

## THE CONSTITUTIONAL POLITICS *HELLER* LAUNCHED

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In a recent essay in the *New York Times*, retired Supreme Court Justice John Paul Stevens called for the repeal of the Second Amendment.<sup>1</sup> Summarizing arguments he had previously set forth in his dissent in *District of Columbia v. Heller*<sup>2</sup> and a 2014 book,<sup>3</sup> Justice Stevens contended that the Second Amendment, properly construed, poses no “limit on either federal or state authority to enact gun control legislation,” because it does not protect an individual right.<sup>4</sup> Given the low probability of the Court correcting its error in *Heller* in the near future, Justice Stevens urged the People to do so.

The Stevens essay almost immediately drew friendly fire from gun control proponents. By calling for the repeal of the Second Amendment, the critics worried, Justice Stevens was playing into the hands of gun rights advocates, who would point to the essay as evidence that liberals really do want to fully disarm Americans.<sup>5</sup> What’s more, they complained, the call for repeal was unnecessary, because *Heller*

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1. John Paul Stevens, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html> [perma.cc/L7JJ-8NQ9].

2. 554 U.S. 570, 636–80 (2008) (Stevens, J., dissenting).

3. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 125–34 (2014).

4. Stevens, *supra* note 1.

5. See, e.g., Steve Chapman, *John Paul Stevens is Wrong: Trying to Repeal the Second Amendment Would Be a Pointless Mistake*, CHI. TRIB. (Mar. 27, 2018), <http://www.chicagotribune.com/news/opinion/chapman/ct-repeal-second-amendment-stevens-20180327-story.html> [perma.cc/LTC4-HSBC] (“Stevens has just done the NRA and its allies a great favor . . .”); Laurence H. Tribe, *The Second Amendment Isn’t the Problem*, WASH. POST (Mar. 28, 2018), [https://www.washingtonpost.com/opinions/repealing-the-second-amendment-is-a-dangerous-idea/2018/03/28/ab194138-32af-11e8-8bddcdb33a5cef83\\_story.html](https://www.washingtonpost.com/opinions/repealing-the-second-amendment-is-a-dangerous-idea/2018/03/28/ab194138-32af-11e8-8bddcdb33a5cef83_story.html) [perma.cc/BRM6-3RCD] (“Stevens handed the gun lobby a rhetorical howitzer.”); Matthew Yglesias, *Let’s Not Repeal the 2nd Amendment*, VOX (Mar. 28, 2018), <https://www.vox.com/2018/3/28/17168772/second-amendment-stevens> [perma.cc/CCS3-LLC7] (“Reopening a decade-old constitutional argument . . . is at best a distraction and at worst counterproductive.”).

does not stand in the way of gun control.<sup>6</sup> After all, in *Heller* itself, Justice Antonin Scalia's majority opinion listed a wide variety of firearms regulations that would not run afoul of the Second Amendment.<sup>7</sup>

Might the critics of Justice Stevens also have cited the findings of Professors Eric Ruben and Joseph Blocher? Their comprehensive study<sup>8</sup> of post-*Heller* state and lower federal court rulings tests the claim that those courts have systematically underenforced the right recognized in *Heller* and made applicable to state and local gun regulation in *McDonald v. City of Chicago*.<sup>9</sup> Ruben and Blocher find that Second Amendment claims have an overall success rate of only nine percent.<sup>10</sup> Challenges that reach the federal appeals courts succeed in only thirteen percent of cases,<sup>11</sup> a figure that, as Ruben and Blocher note, reflects an unusually high appeal rate for Second Amendment cases relative to other kinds of cases.<sup>12</sup>

Accordingly, it appears that Ruben and Blocher have provided powerful evidence for the critics of Justice Stevens. Given the strong tendency of Second Amendment challenges to fail, the contention would go, there is no need to repeal the Second Amendment in order for gun regulation to be sustained.

Yet that view is wrong. A closer look at the Ruben and Blocher study shows that it implies that the Second Amendment as currently understood stands as a major obstacle to the sort of firearms regulation that would be needed to make a substantial dent in America's gun violence problem.

Handguns account for far more murders than any other type of firearm or weapon of any kind.<sup>13</sup> *Heller* and *McDonald* ensure that most adults can have handguns in their homes, and the lower court

6. See Chapman, *supra* note 5 ("In those decisions that Stevens decries, the Supreme Court said the Constitution allows various types of regulation."); Tribe, *supra* note 5 ("[T]he Second Amendment's right to bear arms, even as interpreted by a conservative Supreme Court and the right-leaning lower federal courts, is far from absolute . . .").

7. See *Heller*, 554 U.S. at 626–27 (listing acceptable forms of regulation).

8. Eric Ruben and Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433 (2018).

9. 561 U.S. 742 (2010).

10. Ruben and Blocher, *supra* note 8, at 1473.

11. *Id.*

12. See *id.* at 1472 ("Notably, however, our numbers suggest that the appeal rate is higher in Second Amendment cases than in many other areas of law.")

13. 2016 Crime in the United States, *Expanded Homicide Data Table 4, Murder Victims by Weapon, 2012-2016*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-4.xls> [perma.cc/L6XR-V42W].

cases surveyed by Ruben and Blocher indicate that the Second Amendment also protects a right to carry handguns in public.

Although Ruben and Blocher demonstrate that most Second Amendment challenges fail, they also show that the failures and successes are not evenly distributed across categories of cases. “Challenges to public carry restrictions had a success rate of 22 percent, which is the highest in [their] dataset.”<sup>14</sup> As they note, courts have struck down bans on public carriage of handguns in Washington, D.C. and Illinois, the only places that had such bans.<sup>15</sup>

Moreover, it is very likely that, if faced with the question, the Supreme Court would rule that the right to keep and bear arms applies in public as well as in the home. Shortly after the *Heller* decision was announced, I suggested that the majority opinion could be read more narrowly, but even I acknowledged that “prima facie, the logic and language of *Heller* extend to the possession and use of firearms outside of the home.”<sup>16</sup>

The lower courts have, as Ruben and Blocher document, tended not to look beyond that *prima facie* logic and language. As Judge Posner wrote in a 2012 case,

Both *Heller* and *McDonald* do say that “the need for defense of self, family, and property is *most acute*” in the home, but that doesn’t mean it is not acute outside the home. *Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home, as when it says that the amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” Confrontations are not limited to the home.<sup>17</sup>

It remains possible, of course, that the Supreme Court could limit the Second Amendment right to the home, thus allowing public carry bans. However, with the Court’s existing personnel, that seems

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14. Ruben and Blocher, *supra* note 8, at 1484.

15. *Id.* at 1484–85.

16. Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 228 (2008). My argument that the *Heller* right could nonetheless be limited to the home was based in part on an analogy to obscenity. *See id.* at 231–33 (discussing, *inter alia*, *Stanley v. Georgia*, 394 U.S. 557 (1969)). For a fuller development of that analogy, see generally Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009).

17. *Moore v. Madigan*, 702 F.3d 933, 935–36 (7th Cir. 2012) (alteration in original) (citations omitted).

unlikely. Certainly, no post-*Heller* developments indicate an inclination on the part of a majority of the current justices to narrow the right in this way.

Indeed, it seems more likely that the Supreme Court as currently constituted would reject at least some of the lower court rulings upholding firearms regulation than that it would reject one of the much smaller number of lower court opinions invalidating challenged firearms regulations. As Ruben and Blocher observe, Justice Clarence Thomas has been vocal in protesting what he regards as “second-class treatment” of the Second Amendment in the lower courts.<sup>18</sup> To be sure, one might think that by failing to heed Justice Thomas’s call to rein in the state and lower federal courts his colleagues have tacitly approved their rulings, but if so, then one would also think that the Court has signaled approval of the lower court decisions invalidating public carry bans.

More broadly, one might wonder how reliable lower court rulings are as a predictor of the path of Supreme Court doctrine. The Court sometimes invokes a rough consensus among lower courts as an apparent ground for resolving an issue in accordance with that consensus.<sup>19</sup> Indeed, before he retired, Justice Stevens repeatedly urged that the weight of lower court opinion ought to be treated as a kind of formal precedent in the Supreme Court.<sup>20</sup> However, Stevens was always in dissent in doing so. His view that lower court consensus deserves Supreme Court deference has never prevailed. If and when the Supreme Court takes up the Second Amendment issues that it has thus far left to the lower courts, any consensus to have emerged among those courts will be deemed nothing more than persuasive precedent.

Accordingly, it is possible that the Supreme Court could end up allowing even greater regulation of firearms than the lower courts have heretofore allowed. However, in the medium term, that seems extremely unlikely. The Court has not decided a major Second Amendment case since *McDonald* in 2010. Notably, in that time, the only expressions of disagreement with the lower courts have come from justices complaining that *Heller* and *McDonald* are not being enforced with sufficient rigor.

18. See Ruben and Blocher, *supra* note 8, at 1448 & nn. 72–74 (citing examples).

19. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (citations omitted) (approvingly stating that “[w]ith the exception of the opinion here under review and one other . . ., the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution”).

20. See, e.g., *McNally v. United States*, 483 U.S. 350, 376–77 (1987) (Stevens, J., dissenting) (citing prior dissents of Stevens, J.).

As noted above, Justice Thomas has repeatedly complained about the lower courts' supposedly shabby treatment of the Second Amendment. He does not appear to be alone in his views. In *Caetano v. Massachusetts*,<sup>21</sup> the Court vacated a Massachusetts Supreme Judicial Court ruling that had treated stun guns as outside the scope of the Second Amendment on the grounds that they were a modern invention that are not readily adaptable to military use.<sup>22</sup> Justice Alito, joined by Justice Thomas, would have gone further to find that stun guns are affirmatively protected, setting forth an approach to the "common use" inquiry of *Heller* that would likely deem semiautomatic rifles presumptively protected as well.<sup>23</sup>

To be clear, no one can predict with great confidence how the Supreme Court would decide all of the Second Amendment issues that have been thus far left to the state and lower federal courts. But it does seem highly unlikely that, the Roberts Court would substantially cut back on the scope of the Second Amendment as currently protected in the lower courts and might well expand it. Consequently, the prodigious efforts of Ruben and Blocher, valuable as they are in many respects, provide little support for the critics of Justice Stevens. The Second Amendment does appear to stand as an obstacle to laws addressing the firearms responsible for the greatest harm, namely handguns.

Does it follow that proponents of stricter gun control should join Justice Stevens in calling for repeal of the Second Amendment? The critics say no. Although the Second Amendment as construed by the courts would bar a comprehensive handgun ban, it would not bar most of the sorts of laws that have sufficient political support to be enacted by Congress.<sup>24</sup> If ordinary politics set stricter limits on gun control than

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21. 136 S. Ct. 1027 (2016) (per curiam).

22. *Id.* at 1027–28.

23. *See id.* at 1032 (Alito, J., joined by Thomas, J., concurring in the judgment) (noting that possession of hundreds of thousands of stun guns by Americans sufficed to render them in common use). Americans possess millions of semiautomatic rifles. *See Kolbe v. Hogan*, 849 F.3d 114, 153 (4th Cir. 2017) (en banc) (Traxler, J., joined by Niemeyer, J., Shedd, J., and Agee, J., dissenting) ("It is beyond any reasonable dispute from the record before us that a statistically significant number of American citizens possess semiautomatic rifles (and magazines holding more than 10 rounds) for lawful purposes. Between 1990 and 2012, more than 8 million AR- and AK- platform semiautomatic rifles alone were manufactured in or imported into the United States.").

24. *See Yglesias, supra* note 5 ("The Supreme Court's current Second Amendment jurisprudence allows all the gun regulation ideas that currently have any meaningful support in Congress.").

does the Second Amendment as construed by the courts, why focus on the Second Amendment rather than ordinary politics?

One answer is that much politics is local. The laws struck down in *Heller*, *McDonald*, and other cases in which the courts have said that states and localities went too far were instances of the Second Amendment limiting what the democratic process would otherwise produce and did in fact produce. State and local laws may have *less* of an impact in limiting gun violence than would national legislation—because firearms legally purchased in one jurisdiction can readily enter the illegal market in neighboring jurisdictions with stricter laws—but that is not a reason to conclude that the state and local laws have *no* impact.

Perhaps a better objection to the call to repeal the Second Amendment focuses on its impracticality. A world in which two thirds of each house of Congress and majorities in three quarters of state legislatures vote to repeal the Second Amendment, this argument goes, would be a world in which the battle had already been won. The realistic prospect of Second Amendment repeal, according to this objection, could only come into view when it would no longer be needed.

There is no doubt something to this objection, but it proves too much. It suggests that normatively laden constitutional amendments are never worth seeking. Yet one of the functions of constitutional amendments is to entrench rights against backsliding,<sup>25</sup> to guard against what Justice Scalia colorfully called “rot.”<sup>26</sup> One might therefore think that pursuit of Second Amendment repeal could go hand in hand with campaigns to change people’s minds about firearms, legislative reform efforts, and judicial appointments of jurists who reject *Heller* and *McDonald*.

Indeed, one might even think that efforts to repeal the Second Amendment can succeed even when they fail. Consider three potential impacts.

First, by putting Second Amendment repeal on the national agenda, Justice Stevens may have widened or shifted the “Overton

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25. See Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1670 (2009) (“[S]ome aspects of some constitutional rights[] may be justified on antibacksliding grounds.”).

26. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 40–41 (Amy Gutmann ed., 1997).

window,” the range of politically feasible possibilities.<sup>27</sup> If respectable figures like a retired Supreme Court justice promote Second Amendment repeal, then measures like a national ban on semi-automatic rifles will come to seem centrist or even center-right.

Second, a substantial shift in the terms of the public debate about firearms and the Second Amendment could change how the Supreme Court perceives the issue. As Professor David Strauss has noted, movements to amend the Constitution sometimes succeed by rendering an amendment unnecessary, because the Court steps in to accomplish by a change in doctrine most or all of what the amendment sought.<sup>28</sup> Justice Stevens could, by calling for Second Amendment repeal, spark a movement that lacks the geographic breadth to succeed under Article V’s state-centered ratification process but nonetheless has sufficient power to influence a future Supreme Court either to cut back on or completely overrule *Heller* and *MacDonald*.

Third and perhaps most importantly, high-profile Supreme Court cases like *Heller* and *McDonald* have a dual identity. Like ordinary cases, they establish rules that govern lower courts and the primary actors (here federal, state, and local lawmakers) to whom they apply. However, extraordinary cases also take on symbolic cultural significance beyond their immediate doctrinal import. *Brown v. Board of Education*<sup>29</sup> had no direct implications for private racial discrimination, but it amplified a moral principle that informed the debate that led to civil rights legislation that did regulate private conduct. *Obergefell v. Hodges*<sup>30</sup> was “only” a case about state denial of the right of same-sex couples to marry. But, for people who support as well as for those who oppose that right, it has broader implications for, respectively, private discrimination based on sexual orientation in a range of contexts and the ability of persons with religious scruples to refuse to engage in speech or conduct that they believe counts as complicity in an immoral institution.

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27. See Joseph G. Lehman, *An Introduction to the Overton Window of Political Possibility*, MACKINAC CTR. FOR PUB. POL. (Apr. 8, 2010), <http://www.mackinac.org/12481> [perma.cc/CCD7-LMTD] (“At any one time, some group of adjacent policies along the freedom spectrum fall into a ‘window of political possibility.’ Policies inside the window are politically acceptable, meaning officeholders believe they can support the policies and survive the next election. Policies outside the window, either higher or lower, are politically unacceptable at the moment. If you shift the position or size of the window, you change what is politically possible.”).

28. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 125–26 (2010) (explaining how the failed Child Labor Amendment and Equal Rights Amendment effectively became part of the Constitution through judicial decisions).

29. 347 U.S. 483 (1954).

30. 135 S. Ct. 2584 (2015).

The Second Amendment is no different. I live and work in a liberal enclave (Ithaca) within a conservative region (central New York State). When I venture a few miles from home I frequently see yard signs that read “Support the Second Amendment: Repeal the SAFE Act.” They refer to a 2013 New York State law that, among other things, expanded the definition of proscribed “assault weapons” to include newly acquired firearms with magazines capable of holding more than seven rounds.<sup>31</sup> A Second Amendment challenge to the SAFE Act failed in the U.S. Court of Appeals for the Second Circuit.<sup>32</sup> Why, then, do my neighbors’ yard signs associate SAFE Act repeal with the Second Amendment?

Some of them may not have heard about the appeals court ruling, but I strongly suspect that even those who did would say that the *real* Second Amendment bars the SAFE Act, regardless of the ruling. Indeed, even if the Supreme Court were to affirm that the sorts of assault weapons bans upheld by the federal appeals courts are constitutional, my neighbors would persist in their view that the Second Amendment forbids such bans. What’s more, they might even draw support from *Heller* itself—not as doctrine that includes permissible limitations, but as a symbol of the core meaning of the Second Amendment.

Professor Reva Siegel has argued persuasively that the vision of the Second Amendment that triumphed in *Heller* was conceived and refined in a late twentieth century social movement on the political right.<sup>33</sup> *Heller* translated that vision into legal doctrine, but it also reinforced the movement, which takes from *Heller* what suits its own purposes. Just as liberals regard modern Supreme Court cases that read *Brown* to endorse a principle of color-blindness as a betrayal of the *real Brown*,<sup>34</sup> so conservatives would likely regard any future Supreme Court rulings that read *Heller* to permit most of the sorts of gun control that the lower courts have thus far permitted as a betrayal of the *real Heller* and certainly as a betrayal of the *real* Second Amendment.

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31. Secure Ammunition and Firearms Enforcement Act of Jan. 15, 2013, ch. 1, 2013 N.Y. Laws 1, amended by Act of Mar. 29, 2013, ch. 57, pt. FF, 2013 N.Y. Laws 290, 389.

32. N.Y. State Rifle and Pistol Ass’n v. Cuomo, 804 F.3d 242, 269 (2d Cir. 2015), cert. denied, 136 S. Ct. 2486 (2016).

33. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 207–36 (2008) (tracing the roots of *Heller*’s Second Amendment rationale to a conservative libertarian movement).

34. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798–99 (2007) (Stevens, J., dissenting) (lamenting the “cruel irony” in the majority’s reliance on *Brown* to invalidate a school district’s voluntary integration program that utilized student race as a factor in school assignment).



The call by Justice Stevens to repeal the Second Amendment must be understood as a move in constitutional politics. No matter how many state, lower federal, or even Supreme Court rulings uphold firearms regulations, the Second Amendment stands as a potent symbol and rallying cry for those who wish to exercise political power to eliminate such regulations. Whether an effort to repeal the Second Amendment advances, impedes, or has no impact on the cause of gun control cannot be known in advance. What we can know is that it correctly understands the courts' rulings about the Second Amendment as operating not only in the realm of doctrine but also—perhaps mostly—in the realm of politics.