksgiving after terror attacks in Paris, what occurred instead was its new normal: a mass shooting, this time three dead and nine wounded in Colorado Springs, where another shooter weeks before killed three and himself. The same day in Sacramento four more were killed or wounded. For a 16th time President Barack Obama decried the “easy accessibility of weapons of war” and recurring violence as “not normal,” saying “enough is enough.” Days later a San Bernardino employee and his wife burst in on a party, killing 14 and wounding 21 co-workers. Though linked to terrorism, their assault rifles and semiautomatic handguns were bought locally. And it is the only terrorism act out of 355 mass shootings (killing three or more) to that point in the year, recurring once a day.



Robert W. Ludwig

Exceptionalism Today: Mass Guns, Mass Shootings, Mass Oversights

In its first front-page editorial in a century, “The Gun Epidemic,” the New York Times urged: “It is past time to stop talking” and begin reducing and “eliminating some large categories of weapons and ammunition.” The president in a national address again called on Congress to limit access to “powerful assault weapons,” and took executive actions to start the New Year, though only to enforce existing laws and propose funding for research. He held a prime-time CNN forum on gun violence, and the next day in an historic Times op-ed, “Our Responsibility,” addressed the “epidemic” as “one of the greatest threats” to public health and safety, noting: “Every year, more than 30,000 Americans have their lives cut short by guns. Suicides. Domestic violence. Gang shootouts. Accidents. Hundreds of thousands of Americans have lost” family members. He also warned he “will not campaign for” or “support any candidate” who “does not support common-sense gun reform.”

Though pressure mounts, few expect much to change in today’s legal and political climate. After the Sandy Hook Elementary massacre of 26 first-graders and teachers in 2012, Congress passed no limits at all, while most states expanded gun rights, not controls. Even the president in his op-ed predicted reform “won’t happen during this Congress” or “my presidency.” And his “belief that the Second Amendment guarantees a right to bear arms,” reiterated last week as chief executive and a former constitutional law professor, the very academics we look to besides the U.S. Supreme Court to understand our Constitution, all but ensures that outcome, undercuts his agenda, and perpetuates a surprising myopia for many of today’s Americans.

It wasn’t this way for past generations. In the founding era, as generally overlooked, the country and

some states required militia weapons to be kept in public stores. In the Wild West, contrary to Hollywood myth, frontier towns like Dodge City enforced bans on carrying guns within town limits, including at Tombstone's O.K. Corral (unlike our cities where carry bans have been overturned and guns are allowed even in saloons). During prohibition Congress enacted "gangster weapon" restrictions, unanimously upheld by the Supreme Court in 1939, and further controls after the 1960s assassinations. And in 1980 another unanimous court reaffirmed the Second Amendment "guarantees no right to keep and bear a firearm" not related to a state militia, and "legislative restrictions" do not "trench" on the right.

On the bicentennial of that Amendment to the Militia Clauses of the Constitution, as much relics as the other Military (Third) Amendment on quartering soldiers in homes, former Chief Justice Warren Burger called the notion it conferred a civil right to guns a "fraud" on "the American public by special interest groups." The next year five attorney generals in the Washington Post implored the "nation can no longer afford to let the gun lobbies' distortion of the constitution cripple" gun control, when for "more than 200 years, the federal courts have unanimously" held it "concerns only the arming of the people in service to an organized state Militia," not "private purposes." Burger, decrying "records of homicides" and "mindless homicidal carnage" 10 times elsewhere, called for common-sense regulation to preserve "'domestic tranquility' promised in the Constitution."

In an abrupt turnabout, the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), by a sharply divided 5-4 decision overturning D.C.'s handgun ban and two centuries of settled law and legislative practice, found in the amendment an implied right of self-defense in the home.

The Second Amendment, a spare 27 words, reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Justice Antonin Scalia, writing for the majority, began not at the beginning but in the middle with the "operative clause," addressing the "holder of the right" ("the people") and "substance of the right" ("to keep and bear Arms"). He then dismissed the preamble ("A well-regulated militia, being necessary to the security of a free State"), though the only preamble in the Bill of Rights, and did not construe the final clause, the prohibition and real operative text: "shall not be infringed."

In so doing and not doing, the majority interpreted "free State" as a collective "polity" to mean "country," reading "State" and federalism out of the amendment, and "people" to mean "persons," not a sovereign polity like a state. Conceding the main reason the framers guaranteed a right to arms was to preserve state militias as the preamble stated, the majority looked to history, not that purpose, to divine its scope. Applying their own "historical reality" that the amendment codified a common law right "inherited from our English ancestors" from the 17th century, the majority overlooked much of the American canon of the late 18th century that led to the amendment, while disregarding canons of construction found even in Justice Scalia's treatise with lexicographer Bryan Garner, *Reading Law: The Interpretation of Legal Texts*.

Battling on terrain set by the court's lead textual originalist or espouser of "original intent," the justices disputed the meaning of (almost) every word and their own historiographies behind what the framers wrote and intended. Reflecting the vitriol of the culture war they were asked to resolve, they exchanged their own, with Justice Scalia terming the dissent's conventional military construction of "keep and bear Arms" an "absurdity," "incoherent," and "Grotesque." Justice John Stevens, writing for four dissenting justices, parodied the majority's "atomistic, word-by-word approach" as reminiscent of "the parable of the six blind men and the elephant," each "touching a different part" and failing "to grasp the nature of the creature."

At bottom, Heller elevated a private right to guns found in English and state common law, there subject to a variety of statutory and common law limitations, to a federal guarantee, shorn of those limitations. In dicta Justice Scalia suggested it was subject to “longstanding prohibitions” and the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’” (quoting Blackstone), but under a national standard, stating: “It is enough to note” the “American people have considered the handgun to be the quintessential self-defense weapon.” He cited “presumptively lawful regulatory measures” on the possession of firearms “by felons and the mentally ill,” imposed in 1968, “in sensitive places such as schools and government,” also adopted long after ratification, and on commercial sales. None was found at common law from which Heller held the right derived, or mentioned in the amendment any more than a private right. No such guarantee existed before, then, or since in Great Britain. And none of its drafters, proponents in Congress, or state conventions (but one), proposed such a right, addressing instead state militias.

Like the famous demand to know “the spot” where something arose in our past, it is impossible to know from Heller where the framers elevated a common law right to a constitutional guarantee, in any draft, debate or ratifying convention. And it will be just as impossible for the court in future cases to pinpoint where exceptions were raised in any draft, debate or convention.

For the Heller majority to imply a private right to guns, a common feature of the day (unlike modern implied rights), ignores the general caution of Chief Justice John Marshall, an influential Federalist at the Virginia ratifying convention, that if this were the intent, the framers would “have expressed” it, “in plain and intelligible language.” And to imply the unstated disregards his further admonition, that when amendments proposed in the states and Congress carried no sentiment generally expressed, no fears extensively entertained, and no expression of an intent to apply them to something, as true of squirrel guns and pistols, “This court cannot so apply them.” Even James Madison, who drafted the Bill of Rights, warned against reading varying English and state common law into the Constitution as an “impracticable,” “dishonorable and illegitimate guide.”

Criticism of Heller

Heller evoked heavy criticism, including from conservative jurists. Judge Richard Posner called it “faux originalism” and “law office history” for which “derision is deserved.” Judge Harvie Wilkinson assailed its “judicial activism” in “creat[ing] a new blockbuster constitutional right” and “embedded” exceptions “not apparent to the Court for over two centuries.” He faulted how it “cut loose” the preamble that “reflected the Framer’s views” and “set the context in which the amendment was to be read,” and tossed federalism “overboard like tea.” Both said judicial restraint dictated that puzzling old passages be construed to uphold established law, absent clear contrary evidence.

The notion the amendment is “baffling,” as law professor Michael Dorf put it, with “no definitive answer to what” it means, as Mark Tushnet wrote in *Out of Range*, or the “most mysterious provision” as Cass Sunstein agreed, has become orthodoxy among constitutional scholars (including evidently the president). Given this accepted dogma, some suggest it’s “blowing smoke” (Tushnet) to assert otherwise, and that courts should defer to the “deeply felt commitment” to gun rights of some and to “reasonable restrictions” sought by others, “without purporting to untangle the Amendment’s deepest mysteries” (Sunstein).

Yet nearly all historians do contend otherwise, indicating the notion is wrong. Pauline Meier called Heller an “abuse of history,” not what Madison and Congress meant and the states approved. Saul

Cornell, in his book *The Second Amendment on Trial, Critical Essays on District of Columbia v. Heller*, wrote “there can be little doubt that Scalia got his history badly wrong and Stevens got it mostly right.” Richard Ellis called Heller “legalistic legerdemain” “clearly at odds” with Madison. Jack Rakove deplored “Justice Scalia’s professed disdain for what was actually being debated,” and noted if the framers had “addressed the subject directly,” gun groups “would not have to recycle the same handful of references” or “rip promising snippets” from texts and speeches.

In fact, the Second Amendment is no enigmatic blank to be filled in by lawyers or judges as amateur historians. What is missing is recognition, as Marshall put it and historians understand, it was understood in the day what it meant and why. That understanding was based on constitutional and founding sources, facts and truths, obscured by disuse, misuse and time, hidden in part even from practitioners of history as well as law. Had the court kept with what judges normally contend: the words used and related provisions, canons of construction, drafting histories and debates, the outcome should have been what it was since 1791, and less divided if not unanimous, like the last courts that addressed the amendment in 1939 and 1980.

Remarkably, Heller did not address much less decide the full amendment as is assumed. Nor did Heller address, in roiling settled law if not domestic tranquility, the whole constitutional and founding record, which is far more extensive and clear than believed.

For openers, one would think that in construing the right “to keep and bear Arms,” which the amendment commands “shall not be infringed,” the court addressed the meaning of “infringed.” Yet nowhere in Heller, overturning 200 years of law that the right was collective and not personal, does the court consider let alone decide that term, a proverbial smoking gun hiding in plain view.

Heller, after finding a private right, did recognize, in a section titled “Meaning of the Operative Clause,” the text says “it ‘shall not be infringed,’” but then did not address what “infringed” means. Instead, Justice Scalia transposed “infringed” to “abridged” (“Congress was given no power to abridge the ancient right of individuals to keep and bear arms”), equating the two with no analysis.

This is stunning, and not only because the opinion is by Justice Scalia, who considers Heller a “vindication” of textual originalism, even a “legacy opinion,” as “the best example” of “going back and seeing what the meaning of the Second Amendment was at the time it was adopted[.]” The meaning of “infringed” also is not addressed in dissents by Justices Stevens and Stephen Breyer, nor raised in the parties’ briefs, or dozens of amicus (friend-of-the-court) briefs by scholars, historians, gun-control and rights groups, and linguists.

Two years later, a yet more splintered court in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), a plurality decision lacking a majority, held this newfound right against federal infringement was incorporated to the states, striking down Chicago’s similar ban. Like Heller, the plurality opinion by Justice Samuel Alito used “abridged” and “infringed” interchangeably, defining neither. Justice Clarence Thomas, partly concurring, did attempt to define “abridge” for the Fourteenth Amendment, but found it “best understood to impose a limitation on state power to infringe upon pre-existing” rights, also equating the terms.

As Marshall laid down in *Marbury v. Madison*: “It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.” Under this canon alone, Heller’s construction, which assumed the last clause had no particular effect, would appear “inadmissible.”

Yet the court often conflates “infringed” and “abridged” in deciding whether First Amendment rights were infringed, not “abridged” as written. In *Heller* and *McDonald*, the court did the reverse, substituting abridged for “infringed” as used in the Second Amendment. While transposing the terms in First Amendment cases may or may not be harmless error, their meanings are manifestly different, rendering popular usage for the Second Amendment illusory, and because guns are involved, dangerous.

Even Congress, which drafts and passes amendments for ratification, doesn’t always observe its own terminology. Making the same mistake, former Chairman Orrin Hatch, R-Utah, of the Senate Judiciary Committee, introducing a Senate report “The Right to Keep and Bear Arms,” said the Subcommittee on the Constitution would give “proper recognition” to the right, citing laws “which abridged it.”

Justice Scalia himself offered a cautionary tale on popular usage in “A Text on Textualism, Part 2, Garner and Scalia offer more outtakes from their latest collaboration,” an ABA Journal article by his co-author Garner. It cites an outtake from their treatise *Reading Law* to illustrate how the word “nimrod” acquired an antithetical popular meaning after the Looney Tunes character Bugs Bunny called his nemesis Elmer Fudd a “nimrod,” meaning dimwit, though Nimrod was known for millennia as a famous hunter in the Old Testament. Today’s popular meaning of “nimrod” no more reflects original intent than the popular transposition of “infringed” and “abridged.”

“In expounding the Constitution,” as Marshall also said, “every word must be given its due force, and appropriate meaning; for it is evident” that “no word was unnecessarily used, or needlessly added.” Transposing language “may sometimes be tolerated” to achieve the intent of legislation (as Chief Justice John Roberts did this June in construing “state” to include “federal” exchanges in the Affordable Care Act, which Justice Scalia called “jiggery-pokery”), not the Constitution.

Infringed vs. Abridged

Infringed and abridged are different words, have different meanings in period and modern dictionaries, and are not even synonyms. Where words “cannot, in any appropriate sense, be said to be synonymous,” Justice Joseph Story once warned, to “suppose them to signify the same thing,” as *Heller* and *McDonald* did, “would be to defeat the obvious purposes of both.”

Unlike infringed, “abridged” is a little-known term of art invoked by Congress throughout our history to protect individual rights, in the First, Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, Twenty-sixth, and proposed Equal Rights Amendments (apart from juridical rights in the Fourth through Eighth). Even state constitutions reflect the distinction. Those that keep the right with “the people” mirror the federal prohibition “shall not be infringed” (six, including four original colonies), while others that give it to “each citizen” or “person” substitute “shall not be abridged” (three), or “impaired” (two), “questioned” (six), “denied” (three), or “prohibited” (one).

Why did the framers use, in fact insist upon, “abridged” and not “infringed” when they intended an individual right? The reason becomes obvious when one looks, as urged by Story: “It must have been the result of some determinate reason; and it is not very difficult to find,” here in pertinent drafting history. None of it was addressed in *Heller* or *McDonald*.

What is yet more dispositive, the purpose of using different terms that cannot be said to be synonymous, which to Story also would be “obvious,” can be found in the different meanings given in founding documents. “Abridged” received its classic usage in the First Amendment to protect the

“great” individual rights, as Madison introduced them to Congress. “Infringed,” in an amendment to the Militia Clauses long associated with federalism, was used to protect political or territorial sovereignty, which individuals did not possess, unlike states which jealously guarded it and did.

Examples of the sovereign usage of infringed abound in founding-era documents, some conclusive and also in plain view, some even contrasting infringed and abridged. To be sure, the founding record is not always consistent, like the court, but variations are similarly or otherwise explained.

Even the historical derivation of “infringed,” and how it was understood in the day, become obvious when one looks. As one example, nothing is more distinctly American than the cry “No taxation without representation” against a decade of encroachments by the British Parliament on the sovereignty of colonial legislatures, which led to the Revolution. Similarly distinctive is the term used to protest Parliament’s encroachments on American legislative sovereignty.

Had Justice Scalia consulted his co-author Garner’s *Dictionary of Modern Legal Usage*, whose editions offer examples of “*infringe on* [read *encroach* or *impinge on*] British sovereignty,” or a “city *infringes upon* [read *encroaches* or *impinges upon*] a county’s governmental function” (his emphasis and brackets) — what colonial legislatures protested, and the states feared Congress would do to their sovereignty over their militias, not to individuals. Or simply considering the root word “fringe,” as in border, to which the prefix “in-” is added, would explain what “infringe” really means: to encroach a border, as in the political border of federalism, just how it was used in the Second Amendment.

Justice Stevens in dissent, rightly insisting the Militia Clauses and Second Amendment are “quintessential examples of the Framers’ ‘split[ting] the atom of sovereignty’” into “two political capacities, one state and one federal, each protected from incursion by the other,” cited only its preamble and not its prohibition, overlooking that “infringed” has a meaning specific to that context. Had he applied the majority’s “atomistic, word-by-word approach” he parodied to the final word, he could have brought the elephant, the amendment, into full view.

Ironically the court itself often applies the sovereign meaning of infringed, just not to the Second Amendment. Compounding its assumption, it not only transposes infringed and abridged, but transplants infringed and its sovereign meaning to amendments where it is not found, such as the First and Sixth, overlooking its use and meaning in the Second.

The term “infringed” and its founding record are just some of the smoking guns Heller missed in upending 200 years of law. Other oversights of constitutional and historical truths by the court and today’s generation, which have forgotten or assumed away what was known to earlier courts and generations, exist as well. And while the Heller majority suggested the dissent and “hundreds of judges” had “overread” the court’s unanimous decision in 1939, actually the majority (and even the dissent) underread that and other precedents, for reasons that should also be obvious.

In sum, Heller, mistaken on many levels, never decided the question presented: whether D.C.’s handgun ban “infringed” a Second Amendment right. As a result there’s no reason to suppose the amendment’s meaning differs from what generations of Americans understood for two centuries. And because Heller construed none of the words it did expound in relation to “infringed,” as each must be under another rule laid down by Marshall, little may be left of Heller and McDonald that does not require reconsideration. For example, construing “the people” with the sovereign usage of “infringed” permits only a collective, not individual meaning, and constitutional right.

Like the rest of us, judges make mistakes. As Justice Breyer has said, “we’re human, and when it’s 5-4, obviously somebody’s wrong.” Justice Stevens, noting “the most careful craftsman occasionally overlooks” something important, has revealed his former practice, on catching an “obvious point that I overlooked,” of sending his clerks memos titled “Oops.”

Justice Scalia, who counsels judicial “self-abnegation” in divining original intent, last year issued his own mea culpa about a case expanding a “judge-invented doctrine,” stating “I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention. Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa*.” That commendable candor about glaring error remains to be applied to the ill-starred *Heller*.

Fiddling with the Wrong Term, the Republic Bleeds

It’s hard to overstate the facts or how accepting we’ve become of guns and senseless carnage, so long as we inflict it on ourselves in pursuit of a gauzy, misunderstood right. After *Heller*, guns surpassed the population for the first time, and proliferated to 357 million as of the latest 2013 data. Meanwhile, as the president indicated, 33,000 Americans are killed every year by guns (with 100,000 wounded or maimed), or 88 each day.

Since 9/11, after we poured billions into homeland security and invaded two countries to protect ourselves, 88 persons (counting San Bernardino) died from terrorism, the same number we lose every day to guns. In fact, in that period hundreds of thousands of Americans have died, as columnist Fareed Zakaria has observed, and “we have done ... nothing.” Similar reactions to the Paris attacks that left 130 dead included calls to increase security, bar immigration, and invade a third country, when the same death total from guns recurs here ... almost daily.

Most mass shootings involve domestic violence, a tragic irony given *Heller*’s sentimental rationale that the Second Amendment “surely elevates above all other interests” the right to guns “in defense of hearth and home,” for which the dissent noted there is “not a word” in its text or history. And nearly two-thirds of gun deaths also occur in the home, not from intrusions as *Heller* assumed, but suicide, due to ready access to guns for “self-defense.”

All forms of deadly violence, whether by domestic attack, suicide, employee, road-rage, or mass murder in schools, offices, stores, theaters, churches and military bases, even accidents, are far more easily and lethally carried out with guns than other means — which is why assailants use them, including on themselves.

So too with terrorism. Compare the attacks in Paris and its illegal assault weapons, or San Bernardino and its legal assault weapons, with a London subway attack the next week involving a knife (like its last terrorist case), leaving two wounded. How many San Bernardino workers would have died were knives used instead of assault weapons (or how many London subway riders could have but for its gun controls)?

The country has lost its way. Proud of its exceptionalism, it now is seen as exceptionally something else. Unlike our approach, satirized as “‘No Way to Prevent This,’ Says Only Nation Where This Regularly Happens,” gun violence is almost unheard of in most of the developed world. In Japan, 12 people were killed by guns in 2013 (10 due to crime syndicates). Our death rate is 50 times that of Germany. And our levels of guns and violence are incomprehensible to Britain and other former colonies. Australia

reportedly doesn't "understand America's need for guns." Its former prime minister, following 1997 bans and buybacks after its mass shootings, said in the Times: "Few Australians would deny that their country is safer today as a consequence of gun control." Canada requires a background check on all buyers and classifies firearms as nonrestricted (hunting rifles), restricted (handguns and semi-automatics), and prohibited (other handguns and automatic weapons). Britain itself, the direct descendent of "our English forefathers" in whom Heller found its history, has among the strictest controls and lowest violence in the world. Handguns and assault rifles are banned and most police are unarmed. British media assail "America's shame" and "obscene proliferation of guns." Their police report looking with "horror" at ours shooting unarmed citizens, another recurring crisis, in a country inured to gun violence.

Undeterred, gun proponents, assuming the question decided and there is at last a federal right, have pressed its enforcement in courts across the country, and for expansion of open- and concealed-carry laws and rollbacks of controls in state legislatures. Even Judge Posner, in a decision days before the Sandy Hook massacre, was constrained by Heller to apply its right of self-defense in the home to public carry, striking down an Illinois ban, noting a Chicagoan "has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress."

Gun-control advocates, likewise believing the issue decided, are left to argue Heller's vague dicta that the right is not absolute. Shifting from lobbying Congress to the states and localities, they cite each high-profile tragedy to advance their cause. Yet the pattern persists: outcries are renewed, new groups are formed, and polls provide support, but a pro-gun backlash results, momentum fades, no federal and few state limits are enacted, and change occurs at the margins. Even after Sandy Hook, 21 states relaxed, not tightened gun laws the next year, to allow guns on campuses, in churches, even bars. As a British commentator observed: "In retrospect Sandy Hook marked the end of the U.S. gun-control debate. Once America decided killing children was bearable, it was over."

Some now advocate a public-health approach, concluding political efforts have only led to legislative defeats in the face of the gun lobby's clout, and a sense of helplessness. Such a campaign modeled on those against smoking and drunk driving may seem promising. But the Supreme Court never guaranteed a right to smoke or drive drunk, or ruled restrictions unconstitutional, the trump cards gun-rights groups now hold in federal and state courts and legislatures, and ultimately the Supreme Court.

In the wake of San Bernardino, the court did decline to review a Chicago suburb's ban on assault weapons and high capacity magazines, as it did this June a San Francisco law requiring handgun container or trigger locks. Justices Thomas and Scalia dissented, finding the former "flouted" and other in "serious tension" with Heller and McDonald. Some read into the denials of review that a majority of the court now countenances such restrictions, despite the dissents it should have reviewed the "splitless decisions," indicating there were insufficient conflicts in the lower courts to warrant review. Neither case addressed the meaning of "infringed."

There is a Better Way

The Second Amendment is neither mysterious nor hopelessly inscrutable, just grievously misunderstood by the gun lobby and many Americans today. The country is not exceptional in levels of mental illness or suicide, but in guns and gun violence. And we are not helpless in asking the court to consider what it never decided, the amendment's actual wording. If originalism is "adhering to the original meaning of the text of the Constitution — each and every word" as adherents insist, then whatever that meaning is,

the court has yet to say. And as the foregoing begins to demonstrate, when the full text is considered and operative verb is read with its subjects, the original meaning becomes clear — each and every word.

Even without this insight, Chief Justice Burger sought to reveal its truths and that of domestic tranquility to the last generation. So did Justice Lewis Powell, another conservative member of the Burger court, who questioned “why the Second Amendment or the notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number of murders in our society.” With gun tragedies, legislative stalemate, judicial uncertainty, and domestic and international revulsion mounting, and the error in overturning 200 years of settled law glaringly obvious, a mess only it can clean up, the court has the obligation to actually decide its full truths for this one.

Until that happens, arguably *Heller*, having neither addressed nor authoritatively decided whether anything was “infringed,” has no stare decisis effect (to stand by things decided) on the courts or legislatures. That would mean the court’s prior unanimous holding in 1939 (*United States v. Miller*, 307 U.S. 174), which *Heller* never overruled, as unanimously reaffirmed by the Burger court in 1980 (*Lewis v. United States*, 445 U.S. 55), is still controlling.

And though former Justice Stevens has proposed an amendment adding five words (“when serving in the Militia”), to make the amendment “unambiguously conform to the original intent” and remove the “emotional” gun-lobby argument that distorts debate on legislation to “minimize the slaughter caused by the prevalence of guns,” it is gun proponents that should be seeking an amendment if they believe inadequate state constitutions that do recognize an individual right. Gun rights and control groups have much to debate, just not the Second Amendment.

As Lewis affirmed, just as militias may be “well-regulated” as stated in the amendment, nothing in it prevents “legislative restrictions” on guns, including those called for in the *Times* editorial. Nothing prevents subjecting guns to product liability and research like the mattresses they are hidden under, or owners to training, licensing and insurance as required for the similarly dangerous cars they operate. And nothing prevents restoring domestic tranquility, and rejoining the rest of the civilized world, for which our nation once was a shining light.

—By Robert W. Ludwig, Ludwig & Robinson PLLC

This article is printed with permission of Robert W. Ludwig, © 2016 All rights reserved.

Robert W. Ludwig is a founding member of Ludwig & Robinson PLLC, a law firm based in Washington, D.C., with an office in Detroit and an affiliate in Germany. The firm has a national and international practice in trial and appellate litigation.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2016, Portfolio Media, Inc.