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Why Didn't the Supreme Court Take My Advice in the *Heller* Case? Some Speculative Responses to an Egocentric Question

SANFORD LEVINSON*

INTRODUCTION

I am extremely grateful to the editors of the *Hastings Law Journal* for giving me the opportunity to lead off what turned out to be a superb Symposium on *District of Columbia v. Heller*,[1] the (in)famous case in which a slender majority of the Supreme Court invalidated a District of Columbia ordinance that functionally prohibited the private possession of handguns even in one's own home. As readers of the entire Symposium will readily see, a number of participants presented excellent, even stunning, legal analyses of the issues raised by *Heller*, and it is no purpose of mine to try to compete with those papers even if I had the capacity to do so. Instead, I want in many ways to forego legal analysis entirely and build on my alternate identity as a political scientist to offer some admittedly highly speculative conclusions regarding a variety of institutional issues presented by the litigation of *Heller* within the Supreme Court. One will readily note the relative absence of footnotes in what follows. This is explained not only by the informality of the original remarks that I offered to "keynote" the Symposium, but also, and more importantly, by the sheer fact that I will be offering a variety of surmises that, though potentially capable of proof or disproof, can certainly not be easily substantiated at this time through any material in the public record. I obviously believe in the plausibility of everything I

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1. 128 S. Ct. 2783 (2008).

will be asserting, but the kinds of proof that lawyers—and even more to the point, law review editors—prefer, will be lacking.

I begin by noting that on February 25, 2008, I published a piece in the *National Law Journal*[2] entreating the members of the Supreme Court to accept the guidance of the brief filed in the *Heller* case by then-Solicitor General Paul Clement for the United States as amicus curiae.[3] Without going through Clement's entire argument, I think it is fair to summarize it as follows:

- The Second Amendment indeed does offer some level of protection for the ownership and possession of firearms.
- However, the Circuit Court for the District of Columbia had, in its own decision in the case, placed too strict a burden on the government in order to justify the regulation of firearms.
- The Court, after enunciating the correct test, should remand the case to the Circuit Court below for a decision applying the correct standard of review, which might well have led to the repeated invalidation of the District of Columbia law at issue in the case.

Although I did not agree with the Clement brief in every detail—it was more "originalist" than is my own wont—it struck me as a thoroughly commendable piece of lawyering, carefully analyzing the various issues raised by the litigation and expressing great concern for the various institutional interests at stake. I have never met the former Solicitor General, but it reinforced what I had heard from more knowledgeable friends that he was a thoroughly professional, relatively non-ideological, member of the Bush Administration.

As someone with a longtime interest in the Second Amendment,[4] I was obviously interested in what the Court might and should say in its first full-scale confrontation with the Amendment in almost seventy years.[5] The Clement brief struck me as providing excellent guidance for the Court. Frankly, its attractiveness transcended what might be called "merely legal" considerations. Acceptance of its views by the Court, including those Justices out of phase with the current majority, might help to soften the culture war about guns that has been a feature of American life now for many years.[6] Moreover, it would be disingenuous

2. Sanford Levinson, *Why Use Originalism?*, NAT'L L.J., Feb. 25, 2008, at 27.

3. Brief for the United States as Amicus Curiae, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 157201.

4. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

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

6. *See, e.g.*, MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS (2007) (providing a good overview of the cultural, political, and legal cleavages surrounding the issue of gun control); *see also* GUNS IN AMERICA: A READER (Jan E. Dizard et al. eds., 1999) (collection of essays on various aspects of the topic).

to suppress the fact that I have also long believed that the Democratic Party has unwisely "overinvested" in supporting basically symbolic "gun control" measures, with dire consequences for the Party's appeal to important parts of the electorate.[7] Dampening the culture war would be good not only for the country; it would also help the Democratic Party (not, one can be certain, a goal of the Solicitor General's).

My esteem for the brief, which represented the purported views of the Bush Administration, was not shared by everyone in that Administration. Thus, former Vice President Dick Cheney, in his capacity as President of the Senate, signed a competing brief that was considerably more favorably disposed to the D.C. Circuit Court's opinion.[8] It is worth noting that that brief was submitted on behalf of "55 Members of the United States Senate, the President of the United States Senate, and 250 Members of the United States House of Representatives," i.e., a majority of both the House and the Senate.[9] An obvious question, especially for political scientists, is what explains the striking cleavage between the Office of the Solicitor General and the Office of the Vice President (or President of the Senate). I strongly suspect that the answer lies in Clement's having to behave as a more truly institutionally "responsible" decision maker than was true of the senators, representatives, and Vice President, who had greater freedom to engage in rather flamboyant position-taking, for their own political ends, than did Clement.

Thus, I would expect evidence to be available, even if I do not currently possess it, that Clement, as Solicitor General, believed that he had an institutional, even if not formally "legal," duty to be responsive to the career attorneys in the Department of Justice, particularly those in the Criminal Division, who were legitimately concerned that the opinion written by Judge Laurence Silberman for the D.C. Circuit Court would, if accepted without significant modification, call into question a whole panoply of federal regulations going well beyond the de facto prohibition of handguns instantiated in the District of Columbia ordinance.[10] Another way of putting this, perhaps, is that the Department of Justice, embodied for these purposes in the Solicitor General, no longer had the luxury of offering its rather vague, general support for the Second

7. *See* Sanford Levinson, *Democratic Politics and Gun Control*, RECONSTRUCTION, Spring 1992, at 137, 137–41.

8. Brief for Amici Curiae 55 Members of United States Senate et al. in Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_RespondentAmCuSenateHouseMembers.pdf.

9. *Id.*

10. *See* REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 77–86 (1992) (discussing the Solicitor General's responsiveness to divisions, departments, and agencies within the executive branch).

Amendment, as had been announced by former Attorney General John Ashcroft.[11] Rather, it had to walk a careful course between recognizing the legitimate rights of gun owners while, at the same time, recognizing the equally legitimate interests of the public in a broad range of regulations. To adopt the language of my colleague Mitchell Berman, it was not enough to say that the Constitution "meant" that "gun rights" were protected; instead, courts now had to craft "constitutional decision rules" that gave genuine and implementable meaning to the far more general declaration of constitutional protection.[12]

In any event, as it is sometimes said, "what one sees depends on where one sits," and Clement sat in a chair that required a significant measure of institutional responsibility for the consequences of legal positions that were being asserted. That, of course, may not describe the situation of the many members of Congress who are almost infinitely more concerned with keeping their political "bases" happy—and thus assuring their reelection—than with the institutional interests of oft-dismissed "bureaucrats" who staff such institutions as the Criminal Division of the Justice Department. This is true, whether paradoxically or not, even if one might readily suspect that these particular bureaucrats are relatively unlikely to be politically "liberal" in the way that term is commonly used. Indeed, one would assume that most people who choose to be career prosecutors feel especially concerned with putting presumptively bad people behind bars and believe that federal laws prohibiting, say, felons from possessing firearms, are a handy means to that desirable end.

Moreover, for what it is worth, there is good reason to believe that the Clement brief captures the present views of the American public. Contemporary public opinion polling data demonstrates, fairly conclusively, that most Americans do believe in some kind of individual right to possess firearms,[13] even as the same data show that most Americans support greater control of handguns.[14] But "control," for most people, does not mean the de facto "prohibition" present in the D.C. ordinance, which helps to explain what appears to be wide support for the Court's ultimate decision.[15] I would doubt, though, that Clement was

11. Letter from John Ashcroft, U.S. Attorney Gen., to James Jay Baker, Executive Dir., Nat'l Rifle Ass'n (May 17, 2001), *available at* http://www.nraila.org/images/Ashcroft.pdf.

12. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9–12 (2004).

13. *See, e.g.*, Joan Biskupic, *Do You Have a Legal Right to Own a Gun?*, USA TODAY, Feb. 27, 2008, at 1A, *available at* http://www.usatoday.com/news/washington/2008-02-26-guns-cover_N.htm ("Nearly three out of four Americans—73%—believe the Second Amendment spells out an individual right to own a firearm, according to a *USA TODAY*/Gallup Poll of 1,016 adults taken Feb. 8–10.").

14. *See, e.g.*, Harris Poll, *Does the Second Amendment Provide the Right to Bear Arms? U.S. Adults Think So*, HARRIS INTERACTIVE, June 3, 2008, http://www.harrisinteractive.com/harris_poll/index.asp?PID=914.

15. Although there does not appear to be a Gallup or other poll on *Heller* per se, one reason to

particularly motivated by appealing to "the American public," as against maintaining the loyalty of career professionals within the Justice Department (or, for that matter, the Justices of the Supreme Court who look to the Solicitor General for conscientious reflection).

In my *National Law Journal* article, I expressed the hope, naïve as this appears in retrospect, that the Court might even join together in a unanimous decision.[16] This would necessarily require that the four "moderates" or "liberals"—what one calls them is a function of one's own politics—concede that the Second Amendment does indeed offer at least some meaningful protection to peaceful and law-abiding citizens who wish to possess guns, especially in their own homes.[17] This would entail rejection of what is usually called the "collective rights" view of the Amendment inasmuch as that is interpreted as protecting only the right of states to have organized militias should they wish to and otherwise leaves individual citizens at the mercy of unfettered legislative power.[18]

"Conservatives" on the Court would obviously have to accept a less rigorous view of the Amendment than that enunciated by the Circuit Court below, but one might have hoped that Chief Justice John Roberts especially, given his announced desire to achieve a more harmonious Court,[19] might acquiesce to such a deal if it enabled the writing of a unanimous—or even a near-unanimous—opinion. Moreover, as already noted, the achievement of such unanimity—the Scalian lion sitting in peaceful repose with the Ginsburgian lamb—might conceivably help to cool down the "culture war" that rages over the issue of guns; political liberals and conservatives could demonstrate the possibility of achieving a meaningful compromise that offered a way out of the current unpleasantness of acrimony and mistrust. Former President George W. Bush's hope expressed during the 2000 campaign to be a "uniter, not a divider"[20] would be achieved, thanks to his Solicitor General, in a perhaps unexpected area of American politics.[21]

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suspect wide support for the decision is that almost no prominent national politician even criticized *Heller*, let alone denounced it. This included, of course, then-candidate Barack Obama, who issued a statement after the Supreme Court's decision, noting his belief "that the Second Amendment protects the right of individuals to bear arms." *See* Posting of Christopher Hass to Organizing for America Community Blogs, http://my.barackobama.com/page/community/post/stateupdates/gG5NxL (June 26, 2008, 12:25 pm EDT). I take this to be a signal that those politicians with special incentives to discern public opinion believe that the Court's enunciation of such a right is widely supported.

16. Levinson, *supra* note 2.

17. *Id.*

18. *Id.*

19. *See, e.g.*, Jeffrey Rosen, *Roberts's Rules*, ATLANTIC MONTHLY, Jan.–Feb. 2007, at 104–05, *available at* http://www.theatlantic.com/doc/200701/john-roberts.

20. George W. Bush, *Why You Should Vote for Me*, USA TODAY, Nov. 7, 2000, at 29A.

21. My friend Mark Graber offers the cautionary note that there is no real evidence that Supreme Court decisions, even if they are unanimous, can actually play an effective role in what might be termed "managing" important conflicts within American culture. E-mail from Mark A. Graber,

Needless to say, my hopes were (almost) completely unfulfilled. *Heller*, as most recognize, is just another example of a bitter 5–4 split in the Court in which each side leveled broadsides at the other that, in effect, challenged their intellectual competence as constitutional interpreters. The tone of Justice Antonin Scalia's opinion is that of a lion seeking to devour his adversaries rather than to live with them in a spirit of amity. What is especially ironic—and thus explains my parenthetical "almost" in the first sentence of this paragraph—is that a careful reading of Justice Scalia's opinion in the case, whatever its tone, suggests that the actual import of *Heller* may be far, far closer to what would have been the case had the Clement brief forthrightly been accepted. A number of commentators, including participants in the Hastings Symposium, have already suggested that *Heller* is a relatively unloaded weapon with regard to almost all state and federal gun control legislation beyond the prohibition of firearms in one's home.[22]

So my question, however egocentric it sounds, is "why didn't the Court follow my altogether sensible advice?" Especially since that would have required only the acceptance of the formal position of the Bush Administration itself and foregoing the Supreme Court's own invalidation of the D.C. ordinance (rather than remanding it to the court below for that almost certain fate)? Even in the absence of direct evidence, I believe that I can, as both a lawyer and political scientist, offer some surmises that might prove illuminating in our attempts to analyze judicial decisions and the judges who make them.

I. WAS IT SIMPLY DUMB TO BELIEVE THAT LIBERALS/MODERATES MIGHT BE ATTRACTED BY CLEMENT'S ARGUMENT (OR BY ANY OTHER ARGUMENT THAT WOULD LEAD TO THE INVALIDATION OF THE D.C. ORDINANCE)?

The answer to this nonrhetorical question might, of course, be yes. But there are three separate grounds by which one might achieve that conclusion. The first is to deny that Clement (or anyone else attacking the ordinance) presented a correct reading of the Constitution, so no

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Professor of Law and Gov't, Univ. of Md. Sch. of Law, to author (Feb. 24, 2009, 09:36 CST) (on file with the Hastings Law Journal). Consider only the unanimous opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954), which notably failed to bring closure to the debate over school segregation. And, Graber writes, "[c]ertainly *Marbury* and *McCulloch* do not support the proposition" that unanimity stills dissent in the wider culture. Graber, *supra*.

22. *See, e.g.*, Adam Liptak, *Gun Ruling Was Called a Landmark, but That Remains To Be Seen*, N.Y. TIMES, Mar. 17, 2009, at A14, *available at* http://www.nytimes.com/2009/03/17/us/17bar.html?ref=politics ("Since [*Heller*], lower federal courts have decided more than 80 cases interpreting the decision . . . and it is now possible to make a preliminary assessment of its impact. So far, Heller is firing blanks."); *see also* Symposium, *The Second Amendment After* Heller, 60 HASTINGS L.J. 1203 (2009); Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551 (2009) (detailing *Heller*'s lack of significance for courts below).

more need be said. Judges should be guided, as avatars of Ronald Dworkin's "Hercules," by their view as to the best view of the law.[23] Even if I happen to believe that Clement's brief, perhaps suitably tweaked, presented just that view, that is truly irrelevant in the absence of sincere agreement by the judges in question. This premise obviously relies on what is in fact a controversial analysis of judicial decision making, which both takes legal argument with the utmost seriousness and presumes that judges are guided by such argument rather than, say, their own policy preferences. However, many people, especially in the legal academy, have this view. If one asks why the majority and dissenters disagree so dramatically on the reading of the Constitution, all one can say is that they happen to have sincerely different views about constitutional meaning. To be sure, that difference might well embarrass anyone who believes that high-quality legal education—six of the nine Justices went to the Harvard Law School, after all[24]—should produce some kind of consensus as to how tough legal questions should be answered, but that is the topic for another essay.

For many, especially political scientists, the best explanation for the kind of differences observed in *Heller* (and, of course, many other cases) is that legal arguments per se are relatively weak explanations for judicial votes. Given that almost all cases that reach the Supreme Court involve quite indeterminate aspects of the Constitution, judges make their decisions not on the basis of "convincing legal arguments"—the existence of which is belied by the very splits we are trying to explain—but, rather by the policy preferences of the judges. To hope that the four ultimate dissenters would find my views compatible would have required believing, albeit implausibly, that they in fact personally support at least some degree of freedom for persons to own handguns in the District of Columbia and thus agree that the ordinance is an indefensible infringement of what is properly viewed as a constitutionally protected liberty. Indeed, perhaps one would have to imagine that one or more of those judges might want to have a handgun in his or her own home as a potential means of defense against an intruder. Such an analysis relies on adopting what is usually called the "attitudinal model" of judging, which emphasizes the role of judges, particularly at the level of the Supreme Court, as public-policy makers rather than impersonal servants of inevitably indeterminate legal commands.[25]

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23. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116–18 (1977).

24. If Supreme Court nominee (and Yale Law School graduate) Sonia Sotomayor is confirmed, Harvard's representation on the Court will be down to a "mere" five.

25. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86–97 (2002) (delineating the argument that Justices' policy attitudes are the primary variable in explaining their decision); *see also* Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251, 1258–66 (2008) (providing an excellent

If there is anything that seems clear beyond doubt, though, it is that the four Justices in dissent are exceedingly unlikely to have a policy preference for "gun rights" instead of "gun control" (or, indeed, "gun prohibition"). To the extent that class and culture seem to be linked with one's position on the issue of guns,[26] it is hard to find a more predictable set of "anti-gun" decision makers than at least three of the four dissenters. The fourth, Justice David Souter, is, after all, from New Hampshire—the "live free or die" state—and if one knew nothing more about Souter than his identity as a Granite State Republican, one might be surprised if he shared the animus against guns that I am attributing (without specific evidence) to Justices Ruth Bader Ginsburg, Stephen Breyer, and John Paul Stevens. Attitudinalism triumphs, but in the opposite direction from my own desire for acceptance of the Clement brief. Of course, it should be noted immediately, there is no reason to adopt an attitudinal model to explain the dissenters and not the Justices in the majority. Perhaps the Justices in the majority are as predisposed, on policy grounds, to favor greater gun rights as the Justices in the minority are to be perturbed by that very possibility.

Recall that I offered two other reasons to embrace the Solicitor General's argument. One involved dampening the culture war. Why should not all Justices, whether liberal or conservative, believe that that might be conducive to the institutional interests of the Court itself, especially if it gained widespread applause from the broad center of the American public for reaching such a sensible "middle ground"? And would not it have been obvious to the dissenting Justices that there would be a vast public outcry—not only from conservative Republicans—should the Court overrule the Circuit Court and reinstate the prohibitory D.C. gun ban? My second reason, under some models, might be thought to be relevant, at least to the two identified Democrats on the Court, Justices Breyer and Ginsburg. The perceived militant opposition to the rights of gun owners by the Democratic Party over the past several decades has been bad for its political health. There is, for example, strong evidence that President Bill Clinton's insistence on forcing the "assault-weapons" ban through Congress as part of his 1994 legislative package helped to contribute to the debacles in the 1994 elections—including the loss of Speaker of the House Tom Foley (from a hunting-oriented district in eastern Washington)—that shifted control of

comparison of "legalist" and "attitudinal" models of explaining judicial behavior); Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001) (providing an illuminating and readily accessible entry point into the debate).

26. *See, e.g.*, Dan M. Kahan et al., *Modeling Facts, Culture and Cognition in the Gun Debate*, 18 SOC. JUST. RES. 203 (2005); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1292–1305 (2003).

the House from Democrats to the Republicans with stunning consequences for American politics (including Clinton's own subsequent impeachment).[27]

Whatever might have motivated the refusal of the dissenters to bend, it was not a concern for the institutional interests of the Democratic Party. Barack Obama and Hillary Clinton both spent much of the spring of 2008 declaring, with whatever degree of sincerity, their respect for guns in general and the Second Amendment in particular.[28] I am confident that the Obama campaign would have treated a "victory" by the dissenters as akin to the discovery of new tapes of speeches by the Reverend Jeremiah Wright, perhaps showing the candidate clapping at the more incendiary passages of Reverend Wright. This is no small point: one is sometimes tempted to view our division of judges into "conservative" or "liberal" as equal to a commitment to the interests of the political parties identified with such views. Thus a "conservative judge" will rule in ways that foreseeably help the Republican Party, just as a "liberal judge" would be expected to ask, prior to casting his or her vote, what is good for the Democrats. To be sure, there *are* cases, such as *Bush v. Gore*,[29] that certainly invite (and, I believe, justify) such a perspective. But we should be clear that many, many cases do not.

Racial gerrymandering, for example, is an unusually interesting example of a situation where ideology and political interest almost certainly do not converge. That is, it has been, generally speaking, Republicans who have benefited overall from the significant use of racial criteria in designing electoral districts, and Democrats, concomitantly, who have paid significant costs.[30] This, however, is not reflected in the split within the Supreme Court, where sincere conservatives, who are appalled by racial gerrymandering, have attempted to shut it down, even as political liberals have been willing to support it regardless of the costs it might impose on the Democratic Party.[31] Political *ideology* might

27. *See* HARRY L. WILSON, GUNS, GUN CONTROL, AND ELECTIONS: THE POLITICS AND POLICY OF FIREARMS 156–62 (2006).

28. *See, e.g.*, *Gun-Shy Candidates Fall Short of a Solution*, ABC NEWS, Feb. 17, 2008, http://www.abcnews.go.com/Politics/story?id=4303968 (detailing Obama's and Clinton's support for the Second Amendment and an individual right to bear arms).

29. 531 U.S. 98 (2000).

30. *See, e.g.*, DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 10 (1997) (arguing that conservative Republicans, along with African-American and Latino politicians, have been the principal beneficiaries of racial gerrymandering).

31. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993). Each of the cases in this string of 5-4 decisions involving racial gerrymandering featured a lineup of five political conservatives, all Republican, in the majority against two Democrats and two distinctly moderate Republicans. Indeed, the most recent voting rights case, *Bartlett v. Strickland*, decided by the Supreme Court on March 9, 2009, is another "standard-form" 5-4 split, with Justice Kennedy writing for the conservative majority. *See* 129 S. Ct. 1231, 1235–38 (2009).

explain these different voting patterns, but a crass commitment to the short-run interest of the political *party* that presumably instantiates the general ideology does not. This is why it was a group of politically conservative Justices who made an immense in-kind contribution to the Obama campaign by, in effect, taking the issue of gun control and gun rights off the table for the 2008 election season and providing candidate Obama with the opportunity to offer his support to the *Heller* decision as a way of reassuring gun owners that he in fact supported the Second Amendment and its guarantee of at least some sort of protection for the right to bear arms.

II. WHAT ABOUT THE MAJORITY?

The fact that there might be good explanations for the refusal of the dissenters to go along with my eminently sensible recommendations does not provide answers to the linked question of why the majority also chose not to embrace the Clement brief. Perhaps that was never in the cards. But perhaps it also depended, in large measure, on who was chosen to write the majority opinion.

A. WHY SCALIA?

Having disposed of the dissenting minority and offered some surmises as to why none of them, one presumes, made any overtures to Chief Justice Roberts and his conservative colleague to coalesce around a Clement-type opinion, we are left with the task of explaining some of the oddities in the behavior of the Justices in the majority. Begin with the very point that there were multiple ways to get to the desired result, including adopting the Clement brief.

So the first question one should ask is why Chief Justice Roberts assigned the opinion to Justice Scalia? The operating rule of the Court is that the Chief Justice, if part of the majority, gets to assign the task of writing the opinion to whomever he wishes.[32] Otherwise, the senior Justice selects the opinion writer.[33] So why did he wish that Justice Scalia—certainly one of the most polarizing figures on the Court—write what would undoubtedly be viewed as one of the major opinions of the entire term, if not of many terms? Is it enough to say that Scalia was almost certainly champing at the bit, having in effect announced several years before that he was ready and willing to breathe life in what had become the moribund Second Amendment?[34] But Justice Thomas had

32. *See* ENCYCLOPEDIA OF THE UNITED STATES 294–95 (David S. Tanenhaus ed., 2008); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 607 (Kermit L. Hall et al. eds., 1992).

33. *See supra* note 32.

34. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 43, 136–37 (1998).

also indicated what might be called a proprietary interest in the Second Amendment.[35] So why not choose Justice Thomas, who has rarely had the opportunity to write a truly major opinion for the Court? Moreover, Justice Thomas is a far more committed "originalist" than is Justice Scalia, a self-proclaimed "faint-hearted originalist."[36] This, of course, may help to explain the choice of Justice Scalia over Justice Thomas, at least if we assume that Chief Justice Roberts, if an originalist at all, is almost infinitely more likely to be of the faint-hearted, rather than full-throated, variety.

But this simply forces us to ask why Chief Justice Roberts chose Justice Scalia—or an originalist—at all? Why did he not assign it to himself, given the obvious importance of the decision? There is at least a limited tradition of Chief Justices assigning themselves the opinions in cases that are viewed as unusually significant for the polity. Chief Justice John Marshall, most notably, made a career out of doing so.[37] The most famous modern example, of course, is the then–newly appointed Chief Justice Earl Warren's taking the helm in *Brown v. Board of Education*.[38] Or think of Chief Justice Warren Burger's opinion in *United States v. Nixon*.[39] It has been suggested, though, that "Chief Justice Rehnquist did not display this tendency to self-assign important opinions,"[40] and it is possible that Roberts, who, after all, clerked for Rehnquist, was influenced by this relatively self-effacing behavior.

In choosing Justice Scalia, Chief Justice Roberts was also choosing in effect to receive an opinion that would undoubtedly push Justice Scalia's own favored approach to constitutional interpretation, which is, at least rhetorically, "originalist." As former Harvard Law School Professor Cass Sunstein wrote at the very beginning of his recent *Harvard Law Review* article analyzing Justice Scalia's opinion, it is, without doubt, "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court."[41] Surely, this could have been no surprise to Chief

35. *See* Printz v. United States, 521 U.S. 898, 936–39 (1997) (Thomas, J., concurring) (explicitly recognizing, unlike Justice Scalia's opinion for the Court, the potential significance of the Second Amendment).

36. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist."); *see also* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 8–16 (2006). For an example of Justice Thomas's comparatively greater commitment to originalism, see his concurring opinion in *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

37. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

38. 347 U.S. 483 (1954).

39. 418 U.S. 683 (1974).

40. *See* Cross, *supra* note 25, at 1267 n.118 (citing Forest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421, 435 (1996)).

41. Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 246 (2008).

Justice Roberts. So, regardless of the demeanor he adopted before the Senate Judiciary Committee, to which he pledged that his jurisprudence would be distinguished by its "modesty and humility,"—which seemed to suggest a respect for precedent and deference to other decision-making bodies—perhaps Chief Justice Roberts is actually a hard-core originalist who happily sees an ally in the predictably dogmatic, flamboyant, and decidedly nondeferential Justice Scalia.[42]

B. But How Autonomous Was Scalia After All? What Was the Price of Getting a Fifth Vote?

The Chief Justice had complete autonomy in deciding whom to ask to write the presumptive "Opinion of the Court," but, of course, he could not necessarily guarantee that all of his four colleagues in the majority would be happy with what would be presented to them. Indeed, it appears close to self-evident that Justice Scalia made some significant concessions in order to get at least the key fifth vote, presumably from Justice Anthony Kennedy, but, who exactly knows, maybe from Chief Justice Roberts and/or Justice Samuel Alito as well. What unites almost everyone who has attempted to analyze Justice Scalia's opinion is a shared belief that it is an intellectual shambles, particularly, and centrally, with regard to the notorious Part III[43] in which he announces, without the slightest trace of supporting argument, that most federal gun control laws are in fact constitutionally unproblematic, whatever might have been suggested by the language earlier in the opinion.[44] "Originalism" goes out the window at this point, which may help to explain why perhaps the most savage critique of Justice Scalia's opinion has been written by Professor Nelson Lund, a strong conservative supporter of gun rights who is also originalist in his preferred methodology of constitutional analysis.[45] "[T]he Court's reasoning," writes Professor Lund, "is at critical points so defective—and so transparently non-originalist in some respects—that *Heller* should be

42. *See* Jeffrey Toobin, *No More Mr. Nice Guy*, New Yorker, May 25, 2009, at 43, *available at* http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin.

43. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).

44. *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 Harv. L. Rev. 191, 196–97 (2008) (referring to the "temporal oddities in the evidence the majority marshals").

45. Nelson Lund, *The Second Amendment,* Heller, *and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343 (2009). Interestingly enough, Scalia's opinion has also been strongly criticized by at least two conservative federal judges who believe that it betrayed another conservative value, judicial restraint. *See* Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, New Republic, Aug. 27, 2008, at 32, *available at* http://www.tnr.com/story_print.html?id=d2f38db8-3c8a-477e-bdoa-5bd56deoe7co; J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253 (2009).

seen as an embarrassment for those who joined the majority opinion. . . . Originalism deserved better from its judicial defenders."[46]

Part III begins by noting that, unexceptionably, "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and Justice Scalia goes on to recognize a plethora of those limits.[47] He specifically mentions, for example, such common laws as those prohibiting possession of firearms by convicted felons or by the mentally ill.[48] Similarly, Justice Scalia is quick to assert the legitimacy of regulating firearms outside the home or prohibiting "unusual" firearms,[49] though, as already suggested, there is no scintilla of an explanation as to why, say, Martha Stewart, a decidedly nonviolent convicted felon, no longer has what we were earlier told was a constitutionally protected right to be able most effectively to defend herself in the sanctuary of her own home.[50] "Originalists" certainly could note, altogether accurately, that many contemporary limits on firearms are relatively recent—or at least far past 1791—additions to the federal code. Some firearms are "unusual" only because they are illegal, not because a "free market" has rejected them as suitable for self-defense (or engaging in the overthrow of an oppressive government, another value that one might see as helping to explain the origins of the Second Amendment).[51]

Assuming that I am correct in ascribing Part III, and its stunning incoherence, to the vagaries of intra-Court bargaining, how critical should we really be? A Justice may well believe that it is vitally important to turn what would otherwise be a plurality opinion into an "Opinion for the Court."[52] One must always remember that Supreme Court opinions are often the products of careful negotiation; that is certainly a lesson taught by the study of Chief Justice Warren's opinion in *Brown* itself, to mention only one of the most famous examples.[53] But consider as well a memorandum written by Chief Justice Rehnquist to his colleagues concerning an opinion he was charged with drafting:

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46. Lund, *supra* note 45, at 1345.

47. *Heller*, 128 S. Ct. at 2816.

48. *Id.* at 2816–17.

49. *Id.* at 2817.

50. *Id.* at 2788–99.

51. *See* Levinson, *supra* note 4, at 648; *see also* Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel,* The Militia and the Right to Arms, 12 WM. & MARY BILL RTS. J. 315 (2004) (book review).

52. Part of "collegiality" on a multi-member court may be a demonstrated willingness to compromise with one's colleagues in order to generate a sufficient consensus behind a given opinion. *See* Frank B. Cross & Emerson H. Tiller, *Understanding Collegiality on the Court,* 10 U. PA. J. CON. L. 257, 259 (2008).

53. For the canonical treatment of the extensive intra-Court deliberation (and bargaining) process, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 582–699 (3d ed. 1987); and ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 151–82 (2003).

> I prefer the position taken in the most recent circulation of my proposed opinion for the Court, but want very much to avoid a fractionated Court on that point. . . . If a majority prefer Nino's [Justice Scalia's] view, I will adopt it; if I can get a majority for the view contained in the present draft, I will adhere to that. If there is some "middle ground" that will attract a majority, I will even adopt that.[54]

It is a categorical mistake to view Supreme Court Justices, even if they are former law professors themselves (as Scalia most certainly was), as continuing to play the role of a professor, where intellectual coherence is the highest value. In becoming a Justice, Scalia took on a distinctly different role, and judicial opinions inevitably reflect the demands placed on Justices. As is likely with such products—recall the common adage that a camel is a horse designed by a committee—intellectual coherence may be secondary to achieving the objective of gaining, in this instance, the all-important fifth vote needed to turn what might otherwise have simply been a "plurality" opinion into the "Opinion for the Court."[55] Perhaps one might expect opinions signed only by a single Justice, whether in concurrence or dissent, to meet the standards one might set for papers in a law school seminar. That would simply be a mistake with regard to a majority opinion of a politically aware group of Justices.

C. Once Scalia Has Made the Concessions Present in Part III, Then How Different Is It, After All, from the Approach Taken by Clement in His Brief?

If the opposition to that brief, by Cheney and others, was driven by a fear that it would provide too little protection to gun owners, is there any reason for proponents of such protection to be any more optimistic about the consequences of *Heller*, even if we put to one side any possible changes in the makeup of the federal or state judiciaries that will actually be called upon to implement the decision? What, precisely, did the Court—or its conservative majority—gain by rejecting the Clement brief, and embracing Justice Scalia's opinion in its stead, beyond an onslaught of intellectual criticism that is remarkable for bringing together traditional adversaries who can agree, if on nothing else, that Justice Scalia's opinion is unusually shoddy as a piece of intellectual handiwork?

Early returns suggest that "inferior courts" are proving extremely hesitant to read *Heller* as a Magna Carta for gun owners.[56] The only post-

54. Cross & Tiller, *supra* note 52, at 259 n.10 (quoting Bernard Schwartz, Decision: How the Supreme Court Decides Cases 21 (1996)).

55. See, for example, the Court's decision just the year before in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, (2007). Justice Kennedy refused to sign Justice Roberts's opinion and instead wrote a concurrence in the judgment, which deprived Roberts's opinion of its imprimatur as the "Opinion of the Court." *See id.* at 2741; *id.* at 2788–97 (Kennedy, J., concurring in part and concurring in the judgment).

56. *See* Liptak, *supra* note 22.

Heller "winner" so far appears to be someone indicted (but not convicted) of possessing child pornography, which carries with it the inability to possess a gun.[57] And even that decision was only by a federal magistrate.[58] All cases decided by district judges have ruled firmly on behalf of the state. As Brannon Denning observed in his own contribution to this Symposium,[59] it is far too early to tell whether *Heller* will be the harbinger of a significant development in legal doctrine or, like *United States v. Lopez*,[60] a case generating a great deal of scholarly sound and fury that ultimately signified almost nothing with regard to the wider legal universe.[61] Like *Lopez*, *Heller* has invigorated the legal academy. The *Hastings Law Journal* will be joining its counterparts at Harvard, Syracuse, UCLA, and Lewis & Clark law schools in publishing multiple articles devoted to the case.[62] It will be interesting to look back on these symposia ten years from now—as we look back on similar symposia on *Lopez*—and assess the fit between the predictions made by both admirers and critics of the decision in *Heller* and the actualities of observed behavior by courts and other relevant political actors. This may be just one more example of the almost pathological over-estimation of the importance of the Supreme Court by those ensconced in the legal academy (including, for that matter, very able and conscientious members of law reviews who learn from their professors about the centrality of the Supreme Court).

In any event, I conclude with a simple question: Would the Court—or, for that matter, devotees of gun rights—really have been worse off had it accepted my advice to rally around Clement and try to forge an opinion that might have brought the two wings of the Court together and rendered unnecessary the high-decibel debate over the ostensible importance of originalism in discerning the present meaning of the Second Amendment?

57. *Id.*; *see also* United States v. Arzenberger, 592 F. Supp. 2d 590 (S.D.N.Y. 2008).

58. *See Arzenberger*, 592 F. Supp. 2d 590.

59. Brannon P. Denning & Glenn H. Reynolds, Heller *High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245 (2009).

60. 514 U.S. 549 (1995).

61. *See, e.g.*, Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez, *or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 369–71.

62. *See* Akhil Reed Amar, Comment, Heller, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008); Siegel, *supra* note 45; Sunstein, *supra* note 41; Symposium, *The Second Amendment After* District of Columbia v. Heller, 13 LEWIS & CLARK L. REV. 315 (2009); Symposium, *The Second Amendment and the Right to Bear Arms After* D.C. v. Heller, 56 UCLA L. REV. 1041 (2009).

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