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Resurrecting the "Dead" Second Amendment: How the Libertarian Legal Movement Has Shaped Gun Control Litigation

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RESURRECTING THE “DEAD” SECOND AMENDMENT:
HOW THE LIBERTARIAN LEGAL MOVEMENT
HAS SHAPED GUN CONTROL LITIGATION

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Table of Contents

Abstract	1
Introduction	1
I. Traditionalists v. Libertarians in the Conservative Legal Movement	4
A. Traditional Conservatives	4
B. Libertarian Legal Movement	7
II. The Libertarian Individual-Right Theory and the Second Amendment	13
A. The Development of the Modern NRA	13
B. The Individual-Right Theory	15
III. Libertarianism in <i>Heller</i>	23
A. Background of <i>Heller</i>	23
B. Scalia’s Libertarian Analysis	25
1. Historical Analysis	25
2. Linguistic Analysis	27
3. <i>Miller</i> Dissent	29
C. Stevens’s Dissent	30
1. Historical Analysis	31
2. Linguistic Analysis	33
3. <i>Miller</i> Dissent	35
D. Analysis of the <i>Heller</i> Decision	36
E. Traditional Conservative Backlash	41
F. Epilogue	44
IV. Gun control Legislation Following <i>Heller</i> and <i>McDonald</i>	46
A. Challenged Laws Frequently Upheld	46
B. Divide Between Traditional Conservatives and Libertarians	49
1. <i>Peterson v. Martinez</i> (2013)	50
2. <i>Peruta v. San Diego County</i> (2014)	53
C. Epilogue.....	56
Conclusion	58

Abstract

For nearly two centuries following its adoption, the Second Amendment was largely ignored and even referred to as a “dead amendment.” Virtually all legal scholarship considered the right protected by the amendment to be a collective right written into the Constitution to protect local militias from a powerful federal standing army. However, beginning in the late 1970s a surge of libertarian scholarship began to emerge promoting the Second Amendment as a safeguard for an individual right to bear arms without any connection to military service. Promoted by the National Rifle Association and libertarian theorists, the individual-right theory began to gain popularity among legal scholars and historians, and in 2008 it was adopted by the Supreme Court of the United States in District of Columbia v. Heller. Following Heller, lower courts have primarily read Justice Antonin Scalia’s decision narrowly, upholding challenged gun control laws. One area of legislation, the restriction of concealed-carry rights, has served as the exception to this rule, as libertarian judges have successfully struck down such laws. The battle over the meaning of the Second Amendment between traditional conservative and libertarian judges and scholars illustrates a growing divide in the conservative legal movement. Questioning the traditional conservative reliance on judicial restraint, libertarians have slowly challenged conservative legal convention, aimed at limiting the scope of the American regulatory state. This thesis analyzes the conflict between traditional conservatives and libertarians, assesses the rise of the libertarian constitutionalism and its impact on Second Amendment litigation, and evaluates the future of the libertarian legal movement.

Introduction

From the time of the ratification of the Bill of Rights in 1791, the Second Amendment received little attention from either scholars or the Supreme Court of the United States. Labeled a “dead” amendment, the Second was interpreted as a protection of the right of state militias to bear arms. Contrary to the claims of a small group of constitutional scholars, it was not thought to give individuals a right to own or carry a weapon. The individual-right theory, called “a fraud” by Chief Justice Warren Burger, did not receive much attention or support until the late 1970s, when more conservative members of the National Rifle Association gained power at the group’s annual convention in 1977 (Toobin 2012). This new leadership pushed for the individualist interpretation, and it provided money and support for conservative and libertarian scholars to

breathe new life into the amendment. Despite initially facing harsh ridicule, the individualist model became conservative conventional wisdom and began to win over numerous historians and legal scholars.

In 2008, the U.S. Supreme Court endorsed the individual-right theory. In *District of Columbia v. Heller*, the Court ruled that the Second Amendment indeed protects an individual's right to keep and bear arms. Writing for the majority, Justice Antonin Scalia applied his "originalist" theory of constitutional interpretation to show that the writers of the Second Amendment intended to protect individual gun ownership. In a scathing dissent, Justice John Paul Stevens criticized Scalia's historical and linguistic analysis and accused the majority of ignoring the precedent established in the Court's decision in *U.S. v. Miller* in 1939. Despite being an apparent victory for individualists, Scalia's majority opinion does not invalidate all federal gun laws. In fact, the decision is quite narrow and simply states that the federal government cannot ban the individual ownership of handguns in the home.

In the wake of several tragedies involving gun violence, Americans began to look for ways to curb mass shootings, such as stronger gun control legislation. This renewed interest in gun control led to debate over not only the effectiveness of such reform but also its legality, all of which has brought new importance to the *Heller* decision. The pressing question—what exactly did *Heller* say?—must be answered in order to determine the future of American gun policy. Seven years after *Heller*, the answer to that question appears to be "not much." The fall of gun control laws predicted by gun-rights advocates has not happened. Lower courts have almost unanimously upheld popular gun control laws ranging from the denial of ownership for felons to the restriction of carrying guns in national parks.

Despite these victories for gun control advocates, one area of gun control legislation has successfully been defeated in a few cases. Laws prohibiting the concealed carrying of weapons have been struck down by the Seventh and Tenth United States courts of appeal. This thesis will examine and explain why these laws have been struck down. The first chapter will illustrate the developing fracture within the conservative legal movement caused by the rise of libertarian legal scholarship. The second chapter will explain the development of a libertarian interpretation of the Second Amendment and the National Rifle Association's role in the rise of this theory's popularity. The third chapter will analyze the *Heller* decision, showing how the libertarian individual-right theory of the amendment received support from the U.S. Supreme Court's conservative bloc. The fourth chapter will evaluate the impact of *Heller* on gun control legislation in lower courts and on how the traditional-libertarian debate has influenced judges. The thesis will conclude with an evaluation of the rise of libertarian legal scholarship and the implications of that scholarship for the conservative legal movement.

I. Traditionalists v. Libertarians in the Conservative Legal Movement

Partisan confrontations over the makeup and direction of the Supreme Court of the United States are nothing new. From President Franklin D. Roosevelt's 1937 court-packing plan to the more recent battles over the nominations of Robert Bork and Clarence Thomas, political parties have competed to shape the ideology of the Court. While these conflicts have influenced the Court in the past, a new struggle between competing legal theorists over the intellectual direction of the Court is the major legal confrontation of our day. The current nature of politics and the makeup of the Court today would have many believe this divide is between the Court's conservative and liberals, with pundits arguing that the Court is "inching right" (Lazarus 2013). This narrative is not entirely wrong. The Court's conservative bloc – Chief Justice John Roberts and Associate Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito – continue to recycle conservative arguments on most high-profile issues, usually voting together and defeating the Court's liberal minority. However, scholars are beginning to understand that the conservative legal movement is not a monolith. The ascendance of libertarian legal theory within conservative legal scholarship has created a growing divide among Republican-appointed judges and it has challenged their traditional beliefs about the role of judicial review. This chapter will examine the traditional conservative and libertarian legal movements and the growing divide between them.

A. Traditional Conservatives

Before examining the effects of the conflict within the conservative legal movement, it is essential to define the characteristics of each opposing side and identify the history of their development. The disagreement between judges and legal scholars described as traditional and

their libertarian counterparts centers on two questions regarding the proper role of the courts: First, what is judicial restraint? Second, should the conservative legal movement affirm it? Furthermore, the answers to these questions must be understood within the context of originalism, a popular theory of legal conservatism. The idea that judges must enforce the original meaning of the Constitution is a fundamental belief among those battling for control of the conservative legal movement, thus raising the question of whether originalism demands, or is undermined by, judicial restraint (Alicea 2013).

Considering the long history of dedication to judicial restraint within the conservative legal movement, the libertarian challenge to the belief is remarkable. The principle of judicial restraint has been a pillar of legal conservatism and it has a long history in American legal theory and case law. U.S. Supreme Court decisions invoke judicial restraint as early as 1810, when *Fletcher v. Peck* held that judges should strike down laws only if they “feel a clear and strong conviction” of unconstitutionality and that judges should “seldom if ever” declare a law unconstitutional “in a doubtful case” (*Fletcher v. Peck* 1810, 128). Chief Justice John Marshall’s majority opinion in *Fletcher* essentially argues that when plausible arguments exist on both sides of a dispute, courts should defer to lawmakers. Nineteenth-century legal theorist James Bradley Thayer followed Marshall’s argument and served as a leading figure for this insistence on a high level of restraint. Thayer argued that judicial review was appropriate only “when those who have the right to make laws have not merely made a mistake, but have made a very clear one, – so clear that it is not open to rational question” (Thayer 1893, 21). While this incredibly high standard of judicial restraint has slowly declined, traditional conservative judges and legal scholars still emphasize the importance of courts deferring to legislatures.

Yale Law Professor and U.S. Court of Appeals Judge Robert Bork stood as one of the most influential conservative legal scholars. Inspired by fellow Yale law professor Alexander Bickel, who once remarked “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now,” Bork argued our constitutional system was designed to balance majoritarian and counter-majoritarian interests, ensuring that majorities could not violate individual freedoms and that minorities could not stop majority’s legitimate exercise of rule (Alicea 2013).

Determining the boundary between majority power and minority protection is the duty that society has entrusted to the courts, and judicial review is the means for exercising it. For Bork and other traditional conservatives, a judge's personal preferences and values should not influence their decisions. Instead, judges must be averse to striking down popular legislation and remain deferential to legislative enactments. Courts must only intervene when an act is unquestionably unconstitutional (Bork 1990).

While the proper role of courts is one question used to frame the conflict between traditional conservatives and libertarians, some scholars view the disagreement as a matter of the level of skepticism brought to government. Popular assumption dictates that conservatives are highly skeptical of government, but when it comes to legal theory this is not necessarily the case. The clearest example of this pro-government conservative position is the Court’s decision in *Lochner v. New York* (1905). New York’s 1895 Bakeshop Act banned bakery employees from working more than 10 hours per day or 60 hours per week. Justice Rufus Peckham’s majority decision for the 5–4 Court struck down the law, citing the right to liberty of contract protected by the Due Process Clause of the 14th Amendment. The laissez-faire conservative majority that made up the *Lochner* Court adopted the activist notion of a non-existent liberty of contract

because of its disdain for the law on policy grounds. While liberals denounced the decision striking down this regulatory act, many of today's prominent traditional conservative legal scholars share their disdain. Traditional conservatives criticize libertarian legal scholars, like David Bernstein, who argue that *Lochner* was a fair decision supported by precedent (Bernstein 2011). In his 1990 book *The Tempting of America*, Bork described *Lochner* as “the symbol, indeed the quintessence of judicial usurpation of power” (Bork 1990, 44). He adds, “in wide areas of life, majorities are entitled to rule, if they wish, simply because they are majorities,” meaning that in most cases courts should defer to lawmakers and presume the constitutionality of a challenged law (Bork 1990, 139). The commitment to originalism, judicial restraint, and deference to legislatures is fundamental to the beliefs of traditionally conservative judges.

B. Libertarian Legal Movement

The conservative legal movement is not limited to traditional conservatives who share the same reverence toward judicial restraint. Following the political backlash against the Court's perceived liberal activism in the 1960s and 1970s, when landmark decisions legalized abortion, gave defendants procedural safeguards against self-incrimination, endorsed school busing, applied heightened judicial scrutiny to sex discrimination in government, limited the scope of executive power, and loosened the eligibility requirements for access to federal welfare programs, many conservatives viewed the Court as both endorsing a liberal wish list and adopting a new role of inventing rights previously unrecognized in constitutional law (Root 2010). These decisions inspired some conservatives to adopt the same strategies as their liberal counterparts. Like judicial liberals, political conservatives influenced by libertarian thought began encouraging an activist approach to the law. Instead of primarily emphasizing the protection of personal rights like their liberal opponents, these libertarian-leaning conservatives

extended the notion that courts must protect individual rights, including economic rights. David Kennedy, co-founder of the Institute for Justice, a libertarian public-interest law firm, explained that “with the lessons by the leftist activists of the sixties and early seventies in their use of the courts to obtain results which they were unable to obtain politically, there developed a movement to use the same tactics on behalf of more traditional, more conservative, more libertarian causes” (Root 2010). While traditional conservatives rely on judicial restraint and deference to majorities, libertarians declare that courts must place individual liberty at the forefront, “thus requiring government to provide the courts with a legitimate health or safety rationale in support of every contested regulation (Root 2010).

Political scientist Stephen Macedo was a leading libertarian challenger to the pro-government conservative judicial theory. Writing for the Cato Institute, a leading libertarian think tank, Macedo argued that leading traditional conservatives such as Bork and Reagan Administration Attorney General Edward Meese misunderstood the nature of the Constitution. In his book *The New Right v. The Constitution*, Macedo argued that “when conservatives like Bork treat rights as islands surrounded by a sea of government powers, they precisely reverse the view of the Founders as enshrined in the Constitution, wherein government powers are limited and specified and rendered as islands surrounded by a sea of individual rights” (Macedo 1987, 32). For libertarians, the Court must constrain governmental power in favor of individual liberty. Macedo’s Cato Institute played a major role in promoting this view and critiquing traditional conservative jurisprudence. Cato not only published Macedo’s book but also produced numerous popular articles and studies promoting a libertarian vision of the law, including *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1989), edited by Randy Barnett; *Forfeiting Our Property Rights* (1995), by Rep. Henry Hyde, *Simple Rules for a*

Complex World (1995), by Richard Epstein; and *Rule of Law in the Wake of Clinton* (2000), edited by Roger Pilon.

In October 1984, Cato hosted a conference devoted to the topic of “Economic Liberties and the Constitution.” University of Chicago law professor Richard Epstein and Antonin Scalia, then a federal appeals court judge, each represented the conflicting sides of the conservative legal movement. Scalia represented the traditional conservative view, arguing that courts should defer to legislatures and that “the Supreme Court decisions rejecting substantive due process in the economic field are clear, unequivocal and current... The position the Supreme Court has arrived at is good – or at least that the suggestion that it change its position is even worse” (Rosen 2005). In response, Epstein argued that the traditional conservatives stance represented the idea that “it is up to Congress and the states to determine the limitations of their own power” and ignores the Constitution’s “many broad and powerful clauses designed to limit the jurisdiction of both federal and state governments,” thus “totally subverting the original constitutional arrangement of limited government” (Root 2010). Attempting to revive doctrines long ago repudiated, Epstein argued for new libertarian interpretations of the Commerce Clause, the Fifth’s Amendments Takings Clause, the 14th Amendment’s Due Process Clause, and the Privileges and Immunities Clause. In order to take those provisions seriously, Epstein argued that some movement toward judicial activism is required in order to expand substantive due process on behalf of economic rights.

Epstein solidified his position as an intellectual leader within the libertarian legal movement. For him, libertarian legal theory required an aggressive judiciary willing to overturn mistaken precedents and strike down unconstitutional state and federal statutes, which included many of the laws underpinning the modern welfare state. According to Epstein:

“all individuals have certain inherent rights and liberties, including ‘economic’ liberties like the right to property and, more crucially, the right to part with it only voluntarily. These rights are violated any time an individual is deprived of his property without compensation...when it is stolen, for example, but also when it is subjected to governmental regulation that reduces its value or when a government fails to provide greater security in exchange for the property it seizes... Any government that violates them is, repressive” (Epstein 1985).

To Epstein, minimum wage laws and zoning regulations are examples of chains used by the United States to restrict the freedom of American citizens. Unlike their conservative counterparts who may also support a deregulated state, Epstein and libertarian theorists encourage judicial activism and seek to strike down laws on behalf of rights that are not explicitly protected by the Constitution, particularly laws that expanded state and federal power during the New Deal years.

The 1984 Cato Institute debate illuminated the divide between conservatives and libertarians. This debate represented what legal theorist Roger Pilon describes as “the first time libertarians threw down the gauntlet” (Root 2010). Epstein’s defense of libertarian legal theory and his critique of traditional conservatives inspired many libertarian legal theorists to begin promoting their ideas in conservative legal circles, and slowly the movement gained a dedicated and vocal following. Libertarian legal theory began to influence conservative groups such as the Federalist Society. The Federalist Society functions as a legal network and academic seminar that draws speakers from across the conservative spectrum. Because the organization does not take official positions on public policy questions, rising conservative law students and members of the Society have been exposed to the libertarian ideas promoted by Epstein.

Today, Georgetown law professor Randy Barnett is one of the most influential figures in libertarian legal theory. Barnett has served as the bridge between libertarian-leaning theorists and traditional conservative advocates of originalism. Until recently, many libertarians would not have considered themselves originalists. However, Barnett’s work has sought to bring the two

groups closer together. His theory purports to tie originalism to aggressive judicial review by contending that “the only basis for loyalty to the Constitution is that it is procedurally just: The procedures it requires are likely to ensure that laws are necessary to protect the rights of others... and proper insofar as they do not violate the preexisting rights of the persons on whom they are imposed” (Alicea 2013). With his belief in originalism, Barnett further argues for the adoption of a “presumption of liberty,” meaning that the government must “justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow ‘fundamental’” (Root 2010). In Barnett’s opinion, courts would presume that most challenged laws are unconstitutional. It is the duty of the government to establish that any law passed that infringes on individual freedom is necessary and proper. A law is considered proper when it “prohibits wrongful action or regulates right action, and it is only necessary if there were no less restrictive alternatives to the liberty-restricting means that were chosen” (Alicea 2013). Currently, Barnett’s presumption of unconstitutionality is the biggest competitor against judicial restraint within the conservative legal movement. Barnett’s theory not only “spurn[s] deference to popular enactments, it presumes most are invalid. Skepticism of legislative majorities replaces skepticism of judicial power” (Alicea 2013). For Barnett, courts should not be concerned with the will of popularly elected majorities; instead courts must focus on protecting individual liberty.

The presumption of liberty and unconstitutionality argued for by libertarians would dramatically change the American regulatory state. *Lochner*, noted above as an incorrect decision for legal liberals and traditional conservatives, is viewed as a triumph by libertarians. Michael Greve, a leading libertarian theorist at the American Enterprise Institute, argues *West Coast Hotel Co. v. Parrish* (1937) which upheld a state minimum wage law for women and

children and overturned *Lochner*, was a disaster that resulted in “the judicial abandonment of constitutional limits on government power that are inherent in the nature of a free society and the creation of a regulatory behemoth” (Rosen 2005). During the 1960s and 1970s, new independent regulatory agencies, including the Environmental Protection Agency and the Occupational Safety and Health Administration began issuing numerous new regulations, many of which libertarian legal scholars believe to be unconstitutional. Acknowledging that many of these regulations, along with the regulations created during the New Deal, are politically popular, libertarians have viewed judicial deference as a dead end for conservatives and believe that activist judges must begin to strongly defend individual liberty.

While economic rights are the primary focus of libertarian scholars, the Second Amendment serves as the most prominent example of libertarian victory in the Supreme Court. While the Second Amendment was once labeled a “dead amendment,” libertarian activism led to the Court’s adoption of the individual-right theory, a former fringe constitutional theory. The next chapter will consider the role of libertarians in the shaping of modern Second Amendment jurisprudence.

II. The Libertarian Individual-Right Theory and the Second Amendment

Since the ratification of the Bill of Rights in 1791, the Second Amendment had received little attention from scholars and the U.S. Supreme Court. Considered a dead amendment, the Second was interpreted as a protection of the right of state militias to bear arms. It did not, as a small group of constitutional scholars claimed, give individuals a right to own or carry a weapon. The individual-right theory, called “a fraud” by Chief Justice Warren Burger, did not receive much attention or support until the late 1970s when libertarian-leaning members of the National Rifle Association gained power at the group’s annual convention in 1977 (Toobin 2012). Even traditionalist icon Robert Bork argued that “the National Rifle Association is always arguing that the Second Amendment determines the right to bear arms. But I think it really is the people’s right to bear arms in a militia. The NRA thinks that it protects their right to have Teflon coated bullets. But that’s not the original understanding” (Bensimhorn 1991). This new leadership pushed for the individualist interpretation, and it provided money and support for conservative and libertarian scholars to breathe new life into the amendment. Despite initially facing harsh ridicule, the individualist model became conservative conventional wisdom and began to win over numerous historians and legal scholars. The sections within this chapter will examine the development of the NRA as it is known today, along with the meaning of the libertarian individual-right theory.

A. The Development of the Modern NRA

Without the leadership change within the NRA in 1977, it is likely that the individual-right theory would have remained a fringe constitutional theory and that the Second Amendment would have continued to guard solely the collective right to assemble locally organized state

militias. The NRA focused more on sport hunting and began to sponsor target shooting competitions and publishing a magazine with articles on hunting and advertisements for rifles. Until 1977, the group's motto was "Firearms Safety Education, Marksmanship Training, Shooting for Recreation." Even more surprisingly, the early NRA supported, and often helped write, many of the nation's first federal gun control laws, including the 1934 National Firearms Act and the 1938 Gun Control Act (Rosenfield 2013). Testifying before Congress in 1938, NRA President Karl T. Frederick supported the National Firearms Act, stating that "I have never believed in the general practice of carrying weapons. I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses" (Rosenfield 2013). After several summers of race-related riots and the assassinations of Martin Luther King Jr. and Robert F. Kennedy Jr, the Gun Control Act of 1968 was passed, strengthening and reauthorizing the FDR-era gun control laws. Following passage of the 1968 law, NRA Executive Vice-President Franklin Orth told the group's magazine, "The measure as a whole appears to be one that the sportsmen of America can live with" (Rosenfield 2013). Orth believed sportsman could live with the law, and most member of the NRA agreed. However, following the 1971 raid of a lifetime NRA member's home by the Bureau of Alcohol, Tobacco, Firearms and Explosives, a few passionate members within the NRA began to voice their resentment of the new federal law, and began searching for ways to change the group's mission.

Beginning in the 1960s, a few articles in *American Rifleman* began arguing that the Second Amendment meant the right of an individual to own a gun (Burbick 2006). However, during that time the Black Panther Party was the group most associated with this belief. By 1968, editorials in the magazine began to argue that the problem was fighting crime, not guns, and new members in the group became more interested in owning guns for self-protection, not hunting.

The split within the NRA began to widen, and in 1975 the Institute for Legislative Action, a new lobbying arm for the group, was created. Harlon B. Carter, former chief of the U.S. Border Patrol and a staunch libertarian, became the head of the Institute, and he started organizing members to expand and promote the individual-right theory to both everyday members of the NRA and lawmakers in Washington. A year later, the traditional, old-guard NRA Board of Directors fired Carter and his supporters and began efforts to return to the group's sportsman roots.

The attempt to de-radicalize the NRA failed. At the NRA's 1977 annual convention, Carter and his followers interrupted the agenda from the floor and changed the trajectory of the group. A new Board of Directors was elected, the lobbying Institute for Legislative Action was restored, and the group recommitted to fighting gun control and promoting the individual-right theory. Carter became the NRA's executive director and ushered in the age of the modern NRA by changing the group's motto to "The Right Of The People To Keep And Bear Arms Shall Not Be Infringed," carefully leaving out the Amendment's first clause, "a well regulated Militia, being necessary to the security of a free State," indicating the beginning of the group's attempt to forget the Amendment's connection to state militias. Soon, articles supporting the individual-right theory began appearing in not only *American Rifleman* but also respected legal journals. The NRA began to rewrite "American history to legitimize the armed citizen unregulated except by his own ability to buy a gun at whatever price he could afford" (Burbick, 2006). The libertarian insurgency within the NRA, and its expansive vision of the Second Amendment, had officially won control of the well-funded and influential group.

B. The Individual-Right Theory

Before examining the libertarian individual-right victory in the Supreme Court, this section will survey the arguments of libertarian theorists supporting the individual-right theory.

As libertarians rose to power within the NRA and advocated for the individual's right to the liberty of possessing a firearm, they began to influence legal theorists to pursue arguments aimed at dismantling gun control laws on constitutional grounds. Out of this movement to re-interpret the Second Amendment came the individual-right theory. Individual-right theorists argue that the Second Amendment has been misunderstood and that its history and text indicate a broad protection of the individual citizen's right to possess firearms. Like the other rights protected by the Bill of Rights, the right to keep and bear arms is a right that can be asserted against government infringement. It is not absolute, but it also cannot be ignored by legislators. Individualists believe the amendment has been unjustly ignored; and their scholarship shows that a vast amount of historical and textual evidence supports their claim of the existence of an individual right. Citing English Common Law and the history surrounding the adoption of the Bill of Rights, individualists declare that the framers of the Second Amendment clearly intended to defend an individual right. They believe the text evidently supports their assertion, rendering any other reading of the amendment inaccurate. Finally, individualists interpret *United States. v. Miller*, a 1939 Supreme Court decision upholding the National Firearms Act, as a triumph for their cause and use it to show the Court's endorsement of an individual right. As more scholars and historians accept their position, the champions of what has become the "standard model" have succeeded in persuading courts and the general public.

Libertarian individualist scholars begin their historical analysis of the Second Amendment with an examination of the English influence on the amendment's framers. After the Glorious Revolution, Parliament enacted the Declaration of Rights, which protected the most basic rights, including the right to bear arms. Parliament declared that "the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law"

(Hardy 2011, 319). For individualists, the text and its history make the individual nature of the right clear. The debates surrounding the inclusion of this right focused on disarmament bills, and words like “common defense” were dropped in favor of language more friendly to an individual right (Hardy 2011, 320). These scholars also refer to English jurist Sir William Blackstone, who wrote that the right to be armed was synonymous with the natural right of resistance and self-preservation (Hardy 2011, 320). Individualists stress the influence of Blackstone on the amendment’s framers. When the British complained about the Americans stockpiling arms, Samuel Adams responded, “It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense; and as Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression” (Hardy 2011, 320). For individualists, the framers of the Second Amendment clearly followed in the footsteps of the English and protecting the natural right of self-defense.

Historical analysis of the ratification process by individualists shows that the Bill of Rights was ratified with the intent to ensure that citizens would not be disarmed. Stephen P. Halbrook contends that “the Second Amendment was designed to guarantee the right of the people to have ‘their private arms’ to prevent tyranny and to overpower an abusive standing army or select militia” (Halbrook 1994, 83). Fearing disarmament by the federal government, the framers of the amendment recognized the importance of including the individual right to remain armed. Individualists frequently quote figures including James Madison, Alexander Hamilton, and John Adams in support of an individual right. Hamilton writes in *The Federalist* No. 28, “If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of

government” (Halbrook 1994, 72). Also indicating the importance of citizens remaining armed, Adams wrote that “arms in the hands of citizens may be used at individual discretion in private self-defense” (Halbrook 1994, 69). Halbrook’s book even borrows its title, *That Every Man Be Armed*, from a quotation by Patrick Henry. By frequently quoting these men, individualists attempt to show that the authors of the Second Amendment valued the right of the individual to possess arms.

Individualists also emphasize the recommendations made by states during the ratification process. During this process, five states suggested including the right to bear arms as a constitutionally protected right compared with just four states recommending the right to assembly and to due process (Kates 1983, 15). Further, only three states proposed protecting free speech rights (Kates 1983, 16). The support from these states shows how valued the individual right to bear arms was and that both Federalists and anti-Federalists supported its inclusion. The only debate was over how best to guarantee the right. Federalists urged Madison, the leading Federalist and supporter of the original Constitution, to draft amendments. Early in his notes, Madison recognized the importance of the right to bear arms and also wrote that the amendments “relate first to private rights” (Kates 1983, 16). For individualists, Madison’s notes show his intention to protect the right for individuals similar to rights such as freedom of religion and protection of the press. Anti-Federalist leaders like Samuel Adams also stressed the necessity of allowing private citizens to remain armed. Adams believed that the Constitution must be written with the guarantee that men would be able to retain their private arms as a check against the federal government and a standing army (Kates 1983, 8). The support of the private right to bear arms by both Federalists and anti-Federalists enforces libertarian’s beliefs in the individualist interpretation that the right to be protected was an individual right.

For individualists, the support found in their historical analysis is not even their strongest argument. Individualists claim that the text and language of the amendment unmistakably protects an individual right. Structurally, these scholars emphasize the operative clause, “the right of the people to keep and bear Arms, shall not be infringed,” as the commanding clause of the amendment (U.S. Constitution Amendment 2). Glenn Harlan Reynolds writes that “the right to keep and bear arms is not subordinate to the purpose of having a militia—the notion of a “well regulated militia” is subordinate to the purpose of having an armed citizenry” (Reynolds 1995, 473). The amendment should be read so that the militia, as referenced in the prefatory clause, properly exists and functions through armed citizens. The structure of the amendment indicates that ensuring an armed citizenry allows the formation of militias the Founders believed to be essential to protecting a free state.

Studying the words and phrases of the amendment, individualists contest many of the claimed meanings proposed by collectivists. First, individualists contest the meaning of “a well regulated militia.” Unlike collectivists, who view the militia as a formal fighting force, individualists see the militia as the whole adult male population. Individuals owned firearms and with those firearms formed the militias to which the amendment’s authors referred. To form a militia, individuals thus needed to own firearms, and the right to do so needed to be protected. Kates writes that “the amendment’s wording...made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people’s right to possess those arms” (Kates 1983, 18). To protect a free state, the individual right to bear arms needed to be guaranteed.

Next, individualists disagree with the meaning of “right of the people.” They believe this phrase solidifies their position that the amendment protects individuals. Argues Kates, “The phrase ‘the people’ appears in four other provisions of the Bill of Rights, always denoting rights pertaining to individuals” (Kates 1983, 12). Individualists cannot understand the collectivist claim that “right of the people” does not have the same meaning as the First, Fourth, or Ninth Amendments, all of which pertain in their view to individual rights. They believe it is foolish to think the framers of the Bill of Rights would use the phrase in the First Amendment, where an individual right is protected, and then change its meaning forty-six words later to a collective right (Kates 1983, 12).

The last controversial phrase found in the amendment is “to bear arms.” Individualists reject the collectivist argument that “to bear arms” is exclusively used in a military context. They cite several examples of the phrase used outside of a military context. First, scholar Randy Barnett highlights Thomas Jefferson’s Bill for the Preservation of Deer. This bill uses the phrase “to bear arms” in a nonmilitary context referencing hunting, thereby refuting the collectivist argument that the Amendment is connected solely to military affairs (Barnett 2004, 245). Barnett also refers to law professor St. George Tucker’s annotated version of “Blackstone’s Commentaries” where the phrase is used multiple times in the context of private ownership and not military use (Barnett 2004, 246). Barnett concludes his summary of evidence by presenting the minority report of the Pennsylvania ratification convention. The report states that “the people have a right to bear arms for the defense of themselves” (Barnett 2004, 246). This is an obvious example of the phrase used outside of military context. Individualists believe that the historical record definitively refutes the collectivist claim about the meaning of “to bear arms.”

Finally, libertarian individualists interpret *Miller* differently from collectivist scholars, who read the decision as an endorsement of the collectivist theory. In *Miller*, the Court was asked if the Second Amendment protected an individual's right to keep a sawed-off shotgun. The Court ruled that there was no evidence that the weapon bore "some reasonable relationship to the preservation or efficiency of a well regulated militia" (*U.S. v. Miller* 1939, 178). Despite what appears to be an obvious endorsement of the collectivist argument, libertarians believe *Miller* supports their individualist cause. Barnett and Kates claim that the Court implicitly recognized the Second Amendment as an individual right merely by hearing the case (Barnett and Kates 1996, 1152). Because the appellees were simply individuals claiming protection guaranteed by the Second Amendment and not members of a government-organized state militia, the Court could have ruled that they had no grounds on which to challenge the Second Amendment (Barnett and Kates 1996, 1152). If the Court supported the collectivist theory, these scholars argue that the Court would have dismissed the case on the grounds that the appellees lacked standing. Allowing the appellees to make their case as individuals not affiliated with any militia indicated that the Court recognized an individual right to invoke the Second Amendment. Individualists also claim that the decision can be read as saying that individuals have a Second Amendment right to possess firearms that might be useful in military service. They argue that *Miller* can be read to say that "if the sawed-off shotgun had been a militia weapon... the [appellees]... would have had a constitutional right to possess it" (Dorf 2000, 251). These libertarians believe the *Miller* Court took issue with the type of weapon. If the possession of a weapon commonly used in militias would have been questioned, individualists argue that the Court would have granted Second Amendment protection.

Because of the surge of research and scholarly articles, libertarian individualist scholars of the Second Amendment have declared the collectivist theory dead. Barnett and Kates (1996, 1259) claim that “the right to bear arms...seems no longer open to dispute,” and that “an intellectually viable response...has yet to be made.” The quantity of the work, however, does diminish the importance of the quality of their conclusions. Presenting a distorted view of history and of the constitutional text itself, individualists manipulate the past to support their present political agenda. Individualists not only cherry-pick quotes from influential leaders—and do so out of context—but also cite works written by early Americans whose views on gun rights were in the minority. Their arguments regarding the language of the text is weak, and their disregard of the amendment’s preamble is troubling. Most disturbing, individualists blatantly ignore the precedent established in *Miller*. Despite these shortcomings, this once fringe libertarian theory has been adopted by the Supreme Court. The following chapter will examine how the majority opinion in *District of Columbia v. Heller* reflects the findings of libertarian scholarship, the traditional conservative backlash against *Heller*, and the meaning and implications of the decision.

III. Libertarianism in *Heller*

This chapter will begin by describing the background of *District of Columbia v. Heller* (2008), followed by an examination of the historical and linguistic arguments presented by Scalia, strongly influenced by libertarian individual-right scholarship, and the arguments of his opponent, Justice John Paul Stevens, who presents the collectivist interpretation of the Second Amendment. While Stevens and the collectivists made the better argument, Scalia's individualist argument received support from the other conservative members of the Court, allowing the libertarian argument to triumph. The final section will conclude by exploring the traditional conservative backlash, along with describing the meaning of *Heller*.

A. Background of *Heller*

For several decades after the *Miller* decision, the Second Amendment was generally ignored. While lower courts offered contradictory opinions based on their interpretation of *Miller*, the Supreme Court largely avoided any cases regarding the Second Amendment. In 2008, the Court finally addressed the competing interpretations when it heard *District of Columbia v. Heller*. Focusing on a restrictive District of Columbia handgun law, *Heller* was the opportunity individualists had been waiting for. In a narrow 5–4 decision split along ideological lines, Justice Antonin Scalia penned the majority opinion. Scalia supported the libertarian individual-right theory and struck down the District of Columbia law as a violation of the Second Amendment using many of the arguments proposed by libertarian scholars. Dissenting opinions were written by Justices John Paul Stevens and Stephen Breyer, each arguing that the Second Amendment protects the rights of individuals to bear arms only as part of a well-regulated state militia.

Troubled by high levels of gun violence, the District of Columbia passed legislation in 1976 banning the possession of handguns by making it a crime to carry an unregistered handgun and prohibiting the registration of handguns. The law further stated that the chief of police may offer 1-year licenses and that any handgun kept at home must be unloaded and disassembled. Dick Anthony Heller, a District of Columbia security officer, applied for a permit to own a handgun for self-defense and was turned down. Heller sued the city, claiming that the law violated his Second Amendment rights (*District of Columbia v. Heller* 2008, 1390). The federal district court for the District of Columbia dismissed Heller's claim, but the U.S. Court of Appeals for the District of Columbia Circuit reversed the decision and sided with Heller, holding that the Second Amendment protected an individual's right to possess firearms and that the law violated that right (*District of Columbia v. Heller* 2008, 1).

On June 26, 2008, the Supreme Court affirmed the D.C. Circuit's ruling. First, the Court held that "the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home" (*District of Columbia v. Heller* 2008, 1). Next, the Court held that the right is not unlimited and that some laws, such as the prohibition of gun ownership by the mentally ill or bans on unusually dangerous weapons, were constitutionally acceptable (*District of Columbia v. Heller* 2008, 2). Finally, the Court concluded that the District of Columbia law was unconstitutional because it banned an entire class of arms that a vast number of Americans have chosen to use for lawful self-defense purposes (*District of Columbia v. Heller* 2008, 2).

B. Scalia's Libertarian Analysis

1. Historical Analysis

Like libertarian individualist theorists, Scalia asserts that the Second Amendment codified a pre-existing right to individually possess and carry firearms for self-defense (*District of Columbia v. Heller* 2008, 19). He begins his examination of the amendment's history with the English Declaration of Rights. Following the Glorious Revolution, the English, who feared standing armies and the threat they posed, obtained the guarantee that Protestants would never be disarmed. Scalia writes, "This right has long been understood to be the predecessor to our Second Amendment.... It was clearly an individual right...secured to them as individuals according to libertarian political principles, not as members of a fighting force" (*District of Columbia v. Heller* 2008, 20). For Scalia, the English are clearly protecting an individual right, a right later adopted by Americans. Individualists place high value on the words of Blackstone, who calls the right to possess firearms a fundamental and individual right. Scalia cites Blackstone to show that the right was meant to protect the English from public and private violence (*District of Columbia v. Heller* 2008, 21).

Next, Scalia discusses the ratification of the Second Amendment. He begins by introducing four state constitutions that were written before the ratification of the Bill of Rights. Each of these constitutions guaranteed a right to possess firearms similar to that contained in the Bill of Rights. Like many individualist scholars, Scalia believes that these constitutions, whose language is clearer, reflect the true meaning of the Second Amendment. Pennsylvania and Vermont use the phrase "That the people have a right to bear arms for the defense of themselves, and the state" (*District of Columbia v. Heller* 2008, 28). The constitutions of Massachusetts and

North Carolina also include variations of the phrase that can be interpreted to protect an individual right (*District of Columbia v. Heller* 2008, 29). Following the ratification of the Bill of Rights, nine states adopted protections for the right to bear arms. Seven of these states unequivocally used language protecting an individual right, which leads Scalia to argue that it would be unlikely for the federal Second Amendment to be an outlier (*District of Columbia v. Heller* 2008, 30). Scalia believes the state constitutions of Pennsylvania, Vermont, Massachusetts, and North Carolina, which protected an individual right to gun possession, served as examples for the drafters of the Bill of Rights and their writing of the Second Amendment. He also argues that the seven states that developed constitutions following the United States Constitution borrowed similar language found in the Second Amendment with the intention of codifying an individual protection.

Scalia believes the Second Amendment was included in the Bill of Rights to codify the pre-existing right of self-defense. Anti-Federalist rhetoric focused on the fear that the federal government would disarm the people and impose rule through a standing army. For Scalia, the first Congress, which was dominated by Federalists, rejected the changes proposed by the anti-Federalists that favored protection of the militia and instead chose to include amendments protecting uncontroversial individual rights, including the right to possess arms (*District of Columbia v. Heller* 2008, 31). This view is similar to the individualist contention that the drafters of the Bill of Rights highly valued the right to bear arms. Like individualist scholars, Scalia believes that the amendment was the codification of what was considered to be a natural right, not just a protection for militias.

2. Linguistic Analysis

Next, Scalia turns to the language of the Second Amendment, once again arguing along the same lines as the libertarian individualists. He begins his analysis by dividing the amendment into two clauses: the prefatory clause (“A well regulated militia, being necessary to the security of a free State”), and the operative clause (“the right of the people to keep and bear Arms, shall not be infringed”). Scalia believes the prefatory clause simply announces the purpose of the Amendment and does not limit the operative clause (*District of Columbia v. Heller* 2008, 3). He writes that while “this structure...is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose” (*District of Columbia v. Heller* 2008, 3). For Scalia, the prefatory clause may offer clarification regarding the operative clause, but it in no way restricts its meaning. After defining several key phrases found in both clauses, Scalia offers a conclusion regarding the meaning of the structure of the amendment.

Scalia begins his analysis of the operative clause with an examination of the phrase “the right of the people.” The Bill of Rights uses the phrase three times: in the First Amendment’s Assembly-and-Petition Clause, in the Fourth Amendment’s Search-and-Seizure Clause, and in an analogous phrase in the Ninth Amendment (*District of Columbia v. Heller* 2008, 5). According to Scalia, each of these examples refers to the protection of an individual right, not a collective right. The use of the words “the people” by themselves is found three additional times in the Constitution, each regarding the reservation of power, not rights (*District of Columbia v. Heller* 2008, 6). The phrase “right of the people,” when used in its entirety, always refers to an individual right. “The people” used in these six examples has been read to describe the entire political community. Therefore, according to Scalia, the amendment does not just protect a

subset of people, in this case the militia consisting of adult white males. Instead, it protects the rights of all Americans.

Scalia then moves to the phrase “keep and bear arms.” For Scalia, the word “arms” has the same meaning today that it did when the amendment was written. The 1773 edition of Samuel Johnson’s dictionary defined “arms” as weapons for either offense or defense (*District of Columbia v. Heller* 2008, 7). These weapons did not have to be related to military use or specifically designed for military use. Next, the phrase “keep arms” naturally reads as to have weapons (*District of Columbia v. Heller* 2008, 8). While the phrase was not commonly found during the founding era, several prominent legal writers, including Blackstone, used the phrase to refer to an individual right unconnected to military service. Scalia believes it is clear that “keep arms” referred to any individual possessing arms. The final phrase “bear arms” is the most controversial. Scalia writes that “bear arms” refers simply to carrying weapons and “in no way connotes participation in a structured military organization” (*District of Columbia v. Heller* 2008, 11). Several state constitutions enacted after the adoption of the Bill of Rights included the phrase “bear arms,” each clearly referring to a general individual right without connection to military service. Scalia acknowledges the existence of an idiomatic meaning of the phrase connecting to military service. However, he argues that the word “against” must follow “bear arms” in order to give the phrase the meaning of carrying weapons in military service. Every example used by collectivist scholars to show this military service meaning features the word “against” following the phrase in question; therefore it is inaccurate to say the writers of the Bill of Rights were referring to a right connected to military use (*District of Columbia v. Heller* 2008, 12–13).

Shifting his focus to the prefatory clause, Scalia next examines the phrases “well regulated militia” and “security of a free state.” He defines the militia as “all males physically capable of acting in concert for the common defense” (*District of Columbia v. Heller* 2008, 22). He also states that “well regulated” simply means having proper training and imposing discipline. Regarding “security of a free state,” Scalia argues that the “states” refers to the entire polity, not just individual states, and that the militia is necessary for its security because it makes a standing army unnecessary and serves as protection against tyranny (*District of Columbia v. Heller* 2008 24–25).

Given his understanding of each of these debated phrases, Scalia believes it is logical that the amendment protects an individual right. Like libertarian individualist theorists, he argues that the amendment was written to guarantee individuals’ access to arms so they could maintain militias to defend against potential invasion or tyranny. Scalia writes, “It is entirely sensible that the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia” (*District of Columbia v. Heller* 2008, 26). The right was codified to protect against the disarmament of militias by the new federal government. However, Scalia and individualists do not believe this suggests that preserving the militia was the only reason Americans valued the right to bear arms; self-defense and hunting were certainly more valued. Instead, they argue the prefatory clause announces that the amendment was codified to protect militias, whereas the operative clause demonstrates the individual protection of the right of self-preservation.

3. Miller Analysis

The most important case involving Second Amendment issues prior to *Heller* is *United States v. Miller* (1939). Scalia strongly disagrees with the emphasis on and interpretation of

Miller presented by collectivists. He argues that the basis for the case was the type of weapon used by the appellees, not the meaning of the Second Amendment (*District of Columbia v. Heller* 2008, 49). Scalia does not believe the Court there advocates the collectivist argument; rather it simply states that sawed-off shotguns are not protected by the Second Amendment. This argument matches perfectly with the argument proposed by many libertarian scholars. Believing this opinion indicates support for the individual-right theory, Scalia argues that *Miller* holds only that individuals may possess firearms that have “some reasonable relationship to the preservation or efficiency of a well regulated militia” (*District of Columbia v. Heller* 2008, 50). He adds that “had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen” (*District of Columbia v. Heller* 2008, 50).

Even if this interpretation is not accepted, Scalia argues it is wrongheaded of collectivists to read *Miller* as anything beyond another example of the Court ignoring the meaning of the Second Amendment. Looking at the details of the case, which include the fact that only the federal government submitted a brief, Scalia insists that the Court did not want to take this opportunity to determine the meaning of the Second Amendment. In short, he finds no indication that the majority’s ruling in *Heller* conflicts with any other examination of the Second Amendment by the Court.

C. Stevens’s Dissent

Scalia’s majority opinion explicitly represents the libertarian individualist theory, defended under the guise of originalism. In his dissent, Justice John Paul Stevens does not engage in the libertarian versus traditionalist debate; instead, he chooses to engage in the originalist debate. Stevens’s dissent represents the collectivist approach to the Second

Amendment that dominated constitutional theory prior to the development of the individual-right theory. While there is no definitive collective-right theory, its advocates generally believe that the Second Amendment grants the people a collective right to an armed militia, as opposed to a broad individual right to own firearms with limited government restriction. Collectivists do not view the Second Amendment as a barrier to federal or state gun control laws. They believe that the individual-right theory emanates from distorted historical analysis, perversion of the amendment's language, and ignorance regarding the Supreme Court's ruling in *U.S. v. Miller* in 1939. Collective-right theorists rely on historical analysis of English Common Law and the drafting history of the United States Constitution to demonstrate the collective nature of the right guaranteed in the Second Amendment. Close examination of the historical record shows that the writers of the Second Amendment intended to defend local militias from being disbanded by the federal government, not to protect an individual's right to own firearms. Collectivists also use linguistic analysis to show how individualist theorists have misread the amendment in order to promote their political agenda. Finally, precedent (specifically the ruling in *Miller*) supports the view that the Second Amendment protects the right to bear arms in relation to service in a militia. While collectivists are not in total agreement, these common themes make up the general collectivist argument. Stevens follows Scalia's originalist approach to the issues, showing that historical, linguistic, and precedent support the collectivist model.

1. Historical Analysis

Presenting an analysis of history similar to collectivists, Stevens strongly disputes the majority opinion. Beginning with Scalia's analysis of English Common Law, Stevens writes that the right protected in the English Declaration of Rights was "adopted in a different historical and political context and framed in markedly different language" and tells us little about the Second

Amendment (*Heller* 2008, 30). The inclusion of the right to bear arms by the English did not establish a general right of all citizens to possess weapons. Rather, it protected the right of some Protestants to bear arms under certain conditions, which included the allowance of regulation by Parliament (*District of Columbia v. Heller* 2008, 29). For Stevens, the English right was born out of a concern different from that behind the American Second Amendment. The English drafted their right to protect certain citizens from disarmament by a tyrannical king, whereas the American right came from the fear of a tyrannical federal government dissolving the militia. Historically, English monarchs had disarmed individual citizens, specifically Protestants, and the English Bill of Rights protected these citizens from such abuse. The writers of the Second Amendment did not fear mass disarmament of individual citizens, as did the English. Rather, they feared a domineering federal standing army that would render local militias powerless. Because of the major differences between the rights, Stevens dismisses the majority's use of Blackstone. Instead, he shows that Blackstone stressed the importance of preambles when interpreting the law, a lesson ignored by the Court (*District of Columbia v. Heller* 2008, 30). The arguments Stevens presents are precisely the same used by collectivists to dismiss the individualist claim that the English right to bear arms is analogous to the Second Amendment.

Stevens intensely scrutinizes the drafting history of the amendment. Putting much more emphasis on this history than does Scalia, Stevens thoroughly shows that the collectivist history of the amendment is much more convincing. Stevens adopts the collectivist view that the amendment is more about federalism and the allocation of military power than it is about individual gun ownership (*District of Columbia v. Heller* 2008, 17). After the Constitution was written, concerns were raised over the federal government's control of the local militias and over the size and power of federal military force. While the Constitution allowed Congress to arm and

train militias, it did not prevent Congress from potentially disarming the local forces. Anti-Federalists feared that without protection, local militias would be disarmed and a federal standing army would reign supreme. States were not concerned about the federal government taking away the guns of individuals. Rather, the fear was centered on the national military becoming too powerful.

When drafting the Bill of Rights, Madison received many proposals regarding the right of citizens to remain armed. Many of the proposals voiced concern over standing armies and the necessity of keeping militias armed. Several states also proposed amendments that demonstrated a clear and broad intention to protect the individual right to bear arms (*District of Columbia v. Heller* 2008, 21–24). With all these proposals in mind, it is important to note that Madison adopted the language of the proposals recommending protection of the local militias; he specifically avoided the language used in the broader proposals. By rejecting the proposals made by states advocating the protection of an individual right, Madison makes it clear that the amendment was drafted with the intention of protecting militias from disarmament by the federal government (*District of Columbia v. Heller* 2008, 23). This version of the drafting process is similar to the history proposed by collectivists, and it is the central point of Stevens’s historical analysis of the amendment

2. Linguistic Analysis

In his dissent, Stevens focuses on three sections of the text: the introductory language of the prefatory clause, the class of people within its reach, and the unitary nature of the right it protects (*District of Columbia v. Heller* 2008, 5). Beginning with the prefatory clause, Stevens writes that “the preamble to the Second Amendment makes three important points. It identifies

the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be 'well regulated'" (*District of Columbia v. Heller* 2008, 5). Stevens believes the language found in the amendment is similar to the language used in several State Declarations of Rights and highlights the importance of the militia and the fear of federal standing armies. The Second Amendment omits any language referring to the individual use of firearms for hunting or personal self-defense, which is important because two state declarations, Pennsylvania's and Vermont's, expressly protected these individual uses (*District of Columbia v. Heller* 2008, 6). This difference reinforces the idea that the prefatory clause of the Second Amendment announces a clear purpose: to protect the military use of firearms. Citing *Marbury v. Madison* (1803), Stevens argues that "it cannot be presumed that any clause in the constitution is intended to be without effect" (*District of Columbia v. Heller* 2008, 8). The prefatory clause declares the purpose of the amendment and gives meaning to the remainder of the text, and its importance cannot be diminished.

After establishing the importance of the amendment's preamble, Stevens examines the importance of the phrase "the right of the people." Criticizing the majority, Stevens argues that the Second Amendment is not similar to either the First or Fourth Amendments, as the Court claims. Stevens contends that the Court itself narrows the class of citizens protected by the Second Amendment. Law-abiding and responsible citizens are afforded the right to bear arms. However, felons and irresponsible citizens are still protected by the First and Fourth Amendments (*District of Columbia v. Heller* 2008, 9). Scalia offers nothing to reconcile the much narrower definition of "the people" applied by the Court to the Second Amendment with the broader definition applied to the First and Fourth Amendments. Regarding the First

Amendment, Stevens argues that “the right of the people” is used only when describing the right peaceably to assemble and to petition the government for a redress of grievances. Stevens contends that these rights “contemplate collective action” (*District of Columbia v. Heller* 2008, 10). The concerns of these protected rights involve actions engaged in by groups. Serving in a militia is the collective action that is being protected in the Second Amendment.

The final phrase Stevens examines is “to keep and bear arms.” He says “they describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities” (*District of Columbia v. Heller* 2008, 11). Stevens argues that bear arms is a familiar idiom that means to “serve as a soldier, do military service, fight” (*District of Columbia v. Heller* 2008, 11). By including the unmodified phrase “bear arms,” Stevens argues it is clear that the writers of the amendment intended to protect the possession of weapons for military purposes. If the intention was to protect the civilian use of weapons, phrases such as “for the defense of themselves” would have been included, as they were in the Pennsylvania and Vermont Declarations of Rights (*District of Columbia v. Heller* 2008, 12). With no reference to civilian weapons, the text of the operative clause naturally ties back to the purpose established in the amendment’s preamble. Stevens believes the phrase, when read as it would have been read at the time of the adoption of the Bill of Rights, clearly states that the amendment protects the right to have arms available and ready for military use.

3. Miller Analysis

Contrary to the majority, Stevens believes *Miller* was based not on the type of weapon used but on the difference between military and nonmilitary use of weapons (*District of Columbia v. Heller* 2008, 43). “Indeed, if the Second Amendment were not limited in its

coverage to military uses of weapons,” Stevens asks, “why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?” (*District of Columbia v. Heller* 2008, 43)

Stevens next argues that the decisional history of *Miller* is irrelevant and mentioned only because the Court knows its argument is weak (*District of Columbia v. Heller* 2008, 43). He says the Court’s contention that *Miller* does not contain a word about the amendment’s history is plainly wrong, and he quotes the opinion at length to show that the *Miller* Court did indeed research the history of the amendment (*District of Columbia v. Heller* 2008, 44). Stevens concludes, “The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion of the *Miller* Court... Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years” (*District of Columbia v. Heller* 2008, 44–45).

D. Analysis of the *Heller* Decision

Beginning with the historical analysis, Stevens and collectivist theorists present a thorough and logical examination of the history of the Second Amendment. The collectivist model appears to be a commonsense reading of sources and interpretation of the drafting process. On the other hand, Scalia and libertarian individualist scholars propose a distorted interpretation of history. The English Declaration of Rights is not analogous to the American Bill of Rights, and the individualist use of Blackstone is at odds with the theorist’s actual views. The English Declaration of Rights was not a general grant to all persons to possess firearms. Instead, it was a right that depended on the religion and social and economic status of an individual; more

important, it was subject to regulation by Parliament. It was not the codification of a common law right, as Scalia and individualists contend.

Ignoring and distorting the drafting history of the amendment, Scalia and libertarian individualists miss what appears to be the obvious intention of Madison and the state proposals on which he modeled the language. The Second Amendment was drafted to protect local militias from a powerful federal standing army, not to protect a supposed common law right to individually possess a firearm. If the meaning of the amendment relies on the original intention of Madison, it appears that the collectivists have made the stronger argument. Had Madison intended to protect an individual right, he would have adopted language similar to the proposals of states that wanted such a right protected. It is difficult to see why Madison would adopt collectivist language with the intention of protecting an individual right. This view, however, is advocated by individualists and accepted by Scalia. He and the individualist theorists choose to highlight selectively some areas of the drafting history of the amendment, while ignoring the history that challenges their view, such as early drafts written by Madison and the recommendations made by the states. By ignoring the evidence that supports the collectivist argument, individualists distort the actual intentions of Madison and those who helped him develop the Bill of Rights. Scalia contends that Stevens's reliance on Madison's deleted drafts and notes is perilous. However, it makes little sense simply to dismiss these sources when trying to understand the thinking of Madison and his intentions for the amendment.

Scalia's emphasis on the operative clause and the meanings he attributes to each phrase that he analyzes is similar to, if not exactly the same as, the arguments made by individualist scholars, whereas Stevens makes the same claims as collectivists. In the justices' disagreement over the linguistics of the amendment, Stevens makes the stronger argument. He and collectivist

theorists provide a more natural reading of the amendment that does not diminish the importance of the prefatory clause. Their analysis of the language used in the amendment also appears to be more accurate historically, even though collectivists appear to present an overwhelming amount of evidence supporting their claims regarding the meaning of the key phrases analyzed and the importance of the amendment's preamble. The arguments made by Scalia and individualists are less clear and not only distort the history surrounding the individual words and phrases of the amendment but also appear to attempt to change its meaning by distorting the structure of the amendment itself and emphasizing the operative clause while dismissing the preamble.

In his dissent, Stevens strongly refutes the arguments made by Scalia. He first argues that the Court's emphasis on the operative clause and dismissal of the prefatory clause is not how the Court ordinarily reads such texts (*District of Columbia v. Heller* 2008, 8). Scalia is wrong to begin his analysis with the operative clause and to use the preamble only to ensure that his reading of the operative clause fits logically with the purpose of the prefatory clause. In his decision, Scalia has essentially decided that the Court can render meaningless phrases found in the Constitution. To reach the conclusion he wants, Scalia takes a text that is at best ambiguous and ignores a preamble that may serve to allay any ambiguity. In response, Scalia justifies analyzing the operative clause first by arguing that to determine whether the prologue clarifies ambiguity, the Court must first establish that ambiguity exists in the operative clause. He adds, "Even if we considered the prologue along with the operative provision we would reach the same result we do today, since (as we explain) our interpretation of 'the right of the people to keep and bear arms' furthers the purpose of an effective militia no less than (indeed, more than) the dissent's interpretation" (*District of Columbia v. Heller* 2008, 5). This argument is weak and implies that the Court has the power to ignore words in the Constitution.

Scalia's comparison of the Second Amendment to the First and Fourth Amendments is also flawed. He responds to Stevens's criticism of the comparison by writing that the right to assembly is indeed an individual right not connected to an individual's membership in some "assembly," and that Stevens is wrong to assume that the right to petition is not an individual right (*District of Columbia v. Heller* 2008, 5). This justification, however, is simply not strong enough to withstand Stevens's argument that "the people" in the Second Amendment is not the same as it is in the First and Fourth Amendments. Stevens argues that while the First Amendment would surely protect a felon or irresponsible citizen to express himself freely, the Court rules that the Second Amendment protects only law-abiding and responsible citizens. It does not make sense for Scalia to argue that the "people" protected in the First Amendment is the same as the "people" referred to in the Second Amendment when the Court itself differentiates the two. To this argument, Scalia offers no response. Regarding the phrase "keep and bear arms," Scalia ignores dozens of "books, pamphlets, and other sources disseminated in the period between the Declaration of Independence and the adoption of the Second Amendment" where "bear arms" is interpreted as meaning to serve as a soldier (*District of Columbia v. Heller* 2008, 12). His claim that the phrase has only its idiomatic meaning when followed by the word "against" simply is not true when contemporary texts are closely studied. Stevens cites several examples showing a clear idiomatic meaning of the phrase without any additional words modifying its meaning. When read naturally, the amendment as a whole appears to protect the right to use and possess arms in conjunction with military service. If the amendment truly meant to protect the individual right to bear arms, additional clarifying language would be present.

As with their disagreements over the historical and linguistic analysis of the amendment, Scalia and Stevens once again divide along individualist versus collectivist lines. The

commentaries Scalia cites are the same ones referred to by individualist scholars, and the criticism of such sources by Stevens is the same as that offered by his collectivist contemporaries. Scalia and Stevens also interpret the decisions of the Court in the same fashion as do individualists and collectivists. Their disagreement particularly heats up over the meaning of *Miller*, with each justice hurling harsh words at his opponent. This point of contention is much more clearly in favor of Stevens and the collectivist argument, and each citation made by Scalia is thoroughly criticized by Stevens. When discussing the *Miller* decision, Stevens offers a strongly worded rebuttal to Scalia's interpretation of the decision that makes the majority's argument appear weak.

The uncertainties surrounding the history and language of the amendment offer an opportunity for valid debate. However, the meaning of *Miller* is quite clear and should not be contested. *Miller* states, "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made," clearly indicating the Court's decision that the amendment was tied to military service (*District of Columbia v. Heller* 2008, 44). Stevens presents a meticulous critique of Scalia's distortion of *Miller* that illustrates the true meaning of the decision. In an almost fiery conclusion to his argument, Stevens claims that Scalia does not actually believe the *Miller* Court insufficiently studied the history of the amendment. Rather, Stevens argues, Scalia and the majority simply did not like the conclusion the Court reached there. Scalia contends that while the meaning of the decision may be debated, it is "particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment" (*District of Columbia v. Heller* 2008, 50). However, this argument is wrong because it is clear that the *Miller* Court examined much of the same material as the *Heller*

Court. The Court's apparent decision to ignore the precedent established in *Miller*—and to do so without persuasive justification—is surprising and not consistent with the theory of judicial restraint. While the debate between Scalia and Stevens primarily focused on the flaws of originalism, Scalia's victory legitimized the libertarian individualist argument and overturned centuries of Second Amendment jurisprudence.

E. Traditional Conservative Backlash

The competing historical and linguistic analyses presented in Scalia's majority opinion and Justice Stevens's dissent reflects perfectly the divide between individualist and collectivist theorists. Despite having the more persuasive arguments regarding the history, language, and precedent related to the Second Amendment, Stevens and the collectivist model was rejected by the Court's more conservative justices. While Stevens had the stronger argument, Scalia had the votes, so the individual-right theory was endorsed by the Court. It is not surprising that the scathing and reasoned dissent from Stevens was supported by liberals. However, following the announcement of *Heller* many were surprised to hear criticism of Scalia's opinion from Republican-appointed judges. Judges Richard Posner and J. Harvie Wilkinson III were two of the loudest critics of Scalia's opinion, each arguing against the libertarian individualist theory and what they saw as the Court's unwarranted judicial activism.

Richard Posner, a Reagan-appointee to the U.S. Court of Appeals for the Seventh Circuit, wrote a blistering criticism of the *Heller* decision in the *New Republic* (Posner 2008). Posner begins his article, "In Defense of Looseness," by analyzing the same history of the ratification process of the Second Amendment that Scalia examined but reaching the opposite conclusion, the one shared by Stevens and other collectivists. In doing so, Posner attempted to show that "the

Supreme Court, in deciding constitutional cases, exercises freewheeling discretion strongly flavored with ideology” (Posner 2008). Posner argues that while most professional historians support Stevens’s conclusion, Scalia and his staff labored mightily to write an opinion that would overwhelm the doubters (Posner 2008). The statements cited by the majority meant little before *Heller*, and the historical arguments made by Scalia were influenced by libertarian-leaning lawyers, advocates, and law professors, with an agenda aimed at expanding the nature of the Second Amendment.

Posner believes politics, not principles, have influenced Supreme Court decisions, especially *Heller*. He writes, “The idea behind the decision – it is not articulated, of course, and perhaps not even consciously held – may simply be that turnabout is fair play,” indicating that liberal judges have used perceived activist means to expand constitutional rights, and now conservatives, inspired by libertarian legal thinkers, are covering their own activism under the guise of originalism (Posner 2008). Representing the traditional conservative stance, Posner believes the Court must return to a preference for judicial modesty, or else decisions will be made based on the political makeup of the Court at any given time. He argues that “a preference for judicial modesty – for less interference by the Supreme Court with the other branches of government – cannot be derived by some logical process from constitutional text or history. It would have to be imposed. It would be a discretionary choice by the justices. But judging from *Heller*, it would be a wise choice” (Posner 2008). For Posner, decisions must be reached by means of principled judicial restraint, and the embrace of judicial restraint by all judges would be a step toward de-politicizing the Court. Decisions such as *Heller* would be made by disinterested judges respecting both the Constitution and legislatures, not judges interested in furthering their ideological agendas.

Another Reagan-appointee, Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit, penned “Of Guns, Abortions, and the Unraveling Rule of Law” for the *Virginia Law Review* (Wilkinson 2009). He contends that “Heller represents a triumph for conservative lawyers. But it also represents a failure—the Court’s failure to adhere to a conservative judicial methodology in reaching its decision. In fact, Heller encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts” (Wilkinson 2009). Wilkinson argues that *Heller* is guilty of the same sins as the Court’s 1973 *Roe v. Wade* decision, which recognized a constitutional right to abortion. He believes that the *Heller* majority used the Second Amendment, at best an ambiguous text, to impose its policy preference, thereby damaging both the democratic process and local values. He argues that “in both *Roe* and *Heller* the Court claimed to find in the Constitution the authority to overrule the wishes of the people’s representatives. In both cases, the constitutional text did not clearly mandate the result.... [Both are] failure[s] to respect legislative judgements” (Wilkinson 2009). Like Posner, Wilkinson thinks that “observers will be tempted to view *Heller* as a revenge for *Roe*...a sort of judicial tit-for-tat” (Wilkinson 2009). Wilkinson concludes that *Heller* represented “the worst of missed opportunities – the chance to ground conservative jurisprudence in enduring and consistent principles of restraint...There is now a real risk that the Second Amendment will damage conservative judicial philosophy” (Wilkinson 2009). The damage Wilkinson refers to is the influence of libertarian activism. The *Heller* decision, one in which traditional conservatives had the opportunity to defer to D.C. law, has upended the doctrine of restraint and in Wilkinson’s eyes has made the conservative Supreme Court jurists as bad as their liberal *Roe* counterparts.

F. Epilogue

Scalia's opinion was a major victory for libertarians. However, it was not a total loss for gun control advocates. The opinion endorsed the individualist model but did not open the door to invalidate all federal gun control laws. "Like most rights," Scalia observes, "the right secured by the Second Amendment is not unlimited... Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" (*Heller* 2008, 54). Scalia did not endorse the invalidation of all federal gun control laws, and he placed a number of significant qualifications on gun ownership. The District of Columbia's law was among the strictest in the country, and immediately following the decision it was unclear whether *Heller* would have a major impact on other federal gun laws. While pro-gun enthusiasts may have predicted a wave of decisions invalidating gun control laws, it became clear that the decision was not the landmark victory gun-rights advocates expected. Scalia writes "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" (*District of Columbia v. Heller* 2008, 54). The Court's decision to avoid an exhaustive historical analysis of the full scope of the Second Amendment indicates a reluctance to fully embrace the libertarian interpretation relied on by Scalia. Instead of broadening the protection of the amendment as much as it logically could, the Court instead opted to make a limited decision that struck down a strict law. Many libertarians were disappointed that Scalia did not take a stronger individualist step.

Before showing how this limited ruling has confused lower courts on other issues, it is important to highlight *McDonald v. City of Chicago* (2010) and how the Court applied its *Heller*

ruling to states. While there is no doubt that the Second Amendment applies to the federal government, the next question after *Heller* was whether it also applies to the states. In 2010, this question was answered by the Court in *McDonald*. In the wake of *Heller*, several citizens of Chicago filed suit against the city, arguing that its handgun ban violated the Second and Fourteenth Amendments (*McDonald v. City of Chicago* 2010, 1). Believing the right to keep and bear arms to be fundamental, McDonald argued that Chicago was prohibited from infringing on this right. Chicago argued that local governments should be able to tailor gun regulation to local conditions. Citing the *Slaughterhouse Cases* (1873), where the Court held that the Fourteenth Amendment's Privileges or Immunities Clause includes only those rights that "are dependent upon citizenship of the United States, and not citizenship of a State," Chicago argued that the Second Amendment did not apply to the states (Liptak 2009).

In another 5–4 decision, the Court ruled in favor of McDonald, but on the basis of the Fourteenth Amendment's Due Process Clause rather than its Privileges or Immunities Clause. Writing for the majority, Justice Samuel Alito counted "the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty" (*McDonald v. City of Chicago* 2010, 31). Just as other fundamental rights protected by the Bill of Rights apply to states as well as to the national government, so too does the right to keep and bear arms. The Court used *McDonald* to "incorporate the Second Amendment, making it applicable to state and local governments, as well as to the national government. Like *Heller*, the *McDonald* decision appears to be a symbolic victory whose practical effect is still unclear. *McDonald* simply ruled that there is a right to keep handguns in the home for self-defense. The Court once again did not offer much guidance to lower courts regarding the scope of the protection afforded by the Second Amendment.

IV. Gun control Legislation Following *Heller* and *McDonald*

This chapter will examine challenged gun control laws following *Heller* and *McDonald*. While the libertarian individualist argument won in both cases, neither *Heller* nor *McDonald* was explicit about which types of laws are constitutional and which are not. The issues examined include legislation regarding who can possess a gun, when and where a gun can be carried, what types of weapons individuals can own, whether registration requirements are constitutional, and whether guns can be carried in special places such as national parks and schools. While in most cases that have gone before conservative majorities this lack of clarity has led to laws being upheld in the spirit of traditional conservatives and their belief in deferring to legislatures, one specific area of gun law – concealed-carry laws – has divided traditional conservatives and the libertarians who influenced the *Heller* victory. Here, the battle between traditional conservatives and libertarians is over the “core” meaning of the Second Amendment. Traditional conservatives read *Heller* narrowly, arguing that the decision is solely tied to gun possession in the home and that longstanding gun control legislation is constitutional. Libertarian scholars interpret *Heller* more broadly, continuing to expand their individualist argument. They believe the core of the amendment is the protection of an individual’s right to self-defense, both in and out of the home. Using a hybrid form of scrutiny that examines whether challenged laws burden this core right, libertarian-leaning judges create a greater range of laws to strike down.

A. Challenged Laws Frequently Upheld

Heller did not provide lower courts with adequate guidelines on how to resolve gun control controversy. Different standards have emerged within lower courts, each of which subjects legislation to different levels of scrutiny. The only consistency found in these cases is in

the results, where challenged gun control laws almost always survive (Mehr and Winkler 2010). While libertarian scholars succeeded in arguing for an individual-right interpretation of the Second Amendment, they have not convinced courts to dismantle existing gun control legislation. According to the Law Center to Prevent Gun Violence (2013), “since the Court’s decision in the *Heller* case, lower courts across the country have been inundated with costly and time-consuming challenges to state and local gun laws. However, lower courts have consistently upheld these laws.” The Center reports “since [the *Heller* decision], there have been over 800 Second Amendment cases challenging gun laws nationwide, with an overwhelming majority...of the lower court decisions upholding those laws” (Law Center to Prevent Gun Violence 2013). The U.S. Supreme Court has rejected hearing these cases, upholding the lower-court decisions.

There are five primary types of Second Amendment issues in these cases, four of which overwhelmingly result in courts upholding the gun control law (Law Center to Prevent Gun Violence 2013). These cases have primarily applied a categorical or intermediate-scrutiny test to each challenge, reading *Heller* more narrowly and rejecting the libertarian argument that the core protection of the Second Amendment is the broad notion of self-defense. The first type questions whether laws prohibiting felons, domestic abusers, and certain types of misdemeanants from possessing firearms are constitutional. Most of these laws have been upheld unanimously by multiple federal appellate courts. In *United States v. Reese* (2010), which challenged a New Mexico law prohibiting individuals subject to domestic violence from possessing a firearm, the Tenth Circuit upheld the law. The Tenth followed a limited reading of *Heller* and ruled that state governments had the power to keep guns out of the hands of criminals and dangerous people. Here, the court applied intermediate scrutiny, “meaning the government had the burden of showing it had an important objective that was advanced by means substantially related to the

objective” (*United States v. Reese* 2010). Understanding *Heller’s* support of longstanding gun control laws, the court noted the historical practice of banning certain dangerous individuals from possessing firearms, and it ruled that the law was constitutional. The Court denied hearing *Reese*. This reluctance to hear and settle the issue shows that legislators have the ability to block threatening people from accessing firearms.

Next, courts have rejected challenges to restrictions on the possession of machine guns and other types of military-style weapons. In *Heller*, the Court made clear that the Second Amendment does not protect against “dangerous and unusual weapons” (*Heller v. District of Columbia* 2008). Lower courts have followed this ruling, upholding numerous bans on a variety of weapons, including machine guns and assault rifles. In *United States v. Zaleski* (2012), the Second Circuit rejected the argument that the Second Amendment protects an individual’s right to possess machine guns and grenades. Here, the Second Circuit returned to the *Heller* conclusion that argued for courts to uphold longstanding laws. The *Zaleski* court argued that laws prohibiting the possession of certain weapons have historically been upheld, demonstrating both a need for such laws and their constitutionality. The Supreme Court has refused to hear cases challenging these possession limitations, indicating that *Heller* was written to protect such laws.

Another type of case that has survived Second Amendment challenges involves firearm-registration requirements. In *Justice v. Town of Cicero* (2009), the Seventh Circuit upheld a local law requiring the registration of all firearms. The court ruled, like *Heller*, that the Second Amendment is not unlimited. The registration requirement does not deny citizens the right to possess firearms, it merely regulates that right. Quoting *Heller*, the Seventh Circuit ruled that

registration laws have been “presumptively legal” historically, thus upholding the law (*Justice v. Town of Cicero* 2009, 3).

Finally, lower courts have interpreted *Heller* to support laws granting government the ability to regulate firearms in public, sensitive places. In *United States v. Masciandaro* (2011), the Fourth Circuit applied intermediate scrutiny to a law that prohibited gun possession in national parks. The court wrote that “we conclude that the government has amply shown that the regulation reasonably served its substantial interest in public safety” (*Masciandaro* 2011, 3). The Supreme Court decided not to hear any case on this issue. These four types of cases illustrate lower-court refusals to expand *Heller*. Choosing to defer to legislators, the traditional conservative embrace of judicial restraint and rejection of an expanded individual right to self-defense has kept reasonable gun laws alive. While some libertarian gun-rights supporters may believe these challenged laws are unconstitutional, Republican-appointed judges have yet to embrace their arguments.

B. Divide Between Traditional Conservatives and Libertarians

Restrictions on the concealed carrying of firearms are the only set of Second Amendment issues where a clear divide exists between traditional conservative judges and those influenced by libertarianism. While judicial liberals support such legislation, conservatives are divided on the issue of whether individuals have the right to carry guns in public. Some conservatives have relied on the categorical approach, while others have used intermediate scrutiny. Meanwhile, influenced by a libertarian understanding of the core meaning of the Second Amendment, some Republican-appointed judges have argued for a hybrid scrutiny, in which laws are examined to determine whether they burden the “core” of the Second Amendment, which libertarians argue is

self-defense. Republican-appointed judges influenced by libertarian thought have expanded *Heller* and struck down these laws, while more traditional conservatives have relied on judicial restraint, interpreting *Heller* more narrowly and relying on the will of legislatures. The issue of concealed-carry laws represents the first opportunity for conservative judges to adhere to the traditional belief of judicial restraint, or follow the libertarian approach and continue to expand gun rights. The following subsections will examine two cases, *Peterson v. Martinez* (2013) and *Peruta v. San Diego County* (2014), in which Republican-appointed majorities differed on the issue of concealed-carry laws. This chapter will conclude by arguing that conservatives must embrace judicial restraint and an intermediate-scrutiny reading of *Heller* in order to prevent the demise of gun laws in the United States.

1. Peterson v. Martinez (2013)

In the Tenth Circuit Court of Appeals, Republican-appointed judges Bobby Ray Baldock and Harris Hartz joined Judge Carlos Lucero's opinion in *Peterson v. Martinez* (2013) upholding a Colorado law that required licenses for individuals to carry a concealed weapon. The law required that applicants be residents of Colorado, a requirement that Gray Peterson, a Washington resident, failed to fulfill. Peterson filed suit against the Denver sheriff and Colorado's executive director of the Department of Public Safety, arguing that the law violated the Second Amendment, which in the appellant's opinion included the protection of an individual's right to carry publicly a concealed weapon. Appellees Alex Martinez and James Davis, along with various organizations dedicated to protecting gun control laws, argued that the Second Amendment does not include the right to carry a gun outside the home and that communities and states are free to regulate the carrying of guns in public.

Lucero begins his opinion by citing *Heller* and *McDonald's* recognition of the Second Amendment's protection of the individual right to bear arms, while also noting that "the Court has provided precious little guidance with respect to the standard by which restrictions on the possession of firearms should be assessed" (*Peterson v. Martinez* 2013, 17). Because of this lack of guidance, the Tenth Circuit has adopted a "two-pronged approach" to Second Amendment claims in which the court first asks "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee" (*Peterson v. Martinez* 2013, 18). According to Lucero, "if the law does not impose a burden, it is constitutional. If it does, then the court must evaluate the law under some form of means-end scrutiny" (*Peterson v. Martinez* 2013, 18). Following this test, the court must ask whether the Second Amendment includes the right to carry a concealed firearm. By examining precedent and the extensive history of concealed-carry laws, the court concluded that the Second Amendment does not include the right to carry a concealed firearm.

First, Lucero cites *Robertson v. Baldwin* (1897, 281), where, the Court noted that many of the freedoms guaranteed by the Bill of Rights are subject to "certain well-recognized exceptions." In *Robertson*, the Court, declared that the Second Amendment was not absolute and that concealed carry laws fell under the category of freedoms that could be restricted. One of the exceptions the Court cited was the prohibition on concealed weapons. The Court wrote that "the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons" (*Robertson v. Baldwin* 1897, 251–252). For Lucero, *Robertson* is the first case among many that illustrate a longstanding practice in the United States limiting an individual's right to carry a weapon.

Acknowledging the age of the *Robertson* ruling, Lucero writes that “the Supreme Court’s contemporary Second Amendment jurisprudence does nothing to enfeeble – but rather strengthens – the statement that concealed-carry restrictions do not infringe the Second Amendment right to keep arms” (*Peterson v. Martinez* 2013, 22). Like *Peterson*, the *Heller* opinion notes that the Second Amendment is not unlimited. The Second Amendment is not a right to keep and carry any weapon imaginable for any purpose or in every manner. The Supreme Court stressed that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions” (*District of Columbia v. Heller* 2008). Lucero proceeds to demonstrate that bans on the carrying of concealed weapons are longstanding in the United States. In *Nunn v. State* (1846, 243) the Georgia Supreme Court ruled that “so far as the act of 1837 seeks to suppress the practice of carrying certain weapons secretly it is valid, inasmuch as it does not deprive the citizen of natural right of self-defense, or his constitutional right to keep and bear arms.” Scholars also confirm the longstanding nature of concealed-carry laws. Eugene Volokh (2009, 24) writes that “the tradition of prohibiting the concealed carry of firearms does indeed go back to 1813 and the following decades...and by the end of the nineteenth century the constitutionality of such bans had become pretty broadly accepted.” Given this longstanding history, concealed-carry laws must be considered presumptively lawful regulatory measures.

For the *Peterson* court, the core of the Second Amendment is not the libertarian endorsed broad protection of self-defense. Instead, the court emphasizes the *Heller* ruling, writing that “the core right recognized in *Heller* is the right of law-abiding, responsible citizens to use arms in defense of hearth and home” (*Peterson v. Martinez* 2013, 6). The court asserts that Peterson’s challenge does not destroy the core of the amendment. The challenged Colorado law does not restrict his right to self-defense of hearth and home; rather “it restricts only his ability to carry a

concealed weapon outside of the home” (*Peterson v. Martinez* 2013, 6). The *Peterson* court rejects the expansive libertarian reading of the Second Amendment and instead emphasizes the *Heller* ruling that the core of the amendment is the defense of one’s home. Nearly every U.S. Court of Appeals has adopted this understanding of *Heller* and the core of the Second Amendment, with the notable exception of the Ninth Circuit in *Peruta v. San Diego County* (2014).

2. *Peruta v. San Diego County* (2014)

In a 2–1 decision, the U.S. Court of Appeals for the Ninth Circuit ruled that it is unconstitutional to confine the right to bear arms to the home. Judge Diarmuid O’Scannlain, a Reagan-appointee, wrote the opinion and was joined by Consuelo Callahan, a Bush-appointee. Judge Sidney Thomas, a Clinton-appointee, dissented. While California generally prohibits the concealed carrying of a handgun, one can apply for a license to carry such a weapon by demonstrating “good moral character,” completing a specified training course, and establishing good cause (*Peruta v. San Diego County* 2014). At issue is the San Diego County policy defining “good cause,” which does not include concern for personal safety. Wishing to carry a handgun but unable to meet the requirements specified by the county, a group of San Diego residents challenged the law, arguing that the Second Amendment protected their right to bear arms in public. In *Peruta*, the majority addresses whether “the restricted activity – here, a restriction on a responsible, law-abiding citizen’s ability to carry a gun outside the home for self-defense – falls within the Second Amendment right to keep and bear arms for the purpose of self-defense” and whether “San Diego County’s ‘good cause’ permitting requirement infringes the right” (*Peruta v. San Diego County* 2014, 1167). The court answers both questions in the affirmative, giving an expanded meaning to *Heller* and employing a libertarian reading of the Second Amendment.

Citing several nineteenth-century cases interpreting the Second Amendment, O’Scannlain attempts to demonstrate the early protection against concealed-carry laws. Beginning with *Bliss v. Commonwealth* (1822), O’Scannlain writes that “there, Kentucky’s highest court interpreted the state’s Second Amendment analogue...as invalidating a ban on ‘wearing concealed arms’” (*Peruta v. San Diego County* 2014, 1156). He then moves to *Simpson v. State* (1833), contending that, “whatever else the Constitution meant by ‘bear arms,’ it certainly implied the right to carry operable weapons in public” (*Peruta v. San Diego County* 2014, 1160). O’Scannlain further cites *Aymette v. State* (1840), arguing that “the [Tennessee Supreme] Court observed with little fanfare that ‘in the nature of things, if persons were not allowed to bear arms openly, they could not bear them in their defense of the State at all’” (*Peruta v. San Diego County* 2014, 1157). For O’Scannlain, each of these cases demonstrates a commitment from past courts to extending Second Amendment protection to individuals who desire to carry weapons in public.

Addressing the question of whether the restricted activity falls within the Second Amendment right to keep and bear arms, O’Scannlain begins by analyzing the text and history of the Amendment, arguing that “to wear, bear, or carry...upon the person or in the clothing or in a pocket, for the purpose...of being armed and ready for offensive or defensive action in a case of conflict with another person” is the clear historical meaning of the Second Amendment (*Peruta v. San Diego County* 2014, 1154). He adds that “the plain meaning definition of ‘bear arms’ elucidated above makes matters even clearer: the Second Amendment right could not rationally have been limited to the home” (*Peruta v. San Diego County* 2014, 1153). For O’Scannlain, *Heller’s* limited protection for firearms within the home logically extends to carrying in public, supporting the argument that the restricted activity is protected by the amendment. Following his analysis of the textual evidence, O’Scannlain turns to the original public understanding of the

Second Amendment. Returning to the work of Blackstone, O’Scannlain claims that “the right of having and using arms for self-preservation and defense” had its roots in “the natural right of resistance and self-preservation” (*Peruta v. San Diego County* 2014, 1154). This right included protection against both public and private violence, which supports the notion that *Heller* must extend beyond the private confines of one’s home.

This textual and historical analysis and the nineteenth-century precedent are enough for the Ninth Circuit to conclude that the Second Amendment includes protection against concealed-carry laws. Following this analysis, O’Scannlain next addresses whether San Diego County’s “good cause” permitting requirement violates the Second Amendment. Acknowledging that different courts have applied different levels of scrutiny, he first asks, “Does it (the restriction) burden the right or, like in *Heller*, does it destroy the right altogether?” (*Peruta v. San Diego County* 2014, 1168) For O’Scannlain, a restriction that destroys rather than merely burdens the right is an infringement under any condition. Because California also has strict laws against open carrying in public, O’Scannlain argues that “in California, the only way that the typical, responsible, law-abiding citizen can carry a weapon in public for the lawful purpose of self-defense is with a concealed-carry permit. And, in San Diego County, that option has been taken off the table” (*Peruta v. San Diego County* 2014, 1169). Because O’Scannlain believes that San Diego County’s prohibition on the public carrying of guns amounts to the destruction of a protected right, he concludes that it must be invalidated.

As illustrated above, O’Scannlain argues that general self-defense, as opposed to self-defense within the home, is the core of the Second Amendment. This belief is central to libertarian philosophy regarding the Second Amendment. Nelson Lund, Randy Barnett, and Don Kates represent four of the leading libertarian voices on the meaning of the amendment. Lund

writes, “In liberal theory, the right to self-defense is the most fundamental of all rights—far more basic than the guarantees of free speech, freedom of religion, jury trial, and due process of law” (Lund 1987, 103). Barnett and Kates argue that “the right of personal self-defense is inalienable, being the cardinal natural right” (Barnett and Kates 1996, 1139). Together, these scholars have argued that “the Second Amendment was intended...to protect what Locke regarded as the inalienable natural right of individuals to defend themselves against wrongful violence” (Heyman 2014, 245). For libertarian individualist theorists, this broad notion of self-defense is protected by the Second Amendment, and any law that hinders this individual right must be invalidated.

The Ninth Circuit, differing from the other U.S. courts of appeal that have dealt with the issue of concealed-carry laws, agreed with the libertarian interpretation of the core of the Second Amendment. O’Scannlain writes that “both *Heller* and *McDonald* identify the “core component” of the right as self-defense, which necessarily take[s] place wherever [a] person happens to be, whether in a back alley or on the back deck” (*Peruta v. San Diego County* 2014, 1153). He adds that “to confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*...The plain text of the Second Amendment does not limit the right to bear arms to the home” (*Peruta v. San Diego County* 2014, 1153). This expansive view has been rejected by each of the other U.S. courts of appeal and represents a departure from judicial modesty that respects the decisions by legislatures and an adherence to precedent.

C. Epilogue

The clear divide among U.S. courts of appeal over concealed carry legislation makes the issue the next most likely gun control question to go to the Supreme Court under the Second

Amendment. It serves as an opportunity for the Court to embrace the doctrine of restraint, deferring to legislatures to enact laws representative of the popular will for reasonable gun control laws. The issue also is a chance for the libertarian activist approach to extend further the scope of the Second Amendment, which would expand the individual right to own and operate a firearm at the expense of public safety. The core meaning of the Second Amendment in *Heller* is clear: an individual right to self-defense within the home is constitutionally protected. If courts follow the Ninth Circuit and the libertarian scholars who influenced Judge O'Scannlain's ruling, the Second Amendment will develop an even broader meaning, threatening the standing of every form of gun control.

Conclusion

The dramatic change in interpretation of the Second Amendment was a distinctly libertarian effort, and gun advocates must credit the work of the NRA and its legal scholars and lawyers for the expansive growth of gun-ownership protection. Examples of the slow and steady spread of libertarian constitutional thought are not limited to the Second Amendment. Furthermore, both progressives and traditional conservatives have reasons both to support and worry about the growing influence of libertarianism. On the issue of same-sex marriage, progressives have found an ally in the libertarian legal movement. During the U.S. Supreme Court's 2012 Term, the libertarian Cato Institute joined the progressive Constitutional Accountability Center in filing two amicus curiae briefs in support of same-sex marriage. These briefs urged the Court to strike down the Defense of Marriage Act (1996) and Proposition 8 (2008), California's referendum banning same-sex marriage (Lazarus 2013). Until the early 2010s, social and religious conservatives within the Republican Party helped shape conservative jurisprudence. Libertarian support of same-sex marriage, and its victory in court, shows that left-right collaboration is possible and that traditional conservatives cannot expect full cooperation from their libertarian party members.

Rising libertarian influence within the conservative movement is not all good news for progressives. Conservative efforts to dismantle the Affordable Care Act (2010) has garnered major libertarian support. When Congress passed the act, which required nearly all Americans to acquire health insurance, Randy Barnett, a leading individualist and libertarian activist, argued that the bill was unconstitutional. Even though Barnett's colleagues on both the left and the right dismissed his claim as ridiculous, the Georgetown University law professor mounted a campaign of public speaking engagements, television appearances, and law-review articles that brought his

theory from the fringes of constitutional theory to acceptance by the U.S. Supreme Court (Stolberg and Savage 2012). In 2012, the Court began three days of argument, listening essentially to the argument championed by Barnett: “that Congress’s power to set rules for commerce does not extend to regulating ‘inactivity,’ like choosing not to be insured” (Stolberg and Savage 2012). While Barnett is not the first law professor to argue against the individual mandate, he is the most prolific legal academic associated with the challenge. Though the Affordable Care Act was upheld, Barnett and his fellow libertarians helped lead the Court to a 5–4 decision that chipped away at Federal authority to regulate commerce.

Health care is not the only area of law that libertarian-leaning conservatives are influencing. Two cases heard before the U.S. Court of Appeals for the District of Columbia rejected popular regulatory laws. In *EME Homer City Generation v. Environmental Protection Agency* (2012), Judge Jack Kavanaugh, a Republican appointee, struck down the EPA’s rules limiting cross-state air pollution, arguing that the EPA used the rule “to impose massive emissions reduction requirements on upwind States without regard to the limits imposed by the statutory text” (*EME Homer City Generation v. Environmental Protection Agency* 2012, 7). In *Reynolds Tobacco Company v. Food and Drug Administration* (2012), libertarian Judge Janice Rogers Brown struck down a government mandate that required tobacco companies to place graphic images on the packages of their products warning of the dangers of smoking. She argues that “the First Amendment requires the government not only to state a substantial interest justifying a regulation on commercial speech, but also to show that its regulation directly advances that goal.... [The] FDA failed to present any data... showing that enacting their proposed graphic warnings will accomplish the agency's stated objective of reducing smoking rates” (*Reynolds Tobacco Company v. Food and Drug Administration* 2012, 30). Both of these

cases illustrate the libertarian commitment to invalidating regulatory statutes that have historically been supported by both liberals and conservatives.

Libertarian constitutional thought remains a minority position among scholars and jurists and will likely remain a minority position for at least some time to come (Bernstein and Somin 2014). However, the influence of libertarian theory within the conservative legal movement cannot be denied. While the libertarian dream of overturning *Lochner* seems unlikely, *Heller* serves as an example and warning that conventional constitutional interpretation can be challenged and defeated with the right combination of libertarian ideology, lawyers, money, and court composition. While the extent to which the conservative legal movement will embrace libertarian constitutionalism remains unclear, some libertarian activists are hopeful that a tactical alliance can be built. Federalist Society co-founder and president Eugene Meyer, one of the foremost leaders within the conservative legal movement, believes “you’re always going to have divisions, but what I think helps bring us together is that these debates are over what the text of the Constitution actually says.... If we cut the government in half there might be a lot more fault lines in the conservative legal movement. But as long as the basic battle is over whether the U.S. should be more like Europe, the coalition will hold” (Root 2010). As libertarian and conservative lawyers and legal scholars attempt to collaborate on a variety of constitutional issues, supporters of the American regulatory state must prepare to defend the agencies and laws that they hold most dear.

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