



CIVIL RIGHTS: THE HELLER CASE

MINUTES FROM A CONVENTION OF THE FEDERALIST SOCIETY

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East and State Rooms

JUDGE O'SCANNLAIN: Good afternoon and welcome to this afternoon's long anticipated panel on the meaning and implications of the Supreme Court's path-breaking case on the Second Amendment, *District of Columbia v. Heller*.¹ I am Diarmuid O'Scannlain, judge on the United States Court of Appeals for the Ninth Circuit, and I will be moderating today's panel.

To discuss the case, we have four highly qualified individuals and experts on the subject of the Second Amendment, all of whom have had distinguished judicial clerkships. They are Professor Lucas Powe, Jr. of the University of Texas, who clerked for Justice William O. Douglas; Professor Nelson Lund of George Mason University School of Law, who clerked for Judge Pat Higginbotham on the Fifth Circuit and Justice Sandra Day O'Connor; Professor Adam Winkler of the University of California at Los Angeles, former law clerk to my colleague Judge David Thompson; and Clark Neily, senior attorney at the Institute for Justice and co-counsel for the plaintiffs in the *Heller* case itself, who clerked for federal district Judge Royce Lamberth right here in Washington, D.C.

Now, before going further, let me first remind us all of the text of the Second Amendment. It reads, "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."²

Now, one reason why the *Heller* decision received so much attention before and after it was handed down is that since the time of the Second Amendment's adoption in 1791, the Supreme Court has only rarely interpreted its meaning. Indeed, before *Heller*, the most recent Supreme Court case addressing the Amendment in any way was *United States v. Miller*³ in 1939, which only discussed the language of the Amendment briefly.⁴

¹ *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

² U.S. CONST. amend. II.

³ *United States v. Miller*, 307 U.S. 174 (1939).

⁴ See, e.g., Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 49 (2008).

In the years between *Miller* and *Heller*, academic commentators gradually began to pay attention to the Second Amendment and the meaning of its right to keep and bear arms. Ultimately, controversy circled around whether the right to bear arms is an individual or a collective one.⁵ *Heller* resolved that question, among others, in favor of the former interpretation, in a sixty-four-page opinion authored by Justice Scalia for the Chief Justice and Justices Kennedy, Thomas, and Alito, and forty-six- and forty-four-page dissents by Justices Stevens and Breyer respectively for the remaining justices, Justices Souter and Ginsburg.

Well, now, with that very summary presentation in mind, I turn to this afternoon's panel. Professor Powe will start us off with a brief summary of the *Heller* decision itself and then provide a critique of the historical writing of the opinions in the case. Professor Lund will then analyze the opinion from the standpoint of originalism and its implications for originalist jurisprudence in the future. Professor Winkler will then shift gears a bit to talk about what has actually been going on in the lower courts since the *Heller* decision came down, particularly how often and to what purpose lower courts have been analyzing the decision. Finally, Mr. Neily, our only practicing lawyer and a member of the team that won *Heller* in the Supreme Court, will direct our attention to future doctrinal issues such as whether the Second Amendment right is incorporated into the Fourteenth Amendment and therefore binding on the states.

The panelists will speak in the order in which I have introduced them. We will then have some cross-panel responses, following which I will open the floor to questions for any member of the panel.

⁵ See, e.g., Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 *FORDHAM L. REV.* 573, 587 (2004); Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 *TEX. L. REV.* 237 (2004) (book review); Jessica Reese, Note, *The Lone Second Amendment Interpretation: Has It Reached the Status of "Superprecedent"?*, 32 *S. ILL. U. L.J.* 211, 211-12 (2007).

Before we begin, I should also add a word of my own role here. Here, I will be moderating the panel but not taking any position on any of the issues the panelists discuss since, as a Ninth Circuit judge, such legal questions may very well come before me some day.

With that, I suggest we begin with Professor Powe. Professor.

PROFESSOR POWE: What is interesting about the two principal opinions in the case, that of Justice Scalia and Justice Stevens, is both of them relied on originalism and yet managed to come to polar opposite conclusions. Justice Scalia relied on ordinary meaning originalism,⁶ while Justice Stevens relied on original-meaning originalism, where he's much more willing to look at documents that were not public at the time.⁷

Both of them had to deal with the problem that the Second Amendment poses uniquely among the Bill of Rights in that it has a preface, "A well regulated Militia, being necessary to the security of a free State . . ."⁸ And from the beginning, there has been a debate about whether the preface controls or the right at the end of the Second Amendment controls.⁹ Justice Stevens goes with the preface; Justice Scalia goes with the right.

Justice Scalia's opinion is interesting because he works backwards. He worked from right to the preface. First, he started with the right of the people and noted that that's talking individually because he can look at the First, Fourth, and Ninth Amendments and show that they also are speaking of the right of the people in an individual sense.¹⁰ Then he goes to "keep and bear Arms" and finds, yes, that's having a gun.¹¹ And then he turns to the preface, first with "a well regulated Militia," and then "the security of a free State."¹² What he does then—and each of them are extensively

⁶ See *Heller*, 128 S. Ct. 2788, 2791, 2793

⁷ See *id.* at 2833–2835.

⁸ U.S. CONST. amend. II.

⁹ See Akhil Reed Amar, *Second Thoughts*, LAW & CONTEMP. PROBS., Spring 2002, at 103, 103.

¹⁰ See *Heller*, 128 S. Ct. at 2789.

¹¹ See *id.* at 2792–97.

¹² See *id.* at 2799–2801.

documented—is conclude, the purpose of the clause, the prefatory clause, doesn't control the right.¹³ It offers one but not the exclusive reason for why we can keep and bear arms. And he backs this up by looking at state constitutions that were extant at the time.¹⁴

Then in what, for me, was the more interesting part of Justice Scalia's opinion, which takes half again as long, or half the size of the first part, is he looks at post-ratification statements.¹⁵ And this is divided into two parts: pre-Civil War and then post-Civil War. And so, he's relying on a lot of nineteenth-century commentary to show what the original meaning of the Second Amendment was in 1791.¹⁶ Justice Stevens, I think, says, "Kind of interesting for an originalist."¹⁷

Justice Stevens takes the clause from the beginning to the end and also does a thorough job. In his words, there is a "clear answer" to the meaning of the Second Amendment,¹⁸ and that clear answer is the exact opposite of Justice Scalia. And then in the twist that I like about Stevens's opinion is he relies on the 1939 case of *United States v. Miller*,¹⁹ one of the more ambiguous opinions that I've read. Miller's ambiguity stems from the fact that the opinion can be read two ways: (1) to hold private individuals have a right to possess militia weapons or (2) to hold that only militia members may possess weapons.²⁰ The former is the better reading, but Stevens blithely treats the latter as unasailably correct.²¹

¹³ See *id.* at 2801–02.

¹⁴ See *id.* at 2802–05.

¹⁵ See *id.* at 2805–12.

¹⁶ See *id.* at 2807–11.

¹⁷ See *id.* at 2837 n.28 (Stevens, J., dissenting).

¹⁸ See *id.* at 2822 (majority opinion).

¹⁹ *United States v. Miller*, 307 U.S. 174 (1939).

²⁰ See, e.g., Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI-KENT L. REV. 291, 297–99 (2000) ("The individual rights advocates correctly point out that *Miller* might plausibly be read to suggest a negative pregnant: 'if the sawed-off shotgun had been a militia weapon, then,' on this reading, the defendants 'would have had a constitutional right to possess it.' . . . [However], the Supreme Court has not read *Miller* to imply anything resembling an individual right to firearms possession.")

²¹ See *Heller*, 128 S. Ct. at 2844–46 (Stevens, J., dissenting) ("The key to [*Miller*] did not . . . turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns.")

Justice McReynolds's unanimous opinion in *Miller* seems to rely on the government brief in the case, and the government brief in the case is obviously the dominant one because of the time of argument, *Miller* had been killed in a gully in Oklahoma with his gun near him and was not represented at the Supreme Court. And my view is if you're going to argue a case without an opponent; if you lose, retire.

(Laughter.)

PROFESSOR POWE: How Justice Stevens could rely on an ambiguous and not particularly good opinion by perhaps the worst judge of the twentieth century should have caused some consternation.

I'll just say one thing about Justice Breyer's opinion. He agrees with Justice Stevens but says, "Even if Scalia is right, the District of Columbia's ban on handguns is an appropriate balancing of the interests involved,"²² sort of a sophisticated view of Felix Frankfurter's concurring opinion in *Dennis v. United States*, where Frankfurter found Congress could balance away the First Amendment rights at issue.²³

Both opinions are really confident that they are right. And the stunning thing is real historians have written about the Second Amendment—Saul Cornell, Jack Rakove, Joyce Malcolm²⁴—and real historians are split on the meaning of the Second Amendment. I have written on it, favoring Scalia's opinion but with far less certainty than he has—although that could be said about any issue between us—

(Laughter.)

PROFESSOR POWE: —and I was troubled when I got a response from Professor Rakove, who is a specialist in the founding era. The response was, "You don't understand." If somebody who specializes in late eighteenth-century America tells me that I don't

²² See *id.* at 2847 (Breyer, J., dissenting).

²³ *Dennis v. United States*, 341 U.S. 494, 524–26 (Frankfurter, J., concurring).

²⁴ See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); JACK RAKOVE, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994).

understand late eighteenth-century America, I've got to wake up and listen. It seems to me that he's more likely right than I am, and it has caused me to wonder quite a bit.

But if professional historians are split on what the meaning of the Second Amendment in late eighteenth-century America is, that's a lot of chutzpah for untrained judges to enter into this debate and try and decide it, especially without taking issue with the historians. You will not find Scalia explaining why Rakove and Saul Cornell are wrong. You will not find Stevens explaining why Joyce Malcolm is wrong. It bothers me a lot. I don't blame them for ignoring the people on the other side. I constantly teach my class that the value of being a Supreme Court justice is you never have to answer a hard question; just duck it.

I want to talk about, for a couple of minutes, the First Amendment, which I've spent twenty-some odd years thinking about in the context of the founding era, and the question is, for this, "What did the First Amendment mean in 1791?" And the easy answer is "Blackstone."²⁵ Everybody, all lawyers had a copy of Blackstone, and Blackstone says freedom of the press consists of laying prior restraints, but it's okay to have subsequent punishment. We can have the law of seditious libel. That's one interpretation and possibly a dominant one.

A second one easily represented by John Adams talking about the Massachusetts Constitution was that you could have seditious libel, but you had to recognize truth as a defense in the circumstances where the speaker was uttering his statements for the public good.²⁶ So, if you're telling the truth but not for the public good, you can be convicted.

A third possibility is the one that came out in the Sedition Act of 1798,²⁷ which is truth is an absolute defense to seditious libel.

²⁵ WILLIAM BLACKSTONE, 4 COMMENTARIES *150, *150-53.

²⁶ See LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 42 (1991); STEPHEN FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA 58 (2008).

²⁷ An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798) (expired 1801).

And a fourth one, articulated during the Revolutionary War and then clearly articulated in St. George Tucker's *Blackstone*,²⁸ the first American edition of *Blackstone*, is you can't have seditious libel.

After studying this for twenty years, I can't tell you what was the meaning of the First Amendment in 1791. I just don't know. All four of these choices are available, and it seems to me that probably the first and the fourth are the least likely, and I'd have to pick between one of the other, middle two, but I don't know that either. And this puts me to my final point, which is the troublesome one.

I'm going to quote Justice Scalia. Scalia scoffs at "the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of rights to keep and bear arms. This simply does not comport with our long-standing view that the Bill of Rights codified venerable, widely understood liberties."²⁹ And my point on the First Amendment is it codified a venerable liberty, but it isn't widely understood what it is. This brings me to professional historians. If Edmund Morgan and Bernard Baiyln and Gordon Wood, who I think are the three preeminent historians of the period over last half-century, if they've taught us anything, it's that the founding era, from the end of the French and Indian Wars into the early Jefferson administration was a deeply creative and dynamic era with respect to constitutionalism and political theory.³⁰

Thus, I am personally concerned with any static theory that wants to freeze American thinking at a precise point in history because the Americans of that era had not frozen their thinking. They were still thinking through what they were doing and what it meant throughout the 1790s, and we really don't get more settled meaning until we're into Jefferson's administration.

JUDGE O'SCANNLAIN: Thank you very much.

²⁸ WILLIAM BLACKSTONE, 4 COMMENTARIES *142 (St. George Tucker ed.) (1803).

²⁹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2804 (2008).

³⁰ See, e.g., BERNARD BAILYN, *FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE* (1990); EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC 1763-89* (1977); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

Professor Lund.

PROFESSOR LUND: Thank you. I'm going to talk a little bit about originalism, which is a central concern of the Federalist Society and an interpretive method to which I subscribe. And I should also mention at the outset that I agree with the result in the *Heller* case.

Justice Scalia's *Heller* opinion has to be one of the most self-consciously originalist opinions in modern times, and with respect to the threshold interpretive issue in the case, I think his analysis is quite successful. Reconciling the two clauses of the Second Amendment is a puzzle, a real puzzle, and Scalia does a good job, I think, of showing that the arguments for the individual right interpretation are overwhelmingly powerful. So far, so good. But that's not enough to resolve the two specific issues in the case before the Court.

There were basically two D.C. statutes being challenged. One was a ban on handguns³¹ and the other one was a ban on keeping any firearm loaded and, therefore, operable.³² So you couldn't have any operable firearm in your home in the District of Columbia. Now, that second issue was easy. D.C.'s requirement that all firearms be disabled at all times constituted a complete deprivation of the right protected by the Second Amendment, and that's got to be unconstitutional.

The ban on handguns, though, presented a more difficult question. And here, I think Justice Scalia's originalist approach runs into some very serious problems. Scalia's first step comes when he says the Constitution's textual reference to the right to keep and bear arms must refer to a pre-existing right.³³ Now, as a matter of ordinary English usage, I don't think that's correct. A statute, for example, could say American citizens have the right to travel to Cuba, but that would not imply that they had the right before the statute was enacted. Of course, it is true that Americans did have a right to keep and bear arms before the Bill of Rights was adopted, and

³¹ D.C. CODE § 7-2501.01(12) (2001); *id.* at § 7-2502.01(a); *id.* at § 7-2502.02(a)(4).

³² *Id.* at § 7-2507.02.

³³ *Heller*, 128 S. Ct. at 2797.

Scalia thinks it's important that the Second Amendment must be referring to that specific right.

Why? Primarily because he believes that his originalist method requires that he determine the content or scope of the right to arms through an historical inquiry. That's important because an historical inquiry is the alternative that Scalia offers to Justice Breyer's demand that any gun control regulation be subjected to interest-balancing analysis.³⁴ Scalia dismisses Breyer with a curt response that the relevant interest balancing has already been performed by the Constitution.³⁵ That certainly sounds like originalism, and you almost want to stand up and cheer when you hear that.

But then you have to ask, "What exactly does history tell us about handgun bans?" Oddly, Scalia has nothing at all to say about that. Now maybe it was so obvious that he didn't need to bother. There were almost no gun control regulations at all when the Bill of Rights was adopted, so people had an almost unlimited right to keep and bear arms. If that's what the Second Amendment protects, then virtually all modern forms of gun control are unconstitutional. But that's not what Scalia means.

Maybe he means the Constitution incorporated the right to arms in the English Bill of Rights.³⁶ But that can't be it because that right was expressly subject to abridgement by the legislature, and it only applied to Protestants.

(Laughter.)

PROFESSOR LUND: Similarly, it can't be the common law right identified in Blackstone.³⁷ That right was almost unlimited at the time but it was also subject to revision by the legislature. Well, maybe he means pre-existing rights under the various constitutions of the American states. But most state constitutions did not include

³⁴ *Id.* at 2852 (Breyer, J., dissenting).

³⁵ *Id.* at 2821.

³⁶ Bill of Rights, 1688 1 W. & M., c. 2 (Eng.) ("That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.").

³⁷ See WILLIAM BLACKSTONE, 4 COMMENTARIES *143-44.

the right to arms.³⁸ And in the states that did have constitutional provisions, how would you figure out what the scope of the right was? Since legislatures weren't enacting gun control statutes, nobody had any reason to ask exactly what was and was not permitted by the state constitutions, with some rare exceptions. There were a few rare statutes,³⁹ but for the most part, there weren't any attempts to abridge the right. So how would you know what would have been permitted if legislatures had wanted to adopt new regulations?

I think Scalia got off on a fundamentally wrong track by assuming that the Second Amendment protects a pre-existing right whose content or scope can be determined directly through an historical inquiry, and one side of the problem is that he never performs any such inquiry. But that's not all. When he tries to explain why D.C.'s handgun ban is unconstitutional, the only reason he gives is that handguns are popular weapons for self-defense among Americans today.⁴⁰ What's more, he gives several reasons why modern Americans might prefer handguns over rifles and shotguns.⁴¹ For example, you can hold a pistol in one hand while you phone the police with the other, which is a lot harder to do with a twelve-gauge.

(Laughter.)

PROFESSOR LUND: This would certainly be relevant to a Breyer-type analysis, but it doesn't have much basis in the history of the eighteenth century, where they didn't have telephones. Now, this is not an originalist or historical argument. If it's any kind of argument at all, it's probably a disguised and incomplete form of the Breyer interest-balancing approach that Scalia disdainfully dismissed.

³⁸ See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 193-204.

³⁹ *Heller*, 128 S. Ct. at 2820 (commenting on the restrictions in Boston, Philadelphia, and New York); see also Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 162 (2007).

⁴⁰ *Heller*, 128 S. Ct. at 2818.

⁴¹ *Id.*

But things get worse. Scalia's opinion also contains a series of dicta approving several types of gun control that were not at issue in the case.⁴² Little analysis of any kind is provided, and Justice Scalia says the historical justifications for these exceptions to the right to keep and bear arms will be provided if and when the Court reviews a case in which they're at issue.⁴³ So, with regard to these exceptions to the right to arms, we seem to have a case of verdict first and trial later, if at all.

What's more, some of the Second Amendment exceptions listed in the *Heller* opinion are manifestly problematic. And I'm just going to talk very briefly about two examples. First, the Court says convicted felons may be disarmed,⁴⁴ which sounds perfectly reasonable at first, but it can't be right. If the Second Amendment protects a fundamental right to arms for self-defense, how can it allow the government to leave American citizens defenseless in their own homes for the rest of their lives on the basis of nothing more than a nonviolent felony like tax evasion or insider trading?

It would make more sense to say that these felons can be silenced for the rest of their lives. These crimes, after all, involve an abuse of speech, such as making false statements to the government or negotiating contracts that the government forbids. But they don't have anything at all to do with firearms or violence. And what about strict liability felonies like failing to keep proper records of livestock transactions? Is that enough to—that's 7 U.S.C. § 221⁴⁵—

(Laughter.)

PROFESSOR LUND: Is that enough to justify leaving you defenseless against violent criminals for the rest of your life?

⁴² *Id.* at 2821.

⁴³ *Id.*

⁴⁴ *Id.* at 2817.

⁴⁵ 7 U.S.C. § 221 (2006) ("Every packer, any swine contractor, and any live poultry dealer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business . . .").

Next, the Court approves gun-free zone in what Scalia calls “sensitive places,” such as schools and government buildings.⁴⁶ On what historical basis will courts decide whether particular places are sufficiently sensitive to justify disarming citizens who go there? Is a university campus more sensitive than a shopping mall across the street? Did the whole city of New Orleans become a sensitive place after Hurricane Katrina? If so, then I guess it was perfectly okay for the government to confiscate weapons from law-abiding citizens whom the government could not protect from roving bands of looters and criminals.

Notwithstanding Scalia’s promise that historical justifications will be provided later for these and other restrictions on the right to arms, I don’t think they ever will be provided. If Scalia couldn’t provide an historical justification for striking down the D.C. handgun ban at issue in this case, it’s not very likely that he really has historical justifications to back up all the dicta.

The *Heller* case gave the Supreme Court, and Justice Scalia in particular, a rare opportunity to show why originalism deserves to be taken seriously. Unfortunately, the Court’s performance is so transparently defective that it’s quite possible that this decision will become Exhibit A when people seek to discredit originalism as an interpretive method.

This self-inflicted wound I think was quite unnecessary because I think it resulted from what might be called theoretically obsessive originalism. The idea that interest balancing should be banished from constitutional law is probably a response to the obvious fact that judges can manipulate such analysis to get any result they want, which is certainly true. But interest balancing cannot be banished. It can only be driven underground. And if you do that, you just make originalism look as lawless and result-oriented as the Living Constitutionalism that Scalia and many of us in the Federalist Society have been denouncing for years. What a pity.

Thank you.

⁴⁶ *Heller*, 128 S. Ct. at 2817.

(Applause.)

JUDGE O'SCANNLAIN: You'll now hear from Professor Winkler.

PROFESSOR WINKLER: It is with great hesitation that I speak after Nelson Lund for fear of looking quite short relative to him. But I would like to thank Judge O'Scannlain, my fellow panelists, and the Federalist Society for having me out here.

When *Heller* was decided in June of this year, it was immediately declared to be "a triumph of originalism" by Supreme Court advocates, legal scholars, and newspaper reporters,⁴⁷ and certainly Justice Scalia's majority opinion relies heavily on originalism, looking at the original understanding of the Second Amendment to determine that the Amendment protects an individual right to bear arms for self-defense and not related to militia service. And even the dissenters embraced originalism, as Professor Powe makes clear.⁴⁸ Justice Stevens adopted originalism to argue that the Second Amendment protected an individual right only associated with militia service.⁴⁹

Heller was declared the triumph of originalism much the same way that in the history books, people think about *Brown*⁵⁰ as the triumph of Living Constitutionalism. And there are similarities between these two cases. They were both very well-lawyered interest group litigation, conceived of and funded by civil rights groups with recruited plaintiffs. And both *Brown* and *Heller* were the beneficiaries of excellent lawyering by the teams that made the arguments. This is in contrast with a lot of right-to-bear-arms litigation out there, which is brought by criminals who are caught with a fire-arm who raise a challenge as a desperate effort to get free. Quite a contrast with the *Heller* case.

⁴⁷ See, e.g., Reva B. Siegel, Comment, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 193 (2008).

⁴⁸ See *supra* text accompanying note 7.

⁴⁹ *Heller*, 128 S. Ct. at 2827 (Stevens, J., dissenting).

⁵⁰ See, e.g., Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 67 (1998). But see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 527 (1989).

But is *Heller* a triumph of originalism? I think if it is, it's only a triumph of what you might call "soundstage originalism." You'll excuse my Hollywood references, but that's where I was born and raised. From afar, it looks like originalism has built something wonderful, a right to bear arms. But as you get closer and look past the façade, you see that originalism has not done very much of the hard work for the Second Amendment in the *Heller* case.

The significance of the Second Amendment is not that it creates an abstract right to bear arms but rather that it's a limitation on what government can do. What limits does the Second Amendment provide? Here, the *Heller* opinion does not reference original understanding to answer this question. So, where the rubber hits the road—that is, what laws the Second Amendment bans, what laws the Second Amendment allows—the Court refuses to look at originalism and offers no originalist defense.

So, for instance, why does the Court say that the ban on handguns in Washington, D.C. is constitutionally impermissible but, as the Court suggests, a ban on machine guns would not be?⁵¹ Well, the Court says, "[h]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."⁵² Machine guns, by contrast, are "dangerous and unusual weapons" that are not in common use.⁵³ But this isn't originalism. It's Living Constitutionalism. Modern conditions and modern preferences shape the scope of the Second Amendment's meaning and protection.

What laws are limited? How does the Second Amendment limit the government? The Court looks to popular choices of consumers in the marketplace and government regulations that are born of the twentieth century.⁵⁴ Handguns are protected because consumers in the twentieth century choose to buy handguns for protection. Machine guns are unusual because civilians don't choose them. Why

⁵¹ *Heller*, 128 S. Ct. at 2815.

⁵² *Id.* at 2818.

⁵³ *Id.* at 2817.

⁵⁴ *Id.* at 2818.

do civilians not choose them? Well, because federal law has banned civilians from choosing them since 1934.⁵⁵

(Laughter.)

PROFESSOR WINKLER: Certainly, federal law, even if it's interpreting the Second Amendment, can't alter the scope of the original meaning of that provision.

The most important paragraph in *Heller* is Scalia's laundry list of long-standing prohibitions that the Court makes clear are not called into question by the opinion.⁵⁶ Professor Lund mentioned this list.⁵⁷ It includes bans on possession by felons – and we're really talking here about ex-felons, right? The felons who are in prison don't have guns and don't have access to them. We're talking about ex-felons who've served their sentences – bans on possession by the mentally ill, bans on guns in sensitive places such as schools and government buildings, and restrictions on commercial sales.

There's not an iota of historical discussion in the *Heller* case to justify these exceptions, and perhaps for good reason. These gun control laws are modern inventions. Restrictions on commercial sales are a product of the twentieth century. The Founders did not bar weapons in schools or in government buildings. Weapon laws barring ex-felons from owning firearms were adopted in the 1920s and 1930s as part of, of all things, NRA-backed gun control laws.⁵⁸ These laws do not reflect long-standing unbroken traditions that we inherited from the Founders. They are, instead, prohibitions that were borne of the Progressive and New Deal eras to respond to modern conditions of urbanization, mass-produced firearms, and the rise of organized crime.⁵⁹

⁵⁵ *Id.* at 2815 (noting that the National Firearm Act's restrictions on machine guns were not challenged in *United States v. Miller*, 307 U.S. 174 (1939)).

⁵⁶ *Id.* at 2816-17; *see also id.* at 2817 n.26 (noting that the list of presumptively lawful regulatory measures "does not purport to be exhaustive").

⁵⁷ *See supra* text accompanying notes 42-46.

⁵⁸ *See, e.g.*, Federal Firearms Act, 15 U.S.C. §§ 901-909 (1938) (repealed 1968).

⁵⁹ *See* Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 137-38 (1975).

Now, perhaps, there are historical analogies to these laws that could be offered and could be used to support them. I disagree with Professor Lund here; the Founders did have gun control. They had mandatory musters. Everyone with a gun had to show up and register their firearm and be ready to use it and show that they knew how to use it and that the gun was in working order.⁶⁰ There were laws requiring safe storage of gunpowder.⁶¹ And there was selective disarmament. Blacks were disarmed, free and slave, and loyalists to the Crown were disarmed in the early Framing period.⁶² So, the Framers did have gun control laws that the Court can draw analogies to in finding out which laws are permissible under the original understanding of the Second Amendment. But the Court doesn't do that.

Why do I think this laundry list is so important? Because *Heller* has led to a considerable wave of litigation in the lower federal courts. In the five months since *Heller* was handed down by the Court, there have been over fifty rulings by federal courts on the constitutionality of gun control laws.⁶³ The *Heller* court failed to articulate a standard of review, and so what do courts look for in trying to figure out what the *Heller* case means for the constitutionality of these gun control laws that they have to confront? Well, they look to the laundry list and say, "The Court said these laws are constitutionally permissible and so we'll uphold this law too." And indeed, of those fifty decisions, every single lower court decision to rule on the merits of a constitutional challenge under the Second Amendment has upheld the challenged law. Not a single

⁶⁰ CORNELL, *supra* note 24, at 27–28.

⁶¹ See, e.g., Act of June 26, 1792, 1792 Mass. Acts 208 (addressing the carting and transporting of gunpowder in Boston); Act of Apr. 13, 1784, 1784 N.Y. Laws 627 (concerning the storage of gunpowder); Act of Dec. 6, 1783, ch. MLIX, 11 PA. STAT. ANN. 209 (concerning the securing of gunpowder).

⁶² See, e.g., Act of June 13, 1777, ch. DCCLVI, 9 PA. STAT. ANN. 110, 112–13 (anyone refusing to take an oath of loyalty to the state shall be disarmed); see also MALCOLM, *supra* note 24, at 140–41 ("[Blacks'] inability to legally own weapons merely confirmed their status as outsiders and inferiors.").

⁶³ See, e.g., McDonald v. City of Chicago, No. 08-C3645, 2008 U.S. Dist. LEXIS 98133 (N.D. Ill. Dec. 4, 2008) (upholding a municipal handgun ban); United States v. Kilgore, No. 08-cr-66-bbc, 2008 U.S. Dist. LEXIS 69393 (W.D. Wis. Aug. 26, 2008) (upholding a gun ban for convicted felons).

law since *Heller* has been invalidated. Now, that's not to say that there won't be laws eventually invalidated. I think there will be.

But so far today, you're not seeing a lot of jumping on the *Heller* bandwagon, if you will. The courts upheld a wide variety of laws. Some of these come from the list that Justice Scalia offers in the *Heller* case. Courts have upheld bans on possession by ex-felons,⁶⁴ bans on guns in sensitive places such as post offices and school zones,⁶⁵ restrictions on commercial sales such as bans of straw purchasing,⁶⁶ and restrictions on the importation of firearms for sale.⁶⁷ But the courts have also upheld a wide variety of laws that don't really have any clear tie even to that paragraph, although they cite the paragraph for support.⁶⁸ For example, bans on the basis of misdemeanor convictions for domestic violence and disarmament of substance abusers and illegal aliens have been upheld.⁶⁹

Courts have upheld registration and licensing requirements, including permitting for concealed carry of firearms,⁷⁰ mandatory

⁶⁴ See, e.g., *Kilgore*, 2008 U.S. Dist. LEXIS 69393.

⁶⁵ See, e.g., *United States v. Dorosan*, No. 08-042, 2008 U.S. Dist. LEXIS 51547 (E.D. La. July 7, 2008) (upholding a ban on guns on postal property); *United States v. Lewis*, No. 2008-45, 2008 U.S. Dist. LEXIS 103631 (D.V.I. Dec. 24, 2008) (upholding a ban on guns in school zones).

⁶⁶ See, e.g., *United States v. Bledsoe*, No. SA-08-CR-13(2)-XR, 2008 U.S. Dist. LEXIS 60522 (W.D. Tex. Aug. 8, 2008) (upholding a ban on straw purchasing).

⁶⁷ See, e.g., *City of New York v. Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237 (E.D.N.Y. 2008) (upholding restrictions on the importation of guns for sale).

⁶⁸ See, e.g., *United States v. Hall*, No. 2:08-00006, 2008 U.S. Dist. LEXIS 59641 (S.D. W. Va. Aug. 4, 2008) (upholding restrictions on concealed weapons); *United States v. Fincher*, 583 F.3d 868 (8th Cir. 2008) (upholding restrictions on possession of machine guns and sawed-off shotguns); *Nat'l Rifle Ass'n v. City of Evanston*, No. 08-C3693, 2008 U.S. Dist. LEXIS 95572 (N.D. Ill. Nov. 24, 2008) (upholding a law barring possession of handguns).

⁶⁹ See, e.g., *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008) (upholding a restriction on gun possession by those with misdemeanor domestic violence convictions); *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 U.S. Dist. LEXIS 103448 (W.D.N.C. Oct. 3, 2008) (upholding a restriction on gun possession by illegal aliens); *United States v. Yancey*, No. 08-cr-103-bbc, 2008 U.S. Dist. LEXIS 77878 (W.D. Wis. Oct. 3, 2008) (upholding a restriction on gun possession by substance abusers).

⁷⁰ See, e.g., *Hall*, 2008 U.S. Dist. LEXIS 59641 (upholding a requirement of a permit to carry a concealed weapon).

registration of specific types of firearms,⁷¹ and bans on sawed-off shotguns and—perhaps as one might predict from *Heller* decision—bans on machine guns.⁷² In short, the lower courts have already upheld the vast majority of different types of gun control laws currently on the books. In other words, the bulk of modern gun control policy is not called into question at least to date by the *Heller* case.

Now, we can contrast this a little bit to *Brown*, the comparison I mentioned earlier. In the wake of that decision, the federal courts went wild striking down laws that required segregation.⁷³ Racially discriminatory laws fell over and over again. The Supreme Court didn't even have to make the claim that we always talk about in constitutional law class. Isn't *Brown* limited to the educational context? That's the argument that the Court makes, that educational discrimination is problematic, and the lower courts then applied that principle all across American law. We have not seen the *Heller* principle with any kind of vigor across all of gun control law. So, what we have is a lot of cases, Second Amendment cases, but the outcomes are not very different than they would have been under the militia theory of the Second Amendment.

I think, in fact, what we're seeing is that the Second Amendment is going to morph into a very similar version of the right to bear arms that we have at the state level. Forty-two states already protect, in their state constitutions, the individual right to bear arms—not related to militia service; only for purposes of self-defense.⁷⁴ State courts have ruled on hundreds of gun control laws,

⁷¹ See, e.g., *United States v. Gilbert*, 286 Fed. Appx. 383 (9th Cir. 2008) (upholding conviction for possession of unregistered firearms); *United States v. Perkins*, No. 4:08CR-3064, 2008 U.S. Dist. LEXIS 72892 (D. Neb. Sept. 12, 2008) (upholding convictions for possession of unregistered firearms).

⁷² See, e.g., *Fincher*, 538 F.3d 868 (upholding a ban on machine guns and sawed-off shotguns).

⁷³ See, e.g., *Dawson v. Baltimore City*, 220 F.2d 386 (4th Cir. 1955) (segregation in public parks found illegal); *Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1957) (segregation on a public golf course found illegal); *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956) (segregation in cafeteria found illegal).

⁷⁴ Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989).

cases challenging the constitutionality of laws under these state constitutional provisions. And what do the courts do in those cases? Well, they provide clear protection against disarmament.⁷⁵ They say that the right to bear arms, if it means anything, means that you cannot completely disarm the people. But short of complete disarmament, the state courts across the country apply a very deferential kind of scrutiny to gun control legislation and will just generally defer to legislatures and allow gun control laws to survive.

Only extreme and arbitrary and irrational laws at the state level are generally invalidated.⁷⁶ And we might think of the D.C. law as an example of such an extreme, arbitrary, and irrational law, a law that bans, effectively, all self-defense with firearms because of the combination of the handgun ban and the disassemblage requirement—the safe storage requirement—on the firearms. It remains to be seen how many other laws, if any, will be felled by *Heller*. But one thing is clear already: whether they stand or whether they fall will not turn on the original meaning of the Second Amendment.

Thank you.

JUDGE O'SCANNLAIN: Our last presenter, Mr. Neily.

MR. NEILY: Thank you. Unlike Adam, it's with considerably less fear that I stand before you at this podium than I would have had four months and twenty-seven days ago, D.C. no longer being a gun-free zone.

(Laughter.)

MR. NEILY: You're not supposed to be carrying it, but if you are, just keep it on the down low. But we'll get to that.

There are two questions basically going forward after *Heller* that are, I think, of most interest in terms of the scope of the Second Amendment and how it will be applied. We've already touched on

⁷⁵ See, e.g., *Wilson v. State*, 33 Ark. 557 (1878) (invalidating a law prohibiting the carrying of a pistol); *People v. Nakamura*, 62 P.2d 246 (Colo. 1936) (invalidating a law disarming aliens); *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. Ct. App. 1971) (invalidating a law prohibiting the carrying of deadly weapons).

⁷⁶ See, e.g., *City of Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972) (“unnecessarily broad”); *Junction City v. Mevis*, 601 P.2d 1145 (Kan. 1979) (“unreasonable and oppressive”); *State v. Kerner*, 107 S.E. 222 (N.C. 1921) (“unreasonable regulation”).

both of them in various ways. The first, of course, is whether it will be incorporated or applied against state and local governments; that remains unclear. And the second is the question of how much deference governments will receive when regulations are reviewed under the Second Amendment.

I think those questions are interestingly linked, and they're interestingly linked because of the history of the Fourteenth Amendment,⁷⁷ which is something that you will almost never hear from gun control proponents. It's a terrible history. It's among the most awful periods of history that we have in this country, and it is a history through which the question of the right to keep and bear arms is woven like a thread, and one that actually produces very clear answers to the questions of, first, whether the right to keep and bear arms should be applicable against state and local governments and, second, how much deference governments should receive.

As we all know, or I assume most of us know, the Privileges or Immunities Clause was essentially written out of the Fourteenth Amendment by the Supreme Court in the *Slaughterhouse Cases*,⁷⁸ which interpreted it to protect a relatively trivial set of so-called "national rights of citizenship," like the right to claim the protection of the government on the high seas.⁷⁹ And I think that we all know that's why the Civil War was fought, because that's what was going on there. And some commentators noted that despite the fact that there's not necessarily a consensus on what the Privileges or Immunities Clause of the Fourteenth Amendment does mean,⁸⁰ there is nearly uniform consensus that it does not

⁷⁷ See Koren Wai Wong-Ervin, Note, *The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence*, 50 HASTINGS L.J. 177, 203 (1998); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007).

⁷⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

⁷⁹ See *id.* at 79.

⁸⁰ See Daniel J. Levin, *Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and an Interpretive Truce*, 35 HARV. C.R.-C.L. L. REV. 569, 570-71 (2000).

mean what the Supreme Court said it meant in *Slaughterhouse*.⁸¹ So, it's a question that I think is open for reconsideration and should be reconsidered by the Supreme Court, and there are already cases, including one that's being litigated by my co-counsel Alan Gura of Chicago,⁸² that are attempting to bring that question to the Supreme Court. It's an important question. It's a question that I hope that the Supreme Court takes sooner rather than later.

What is this history that I referred to that's relevant to answering this question under the Fourteenth Amendment? It's an ugly history of black and white abolitionists—not just black, but black and white abolitionists—following the Civil War—being disarmed for the specific purpose of making them easier to terrorize and, in some cases, lynch. That was one of the avowed purposes for which the Fourteenth Amendment was passed: to enable the federal courts to prevent state governments from either affirmatively disarming citizens or allowing roving bands of Klansmen and others to disarm those people.⁸³ And it sheds interesting light on this whole militia question because in some states, including South Carolina and Kentucky, it was actually the state militias that were doing this disarming, to make it easier to lynch people and to terrorize them.⁸⁴ That history cannot be ignored, and that history will be, I think, at the center of the debate that we have over whether the Second Amendment should be incorporated and what amount of deference

⁸¹ See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Michael Kent Curtis, *The Curious History of Attempts to Suppress Anti-slavery Speech, Press, and Petition in 1835-37*, 89 NW. U. L. REV. 785 (1995); Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1147-50 (1997); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

⁸² *McDonald v. City of Chicago*, No. 08-C-3645, 2008 U.S. Dist. Lexis 98133 (N.D. Ill. Dec. 4, 2008). This decision is currently being appealed to the Seventh Circuit Court of Appeals. See *ChicagoGunCase.com*, <http://www.chicagoguncase.com> (last visited Mar. 5, 2008).

⁸³ Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 345-46 (1991).

⁸⁴ *Id.* at 314 (discussing the controversy over the power of state militias).

governments should be given when confronted by a state or local regulation of gun ownership.

There's no question that the refusal of the federal courts to protect the right to keep and bear arms throughout the South in the wake of the Civil War, which was one of the results of the *Slaughterhouse* case, was disastrous—disastrous for freedmen, the newly freed blacks, disastrous for white abolitionists. We had a history of lynching, violence and terror throughout that region of the country, in many cases perpetrated by white armed mobs against disarmed, innocent civilians.

And I think that it's no secret that even if the courts have said, for example, that the Second Amendment or right to keep and bear arms should be incorporated against the states, if there had been this idea of tremendous judicial deference at the time in the 1860s and 1870s, there would have been no real effect. People would not have been able to go into court and ensure that they could have guns in order to defend themselves against these rampaging mobs. So that's why I think that the question of incorporation and the question of deference are linked together in this history that surrounds Fourteenth Amendment, and it's something that we need to be mindful of.

If we are going to do real constitutional law, if we are going to ask ourselves how the Fourteenth Amendment was understood by the people who wrote it and by the people who ratified it, then we have to look at what was going on at the time and ask ourselves, "Was it the understanding of the people who ratified that amendment that local gun regulations should be given tremendous deference by the federal courts—the very federal courts that were intended to be empowered to strike down those regulations in order to prevent this violence, or at least to enable people to resist?" And I think the answer to that question has to be no.

Now, I suppose it could be argued that everything has changed since then and we don't have to worry about an oppressive government interfering with our rights or violating our rights or exploiting us, and we don't have to worry about citizens being preyed on by other violent citizens. All of that is a matter of history. It's all in the

past. I don't agree with that. I suspect most people in this room don't agree with that.

It's different now, no question, but it's different only in degree. It's not different qualitatively. We still have innocent citizens being preyed on by other citizens. We still have incidents of the government violating people's rights, kicking in doors, and shooting dogs to prosecute people for relatively trivial drug offenses. I'm not saying that this requires any kind of an armed insurrection, but it certainly suggests that the right is just as important today as it ever has been in the history of this country, and one that should not be lightly written out of the Constitution, either by denying the history of the Fourteenth Amendment or by according undue deference to state and local governments that, in my judgment, have not earned it.

(Applause.)

JUDGE O'SCANNLAIN: I want to probe the standard of review a little further. Clark Neily talked about the likelihood of deferential treatment,⁸⁵ but will the interest-balancing inquiry of Justice Breyer's dissent ultimately prevail, do you think? Will Second Amendment jurisprudence develop its own version of strict scrutiny, heightened scrutiny, and rational basis scrutiny, which we are familiar with in other areas of constitutional law? Will its analysis be more historical and less about interest balancing, especially in view of the fact that several members of the *Heller* majority have traditionally been hostile to such balancing?

Who would like to take that question among the members of the panel?

PROFESSOR WINKLER: Well, I think that it's certainly one of the big questions left open from *Heller*, which is what standard of review applies to gun control laws. In modern American constitutional law, we tend to do two things. We identify the existence of a right, and then generally the courts adopt some kind of standard or rule or test that's going to be used to determine the constitutionality of any number of kinds of restrictions on that right or burdens on that right.

⁸⁵ See *supra* text accompanying notes 83–84.

Our traditional way of thinking about this is that if we think of a fundamental right, you think that strict scrutiny is automatically triggered. I don't think that's the case. I don't think that's an accurate description of American constitutional law. In fact, the Court has held that virtually all of the Bill of Rights, all those rights are fundamental rights, but the Court applies strict scrutiny in only a very small number of the Bill of Rights.⁸⁶ The Supreme Court applies strict scrutiny in the First Amendment context and the Due Process Clause of the Fifth Amendment.⁸⁷ But there's no strict scrutiny in most of the Bill of Rights amendments. The Court does not use strict scrutiny in Fourth Amendment cases; any Fifth Amendment cases, other than due process or implicit equal protection cases out of the Fifth Amendment; or Sixth, Seventh, or Eighth Amendment cases. So, the courts often use a whole rainbow of different kinds of standards of review that one might apply in constitutional analysis.

And the question is why the courts are suspect in some cases and more deferential in others. And, generally, they tend to be suspect when they think that there's virtually no space for legitimate regulation in the area. The reason why race classifications are suspect is because the Court thinks there almost never will be a constitutionally permissible race classification, so the courts are suspect. Almost never will political viewpoint discrimination be constitutional under the First Amendment, so the courts apply a strict form of scrutiny.

That's not the case in gun regulation. Almost everyone agrees that some regulation of guns is a good idea, and even a variety, maybe a wide variety of gun control laws are good ideas. Bans on particular kinds of weapons; bans on particular people having weapons in particular places, these are very, very common parts of American history.

As I mentioned, forty-two states have individual right to bear arms provisions in their constitutions. There have been hundreds

⁸⁶ See, e.g., Nicole Duncan, *Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679 (1995).

⁸⁷ See, e.g., K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 438-39 (1997).

and hundreds of cases decided under these provisions—decades of litigation. Every single state, every one of them across the board, applies what they call a “reasonable regulation standard.”⁸⁸ It’s not the same thing as rational basis review, but the results are not much different from rational basis review in that the courts, going back to World War II, have upheld virtually every law that’s been challenged under state constitutional law with just a very small handful of exceptions.⁸⁹

So, I think if you take seriously the reasons why we apply a heightened form of scrutiny or a deferential form of scrutiny and take this history and the real long-standing tradition of growth—that is, how it’s treated in the state courts across the country in every single jurisdiction—then I think a deferential standard of review seems appropriate.

But I know Clark’s going to disagree with me.

JUDGE O’SANNLAIN: We’re going to be taking questions from the floor very shortly, but before doing that, I want to ask other members of the panel if they agree or disagree with what you just heard. Mr. Neily.

MR. NEILY: I think maybe as a practitioner, I take a somewhat more pragmatic view. I think oftentimes, standards of review are just words, maybe even increasingly so. From the litigation standpoint, in my experience as a constitutional litigator, oftentimes virtually everything comes down to the question of who bears the burden. Does the citizen bear the burden of justifying the exercise of liberty or does the government bear the burden of justifying a regulation? And you can dress up everything else you want to with words and it really doesn’t make that much difference.

So, I think that essentially, what the Second Amendment’s going to come down to is where that burden is going to be assigned. I

⁸⁸ See, e.g., Adam Winkler, *Gun Control: Old Problems, New Paradigms: The Reasonable Right to Bear Arms*, 17 STAN. L. & POL’Y REV. 597, 598 (2006); see also Volokh, *supra* note 38 (a comprehensive listing of the state constitutional provisions with regard to the right to bear arms).

⁸⁹ See Winkler, *supra* note 88, at 598, 600–01.

think that may actually still be up in the air. If the burden is assigned to the citizen to justify the exercise of Second Amendment rights, I think that the Second Amendment will be gradually watered down until it means nothing, the way that, for example, the Court has arguably done with property rights. If, on the other hand, the Second Amendment is considered to be a fundamental right akin to the First Amendment, as Professor Powe suggested that it might, then it will be subject to various exceptions and regulations, but those will be drawn narrowly, and it will be the government that bears the burden of establishing that those exceptions are necessary, and the citizens will generally win cases. I think that's very much up in the air which way it's going to go.

JUDGE O'SCANNLAIN: Any other responses on this side of the dais?

PROFESSOR POWE: I think it's inconceivable that Adam will be proven wrong. It seems to me that we can agree that these are labels, although they're outcome-determinative labels. Scalia's opinion makes quite clear a lot of gun control regulation is constitutional. And I think we're going to find a lot more is too.

PROFESSOR LUND: Well, I largely agree, but I would put things a little bit differently. The one thing I think we know for sure is that whatever happens is going to be the result of an interest-balancing judgment by the Court, which could come in different forms. It could come in the form that it comes in the *Heller* opinion, which is, call it an historical analysis, pretend it's an historical analysis, and then do an unstated interest balancing to get the result that you want. Or not do any analysis at all, and just announce the results.

Or, at the other extreme, the Court could do something like Justice Breyer and some others on the Court have wanted to do, which is openly do a kind of cost-benefit analysis and total things up—how much infringement is there on the interests of the person that wants the gun and how much weight is there in the government's reasons for wanting to stop him from having a gun. Or you could do something in the middle, which is something like the standards of review that we see in other areas of constitutional law: strict scrutiny, intermediate scrutiny, rational basis, rational basis with bite, rational basis with two and a half bites, and all of that—

(Laughter.)

PROFESSOR LUND: —that we're all so familiar with. And that, of course, is just as manipulable as the other two, and if you wanted a quick proof of that, just read the *Grutter*⁹⁰ decision, where they decided that racial preferences in law schools passed strict scrutiny.⁹¹ And then, of course, read Chief Justice Rehnquist's dissent⁹² and Justice Thomas's dissent⁹³ and see if there's any difference between strict scrutiny and rational basis review. So all of these things are infinitely manipulable. What's really going to determine the shape of Second Amendment jurisprudence in the future is how seriously the justices on the Supreme Court take the purpose of the Second Amendment. There's no way to know how they're going to talk about it, but that's what's going to determine the outcome, and that's going to depend on who's on the Court.

JUDGE O'SCANNLAIN: I would like to invite anyone seated to come to the mic and be ready to ask a question.

AUDIENCE PARTICIPANT: During the *Heller* case, the Bush administration submitted an interesting argument in one of their briefs that opens a door that I don't think has been adequately explored in subsequent discussion. They drew an analogy to the congressional preemptive power to regulate the time, manner, and place of congressional elections, except for the place of the senatorial elections.⁹⁴ And this opens the question—what would be the constitutional status of a congressional statute that required voters in congressional elections to vote within a one-nanosecond time-frame while balancing on one hand at a polling place on the moon?

Now, by the *Gibbons v. Ogden*⁹⁵ doctrine that the Congress has plenary power within a sphere, that would seem to be permissible.

⁹⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁹¹ *Id.* at 343–44.

⁹² *Id.* at 378–88 (Rehnquist, J., dissenting).

⁹³ *Id.* at 349–78 (Thomas, J., dissenting).

⁹⁴ This argument does not actually appear in the Solicitor General's Amicus Brief to the Supreme Court in the *Heller* case. See Brief for the United States as Amicus Curiae, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

⁹⁵ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

Some others might argue that it would be an abuse of discretion. I would argue that it would be unconstitutional because no delegations of power are plenary; they are only delegations in a particular direction, and the only kind of regulations of the militia, and therefore the right to keep and bear arms, that it would be constitutionally permissible would be to make militia more effective—

JUDGE O'SCANNLAIN: Alright.

AUDIENCE PARTICIPANT: —which is what Mr. Winkler has referred to. So I would like the panel to comment on this line of argument and how it might be further developed.

JUDGE O'SCANNLAIN: Very well. Comments? Responses?

PROFESSOR LUND: Well, I guess I'll give it a try.

JUDGE O'SCANNLAIN: Professor Lund.

PROFESSOR LUND: I think you misunderstood the Solicitor General's brief, and I should say I don't approve of that brief. But I think the passage in that brief that you're referring to,⁹⁶ was trying to find cases using what's called intermediate scrutiny in the voting rights area to support the proposition that intermediate scrutiny should apply to Second Amendment. And so, I don't think that the cases he cited actually stand for the proposition that the government has plenary control over elections and can say that they must be held on the moon or something. I don't think that's what those cases stand for, and I don't think that's what they're being cited for—which is not to say that I approve of the intermediate scrutiny argument that the Solicitor General presented in his brief.

JUDGE O'SCANNLAIN: Next question.

AUDIENCE PARTICIPANT: The words “to keep and bear” in the Second Amendment are often used as though they were just one, but arguably, “keep” and “bear” are two separate words with separate meanings. Common sense would dictate “keep” might refer to keeping something at home, and “bear” might refer to carrying it. The Court made clear that a complete prohibition on keeping firearms at home is not okay.⁹⁷ They also made clear that regulation of

⁹⁶ Brief for the United States, *supra* note 94, at 24.

⁹⁷ *Heller*, 128 S. Ct. at 2818.

firearms ownership and carry laws are okay.⁹⁸ I'd like the panelists to comment on what, if anything, *Heller* says or would say about an absolute prohibition on rights to carry.

JUDGE O'SCANNLAIN: Right to carry. Anyone?

MR. NEILY: Right to carry is a really interesting issue. You can go back in history and find laws that actually required people to carry arms, for example, to church. In Georgia, there was a law that said that men had to carry arms to church.⁹⁹ And there's been an interesting back-and-forth. Back in the old days, it was considered to be sort of cowardly to carry a concealed weapon. So, you had concealed carry bans, and those were upheld largely by state courts.¹⁰⁰ But I think they were upheld mainly because it was thought at the time that what cowardly assassins did is they carried their guns concealed.

My suspicion now is that most jurisdictions would prefer to have people carrying their arms concealed because it's scary to see somebody walking around open carry, even though it's legal in many states.

(Laughter.)

MR. NEILY: And so it would be interesting to see if any judges pick up on that sort of switch, I think, in attitude.

The question of whether or not the state can declare that no one can carry a gun anywhere at any time, I think is an open one, and I'd be very surprised if that was found to be consistent with the *Heller* ruling. I admit that *Heller* doesn't speak to that issue, but I think the idea that "keep and bear" is a unitary phrase has been completely blown out of the water by Scalia, or at least it's fore-closed now, as a matter of Supreme Court precedent. And so, the courts are going to have to give independent significance to the term "bear."

JUDGE O'SCANNLAIN: Any other observations?

⁹⁸ *Id.* at 2816-17.

⁹⁹ *See id.* at 2802-03.

¹⁰⁰ *See id.* at 2816.

PROFESSOR WINKLER: That's a good observation. Many of us in the field generally refer to the right to bear arms, and we're really referring to the right to keep and bear arms. So, it's a well-made distinction.

With regard to concealed carry laws, as the Court mentions, some of the earliest gun control laws that were challenged in state courts under state constitutional right to bear arms provisions were these bans on concealed carry.¹⁰¹ And a few courts invalidated them.¹⁰² The majority of courts upheld these laws, sometimes because there was open carry permitted, but not always. There were some laws that banned even open carry,¹⁰³ and you weren't allowed to carry at all. So, concealed carry laws have a long tradition of being upheld. I think the real question arises out of the underlying purpose of the right to bear arms in *Heller*, a right of self-defense.

The real interesting question in this case is how broad does that right to self-defense become? Is it a right to self-defense outside of your home? Does it mean you have a right to carry a gun? Or maybe you have a right to carry a gun without being permitted or licensed if you have self-defense. Obviously, there are some people such as ex-felons or illegal aliens who might still nevertheless have some basic right of self-defense that would be denied even under this.

I think that one of the questions is: will self-defense grow and expand and lead to the creation of more judicial rights than the Second Amendment ever envisioned, in much the same way that *Griswold*¹⁰⁴ protected a right to privacy that then took on its own life and ended up protecting laws that were not envisioned in that original case? I'm not saying that it will, but I think it's one of the interesting questions to see where that right of self-defense goes to and how it grows.

JUDGE O'SCANNLAIN: Next question please.

¹⁰¹ See *id.*

¹⁰² See *id.* at 2818.

¹⁰³ See, e.g., ARK. CODE ANN. § 5-73-120 (2008); OKLA. STAT. ANN. tit. 21, § 1272 (West 2009); S.C. CODE ANN. § 16-23-20 (2008); TEX. PENAL CODE ANN. § 46.02 (Vernon 2007).

¹⁰⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

AUDIENCE PARTICIPANT: My question is about *Heller* and history. Several of the panelists have eloquently, and I think correctly, criticized the Court's opinion in *Heller* as the kind of opinion it's self-consciously written to be as orthodox modern originalism. And orthodox modern originalism focuses narrowly on the specific time of enactment, the context of enactment of the late eighteenth century. But there are other ways that history has been used to give meaning to constitutional provisions, and one of them is the more low-tech sort of Burkean tradition-based approach that people like Professor Ernest Young have supported.¹⁰⁵

And my question is, is *Heller* significantly more successful as a Burkean opinion than as the originalist opinion it wants to be?

I just have to throw this out if Professor Winkler wants to engage this. Professor Winkler puts a lot of emphasis on the practice of mid- and late-twentieth century state courts, which have taken this deferential approach to the right to arms. Does he think it's significant that that case law was completely absent from the majority's opinion? Indeed, it seems to go out of its way not to fight or give way to those, and—instead—to point to nineteenth-century cases and say, I might argue, "These are courts being conscientious about the right to arms; lower courts, you need to shape up."

JUDGE O'SCANNLAIN: All right. Burke versus originalism. Any takers?

PROFESSOR POWE: I agree with you completely. I think that a Burkean look at American traditions is a very appropriate way of interpreting the Constitution, and I think if Scalia had written his opinion to encompass that idea, it would be far more persuasive, although it would require him to state why tradition ends in 1899 rather than continues on into the twentieth century, where the tradition is somewhat, I think it's still the same tradition. To the best of my knowledge, no state in the last half-century has not adopted a constitutional amendment protecting the right to some form of the right to keep and bear arms if it's been given to the voters. So, it seems to me

¹⁰⁵ Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

that tradition has, in fact, continued through the twentieth century, albeit watered down by very deferential state court decisions.

But back to the point. I think as a Burkean opinion, Scalia does succeed.

JUDGE O'SCANNLAIN: Any other comment?

PROFESSOR LUND: I'll just add to that. I think that you could have—I would have never expected Scalia to do this—but you could make a very good Living Constitutionalism argument for the right to bear arms. You have a right that's protected by almost every state constitution in America. I imagine that the Court would interpret the Due Process Clause to protect same-sex marriage if same-sex marriage were guaranteed in forty-two state constitutions because it would be an example of some evolving traditions, but also because, as Clark points out, I think the meaning of the right to arms might well have been changed by the time of the Fourteenth Amendment.

It's extremely clear that the Fourteenth Amendment was designed to protect individuals from disarmament by the government when those guns were used for individual self-defense. I think that it's a little weaker argument when you look back at the original understanding of the Second Amendment, but the argument becomes much stronger with the Fourteenth Amendment. I think any sincerely applied version of Living Constitutionalism—not where the judge gets to make it up and do whatever he or she wants, but any sincere version that really looks to the tradition and evolving standards under modern conditions—would have to protect an individual right to bear arms for self-defense.

JUDGE O'SCANNLAIN: Next question.

AUDIENCE PARTICIPANT: Professor Winkler, you said that fifty federal courts have ruled post-*Heller*,¹⁰⁶ but it seems like most of the legal issues that you've mentioned that they decided were related to machine guns, rifles, and permit systems. Have there been any lower court rulings addressing de facto bans where technically

¹⁰⁶ See *supra* text accompanying note 63.

there's a process to get a permit either to carry or to keep in the home but the police have absolute discretion to grant or deny it?

PROFESSOR WINKLER: No, there haven't been any—well, there was a state court decision that upheld New York's licensing laws¹⁰⁷ but not a federal court decision.

If one were to identify a set of laws that are most likely to be invalidated, I think you'd have the other cities that have bans on handguns somewhat equivalent to D.C., such as Chicago. Another likely contender would be New York's permitting law.¹⁰⁸ New York has the most ridiculous permitting law in the country, where you can get a permit; they just don't give them out. And when they do give them out, they give them out only to very illustrious people in New York, famous people, elites like Mayor Ed Koch and the former publisher of the *New York Times*. I don't think any constitutional right of whatever sort should be divvied out on the basis of the pure, unfettered discretion of an executive agency or an executive branch official.

I think you will see some of those cases probably come down differently than the fifty cases I've talked about. And you will see some successful Second Amendment litigation on some of those especially extreme laws. Whether it goes much further than that, I'm not really that sure.

MR. NEILY: I would just add one thing if I could. Those discretionary issue permits, by the way, have also an ugly history under the Fourteenth Amendment. Oftentimes you had laws exclusively disarming blacks, and when it became clear that those were too overtly racially discriminatory, they changed it to make it local discretion, so you then had to go and apply to your local sheriff.¹⁰⁹ And guess what. He was going to use as one of his criteria to make that decision what color you were. So, some—not all, but some—of these discretionary permitting laws actually trace their heritage back to the same

¹⁰⁷ *People v. Abdullah*, 870 N.Y.S.2d 886 (Crim Ct. 2008).

¹⁰⁸ N.Y., N.Y., ADMIN. CODE §§ 10-131, -301 (1985).

¹⁰⁹ See Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 80-83 (1991).

ugly history of racism and racial oppression in the South, and I think that will come out at an appropriate time as well and add to the persuasiveness of the arguments tracking those down.

JUDGE O'SCANNLAIN: Go ahead. Question.

AUDIENCE PARTICIPANT: I'd like to know why the Second Amendment doesn't protect my ability to own and keep and bear a fully automatic M-16. And the main opinion in *Heller* does talk about the usual type of firearm used in the militia at the time. Back when the Amendment was passed, the usual firearm held by people was equal to or even in some cases superior to the standard-issue firearm by government-organized army.

Today's standard-issue firearm in the United States Army is pretty much the M-16. It's fully automatic. The standard issue firearm around the world is the AK-47. If we're ever invaded by a foreign army, it's most likely to be an army of people toting AK-47s.

(Laughter.)

AUDIENCE PARTICIPANT: Why doesn't the militia, which—you know, I'm between the ages and eighteen and however high it goes, forty-five—why don't I have not only a right to keep and bear a fully automatic M-16 but why aren't I obligated to?

JUDGE O'SCANNLAIN: Thank you. Answer.

PROFESSOR LUND: Well, the answer that *Heller* gives is based on *Miller*,¹¹⁰ and it's based on a complete misreading of *Miller*. We didn't have a chance to get into this part of history, the history of the court's own precedents, but both Scalia and Stevens grossly misstate the facts of the case in *Miller*, and they do it in such a way as to reinforce the conclusion that *Miller* held that sawed-off shotguns were not protected by the Second Amendment.

There is no such holding in *Miller*. You can't get that holding out of *Miller*. And the only way you could get it is by having different facts in the case, mainly the ones that Scalia and Stevens invented out of thin air. And then in the course of discussing the *Miller* case, which supposedly held that short-barreled shotguns are not protected by

¹¹⁰ *United States v. Miller*, 307 U.S. 174 (1939).

the Second Amendment, Scalia says, well, that if these shotguns are protected that would mean that machine guns are protected as well, and that's inconceivable. Of course, it's perfectly conceivable given what *Miller* said, which was that the arms that are protected by the Second Amendment are those that are useful for military purposes,¹¹¹ which is your point I guess. But that question has just kind of dissolved in the haze of the misreading of *Miller*, freeing Justice Scalia from the obligation to answer your question.

JUDGE O'SCANNLAIN: Final question of the panel.

AUDIENCE PARTICIPANT: My question was about something that Professor Winkler said. You criticized the rulings being non-originalist for discussing what kinds of guns are used today in terms of machine guns versus handguns.¹¹² But I was just wondering, not necessarily in the Second Amendment but on an abstract level, are there no situations where an originalist would look at the custom of the day to determine the constitutional right? Is it ever possible to have a case where an originalist really would look at the custom of the day?

PROFESSOR WINKLER: Well, I think it's certainly possible. You could have a constitutional right where you look at the original understanding, and the original understanding is that the courts will defer to the customs of the day.

I guess the hard question comes in whether the courts today, two hundred years later, can still look to any custom that's arisen since then. If you think that a ban on machine guns is unconstitutional for the reasons that we just talked about a little bit in the last question—if you think that's unconstitutional, the fact that it's now not customary to own a machine gun shouldn't be the key question. It's not customary because federal law has banned it, has taken it off the market. If you had it on the market, maybe it would be customary. Maybe it wouldn't be. Maybe people wouldn't want machine guns.

But the hard part is that the machine gun ban cannot be constitutional today because it's a long-standing tradition. But if we had

¹¹¹ *Id.* at 178.

¹¹² See *supra* text accompanying notes 47–55.

this discussion in 1935, it would be unconstitutional because it's not a long-standing tradition? If you're going to look at custom, you'll either have to look at the customs that they believed in, or you have to accept, really, a Living Constitutionalism that allows current contemporary conditions to alter and affect the meaning of the Constitution. Either way—at least in the last instance—it's certainly not original understanding.

JUDGE O'SCANNLAIN: With that response, let me ask the audience, please, to express appreciation to such an articulate and well-informed panel.

(Applause.)

(Panel concluded.)