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The Road to Heller

A militant National Rifle Association combined with a forest's worth of law review articles built inexorable momentum to press the court to change its views of the Second Amendment.

Key government agencies began to shift first. Republicans took control of the U.S. Senate for the first time in twenty-four years in 1981. Utah senator Orrin Hatch became chair of a key Judiciary Committee panel. He commissioned a study, "The Right to Keep and Bear Arms." In a breathless tone it announced, "What the Subcommittee on the Constitution uncovered was clear—and long lost—proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms." The cryptologist discovering invisible writing on the back of the Declaration of Independence in the Disney movie *National Treasure* could not have said it better.

A constitutional right to gun ownership, though, was still too far a reach, even for the doctrinal conservatives in Ronald Reagan's Justice Department. In part, "the individual rights claim on the Second Amendment was a New Right right," notes Yale's Reva Siegel, "at odds with judicial precedent and in tension with New Right complaints about

judicial activism." It would undo the work not of judges, but democratically elected legislators. In addition, libertarian law professors and insurrectionist movie actors were only part of the conservative coalition. The Justice Department spoke for law enforcement, as well, and the national agencies (such as the FBI and Bureau of Alcohol, Tobacco and Firearms) and local police were united in their desire to crack down on gun violence. Attorney General Meese, fresh from the controversy and impact of his original intent speeches, commissioned a comprehensive strategy to map a drive for jurisprudential change in fifteen areas ranging from the "exclusionary rule" under the Fourth Amendment to public initiatives to strengthen private religious education. *The Constitution in the Year 2000* was an audacious plan to rewrite constitutional doctrine. It did not include a strategy for the Second Amendment.

But the NRA's power to elect presidents (and the judges they appoint) began to shift the organs of government, too. In 2000 ("especially for you, Mr. Gore"), gun activists strongly backed Governor George W. Bush of Texas. During the election, a new dispute over the meaning of the Second Amendment began to move through the courts. Timothy Emerson, a Texas doctor, was under a restraining order after allegedly threatening to kill his wife's lover. Federal law barred him from owning guns. He was indicted for owning a Beretta pistol. He insisted his Second Amendment right had been violated. In a letter about the case, a Justice Department official confirmed its long-held view that "the Second Amendment does not extend an individual right to keep and bear arms." NRA activists circulated it widely in West Virginia, Tennessee, and Arkansas, states previously won by Democrats but lost by the Democratic vice president.

In 2001, newly installed Attorney General John Ashcroft announced a major policy pivot. The NRA's head lobbyist read Ashcroft's letter to the group at its convention in Kansas City: "The text and original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms." The next year, the Justice Department formally reversed its position of seven decades. A federal appeals court ruled against the Texas doctor, but made the noteworthy assertion that the

Constitution confers a right to own a gun. Solicitor General Ted Olson, who had argued the *Bush v. Gore* case that secured the presidency, urged the Supreme Court to reject the doctor's appeal. At the same time, the Justice Department argued that the Constitution "broadly protects the rights of individuals" to own firearms.

The individual rights argument was starting to win in another forum: public opinion. Citizens were sharply divided on gun laws. By early 2008, according to the Gallup poll, 73 percent of Americans believed the Second Amendment "guaranteed the rights of Americans to own guns" outside the militia. In 1959, according to a Gallup poll, 60 percent of Americans favored banning handguns; that dropped to 41 percent by 1975 and stood at 24 percent in 2012. The idea of a Second Amendment right began to become synonymous with opposition to gun control, with conservatism, even with support for the Republican Party. In 1993, for example, *The New York Times* mentioned gun control 388 times, and the Second Amendment only sixteen. By 2002, overall mentions of the issue dropped, but the Second Amendment was mentioned fifty times.

In the end, it was neither the NRA nor the Bush administration that pressed the Supreme Court to reverse course. A small group of libertarian lawyers believed other gun advocates too timid. They targeted a gun law passed by the local government in Washington, D.C., in 1976, perhaps the nation's strictest. It barred individuals from keeping a handgun at home and required trigger locks on other guns. Robert Levy was a technology entrepreneur who graduated law school at age fifty-three, then served as a clerk for two federal judges. A constitutional fellow at the idiosyncratic Cato Institute, Levy found appealing plaintiffs and bankrolled the litigation. By the time the case reached the high court, Levy and two colleagues represented Dick Heller, a security guard at the Thurgood Marshall Federal Judiciary Building who wanted to bring his work revolver home to his high-crime neighborhood. The NRA tried to sideswipe the effort, filing what Heller's lawyers called "sham litigation" to cloud the case. Worried about an adverse court ruling, it even tried to persuade Congress to nullify the District's law, which would have rendered the case moot. The D.C. Circuit Court of Appeals—the court

where Justices Roberts, Scalia, and Ginsburg once served—struck down the gun law, 2 to 1.

All knew that the Supreme Court was poised to speak in a new voice on the Second Amendment. Sixty-six friend of the court briefs from scholars, lawmakers, and interest groups tumbled into the clerk's office. Linguists wrote to explain the meaning of the preamble. Early American historians explained the history of the amendment's ratification. The NAACP Legal Defense Fund, the American Bar Association, organizations against domestic violence, Jews for the Preservation of Firearms Ownership, and many others weighed in. Many expected the George W. Bush administration to speak for those who opposed the D.C. law. Instead, the brief filed by Solicitor General Paul Clement equivocated. Second Amendment rhetoric aside, the Department of Justice argued that the Appeals Court ruling would endanger bans on weapons such as machine guns. It endorsed a "reasonable" Second Amendment right, and said the Court of Appeals had not applied that analysis in striking down the ban on handguns. Conservatives pounced. Vice President Dick Cheney filed his own far more adamant brief, with a majority of members of the House and Senate, backing Heller.

At the argument before the justices, the surprise was the degree to which originalism had triumphed. There were few questions about current gun laws, or the toll of gun violence, or legislative history, or precedent: all the things prior courts relied on to make major decisions. Queries from the justices focused heavily on colonial, early American, even seventeenth-century British history. The smell of snuff could have pervaded the courtroom. Much history was fuzzy, at best. Justice Anthony Kennedy asked of the amendment, "It had nothing to do with the concerns of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?" The District's lawyer, former acting Solicitor General Walter Dellinger, explained that the debate over the amendment—all of which took place on the Eastern seaboard, far from grizzly danger—focused on militias and fighting government tyranny. Justice Stephen Breyer noted that guns kill or wound 80,000 to 100,000 Americans per

year. Would it be unreasonable for a city with a high crime rate to ban handguns? "You want to say yes," Scalia instructed Heller's lawyer. He agreed.

HELLER'S PUBLIC MEANING

On the last day of the term in June 2008—in the final opinion announced before the presidential election—the Supreme Court issued its ruling.

Five to four, the justices voted to strike down the capital's gun law. Chief Justice Roberts, Anthony Kennedy, Clarence Thomas, and Samuel Alito joined Scalia's opinion. Justices John Paul Stevens, Ruth Bader Ginsburg, David Souter, and Stephen Breyer dissented. For the first time, the Court ruled that the Second Amendment recognizes an individual right to own a gun unrelated to militia service. Scalia wrote the opinion, a sure sign the Court would move aggressively to the right. Roberts had done something Rehnquist never would: he assigned Scalia the job of writing the big one. It remains Scalia's most important majority opinion.

At last, Scalia could apply his honed judicial model to a consequential case. How did he do so? A close read is instructive.

Scalia does not seek to explain the Framers' original intent: this is emphatically an opinion focused on a closely parsed text, regardless of what it meant to those who wrote and ratified it. The Second Amendment, he begins, "is naturally divided into two parts: its prefatory clause and its operative clause." But he has a surprising way to deal with that prefatory clause, the homage to the "well regulated militia being necessary to the security of a free state," so important to the Framers. *He skips right over it.* Scalia simply lops off the first half of the amendment, just as in the bowdlerized quote in the NRA headquarters lobby.

What counts is the second half. This is the right way to read the amendment, Scalia's opinion explains, because that is the way people in the past used to read constitutional provisions. In support he turns to a

treatise on statutes published in 1874, nearly a century later. Other than to show off his clerks' research skills, why then? One clue is that statutes and constitutional provisions were seen differently in the late 1700s, when the Second Amendment was written. There, the proper construction was loose. Moreover, lawyers in the Founding Era knew they were seeking to win approval from ordinary citizens who played a much greater role in ratification.

Then Scalia takes the reader on an almost claustrophobic reading of the words of the amendment's second part. Who are "the people"? The majority concludes quickly that meant all members of the political community. It simply announces peremptorily: "We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."

Then, "keep and bear arms." As we have seen, the overwhelming public usage of "bear arms" at the time of the Constitution referred to military service. Scalia's opinion could have grappled with this in any number of ways. Instead, it mulls over each word separately (and out of sequence): "arms" and "bear" and "keep" are parsed and defined one at a time. The analysis verges on tendentious: "At the time of the founding, as now, to 'bear' meant to 'carry.'" As source material, it cites three separate dictionaries from the 1700s. It all has the feel of an ambitious Scrabble player trying too hard to prove that triple score word really does exist. At times this word search stretches credibility.

> *The phrase "bear Arms" also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: to serve as a soldier, do military service, fight or to wage war. . . . But it* unequivocally *bore that idiomatic meaning only when followed by the preposition "against," which was in turn followed by the target of the hostilities.*

That is plainly wrong. When the Framers debated giving conscientious objector status to those "religiously scrupulous of bearing arms," Madison and Gerry were not worried about those too physically weak to lift a musket. "Giving 'bear Arms' its idiomatic meaning would cause the

protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed." Well, yes: that is exactly the specter that worried some Anti-Federalists: that people would be barred from serving in state militias.

Scalia fumes and fusses about the words. "Bear" must mean "carry," since "keep" means "keep." Otherwise, "It would be rather like saying 'He filled and kicked the bucket' to mean 'He filled the bucket and died.' Grotesque." Harrumph, he might have added. "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation."

The opinion then strolls, Wikipedia-like, through the historical background before the Founding Era: it describes England's 1688 Glorious Revolution and the limited right to arms it granted some Protestants. (The colonists changed that right in drafting the Second Amendment, anyway.) It made the powerful point that for colonists, the right to have guns was "fundamental," a "natural right." The amendment did not create a new right, but acknowledged an existing one.

> *There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for* any *sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for* any purpose.

The opinion then spends precisely two pages (out of sixty-four) on "a well regulated militia." It agrees that the Constitution defines those entities with precision, as the military forces controlled by state governments—but breezily asserts that the amendment referred to something else, meaning "all able-bodied men." The Constitution refers to "the" militia, but the amendment refers to "a" militia, which is apparently something else entirely. Scalia also declares that the word "state" connotes government generally, rather than the way it is meant every single other

place it is used in the Constitution: to refer to states, such as Rhode Island or Georgia.

Glancingly, the opinion does grapple with the nub of the challenge: the fact that the Second Amendment was driven largely by the fear that many Founders had that state militias would be disarmed by the central government. The amendment thus confirmed the right to "keep and bear arms." But the opinion never really addresses the connection between that fear and the decision to respond with an amendment. It strolls through contemporary state constitutions, only one of which explicitly protected arms for self-defense at the time of the amendment's drafting—the very menu from which Madison and colleagues chose their markedly more limited language.

At its best, Scalia's opinion makes strong points: Madison was bent on reassuring Federalists that nothing would change the structure of the Constitution. Given that, how could this articulated right actually reassure those who worried about the state militias? Madison originally intended the militia provisions to be part of the Bill of Rights, rather than inserted into Article I itself. At its worst, it engages in sleight-of-hand. The opinion selectively cites later commentators from the 1800s who agree with an individual rights interpretation. It snipes at Stevens's dissent, which quotes the jurist Joseph Story in an 1833 treatise as focusing his attention on the militia. "That is wrong." Actually, it isn't. The majority opinion simply looks at an earlier section of Story's lecture than Stevens had.

It is the fog of history that rolls most notably across the pages. There are plenty of things we do not know, and many more that have lost their validity over time. Earlier Scalia wrote that to truly engage in originalism requires a gargantuan level of historical inquiry. He essentially chose to ignore the actual, stated, publicly known purpose of the amendment—focusing instead on what the words must have meant, if the right dictionaries are consulted.

Scalia professes to practice a refined form of originalism: not a futile search for the subjective "intent" of the Founders, but "original public meaning." This was the most visible opportunity he would have to apply this approach. In the end it appears to be little more than "words

with friends." Even accepting, somehow, that what was meant then—in 1791—should control our actions today, "public meaning" can mean little without context. The context was the fight over the militia and the army. And that context is, basically, ignored. Such a genuine historic inquiry would not be without ambiguities. We would be uncomfortable with the idea that states could fight wars against the U.S. Army. We would recognize that the Founders expected people to have *military* weapons in their homes. (Muskets, not rocket-propelled grenade launchers, but still.) Above all, the principal fact about the world of the militias and the Second Amendment is that it is gone, both in terms of people's concerns and even the institutions they sought to address them.

The Court's ruling overturned two centuries of precedent. Usually justices acknowledge that fact, as when *Brown v. Board of Education* overturned *Plessy v. Ferguson*. Instead of being intellectually honest about that, Scalia's opinion insists it did no such thing. Most relevant is the *Miller* case from 1939, which found that the Second Amendment did not protect guns not used for "military purposes." The majority does not say it overrules *Miller*. Rather, it explains that *Miller* simply held that the sawed-off shotgun was not covered by the right: the "type of weapon at issue was not eligible for Second Amendment protection." With a shrug the justices deem it "unsurprising that such a significant matter has been for so long judicially unresolved."

But the Bill of Rights has mostly been applied to the states for a half century now. And federal gun laws began in the 1930s. Indeed, Scalia himself sat on the Court when it considered some of them. The Court's previous reluctance to find an individual right to a handgun was not an oversight, or the result of tardiness. It reflected the judicial consensus.

And then—after engaging in hyper-literal readings of words, and after pages of highly selective historical readings from two hundred years ago that ignore the history of the past hundred years—suddenly the opinion veers away from originalism altogether.

> *Like most rights, the right secured by the Second Amendment is not unlimited. From [the English legal writer] Blackstone through the 19th-*

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century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

This eminently sensible list barges into the text, seemingly from nowhere. Is it the price to secure a fifth vote (perhaps from Justice Anthony Kennedy, the court's eternal swing voter)? Are these included with an eye toward public opinion, to show citizens the courts had not leapt fully in bed with the NRA? ("I am an originalist. I am not a nut.") Regardless, no explanation is given why these limitations are acceptable. And why, if these are permitted, the District of Columbia's law is not.

The opinion offers another clue for future courts: weapons that are "dangerous and unusual" can be banned, but those that are "in common use" cannot. Market share evidently determines constitutionality. This fully severs the first half of the amendment and floats it off to sea. The militia is irrelevant, Scalia writes. For "it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." Or, to paraphrase the justice's frequent reply when asked about *Bush v. Gore*, "Well regulated militias? Get over it."

Having set out a broad, transformative statement of the right to bear arms, and then limiting it with a seemingly random set of exceptions, the opinion finally gets around to striking down the Washington, D.C., law. The statute, it notes correctly, was an outlier, much stricter than that of other jurisdictions. Handguns are distinct. They are "the quintessential self-defense weapon." The ban only applies to guns kept in the home, where most suicides and domestic assaults take place. Nonetheless,

"whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."

Hearth and home: we've come far from "a well regulated militia" and the "security of a free state." *The New Yorker*'s Jeffrey Toobin summarized it well: "Scalia translated a right to military weapons in the eighteenth century to a right to handguns in the 21st."

The opinion drew two lengthy dissents. Stevens wrote an impassioned assessment of the purpose, historical roots, and intended meaning of the amendment. Stevens found himself arguing emphatically that the militias were—and still are—the protected party. This is what has been called the "states' rights" version of the Second Amendment. "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia," he declared flatly.

> *It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several states. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.*

It is in Stevens's dissent that we hear at length from Madison himself, from the debates over the Second Amendment and its meaning by the men who framed and ratified it. The dissent powerfully sets out the historic record. The elderly jurist, seeing the Court begin to lurch from the caution it had displayed during most of his time on the bench, seems incredulous at the majority's blasé mien as it abandons two centuries of precedent. "Even if the textual and historical arguments on both sides of the issue were evenly balanced," he writes, "respect for the well-settled views of all our predecessors on this Court, and for the rule of law itself,

would prevent most jurists from endorsing such a dramatic upheaval in the law." Stevens made a consequential strategic choice. He made a *better* originalist argument than Scalia. Plainly he believed he had the facts on his side: both original public meaning and original intent. But his focus on the doings of Framers from 1791 missed a chance to make the point that there is something amiss about allowing ourselves to be guided entirely by their choices, ignoring the intervening two-hundred-plus years of history, law, and social development.

Breyer issued his own dissent. He chose a different tack. In effect, Breyer stipulated that there was an individual right. What then? What kind of right? And how do we know when it has been violated? Historical evidence about the scope of the right is "the *beginning*, rather than the *end*, of any constitutional inquiry." To decide on a particular regulation of guns "requires us to focus on practicalities, the statute's rationale, the problems that called it into being, its relations to those objectives—in a word, the details." Breyer proposed an "interest balancing inquiry," in which judges had no choice but to weigh the costs and benefits of a particular law. And gun regulation was exactly the kind of area where democratically elected governmental bodies, such state legislatures or Congress, are "likely to have greater expertise and greater institutional factfinding capacity." Where lawmakers could draw different results from different facts, courts should defer and let them do so. Citing UCLA's Adam Winkler, he notes that hundreds of state Supreme Court decisions on firearms law took this approach. Breyer's dissent rings with the voices of Holmes and Brandeis. It also reflects the approach he set out in his own book, *Active Liberty*. In his view, the overarching theme of the Constitution is democracy, and judges had better be very careful when overturning the work of popularly elected branches. The majority brushed that idea aside: Breyer was proposing little more than a "judicial balancing test." But the people had already balanced the interests, albeit people wearing breeches in 1791. Breyer's dissent received short shrift on decision day. *The New York Times* gave it one sentence. In the real world, in subsequent years, it has had far greater impact as judges and legislatures tried to sort through *Heller*'s sepia-toned new world.

Outside the court, camera crews swarmed, protesters cheered and jeered, and the plaintiffs stood for interviews. Dick Heller answered questions, grinning in front of a handheld sign. It read, once again misquoting Patrick Henry, "THE GREAT OBJECT, EVERY MAN BE ARMED."

ORIGINALISM AS LIVING CONSTITUTIONALISM

Away from the Supreme Court steps, reactions fell along surprising lines. Politicians breathed relief. John McCain, the likely Republican nominee, applauded it; so did Barack Obama. Scalia himself later pointed proudly to *Heller* as the greatest "vindication of originalism. . . . When I first came on this Court, I was the only originalist. Counsel would not even allude to original meaning," Scalia told legal journalist Marcia Coyle. "They would cite the last Supreme Court case." Originalism once had been advanced as a way to avoid the "temptations of politics" on the Court. Now it was the basis for a 5 to 4 ruling that Velcroed snugly to the jurists' political predilections—in service of a ruling in which judges negated the decision of a local government.

The most thoughtful progressive scholars recognized that the Court was responding to a broad shift in attitudes about gun rights. For one thing, elections matter. The presidents who appointed the five justices in the majority all were themselves NRA members. In *Heller*, Yale's Reva Siegel argued in a brilliant article, "originalism" is the best recent example of "living constitutionalism." At moments, Scalia was quite frank about the source of the constitutional understanding. *Heller* let slip that even if "hundreds of judges" had relied on the Supreme Court's *Miller* case, that "cannot nullify the reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms." Another liberal academic, Cass Sunstein, noted that it can be appropriate for a court to recognize a right because it reflects a consensus. Consider this thought experiment: what would have happened if the Supreme Court ruled the other way—had it proclaimed there was no personal right to carry

a gun? Certainly it would have prompted an uproar. It might well have spurred a constitutional amendment.

While citizens are split on gun control, majorities shift and attitudes change, sometimes depending on how polling questions are asked. Siegel correctly identified *Heller* as the product of something more purposeful: the long campaign by the gun lobby to create a public climate that would make a Supreme Court ruling inevitable. Siegel and other observers are tracing and quantifying what Finley Peter Dunne's "Mr. Dooley" observed a century ago when he noted, "No matter whether th' Constitution follows th' flag or not, the Supreme Coort follows th' iliction returns." This new school of liberal scholars is spelling out ways the Court responds to public opinion. Far from a principled reliance on the intent of the Framers in 1791, they suggest, the opinion's originalism is little more than "living constitutionalism" with a Southern accent. There is an unnerving risk: that judges will feel emboldened by a vague sense of public opinion, or manipulated by pressure groups. When elected bodies such as the Washington, D.C., City Council enact laws, through normal processes rife with messy compromise, they ought to be given greater weight. Even though most members of Congress signed a brief urging the Court to strike down the District's handgun law, those same lawmakers never got around to passing a law that would do exactly that, even though the federal government has ultimate power over the capital's local laws.

Liberals, in short, mostly responded to *Heller* with a practiced shrug: is it really a surprise that the Court would rule as it did, given its political alignment? For progressives, the opinion with all its pretensions was one more piece of evidence for a chastened, realistic assessment of the Court and its role in American politics.

Meanwhile, some prominent conservatives have denounced *Heller*. For them, the case marked a return of loosey-goosey constitutionalism of the kind they, and Scalia, had spent a career eviscerating.

J. Harvie Wilkinson III, a federal appeals court judge from Virginia, scorched Scalia's opinion. Wilkinson was a former Reagan official,

whom President George W. Bush had interviewed as a possible chief justice nominee. (Bush grilled him on his fitness regimen.) His impeccable standing among conservatives made his words sting. *Heller*, he said, was as great an act of judicial overreaching as *Roe v. Wade*.

> *After decades of criticizing activist judges for this or that defalcation, conservatives have now committed many of the same sins. In* Heller, *the majority read an ambiguous constitutional provision as creating a substantive right that the Court had never acknowledged in more than two hundred years since the amendment's enactment. The majority then used that same right to strike down a law passed by elected officials, acting, rightly or wrongly, to preserve the safety of the citizenry.*

Wilkinson was particularly aghast at the paragraph listing permissible gun restrictions. "The Constitution's text," he wrote, "has as little to say about restrictions on firearm ownership by felons as it does about the trimesters of pregnancy" (the medical methodology used by Justice Harry Blackmun in *Roe*).

Richard Posner was even more perturbed. Posner is one of America's leading public intellectuals. (He made the list, and put himself on it, but it's true.) A rare polymath, he is a judge on the U.S. Court of Appeals for the Seventh Circuit, continues to teach at the University of Chicago, publishes a blog with a Nobel laureate economist, and churns out books on topics from the financial crash to law and literature. Posner pioneered the use of economics in law. He was anything but economical in his scorn for *Heller*. "It is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology," he wrote in *The New Republic*. Perhaps, he speculated, "turnabout is fair play" after liberal decisions. Posner mourned the fact that local governments would be blocked from enacting local policies because of the political sentiments of a majority of Americans. Even the opinion's purported originalism left him cold. "The range of historical references in the majority

opinion is breathtaking, but it is not evidence of disinterested historical inquiry. It is evidence of the ability of well-staffed courts to produce snow jobs."

Then things got really nasty. With a coauthor, Scalia published *Reading Law*, a 567-page treatise on how to interpret legal texts—his magnum opus arguing that the meaning of laws, and constitutions, does not change over time. Posner's review: "incoherence." "*Heller* probably is the best known and the most heavily criticized of Justice Scalia's opinions. *Reading Law* is Scalia's response to the criticism," Posner wrote. "It is unconvincing." He noted that whatever he might claim, Scalia "is doing legislative history" when he scours for "original meanings of eighteenth-century provisions." Legislative history: them's fightin' words. Scalia stammered to an interviewer that Posner's assertion is "simply, to put it bluntly, a lie." It's a good thing the two did not have guns.

Another telling critique, at least implicit, came from another conservative judge, Frank Easterbrook, also on the Seventh Circuit. His seeming slap came in an unexpected place: in the foreword to Scalia's book. "Words don't have intrinsic meanings; the significance of an expression depends on how the interpretive community alive at the time of the text's adoption understood those words. The older the text, the more distant that interpretive community is from our own. At some point the difference becomes so great that the meaning is no longer recoverable reliably," Easterbrook wrote. When that happens, the courts should "declare that meaning has been lost, so that the living political community must choose." He dryly cites *Heller* as a controversial example. Reviewing the volume, Posner noted it was hard to escape that the "living political community" in *Heller*, Richard Posner noted, "consisted of the elected officials, and the electorate, of the District of Columbia."

In effect, these three leading conservative jurists were calling out Scalia for having become what he, and they, had decried for years: a judicial activist who conjured spurious legal theories to justify Court interventions into the political process that just happened to advance their policy views and political aims.

RIGHT TURN

Heller was the first major case in which the Roberts Court upended years of precedent to move in a conservative direction. It was not the last.

Two years later, in 2010, the same five justices issued *Citizens United v. FEC*. There the Court overturned the long-standing bar on corporations and unions spending unlimited sums to defeat or elect candidates. No nod to minimalism, here. It erased decades of Supreme Court precedent. It also nullified federal law dating back to 1907, when President Theodore Roosevelt fought for a law banning corporate election spending. (He had been caught in a campaign finance scandal, and he wanted to defend his honor. Without reform, he declared, "Sooner or later, there will be a riotous, wicked, murderous day of atonement.") Neither party in *Citizens United* had asked for this result. The opinion rang with indignant tones. "The censorship we now confront is vast in its reach," wrote Justice Anthony Kennedy. "The government has muffled the voices that best represent the most significant segments of the economy." Justice Stevens dissented again. "While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."

Two years after, the Court came within inches of striking down the Affordable Care Act, the health care law popularly (and unpopularly) known as Obamacare. In the end, Chief Justice Roberts joined the majority to hold the law constitutional under the "taxing power." But the *Heller* majority justices found the statute's requirement that individuals buy health insurance violated the Commerce Clause, which gives Congress power to regulate the economy. Originalists insisted the Supreme Court got it wrong in 1937 when it dropped its resistance to government regulation of business. Some called it the "Lost Constitution." Had the Court struck down Obamacare on the grounds that it exceeded Congress's power under the Commerce Clause, it would have set in motion forces that would have toppled statutes going back to the New Deal. Dozens of laws and hundreds of prior cases could have been at risk.

Then in June 2013, in *Shelby County v. Holder*, the Court effectively overturned the key provision of the Voting Rights Act, perhaps the nation's most effective civil rights law. Again, the five *Heller* justices ruled. Again, they undercut carefully crafted laws. The original 1965 statute came after beatings of civil rights marchers at the Edmund Pettus Bridge in Selma, Alabama, galvanized President Lyndon Johnson and Congress to act. It was reauthorized three times. In 2005, the Senate voted 98 to 0 to reauthorize it, and the Supreme Court upheld it, as it had repeatedly. At oral argument, Scalia declared that the Voting Rights Act perpetuated "racial entitlement." "Even the name of it is wonderful: the Voting Rights Act," he added. "Who is going to vote against that in the future?" In its ruling the Court effectively ended Section 5, which required the Justice Department or federal courts to approve in advance changes in voting laws in jurisdictions with a history of discrimination. The opinion drew on some imaginary originalism: it explained the law violated a constitutional rule of "equal sovereignty"—not among people, but among states. This phrase, with a murky provenance, only has ever previously applied to the terms on which states entered the Union. It poses severe challenges for other laws that are premised on the aftermath of slavery, sounding an echo of Southern complaints about Reconstruction. Faulkner would have understood: "The past is never dead. It's not even past."

Not all these rulings relied on originalism. Rather, beyond their ideological bent, they seem suffused with contempt for Congress, or more broadly for elected governments.

To be sure, Roberts displayed a canny sense when to press, and when to retreat. In spring 2009, the same five justices had made clear their itch to overturn the Voting Rights Act, but pulled back. Jeffrey Toobin reports that Roberts first sought a narrower ruling in *Citizens United*, then lost out to the emotional First Amendment soliloquy ultimately in Kennedy's opinion. The Court sprang multiple leaks to reveal that Roberts first voted to kill the Affordable Care Act, then changed his vote. If so, his switch in time saved the nine from being a central campaign issue for years to come. Roberts cannot dictate results; his role is more

akin to a legislative leader heading a rowdy and ideological caucus. But he seems always to have his eye on the gauge of public respect for the Court. Given the frequent dysfunction consuming the rest of the capital, it is a pleasure to watch an institution run well. But it is running hard to the right.

Lines are not neatly drawn. The same week the Court gutted the Voting Rights Act, it also struck down the Defense of Marriage Act, also approved by an overwhelming majority of Congress in 1996. DOMA refused federal recognition for legal same sex marriages. There were crucial differences. The 2013 case was in fact the first time the Court weighed DOMA's constitutionality. More, it came in a pair of opinions where the Court actually sidestepped the need to overturn the marriage laws of four out of five states to rule that equal protection required states to allow same sex marriages. The strongest justification for overturning DOMA—powerful if largely unspoken—was that the country had evolved, progressed. Our understanding of equality has changed over time. Seen in that light, the DOMA ruling served as the most recent application of long-standing constitutional principles. Bitterly dissenting, Scalia denounced the marriage equality ruling. "[We] have no power under the Constitution to invalidate this democratically adopted legislation," he complained, an error that springs from a "diseased root: an exalted conception of the role of this institution in America." Perhaps he was being droll.

Scholars debate the intensity of the Roberts Court's activism. Ruth Bader Ginsburg, in a rare public rebuke, called it "one of the most activist courts in history." Some argue these justices are no more prone to strike down federal laws than their predecessors. That measures quantity, not quality. Not in decades has the Court overturned laws of such reach. And never over a century have the justices relied so frequently on assertions about original intent and meaning. *Heller* stood most explicitly. Prior court precedent was skimpy. That hardly explains the health care decision: it, too, focused intently on what the Framers meant by "commerce," despite myriad relevant precedents. *Citizens United*, by contrast, could not rely on history—at the time of the founding, for profit cor-

porations of the kind we have today did not exist. And *Shelby County*'s rationale appears to be "that was then, this is now." What seemed to matter most, in each of these cases, was outcomes: the political coalition of the party that appointed the justices, with gun owners, business, and white Southern voters at its heart, proved more powerful than any interpretive methodology. Perhaps this ought not to surprise.

This much is evident: after public backlash (and electoral shifts), for three decades left and right stalemated on the Court. No more. Today's justices seem constrained only by their sense of what the political market will bear. Originalism and textualism have proven no more principled as methods of interpretation than any other.

ON THE ROAD

Students, neatly pressed; faculty; alumni; journalists: over seven hundred of them filled Princeton's Neo-Gothic Richardson Auditorium the afternoon of December 11, 2012. Antonin Scalia looked out over the crowd. The Supreme Court justice, in his twenty-sixth year on the Court, had settled into his shtick: opinionated, jovial, garrulous, a hint of arrogance. It was a friendly audience, thrilled to be in the presence of a renowned jurist and not entirely unhappy with the contents of his talk, either. The James Madison Program sponsored the lecture. Its other public events the same academic year included "Left Turn: How Liberal Media Bias Distorts the American Mind" and a panel on "Benghazi: What Do We Know? What Don't We Know? What Do We Need to Know?"

Some applauded when a freshman asked the justice why he had compared homosexuality to bestiality and murder. Others applauded when Scalia pugnaciously replied, "I don't apologize for the things I raised. I'm not comparing homosexuality to murder. I'm comparing the principle that a society may not adopt moral sanctions, moral views, against certain conduct. I'm comparing that with respect to murder and that with respect to homosexuality."

Scalia was in his element. His greatest passion came when he propounded his jurisprudential vision. "I have classes of little kids who come to the court, and they recite very proudly what they've been taught, 'The Constitution is a living document.' It isn't a living document! It's dead," Scalia declared. "Dead, dead, dead!" The crowd laughed.

The Princeton speech came four and a half years after the justice proudly announced *Heller* from the bench. It was also three days before a deranged young man walked into Sandy Hook Elementary School in Newtown, Connecticut, and murdered twenty children and six adults. The nation would begin to discuss gun control again—this time in the context of a newly articulated constitutional doctrine that might limit next steps.