AMERICANS AGAINST GUN VIOLENCE

Americans Against Gun Violence
7862 Winding Way #151
Fair Oaks, CA 95628
(916) 668-4160
aagunv.org / info@aagunv.org

A Death Sentence, Wrongly Decided

A discussion of some of the more egregious flaws in the Supreme Court's 2008 Heller decision and its progeny and the devastating public health repercussions of these decisions

By Bill Durston, M.D.
President, Americans Against Gun Violence

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INTRODUCTION

In the 2008 case of *District of Columbia v. Heller,* a case in which the gun lobby challenged the constitutionality of Washington DC's partial handgun ban and safe firearm storage laws, a narrow 5-4 majority of Supreme Court justices reversed over two centuries of legal precedent in ruling for the first time in U.S. history that the Second Amendment confers an individual right to own guns unrelated to service in a "well regulated militia."[1]

The majority opinion in the *Heller* decision, written by Justice Antonin Scalia, has been appropriately described by respected authorities as "gun rights propaganda passing as scholarship"[2] and as "evidence of the ability of well-staffed courts to produce snow jobs."[3] The late Supreme Court Justice John Paul Stevens, who authored a dissenting opinion in *Heller,* described the majority opinion as "unquestionably the most clearly incorrect decision that the Court announced during my [35 year] tenure on the bench."[4] Justice Stevens noted that in the *Heller* decision, the majority endorsed an interpretation of the Second Amendment that the late Supreme Court Chief Justice Warren Burger had called "[O]ne of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime."[5]

In this article, I will discuss some of the more egregious flaws in Scalia's opinion and the evidence that the *Heller* decision is worse than "gun rights propaganda," worse than a "snow job," worse even than a "fraud on the American public." In creating a constitutional obstacle, where none previously existed, to the adoption of stringent gun control laws in the United States comparable to the laws in other

high income democratic countries – countries in which the rate of firearm related deaths is, on average, one tenth the rate in the United States[6] – the *Heller* decision is literally a death sentence for tens of thousands of Americans annually.

I. The *Heller* decision is inconsistent with the plain wording of the Second Amendment.

A. The Heller decision is inconsistent with the "well regulated militia" clause of the Second Amendment.

The Second Amendment states, in its entirety: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

In the unanimous 1939 *Miller* decision, the Supreme Court noted the inextricable relationship between the "well regulated Militia" clause in the first half of the Amendment and the "right of the people to keep and bear Arms" clause in the second half of the Amendment. The Court stated in *Miller*:

> The Constitution as originally adopted granted to the Congress power — "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." 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. It must be interpreted and applied with that end in view.[7]

Quoting from another portion of the *Miller* decision, the Supreme Court reiterated in the 1980 case of *Lewis v. United States,* "[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[8]

Professors of English and Linguistics filed an *amicus* brief in the *Heller* case in which they confirmed the inextricable relationship between the "well regulated militia" clause and the "right of the people to keep and bear arms" clause in the Second Amendment. In their brief, they wrote:

> Under longstanding linguistic principles that were well understood and recognized at the time that the Second Amendment was adopted, the "well regulated Militia" clause necessarily adds meaning to the "keep and bear Arms'" clause by furnishing the reason for the latter's existence....On its face, the language of the Amendment tells us that the reason why the right

> of the people to keep and bear arms shall not be infringed is because a well regulated militia is necessary to the security of a free state. The purpose of the Second Amendment, therefore, is to perpetuate "a well regulated militia."[9]

Justice Scalia struggles mightily in his majority opinion to explain away the fact that the clearly stated purpose of the "right of the people to keep and bear arms" in the Second Amendment is a collective right to provide for the common defense through a "well regulated militia," not a right of individual citizens to own firearms for some other purpose. In one of many examples of circular reasoning and internal contradictions that permeate the *Heller* decision, Scalia acknowledges that the term, "the people," was used in a collective sense throughout the constitution. Scalia quotes the Court's prior decision in *United States v. Verdugo-Urquidez* in which the Court stated, "'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community…."[10] Scalia then states "…the 'militia' in colonial America consisted of a subset of 'the people'—those who were male, able bodied, and within a certain age range."[11] Scalia contradicts himself, however, in the next sentence: "Reading the Second Amendment as protecting only the right to 'keep and bear Arms' in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as 'the people.'"[12] In fact, this reading of the Second Amendment fits perfectly with Scalia's own previous acknowledgement that "'the people'… refers to a class of persons who are part of a national community" and that the "militia" consists of "a subset of 'the people.'" Apparently, however, Scalia had already made up his mind that the Second Amendment must confer an individual right to own guns unrelated to service in a well regulated militia, for Scalia concludes this line of circular, internally contradictory reasoning by stating in the very next sentence, "We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."[13]

Scalia employs circular reasoning again later in the majority opinion in attempting to dismiss the relevance of the "well regulated militia clause" of the Second Amendment. Scalia states, with no supporting documentation, that one of the "many reasons why the militia was thought to be 'necessary to the security of a free State'" was that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."[14] Scalia's contention that one of the reasons for the adoption of the Second Amendment was to confer a constitutional right for "able-bodied men" who disagreed with the democratically elected government created by the Constitution to participate in armed insurrection if they felt that the government was operating in a tyrannical manner is not only unsupported by any historical documents,[15] it is absurd. It would have been suicidal for James Madison, who wrote and submitted the original draft of what would become the Second Amendment in the first session of the U.S. House of Representatives in June of 1789,[16] and for his fellow members of the first U.S. Congress who debated the Amendment, modified it, and subsequently voted to

submit it to the states for ratification, to intentionally include an amendment in the Bill of Rights that would confer a right of citizens who disagreed with them to rise up in arms against them.

On the contrary, one of the most immediate reasons for convening the constitutional convention in Philadelphia in May of 1787 was the failure of the prior Articles of Confederation to provide an adequate mechanism for suppressing armed insurrections, as demonstrated in the case of Shay's Rebellion in 1786.[17] Article I, Section 8 of the Constitution drafted at the Philadelphia convention specifically granted Congress the power "To provide for calling forth the Militia to …suppress Insurrections…."[18] The militia was used for this purpose on several occasions following the ratification of the Second Amendment, including to end the Whiskey Rebellion in 1794,[19] Fries' Rebellion in 1800,[20] and the Dorr Rebellion in 1842.[21] None of the perpetrators of these rebellions was found to be innocent on the basis that they were merely exercising their Second Amendment rights. Instead, all were found guilty of treason. As the Government noted in the case of State v. Dorr, "The Constitution of the United States has annihilated the right of revolution."[22] Rather than acknowledging this fact, however, Scalia concludes that the Second Amendment must confer an individual right to own firearms unrelated to service in a well regulated militia because:

> If, as [attorneys for the District of Columbia] believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia… that is, the organized militia is the sole institutional beneficiary of the Second Amendment's guarantee - it does not assure the existence of a 'citizens' militia' as a safeguard against tyranny.[23]

In this example of circular reasoning, Scalia is claiming that his false assertion "A," – that the one of the reasons for the adoption of the Second Amendment was to confer a constitutional right to armed insurrection – proves the truth of his false assertion "B" – that the Second Amendment confers an individual right to own guns - because if false assertion "B" were not true, then false assertion "A" would not be true.

As the Supreme Court stated in *Miller* in 1939 and reiterated in *Lewis* in 1980, "[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[24] The District of Columbia was correct, therefore, in arguing that "the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia;" and as the government's attorneys noted in prosecuting the perpetrators of armed rebellions, once the Constitution went into effect in 1788, and continuing after the Second Amendment was ratified in 1791, fomenting armed insurrection constituted treason, not an exercise of any right guaranteed by the Second Amendment or any other part of the Constitution.

B. The Heller decision is also inconsistent with the "keep and bear arms" clause of

the Second Amendment.

Scalia claims that the term, “keep and bear arms,” is consistent with his interpretation of the Second Amendment as guaranteeing an individual right to own guns for personal use.[25] As with many other portions of their majority opinion, however, his discussion of this issue is internally contradictory. In the same paragraph, Scalia states in the first sentence, “The phrase ‘keep arms’ was not prevalent in the written documents of the founding period that we have found,” and in the last sentence, “‘Keep arms’ was simply a common way of referring to possessing arms, for militiamen *and everyone else* [italics in the original].”[26]

Further along in his majority opinion, Scalia acknowledges that, “The phrase, ‘bear arms,’ also had at the time an idiomatic meaning,” and he cites the Brief of the Professors of Linguistics and English as a reference.[27] In their brief, the professors state, “The term ‘bear arms’ is an idiom that means to serve as a soldier, do military service, fight.”[28] Later on the same page in his majority opinion, though, Scalia states, “Giving ‘bear Arms’ its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed.”[29] In fact, however, the view that the Second Amendment was intended to confer a right to possess firearms for use in military service is precisely the interpretation of the Amendment that the Professors of Linguistics and English endorsed in their *amicus* brief in *Heller* and that the Supreme Court endorsed in the 1939 *Miller* decision[30] and reiterated in the 1980 *Lewis* decision.[31] As I will discuss below, this is also the interpretation of the Second Amendment that nearly all lower courts endorsed in the interval between *Miller* and *Heller* and that nearly all academicians endorsed until the 1970’s when the gun lobby began systematically seeding the literature with pseudo-academic, revisionist history.

Both the Brief for Petitioners[32] and the Brief for the Professors of Linguistics and English[33] in the *Heller* case presented extensive evidence showing that the terms “keep arms” and “bear arms” were used almost exclusively during the Founding Era to denote carrying weapons of war collectively in the setting of military service. Rather than refuting this evidence with objective evidence of his own, however, Scalia resorts to responding with nonsensical, mocking sarcasm. Scalia claims that the Petitioners and Professors of English and Linguistics cannot be correct in stating that the term “keep and bear arms” implies possessing and carrying weapons in a military setting because:

> “…the phrase ‘keep and bear Arms’ would be incoherent. The word ‘Arms’ would have two different meanings at once: ‘weapons’ (as the object of ‘keep’) and (as the object of ‘bear’) one-half of an idiom. It would be rather like saying ‘He filled and kicked the bucket’ to mean ‘He filled the bucket and died.’ Grotesque.[34]

The Supreme Court should be profoundly embarrassed by such non-sensical reasoning and sarcastic rhetoric, particularly when it is used as part of the basis for

a majority opinion that threatens the lives of tens of thousands of Americans annually.

There was clearly ample evidence presented to the Court in 2008 for the majority to rule, based on the "keep and bear arms" clause alone, that the Second Amendment was not intended to confer an individual right to own guns unrelated to military service. Since 2008, an overwhelming amount of additional evidence has been amassed in support of this point. In particular, two extensive databases compiled by Brigham Young University (BYU) demonstrate unequivocally that the use of the term, "keep and bear arms," refers to possessing and carrying weapons in the setting of military service.

BYU's Corpus of Founding Era American English ("COFEA") includes over 120,000 texts and 154 million words from primary sources from between 1760 and 1799.[35] BYU's Corpus of Early Modern English ("COEME") includes 40,000 texts and nearly 1.3 billion words from sources dating back to 1475. Studies applying computerized searches of these databases to the Second Amendment have found that the phrase "bear arms" has a collective connotation, typically referring to "the act of soldiering and the use of weapons in war." A survey of both legal and non-legal texts from the Founding Era determined that they "almost always use *bear arms* in an unambiguously military sense."[36] An examination of almost 1,000 uses of "bear arms" in "seventeenth- and eighteen-century English and American texts" found that "roughly 900 separate occurrences of *bear arms* before and during the Founding Era refer to war, soldiering, or other forms of armed action by a group rather than an individual." In contrast, "[n]on-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent."

An examination of uses of "keep arms" similarly concluded that, in founding-era sources, it "almost always appears in a military context."[37] Between COEME and COFEA, there were a total of twenty-six occurrences of "keep arms" excluding duplicates and one instance where "keep" was used to mean "prevent," "as in 'to keep arms from somebody.'" Of those twenty-six occurrences, twenty-five "refer[red] to weapons for use in the military or the militia," and one was ambiguous..

C. Summary of the inconsistency between the Heller decision and the plain wording of the Second Amendment

The evidence cited above demonstrates that the term, "keep and bear Arms" in the second half of the Second Amendment, even in isolation, would not have been understood at its adoption to confer an individual right to possess firearms unconnected with military service. The combination of the phrase, "A well regulated Militia, being necessary to the security of a free State," in the first half of the Second Amendment and the term, "keep and Arms" in the second half constitute indisputable evidence that the Second Amendment was intended to

confer a collective right for individuals qualified to serve in a government regulated militia to possess and carry weapons of war in a military context, not a right of individuals to own an carry firearms for personal use.

II. Scalia's claim that the *Heller* decision is consistent with and supported by prior Supreme Court decisions concerning the Second Amendment is patently false.

Rather than reversing prior Supreme Court decisions concerning the Second Amendment, Scalia claims that his majority opinion in *Heller* is not only consistent with them, but supported by them. Prior to the 2008 *Heller* decision, however, the Supreme Court had issued opinions on the proper interpretation of the Second Amendment in four cases.[38] In all four cases, the Court stated that the Second Amendment did not confer an individual right to own or carry guns unrelated to service in a well regulated militia.

A. United States v. Cruikshank (1876)[39]

The *Heller* decision states, as its primary holding, "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."[40] In section 1(f) under this primary holding, Scalia adds, "None of the Court's precedents forecloses the Court's interpretation."[41] Scalia then quotes a portion of the *Cruikshank* decision as stating:

> "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence…."[42]

Scalia follows with a long, and as I shall subsequently show, irrelevant and inaccurate discussion of "…the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II," and other aspects of 17th Century English history.[43] Scalia returns to the *Cruikshank* case at a later point and claims:[44]

> The limited discussion of the Second Amendment in *Cruikshank* supports, if anything, the individual-rights interpretation. There was no claim in *Cruikshank* that the victims had been deprived of their right to carry arms in a militia; indeed, the Governor had disbanded the local militia unit the year before the mob's attack, see C. Lane, The Day Freedom Died 62 (2008).

A full discussion of the *Cruikshank* case is beyond the scope of this article. To briefly summarize the case, though, after William Cruikshank and fellow Ku Klux Klan members massacred approximately 100 freed slaves who had been deputized by the local sheriff to guard a courthouse in Colfax, Louisiana, the county seat of Grant's Parish, on April 13, 1873, local authorities, intimidated by

the Klan, refused to prosecute the murderers under state and local laws.[45] Cruikshank and other ringleaders were eventually prosecuted and convicted on federal charges, but the case was appealed to the Supreme Court, which overturned their convictions. The sentence in the *Cruikshank* decision, "This is not a right granted by the Constitution,"[46] refers specifically to the Second Amendment right of "bearing arms for a lawful purpose,"[47] which prosecutors claimed Cruikshank and the other Klan members had violated, along with other constitutional rights, when they murdered the freed slaves.

The *Cruikshank* decision was a horrible one, rivaling or even exceeding the ignominy of the *Dred Scott* decision,[48] for reasons unrelated to the Court's interpretation of the Second Amendment. It is clearly hypocritical, however, for Scalia to claim support for his conclusion 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" from a Supreme Court decision that states, with regard to a purported Second Amendment right of "bearing arms for a lawful purpose," that "This is not a right granted by the Constitution."[49] Moreover, the statement that, "There was no claim in *Cruikshank* that the victims had been deprived of their right to carry arms in a militia," is patently false, and is one of many examples throughout Scalia's majority opinion in which he takes snippets out of historical documents to support its arguments when a more complete reading of the documents specifically refutes those arguments.

While the book cited by Scalia, *The Day Freedom Died,* does confirm that the Grant Parish militia had been disbanded the year before the Colfax massacre, the same book documents that in March of 1873, when white supremacists threatened to kill the former militia commander, William Ward, who was himself Black, along with other freed slaves who were former militia members, the Grant Parish judge instructed the sheriff to form an armed posse to guard Ward, other Blacks, and the county courthouse.[50] As the book, *The Day Freedom Died* documents, this posse of freed slaves who brought their own personal firearms with them when they were called into service by the Grant Parish judge very definitely fit Scalia's definition of a militia, and in *Cruikshank*, the government very definitely argued that one of the constitutional rights that William Cruikshank and his fellow Klansmen violated in the Colfax massacre was the Second Amendment right of members of this militia to "keep and bear arms for a lawful purpose."[51]

B. Presser v. Illinois (1886)[52]

As with the *Cruikshank* case, a detailed discussion of *Presser* is beyond the scope of this essay, but I will summarize the aspects of the case relevant to Scalia's claim that the *Presser* decision supports the *Heller* decision. Herman Presser was convicted of violating Illinois state law for leading a group of approximately 400 armed individuals who were members of an unofficial labor organization in a military style parade in Chicago without a government-issued permit. Presser

appealed his conviction to the Supreme Court on the basis that the law under which he was convicted violated the Second Amendment and the due process clause of the Fourteenth Amendment.

The *Presser* decision cites *Cruikshank* as a binding precedent, noting that in *Cruikshank,* "the Chief Justice, in delivering the judgment of the court, said, that the right of the people to keep and bear arms 'is not a right granted by the Constitution.'" Scalia claims, though, that the *Presser* decision "does not refute the individual-rights interpretation of the Amendment;"[53] and that "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations."[54] These claims by Scalia are clearly inconsistent with the above quote from *Cruikshank* that *Presser* cites as a binding precedent. Furthermore, in his dissenting opinion in *Heller,* Justice Stevens notes the following statement in *Presser:*

> "The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offence for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred."[55]

Justice Stevens cites this statement as evidence that "*Presser,* therefore, both affirmed *Cruikshank*'s holding that the Second Amendment posed no obstacle to regulation by state governments, and suggested that in any event nothing in the Constitution protected the use of arms outside the context of a militia 'authorized by law' and organized by the State or Federal Government."[56]

In another example of the nonsensical reasoning and sarcastic rhetoric that is present throughout Scalia's majority opinion, Scalia attempts to refute Justice Stevens' conclusion by stating:

> Unfortunately for Justice STEVENS' argument, that later portion deals with the *Fourteenth Amendment;* it was the *Fourteenth Amendment* to which the plaintiff's nonmembership in the militia was relevant.[57]

Indeed, the above statement from *Presser,* as Justice Stevens himself notes in his dissent, was included in a section of the *Presser* decision that discusses the Fourteenth Amendment, but as Scalia should have known, the portion of the Fourteenth Amendment that Herman Presser claimed Illinois law violated was the clause that states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[58] The next sentence

in the *Presser* decision states, "It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect."[59] In ruling that Herman Presser's "privileges and immunities" under the Fourteenth Amendment had not been violated, the Court was also clearly stating that Presser's conviction had not violated any of Presser's constitutional rights, including any right conferred by the Second Amendment.

C. United States v. Miller (1939)[60]

Scalia claims that the Supreme Court's 1939 *Miller* decision "is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia')."[61] I will discuss the *Miller* decision in some detail in showing that this claim is patently false.

In 1938, Jack Miller and Frank Layton were arrested for transporting an unregistered sawed off shotgun across state lines between Arkansas and Oklahoma in violation of the 1934 National Firearms Act (NFA).[62] An Arkansas district court judge dismissed the charges, ruling that the NFA violated the Second Amendment.[63] A federal prosecutor appealed the case directly to the Supreme Court, which promptly accepted the case and reversed the ruling of the district court judge, remanding the case for further proceedings.[64] Both Jack Miller and Frank Layton were known gangsters,[65] and neither they nor their attorney appeared for oral arguments before the Supreme Court. Miller was murdered, probably by fellow gangsters, before being retried by the district court. Layton subsequently pleaded guilty to the charge of violating the NFA and was sentenced to five year's probation.[66] The district court judge who initially ruled that the NFA violated the Second Amendment had been a U.S. Representative from Arkansas and a vocal supporter of stringent federal gun control laws prior to becoming a judge, leading to speculation that his dismissal of the charges against Miller and Layton was done intentionally to supply the Supreme Court with a test case concerning the constitutionality of the NFA.[67]

The discussion of the *Miller* decision is another of the many examples of Scalia resorting to circular reasoning, sarcastic rhetoric, and quotations taken out of context in an effort to prove a false assertion. Scalia accuses Justice Stevens of placing "overwhelming reliance" on *Miller* in his dissenting opinion[68] and makes mocking reference to Stevens' appeal for application of the principle of *stare decisis*. Scalia states, with regard to Stevens' interpretation of *Miller:*

> "[H]undreds of judges," we are told, "have relied on the view of the Amendment we endorsed there," *post,* at 2823, and "[e]ven if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court,

> and for the rule of law itself would prevent most jurists from endorsing such a dramatic upheaval in the law," *post,* at 2824. And what is, according to Justice STEVENS, the holding of *Miller* that demands such obeisance? That the Second Amendment 'protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons.'" *Post,* at 2823.
>
> Nothing so clearly demonstrates the weakness of Justice STEVENS' case. *Miller* did not hold that and cannot possibly be read to have held that.[69]

As evidence that "Nothing so clearly demonstrates the weakness of Justice STEVENS' case," Scalia presents – literally – "nothing," other than his own emphatic assertion that *Miller* "does not hold" and "cannot possibly be read to have held" what Stevens, the three other justices who joined him in his dissent, the majority of justices in the *Lewis* cases, and "hundreds of judges" in lower federal courts all concurred that the *Miller* decision holds. As I have noted above, the *Miller* decision quotes the clause in Article I, Section 8 of the Constitution concerning the organization of the militia Congress's power over it and clearly 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. It must be interpreted and applied with that end in view.[70]

It is not only "possible" to interpret the 1939 *Miller* decision as Justice Stevens, most Supreme Court justices, and "hundreds of other judges" in lower federal courts did in the interim between *Miller* and the *Heller* case, it is unreasonable interpret it otherwise. As Stevens writes in his dissent, "The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption."[71] Justice Breyer concurred with Stevens' dissent and wrote a separate dissent of his own in which he quotes the above statement in *Miller* as evidence that the primary purpose of the Second Amendment was "militia preservation."[72]

Whereas both Justices Stevens and Breyer quote the statement in *Miller* that the Second Amendment must be interpreted and applied in view of its obvious purpose to "assure the continuation and render possible the effectiveness" of a well regulated militia," Scalia conspicuously avoids this statement. Instead, Scalia focuses on two sentences in *Miller* concerning the type of firearm that Jack Miller and Frank Layton illegally transported across state lines. Scalia claims:

> It is entirely clear that the Court's basis for saying that the Second

> Amendment did not apply was *not* that the defendants were "bear[ing] arms" not "for ... military purposes" but for "nonmilitary use," *post,* at 2823. Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument.*" 307 U.S., at 178, 59 S.Ct. 816 (emphasis added). "Certainly," the Court continued, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Ibid.* Beyond that, the opinion provided no explanation of the content of the right.[73]

For reasons I have discussed above and that Justices Stevens and Breyer addressed in their dissents, Scalia's claim that other than describing the type of firearm that defendants Miller and Layton illegally possessed, the *Miller* opinion "provided no explanation of the content of the [Second Amendment] right," is patently false. Furthermore, as Scalia tacitly acknowledges later in his majority opinion, reading *Miller* as holding that the Second Amendment confers an individual right, unrelated to service in a well regulated militia, to possess the types of firearms that are "part of the ordinary military commitment" or that "could contribute to the common defense," but not other types firearms that don't fit this description, is inconsistent with the NFA; inconsistent with the final holding in *Heller* that the Second Amendment confers an individual right to keep a handgun in the home*;* and, on the face of it, absurd. In attempting to explain away these inconsistencies and absurdities, Scalia states:

> We may as well consider at this point (for we will have to consider eventually) *what* types of weapons *Miller* permits. Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939.[74]

Scalia is correct in noting that the National Firearms Act of 1934 regulated civilian ownership of fully automatic machine guns as well as sawed off shotguns. Scalia fails to directly acknowledge, however, that the "startling reading" of *Miller* to which he refers is precisely the reading that he endorses: namely, that the *Miller* decision only specifies the *"type of weapon"*[75] (with italics added for emphasis by Scalia) that is constitutionally protected, and that *Miller* endorses an individual right, unconnected with service in a well regulated militia, for civilian ownership of firearms of the type that are "part of the ordinary military equipment" or that "could contribute to the common defense," but not of weapons such as sawed off shotguns which don't fit into either category. Such a reading of *Miller* is more than startling. It is counterfactual and absurd. Under such a reading, ownership of fully automatic machine guns by individual civilians, along with civilian ownership of

grenade launchers, flame throwers, shoulder mounted anti-aircraft missiles, and other small arms that can be carried by a single individual in warfare and kept in one's own home would be protected by the Second Amendment, whereas the possession the kinds of rifles and shotguns traditionally used for hunting deer and waterfowl would not be protected. Moreover, there is no reason to believe that keeping a handgun in the home, which Scalia claims is protected by the Second Amendment, is any more "part of the ordinary military equipment" or more likely to be used to "contribute to the common defense" than possession of a sawed off shotgun, which Scalia concedes is not constitutionally protected.

Scalia attempts to explain away these inconsistencies and absurdities in its interpretation of the *Miller* decision by referring to a single sentence in the 1980 case of *State v. Kessler* – a case involving the question of whether a prohibition on the possession of "billy" clubs violated the Oregon State Constitution.[76] Scalia argues that Oregon Supreme Court noted parenthetically in this case, "In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same."[77] (The term, "small arms," in brackets, was added by Scalia, apparently to lead the reader to infer that the *Kessler* case was related to firearms, not billy clubs. The term, "Small arms" is not present in the original *Kessler* decision.)[78] While this statement may be true, it has no relevance to the proper interpretation of the Second Amendment today. Unlike the Second Amendment, the Oregon State Constitution includes a clause that confers a right of "the people" to "bear arms for the defence [*sic*] of themselves."[79] Furthermore, weapons used by members of the National Guard and other branches of the military are no longer "one and the same" as weapons kept in the home, and as I will discuss below, there is no net defensive value in keeping any type of firearms in the home. In yet another example of circular reasoning, though, Scalia concludes from the above sentence in *Kessler*:

> Indeed, that is precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.[80]

There is nothing in the *Miller* decision that states or even implies that the Second Amendment confers an individual right to own any kind of firearm unrelated to service in a well regulated militia. Because Scalia disagrees with the holding in *Miller* that "the right of the people to keep and bear arms" is inextricably related to "the preservation or efficiency of a well regulated militia," Scalia reads the *Miller* decision as stating what he wants it to say, not what it actually says.

Despite claiming that the *Miller* decision "is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms,"[81] Scalia, apparently still insecure with his failure to substantiate this claim, resorts to mocking sarcasm once again in an attempt to undermine the credibility of the *Miller* decision and the dissenting opinions of Justices Stevens and Breyer.

Scalia states:

> As for the text of the Court's opinion itself [in *Miller*], that discusses *none* of the history of the Second Amendment…. Not a word *(not a word)* about the history of the Second Amendment. This is the mighty rock upon which the dissent rests its case.[82]

As Justice Stevens notes in his dissent, however, “The Court is simply wrong when it intones that *Miller* contained "*not a word*" about the Amendment's history.”[83] While the unanimous *Miller* decision was far more concise than the rambling *Heller* majority opinion, Justice Stevens documents that the *Miller* decision makes references to many of the same sources that Scalia cites in *Heller*.[84] Stevens also notes that Scalia himself gives “short shrift” to the drafting history of the Second Amendment[85] and doesn’t introduce any relevant new evidence that would provide a basis for overruling *Miller.*[86] And finally, concerning the “hundreds of judges” who Justice Stevens stated depended on *Miller,* Stevens documents in a footnote[87] that with the exception of a single outlier – the 2001 case of *United States v. Emersion*[88] in which two judges opined in a 2-1 split decision in *dicta* unrelated to the question in the case at hand that the Second Amendment conferred an individual right to own firearms – in all of the 19 other federal appeals court cases that considered the Second Amendment in the interim between the 1939 *Miller* decision and the 2008 *Heller* case, the courts ruled, consistent with *Miller,* that the Second Amendment did not confer an individual right to own firearms unrelated to service in a well regulated militia. Scalia dismisses these 19 cases appeals court decisions and an untold number of other federal district court decisions by merely stating in a footnote:

> As for the "hundreds of judges," *post,* at 2823, who have relied on the view of the Second Amendment Justice STEVENS claims we endorsed in *Miller:* If so, they overread *Miller.*[89]

Justice Stevens summarizes Scalia’s misrepresentation of the *Miller* decision by stating:

> “The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the *Miller* Court reached on that evidence. 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.”[90]

D. Lewis v. United States (1980)[91]

As I have noted above, in the 1980 case of *Lewis v. United States,* the Supreme Court quoted from a portion of the 1939 *Miller* decision in reiterating, “[T]he

Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[92] Scalia dismisses this statement in *Lewis* as "a footnoted dictum in a case where the point was not at issue and was not argued."[93] Ironically, Scalia's dismissal of the relevance of the *Lewis* footnote is itself included in one of 29 footnotes in Scalia's majority opinion, many of which could be subject to similar criticism.

In the *Lewis* case, George Calvin Lewis, Jr., who had pleaded guilty and served prison time for a felony breaking and entering offense, was subsequently arrested again and convicted for possession of a firearm in violation of the federal Gun Control Act of 1968, which prohibits convicted felons from possessing guns.[94] Lewis appealed the firearm possession conviction on the basis that he had not been provided with legal counsel before pleading guilty to the earlier breaking and entering offense, in violation of his Sixth and Fourteenth Amendment rights, and therefore should not be considered to be a convicted felon. It is true, as Scalia claims, that Lewis did not appeal the firearm conviction on the basis that it violated a Second Amendment right. The *Lewis* majority opinion mentioned the *Miller* decision parenthetically, though, that the prohibition of firearm ownership by convicted felons did not "trench upon any constitutionally protected liberties," including any right conferred by the Second Amendment.[95]

If there had been any question in 1980 as to whether the Second Amendment conferred an individual right to own firearms unrelated to service in a well regulated militia, Lewis's attorneys would have almost certainly argued that his conviction for possessing a firearm violated his Second Amendment right. It is likely, though, that Lewis's attorneys were aware of the fact that the Second Amendment had never been interpreted as conferring an individual right to own guns by a federal court, and that including a Second Amendment argument would do more to weaken Lewis's case than to strengthen it. In a 6-3 decision, the Court upheld Lewis's conviction for illegally possessing a firearm. The dissent centered on the question of whether Lewis should be considered a convicted felon, not on any question concerning the constitutionality of laws prohibiting convicted felons from owning guns.

E. Conclusion concerning prior Supreme Court and other federal court decisions concerning the Second Amendment

In summary, Scalia's claim the 2008 *Heller* decision is not only consistent with, but supported by prior Supreme Court decisions is patently false. Without presenting any relevant evidence that was not previously available, the *Heller* decision reversed over two centuries of legal precedent, including the view of the Second Amendment that the courts had taken in four prior Supreme Court cases and in 19 of 20 federal appeals court cases. The *Heller* decision clearly violated the principle

of *stare decisis.*

III. "Right to bear arms" clauses in Founding Era state constitutions do not support Scalia's claim that the Second Amendment was intended to confer an individual right to possess firearms unrelated to service in a well regulated militia.

Scalia claims support for his contention that the Second Amendment was intended to confer an individual right to own guns from the fact that some Founding Era state constitutions and declarations of rights contained clauses that could be reasonably be interpreted as conferring an individual right to own firearms for the purpose of hunting or self defense.[96] For example, the 1776 Pennsylvania Declaration of Rights stated, "That the people have a right to bear arms for the defence of themselves and the state ...."[97] In his dissenting opinion, however, Justice Stevens points out the obvious fallacy in the argument that clauses that might be interpreted as conferring an individual right to own guns in state documents imply that the Second Amendment was intended to confer such a right.[98] The state constitutions were available to the Founders who drafted, debated, revised, and eventually voted to ratify the Second Amendment, but they chose not to include language in the Second Amendment that would confer an individual right to own guns unrelated to service in a well regulated militia. Any language in Founding Era state constitutions that might be interpreted as implying an individual right to bear arms, coupled with the fact that the Founders chose not to include such language in the Second Amendment, not only fails to support Scalia's contention that the Second Amendment was intended to confer an individual right to own guns. On the contrary, the Founders' decision not to include such language in the Second Amendment strongly refutes Scalia's contention.

IV. Scalia's claim that the 1689 English Declaration of Rights and English common law support its ruling that the Second Amendment confers an individual right to own firearms unrelated to service in a well regulated militia is patently false.

Scalia makes repeated references to the 1689 English Declaration of Rights[99] (which it also refers to at other points as the 1688 English Bill of Rights[100]) and to English common law[101] and claims that the Second Amendment was derived, in part at least, from these sources, and should therefore be interpreted as conferring a broad individual right to own firearms unrelated to service in a well regulated militia. For example, Scalia claims that the "important founding era legal scholar,"[102] Joseph Story, "equated the English right with the Second Amendment."[103] In yet another example of circular reasoning, Scalia states, "This

comparison to the [1688 English] Declaration of Right would not make sense if the Second Amendment right was the right to use a gun in a militia, which was plainly not what the English right protected."[104]

In fact, however, as Justice Stevens points out in his dissenting opinion, Scalia's claim that the Second Amendment is an analogue of the 1689 (or 1688) English Declaration of Rights (or Bill of Rights) and should therefore be interpreted as conferring a broad individual right to own guns doesn't make any sense at all.[105] The English Declaration of Rights was adopted at least 100 years before the Second Amendment was drafted; it contains no clause that relates a "right to bear arms" to the need for a "well regulated militia;" it was a contract between an autocratic monarch and his subjects, not between the citizens of a democratic society and their democratically elected leaders; and it did not, in fact, confer a broad individual right to firearm ownership unrelated to military service. Scalia quotes St. George Tucker, who it describes as another "important founding-era scholar," as writing that the Second Amendment was "the true palladium of liberty."[106] Scalia fails to note, however, that in the same paragraph, Tucker wrote, with regard to the 1689 English Bill of Rights:

> "…the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other persons not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty."[107]

And finally, Scalia fails to acknowledge that although the 1689 English Bill of Rights was never repealed and that English common law is still in effect, Great Britain currently has some of the strictest gun control laws of any democratic country in the world, including a complete ban on civilian ownership of all handguns and all automatic and semi-automatic long guns.[108] The adoption of the British handgun ban was prompted by a mass shooting in 1996 in which 16 children and their teacher were killed at the elementary school in Dunblane, Scotland by a gunman using handguns he legally owned. The handgun ban was adopted after the British government conducted an extensive investigation into the causes of the massacre and the steps needed to prevent similar tragedies in the future. The results of the investigation were summarized in the 193 page Cullen report,[109] and the British Government responded to the Cullen report in a 10 page document.[110] Neither the Cullen report nor the Government's response mentions any English Bill of Rights or Declaration of Rights or any aspect of British common law as being an obstacle to a complete ban on civilian ownership of handguns. Such a ban was adopted less than two years after the Dunblane massacre. There have been no further school shootings in Great Britain since the handgun ban went into effect,111 and the rate of gun related deaths in the United Kingdom is currently 1/70th the rate in the United States.[112]

In summary, to the extent that the Second Amendment to the U.S. Constitution

has any relation to the 1688 (or 1689) English Declaration of Rights (or Bill of Rights) or to English common law, this relationship provides no support for Scalia's claim that the District of Columbia's handgun laws violate the Second Amendment, or for that matter, that the Amendment precludes the adoption of far more stringent gun control laws, including a complete ban on civilian ownership of handguns and all automatic and semi-automatic long guns.

V. The *Heller* decision both rests upon and promotes the myth that law abiding U.S. civilians derive net protective value from possessing firearms.

Scalia includes more than 50 references to the purported use of (or need for) guns for self-defense or personal protection.[113] For example, Scalia states that the American people consider the handgun to be "the quintessential self-defense weapon"[114] and that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[115] Scalia also clearly rests the ruling that the District of Columbia's hand ban was unconstitutional in large part upon the myth that a handgun in the home provides net protective value to household members. Scalia argues:

> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The [District of Columbia] handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family' [with reference to *Parker*[116]]," would fail constitutional muster.[117]

It cannot be denied that on occasion, an honest, law-abiding person is able to successfully protect himself or herself, a family member, or his or her property with a gun. There was overwhelming evidence at the time of the 2008 *Heller* decision, however, documenting that guns in U.S. homes were far more likely to be used to kill[118] or injure[119] a household member than to protect against a home invader, and that the presence of a gun in the home was an independent risk factor for the occurrence of a homicide[120] or suicide in the home.[121] It was also known that handguns were used in the vast majority of gun related deaths;[122] and that during the first ten years after the adoption of the District of Columbia's handgun ban – the ban that the *Heller* decision struck down – there had been a 25% reduction in firearm related homicides and a 23% reduction in firearm related suicides in the District, with no increase in homicides or suicides committed by other means, and with no similar reduction in firearm related suicides and homicides in communities surrounding Washington DC.[123]

A representative sample of the evidence showing that guns in the homes and communities of honest, law abiding people are far more likely to be used to harm them than to protect them was presented to the *Heller* Court in the *amici curiae* of the American Academy of Pediatrics *et al*[124] and the American Public Health Association *et al.*[125] Justice Breyer acknowledged some of this evidence in his dissenting opinion,[126] but he noted that this evidence was disputed in the *amici curiae* filed by the gun lobby and gun lobby sympathizers in support of Dick Heller's claim that he needed a handgun for protection.[127] Justice Breyer reasoned, however, that when there is controversy concerning the best evidence concerning a matter of public health, "legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact."[128]

Justice Breyer should be commended for his dissent in *Heller,* but while the gun lobby has published mountains of disinformation promoting the myth that honest, law abiding people should own guns "for protection," there is overwhelming evidence that civilian firearm ownership in the United States confers far greater harm than benefit to innocent civilians. It's not practical in an essay of this type or even in a single book to refute more than a small fraction of the disinformation that the gun industry and its associated lobby has published promoting the myth of "guns for protection." It should be noted, though, that a single piece of rubbish is rubbish; a pile of rubbish is rubbish; and a mountain of rubbish is still rubbish. In this essay, I will address one particularly egregious falsehood promoted by the gun lobby: the assertion that there are 2.5 million defensive gun uses annually in the United States. Justice Breyer refers to this assertion in his dissenting opinion in *Heller,*[129] and Scalia quotes a statement[130] from the majority opinion in *Parker*[131] that makes reference to this assertion.

The claim that there are 2.5 million defensive gun uses a year is based on a telephone survey in which white males in southern states were over-represented.[132] The estimate of 2.5 million defensive gun uses annually is an extrapolation from the fact that 66 out of 4,977 respondents (1.3%) reported over the telephone that they had used a gun defensively in the past year. Not a single one of these alleged defensive gun uses was confirmed through follow-up with law enforcement agencies or by any other means. Obviously, it is not valid to extrapolate from 66 unconfirmed assertions of defensive gun uses in a telephone survey of fewer than 5,000 people to the conclusion that there are 2.5 million defensive gun uses a year in the United States. Moreover, it's been pointed out that using the same type of telephone survey methodology, more Americans report having had contact with space aliens in the past year than having used a gun defensively.[133]

In his dissenting opinion, Justice Breyer disputes Scalia's claim that the District of Columbia's partial handgun ban and safe firearm storage laws would, "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights… fail constitutional muster."[134] Even if there were equipoise between arguments for and against keeping a handgun in the home (and, as I've discussed

above, there is not), Breyer argues, quoting from a Supreme Court decision involving another party named "Heller,"[135] but unrelated to Dick Heller, that the District of Columbia's partial handgun ban and firearm safe storage laws had a "rational relationship" to a "'legitimate,' life-saving objective," – namely, reducing gun related deaths in the District, an objective that, as I've discussed below, it accomplished - and therefore could not be considered on the face of the matter to be unconstitutional.[136] Scalia resorts to nonsensical, circular reasoning once again in responding to Breyer's argument. Scalia states: "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[137]

In addition to the large body of evidence that was available to the Court at the time of the *Heller* decision demonstrating that civilian gun ownership confers no net protective value, substantial additional evidence in support of this fact has been amassed since 2008. For example:

> A study that was published in 2009 of assault victims in Philadelphia showed that someone who was carrying a gun at the time of an assault was 4.5 times more likely to be shot and 4.2 times more likely to be killed than someone who was not carrying a gun.[138]
>
> A meta-analysis published in 2014 of all the medical literature to date on the subject of the association between firearm availability and the risk of becoming a victim of suicide or homicide found that all but one of 16 methodologically sound studies concluded that individuals who owned a gun or had access to one in the home had an increased risk of becoming a victim of suicide or homicide.[139] Pooling the data from all 16 studies, access to a gun was associated with an increased odds ratio of 3.24 of becoming a suicide victim and an odds ratio of 2.0 of becoming a homicide victim.
>
> A case-control study of U.S. Army soldiers who committed suicide from 2011-2013, matched with controls who did not commit suicide, showed that most suicides were committed with guns, most guns used in suicides were privately purchased, and soldiers who either stored a loaded gun at home or carried a personal gun in public had a four-fold increased risk of suicide as compared with controls matched for other suicide risk factors.[140]
>
> Data from the FBI's supplemental Homicide Reports show that from 2011-2015, for every one time a civilian killed someone with a gun in self defense, guns were used in 35 criminal homicides.[141]

In summary, Supreme Court decisions should be based upon objective evidence, not myths; and the Court should not be in the business of endorsing myths promoted by special interest groups. The *Heller* decision both endorses and rests heavily upon the gun lobby's deadly myth that honest, law-abiding people should

own and carry “guns for protection.”

VI. The *Heller* majority allowed the gun lobby to effectively rewrite the Second Amendment.

For the wording of the Second Amendment to be consistent with the gun lobby’s claim that it was intended to confer an individual right to own and carry guns unrelated to service in a well regulated militia, the first half of the Amendment, “A well regulated militia, being necessary to the security of a free state,” would have to be deleted, as it is on the version of the Amendment that is inscribed on the wall in the lobby of the NRA headquarters in Fairfax, Virginia.[142] In addition, in the second half of the Amendment, the term, “the people,” which even Scalia acknowledges is used in a collective sense throughout the Constitution,[143] would have to be changed to “individual people;” and the term, “keep and bear arms,” which, as I have noted above, was used almost exclusively during the Founding Era to refer to possessing and carrying weapons of war in a military setting, would have to be changed to, “own and carry guns for personal use.” The result of this rewrite would be a Second Amendment that states, “The right of individual people to own and carry guns for personal use shall not be infringed.”

As Justice Stevens noted in his dissenting opinion in *Heller,* in reversing the 1939 *Miller* decision - while claiming to be consistent with it - Scalia did not identify any new evidence that had surfaced in the interval between *Miller* and the *Heller* case concerning the proper interpretation of the Second Amendment.[144] Instead, Scalia parroted what historian Saul Cornell has called “revisionist history”[145] and “gun rights propaganda passing as scholarship”[146] that was published *en masse* beginning in the latter half of the 20th Century by a stable full of individuals with ideological and, in some well documented cases, direct financial ties to the gun lobby.

Between 1888, when law review articles were first indexed, and 1959, a total of 11 articles concerning the Second Amendment were published in law journals, and all 11 endorsed the view that the Amendment was intended to confer a collective right of the states to maintain armed militias, not an individual right to own guns for personal use.[147] The former view is usually referred to as the “collective right” interpretation of the Second Amendment, although historian Robert Spitzer referred to it as the “Court view” in his 2000 article in the Chicago-Kent Law Review, in light of the fact that it was the interpretation endorsed by the Supreme Court in all four Second Amendment cases the high court had considered and in nearly 20 federal appeals court rulings on the Second Amendment up to that point in time.[148] The interpretation of the Second Amendment as conferring an individual right to own guns unrelated to service in a well regulated militia has been termed the “individual right” view, although in a blatant attempt to claim undeserved legitimacy for their side, the gun lobby’s authors have adopted the moniker, “the Standard Model,” for their revisionist history version of the Second Amendment.[149] The first article to appear in a law journal in support of the “individual right”

interpretation of the Second Amendment was written by a law student and published in the William and Mary Law Review in 1960.[150] The first citation in the article is a reference to the National Rifle Association's flagship magazine, *The American Rifleman*, offering an indication of the author's bias. Further evidence of the author's bias is his argument that the Civil War was an example of a "lawful revolution" under the U.S. Constitution.[151]

By 1970, a total of 25 articles on the subject of the Second Amendment were referenced in the *Index to Legal Periodicals*, with 22 of these articles supporting the "collective right" interpretation of the Second Amendment and just 3 of them supporting the "individual right" interpretation.[152] Subsequently, As Michael Waldman, president of the Brennan Center for Justice at NYU Law School, wrote in his article, "How the NRA Rewrote the Second Amendment:"

> Then, starting in the late 1970s, a squad of attorneys and professors began to churn out law review submissions, dozens of them, at a prodigious rate. Funds—much of them from the NRA—flowed freely. An essay contest, grants to write book reviews, the creation of "Academics for the Second Amendment," all followed. In 2003, the NRA Foundation provided $1 million to endow the Patrick Henry professorship in constitutional law and the Second Amendment at George Mason University Law School.[153]

From 1970 through 1989, there was a surge in publications in law journals on the subject of the Second Amendment, with 25 articles endorsing the "collective right" interpretation of the Amendment and 27 articles endorsing the "individual right" interpretation. Of the 27 articles endorsing the "individual right" interpretation, a review by Professor Carl T. Bogus at the Roger Williams University School of Law found that at least 16 were written by lawyers with direct financial ties to the gun lobby.[154] Supreme Court justices recognized even while it was happening that pro-gun special interests were attempting to manufacture constitutional protection for the individual use of firearms. In a 1972 case in which a drug dealer appealed his conviction for illegally possessing a handgun on the basis that his Fourth Amendment protection against illegal search and seizure had been violated, Justice Douglas wrote:

> "The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment.…There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted…There is no reason why all pistols should not be barred to everyone except the police."[155]

During the 1990's, at least 58 additional articles were published in law journals endorsing the "individual right" view of the Second Amendment as compared with 29 endorsing the "collective right" view.[156] By 2008, one NRA-financed author alone, Stephen P. Halbrook,[157] had written at least 20 law review articles

advocating the “individual right” view of the Second Amendment, including at least four articles likening U.S. gun control laws to the policies of Nazi Germany.[158]

Fifteen history professors submitted an *amicus* brief in the *Heller* case in which they reviewed the overwhelming evidence from original Founding Era documents indicating that the founders who drafted, debated, revised, and eventually ratified the Second Amendment clearly did not intend for it to confer an individual right to own guns unrelated to service in a well regulated militia.[159] Scalia doesn’t make a single reference to this brief. In contrast, Scalia refers to the writings of Halbrook, other NRA-funded authors Don B. Kates[160] and Joyce Lee Malcolm,[161] and a former NRA board member, Joseph Olson,[162] at least seven times.[163]

In the case of *District of Columbia v. Heller,* the five justices in the majority endorsed the gun lobby’s rewrite of the Second Amendment, a version that the late Supreme Court Chief Justice Warren Burger, had called, “[O]ne of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime.”[164]

VII. The progeny of the *Heller* decision

Prior to the Supreme Court’s rogue 2008 *Heller* decision, no U.S. gun law had ever been overturned by a federal court on a Second Amendment basis. The *Heller* decision signaled to the gun lobby, though, that it was now “open season” to challenge all sorts of other gun laws. Initially, most of the new challenges failed, but two years following the *Heller* decision, the same five justices in the *Heller* majority ruled in the case of *McDonald v. Chicago* that Chicago’s partial handgun ban also violated the Second Amendment.[165]

Following *McDonald,* with one strange exception in 2016 in which the Court ruled that a ban on “stun guns” (devices intended to ward off attackers by delivering an electrical shock) was also unconstitutional,[166] the Supreme Court declined to hear any new Second Amendment cases for almost a decade. In 2019, though, with two new Trump appointees on the Supreme Court (Justices Gorsuch and Kavanaugh), the Court agreed to hear the case of the *New York State Rifle and Pistol Association (NYSRPA) v. New York City* in which the gun lobby claimed that the City’s prohibition on carrying a handgun anywhere in the City except to and from a City approved firing range violated the Second Amendment.[167] New York City capitulated to the gun lobby, rescinding the law in question in order to make the case moot, but the NYSRPA came right back and challenged New York State’s restrictions on concealed carry of handguns in the case of *NYSRPA v. Corlett.* This case became *NYSRPA v. Bruen* when Kevin Bruen succeeded Keith Corlett as the Superintendent of the New York State Police. In April of 2021, the Supreme Court agreed to hear the case. By this time, the death of Justice Ginsburg in September of 2020, had given Trump the opportunity to nominate a third Supreme Court justice, Amy Coney Barrett, who like Gorsuch and Kavanaugh, was a favorite of the gun lobby.

We filed an *amicus* brief in the *NYSRPA v. Bruen* case, calling on the Court to not only uphold the constitutionality of New York's concealed carry law, but to take the opportunity of this case to overturn the *Heller* decision. Not unexpectedly, though, in a decision announced on June 23, 2022, the three remaining justices from the *Heller* majority (Roberts, Alito, and Thomas) and the three new Trump nominees (Gorsuch, Kavanaugh, and Coney Barrett) compounded the harm done by *Heller* and took the fraudulent misrepresentation of the Second Amendment to a new low in ruling that New York's requirement for a special permit to carry a concealed handgun in public was unconstitutional. The six-justice majority quoted the *Heller* decision more than 120 times in their opinions. In addition, despite claiming that a "means-end" test was "one step too many" in determining the constitutionality of gun control laws,[168] they made more than 60 references to the private gun ownership as a means for the end purpose of "self-defense," completely ignoring the overwhelming evidence that, as noted above, was presented to the Court in *amicus* briefs in the *Heller* case, and that we also reiterated in our *amicus* brief in *Bruen,*[169] showing that guns in the homes and in the communities of honest, law-abiding members of a democratic society are far more likely to be used to harm innocent people than to protect them.

If there is anything hopeful to be found in the *Bruen* decision, it's the fact that Justice Breyer, writing in a dissenting opinion joined by Justices Sotomayor and Kagan, cited *amicus* briefs, including the one we filed on behalf of Americans Against Gun Violence, as evidence that the *Heller* case had been wrongly decided. Justice Breyer wrote:

> The *Heller* majority relied heavily on its interpretation of the English Bill of Rights….The majority interpreted that language to mean a private right to bear arms for self-defense, "having nothing whatever to do with service in a militia." Two years later, however, 21 English and early American historians (including experts at top universities) told us in [*McDonald v. Chicago,* citing the *amicus* brief for English/Early American Historians] that the *Heller* Court had gotten the history wrong: The English Bill of Rights "did not ... protect an individual's right to possess, own, or use arms for private purposes such as to defend a home against burglars."…And that was not the *Heller* Court's only questionable judgment. The majority rejected Justice Stevens' argument that the Second Amendment's use of the words "bear Arms" drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. Linguistics experts now tell us that the majority was wrong to do so [with references to *amicus* briefs filed by Linguistics Professors and Experts, attorney Neal Goldfarb, and Americans Against Gun Violence].[170]

Justice Breyer has since retired from the Court and has been replaced by Justice Ketanji Brown Jackson. The above excerpt from his minority opinion in *Bruen,* however, provides encouragement that filing *amicus* briefs in important Second Amendment cases is a means of planting the seeds that will eventually result in

the *Heller* decision and its progeny being overturned.

One week after announcing the *Bruen* decision, the Supreme Court majority further compounded the harm it had done in *Bruen* and *Heller.* On June 30, 2023, the Court effectively invalidated bans on large capacity magazines (LCM's) in California and New Jersey, a ban on openly carrying loaded guns in public in Hawaii, and a ban on assault weapons in Maryland by issuing what are known as "GVR" orders (an acronym for **g**rant *writ of certiorari*, **v**acate the lower court's ruling, and **r**emand the case for further consideration), without ever actually hearing the four cases in which it issued the orders. The four cases included *Duncan v. Bonta* (challenging California's LCM ban);[171] *Association of New Jersey Rifle, et al. v. Bruck (*challenging New Jersey's LCM ban);[172] *Young v. Hawaii* (challenging Hawaii's open carry ban); *and Bianchi v, Frosh* (challenging *Maryland's assault weapons ban)*.[173] In all four cases, appeals courts had previously upheld the constitutionality of the laws in question, and in all four cases, the Supreme Court instructed the lower courts to reconsider their decisions "in light of" the *Bruen* decision.

The *Bruen* decision and the GVR orders announced a new "open season" for the gun lobby to challenge all kinds other gun laws. While a discussion of all the new challenges is beyond the scope of this essay, the case of *United States v. Rahimi* is indicative of the extreme nature of many of these challenges.

Zackey Rahimi, a drug dealer who had been involved in five shootings in Texas in a two-month period and who was under a domestic violence restraining order (DVRO), was convicted of being in possession of a firearm in violation of federal law that prohibits persons under a DVRO from possessing guns. Rahimi appealed his conviction on the basis that the federal statute prohibiting someone under a DVRO from possessing a firearm violated his Second Amendment rights. A district court judge and a three-judge panel of the Fifth Circuit Court of Appeals upheld Rahimi's conviction. Following the Supreme Court's 2022 *Bruen* decision, however, the Fifth Circuit Court of Appeals vacated Rahimi's conviction, stating:

> Considering the issue afresh, we conclude that *Bruen* requires us to re-evaluate our Second Amendment jurisprudence and that under *Bruen,* § 922(g)(8) [the federal statute prohibiting someone under a DVRO from possessing a firearm] fails to pass constitutional muster. We therefore reverse the district court's ruling to the contrary and vacate Rahimi's conviction.[174]

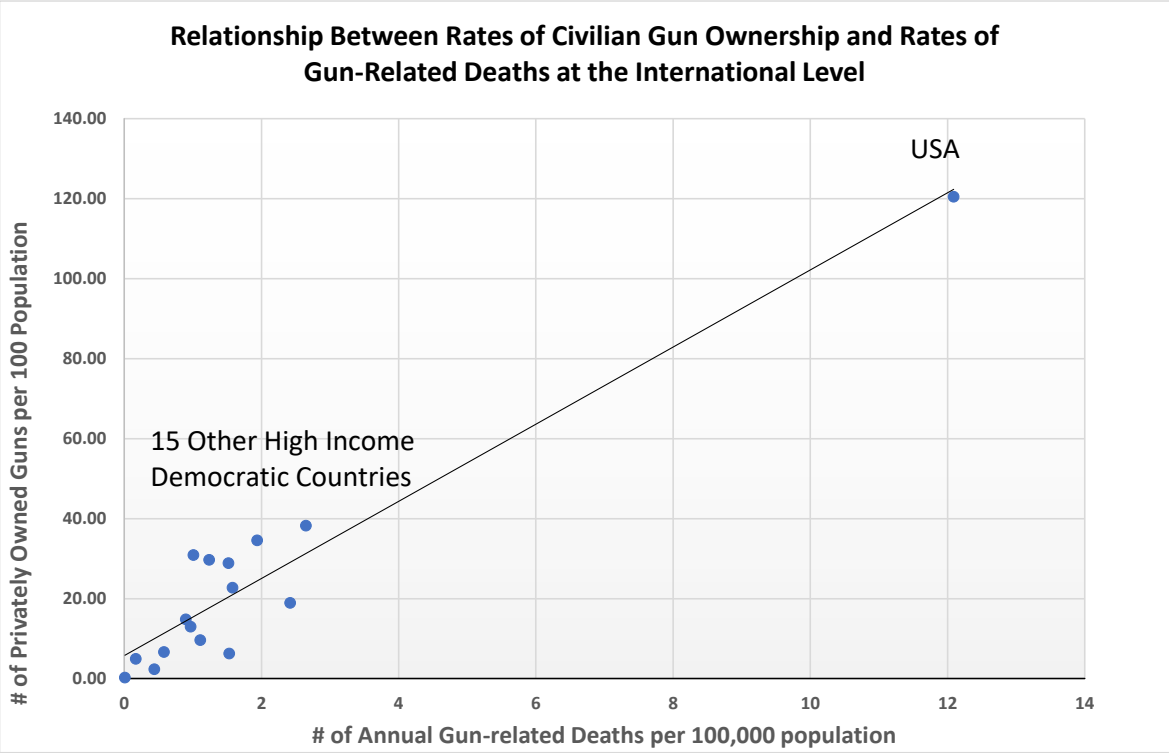
The Supreme Court agreed to review the case, and the Court heard oral arguments on November 7, 2023. Americans Against Gun Violence filed another *amicus* brief in this case calling on the Court to not only uphold the constitutionality of the federal statute prohibiting someone under a DVRO from possessing a firearm, but to take the opportunity of this case to overturn the *Heller* decision and its progeny, including the *Bruen* decision. At the time of this writing, the Court's decision is pending.

VIII. The *Heller* decision and its progeny are death sentence for tens of thousands of Americans annually.

In 2021, the most recent year for which fatal injury data are available from the Centers for Disease Control at the time of this writing, 48,630 U.S. residents died of gunshot wounds – the highest annual toll of gun deaths in U.S. history.[175] The number of Americans killed annually with guns has been steadily increasing since the *Heller* decision in 2008, when 31,953 U.S. residents died of gunshot wounds.

The rate of gun related deaths in the United States is 10 times higher than the average rate for the other high income democratic countries of the world.[176] Our rate of homicide by any means is 7 times higher than the average rate in these other countries, driven by a gun homicide rate that is 25 times higher. As the American Public Health Association *et al* pointed out in their *amicus* brief in the *Heller* case, our extraordinarily high gun homicide rate is not a result of Americans being inherently more violent than people in other high income democratic countries.[177] In fact, the rate of criminal assault by any means in the United States is below the average rate for other high income democratic countries of the world.[178] And our extraordinarily high rate of gun related suicides isn't due to an extraordinarily high rate of mental illness in our country as compared with other high income democracies.[179] We would have one of the lowest suicide rate of any high income democratic country if it weren't for the fact that our gun suicide rate is 8 times higher than the international average.[180]

The factors that most clearly explain our extraordinarily high rate of gun related homicide and suicide as compared with other high income democratic countries are our extraordinarily lax gun control laws and the extraordinarily high number of privately owned guns in circulation.[181] International comparisons show a direct relationship between per capita gun ownership and rates of gun related deaths, with the United States being an extreme outlier in both categories (see graph below). And the experiences of other countries,[182] consistent with the experience of the District of Columbia after it enacted the handgun ban that the *Heller* decision struck down,[183] show that when access to guns is reduced, not only do rates of gun related homicide and suicide go down, overall rates of homicide and suicide decline. In other words, when access to guns is limited, people don't generally substitute other highly lethal means of attempting to harm themselves or others.



Legend: The computer generated best fit line demonstrates the direct, linear relationship between rates of *per capita* gun ownership and rates of gun related deaths at the international level, with the United States being an extreme outlier in both categories. The 15 other high income democratic countries represented by points on the graph are, in order from the lowest to highest rates of gun-related deaths, Japan, United Kingdom, Netherlands, Spain, Australia, Italy, Germany, Denmark, New Zealand, Norway, Belgium, Sweden, Canada, France, and Finland. Data used to construct this graph were taken from the website GunPolicy.org, which is affiliated with the University of Sydney school of public health.

The guiding policy in the United States for who should or should not be allowed to possess a gun differs from the guiding policy of every other high income democratic country at the most fundamental level. In the United States, it has long been the guiding policy than anyone of a certain age who seeks to acquire a firearm may legally do so, assuming that he or she is not on a perennially incomplete federal database of persons who are prohibited, based on one or more relatively narrow criteria, from owning guns. This guiding policy is termed, "permissive."[184] While our permissive guiding policy predated the *Heller* decision, *Heller* codified it as a constitutional right. In every other high income democratic country of the world, the guiding policy for firearm ownership is "restrictive."[185] In these other democratic countries, an individual who seeks to legally acquire a gun must first show a legitimate need to own one and evidence that he or she can handle one safely. Furthermore, recognizing that there is no net protective value in civilians owning or carrying firearms in a democratic society, many other high income democratic countries, including Great Britain, Australia, and New Zealand, do not accept "self defense" as a legitimate reason for owning a gun.[186]

Another fundamental difference between the United States and other high income

democratic countries is our response to mass shootings. Great Britain,[187] Australia,[188] and New Zealand[189] all reacted promptly and definitively to mass shootings committed with semi-automatic rifles by completely banning civilian ownership of these types of weapons and requiring residents who already owned these kinds of weapons to surrender them to be destroyed in return for monetary compensation. Great Britain went a step farther following the 1996 mass shooting at the elementary school in Dunblane, Scotland, committed with handguns that the shooter legally owned. Within two years of the Dunblane mass shooting, Great Britain completely banned civilian ownership of handguns.[190]

The United States, in comparison, adopted a weak "assault weapons" ban in 1994 that grandfathered in all so-called "assault weapons" already in circulation and that defined an "assault weapon" in such a narrow manner as to allow the gun industry to continue to manufacture and sell weapons that evaded the definition but that were every bit as deadly.[191] It's doubtful that the U.S. "assault weapons ban" had any significant effect in reducing the number of mass shootings or overall gun related deaths, and it was allowed to sunset in 2004. At least one federal district court judge, likening an AR-15 to a "Swiss Army Knife," has interpreted the *Heller* decision as prohibiting even this kind of weak "assault weapons ban."[192] While it's too soon to evaluate the effect of New Zealand's ban on all semi-automatic rifles, it's known that Australia's ban was followed by a steady decline in firearm related deaths and a period of 22 years without another mass shooting.[193] And as I have discussed above, as a result of its complete ban on civilian ownership of handguns and all automatic and semi-automatic long guns, Great Britain currently has one of the lowest rates of gun related deaths in the world, and a rate 1/60th that of the United States.[194] The *Heller* decision clearly prohibits the United States from adopting stringent gun control laws comparable to those in Great Britain, despite the fact that in the *Heller* majority opinion, Justice Scalia repeatedly claims that the Second Amendment is an analogue of the 1689 English Declaration of Rights and English common law.

If the United States were to adopt stringent gun control laws comparable to the laws in other high income democratic countries, there is no reason to believe that we could not reduce our rates of gun related deaths to comparable levels. Assuming that there would continue to be approximately 40,000 gun related deaths annually in the United States if current gun laws and rates of *per capita* gun ownership remain in place, adopting stringent gun control laws that would lower the U.S rate to the average rate in other high income democratic countries would be expected save 36,000 lives a year. If we adopted laws comparable to those in Great Britain, we could expect to save over 39,000 lives a year.

In creating a constitutional obstacle, where none previously existed, to the adoption of stringent gun control laws in the United States comparable to the laws in other high income democratic countries, the *Heller* decision and its progeny are literally death sentences for tens of thousands of Americans annually.

Conclusion

The 2008 *Heller* case was wrongly decided. For the reasons that I have discussed above, and for additional reasons beyond the scope of this essay, the *Heller* decision is fundamentally, egregiously, embarrassingly flawed. Worse yet, the *Heller* decision and its progeny are literally death sentences for tens of thousands of Americans annually.

In the short term, the Supreme Court must be reconstituted with a majority of justices who will reverse the *Heller* decision and its progeny. In the long term, the United States should adopt a new constitutional amendment that clarifies, as the Supreme Court stated in the 1980 *Lewis* case,[195] that neither the Second Amendment nor any other part of the United States Constitution guarantees an individual right to own firearms unrelated to service in a well regulated militia.

At the time of this writing, Americans Against Gun Violence remains the only gun violence prevention organization in the United States that openly advocates and is actively working toward overturning the *Heller* decision and its progeny, including by filing *amicus curiae* (friend of the court) briefs in important Second Amendment cases and by educating the American public and policy makers concerning the true history and intent of the Second Amendment. We urge other organizations and individuals who are concerned about our country's shameful epidemic of gun violence to join us in openly calling for the Supreme Court to overturn the *Heller* and its progeny and in calling for lower courts to interpret these fatally flawed decisions as narrowly as possible until they are overturned.

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