

## Time To Heed Justice Stevens' Criticism Of Gun Decision

By **Robert Ludwig** (July 19, 2019)

As tributes pour in for former U.S. Supreme Court Justice John Paul Stevens, who died Tuesday at 99 years old, perhaps none would have gratified him more than for the country to finally look to *District of Columbia v. Heller*<sup>[1]</sup> to understand how it worsens gun violence, as he warned to the end. Better yet, to find a way to overturn it.



Robert Ludwig

In a memoir published in May on his “first 94 years,” Justice Stevens called that 5-4 decision, which discovered for the first time in 200 years a blockbuster right to possess guns, “the worst self-inflicted wound in the Court’s history.”<sup>[2]</sup> Author of the lead dissent, he revealed a preemptive memo he circulated before Justice Antonin Scalia completed his majority opinion, in the hope the memo, or the “negative consequences” that “all could foresee,” would give “greater pause before announcing such a radical change in the law that would greatly tie the hands” of lawmakers seeking “solutions to the gun problem in America.”<sup>[3]</sup>

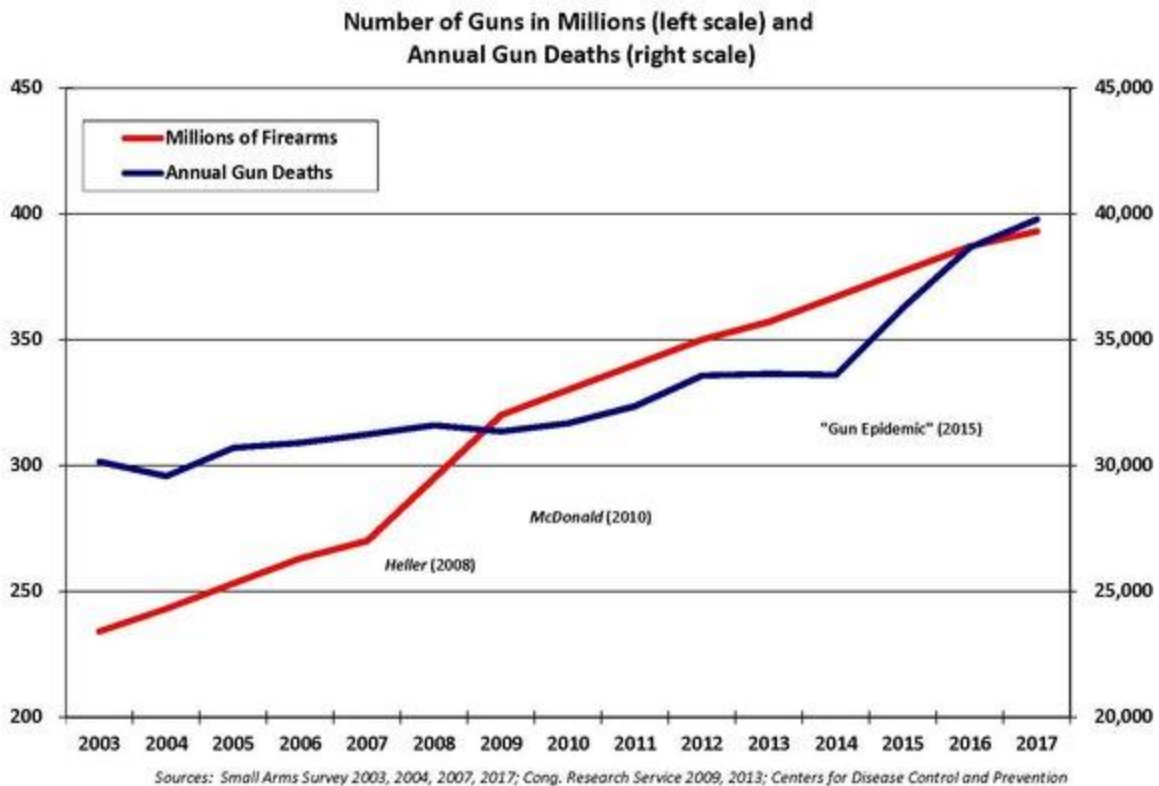
Five years ago, citing “the slaughter caused by the prevalence of guns,” Justice Stevens warned it is “profoundly important” to see how *Heller* “curtail[s] the government’s power to regulate the use of handguns that contribute to the 88 [now 109] firearm deaths every day,” urging that the right “to keep and bear arms” be clarified by amendment with five words: “when serving in the militia.”<sup>[4]</sup> Last year in a provocative op-ed<sup>[5]</sup> after the Parkland massacre, he called background checks and assault-rifle bans useful to minimize “mass killings of schoolchildren and others” but no cure, and encouraged students to “seek more effective and more lasting reform” and “demand a repeal of the Second Amendment.”

In his memoir Justice Stevens was even more emphatic: An amendment “to overrule *Heller* is desperately needed to prevent [more] tragedies.”<sup>[6]</sup>

### **Heller Turned a “Gun Problem” Into a “Gun Epidemic”**

As Justice Stevens anticipated, America’s “gun problem” became a “gun epidemic,” as declared in a historic page-one New York Times editorial in 2015.<sup>[7]</sup> It keeps growing, year after year.

The numbers tell the story. After *Heller* declared a constitutional right to guns in 2008, extended to the states by *McDonald v. Chicago* in 2010,<sup>[8]</sup> guns and annual gun deaths surged in tandem, from 310 to 400 million and 31,500 to 40,000, as seen in this graph:



Thanks to Heller and its negative consequences, the nation now suffers record gun violence, frequent mass shootings, and more and more school shootings, triggering last year's March for Our Lives.

Not only was this "foreseeable" to the Heller justices, courts throughout our history have known that unchecked gun proliferation and use tend to lead to impulsive, confrontational behavior, with deadly results. In 1832, a legal treatise cited by the majority and dissents condemned the practice of carrying loaded pistols, noting they "frequently turned a quarrel into a bloody affray, which otherwise would have terminated in angry words." [9]

### **Overturing Heller Is "Desperately Needed"**

Justice Stevens was also right that a way to overrule Heller is desperately needed. Treating Heller and the Second Amendment as the rock and a hard place, he viewed revision or repeal of the amendment as the easier course. But it doesn't need changing, serves too important a purpose in our complicated federal system, and means something other than what he believed.

Still, there is a way to overrule Heller, hiding in plain sight. As pointed out in my 2016 Law360 article, "2nd Amendment Still Undecided, Hiding in Plain View," published the month after the "gun epidemic" was declared and a month before Justice Scalia's death, Heller never decided the full Second Amendment. And having overlooked pivotal text, it cannot legally stand.

## A Historic Legal Blunder

Justice Scalia considered Heller his “legacy” opinion, a “vindication” of his doctrine of textual originalism, and “the best example” of “seeing what the meaning of the Second Amendment was at the time it was adopted.”[10] A generation of adherents insist on fidelity to legal text — each and every word.

That superficial doctrine — which relies on dictionaries as a shortcut for canons of construction, and knowledge that “should precede judging”[11] — is prone to oversimplification, faulty assumptions and bad law. The best example? Heller itself.[12]

As explained in my 2018 Law360 article, “The Historic Legal Blunder That Enabled Our Gun Epidemic,” Heller surprisingly did not address the full amendment before the court, 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.” Overlooking the prohibition and verb on which the amendment rests, Justice Scalia transposed “shall not be infringed” to “abridged,”[13] though they are not synonyms, as is obvious from any thesaurus, but constitutional terms of art. “Abridge” has been used the last 230 years — for the “great rights” in the First Amendment, where the first Congress rejected the substitution of “infringe,” and in all such amendments since — to protect private rights; “infringe” to protect public rights, of states over their militia. Nor was the meaning of infringed addressed by the dissents, parties or 66 amici curiae, or two years later in McDonald, which also equated the terms.[14]

Justice Stevens for the dissents parodied the majority’s “word-by-word approach,” citing the parable of the six blind men, each touching a different part, and failing to grasp the nature of an elephant. Recognizing the amendment is a “quintessential example” of federalism, 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,” the dissents themselves never touched its last part — “shall not be infringed” — which carried that meaning, and guaranteed a state right.

Historic too, all nine Heller justices found variants of a personal right, the decade after former Chief Justice Warren Burger denounced that notion as “the greatest piece of fraud.”[15] None explained the radical departure from settled understanding that the amendment protected a public right. A former nominee to the Supreme Court who could have changed Heller’s outcome, Judge Robert Bork, agreed the amendment “was designed to allow states to defend themselves against a possible tyrannical national government.”

And each called the other’s private right absurd. Justice Stevens called the majority’s private right of self-defense, implied largely from dictionaries and of which there is “not a word” in founding debates, “really quite absurd.”[16] The dissents’ own conjecture: “Surely it protects” an individual right to keep and bear arms for militia duty, was mocked by Justice Scalia as a “right to be a soldier or to wage war — an absurdity.”[17]

The District of Columbia invited Heller’s error, assuming away the amendment’s text and public meaning, in arguing it protects a private right. The question it presented asked the court to decide: “Whether [D.C. gun laws] violate the Second Amendment rights of individuals [un]affiliated with any state-regulated militia,” not whether the rights were “infringed” as written in the Constitution. The majority so held: “In sum, we hold that the District’s ban ... violates the Second Amendment.” That question disregarded not just text, but all but a private right. D.C.’s lawyer even began oral argument: “What is at issue this morning is the scope and nature of the individual right protected,” ignoring a public right.

The actual words and public meaning of the Second Amendment never had a chance.

### **Heller Cannot Legally Stand**

Overlooking text is “probably the strongest reason for not following a decision,” the California Supreme Court said in correcting a 140-year oversight “announced in ignorance” of an 1872 statute, a “remarkable failure of the adversary system” (as argued in the court below). Noting “[i]t is better that wisdom come to our attention late than not at all,” the court held because “relevant language and history” was not addressed, its prior case “cannot stand.”[18]

Having not addressed the amendment’s full text and history, Heller likewise cannot stand.

### **A Better, Validated Approach**

Heller’s oversights of legal distinctions — infringe and abridge, public and private rights — are part of a larger failure to understand founding and Enlightenment principles that underlie American constitutionalism.

Validating this distinction, a near-unanimous court last year distinguished public and private rights in a patent infringement case. Justice Clarence Thomas wrote: “This Court has long recognized the grant of a patent is a ‘matter involving public rights,’ not ‘private rights,’ correcting the common assumption that ‘most everyone considered a patent a personal right,’ as Justice Neil Gorsuch dissented.

Though that 7-2 opinion did not consider what “infringement” means in relation to patents (i.e., why the doctrine is not “patent abridgement”), it shows how quickly misconceptions can be corrected, even by justices in the Heller majority like Thomas. Correcting Heller will be even more decisive, finally putting to rest any notion of a private right.

### **Blind Spots Are Putting American Lives at Risk**

For constitutional scholars who call the amendment's text “baffling” and beyond comprehension, not to know infringe and abridge are constitutional terms of art — no more interchangeable than “patent infringement” and “patent abridgement” — is a serious problem. But for lawyers to argue and courts to decide a constitutional provision without construing its full wording borders on malpractice.

For Heller’s majority and dissents to find variants of an individual right the other called “absurd” is troubling enough. But for the majority to transpose the people’s right to bear arms to a facetious right to “to carry [handguns] in the home,”[19] forgets what the court “must never forget, that it is a constitution we are expounding.”[20] And for the dissents to find a right that was also a duty (to bear arms in a militia, subject to state fines and imprisonment if not exercised) — unlike any other individual right — makes no sense. That contradiction, the conventional wisdom of today’s revisionist scholars, should have been a telltale sign the interpretation is wrong.[21]

For Heller’s majority and dissents, and thousands of lawyers and courts applying its related right — to use weapons “typically possessed by law-abiding citizens for lawful purposes”[22] — not to check its support, is another dereliction. That “common use” fiction rests on a single case, involving billy clubs, which miscites, and misreads, a picture-book encyclopedia on swords and bayonets. Yet that flimsy test has been enforced across the country to undo

long-standing gun control. Worse, it is poised for extension to public carry, with government litigants still not challenging it.

It is with these blind spots, or worse, that national gun policy is now determined. Heller's "judicial craftsmen have confidently [taken] a policy choice ... 'off the table,'" reversed settled law "without compelling evidence" for doing so,[23] and accepted the negative consequences — all based on guesswork, on part of the amendment.

These are but some of the many blind-spots and systemic oversights of conventional wisdom today. Others include the real meaning and sources of the Second Amendment: who determined its "baffling" (actually clear) wording, when and why.

### **Increasing Stakes, to Public Carry**

The stakes are set to increase dramatically, and with them the epidemic.

Two weeks ago, in the first Supreme Court case in a decade that could extend Heller to public carry, *New York State Rifle & Pistol Association Inc. v. City of New York*, the city filed an extraordinary letter saying "this Court's grant of review" caused it to take a "fresh look," that its carry regulation was changed to "give[] petitioners everything they sought," a new state law prohibits localities from enacting such regulations making the case "doubly moot," and the U.S. Court of Appeals for the Second Circuit decision upholding its regulation should be vacated, after six years of litigation.

Further, should the court still require briefing (on Aug. 5), the city "do[es] not intend to address" the constitutional question. The petitioners opposed the city's "premature and procedurally irregular letter," which the court rejected pending a proper motion to dismiss. In effect, the city's about-face seeks to avoid responsibility for conventional arguments likely to produce another historic blunder.

New York City's abdication reflects diminished faith in the gun-control community's arguments that resulted in Heller, and growing fear of another blockbuster right. For that reason, the District of Columbia, which lost Heller, elected not to seek review of a 2017 U.S. Court of Appeals for the District of Columbia Circuit decision overturning its concealed carry law,[24] saying: "Public safety is [our] paramount concern." But "we must reckon with the fact that an adverse decision by the Supreme Court could have far-ranging negative effects not just on District residents, but on the country as a whole." [25]

Postponing the day of reckoning for local and state governments defending public carry laws likely will buy only months with other cases pending, and Justice Brett Kavanaugh now a reliable vote for granting cert.

Without a better approach — one that raises and allows the court to correct historic error — these cases greatly increase the odds it will soon expand Heller from the home to the streets, creating a new blockbuster right and level of gun violence.

### **Decide the Actual Amendment**

Chief Justice John Roberts has from time to time called out "when this Court needs to say enough is enough." [26]

It is past time for the courts, bar and academy to address the full Second Amendment. To stop assuming away text and longtime meaning. To stop turning a "gun problem" into a

“gun epidemic,” and one blockbuster right into another, once sensibly called a “fraud.”

Shortly before he died Justice Scalia disowned a case of “judge-invented doctrine,” convinced “it was wrongly decided” as was “glaringly obvious,” urging his colleagues to overrule it rather than insist Congress “clean up a mess that I helped make.”<sup>[27]</sup> Similarly, Justice Stevens issued “Oops” memos on catching an “obvious point that I overlooked.” Their commendable candor and humility remain to be applied to the ill-starred Heller decision. Only the court, not Congress or state legislatures, can clean up the mess it made.

Enough is enough: Decide the actual amendment. And pay Justice Stevens an ultimate tribute: Overrule Heller.

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[1] District of Columbia v. Heller, 554 U.S. 570 (2008).

[2] J.P. Stevens, “The Making of a Justice” 485 (2019).

[3] Id. at 484.

[4] J.P. Stevens, “Six Amendments – How and Why We Should Change the Constitution” 131 (2014).

[5] New York Times, Mar. 27, 2018. <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>

[6] “The Making of a Justice” 484.

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

[8] 561 U.S. 742 (2010).

[9] B. Oliver, “The Rights of an American Citizen; with a Commentary on State Rights, and on the Constitution and Policy of the United States” 178 (1832).

[10] B.A. Murphy, “Scalia, a Court of One” 390 (2014) (quoting NPR interview).

[11] Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting).

[12] For another, see “The Foreign Sovereign Immunities Act: Bedlam Redux” (Law360 Sept. 22, 2017) (recounting another decades-long inability of the courts and bar to resolve enigmatic text, similar staggering costs caused by a mere textual assumption that “substantial contact” requires more than “minimum contacts,” and how Justice Scalia and

others ultimately were persuaded “substantial” means “minimum”).

[13] 554 U.S. at 599 (“Congress was given no power to abridge the ancient right of individuals to keep and bear arms”).

[14] 561 U.S. at 758, 759, 761, 769, 788 (Alito, J.) (e.g., protection “against state infringement sometimes differed from” that “against abridgment by the Federal Government,” inverting their meanings).

[15] “The Making of a Justice” 483 (quoting 1991 appearance on PBS MacNeil/Lehrer News Hour).

[16] “Six Amendments” 132.

[17] 554 U.S. at 586.

[18] *Fluor Corp. v. Super. Ct.*, 354 P.3d 302, 304, 333 (Cal. 2015).

[19] 554 U.S. at 635.

[20] *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

[21] In another disconnect, the dissents said the term “the people” reminds “it is the collective action of individuals having a duty to serve in the militia that the text directly protects,” with “the ultimate purpose ... to protect the States' share” of “divided sovereignty.” *Id.* at 645. Noting the majority “offers no way to harmonize its conflicting pronouncements,” *id.* at 644, the dissents did not harmonize their conflicting individual and collective or state rights either.

[22] *Id.* at 625, 720-21.

[23] 554 U.S. at 679 (Stevens, J., dissenting).

[24] *Wrenn v. District of Columbia*, 2017 U.S. App. LEXIS 18881 (D.C. Cir. Sept. 28, 2017).

[25] Washington Post article Oct. 5, 2017, [https://www.washingtonpost.com/local/dc-politics/dc-will-not-appeal-gun-law-to-supreme-court/2017/10/05/e0e7c054-a9d0-11e7-850e-2bdd1236be5d\\_story.html](https://www.washingtonpost.com/local/dc-politics/dc-will-not-appeal-gun-law-to-supreme-court/2017/10/05/e0e7c054-a9d0-11e7-850e-2bdd1236be5d_story.html) (quoting D.C. Attorney General Karl Racine).

[26] *Armour v. Indianapolis*, 566 U.S. 673 693 (2012) (Roberts, C.J., dissenting); see also *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (Roberts, C.J.) (“Enough is enough.”).

[27] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 814 (2014) (Scalia, J., dissenting).