

Expert Analysis - Opinion

The Historic Legal Blunder That Enabled Our Gun Epidemic

Renouncing Heller By Deciding — Not Repealing — The Full Second Amendment

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Law360 (April 25, 2018, 5:37 PM EDT)

"Having forgotten there was an American Enlightenment and our founding history, we now have what prior generations did not: a 'gun epidemic.'"

—www.americanenlightenmentproject.org

As little noticed, today's gun epidemic arose after a closely divided [U.S. Supreme Court](#) in *District of Columbia v. Heller*[1] in 2008 declared a right to guns under the Second Amendment. Unnoticed also: Its full text, usages and history were never presented or addressed in *Heller*, though essential to its construction, and shed revelatory lights on its purpose and plain meaning.

Not deciding the full amendment, *Heller* ultimately will have no legal effect. Whether because *stare decisis* as established does not apply where a pivotal part of an enactment is

missed, or that and other serious oversights warrant it be overruled 9-0 in the Supreme Court, the result is the same: Heller receives a proper burial.

The late Justice Antonin Scalia, who wrote the majority opinion in Heller, once offered a mea culpa about “judge-invented doctrine” whose “error has grown more glaringly obvious,” saying in his 2014 dissent in Michigan v. [Bay Mills Indian Community](#) that “stare decisis does not recommend its retention. Rather than insist that Congress clean up a mess that I helped make, I would overrule” it.[2] That candor remains to be applied to the ill-starred Heller, whose effects grow daily more deadly.

Students “March for Our Lives”

Students, awakening to the abattoir of gun violence they’ve inherited, erupted in protest after the Valentine’s Day massacre at a Parkland, Florida, high school that left 17 dead and 17 wounded. Fearful of being shot in weekly school shootings, they led a March for Our Lives, followed by Town Halls for Our Lives, and last week’s National School Walkout. They were urged to stay on school grounds viewed increasingly like killing fields. Like students who inherited and protested the Vietnam War, they’re not going away until their demands are met for gun reform, or to Vote Them Out if politicians fail to act.

More deferential to authority than their Vietnam-era elders, they say they respect Second Amendment rights, at least as found by the “judicial activism” of a bare 5-4 conservative majority in Heller that “created a new blockbuster right” complete with unstated exceptions “not apparent ... for over two centuries,” criticized even by conservatives like Fourth Circuit Judge J. Harvie Wilkinson. Like most Americans it’s doubtful the students read Heller, but they seek only reforms allowed by its limited exceptions, including an assault-rifle ban, universal background checks, and a minimum age of 21 for purchases.

Calling them useful to minimize “mass killings of schoolchildren and others in our society,” but not enough to curb worsening violence, retired Supreme Court justice John Paul Stevens, a Republican who led dissents in *Heller* and the even more divided plurality decision in *McDonald v. Chicago* (2010),^[3] just wrote [a provocative op-ed](#).^[4] In it he encouraged students to “seek more effective and more lasting reform” and “demand a repeal of the Second Amendment.”

The backlash was swift. Constitutional scholars backing the “gun safety” movement, the moniker that truckles to extreme positions of the [National Rifle Association](#), issued their own op-eds: “A stupid way to fight our gun problem,” wrote Harvard Law School professor Laurence Tribe;^[5] “a gift the NRA doesn’t deserve,” said Michael Waldman, Brennan Center for Justice president and former President Bill Clinton speechwriter;^[6] “plays right into the hands of the @nra,” tweeted UCLA School of Law professor Adam Winkler (misstating that Stevens called for repeal for years).

Meanwhile this week, another shooting left four dead and two injured at a Waffle House in Antioch, Tennessee, its second mass shooting in eight months after a church shooting killed one and wounded seven. A Parkland survivor, Emma Gonzalez, tweeted: “Mass shootings occur in churches, in schools, at concerts, in waffle houses — just about anywhere. Except in other countries.”

A Cassandra Unheeded on *Heller*

These scholars are right to the extent repeal is politically futile, as doubtless the long-serving justice knows. Also misplaced was Justice Stevens' 2014 book proposing to add five words: “when serving in the Militia”;^[7] the amendment doesn’t need amending and means something else, as [my recent three-part article explained](#).^[8]

Justice Stevens otherwise is right, astutely recognizing the real obstacle to “more effective” reform is legal, not political. “Gun safety” advocates like Waldman, who asserts, “What is holding the country back is not the Constitution or court rulings, but legislatures in thrall to the intense minority of gun rights absolutists,” are tragically myopic: it is court rulings. Stevens is one of the few national voices who acknowledges it.

His 2014 book, recognizing “the slaughter caused by the prevalence of guns,” presaged the “Gun Epidemic,” declared the next year in a historic front-page editorial in the [New York Times](#).^[9] Stevens stressed it was “profoundly important” to know Heller and McDonald “curtail the government’s power to regulate the use of handguns that contribute to the roughly 88 [now 96] firearm-related deaths ... every day.” His recent op-ed named Heller again, still “convinced [it] was wrong,” for providing “the N.R.A. with a propaganda weapon of immense power,” noting another conservative, Chief Justice Warren Burger in 1991, called it a “fraud.”

“Gun safety” academics insist the country can “live with” Heller’s unsupported exceptions while Americans increasingly die, missing the giant lacuna behind the sudden “gun epidemic.” After Heller and McDonald declared a right to guns, proliferation exploded from 310 to 360 million, “now more guns than people.”^[10] Gun deaths averaging 31,500 surged to “epidemic” levels at 36,252 in 2015, and again to 38,658 in 2016.^[11]

As Justice Stevens recognized, incremental reform at the margins will not stem the growing crisis. Banning semiautomatic rifles like AR-15s and limiting high-capacity magazines to 10 rounds can be easily circumvented: a couple Heller-protected handguns taken from the home in a coat or bag are just as capable of mass slaughter, as occurred in shootings at Virginia Tech that killed 32 using semiautomatics and the Orlando nightclub that killed 49 with a semiautomatic pistol (and assault rifle). Universal background checks won’t reach private transfers, thefts or misuse of 360 million guns. Raising the minimum age would not have prevented most of the worst mass shootings.

And large mass shootings comprise a small percent of the 96 Americans killed each day. Daily mass shootings, usually with handguns, are so common they're no longer news. And handguns account for most deaths in the home where Heller enabled arsenals and record suicides (two-thirds of deaths), domestic violence and accidents, or when taken outside for emotional and grievance killings.

As Justice Stevens warned, it is because of Heller that the country is largely blocked from regulating handguns and other "common" firearms through the legislative process. Efforts at control have been marginalized and political discourse chilled. Laws to limit purchases to one a month have been overturned. Carry bans have been struck down, even by Seventh Circuit Judge Richard Posner who considers Heller "faux history" and a "snow job."

The country has a gun addiction, fed by Heller. Imagine trying to combat drunk driving after the court declared a right to drive drunk. Supremely frustrated like many Americans, Justice Stevens, treating Heller and the Second Amendment as the rock and a hard place, chose constitutional repeal as the easier course.

Actually, it is Heller, far from a mighty rock, that is vulnerable. That opinion and the narrative that has taken hold among both gun rights and safety groups is deeply rooted in ignorance about the Second Amendment. Contrary to conventional thinking, Heller is only one court case away from being renounced as the historic blunder it is, for elementary oversights of text and founding history.

Looking Without Seeing

"Knowledge is essential to understanding; and understanding should precede judging."

—Justice Louis Brandeis

"History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know."

—Justice Oliver Wendell Holmes

A "Mysterious" Amendment "Decided" by Guesswork

It is not just "profoundly important" to see Heller as a cause, but also that it purported to decide the amendment and take legislative choices off the table by guesswork.

Leading academics consider the amendment the "most mysterious provision" with "no definitive answer to what" it means, and insist to contend otherwise is "blowing smoke" — conventional wisdom that is wrong, as it often is.[12]

Justice Scalia, saying the court took "seriously" concerns over "handgun violence," confidently declared the "enshrinement of constitutional rights" take "certain policy choices off the table," guessing like everyone else.[13] Even Stevens in dissent was guessing: "Surely it protects a right that can be enforced by individuals" to keep arms for militia duty but not self-defense — a break-glass notion — or what Scalia mocked as a "right to be a soldier," "incoherent" and "Grotesque."

Parable of the Six Blind Men and Two-Thirds of the Elephant

It is important to see that Heller is not only guesswork, but guesswork over two-thirds of the amendment, which 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."

Heller. among other things, overlooked the prohibition and verb on which the amendment rests, as pointed out in [my Law360 article](#) weeks before Justice Scalia's death.[14]

One would think that in construing the right “to keep and bear Arms,” which the amendment commands “shall not be infringed,” the court considered the meaning of “infringed.” Yet nowhere did Heller, overturning 200 years of law, even address that term.

A textual oversight by any court is highly unusual, especially by Justice Scalia who deemed Heller a “vindication” of “textual originalism” and a “legacy opinion.” Infringed also was not addressed by Justices Stevens or Stephen Breyer in dissent, or in any party brief or dozens of amicus briefs by scholars, gun control and rights groups, and linguists.

Justice Stevens parodied the majority’s “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,” missing the last word himself. Calling the Militia Clauses and amendment “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,” Stevens cited the amendment’s preamble, not its prohibition, overlooking “infringed” has a meaning specific to that context which would have allowed him to “grasp” it. Two years later in McDonald, Stevens again cited the preamble: “Notwithstanding the Heller Court’s efforts to write the Second Amendment’s preamble out of the Constitution, the Amendment still serves the structural function of protecting the States from encroachment by an overreaching Federal Government,” still overlooking the clarifying prohibition.

Which Nimrod: the Biblical Hunter or Elmer Fudd?

It’s also important to know Heller and McDonald casually transposed infringed to abridged. Justice Scalia wrote: “Congress was given no power to abridge the ancient right of individuals to keep and bear arms,” equating the two with no analysis. Two years later in McDonald, Justice Samuel Alito also used abridged and infringed interchangeably. Justice

Clarence Thomas, partly concurring, defined abridge for the Fourteenth Amendment as “a limitation on state power to infringe upon pre-existing” rights, again equating the terms.

Transposing language “may sometimes be tolerated” to achieve the intent of legislation — as Chief Justice John Roberts did construing “state” to include “federal” exchanges under the Affordable Care Act (which Justice Scalia called “jiggery-pokery” and “pure applesauce”) — not the Constitution.

Infringed and abridged 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 ... would be to defeat the obvious purposes of both.”

Both are universally overlooked terms of art: infringed was used in the Second Amendment to ensure the legislative right of states over their militia; abridged was used to protect individual rights in the First Amendment and in all such amendments for 200 years since.

Textual originalism is part of the problem, a “dictionary-centered” doctrine Judge Posner calls “hopeless.” Under that superficial substitute for knowledge, or illusory shortcut to understanding essential to judging, courts often miss forgotten concepts.[15]

But had Justice Scalia stopped to address “infringed” and consulted Garner's Dictionary of Modern Legal Usage (by his frequent co-author), he'd have found an archaic meaning: “*infringe* on [read *encroach* or *impinge* on] British sovereignty” (Garner's emphasis and brackets). Without knowing that historical usage was behind the famous colonial protests against British “taxation without representation,” and what states feared Congress would do to their sovereignty over militias, he might have picked another, more popular meaning.

Yet Scalia could also have foreseen that a popular meaning was not the founding fathers' infringed, having offered a cautionary tale in an outtake to his treatise.[16] The tale

illustrated how Nimrod, known for millennia as an Old Testament hunter, acquired a new meaning after Looney Tunes' Bugs Bunny called his nemesis Elmer Fudd a "nimrod," meaning dimwit. Imagine construing the Old Testament by substituting Elmer Fudd for the famous Nimrod. Or transposing the verb in the Fifth Commandment from "shall not kill" to "shall not maim." That's what Heller and McDonald did, transposing the constitutional command.

Making the same mistake is the National Rifle Association. In 2012, NRA executive Wayne LaPierre declared on "Meet the Press" that it would be an "absolute abridgement" of Second Amendment rights to regulate assault rifles after the Sandy Hook Elementary School massacre.

Recently commenting on the "basic omission regarding infringed," Professor Jack Rakove of Stanford University, the eminent founding-era historian and lead on the historians' amicus brief in Heller, said: "If you don't do the work and explore the specific usages common in the 18th century, you just can't make sense of the story."

"Really Quite Absurd"

Justice Stevens also pointed out in his book that Heller's elevation of a common law right of self-defense to a guarantee, with little or no evidence that's what the framers intended, is "really quite absurd." Also absurd, though generally overlooked, are Heller's holdings.

First, Heller, construing two-thirds of the amendment up to "keep and bear Arms," found an oddly worded right to "handgun possession" and to "carry it in the home."^[17] Transposing infringed to abridged and using dictionaries for the rest, Heller transformed it to, in effect: "A disciplined citizen's militia, being necessary to the security of a free country, the right of individuals to possess and carry a handgun in the home, shall not be abridged."^[18]

Heller's second right to "weapons typically possessed by law-abiding citizens for lawful purposes,"[19] the dispositive legal standard in deciding Second Amendment cases since, is another tragicomical misstep of epic proportions. It rests solely on a 1980 case involving billy clubs, not firearms,[20] which miscites an encyclopedia of swords that contradicts it.[21] That flimsy case is the linchpin of a Heller fiction applied without question ever since.

Heller's final right to insurrection of "citizen militia" when "order broke down" as a "safeguard against tyranny," the pablum of gun groups, ignores constitutional bedrock: The amendment and Guarantee Clause are checks that ensure republican order in the federal and state governments. It's also dangerous, inspiring private militia that intimidated Charlottesville last year, and absurd on many levels, including that citizen militia (armed mobs) are no more protected than citizen juries (lynch mobs).[22] As Alexander Hamilton explained, it is "an axiom of our political system that the State governments ... afford complete security against invasions of the public liberty by the national authority," not citizens that "rush tumultuously to arms, without concert" or resources "except in their courage and despair." [23]

Needless Carnage, Misguided Disputes, and Waste

The effects of Heller are devastating. Since it opened the floodgates, there have been 300,000 deaths and counting, another every 15 minutes, with millions wounded physically or psychologically, already half the Civil War carnage sparked by Dred Scott v. Sandford.

There have been hundreds of misguided court battles over Heller's nonexistent rights, fictions and obiter dictum exceptions, all having nothing to do with the amendment.

Millions are wasted in litigation, lobbying and elections across the country in misplaced disputes over rights that do not exist, and by communities, schools, police, health services and businesses left to deal with Heller's aftermath.

A “Duty” and “Pleasure”: Renouncing Opinions that Overlook Text

The Problem is Legal

It is past time to recognize where the problem lies: A historic legal blunder that overlooked a pivotal portion of the Second Amendment in creating a right to guns and insurrection and all-too-predictable gun and insurrection violence.

Heller is the culmination of a long failure of the courts, bar and academy to understand the amendment. It is not “mysterious,” nor should any have presumed it to be: The founders knew what it meant and why. The first of two military amendments, it not only protected a right of the founding era (and today), but one of existential survival to the new states and young nation. That it fell quickly into disuse, like the Third Amendment on quartering soldiers in homes, should have aided understanding, not cut it off.

Yet divided Heller and McDonald courts — eschewing cautions of Justice Brandeis that knowledge essential to understanding precede judging, and Justice Holmes that history be studied to “know the precise scope of rules which it is our business to know” — proceeded, by guesswork, to enshrine a new right and take gun policy away from legislatures where it belongs.

Fortunately, contrary to common belief, Heller can have no binding effect, whether as bounded by its irrelevant question presented, epic failure to consider the full text, or impermissible transposition of constitutional terms, among many serious oversights.

Justice Scalia’s successor once wrote: “After all, it is the ‘duty of the judicial department to say what the law is,’ ... not to develop a rococo jurisprudence about ... a hypothetical law that Congress might’ve — but clearly didn’t — enact.”[24] Heller, not deciding the verb on

which the entire amendment rests, is “rococo jurisprudence” on “a hypothetical law” the First Congress and ratifying states clearly didn’t enact.

Stare Decisis Cannot Apply Where Text is Overlooked

“When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises.”[25]

In particular, “where a statute covering the subject matter has been overlooked, the doctrine of stare decisis does not apply.”[26] As one court held, though “it seems surprising,” the prior opinion “did not focus on or even consider the words ... we now recognize to be pivotal” and, “therefore, has nothing to contribute[.]”[27] Another admonished: “When a palpable mistake” is made in “overlooking a portion of the statute involved, ... we think it not only the duty, but ... pleasure ... to rectify the error and give expression to the law as written[.]”[28]

Overlooking an enactment is “‘Probably the strongest reason’ for not following a decision,”[29] as noted by the California Supreme Court in correcting a 140-year oversight strikingly like *Heller*. The petitioner in *Fluor Corp. v. Superior Court of Orange County* explained: “Despite the [prior] case’s high visibility, drawing amicus briefs on both sides,” it was “‘announced in ignorance’” of the statute in a “‘remarkable failure of the adversary system.’” The California court agreed that because the “relevant language and history” was not applied, the prior case “cannot stand.”

Taking the Country “to Hell”

The California court gave “a simple explanation for any prior relative obscurity” of the statute: Until a recent change in industry practice, “there was little cause for insureds to think about” an 1872 insurance statute.

Until Heller, there was little need to consider the prohibition: The preamble on protecting state militia, unique in the Bill of Rights, had been enough. It also wasn't "entirely the Court's fault" as Justice Scalia wrote of the court's last Second Amendment case.[30] Heller's oversight was invited by the District of Columbia in its question presented: "Whether [its gun laws] violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia," not whether they "infringed" any such right.

But unlike the California case, after Heller changed 200 years of practice, courts and lawyers still have not seen the light. Missing, inter alia, the text and a fictional standard for a decade, they have let Heller lead the country to a crisis.

Justice Holmes famously said, "If my fellow citizens want to go to Hell" it was his job to "help them." That's where Heller and its "gun safety" apologists are taking them. But it is not the court's job to take Americans where the Constitution manifestly never meant them to go.

The Constitution Provides for Domestic Tranquility, Not a Suicide Pact

After the Parkland shooting, Max Boot in a [Washington Post](#) op-ed — "The Second Amendment is being turned into a suicide pact" — fixed blame on politicians, "primarily but not exclusively Republicans," for their "idolatrous worship" of the amendment. In fact, a long list of Democrats, headed by President Clinton, former constitutional law lecturer President Obama, and Democratic-nominee Hillary Clinton, are on record as supporting a Second Amendment right to guns. So too, improbably, is former Congresswoman and shooting victim Gabby Giffords, and the Giffords Law Center to Prevent Gun Violence.

That mainstream leaders and even "gun safety" groups express a belief in an individual right to guns, after Chief Justice Warren Burger denounced it as a fraud, is stunning. That all nine justices in Heller posited variants of an individual right is yet more remarkable.

Tragically, today's political and judicial leaders, having forgotten what the founding generation meant, are leading the country to expand home arsenals, comprising as Boot notes a reported 48 percent of the world's civilian firearms, enabling with Heller the growing epidemic.

As the California court said of its 140-year oversight, "It is better that wisdom, or at least controlling authority, come to our attention late, rather than not at all." To end the gun epidemic, all that remains is to present controlling text, authority and founding history to the next court.

Meanwhile students, rather than move to Canada as Vietnam-era protestors did, might heed Justice Stevens' call for effective reform and seek what our neighbor, sharing our heritage and urban-rural divide, deems sensible. It classifies firearms as non-restricted (hunting rifles), restricted (handguns and semiautomatics) and prohibited (certain handguns and automatic weapons). That seems to work for gun rights and control groups, and schools. Against our 34 school shootings so far this year,[31] the number in Canada: zero.

To make real reform possible, what is needed is not repeal of the Second Amendment, but a court challenge to Heller. Having not construed the full text, among many other things hiding in plain sight, there is no legal way it can stand.

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[1] 554 U.S. 570 (2008).

[2] Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2045 (2014) (Scalia, J., dissenting).

[3] 561 U.S. 742 (2010),

[4] New York Times, Mar. 27, 2018.

[5] Washington Post, Mar. 29, 2018.

[6] [Los Angeles Times](#), Mar. 30, 2018.

[7] J.P. Stevens, “Six Amendments – How and Why We Should Change the Constitution” (2014).

[8] R. Ludwig, “Heller Sequels and 2nd Amendment, Still Undecided: Part 1” (Law360 July 20, 2017); Part 2 (Law360 Aug. 3, 2017); and Part 3 (Law360 Aug. 24, 2017).

[9] New York Times, Dec. 4, 2015.

[10] Washington Post, Oct. 5, 2015.

[11] See [Centers for Disease Control](#) and Prevention, "Fatal Injury Reports," Injury Prevention & Control: Data & Statistics (WISQARS), accessed Dec. 23, 2017 <http://1.usa.gov/1plXBux>'.

[12] See R. Ludwig, "Heller Sequels and 2nd Amendment, Still Undecided: Part 2 (Law360 Aug. 3, 2017).

[13] R. Ludwig, "Heller Sequels and 2nd Amendment, Still Undecided: Part 1" (Law360 July 20, 2017).

[14] R. Ludwig, "2nd Amendment Still Undecided, Hiding in Plain View" (Law360 Jan. 11, 2016).

[15] See, e.g., R. Ludwig, "The Foreign Sovereign Immunities Act: 'Bedlam' Redux" (Law360 Sept. 22, 2017) (showing "substantial contact" means "minimum contacts," using forgotten legal history to solve a 40-year linguistic mystery, ultimately persuading justices including Justice Scalia).

[16] B. Garner, "A Text on Textualism, Part 2, Garner and Scalia Offer More Outtakes from Their Latest Collaboration," ABA Journal (Nov. 2012).

[17] Heller, 554 U.S. at 635.

[18] Id. at 579-80, 592, 597-99, 635.

[19] Id. at 625, 720-21.

[20] See id. at 624-25 ("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)).”).

[21] See R. Ludwig, “Heller Sequels and 2nd Amendment, Still Undecided: Part 3” (Law360 Aug. 24, 2017).

[22] See *id.*

[23] A. Hamilton, “The Federalist No. 28”; see also J. Madison, “The Federalist No. 46” (drafter of amendment explaining same).

[24] *Prost v. Anderson*, 636 F.3d 578, 596 (10th Cir. 2011) (Gorsuch, J.).

[25] *Nat’l Cable TV Ass’n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1581 (Fed. Cir. 1991) (citing *Webster v. Fall*, 266 U.S. 507 (1925)).

[26] *State v. Mobley*, 83 S.E.2d 100, 108 (N.C. 1954).

[27] *State v. Sandoval*, 156 P.3d 60, 64 (Or. 2007).

[28] *Remey v. Iowa C.R. Co.* 89 N.W. 218, 222 (Iowa 1902).

[29] *Fluor Corp. v. Super. Ct.*, 354 P.3d 302, 333 (Cal. 2015).

[30] *Heller*, 554 U.S. at 623.

[31] P. Krishnakumar, “Since Sandy Hook, a gun has been fired on school grounds nearly once a week,” *Los Angeles Times* (updated through Mar. 22, 2018).