The Court evaded the issue in *Heller* by cutting loose the Second Amendment from any concern with state
militias (the "National Guard," as they are now called). The majority opinion acknowledges that allowing people to keep guns in their homes cannot help the militias, because modern military weapons are not appropriate for home defense (most of them are too dangerous), and anyway the opinion says that the only weapons the Second Amendment entitles people to possess are ones that are not "highly unusual in society at large." Modern military weapons are highly unusual in society at large. By creating a privilege to own guns of no interest to a militia, the Court decoupled the amendment's two clauses.

It justified this decoupling by arguing that the word "people" in the expression "the right of the people to keep and bear Arms" (the amendment's second clause) must encompass more than just militiamen, because eighteenth-century militias enrolled only able-bodied free men--a mere subset of the people of the United States. But obviously the Framers did not mean to confer even a prima facie constitutional right to possess guns on slaves, criminals, lunatics, and children. The purpose of the first clause of the amendment, the militia clause, is to narrow the right that the second clause confers on the "people."

My analysis to this point has been "originalist"--and it has led to the opposite conclusion from that of the majority of the Supreme Court. It has been a narrow originalism, like that of Scalia's majority opinion, because it has ignored the interpretive conventions of the legal culture in which the Second Amendment was drafted and ratified. The reigning theory of legislative interpretation in the eighteenth century was loose (or flexible, or nonliteral) construction. This is explicit in William Blackstone's *Commentaries on the Laws of England*, on which the majority opinion in *Heller* ironically relies. In the *Commentaries* we read that a medieval law of Bologna stating that "whoever drew blood in the streets should be punished with the utmost severity" should not be interpreted to make punishable a surgeon "who opened the vein of a person that fell down in the street with a fit." Blackstone explained that "the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.... As to the effects and consequence, the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them" (emphasis added). John Marshall, the greatest Supreme Court justice of the generation that wrote the Constitution and the Bill of Rights, was also a loose constructionist.

Originalism without the interpretive theory that the Framers and the ratifiers of the Constitution expected the courts to use in construing constitutional provisions is faux originalism. True originalism licenses loose construction. And loose construction is especially appropriate for interpreting a constitutional provision ratified more than two centuries ago, dealing with a subject that has been transformed in the intervening period by social and technological change, including urbanization and a revolution in warfare and weaponry.

The Framers of the Bill of Rights could not have been thinking of the crime problem in the large crime-ridden metropolises of twenty-first-century America, and it is unlikely that they intended to freeze American government two centuries hence at their eighteenth-century level of understanding. Because of the difficulty of amending the Constitution, it has from the beginning been loosely construed so as not to become a straitjacket or a suicide pact. The older the constitutional provision and the more the environment has changed since enactment, the more appropriate is the method of loose construction.

There are few more antiquated constitutional provisions than the Second Amendment. For example, the Framers and the ratifiers of the amendment probably did think that the right of militiamen to keep and bear arms entitled them to keep their weapons in their homes. They were expected to provide the militia's muskets rather than receive them from a weapons depot. Back then, moreover, guns required a lot of upkeep. Without constant care, they would rust and the powder would become moist. Storing the guns at a warehouse would have left many of them inoperable. To use this "original" understanding to allow members of the National Guard to store military weapons (machine guns, grenades, Hummers, and so on) would be preposterous, and it is disclaimed in the majority opinion.
In these and other ways, the *Heller* decision is exposed as an example of loose construction--despite the Court's pretense of engaging in originalist interpretation (but again, an originalism stripped of the original understanding of how a constitutional provision should be interpreted). Just as when the Supreme Court, in 1947 in *Adamson v. California*, decided in the teeth of the language of the Fourteenth Amendment that the amendment "incorporates" the Bill of Rights, an exercise of judicial discretion is presented in *Heller* as historically determined. The Bill of Rights was added to the original Constitution to limit federal power. One provision of the Bill of Rights forbids government to deprive persons of life, liberty, or property without due process of law. The Fourteenth Amendment contains an identical due process clause, but directed against state action. The Court in *Adamson* turned historical handsprings to interpret the Fourteenth Amendment's due process clause as incorporating--that is, making applicable to state action--most of the other provisions of the Bill of Rights. If *Heller* is applied to the states, it will be on the authority of *Adamson*.

The true springs of the *Heller* decision must be sought elsewhere than in the majority's declared commitment to originalism. The idea behind the decision--it is not articulated, of course, and perhaps not even consciously held--may simply be that turnabout is fair play. Liberal judges have used loose construction to expand constitutional prohibitions beyond any reasonable construal of original meaning; and now it is the conservatives' turn. Another plausible example of payback is the conservative justices' expansive interpretation of the free-speech clause of the First Amendment to limit regulation of campaign financing.

It is possible that in both the gun-control case and the campaign-finance cases the justices in the majority, rather than playing tit for tat, thought the laws they were invalidating very dumb, and in the case of the District of Columbia's ban on possession of pistols thought the law wimpish and paternalistic, like requiring bikers to wear helmets. A law that bans possession of pistols outright may even be inferior, at least as a method of controlling crime, to a law that combines strict permit requirements with heavy penalties for violating them, or even to one that simply imposes draconian penalties on crimes committed with guns. But judges are not supposed to invalidate laws merely because, as legislators, they would have voted against them.

There is an important difference, obvious but often overlooked, between using loose construction to prevent making the Constitution a straitjacket and using it to make the Constitution a straitjacket. In *Kennedy v. Louisiana*, a decision handed down shortly before *Heller*, the Supreme Court held that to execute a person who rapes a child but does not kill her violates the cruel and unusual punishments clause of the Eighth Amendment. That was a loose construction that tied the hands of the states and the federal government, and Scalia and the other conservative justices dissented. But in *Heller* it was the liberal justices who were dissenting from a decision that ties the hands of the federal government, and of the states, too, if the Supreme Court decides that the Second Amendment constrains state as well as federal government action. Compare these two cases to the *Zelman* case, decided several years ago. There the Court upheld, against a challenge based on the clause of the First Amendment that forbids governmental establishments of religion, the funneling of public monies to private schools by means of vouchers that parents can use to pay for their kids' tuition. Most private schools are Catholic parochial schools. The interpretation of the establishment clause that permitted the use of public moneys to finance parochial schools rejected the imposition on government of a constitutional restraint that the liberal justices wanted to impose.

Another illuminating contrast to *Heller* is the recent *Kelo* decision. The Supreme Court held that the just compensation clause of the Fifth Amendment does not forbid a state to condemn private property and, having thus seized it, to turn it over to a private developer. The decision provoked outrage by conservatives, who oppose condemnation because it infringes rights of private property. They should not have been outraged. All the Court did was unshackle government from a potential constitutional constraint, and by doing so toss the issue into the political arena. And sure enough, in the wake of the decision a number of states, under pressure from property interests, curtailed their eminent domain powers.
Similarly, had the Supreme Court upheld the District of Columbia gun ordinance, it would not have been outlawing the private possession of guns. It would merely have been leaving the issue of gun control to the political process. The popularity of the decision and its prompt endorsement by both presidential candidates attests to the political power of the "gun lobby"; and an unpopular decision in favor of the government would actually have strengthened the lobby, just as *Roe v. Wade* strengthened the anti-abortion movement. The proper time for using loose construction to enlarge constitutional restrictions on government action is when the group seeking the enlargement does not have good access to the political process to protect its interests, as abortion advocates, like gun advocates, did and do.

**Constitutional interpretations that** relax rather than tighten the Constitution's grip on the legislative and executive branches of government are especially welcome when there are regional or local differences in relevant conditions or in public opinion. The failure to recognize this point (or perhaps indifference to it) was the mistake that the Supreme Court made when it nationalized abortion rights in *Roe v. Wade*. It would be the mistake the Court would be making in the unlikely event that it created a federal constitutional right of homosexual marriage. It is the mistake the Court has made in *Heller*. The differences in attitudes toward private ownership of pistols across regions of the country and, outside the South, between urban and rural areas, are profound (mirroring the national diversity of views about gay marriage, and gay rights in general, as well as about abortion rights). A uniform rule is neither necessary nor appropriate. Yet that is what the *Heller* decision will produce if its rule is held applicable to the states as well as to the District of Columbia and other federal enclaves.

*Heller* gives short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation. A majority of Americans support gun rights. But if the District of Columbia (or Chicago or New York) wants to ban guns, why should the views of a national majority control? Is that democracy, or is it Rousseau's forced conformity to the "general will"? True, a member of a national majority can be a member of a minority within a local area: gun buffs in Washington, D.C., for example. But a person who is a member of a local minority but a national majority can relocate to a part of the country in which the national majority rules. A resident of Washington can move to northern Virginia. This is not to say that there should be no national rights--that Mississippi should be permitted to stone adulterers, or Rhode Island to ban *The Da Vinci Code*. But the question of whether to nationalize an issue in the name of the Constitution calls for an exercise of judgment; and when the nation is deeply divided over an issue to which the Constitution does not speak with any clarity, and a uniform national policy would override differences in local conditions, nationalization may be premature.

There is a further difference between constitutional interpretations that permit government action and ones that forbid it: only the latter create new business for the federal courts. Conservatives rightly decry the enormous expansion in the federal caseload caused by the aggressive constitutional rulings of liberal justices in the 1960s. But if the new rule declared in *Heller* is applied to the states, we may see a similar result, this time engineered by conservatives; and we will have further confirmation that the Warren Court liberated conservative as well as liberal judges from the constraint of judicial modesty. Every time a gun permit is denied, the disappointed applicant will have a potential constitutional claim litigable in the federal courts.

Justice Scalia was emphatic that the right to possess a gun is not absolute. He sparred with Justice Stephen Breyer (who wrote a separate dissenting opinion) over the standard to be applied to restrictions on gun ownership. All that is clear is that an absolute ban on possessing a pistol is unconstitutional. The other restrictions that a government might want to impose are up for grabs. It may take many years for the dust to settle--many years of lawsuits that our litigious society does not need.

Conservatives rightly believe, moreover, that the efficacy of legally enforceable rights as an engine for social reform is overrated. The effects even of such well known and generally applauded decisions as those invalidating racial segregation of public schools and the malapportionment of state legislatures are uncertain, and may not have been, on balance, beneficial. The only certain effect of the *Heller* decision--
for the scholarly literature has yet to reach consensus on the effects of gun-control laws—will be to increase litigation over gun ownership.

I cannot discern any principles in the pattern of the Supreme Court's constitutional interpretations. The absence of principles supports the hypothesis that ideology drives decision in cases in which liberal and conservative values collide. If loose construction produces a conservative limitation on government, most conservatives will support it and most liberals will oppose it; and if it produces a liberal limitation on government, most liberals and conservatives will switch sides. The qualification in "most" is important, though. Scalia has voted to invalidate, on free-speech grounds, laws forbidding the burning of the American flag. That is loose construction—decidedly non-originalist in the narrow sense of his opinion in *Heller*—because burning is not speech; and it is a loose construction that produces a liberal outcome. Breyer concurred in a decision that allowed the Ten Commandments to be exhibited on the grounds of the Texas Capitol; and that was a conservative vote (and the swing vote in the case) by a liberal justice.

Whatever generated these justices' uncharacteristic votes in those two cases, it was not a decision-making method that prevents the exercise of discretion. Both justices employ judicial methodologies that leave them with plenty of running room. In his dissent in the *Zelman* case, Breyer argued that the school voucher system was unconstitutional because there was a "risk" that it could create "a form of religiously based conflict potentially harmful to the Nation's social fabric." In his dissent in *Heller* he reversed the burden, arguing that the risk that allowing limited gun ownership in the District of Columbia would lead to more death and injury from guns was enough to uphold the District's gun law against constitutional challenge.

Since Stevens devoted most of his dissenting opinion in *Heller* to his own interpretation of the original meaning of the Second Amendment, observers may conclude that the entire Court has now embraced originalism as the canonical method of interpreting the Constitution. But this is not a plausible inference in light of the child-rapist case of just a few weeks earlier (non-murdering rapists of adult women were being executed in the United States as recently as the 1960s), from which Scalia dissented. One supposes that Stevens could not resist meeting the majority on its own ground, since the text and the history (both pre- and post-enactment) of the Second Amendment favor the dissent. Among other things, professional historians were on Stevens's side.

Still, his opinion seems to me too dogmatic (the historical evidence is not as one-sided as his opinion suggests); and it leaves the impression that all that divided the two wings of the Court was a disagreement over the historical record. That was playing into Scalia's hands. The majority (and the dissent as well) was engaged in what is derisively referred to--the derision is richly deserved--as "law office history." Lawyers are advocates for their clients, and judges are advocates for whichever side of the case they have decided to vote for. The judge sends his law clerks scurrying to the library and to the Web for bits and pieces of historical documentation. When the clerks are the numerous and able clerks of Supreme Court justices, enjoying the assistance of the capable staffs of the Supreme Court library and the Library of Congress, and when dozens and sometimes hundreds of amicus curiae briefs have been filed, many bulked out with the fruits of their authors' own law-office historiography, it is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position.

But it was not so simple in *Heller*, and Scalia and his staff labored mightily to produce a long opinion (the majority opinion is almost 25,000 words long) that would convince, or perhaps just overwhelm, the doubters. 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.

This is strikingly shown by the lengthy discussion of the history of interpretation of the Second Amendment. Scalia quotes a number of statements to the effect that the amendment guarantees a personal right to possess guns—but they are statements by lawyers or other advocates, including legislators and judges and law professors all tendentiously dabbling in history, rather than by
In Defense of Looseness

disinterested historians: more law-office history, in other words. Sanford Levinson, a distinguished constitutional law professor, has candidly acknowledged that the most important reason for his support of a constitutional right of private possession of guns is that opposition to this right is harmful to the electoral prospects of the Democratic Party.

The statements that the majority opinion cited had little traction before *Heller*. For more than two centuries, the "right" to private possession of guns, supposedly created by the Second Amendment, had lain dormant. Constitutional rights often lie dormant, spectral subjects of theoretical speculation, until some change in the social environment creates a demand for their vivification and enforcement. But nothing has changed in the social environment to justify giving the Second Amendment a new life discontinuous with its old one: a new wine in a decidedly old wineskin. There is no greater urgency about allowing people to possess guns for self-defense or defense of property today than there was thirty years ago, when the prevalence of violent crime was greater, or for that matter one hundred years ago. Only the membership of the Supreme Court has changed.

If constitutional decisions are to be determined by the balance between liberals and conservatives on the Supreme Court, the fig-leafing that we find in *Heller*--the historicizing glaze on personal values and policy preferences--will continue to be irresistibly tempting to the justices, with their large and tireless staffs and their commitment to a mystique of "objective" interpretation. There is no way to purge political principles from constitutional decision-making, but they do not have to be liberal or conservative principles. A preference for judicial modesty--for less interference by the Supreme Court with the other branches of government--cannot be derived by some logical process from constitutional text or history. It would have to be imposed. It would be a discretionary choice by the justices. But judging from *Heller*, it would be a wise choice. It would go some distance toward de-politicizing the Supreme Court. It would lower the temperature of judicial confirmation hearings, widen the field of selection of justices, and enable the Supreme Court to attend to the many important non-constitutional issues that it is inclined to neglect.

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