Law360 Expert Analysis

Heller Sequels And 2nd Amendment, Still Undecided: Part 3

By **Robert W. Ludwig**
August 24, 2017, 6:06 PM EDT

Part 1 of this article discussed the absence of sequels a decade after D.C. v. Heller (2008), in which the U.S. Supreme Court "creat[ed] a new blockbuster" individual right to guns "not apparent to the court for over two centuries," as critiqued by Fourth Circuit Judge Harvie Wilkinson, but seems not to want "to deal with any of the more unpleasant consequences of such a right." As generally overlooked, a narrow 5-4 majority, lacking guidance from academics who consider the Second Amendment "baffling," based its new "right" on implication and guesswork, perpetuating mass oversights. Also overlooked is another unpleasant consequence: Heller, in taking legislative "policy choices off the table," never decided the full amendment, including the prohibition and verb ("infringed") on which it rests.

Part 2 of this article, exploring the roots of the amendment, showed how the Heller majority, relying on dictionaries and English history a century earlier, and disregarding its debates, drafting and American history, was left with no understanding of the problems confronting the Framers, which had nothing to do with an individual right. Meanwhile, academics remain unable to square its circles, including how its (first two) clauses fit (overlooking its third), why James Madison drafted it the way he did, and why it quieted state fears over the right to arm their militia. Perpetuating received wisdom, they conclude we cannot know what it intended. Actually, we can, through fuller textual and historical analysis.

This third and final part of the article shows that Heller, not having decided the full text, has no binding effect. Its partial constructs are so untenable and unsupported, little remains of its implied right(s), that Seventh Circuit Judge Richard Posner scorned as a "snow job" and Chief Justice Warren Burger earlier called a "fraud." Also addressed are the pernicious consequences of allowing Heller's oversights, guesswork and dicta, and not the people's legislatures, to determine gun policy, leading to an "epidemic" of gun proliferation and violence.

Heller's Many Fallacies, On the Partial Amendment it Did Address

Heller is untenable, even on its partial construction of the prefatory and rights clauses, out of context, without construing the prohibitory clause. Despite overturning 200 years of understanding, it cited remarkably little or no support in implying each of the component individual rights it announced: (1) to "handgun possession" and "to carry it in the home," (2) to resist tyrannical government, and (3) to "lawful weapons … possessed at home." Its lack of support is apparent in its literal definitions, empty assertions, and conclusory analyses of the relation between the clauses it did construe.

(1) Right to "handgun possession" and "carry it in the home"

For example, in divining the historical meaning of "keep and bear Arms," the majority, as was said of Justice Joseph Story in 1833 before much founding record was published, lacked "any clue as to the categorical definitions the Framers had ascribed to them," though it had an "enormous" record available today.

Citing little of it, Justice Antonin Scalia used dictionaries to find the "most natural reading" of "keep" arms was to "have" or "possess," overlooking another term of art which, unsurprisingly in an amendment to the Militia Clauses, meant military readiness.

So too with "bear Arms." Conceding its meanings at founding included "to serve as a soldier" or "wage war," Justice Scalia insisted "it unequivocally bore that idiomatic meaning only when followed by the preposition 'against'" and "target of the hostilities," citing another dictionary. Continuing: "Without the preposition, 'bear arms' normally meant" to "'wear, bear, or carry … upon the person … or in a pocket, for … being armed and ready" in "case of conflict with another person,'" quoting Black's Law Dictionary.

Notice that Justice Scalia substituted one preposition ("against" a target) with another (conflict "with" a person), defeating his own logic. He also defeated the new right itself: If "against" or "with" another is not implicit in "bear arms," then Heller's guarantee could consist only of the right to "possess" and "carry" handguns in the home, not use them, depriving its implied right of any defense purpose.

In any event, Heller's notion that "bear Arms" had a military connotation only when followed by "against" is, as might be expected, debunked by the founding record. State constitutions used "bear arms" without "against" in a military sense (e.g., North Carolina (1776): "the People have a Right to bear Arms for the Defence of the State"; Massachusetts (1780): " … bear arms for the common defence"), and post-Heller database searches have turned up hundreds of such founding usages. Had Scalia not been so gun-shy about "what James Madison thought," his usual express concern, he would have found Madison used "bear arms" without "against" not only in his draft ("no person religiously scrupulous of bearing arms, shall be compelled to render military service") — which he dismissed, claiming it

“perilous” to cite “another provision deleted in the drafting process” (by the same author, in the same sentence) — but often. As one example, Madison in “The Federalist No. 46” referred to the people “able to bear arms.” — followed by a period, not a preposition or target.

So did other founders, including Thomas Paine, whose pamphlets inspired the Revolution and founding, employing the same usage as Madison, which cannot be so conveniently edited from founding usage. As Paine wrote in “Common Sense” (1776), enlisting Quakers to the cause: “If the *bearing arms* be sinful, … going to war must be more so,” adding “if ye really preach from conscience,” then “convince the world thereof, by proclaiming your doctrine to our enemies, for they likewise *bear ARMS*.” — (Paine’s emphasis), likewise followed only by a period, nary a preposition nor target.

Chief Justice John Marshall famously reminded in McCulloch v. Maryland (1819): “we must never forget, that it is a constitution we are expounding.” The next year Justice Story wrote in a militia case: “The argument that endeavours to establish such a proposition, is utterly without any solid foundation. We do not sit here to fritter away the constitution upon metaphysical subtleties.” Or as the court later said: “it is not to be frittered away by doubtful construction but … must have a reasonable interpretation, and be held to express the intention of its framers,” and “cannot be construed literally.”

Literally construing “bear Arms” as “carry arms,” upon a preposition distinction “utterly without solid foundation,” self-contradictory and contrary to Madison’s meaning (and “Common Sense”), Justice Scalia’s reasoning then became detached from the Constitution. He concluded: “Giving ‘bear Arms’ its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war — an absurdity,” “incoherent” and “Grotesque.” While it may be farcical for an individual to have such a right — the right the dissents implied, guessing like the majority — it was not at all for a state. Indeed, it was of existential importance to fledgling states at founding. By the amendment, the states retained their sovereign right to arms and thus “wage war” (when invaded, U.S. Constitution Article I, Section 10, Clause 3) — an obvious “idiomatic meaning” on which the majority and dissents otherwise agreed.

Having given literal definitions to terms of art, the majority, next analyzing the preamble and its relation to the rights clause, concluded the preamble “fits perfectly” its individual right, explaining the “debate with respect to the right to keep and bear arms … was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution.” By “right to keep and bear arms,” the majority meant the individual right it implied from dictionaries and ancient English history.

But as shown by the Virginia convention in Part 2 of this article, the state debates were over whether states retained a right to arm their militias, which all agreed was desirable, and whether that concurrent right should be left to implication or made express by amendment. Heller, apart from the proposal of one state (New Hampshire) and two rejected minority proposals, cited no debate in any convention over the right it implied or whether that individual right was desirable or necessary. Instead it loosely transposed the debates, just as it had "infringed" to "abridged," from the right extensively entertained (the states' right to arm their militia) to one not reported in most conventions (an individual right).

What is truly "absurd," "incoherent" or "grotesque" is the idea that an amendment proposed and drafted in response to state existential concerns (as Mason said to protect "our militia, our real and natural strength") intended that "bear Arms" meant "carry [handguns] in the home" (or "a pocket").

(2) Right to insurrection when "constitutional order broke down" as "safeguard against tyranny"

Heller next adopted the insurrectionist rationale and fallacy of gun groups for its implied right, to show how the rights clause "fit" the preamble, advancing, in dicta, a further implied right of individuals to armed insurrection against their government. "It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." Rejecting the argument that a state "organized militia is the sole institutional beneficiary of the Second Amendment's guarantee," the majority said that view "does not assure the existence of a 'citizens' militia' as a safeguard against tyranny." By "citizens' militia," it meant ad hoc militia, little better than mobs.

But what was understood, and assured by the amendment (as the majority half-conceded in asserting organized state militia were not its "sole" beneficiaries), was that state militia would serve to resist federal tyranny. The majority offered no explanation why, when the Constitution's Militia Clauses referred several times to "militia," each time to an organized state force available to be called into national service (as recognized by the court itself during the militia era), the militia could be anything different in the amendment that amended them. It also ignored explicit checks and balances in the Constitution.

Political theory did recognize a right of popular resistance to tyrannical government as Alexander Hamilton noted in "The Federalist No. 28," but against a "single" state having no subsidiary governments. In that case, the "citizen must rush tumultuously to arms, without concert" or resources, "except in their courage and despair." Though the majority didn't cite them, the theory was codified in state revolutionary constitutions like Virginia's, and proposed at its convention as an amendment: "That … the doctrine of non-resistance

against arbitrary power and oppression is absurd, slavish, and destructive[.]" Madison in a draft amendment (also not adopted) modified this revolutionary theory to one more consistent with republican government: "That the people have an … indefeasible right to reform or change their Government, whenever it be formed adverse or inadequate to the purposes of its institution."

In the new federal system, the federal and state governments ensured constitutional order in each other, as Hamilton continued. "Power being almost always the rival of power," the "general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government." It is "an axiom of our political system that the State governments will … afford complete security against invasions of the public liberty by the national authority." This was not just theory. The 13 colonies combined to defend "invasions of the public liberty" (i.e., infringements of legislative sovereignty) against a tyrannical king and Parliament, and ever since the states have served as counterweights to federal excess (including "resistance" to the present administration, California withholding police assistance to federal immigration agents). Madison in "The Federalist No. 46" likewise explained: "extravagant as the supposition is" of federal tyranny, "the State Governments, with the people on their side, would be able to repel the danger." That is, by "a militia amounting to near half a million of citizens with arms in their hands," "united and conducted by Governments" of the states.

These reciprocal powers are expressly enshrined in the Constitution. The (only) Guarantee Clause provided: "The United States shall guarantee to every State … a Republican Form of Government, and shall protect each of them … against domestic violence." The Militia Clauses further empowered the federal government, in response to Shays' Rebellion months before, to "call[] forth the Militia" to "suppress Insurrections," a check on excesses of popular sovereignty and mob rule. Conversely, as Heller recognized, the "organized militia" of each state was an "institutional beneficiary of the Second Amendment's guarantee … as a safeguard against tyranny," even if not in its view the "sole" beneficiary.

It is unclear why the majority believed ad hoc "citizens' militia" were needed or desired as a safeguard beyond state militia, for which it cited no support. It also failed to consider the contradiction of implying constitutional protection to ad hoc militia simply because some arose early in the Revolution before state assemblies reasserted authority, and not to ad hoc juries that also appeared (to tar and feather Loyalists). Just as the court never found ad hoc juries (or lynch mobs) constitutionally protected in the Sixth and Seventh Amendments (or U.S. Constitution Article III, Section 2, Clause 2), the majority had no more grounds to suppose ad hoc militias (or armed mobs) had such protection in the Second.

Heller, if not closely read, appears to retreat from its insurrectionist rationale in discussing U.S. v. Cruikshank (1876) and Presser v. Illinois (1886). Cruikshank vacated convictions of

a white mob for the infamous Colfax Massacre of black militia deputized to defend a Louisiana courthouse. Presser upheld an Illinois law that prohibited private militia from bearing arms and drilling in cities and towns. (Each narrowly held the amendment restrains only the power of Congress, not the states, the prevailing view until McDonald held it incorporated against the states.) Justice Scalia, citing Cruikshank, noted "'the people [must] look for their protection against any violation by their fellow-citizens' … to the States' police power," and Presser as holding the amendment "does not prevent the prohibition of private paramilitary organizations." But those limitations say nothing about the right Heller implied to possess guns against some future breakdown of the constitutional order.

The notion of an individual right to guns as a check on tyranny, the pernicious pablum of the National Rifle Association and other gun groups, has persisted too long. Misinformed insurgencies include Ruby Ridge and Waco, and recently over federal land in Oregon. As noted in my article "Court Nominee, Guns, and Constitutional Illiteracy" (Law360 Mar. 15, 2016), even Sen. Ted Cruz, R-Texas, has proclaimed the amendment "serves as a fundamental check on government tyranny" (misciting Justice Story who stressed "the importance of a well regulated militia"), risking his office by giving "aid or comfort" to "insurrection or rebellion" (as then occurred in Oregon), under another overlooked provision: the 14th Amendment disqualification clause.

Presented an opportunity to put this dangerous distraction to rest, the majority, needing some rationale to explain how the preamble fit its implied right, endorsed it. Predictably, since Heller's endorsement there have been almost weekly "incidents of insurrectionist violence (or the promotion of such violence)," as catalogued by the Coalition to Stop Gun Violence on its "Insurrectionism Timeline." The Southern Poverty Law Center tracks private militias and radical anti-government groups, typically spouting "a set of baseless conspiracy theories about the federal government working to destroy the liberties of Americans." But as Hamilton explained, it is the states that "afford complete security against invasions of the public liberty" by the federal government, as preserved by the Second Amendment.

A constitutional republic "leaves no room for insurrection," explained Paine. "America has the high honor of" giving "the world the example of forming a written constitution by" elected conventions "and improving them by the same procedure." Abraham Lincoln cited the same "great lesson," that what men "cannot take by an election, neither can they take" by rebellion.

That lesson, and the corresponding "axiom of our political system," both seem to have been lost on the court. Heller undermines the former by perpetuating insurrectionist myth (even by U.S. senators), and defeats the latter, intended as one-half of the bulwark for constitutional order, tossing federalism and the existential right of states to arm militia, preserved by the Second Amendment, "overboard like tea."

(3) Right to “lawful weapons” “typically possessed” at home

Another key Heller rationale and fallacy is that citizens could bring any “lawful weapons that they possessed at home to militia duty,” including handguns.

Justice Scalia devised this construct in dismissing, as a “mighty rock” and “virtually unreasoned,” the court’s last Second Amendment case in U.S. v. Miller (1939), a unanimous decision followed by “hundreds of judges,” that the amendment “guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia,’” as reiterated in Lewis v. U.S. (1980) by the Burger court.

To distinguish Miller, Justice Scalia wrote: “We think that Miller's ‘ordinary military equipment’ language must be read in tandem with what comes after,” namely arms “of the kind in common use at the time." Saying the dissents and all those judges “overread Miller,” Scalia read what came after as arms “typically possessed by law-abiding citizens,” or “lawful weapons … possessed at home.”

Justice Scalia did not substantiate this notion with actual evidence, quoting only one Oregon case: "‘In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.’ State v. Kessler, 289 Ore. 359, 368 [] (1980) (citing G. Neumann, Swords and Blades of the American Revolution 6-15, 252-254 (1973)).”

Kessler involved billy clubs, not guns. Its statement is nowhere supported in its cited authority, “Swords & Blades” (subtitled “encyclopedia of bladed weapons — swords, bayonets, spontoons, halberds, pikes, knives, daggers, and axes”), certainly as to “small arms” as inserted by Justice Scalia. Its next sentence: “A colonist usually had only one gun which was used for hunting, protection, and militia duty,” is also not supported by "Swords & Blades," nor in its other authority (Heller did not cite): “W. Moore, ‘Weapons of the American Revolution,’ 8 (1967),” at least at cited page 8. It appears at page 59, which continues: “When the [Revolution] began, there was an extreme scarcity of military guns,” but by “1775, gunsmiths throughout the country were under contract to local Committees … of Safety to produce muskets,” and produced “these Committee of Safety muskets” to each colony’s “own specifications.” Meanwhile, “Swords and Blades” at page 22, which Kessler (and Heller) did not cite, cautioned against “romantic notions associated with early firearms, swords, and polearms,” noting “it was the bayonet which ultimately determined … 18th century battles” including “our War for Independence,” a “critical role … spelled out in contemporary military texts” whose “importance has been long overlooked.” Bayonets of course were affixed to muskets. Page 24, also not cited, continued: “At the outbreak of the

fighting, few Americans even possessed bayonets," but "awareness of this need was immediate and Congress recommended in 1775 that each state require its militia to carry the bayonet …" And Kessler's speculation (following its sloppy citations) — "Therefore, the term 'arms' as used by the drafters … probably was intended to include those weapons used by settlers" — was no more warranted as to clubs than Heller's about handguns (excepting pistols for officers, cavalry and sailors), each contradicted by what was debated and drafted.

Miller itself explained just what it meant by arms "in common use at the time," quoting at length similar Massachusetts, Virginia and New York militia statutes, the latter requiring in 1786 that militiamen have "a good Musket or Firelock, a sufficient Bayonet and Belt." Or had Justice Scalia looked to other primary sources, such as Gov. Thomas Jefferson's "Notes on the State of Virginia" (1781), published in 1787, he would have found: "The law requires every militia-man to provide himself with the arms usual in the regular service" — not any "lawful weapons that they possessed at home" as the majority supposed.

Michael Waldman, president of the Brennan Center for Justice at NYU School of Law, in "The Second Amendment, A Biography," cited similar history: "Colonial legislatures repeatedly passed laws requiring able-bodied men to obtain military-quality muskets[.]" During the founding period, the Articles of Confederation required the states to supply militia with arms, to be kept in "public stores." Jefferson echoed that practice in a 1788 letter to Madison (endorsing amendments thought essential, not mentioning any right to guns), writing: "discipline well the militia, & guard the magazines with them" (i.e., military depots where arms were kept). Months after the amendment was ratified in 1791, the Militia Act of 1792, an indirect taxation experiment due to post-war insolvency, required: "Every citizen … provide himself with a good musket or firelock" and "sufficient bayonet," and within five years "all muskets from arming the militia as is herein required, shall be of" uniform bore.

That was "precisely the way" state debates addressed the subject. Another former Gov. Patrick Henry noted "though our Assembly has, by a succession of laws ... endeavored to have the militia completely armed, it is still far from being the case." But when "the power of arming the militia, and the means of purchasing arms, are taken from the states," "If Congress will not arm them, they will not be armed at all," indeed there will not be "a single musket in the State." Col. George Mason warned that without a state right: "If [Congress] neglect to arm them," the militia "will be of no use." John Marshall, the future chief justice and a Federalist floor leader, also referring to muskets, said: "If Congress neglect our militia, we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militiamen?" Such arguments by both Anti-Federalists and Federalists would have been unnecessary had the founders believed militiamen could, as Heller supposed, bring any household weapon to militia duty. And Virginia not only endeavored to arm its

militia or required militiamen to obtain military arms, but provided by statute they return arms issued after the war.

This is but a sampling of American history, none addressed in Heller, which contradicts the linchpin of its implied right. Though it looked to British history to imply that right, oddly it didn't for its central component. British militiamen not only were "allowed to have a musket; they were required to," Waldman wrote. "More than a right, being armed was a duty."

Amendment Stood on Its Head

The majority that recognized an implied right to "handgun possession" and to "carry it in the home" (with 19th and 20th-century exceptions) stood the Second Amendment on its head: "It may be objected that if weapons that are most useful in military service — M-16 rifles and the like — may be banned, then the … right is completely detached from the prefatory clause." "It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms … highly unusual in society … . But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." That "fit" was not limited by modern developments: Pistols were of little use against muskets (with bayonets).

The disconnect should have served as a check (or trigger lock) on the majority to re-examine its holding. This was at least the third check it ignored in weaponizing, as a constitutional matter, handguns in the home. A second as warned by the dissents (echoed by Judges Wilkinson and Posner) was not to find a new blockbuster right and "fail[] to identify any new evidence supporting" it. A first was the full text.

Justice Story once wrote: "No Court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them." To construe the right "to keep and bear Arms" in a way that it becomes detached from its preamble stressing the "necessity" of a "well regulated militia" for the "security" of a "State," and hold it protects handguns to "carry in the home," not bearing military arms, is something "no Court of justice" can do when "another construction, equally," or here, far more "accordant with the words," exists to protect it: the right of the people (by their legislatures) to keep (normally in "public stores") and bear military arms. That right still accommodates today's "M-16 rifles and the like," for the defense of the state, as intended. And the right of the states to preserve republican government against federal tyranny remains, as recognized in part by Heller, a constitutional necessity as a complement to the Guarantee Clause.

Epic Legal Oversights, an Epidemic of Gun Violence

Heller, far from a “mighty rock,” rests on sand. This sampling of empty, almost risible positions begins to reveal its serious oversights and errors. Heller’s own conclusion that its construction no longer (if ever) served the object of preserving state militia, when another did and does, only confirms the impropriety of its implied right.

The 1990s began with Chief Justice Burger calling the notion of a constitutional guarantee a “fraud … on the American public by special interest groups.” Gun possession was a common law right as it always was (except in certain states that provided a constitutional right, usually misreading the Second Amendment), subject to laws, ordinances and judicial constraints deemed necessary for public safety, policing and to preserve the tranquility promised in the Constitution. As noted by historian Garry Wills: “That is why the gun advocates appeal, above pragmatism and common sense, to a supposed sacred right enshrined in a document Americans revere.”

As noted in Part 1 of this article, that “fraud” gained currency with Yale law professor Sanford Levinson’s article, “The Embarrassing Second Amendment,” which gave credence to individual right and insurrectionist theory upon superficial analysis, an academic drive-by shooting. It became a new “blockbuster” right in Heller, based on its own superficial analysis, an unfortunate drive-by shooting itself. Heller (like Levinson) is correct in one respect: The amendment had never been fully decided. That remains true today.

In an epic oversight, the Heller court purported to decide the Second Amendment without considering its full text. That is remarkable, especially for Justice Scalia and other court textualists. But for any judge to decide, or lawyer to advocate, the Constitution without addressing its full wording borders on malpractice. Being a long-standing mass oversight neither excuses it, nor justifies it as insignificant. It is rudimentary that “In expounding the Constitution … every word must have its due force, and appropriate meaning[.]” Justice Scalia’s own treatise states: “every word and every provision is to be given effect. None should be ignored,” — one of many such canons not followed in Heller, which simply wrote off the last provision of the Second Amendment. Or out of the Constitution, and with it, a clear exegesis of the “baffling” amendment.

Almost as surprising is the failure by the court, lawyers and academy to connect constitutional dots: to recognize that “infringed” and “abridged” are terms of art, one protecting sovereign and the other individual rights. Or to transpose two constitutional terms, as though they had no significance.

It is also astonishing the court cited as its sole authority — in declaring “hundreds of judges” “overread” its unanimous Miller decision that “arms” meant "military equipment" — a single billy-club case (citing a bladed-weapons encyclopedia) to hold militiamen could bring any “lawful weapons that they possessed at home to militia duty.” That 1980 case and flimsy

historical evidence, which the majority underread, if read at all, was the linchpin for its blockbuster right.

What is exceedingly odd, the majority ignored the actual “arms” debated in conventions that proposed the amendment. Even without reading the “enormous mass of material” Justice Scalia said “originalist” inquiry “required” — none cited in creating Heller’s “lawful weapons” construct since applied in hundreds of misguided cases — one can conclude the idea the Framers contemplated a militia of clubs, as Heller’s sole authority held, is absurd. So too Heller’s own notion the new capital district’s militia (which it soon had), or any other late 18th-century militia in this country (or Britain), would let would-be infantrymen bring pistols, with or without fixed bayonets, to militia duty.

Had the majority looked to primary sources, whether debates, militia acts quoted in Miller, or others, it would have had no basis to overturn D.C.’s handgun ban, much less 200 years of understanding. Absent this linchpin, the notion of a guarantee that Chief Justice Burger denounced as a “fraud,” explaining the amendment protected “well regulated” militia, could be said to remain just that.

Even more stunning, two years later in McDonald, after dozens more briefs by parties and amici, no lawyer or justice raised any issue with Kessler, or "Swords & Blades," though they represent the thin edge on which Heller tilted the Second Amendment, from 200 years of understanding to a new blockbuster right. Though Justice Breyer advocated reconsideration, noting: “Since Heller, historians, scholars, and judges have continued to express the view that the Court's historical account was flawed,” he cited as new evidence only English history, and raised no issue with Kessler. In response, Justice Samuel Alito wrote: “nothing written since Heller persuades us to reopen the question there decided. Few other questions of original meaning have been as thoroughly explored.” That statement is remarkable, given how little of the founding record the Heller majority actually explored. And that lawyers and judges are still not even reading a key case from 1980 and verifying its citations (much less applying original sources) indicates they are not doing likewise for the founding record from the 1780s.

These are just some of the mass oversights that have led to Heller purporting to decide the Second Amendment by implication and guesswork, while taking legislative policy choices off the table. “Disenfranchising the American people on this life and death subject” is “the gravest and most serious of steps,” Judge Wilkinson wrote in Kolbe v. Hogan (4th Cir. 2017). Earlier, he warned in U.S. v. Masciandaro (4th Cir. 2011): “We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights[.]”

Paying the price of epic legal oversights and miscalculation, contributing not just to a single act of mayhem but an epidemic of gun proliferation and violence, are scores of Americans with their lives each day. Hundreds more are physically or psychologically wounded, their families and communities with them, having economic consequences not only for dependents, but police and health services left to deal with the carnage. Or police themselves become part of the carnage, or add to it when shooting unarmed citizens, fearful of shadows (as Gen. Washington described militiamen), in attempting to serve communities awash in guns.

After Heller, particularly after McDonald expanded its holding against the states, guns exploded past the population for the first time, to 357 million as of 2013 data. Experiencing now an “epidemic of gun violence” decried in historic 2015 and 2016 front-page and presidential op-eds, which has since grown worse, 36,000 Americans die every year from guns, or over 90 each day, one every 15 minutes.

Justice John Paul Stevens, though calling Heller’s rationales “really quite absurd” in his book “Six Amendments,” downplayed its consequences, except where most dire. Noting that “nothing in” Heller or McDonald “poses any obstacle to the adoption” of preventative “stringent controls on the sale of assault weapons and more complete background checks,” he suggested the “failure of Congress to take any action to minimize the risk of similar tragedies in the future,” citing “multiple killings in Virginia, Colorado, and Arizona,” and the Sandy Hook Elementary School massacre, “cannot be blamed on the Court’s decision in Heller.” But that legal issue remains unsettled as to M-16 equivalents, with a Fourth Circuit en banc decision pending certiorari in Kolbe v. Hogan. It also ignores firearms a step below M-16s, and that no background check will prevent grievance shootings, proliferating along with guns post-Heller. And it overlooks Heller’s chilling effects on legislatures (and courts), raised in 2009 by Judge Wilkinson.

But Justice Stevens does not give Heller and McDonald a pass on massive handgun violence in (or outside) the home: It is “nevertheless profoundly important” to recognize “they curtail the government’s power to regulate the use of handguns that contribute to the roughly eighty-eight firearm-related deaths that occur every day.” As noted in my earlier article: Most mass shootings involve domestic violence, a tragic irony given Heller’s sentimental rationale that the Amendment "surely elevates above all other interests" the right to guns "in defense of hearth and home," for which Stevens’ 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."

Heller Has No Binding Effect: Courts Made and Can Unmake this “Mess”

To place dependence on any part of Heller's construction of (two-thirds) of the militia amendment, as Gen. George Washington warned the Continental Congress of the militia itself, "is, assuredly resting upon a broken staff."

Not deciding the full text, Heller can have no binding effect. No word of the Constitution can be considered without significance, a canon that applies a fortiori to the verb on which it rests. And because Heller construed no other word in relation to "infringed," as mandated by another canon, little is left that does not require reconsideration.

In other words, Heller settled nothing at all. Even its narrow holding is, at best, dicta. Courts "are not bound to follow [Supreme Court] dicta in a prior case in which the point now at issue was not fully debated" (Central Virginia Community College v. Katz (2006)). And like other "recent and erroneous constitutional decisions that create unworkable legal regimes," as Justice Stephen Breyer noted in McDonald, "stare decisis interests are at their lowest." The doctrine "may bind courts as to matters of law, but it cannot bind them as to matters of history," little of which was considered in Heller.

Nothing prevents the courts from considering what Heller never decided, the amendment's actual wording. If textual 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, no court has yet to say. And when the full text is considered and an overlooked verb is read with its subjects, the original meaning of the amendment becomes clear — each and every word. Other mass oversights make it even clearer.

As reminded by Justice Breyer, "we're human, and when it's 5-4, obviously somebody's wrong." Justice Scalia, who counseled judicial "self-abnegation" in divining original intent, issued his own mea culpa in 2015 about a case of "judge-invented doctrine" and "mess that I helped make," stating "its error has grown more glaringly obvious" and "stare decisis does not recommend its retention." Given "glaringly obvious" error in overlooking constitutional text, among other things, it's time for the courts to apply that candor to the ill-starred Heller.

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.

article is for general information purposes and is not intended to be and should not be taken as legal advice.