HELLER AND SECOND AMENDMENT PRECEDENT

Nelson Lund,
George Mason University School of Law

***Lewis & Clark Law Review*, Forthcoming**

George Mason University Law and Economics Research Paper Series

08-48

This paper can be downloaded without charge from the Social Science Research Network at http://ssrn.com/abstract_id=1235537

Heller and Second Amendment Precedent

Nelson Lund[†]

I. Introduction

After more than two centuries of judicial labor and more than 500 thick volumes of judicial opinions, the Supreme Court's practice of constitutional law is now mostly a matter of interpreting its own precedents. Given its discretionary docket, of course, the Court often finds that those precedents do not answer the precise question at issue. But seldom does the Court review an important constitutional case in which there are almost no precedents that even need be considered. And it is even more rare for the Court to have such a case involving a highly controversial provision of the Bill of Rights.

District of Columbia v. Heller is just such a case.[1] This landmark decision concluded, on the basis of a detailed analysis of the original meaning of the Second Amendment, that American citizens have a constitutional right to keep and bear arms for personal self defense, and held that this entails at least the right to keep a handgun in the home and to render it operable for the purpose of

---

[†] Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law. For helpful comments, I am grateful to Stephen G. Gilles and John O. McGinnis.

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

immediate self defense. The Court rejected a theory—unknown to the founding generation but accepted by most of the lower federal courts during the twentieth century—under which the Second Amendment protects only a right of state governments to maintain military organizations, or perhaps a right of individuals to have weapons only while serving in such organizations.

In this case, the Justices were confronted with only one significant Supreme Court precedent, an eight page opinion in *United States v. Miller*.[2] Surprisingly, in light of the nature of modern constitutional law, it is not clear that any of the nine Justices, or their hordes of highly-credentialed law clerks, actually read the very short *Miller* opinion. How else to explain *Heller*'s embarrassingly and pointlessly fictional statement of the procedural facts of the *Miller* case? More importantly, the Court does quote from *Miller*, and the Court does interpret the *Miller* opinion, but in doing so it distorts the holding beyond all recognition.

This brief essay analyzes *Heller*'s treatment of *Miller*. The interpretations of the Second Amendment in the two cases are irreconcilable. There was no legal need for the *Heller* Court to treat *Miller* as a binding precedent, and no legal excuse for pretending that *Miller*'s holding was consistent with the interpretation of the Constitution that *Heller* rightly adopted. The treatment of *Miller* appears to be part of a larger political strategy in which the Court displayed a calculated faint-heartedness toward the original meaning of the Second Amendment. We can only hope that future Courts will treat *Heller* in a more lawyerly manner than *Heller* treated *Miller*.

---

[2] 307 U.S. 174 (1939).

II. The *Miller* Decision

Both Justice Scalia's majority opinion and Justice Stevens' dissent misstate the procedural posture of the *Miller* case. This is not a matter of interpretation, but of indisputable fact. Perhaps it's an harmless error that had no effect on any of *Heller*'s substantive conclusions.[3] But the error creates the impression (and may reflect the Justices' impression) that *Miller* had greater precedential weight than was warranted by the actual decision. And it is symptomatic of a more serious disregard for what *Miller* actually said about the Constitution. In this way at least, misstating the facts about *Miller*'s procedural posture is related to the *Heller* majority's bizarre, unsuccessful, and legally unnecessary effort to reconcile *Miller*'s interpretation of the Second Amendment with the one adopted in *Heller*.

The National Firearms Act of 1934 imposed a substantial transfer tax on short-barreled shotguns (and certain other devices, including machineguns), along with onerous registration and record-keeping requirements. *Miller* arose from a criminal indictment charging two men with transporting an unregistered short-barreled

---

[3] The Court made a more notorious factual mistake the same Term in Kennedy v. Louisiana, 128 S. Ct. 2641, 2653 (2008), *petition for rehearing pending*, http://www.scotusblog.com/wp/wp-content/uploads/2008/07/rehear-kennedy-v-la-7-21-08.pdf. In that case, responsibility for the error lay primarily with the parties and the Department of Justice, all of which failed to call the Court's attention to a relevant federal statute. In *Heller*, by way of contrast, the mistake in the Court's opinion does not appear in the briefs filed by the parties, or in the amicus brief filed by the Department of Justice, or in the opinion of the court below. And even if it had, there is a significant difference between overlooking an uncited provision in the U.S. Code, and misstating a significant fact set forth in a short Supreme Court opinion that was unquestionably the most significant judicial precedent bearing on the case at hand.

shotgun across state lines in violation of the statute. The federal trial court dismissed the indictment on the ground that the statute violated the Second Amendment, but gave absolutely no explanation for this conclusion.[4]

Miller described the procedural posture of the case as follows:

> An indictment in the District Court Western District Arkansas, charged that Jack Miller and Frank Layton [violated the National Firearms Act] . . . .
>
> A duly interposed demurrer alleged: The National Firearms Act is not a revenue measure but an attempt to usurp police power reserved to the States, and is therefore unconstitutional. Also, it offends the inhibition of the Second Amendment to the Constitution—'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'
>
> The District Court held that section eleven of the Act violates the Second Amendment. It accordingly sustained the demurrer and quashed the indictment.

---

[4] The District Court's entire legal analysis consisted of this sentence: "The court is of the opinion that this section [i.e. section 11, which prohibited the interstate transportation of covered weapons unaccompanied by the required evidence of registration] is invalid in that it violates the Second Amendment to the Constitution of the United States, U.S.C.A., providing, 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'" United States v. Miller, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).

The cause is here by direct appeal.[5]

Besides the fact that the Supreme Court was reviewing a bare and unexplained judgment sustaining a demurrer, the criminal defendants failed to appear in the Supreme Court, as the Court was careful to report.[6] Thus, neither the court below nor the defendants offered the Supreme Court any reasons in support of the challenged judgment, and the Justices heard arguments only from the government. After such a stunted adversarial process, and with no precedents of its own to guide its interpretation of the Second Amendment,[7] one would expect a narrow and even tentative decision from the Court. And that is just what the Court delivered.

After quickly disposing of the police power issue (which the trial court had not addressed), the *Miller* Court stated its conclusion about the Second Amendment as follows:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a

---

[5] 307 U.S. at 175-77.

[6] 307 U.S. at 175. The record does not disclose the reason for the defendants' failure to appear. Although the Supreme Court was presumably unaware of the reason, it seems that they were released from custody after the indictment was quashed, and then disappeared, after which their court-appointed lawyer deliberately decided not to defend the judgment. *See* Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J. L. & Liberty 48, —, — & n.124 (2008).

[7] In a footnote, the *Miller* Court cited Presser v. Illinois, 116 U.S. 252 (1886), and Robertson v. Baldwin, 165 U.S. 275 (1897), along with numerous other judicial opinions and commentators, but only for discussions of the nature of the militia. *See* 307 U.S. at 182 n.3.

> barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State of Tennessee*, 2 Humphreys (Tenn.) 154, 158.[8]

This passage states the holding in the case. Note that the Court does not hold that short-barreled shotguns are outside the coverage of the Second Amendment. The Court says only that it has seen no evidence that these weapons have certain militia-related characteristics—which is no surprise given the procedural posture of the case—and that the Court could not take judicial notice of certain facts about the military utility of these weapons. After this statement, one would expect the case to be remanded to give the defendants an opportunity to offer the kind of evidence called for in the Court's holding. Sure enough, *Miller* concludes as follows:

> We are unable to accept the conclusion of the court below and the challenged judgment must be reversed. The cause will be remanded for further proceedings.
>
> Reversed and remanded.[9]

The legal test that the trial court would have been required to employ

---

[8] 307 U.S. at 178.

[9] *Id*. at 183.

on remand[10] is that there is a right to keep and bear a particular weapon only if, at a minimum, the weapon "has some reasonable relationship to the preservation or efficiency of a well regulated militia," which could be shown, for example, by evidence that the weapon is "part of the ordinary military equipment or that its use could contribute to the common defense."[11] Given the procedural posture of the case, the Supreme Court's language could not possibly be read to mean that short-barreled shotguns are outside the protection of the Second Amendment, or that the provisions of the National Firearms Act regulating these weapons are constitutionally valid.

The implications of *Miller* would be very different if the Court had upheld a conviction for violating the statute, rather than reversing the trial court's unexplained decision to sustain a demurrer. If a conviction had been upheld, it would have meant that there is no Second Amendment obstacle to the statutory requirements that the defendants were charged with violating. Depending on how the Court had explained such a conclusion, it might also have meant that short-

---

[10] There were apparently no further proceedings in this case, probably because the defendants were unavailable. *See* Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J. L. & Liberty 48, — (2008).

[11] The defendants, or other defendants in subsequent cases, almost certainly could have presented such evidence. *See, e.g.*, Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942):

> The rule which [*Miller*] laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go. At any rate the rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well known fact that in the so called 'Commando Units' some sort of military use seems to have been found for almost any modern lethal weapon.

barreled shotguns are ineligible for Second Amendment protection. In fact, however, there is no basis for either of these conclusions in the *Miller* opinion.

III. *Heller*'s *Miller*

Nonetheless, the *Heller* Court announced:

> The judgment in [*Miller*] upheld against a Second Amendment challenge two men's federal convictions for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply . . . . was that the *type of weapon at issue* was not eligible for Second Amendment protection.[12]

The propositions in both of these sentences are indisputably wrong, and should easily have been recognized as errors by any lawyer familiar with the *Miller* opinion.[13]

While these errors were almost certainly inadvertent, they are

---

[12] 128 S. Ct. at 2814 (emphasis in original). The passage appears on page 49 of the slip opinion. I provide this citation in case the Court corrects one or both of its errors when it eventually publishes the *Heller* opinion in the U.S. Reports.

[13] Later in the majority opinion, Justice Scalia correctly states that "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." 128 S. Ct. at 2814. This is consistent with, and thus does not amount to a retraction of, his earlier incorrect statement that short-barreled shotguns are "not eligible for Second Amendment protection."

related to other fallacious statements in Justice Scalia's opinion that are clearly deliberate and highly significant. Most important, Justice Scalia attempts to show that *Miller* leaves standard military weapons *outside* the protection of the Second Amendment, but leaves weapons that may have little or no military utility *within* the protection of the Second Amendment. This turns upside down what *Miller* says in its holding, namely that a short-barreled shotgun would be eligible for Second Amendment protection if it were shown that it is "part of the ordinary military equipment or that its use could contribute to the common defense." Here is how Justice Scalia explains *Miller*'s meaning:

> We may as well consider at this point (for we will have to consider eventually) *what* types of weapons *Miller* permits. Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." 307 U.S., at 179. The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. "In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." *State v. Kessler*,

> 289 Ore. 359, 368, 614 P. 2d 94, 98 (1980) (citing G. Neumann, Swords and Blades of the American Revolution 6-15, 252-254 (1973)). Indeed, that is precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right, see Part III, *infra*.[14]

Having mistakenly asserted that *Miller* held short-barreled shotguns ineligible for Second Amendment protection, Justice Scalia now says that it would be "startling" to conclude that *Miller* implies that machineguns "might be" protected. If you just read what *Miller* said, there would be nothing startling about this at all. It would be more startling to think that anyone would deny this conclusion. In 1939, when *Miller* was decided, machineguns were arguably part of "the ordinary military equipment" and they certainly "could contribute to the common defense." In 2008, the conclusion would be even less startling, since machineguns (in the form of fully automatic rifles and carbines) are the *most* ordinary of military weapons.

It would indeed be a little startling to find a Supreme Court opinion saying or implying that the Second Amendment prohibits the government from regulating civilians' use of machineguns. But one does not need to turn *Miller*'s holding upside down in order to avoid *that* startling conclusion. *Miller*'s holding, from which Justice Scalia selectively quotes, clearly indicates that military utility is a necessary condition of Second Amendment protection, but *Miller* nowhere says

[14] 128 S. Ct. at 2815-16 (footnote omitted).

or implies that the government is forbidden to place any restrictions at all on protected weapons. Nor does it say what restrictions might be permissible. Nor does it foreclose the possibility that the government might be permitted to put more restrictions on some protected weapons than it may place on others. *Miller* did not address any of these issues one way or another.

Rather than focusing on the obvious narrowness of the *Miller* holding, however, Justice Scalia argues that *Miller* says "only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Miller* neither says nor implies any such thing.

Justice Scalia attempts to derive such an implication from a statement of historical fact that appears later in the *Miller* opinion, and in a different context. Commenting on the meaning of the term "militia" at the time the Bill of Rights was adopted, *Miller* says: "[O]rdinarily when called for service these men [i.e. members of the militia] were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[15] This is perfectly consistent with *Miller*'s plain insistence that the Second Amendment covers only weapons with military utility. It would not make much sense to expect men to appear for military service armed with weapons that have no military utility, or that are not in common *military* use at the time.

In an unexplained leap, however, Justice Scalia concludes that *Miller* is referring only to weapons that are in common *civilian* use at the time. As a matter of historical fact, it may be true that eighteenth century civilians commonly kept for private purposes the

---

[15] 307 U.S. at 179.

same kinds of weapons that they were expected to bring with them when called for service in the militia. That is why the *Miller* Court could reasonably have thought this historical fact relevant to its conclusion that the Second Amendment does protect weapons that have military utility. But it cannot support Justice Scalia's bizarre conclusion that *Miller*'s reference to weapons that are "part of the ordinary military equipment or [whose] use could contribute to the common defense," is actually a reference only to weapons "typically possessed by law-abiding citizens for lawful purposes."[16]

If there is one type of weapon that is indisputably a part of the "ordinary military equipment" today, it is a high velocity, fully automatic rifle. Federal statutes, however, have ensured that automatic weapons are not "typically possessed by law-abiding citizens for lawful purposes."[17] On the other hand, the .22 caliber rimfire handgun at issue in *Heller* itself has about as little military utility as any modern firearm could have. Yet *Heller* holds that this anemic, single-action revolver is protected by the *Miller* test.[18]

---

[16] 128 S. Ct. at 2815-16.

[17] Since 1986, federal law has frozen the number of such weapons that can legally be registered for civilian use at about 240,000, in a nation of some 300 million people. 18 U.S.C. § 922(o); U.S Dep't of Justice, Bureau of Justice Statistics, *Guns Used in Crimes*, at 4 (1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf.

[18] Dick Heller, the plaintiff in this case, was found to have standing because his application for a license to possess a specific single-action .22 caliber revolver was rejected by the D.C. government. Parker v. District of Columbia, 478 F.3d 370, 375-78 (D.C. Cir. 2007) (decision below). A copy of the application, which identified the particular gun at issue, was filed in the trial court as Exhibit A accompanying the plaintiffs' brief in support of summary judgment, and thus was a part of the record in the case. Whether or not any of the Justices examined the record, the Court had to be referring to this revolver when it said: "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the

Elsewhere in the *Heller* majority opinion, Justice Scalia himself aptly describes this kind of twisted interpretation of a legal text: "Grotesque."[19]

IV. Justice Stevens on *Miller*

Much of Justice Scalia's discussion of *Miller* is devoted to refuting Justice Stevens' claim in dissent that this precedent established that the Second Amendment "protects the right to keep and bear arms for certain military purposes, but that it does not curtail the legislature's power to regulate the nonmilitary use and ownership of weapons."[20] Justice Scalia quite correctly contends that Justice Stevens overreads *Miller*, which is a case that dealt only with the type of weapon protected by the Second Amendment, not with the scope of the right to own and use whatever weapons are protected. Nevertheless, Justice Stevens' interpretation of *Miller* is a less radical misinterpretation than Justice Scalia's.[21]

Justice Stevens takes it as self evident that *Miller*'s holding—with its references to the preservation and efficiency of a well regulated militia and to the potential significance of evidence demonstrating the military utility of short-barreled shotguns—means that the right to keep and bear arms is only a right to have arms for

---

District must permit him to register *his handgun* and must issue him a license to carry *it* in the home." 128 S. Ct. at 2822 (emphasis added).

[19] 128 S. Ct. at 2794 (characterizing Justice Stevens' interpretation of the term "keep and bear arms").

[20] 128 S. Ct. at 2823 (Stevens, J., dissenting).

[21] Like the majority, Justice Stevens misstates the procedural posture of the case. 128 S. Ct. at 2822-23 (slip op. at 2).

military purposes. This is not self evident, but it does gain some apparent support from another statement in *Miller* that Justice Stevens quotes (but which Justice Scalia ignores): "With obvious purpose to assure the continuation and render possible the effectiveness of such forces [i.e. the militia referenced in Article I of the Constitution] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."[22] It might not be unreasonable to infer that this means Congress may restrict the possession and use of weapons up to the point where such restrictions interfere with what *Miller* calls "the preservation and efficiency of a well regulated militia." And that could conceivably mean that the government has carte blanche to restrict the civilian use of weapons so long as it only restricts their civilian use, not their use in the militia.

Although this may not be a preposterous or grotesque interpretation of *Miller*, it is neither necessary nor especially plausible. *Miller* makes no reference to the absence of evidence that the defendants were members of the militia, or that their possession of a short-barreled shotgun had something to do with militia service. The *Miller* Court apparently had no information about the defendants or about their reasons for transporting the weapon in question across state lines: the record on appeal and the government's brief were both silent about this matter.[23] Had the *Miller* Court thought that any of this was relevant to the case, it presumably would have said

---

[22] 307 U.S. at 178.

[23] Justice Scalia refers to the *Miller* defendants as "crooks," apparently on the basis of information that he acquired from outside the record of the *Miller* case. The probable source is a law review article that Justice Scalia cites later in the majority opinion. *See* Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J. L. & Liberty 48, — (2008) ("Miller was a crooked, pliable snitch"); 128 S. Ct. at 2814 (citing Frye's article for a different point).

something to let the trial court know that it should do the appropriate fact-finding on remand. Furthermore, the reference in *Miller*'s holding to weapons that "could contribute to the common defense" strongly suggests that the Second Amendment protects the civilian possession and use of those weapons that *might* be useful for militia duty, whether or not the individual who has them is currently a militiaman or is currently using them for militia-related purposes.

V. The Real Problem with *Miller*

Read only for what it actually says, *Miller* stands for the proposition that a weapon is ineligible for Second Amendment protection if it lacks military utility. I think that proposition is wrong as a matter of constitutional interpretation, largely for the reasons elaborately set forth in Justice Scalia's generally excellent discussion of the original public meaning of the Second Amendment.

In light of *Miller*'s extremely narrow holding, and of Justice Scalia's perfectly accurate comment that *Miller* "did not even purport to be a thorough examination of the Second Amendment,"[24] the *Heller* Court could easily have rejected the legal test that *Miller* expected the court below to employ on remand. This would have been perfectly consistent with the principle of stare decisis, which has frequently permitted the Court to correct errors that had become far more settled than *Miller*'s. By reading *Miller* for far more than it said or implied, and by twisting the meaning of what *Miller* actually said beyond recognition, it is *Heller* that violates and disrespects precedent. Stare decisis does not mean carpe diem, or stare deception,

[24] 128 S. Ct. at 2814.

and the Court has never said that it does.[25]

So what explains *Heller*'s treatment of *Miller*? One can only speculate. One can't help noticing, however, that the gratuitous misreading of *Miller* is part of a larger pattern in which the *Heller* Court went out of its way to offer legally gratuitous endorsements of several forms of gun control that were not at issue in the case.

Besides fallaciously reading *Miller* to mean that short-barreled shotguns may be banned, *Heller* illogically and unnecessarily presumed that the *Miller* Court would also have accepted a ban on machineguns. But this was only the beginning of *Heller*'s endorsements of various gun control regulations: Prohibitions on carrying concealed weapons. Prohibitions on the possession of firearms by felons and the mentally ill. Laws forbidding the carrying of firearms in "sensitive places" such as schools and government buildings. Laws imposing conditions and qualifications on the commercial sale of arms.[26] And maybe every gun control regulation that has been upheld in any of the innumerable decisions handed down by the lower courts since 1939.[27] Some of these

---

[25] I do not mean to suggest that everything the Court has said about stare decisis makes sense. For a penetrating discussion of the difference between the principle of stare decisis and the Court's current doctrine, see Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. Rev. 1165 (2008).

[26] 128 S. Ct. at 2815-16, 2816-17.

[27] 128 S. Ct. at 2815 n.24.

endorsements are ambiguous,[28] and all are dicta. But the endorsements are clear enough for public consumption and they are unlikely to be treated as mere dicta by the lower courts.

It is not by any means self evident that all applications of these gun control regulations should be upheld against Second Amendment challenges.[29] In its own way, this list of endorsements resembles the *Miller* opinion, which Justice Scalia aptly describes as "uncontested and virtually unreasoned."[30] But the list differs from *Miller* in departing dramatically from what has been called "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more."[31]

Maybe that principle has an exception for cases in which the Justices want to provide comforting assurances that the Court is not excessively serious about mere legal analysis, or insensitive to political demands for popular forms of governmental regulation. Or perhaps for cases in which the Justices fear that they will be falsely accused of "judicial activism," as they probably would have been in this case had they not falsely purported to be faithful to *Miller*.

---

[28] At one point, for example, the Court says that the regulations in one (explicitly non-exhaustive) list are "presumptively lawful," 128 S. Ct. at 2817 n.26. Later, however, the Court says that these are regulations "we describe as permissible," and indicates that all that remains is "to expound upon the historical justifications for the exceptions we have mentioned." *Id*. at 2821.

[29] For brief discussions of a few examples, see **[cite]**.

[30] 128 S. Ct. at 2815 n.24.

[31] PDK Laboratories Inc. v. United States Drug Enforcement Administration, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

So maybe *Heller*'s treatment of *Miller* was shrewd judicial politics. There is a great deal of political science literature seeking to debunk the notion that Supreme Court Justices have anywhere near the respect for precedent and legal reasoning that they purport to display in their opinions, or anywhere near the disregard for politics that they frequently and piously proclaim.[32] And it could be that there is too little in the way of shared principles on the current Court to produce coherent decisionmaking or a consistent approach to precedent in controversial cases.[33]

Justice Kennedy, however, who is often held responsible for muddying the doctrinal waters, was probably not responsible for *Heller*'s treatment of *Miller*. At the *Heller* oral argument, he was the only member of the Court who expressed a willingness to repudiate *Miller*'s legal test. He did so repeatedly and emphatically:

- "[I]t seems to me that there is an interpretation of the Second Amendment differing from that of the district court and in Miller and not advanced particularly in the red brief [i.e. the respondent's brief], but that conforms the two clauses and in effect delinks them."[34]

- "I agree that Miller is consistent with what [the Solicitor

---

[32] For a major study focusing on the Court's interpretation of precedent, which includes a review of the broader literature, see Thomas G. Hansford & James F. Spriggs II, *The Politics of Precedent on the U.S. Supreme Court* (2006).

[33] *See, e.g.*, Neal Devins, *Ideological Cohesion and Precedent (Or Why the Court Only Cares about Precedent When Most Justices Agree with Each Other)*, 86 N.C. L. Rev. 1399, 1436-42 (2008).

[34] Transcript of Oral Argument, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf, at 5.

General] just said, but it seems to me Miller, which kind of ends abruptly as an opinion writing anyway, is just insufficient . . . to describe the interests that must have been foremost in the framers' minds when they were concerned about guns being taken away from the people who needed them for their defense."[35]

- "It seems to me that Miller, as we are discussing it now, and the whole idea that the militia clause has a major effect in interpreting the operative clause, is both overinclusive and underinclusive. . . . Well, [respondent's attorney is] being faithful to Miller. I suggest that Miller may be deficient."[36]

The judicial recovery of the original meaning of the Second Amendment, and the elaboration of a jurisprudence faithful to that meaning, have barely begun and could easily be derailed. One cannot help thinking of *United States v. Lopez*,[37] which held that the federal Gun-Free School Zones Act exceeded congressional authority under the Commerce Clause. This decision set off a tremendous spasm of fear and loathing on the left, and hopeful excitement on the right. But Congress quickly reenacted the statute, merely adding a curative jurisdictional provision that has little practical significance.[38] And the Court subsequently interpreted *Lopez* so as to deprive it of much

---

[35] *Id*. at 30-31.

[36] *Id*. at 61-62.

[37] 514 U.S. 549 (1995).

[38] Pub. L. 104-208, § 657 (1996). The amended statute was upheld in United States v. Danks, 221 F.3d 1037 (8th Cir. 1999).

effect except as a drafting guide for Congress.[39]

Heller is certainly a landmark decision. But where its guidance points, or what kind of precedent it will prove to be, may be determined primarily by future Presidents and Senators. With luck, the political branches will give us a Court that takes the Constitution more seriously than it takes its own political agendas and its own political anxieties. That would heighten the chance that future Courts will distinguish *Heller*'s sound and methodologically originalist holding and from its questionable and unsupported dicta.

---

[39] *See* Gonzales v. Raich, 545 U.S. 1, 46 (2005) (O'Connor, J., dissenting). Justice Scalia sought to rebut Justice O'Connor's objection, *id*. at 38 (Scalia, J., concurring in the judgment) , but he provides no example of a regulation that would be barred by *Lopez* and that Congress could not draft around.