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GUEST ESSAY

We Clerked for Justices Scalia and Stevens. America Is Getting Heller Wrong.

May 31, 2022

By Kate Shaw and John Bash

Ms. Shaw is a professor of law at Cardozo Law School. Mr. Bash is an attorney in private practice in Austin, Texas.

In the summer of 2008, the Supreme Court decided *District of Columbia v. Heller*, in which the court held for the first time that the Second Amendment protected an individual right to gun ownership. We were law clerks to Justice Antonin Scalia, who wrote the majority opinion, and Justice John Paul Stevens, who wrote the lead dissent.

Justices Scalia and Stevens clashed over the meaning of the Second Amendment. Justice Scalia's majority opinion held that the amendment protected an individual right to keep a usable handgun at home, which meant the District of Columbia law prohibiting such possession was unconstitutional. Justice Stevens argued that those protections extended only to firearm ownership in conjunction with service in a "well-regulated militia," in the words of the Second Amendment.

We each assisted a boss we revered in drafting his opinion, and we're able to acknowledge that work without breaching any confidences. Justice Scalia had a practice of signing one opinion for a clerk each term, which permitted the clerk to disclose having worked on that case, and for John, that was *Heller*; Justice Stevens noted in his 2019 autobiography, "The Making of a Justice," that Kate was the *Heller* clerk in his chambers.

We continue to hold very different views about both gun regulation and how the Constitution should be interpreted. Kate believes in a robust set of gun safety measures to reduce the unconscionable number of shootings in this country. John is skeptical of laws that would make criminals out of millions of otherwise law-abiding citizens who believe that firearm ownership is essential to protecting their families, and he is not convinced that new measures like bans on widely owned firearms would stop people who are willing to commit murder from obtaining guns.

Kate believes that Justice Stevens's dissent in *Heller* provided a better account of both the text and history of the Second Amendment and that in any event, the method of historical inquiry the majority prescribes should lead to the court upholding most gun safety measures, including the New York law pending before the Supreme Court. John believes that *Heller* correctly construed the original meaning of the Second Amendment and is one of the most important decisions in U.S. history. We disagree about whether *Heller* should be extended to protect citizens who wish to carry firearms outside the home for self-defense and, if so, how states may regulate that activity — issues that the Supreme Court is set to decide in the New York case in the next month or so.

But despite our fundamental disagreements, we are both concerned that *Heller* has been misused in important policy debates about our nation's gun laws. In the 14 years since the *Heller* decision, Congress has not enacted significant new laws regulating firearms, despite progressives' calls for such measures in the wake of mass shootings. Many politicians cite *Heller* as the reason. But they are wrong.

Heller does not totally disable government from passing laws that seek to prevent the kind of atrocities we saw in Uvalde, Texas. And we believe that politicians on both sides of the aisle have (intentionally or not) misconstrued *Heller*. Some progressives, for example, have blamed the Second Amendment, *Heller* or the Supreme Court for mass shootings. And some conservatives have justified contested policy positions merely by pointing to *Heller*, as if the opinion resolved the issues.

Neither is fair. Rather, we think it's clear that every member of the court on which we clerked joined an opinion, either majority or dissent, that agreed that the Constitution leaves elected officials an array of policy options when it comes to gun regulation.

Justice Scalia — the foremost proponent of originalism, who throughout his tenure stressed the limited role of courts in difficult policy debates — could not have been clearer in the closing passage of *Heller* that "the problem of handgun violence in this country" is serious and that the Constitution leaves the government with "a variety of tools for combating that problem, including some measures regulating handguns." *Heller* merely established the constitutional baseline that the government may not disarm citizens in their homes. The opinion expressly recognized "presumptively lawful" regulations such as "laws imposing conditions and qualifications on the commercial sale of arms," as well as bans on carrying weapons in "sensitive places," like schools, and it noted with approval the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller* also recognized the immense public interest in "prohibitions on the possession of firearms by felons and the mentally ill."

Nothing in Heller casts doubt on the permissibility of background check laws or requires the so-called Charleston loophole, which allows individuals to purchase firearms even without completed background checks. Nor does Heller prohibit giving law enforcement officers more effective tools and greater resources to disarm people who have proved themselves to be violent or mentally ill, as long as due process is observed. Heller also gives the government at least some leeway to restrict the kinds of firearms that can be purchased — few would claim a constitutional right to own a grenade launcher, for example — although where that line could be constitutionally drawn is a matter of disagreement, including between us. Indeed, President Donald Trump banned bump stocks in the wake of the mass shooting in Las Vegas.

Most of the obstacles to gun regulations are political and policy based, not legal; it's laws that never get enacted, rather than ones that are struck down, because of an unduly expansive reading of Heller. We are aware of no evidence that any perpetrator of a mass shooting was able to obtain a firearm because of a law struck down under Heller. But Heller looms over most debates about gun regulation, and it often serves as a useful foil for those who would like to deflect responsibility — either for their policy choice to oppose a particular gun regulation proposal or for their failure to convince their fellow legislators and citizens that the proposal should be enacted.

The closest we've come to major new federal gun regulation in recent years came in the post-Sandy Hook effort to create expanded background checks. The most common reason offered by opponents of that legislation? That it would violate the Second Amendment. But that's just not supported by the Supreme Court's interpretation of the amendment in Heller. If opponents of background checks for firearm sales believe that such requirements are unlikely to reduce violence while imposing unwarranted burdens on lawful gun owners, they should make that case openly, not rest on a mistaken view of Heller.

Justices don't control the way their writings are interpreted by later courts and other institutions; certainly law clerks don't. So we're not asserting that our views on Heller are in any way authoritative. But we know the opinions in the case inside and out.

As the nation enters yet another agonizing conversation about gun regulation in the wake of the Uvalde tragedy, all sides should focus on the value judgments and empirical assumptions at the heart of the policy debate, and they should take moral ownership of their positions. The genius of our Constitution is that it leaves many of the hardest questions to the democratic process.

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