

---

---

COMMENT

---

---

---

---

PRESERVING JUDICIAL SUPREMACY  
COME *HELLER* HIGH WATER

---

---

BENJAMIN S. SOFTNESS<sup>†</sup>

INTRODUCTION ..... 623

I. *HELLER* AND *MCDONALD*: THEIR BARK AND THEIR BITE ..... 628

    A. *Heller v. District of Columbia*..... 628

    B. *McDonald v. City of Chicago*..... 630

    C. *Scholarly Reactions* ..... 631

II. WHY MINIMALISM? THREE THEORIES ..... 634

    A. *Mandatory Minimalism* ..... 634

    B. *Foot-in-the-Door Minimalism* ..... 635

    C. *Power-Preserving Minimalism* ..... 637

III. HISTORICAL EXAMPLES OF POWER-PRESERVING  
    MINIMALISM: *MARBURY* AND *BROWN* ..... 641

IV. *HELLER* AS *BROWN* ..... 646

CONCLUSION..... 650

INTRODUCTION

It is the nature of laws and rights to periodically collide, and gun control and gun ownership are no exception. Every state in the Union has gun control laws,<sup>1</sup> and mayors of cities across the United States rely on the

---

<sup>†</sup> Executive Editor, *University of Pennsylvania Law Review*, Volume 161. J.D. Candidate, 2013, University of Pennsylvania Law School; B.A., 2006, Amherst College. I thank Professor Sophia Z. Lee, for her guidance and encouragement throughout this project; Jaclyn Simon, Ethan Simonowitz, and everyone on the *Law Review* for being wonderful colleagues and exemplary editors; my family, for their eternal support; and Janine, for being always by my side. All errors are my own.

<sup>1</sup> BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP'T OF JUSTICE, ATF PUB. 5300.5, STATE LAWS AND PUBLISHED ORDINANCES—FIREARMS (29th ed.

ability to impose limitations on gun ownership to maintain public safety.<sup>2</sup> At the same time, a majority of Americans believes that the Second Amendment to the Constitution<sup>3</sup> protects an individual right to own guns.<sup>4</sup> So when the Supreme Court was asked, first in 2008 and again in 2010, to define the scope of the Second Amendment, it confronted an issue of frequent cultural and political clash.<sup>5</sup> In *District of Columbia v. Heller*, the Court, interpreting the Second Amendment essentially for the first time, concluded that it protects an individual right to gun ownership.<sup>6</sup> Two years later, in *McDonald v. City of Chicago*, the Court applied the newly defined Second Amendment to the states.<sup>7</sup> Both cases ignited significant public and scholarly debate.<sup>8</sup> Between the two, over one hundred amicus briefs were filed with the Court.<sup>9</sup> Scholars' reactions to the rulings ranged widely from praise for the Court's originalism, to concern about questions left unanswered, to charges of judicial activism.

Yet it was not entirely clear what the Court accomplished with *Heller* and *McDonald*. Some suggested that the holdings portended a general hostility to the enterprise of gun control. Because the Court arguably left open certain key questions—such as a standard of review—scholars wondered whether lower courts armed with *Heller* and *McDonald* would invalidate gun control laws at will.

---

2008) [hereinafter ATF REPORT], available at <http://www.atf.gov/publications/download/pdf/atf-p-5300-5/atf-p-5300-5.pdf>.

<sup>2</sup> See *infra* notes 169-70 and accompanying text.

<sup>3</sup> The Second Amendment provides, "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." U.S. CONST. amend. II.

<sup>4</sup> See *Guns*, POLLINGREPORT.COM, <http://www.pollingreport.com/guns2.htm> (last visited Nov. 16, 2011) (listing CNN/Opinion Research Corporation poll data from June 2008 in which 67% of respondents indicated the belief that the Second Amendment guarantees each person the right to own a gun).

<sup>5</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 201-36 (2008) (chronicling the history of the "culture wars" over gun control and the meaning of the Second Amendment).

<sup>6</sup> 554 U.S. 570, 635 (2008); see also *id.* at 625 (calling the question "long judicially unresolved").

<sup>7</sup> 130 S. Ct. 3020, 3050 (2010).

<sup>8</sup> See *infra* notes 50-54 and accompanying text.

<sup>9</sup> See *DC v. Heller*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/dc-v-heller> (last visited Nov. 16, 2012) (listing sixty-seven amicus briefs including that of the United States); *McDonald v. City of Chicago*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/mcdonald-v-city-of-chicago> (last visited Nov. 16, 2012) (listing fifty-one amicus briefs).

Professor Cass Sunstein took another view.<sup>10</sup> Sunstein viewed the *Heller* Court as having issued a restrained, minimalist opinion.<sup>11</sup> He argued that the Court's approach in the case was narrow and represented merely the repudiation of a single law which "starkly departed" from the public understanding of the right to bear arms.<sup>12</sup> As an empirical matter, Sunstein appears to have been correct. Three years after *Heller*, lower courts are not taking very many liberties with gun control laws, and very little has actually changed.<sup>13</sup> Post-*Heller* gun control, in other words, looks a lot like pre-*Heller* gun control.

I agree with Professor Sunstein that *Heller* was minimalist.<sup>14</sup> However, this Comment is devoted to the question of *why* the Court ruled in the way that it did. Sunstein suggests that minimalist rulings like *Heller* are strategic insofar as they pave the way for future "doctrinal innovation" in that area of the law.<sup>15</sup> A minimal Second Amendment holding now makes more palatable a broader Second Amendment holding later.

I do not necessarily disagree with this account of minimalism, but I think it is incomplete. Minimalism does not only facilitate doctrinal innovation in a given area of the law. On my account, the Court sometimes issues minimalist rulings in order to preserve its ability to develop doctrine *at all*. The Court's ability to "say what the law is"<sup>16</sup> depends entirely on its institutional credibility—credibility that is risked when the Court rules on controversial topics. Thus, in certain "hot-button" cases, when the Court is

---

<sup>10</sup> Professor Sunstein is the Felix Frankfurter Professor of Law at Harvard Law School and served from September 2009 to August 2012 as Administrator of the Office of Information and Regulatory Affairs in the Obama Administration. See Cass R. Sunstein, HARVARD L. SCH., <http://www.law.harvard.edu/faculty/directory/index.html?id=552> (last visited Nov. 16, 2012). He has been called "the most remarkably thoughtful, constructive, and productive scholar of his . . . generation." James E. Fleming, *The Odyssey of Cass Sunstein*, 43 TULSA L. REV. 843, 843 (2008). When he was hired to join the Harvard Law School faculty, then-Dean Elena Kagan described Professor Sunstein as "the pre-eminent legal scholar of our time—the most wide-ranging, the most prolific, the most cited and the most influential." Michael Higgins, *Harvard Hires U. of C. Law Professor Cass Sunstein*, CHI. TRIB. (Feb. 20, 2008), [http://articles.chicagotribune.com/2008-02-20/news/0802190580\\_1\\_harvard-law-school-harvard-university-cass-sunstein](http://articles.chicagotribune.com/2008-02-20/news/0802190580_1_harvard-law-school-harvard-university-cass-sunstein).

<sup>11</sup> See Cass R. Sunstein, *Second Amendment Minimalism: Heller As Griswold*, *The Supreme Court, 2007 Term*, 122 HARV. L. REV. 246, 260-71 (2008) (emphasizing the Court's focus on the particular provisions at issue as well as its acknowledgment that the decision leaves much about the Second Amendment unresolved).

<sup>12</sup> *Id.* at 267.

<sup>13</sup> See *infra* notes 69-73 and accompanying text.

<sup>14</sup> *McDonald* was, too. Although Professor Sunstein's paper was about *Heller* and did not address *McDonald*, I believe that his analysis applies equally well to both cases. Thus, for the purposes of this Comment, I often treat the two cases as jurisprudentially quite similar.

<sup>15</sup> Sunstein, *supra* note 11, at 264.

<sup>16</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

required to make a controversial legal determination, it does so on narrow grounds in order to preserve its institutional power. I call this approach “power-preserving minimalism.” Unpopular decisions can harm the Court’s authority when they result in resistance—that is, when the Court’s mandate goes unfollowed. Minimalist decisions avoid this pitfall: they state a legal principle in a way that requires fairly little (or no) action by the population at large. This Comment argues that *Heller* and *McDonald* were decided in just such a way. They were the subject of intense public debate and were quite significant jurisprudentially, but their innovative legal holdings were tempered by judicial tolerance of most existing gun laws. Thus, whether they agreed or not, it was difficult for citizens or political actors (federal, state, or local) to resist or defy the decisions in any way. By demanding fairly little, the decisions preserved the Supreme Court’s power.

In displaying power-preservation tactics, *Heller* and *McDonald* are two in a line of cases that includes *Marbury v. Madison*,<sup>17</sup> *Brown v. Board of Education*,<sup>18</sup> and, most recently, *National Federation of Independent Business v. Sebelius*,<sup>19</sup> the Court’s decision resolving the constitutionality of the Affordable Care Act. In all of these cases, the Court set new legal precedent but demanded very little in practical effect. And in all of these cases, a chief factor motivating the Court was the preservation of its own institutional power.

An exploration of the forces that motivate the Supreme Court is not simply an academic endeavor; it bears on the core of the Court’s function in our constitutional democracy.<sup>20</sup> The Court issues nationally authoritative interpretations of the Constitution and federal law, and these interpretations are binding on everyone, including government actors in the other co-equal branches. Yet no part of the constitutional text or structure technically gives the Court this awesome power.<sup>21</sup> The Court relies on the public’s, and

---

<sup>17</sup> *Id.* at 137.

<sup>18</sup> (*Brown I*), 347 U.S. 483 (1954).

<sup>19</sup> 132 S. Ct. 2566 (2012).

<sup>20</sup> At the outset of this project, I think that two clarifications are important. First, I often speak of power-preservation concerns as “motivating” the Court’s outcomes. I use “motivate” to mean, simply, “provide a motive for.” I do not presume to have uncovered the cause or reason, or even the *singular* motive for the rulings I discuss; I claim only to offer *a* motive. Second, the notion that the Court would take steps to preserve its institutional power should not be read to connote anything nefarious. On the contrary, the Court’s ability to protect its power is critical—and, of course, antecedent—to the effective discharge of its more familiar roles in our constitutional system. More importantly, although I argue at times that power-preservation concerns might affect the breadth or remedial aspects of a ruling, I do not suggest that power preservation ought to, or does, affect the resolution of specific legal issues.

<sup>21</sup> See *infra* notes 102-04 and accompanying text.

the other branches', belief in and deference to the Court's institutional role and competency.<sup>22</sup> It thus falls to the Court to preserve that influence through its primary institutional function—to wit, deciding cases. Moreover, although this Comment explores power preservation primarily through two specific cases, the Court's repeated attempts to preserve and conserve its power is a phenomenon the significance of which is only increasing.<sup>23</sup> It was almost certainly at play in the recent landmark ruling upholding the Affordable Care Act.<sup>24</sup> And, as will be discussed, it has emerged at many key moments throughout the history of the Supreme Court.

---

<sup>22</sup> See *infra* notes 107-08 and accompanying text. Thus, we might even think of the Court's interpretative function as a (massive) "soft power." See generally Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 721-22 (2012) (discussing soft power in the context of foreign affairs and interbranch conflict and noting that "the branches . . . compete publicly for the affections of the people[.]" while those that fail to do so risk "consistently losing power").

<sup>23</sup> "[T]he court's standing with the public has slipped significantly in the past quarter-century," so the Court's power could indeed be waning. Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 8, 2012, at A1.

<sup>24</sup> See *Sebelius*, 132 S. Ct. at 2576-2609 (opinion of Roberts, C.J.). Whether the Chief Justice's opinion in *Sebelius* fits the model outlined in this Comment, see *infra* Section II.C, is left for another paper, but a strong argument could be made that it does.

The case was of huge public significance. See Adam Liptak, *In Health Act, Roberts Given Signature Case*, N.Y. TIMES, Mar. 12, 2012, at A1 ("The decision . . . will have practical consequences for tens of millions of Americans . . ."). Public opinion was divided; the decision was bound to disappoint many on the losing side. Lydia Saad, *Americans Issue Split Decision on Healthcare Ruling*, GALLUP (June 29, 2012), <http://www.gallup.com/poll/155447/Americans-Issue-Split-Decision-Healthcare-Ruling.aspx> (reporting polling data showing that 46% of respondents supported the Supreme Court's ruling, while 46% disagreed with the outcome). And in this unique case, any result—even a ruling for the government—carried a risk of resistance since much of the Act looks to state governments for implementation of the law's reforms. Cf., e.g., Robert Pear, *Republican Governor of Florida Says State Won't Expand Medicaid*, N.Y. TIMES, July 3, 2012, at A12 (discussing the resistance of certain states to aspects of the Affordable Care Act that require state-government cooperation). But see *infra* note 111. Thus, no matter the outcome, the Court risked creating a large, unhappy group with some ability to defy the ruling.

Against that backdrop, the Chief Justice's opinion was a masterclass in power preservation. He stated a novel legal principle, limiting the federal government's power under the Commerce Clause, see *Sebelius*, 132 S. Ct. at 2591-93, but he largely upheld the law. See *id.* at 2600, 2603-07 (upholding the Act's individual mandate but limiting the reach of the Act's Medicaid expansion); see also Adam Liptak, *Justices, By 5-4, Uphold Health Care Law; Roberts in Majority; Victory for Obama*, N.Y. TIMES, June 29, 2012, at A1 (calling the ruling "a victory for Mr. Obama and Congressional Democrats"). Many have opined that power preservation was precisely what motivated the Chief Justice's opinion. See, e.g., John Cassidy, *John Roberts and Mitt Romney: Two Peas in a Pod*, NEW YORKER (June 29, 2012), <http://www.newyorker.com/online/blogs/johncassidy/2012/06/john-roberts-and-mitt-romney-two-peas-in-a-pod.html> (arguing that the Chief Justice "preserved the Court's good name . . . while simultaneously striking another blow against Wickard v. Filburn"); David L. Franklin, *Why Did Roberts Do It?*, SLATE (June 28, 2012, 3:51 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/06/john\\_roberts\\_broke\\_with\\_conservatives\\_to\\_preserve\\_the\\_supreme\\_court\\_s\\_legitimacy.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/john_roberts_broke_with_conservatives_to_preserve_the_supreme_court_s_legitimacy.html) (suggesting that "the court's very legitimacy" was at stake and that Roberts ruled the way he did "to save the court"); Roger Parloff,

This Comment proceeds as follows. Part I summarizes *Heller* and *McDonald* and the scholarly reactions that followed them; it also develops Professor Sunstein's position in some detail. Part II turns to a question that logically follows Professor Sunstein's analysis: that of *why* courts issue minimalist rulings. It lays out three potential reasons, their theoretical underpinnings, and the characteristics that define opinions motivated by each. Part III shows how the last of the three approaches, power-preserving minimalism, has appeared in at least two other important cases in United States legal history. By analogy to the cases in Part III, Part IV posits that *Heller* and *McDonald* followed the same model. It points to the judicial and historical similarities and argues that those parallels indicate a shared motivation. The Comment concludes that its analysis is valuable for two reasons. First, the analytical framework applied to *Heller* and *McDonald* is useful beyond the instant cases and may help categorize other important minimalist rulings, including the Court's historic ruling on the healthcare law. Second, concluding that the Court is at times concerned about its own influence takes appropriate account of the institutional importance of judicial supremacy in our divided system of government.

## I. *HELLER* AND *MCDONALD*: THEIR BARK AND THEIR BITE

### A. *Heller* v. District of Columbia

*Heller* was a Second Amendment challenge to a Washington, D.C., law that imposed strict limits on gun ownership in the District of Columbia.<sup>25</sup> In his analysis of the case, Professor Sunstein describes the law at issue as

---

*In Defense of John Roberts*, CNNMONEY (June 29, 2012, 6:01 AM), <http://management.fortune.cnn.com/2012/06/29/in-defense-of-john-roberts> (lauding the Chief Justice for tending to "the Court's dwindling store of credibility"); Adam Winkler, *The Roberts Court is Born*, SCOTUSBLOG (June 28, 2012, 12:01 PM), <http://www.scotusblog.com/2012/06/the-roberts-court-is-born> ("Roberts may have voted to save health care because he wants to preserve the Court's capital to take on other big issues heading toward the Court.").

With that said, it remains to be seen whether the Chief Justice was successful. The 2012-2013 term should "clarify whether the health care ruling will come to be seen as the case that helped Chief Justice Roberts protect the authority of his court against charges of partisanship." Adam Liptak, *Justices Facing Weighty Rulings and New Dynamic*, N.Y. TIMES, Sept. 29, 2012, at A1. One early study has suggested that the healthcare ruling has actually hurt the Court's reputation so far. See Andrea Campbell & Nathaniel Persily, *The Health Care Case in the Public Mind: How the Supreme Court Shapes Opinion About Itself and the Laws It Considers*, in THE HEALTH CARE CASE (forthcoming May 2013), available at <http://blog.oup.com/wp-content/uploads/2012/09/Persily-Campbell-health-care-case-in-public-mind.pdf>; see also Adam Liptak, *Health Care Case Helped Law But Hurt Supreme Court, Study Finds*, N.Y. TIMES, Oct. 1, 2012, at A19 (citing the aforementioned study).

<sup>25</sup> *District of Columbia v. Heller*, 554 U.S. 570, 574-75 (2008).

“among the most draconian in the nation—a genuine national outlier.”<sup>26</sup> It was especially restrictive of handguns: in the Court’s words, “[i]t [wa]s a crime to carry an unregistered firearm, and the registration of handguns [wa]s prohibited.”<sup>27</sup>

In order to address the law’s validity, the Court found it necessary to answer the “long judicially unresolved” question of whether the Second Amendment protects an individual right to bear arms or rather a collective right to bear arms in connection with state militia service.<sup>28</sup> That endeavor constituted the bulk of the majority opinion.<sup>29</sup> The Court engaged in what Sunstein called “self-consciously originalist”<sup>30</sup> analysis, consulting numerous eighteenth- and nineteenth-century sources, including of-the-period dictionaries,<sup>31</sup> Blackstone’s *Commentaries*,<sup>32</sup> and the Declaration of Independence.<sup>33</sup>

The Court, with Justice Scalia writing for a 5–4 majority (over two vigorous dissents), concluded that the Second Amendment protects the individual right of “law-abiding, responsible citizens to use arms in defense of hearth and home” and invalidated the D.C. law.<sup>34</sup> A blanket ban on handguns, the Court explained, “would fail constitutional muster” under any standard of scrutiny.<sup>35</sup> (The Court did not apply—or set—any specific level of scrutiny.<sup>36</sup>) Nevertheless, the Court assured the District that the Constitution leaves it “a variety of tools for combating” gun violence.<sup>37</sup> It stressed that its opinion should not be read “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 . . . or laws imposing conditions” on the sale of guns.<sup>38</sup> This qualification limited the

<sup>26</sup> Sunstein, *supra* note 11, at 263; *see also Heller*, 554 U.S. at 629 (“Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”).

<sup>27</sup> *Heller*, 554 U.S. at 574-75.

<sup>28</sup> *Id.* at 625.

<sup>29</sup> Fifty-four of sixty-two pages, to be exact. *See id.* at 575-629.

<sup>30</sup> Sunstein, *supra* note 11, at 246. The Court’s analysis was surely thorough, though I express no view as to its historical accuracy or persuasiveness.

<sup>31</sup> *Heller*, 554 U.S. at 582-84.

<sup>32</sup> *Id.* at 582.

<sup>33</sup> *Id.* at 586.

<sup>34</sup> *Id.* at 635.

<sup>35</sup> *Id.* at 628-29.

<sup>36</sup> *Id.* *But see Heller v. District of Columbia (Heller II)*, 670 F.3d 1224, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”).

<sup>37</sup> *Heller*, 554 U.S. at 636.

<sup>38</sup> *Id.* at 626-27.

reach of the decision considerably. Thus, despite the new legal interpretation, lower courts have applied the decision narrowly.<sup>39</sup>

### B. *McDonald v. City of Chicago*

*McDonald v. City of Chicago* came two years later and considered a challenge to two municipal gun control laws in Illinois brought under the Second and Fourteenth Amendments.<sup>40</sup> The Court, this time with Justice Alito writing for the same five-Justice majority, held that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment against the states, and remanded the case for reconsideration by the Seventh Circuit.<sup>41</sup> Although the Court declined to adjudge the specific municipal laws at issue, the writing was on the wall. The Court characterized the laws as similar to the ones in *Heller*, because they prohibited possession of an unregistered firearm and “prohibit[ed] registration of most handguns, thus effectively banning handgun possession.”<sup>42</sup> Perhaps unsurprisingly, both municipal laws were promptly repealed.<sup>43</sup>

As the first case to apply the Second Amendment to the states, *McDonald* was something of a watershed.<sup>44</sup> Indeed, the Court had explicitly held 135 years earlier, in *United States v. Cruikshank*, that the Second Amendment “has no other effect than to restrict the powers of the national government.”<sup>45</sup>

---

<sup>39</sup> See, e.g., *United States v. McCane*, 573 F.3d 1037, 1047-50 (10th Cir. 2009) (Tymkovich, J., concurring) (noting that *Heller*’s dictum emphasizing the case’s respect for “longstanding prohibitions” means that “[r]ather than seriously wrestling with how to apply this new Second Amendment rule, . . . courts will continue to simply reference the applicable *Heller* dictum and move on”).

<sup>40</sup> 130 S. Ct. 3020, 3026 (2010).

<sup>41</sup> *Id.* at 3050. The Court’s decision was based in part on its adoption of *Heller*’s historical analysis of the Second Amendment. See *id.* at 3036-42.

<sup>42</sup> *Id.* at 3026 (emphasis added).

<sup>43</sup> See *NRA v. City of Chicago*, 393 F. App’x 390, 390 (7th Cir. 2010) (remanding to the district court “with instructions to dismiss as moot” the case as a result of the ordinances’ repeal).

<sup>44</sup> Cf. *NRA v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009) (“The Supreme Court has rebuffed requests to apply the second amendment to the states.”), *rev’d sub nom. McDonald*, 130 S.Ct. 3020 (2010).

<sup>45</sup> 92 U.S. 542, 553 (1875); accord *Presser v. Illinois*, 116 U.S. 252, 265 (1886). Interestingly, the *McDonald* Court declined to overrule *Cruikshank* officially. Four Justices from the majority reasoned that, because *Cruikshank* had been decided on Privileges or Immunities Clause grounds (in the wake of the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873)), it did not preclude the Court’s present incorporation analysis, which looks to the Due Process Clause. *McDonald*, 130 S. Ct. at 3030-31. Justice Thomas would have explicitly overruled *Cruikshank*. *Id.* at 3088 (Thomas, J., concurring in part and concurring in the judgment).

But as in *Heller*, the Court was mindful of the reach of its decision. Responding to the municipal respondents' federalism argument that they ought to be free to regulate guns as they deem fit, the Court reiterated *Heller's* protection of longstanding prohibitions on gun ownership.<sup>46</sup> The opinion emphasized that the Court's own holding "by no means eliminates[] [states'] ability to devise solutions to social problems that suit local needs and values."<sup>47</sup> "[I]ncorporation," the Court insisted, "does not imperil every law regulating firearms."<sup>48</sup>

### C. Scholarly Reactions

Reactions to the decisions were numerous, passionate, and varied. Some commentators, assuming the mantle of Justice Stevens's *Heller* dissent,<sup>49</sup> questioned Justice Scalia's historical analysis.<sup>50</sup> Others denounced the holding as "activist,"<sup>51</sup> marked its status as "landmark,"<sup>52</sup> and noted its high stakes, even in advance.<sup>53</sup> One scholar even suggested in his article title, after *Heller* but before *McDonald*, that the latter "May Well Change the Constitutional World As We Know It."<sup>54</sup>

And then there was Professor Sunstein. Rejecting commentary that compared *Heller* to judicially ambitious cases in United States history (for example, *Lochner v. New York*<sup>55</sup>), Sunstein argues that "notwithstanding its apparent sweep, the *Heller* Court's opinion had unmistakable minimalist

<sup>46</sup> *McDonald*, 130 S. Ct. at 3046.

<sup>47</sup> *Id.* at 3046.

<sup>48</sup> *Id.* at 3047.

<sup>49</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 636-80 (Stevens, J., dissenting) (arguing that the history of the Second Amendment does not support the majority's reading).

<sup>50</sup> See, e.g., Adam Winkler, *The Secret History of Guns*, ATLANTIC MONTHLY, Sept. 2011, at 80, 82 (arguing that Framing-era gun control laws were quite strict in that only certain citizens—a subset of men—were permitted, and in fact required, to own guns).

<sup>51</sup> J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 264-65 (2009); see also William G. Merkel, *Heller As Hubris, and How McDonald v. City of Chicago May Well Change the Constitutional World As We Know It*, 50 SANTA CLARA L. REV. 1221, 1222 (2010) ("*Heller* changed the constitutional landscape boldly and significantly."); Jeffrey M. Shaman, *After Heller: What Now for the Second Amendment?*, 50 SANTA CLARA L. REV. 1095, 1095 (2010) ("The *Heller* decision was a severe departure from precedent.").

<sup>52</sup> Paul Duggan, *Having Toppled D.C. Ban, Man Registers Revolver*, WASH. POST, July 19, 2008, at B1; Linda Greenhouse, *Justices, Ruling 5-4, Endorse Personal Right to Own Gun*, N.Y. TIMES, June 27, 2008, at A1.

<sup>53</sup> See Brannon P. Denning, *In Defense of a "Thin" Second Amendment: Culture, the Constitution, and the Gun Control Debate*, 1 ALBANY GOV'T L. REV. 419, 420 (2008) (writing before the decision and declaring the stakes of *Heller* to be "no less than the Court's continued role as our interpreter-in-chief").

<sup>54</sup> Merkel, *supra* note 51, at 1221 (article title).

<sup>55</sup> 198 U.S. 45 (1905)

elements.”<sup>56</sup> A useful point of comparison, Sunstein suggests, is *Griswold v. Connecticut*.<sup>57</sup> In *Griswold*, the Court invalidated a Connecticut law banning the use of contraception on the grounds that the law intruded impermissibly on the privacy of the marital relationship.<sup>58</sup>

First, Sunstein argues that both *Griswold* and *Heller* invalidated laws that were national outliers and in so doing “operated in accordance with a national consensus at the expense of a law that counted as a sharp deviation from it.”<sup>59</sup> Second, in both cases the Court issued a narrow ruling. Just as *Griswold* addressed specifically “the right to use contraceptives *within marriage*,” *Heller* also set “clear limitations” and excepted many existing gun laws in dictum.<sup>60</sup> Third, Sunstein suggests that the apparent boldness of ruling in favor of an individual right was tempered by the fact that a belief in the “individual right to use guns has become an entrenched part of American culture.”<sup>61</sup> Reasonable people disagree as to the role national consensus should play in constitutional law,<sup>62</sup> but, as a “tiebreaker[],” Sunstein argues that national consensus may be—and has been—appropriately considered.<sup>63</sup> Just as popular notions of marital privacy weighed heavily against the Court’s sustaining the law in *Griswold*, it would have been “no light thing for the Supreme Court to announce that tens of millions of Americans are simply mistaken” about their right to bear arms.<sup>64</sup>

Arguably, Sunstein’s analysis applies with equal force to *McDonald*. The Court there *did not even rule* on the constitutionality of the municipal gun laws being challenged; rather, it held the Second Amendment to be incorporated against the states and remanded the challenge to the lower court.<sup>65</sup>

---

<sup>56</sup> Sunstein, *supra* note 11, at 267.

<sup>57</sup> *Id.* at 260; *see also* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>58</sup> 381 U.S. at 485-86.

<sup>59</sup> Sunstein, *supra* note 11, at 263-64.

<sup>60</sup> *Id.* at 267 (emphasis added); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions . . .”).

<sup>61</sup> Sunstein, *supra* note 11, at 270.

<sup>62</sup> *See id.* at 269. Indeed, one might argue that the Court should have looked not to the popular will, but to the lower federal courts’ longstanding reading of the Amendment. *Id.* Or one could argue that the law should have been sustained because, “for Thayerian reasons, the democratic process should be given room to maneuver, at least in the face of reasonable doubt.” *Id.* at 270; *see also* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

<sup>63</sup> Sunstein, *supra* note 11, at 269-70.

<sup>64</sup> *Id.* at 270.

<sup>65</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

More to the point, the Court reiterated *Heller*'s proviso that certain "longstanding" limitations on gun possession were not in jeopardy.<sup>66</sup>

Professor Sunstein also briefly explores the strategic motivations behind *Heller*, suggesting that it may have provided a starting point for a larger doctrinal shift. "[I]f the Court . . . is initiating a new avenue for potential invalidations," he says, "it is likely to begin narrowly," as *Griswold* did in paving the way for later decisions such as *Roe v. Wade*.<sup>67</sup> Sunstein notes that if his analogy to *Griswold* holds, *Heller* may serve as a starting point for "doctrinal innovation."<sup>68</sup>

That doctrinal innovation has yet to materialize. The advent of a new legal right has spurred increased litigation,<sup>69</sup> but three years after *Heller*, very few laws have been invalidated<sup>70</sup> in part because no agreed-upon standard of review has emerged.<sup>71</sup> Indeed, commentators have noted that "the only consistency in the lower court cases is in the results. Regardless of the test used, challenged gun laws almost always survive."<sup>72</sup> Sunstein's prediction that only the most draconian gun laws would fall in *Heller*'s wake appears to have been correct, and some believe that "this is precisely what the Supreme Court wanted."<sup>73</sup> If so, then the question is: *why*?

<sup>66</sup> *Id.* at 3047.

<sup>67</sup> Sunstein, *supra* note 11, at 264.

<sup>68</sup> *Id.*

<sup>69</sup> See Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1141 (2011) ("Hundreds of challenges to gun regulations have been filed in the wake of *Heller* and *McDonald* . . ."); Adam Winkler, *The More the Second Amendment Changes . . .*, PRAWFSBLAWG, <http://prawfsblawg.blogs.com/prawfsblawg/2010/06/index.html> (June 28, 2010, 5:38 PM) (reporting "approximately two hundred" federal lawsuits challenging gun control laws since *Heller*).

<sup>70</sup> Kiehl, *supra* note 69, at 1141-42.

<sup>71</sup> *Id.* at 1141; see also *McDonald*, 130 S. Ct. at 3115 (Stevens, J., dissenting) (expressing concern that the decision forces federal courts to evaluate gun policy "under a standard of review we have not even established").

<sup>72</sup> TINA MEHR & ADAM WINKLER, AM. CONSTITUTION SOC'Y, ISSUE BRIEF: THE STANDARDLESS SECOND AMENDMENT 0 (2010), available at [http://www.aclaw.org/sites/default/files/Mehr\\_and\\_Winkler\\_Standardless\\_Second\\_Amendment.pdf](http://www.aclaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf). One recent exception comes from a federal court in the District of Maryland. In *Woollard v. Sheridan*, the court addressed whether the Second Amendment protects gun ownership beyond the home, which the court acknowledged was "left unanswered in *Heller*." No. 10-2068, 2012 WL 695674, at \*3 (D. Md. Mar. 2, 2012). The court concluded that there was at least some protection for gun ownership outside the home because it determined, inter alia, that the same factors that drove the *Heller* decision—self-defense and the (conditional) right to a weapon in a confrontation—were present, if to a lesser degree, in certain situations beyond the home. *Id.* at \*5-7.

<sup>73</sup> E.g., Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1259 (2009).

## II. WHY MINIMALISM? THREE THEORIES

Professor Sunstein's account of *Heller* briefly touches upon one reason courts exercise judicial minimalism when faced with issues of national interest: they want to provide a starting point for doctrinal shifts. But that is not the only motivation for minimalism. In addition to doctrinal shifts, this Section explores two other forces that might lead courts to minimalist rulings. First, there is the argument that courts simply *ought* to exercise restraint as a matter of democratic principle. Second, as Sunstein mentions, courts might use minimalism to set up future doctrinal shifts. Finally, courts use minimalism as a way to preserve power when forced to make controversial or potentially unpopular decisions.

A consideration of the range of factors that motivate courts to engage in minimalism is not merely an academic exercise. The inquiry exposes the varying impacts of minimalist rulings on the law and the role of the Court vis-à-vis its coordinate branches more broadly. This, in turn, allows for a more complete understanding of what the Court was trying to do in *Heller* and *McDonald*. And if this framework adequately categorizes minimalist rulings beyond the two addressed herein, it may provide a guide for categorizing other cases.

### A. Mandatory Minimalism

Many theorists argue that judges must defer to the political will of the democratic branches except in the most egregious scenarios. Let us call this *mandatory minimalism*. A normative version of this view is perhaps best associated with Justice Felix Frankfurter,<sup>74</sup> whose dissent in *West Virginia State Board of Education v. Barnette*<sup>75</sup> was a paean to judicial minimalism and democratic values. In *Barnette*, the Court invalidated on First Amendment grounds West Virginia's requirement that all students recite the Pledge of Allegiance each morning at school.<sup>76</sup> Admonishing the Court for its ambition, Justice Frankfurter wrote that judges are "not justified in writing [their] private notions of policy into the Constitution" and that their "own opinion[s] about the wisdom or evil of a law should be excluded altogether"

---

<sup>74</sup> See NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 105 (2010) (relating that Frankfurter, before he was a Justice and in response to the *Lochner* era cases, led the development of a constitutional philosophy "based on the principle of judicial restraint"); see also MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 74 (1982) ("[Frankfurter] did not endorse government by the judiciary . . .").

<sup>75</sup> 319 U.S. 624 (1943).

<sup>76</sup> *Id.* at 642.

when reaching a decision.<sup>77</sup> The furthest a judge ought to go, Justice Frankfurter stressed, is to consider “whether legislators could *in reason* have enacted such a law.”<sup>78</sup> Anything more, he said, “prevent[s] the full play of the democratic process.”<sup>79</sup> Even where a provision of the Bill of Rights is involved, Justice Frankfurter argued, the Court ought not to arrogate any “greater veto power.”<sup>80</sup> To consider the courts to be the “primary protector” of *any* right is improper, as legislatures “are ultimate guardians of the liberties . . . in quite as great a degree as the courts.”<sup>81</sup>

There are other, more modern arguments for mandatory minimalism that focus on its practical virtues. For instance, with respect to wartime rulings, Professor Sunstein has argued that courts should issue “narrow, incompletely theorized” rulings as to executive war powers.<sup>82</sup> This practice, he says, “avoid[s] excessive intrusions into the executive domain.”<sup>83</sup> Moreover, it errs on the side of nonintervention in a situation where a court invariably has incomplete knowledge.<sup>84</sup> In other words, a court should defer to the other branches when, as a practical matter, the court is not well situated to decide the question before it.

### B. *Foot-in-the-Door Minimalism*

Minimalism can also be viewed as a strategic decision and not a mandate. After convincingly demonstrating that *Heller* was an example of judicial minimalism,<sup>85</sup> Professor Sunstein notes that the *Heller* holding may have

<sup>77</sup> *Id.* at 647 (Frankfurter, J., dissenting).

<sup>78</sup> *Id.* (emphasis added).

<sup>79</sup> *Id.* at 650; see also Thayer, *supra* note 62, at 144 (“[H]aving regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.”).

<sup>80</sup> *Barnette*, 319 U.S. at 648-49 (Frankfurter, J., dissenting). *But see* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . .”).

<sup>81</sup> *Barnette*, 319 U.S. at 648-49 (Frankfurter, J., dissenting) (quoting *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.)).

<sup>82</sup> Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 103, 108.

<sup>83</sup> *Id.* The same practice also avoids “setting precedents that will, in retrospect,” give the President too much power. *Id.*

<sup>84</sup> *Id.* at 76-77.

<sup>85</sup> See *supra* notes 56-64 and accompanying text. Here it is worth noting that “minimalism” can mean several things. For example, the minimalism I attribute to Justice Frankfurter, *supra* notes 74-81 and accompanying text, prescribes deference to the legislative will, while the “minimalism” Sunstein ascribes to *Heller* and *Griswold* is characterized by effecting doctrinal shifts

been a deliberately small step intended to serve as a “starting point for doctrinal innovation.”<sup>86</sup> Let us call this *foot-in-the-door minimalism*. Sunstein suggests two reasons why the Court might begin a long judicial journey with a single, fairly small step:

One reason is sensible litigation strategy; if the goal is to convince the Court to embark on a new path, the best strategy is usually to find an outlier and ask the Court to invalidate it in a way that leaves a door for future expansion. And if the Court itself is initiating a new avenue for potential invalidations, it is likely to begin narrowly and in a way that does not fit badly with public convictions . . . .<sup>87</sup>

Sunstein suggests that *Heller* could be an example of this kind of minimalism.<sup>88</sup> If it is, then his comparison to *Griswold* holds up well. *Griswold* held narrowly that the Connecticut prohibition on the use of contraception irreconcilably conflicted with “the notions of privacy surrounding the marriage relationship.”<sup>89</sup> The Court did not address the constitutionality of banning the purchase or sale of contraception, nor of the right of unmarried persons to use it.<sup>90</sup> Nevertheless, in subsequent holdings, the Court expanded the right to privacy to protect a growing sphere of activity from state regulation.<sup>91</sup>

It is far from certain, however, that the *Heller* Court was employing foot-in-the-door minimalism. The evidence points both ways. The Supreme Court signaled in *Heller* that it would revisit this nascent area of Second

---

but on narrow grounds. There is, of course, an analytic distinction to be drawn. Nevertheless, for the purposes of this Comment, I allow both judicial approaches to fall under an umbrella of “minimalism.” Both can be contrasted to a more active judicial role that might, say, invalidate legislative action with broad, sweeping rulings that make demanding requirements of the states or the federal political branches. See, e.g., Wilkinson, *supra* note 51, at 289 (offering *Roe v. Wade*, 410 U.S. 113 (1973), as an example of a holding that was “uncommonly aggressive” and “establish[ed] a framework far beyond the issues presented” in the case).

<sup>86</sup> Sunstein, *supra* note 11, at 264.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (emphasis added).

<sup>90</sup> Sunstein, *supra* note 11, at 267.

<sup>91</sup> See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (broadening the right to privacy to include the right to procure an abortion, subject to certain permissible state limitations); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (establishing the right of unmarried persons to use contraceptive devices and stating that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”).

Amendment law.<sup>92</sup> Indeed, *McDonald* itself represents an expansion of the doctrine.<sup>93</sup> On the other hand, one commentator has argued that *Heller*'s reasoning is particularly resistant to future expansion.<sup>94</sup> On that view, proscribing total gun bans while overtly protecting many other prohibitions (with a list that “d[id] not purport to be exhaustive”<sup>95</sup>) laid down a bright-line rule and “mov[ed] other dominoes away from the edge of the table.”<sup>96</sup> In any event, the presence of foot-in-the-door minimalism is a question of intent—a ruling that *permits* judicial expansion is not necessarily written with that objective in mind.<sup>97</sup> Without more input from the Court, it is simply too early to tell whether *Heller* is an instance of foot-in-the-door minimalism.

### C. Power-Preserving Minimalism

There is a third factor that has, at times, motivated the Court to employ minimalism: its desire to preserve judicial supremacy<sup>98</sup> over constitutional interpretation. I call this approach *power-preserving minimalism*. Preserving judicial power may sound like gilding the lily, for the Court's role as the “ultimate expositor of the constitutional text”<sup>99</sup> already enjoys widespread acceptance.<sup>100</sup> But ‘twas not ever thus: judicial supremacy is a product of history.<sup>101</sup>

---

<sup>92</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (“[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .”).

<sup>93</sup> Cf. Sunstein, *supra* note 11, at 268 (demonstrating *Heller*'s narrowness by noting that the Court left open certain questions, including whether the Second Amendment was applicable to the states).

<sup>94</sup> See Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1195-1200 (2009) (calling the *Heller* decision a “less-than-potent legal weapon against other gun laws”).

<sup>95</sup> *Id.* at 1195 (citing *Heller*, 554 U.S. at 627 n.26).

<sup>96</sup> *Id.* at 1196.

<sup>97</sup> Moreover, individual Justices within the majority may have conceptualized the opinion differently. Cf. Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry A. Blackmun*, 34 U. RICH. L. REV. 285, 288 (2000) (relating that the need for five votes means that many Supreme Court opinions “are the result of compromise” (internal quotations omitted)).

<sup>98</sup> “Judicial supremacy” is something of a term of art, but for present purposes it may be understood as the state of affairs wherein the Court’s pronouncements as to the meaning of the Constitution in any given case are binding not only on the parties to the litigation, but on everyone, inside and outside the government, unless or until there is a doctrinal change or constitutional amendment.

<sup>99</sup> *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

<sup>100</sup> See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 228-33 (2004) (“The acceptance of judicial authority is most apparent . . . in the all-but-complete disappearance of public challenges to the Justices’ supremacy

Structurally, of course, there is very little reason for the Court to command as much influence as it does today. The Constitution does not mandate judicial review or judicial supremacy,<sup>102</sup> and the Court has no army with which to impose its will. Indeed, as Alexander Hamilton said, the Judiciary is the only branch of government that has “neither FORCE nor WILL but merely judgment.”<sup>103</sup> It “ultimately depend[s] upon the aid of the executive arm even for the efficacy of its judgments.”<sup>104</sup> Judicial supremacy, then, is entirely the result of—and dependent upon—the coordinate branches’ compliance with judicial decisions.

Today, we take that compliance for granted, but it is not inconceivable that a President would decline to enforce the will of the Court.<sup>105</sup> A President may pay a price at the polls if she ignores the high court, but that

over constitutional law.”); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 27 (2007) (“[J]udicial supremacy has grown and become more secure over time.”).

<sup>101</sup> See, e.g., KRAMER, *supra* note 100, at 45. Beyond empirical truths about the presence or absence of judicial supremacy in our national government, the *normative* value of judicial supremacy is actively debated. See generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending judicial supremacy on the grounds that it provides a crucial settling function in the law); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 489-502 (2006) (arguing that, in the long run, the process of judicial nominations keeps the Court in line with dominant political views); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing that judicial supremacy is problematic in that it subverts the democratic will of the people).

<sup>102</sup> See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (1962) (“[T]his power of judicial review, as it is called, does not derive from any explicit constitutional command.”); Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2000 (2011) (explaining that Americans follow the Supreme Court’s rulings as a result of “history . . . judicial and public practices . . . the development of customs and understandings among the public”); see also U.S. CONST. art. III.

<sup>103</sup> THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>104</sup> *Id.*; see also Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 278-84 (1994) (arguing that judicial supremacy exists mainly at the sufferance of acquiescent executives, whose historical tolerance of such supremacy may not have been intended by the Founders). The Court’s basic dependence on the political branches may prevent it from requiring those branches to adhere to overly restrictive readings of vague constitutional commands. This may help explain the Court’s “lenient scrutiny for laws having only disparate impacts on minorities” even though such lenience is “hardly [an] inevitable reading[] of the U.S. Constitution.” William N. Eskridge, Jr., *America’s Statutory “Constitution,”* 41 U.C. DAVIS L. REV. 1, 32 (2007) (citation omitted).

<sup>105</sup> Cf. *Seven-Sky v. Holder*, 661 F.3d 1, 50 n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction) (“Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, *even if a court has held or would hold the statute constitutional.*” (emphasis added)), *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).

force is mere political reality, not constitutional necessity.<sup>106</sup> So in that sense, the Court is beholden to the people, too.<sup>107</sup> Its credibility and its power come from the fact the people, as a matter of fact, trust the Court, do what it says, and elect presidents who enforce that norm.<sup>108</sup>

Once we accept the proposition that judicial supremacy is tentative, we should acknowledge that when the Court perceives a particular case as threatening its influence,<sup>109</sup> it may choose to decide a case with a deliberate eye toward preserving its own power. In some of those cases, the Court will choose minimalism as the appropriate judicial tool to give effect to this desire.<sup>110</sup> In my view, this approach is necessary when (1) the case addresses

<sup>106</sup> See WHITTINGTON, *supra* note 100, at 26-27 (arguing that judicial supremacy is sustainable for as long as “[t]he president . . . see[s] some political value in deferring to the Court”).

<sup>107</sup> See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 370, 375 (2009) (“Judicial power exists at popular dispensation. . . . [W]hen judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices.”); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2602 (2003) (“[C]onsistent with the concept of popular constitutionalism, the judicial veto necessarily must fall within a range acceptable to popular judgment over time. . . . The question is whether on reflection a judicial decision will win popular acceptance.”). Or, more pithily, “[t]he court likes to pretend it’s completely above public opinion, inured to the momentary zigs and zags of the polls. But most of us know that nothing could be further from the truth.” Dahlia Lithwick, *It’s Not About the Law, Stupid*, SLATE (Mar. 22, 2012, 7:58 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/03/the\\_supreme\\_court\\_is\\_more\\_concerned\\_with\\_the\\_politics\\_of\\_the\\_health\\_care\\_debate\\_than\\_the\\_law\\_single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/the_supreme_court_is_more_concerned_with_the_politics_of_the_health_care_debate_than_the_law_single.html).

<sup>108</sup> Cf. Breyer, *supra* note 102, at 2009 (characterizing the Court’s civil rights–era statements that Southern schools were obligated to desegregate, even in “instances that were not the direct subject of litigation . . . [as] an appeal to law-abiding citizens to follow *Brown’s* law voluntarily” (emphasis added)).

<sup>109</sup> At the extreme, the risk may be one of actual defiance, but it need not be. It is possible for the general public to comply with a Supreme Court decision, yet lose faith in the Court—an outcome which is itself undesirable. *Bush v. Gore* is an oft-cited example of this phenomenon. Critics of the decision not only disagreed on the law but “went after the justices’ motives and their integrity.” JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 181 (2007); see also *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) (“It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today’s decision.”). But “despite the strong opposition to the decision . . . Americans did not riot in the streets, they did not resort to violence, they reacted peacefully and then followed the Court.” Breyer, *supra* note 102, at 2011. That rioting did *not* break out following *Bush*, and that many Americans accepted an outcome with which they disagreed, is perhaps empirical support for Larry Alexander and Frederick Schauer’s position on judicial supremacy—that “there are virtues in settlement for settlement’s sake.” Alexander & Schauer, *supra* note 101, at 1385.

<sup>110</sup> This is certainly not the only approach available to courts facing possible noncompliance. A court can call attention to defiance in order to highlight what it sees as a dangerous power imbalance. In 1861, in *Ex parte Merryman*, Chief Justice Roger Taney (sitting as a circuit judge) ruled that President Lincoln did not have the authority to suspend habeas corpus even though he knew that Lincoln would not comply. 17 F. Cas. 144, 152-53 (Taney, Circuit Justice, C.C.D. Md.

an issue of broad and intense public concern; (2) public opinion is divided (or, worse, squarely on the losing side); and (3) the Court feels legally compelled to rule against the state.<sup>111</sup> Cases, in short, like *Heller*.<sup>112</sup> The hallmarks of power-preserving minimalism are narrow (even if innovative) legal reasoning and, where applicable, minimally demanding remedies. Such outcomes delegate the specifics of effectuating a ruling to political, non-judicial actors.

Delegating control over the remedy serves a dual purpose. First, it placates those opposed to the decision by giving them some (political) control over its manifestation. At the same time, delegation presupposes, and thus preserves, power. One cannot delegate a power that one does not have. Thus, the Court maintains its authority by declining in that instance to use all of it.

Power-preserving minimalism is not inconsistent with foot-in-the-door minimalism.<sup>113</sup> It is, however, a subtle expansion on that notion. Foot-in-the-door minimalism holds that small doctrinal disruptions in a given area

1861) (No. 9,487). Rather than try to fashion a minimal remedy and preserve some semblance of power, Taney acknowledged the conflict openly: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome." *Id.*

The Court has also avoided substantively divisive issues by appealing to procedural or prudential doctrines. See Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 108-12 (2007) (noting that the Court's justiciability doctrine provides "a mechanism by which to avoid awkward cases"). In *Elk Grove Unified School District v. Newdow*, for example, the Court was asked to decide whether Congress' addition of "under God" to the Pledge of Allegiance violated the Establishment Clause. 542 U.S. 1, 5 (2004). Declining to reach the merits of the dispute, the Court ruled that Newdow, the plaintiff below, lacked standing to sue. *Id.* at 17-18. Commentators and some concurring justices argued that the Court's standing rationale was weak and was crafted specifically to avoid deciding the thorny First Amendment issue. See, e.g., *id.* at 18 (Rehnquist, C.J., concurring in the judgment) ("The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim."); Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004) ("In *Newdow*, it may have been politically impossible to affirm and legally impossible to reverse."); Siegel, *supra*, at 111 ("[T]he Court managed to dump the case only by bringing in considerations never before mentioned in standing decisions. . . . [I]n its efforts to rid itself of one awkward case, the Court . . . made bad standing law . . .").

<sup>111</sup> Of course, when the Court rules *for* the state, the compliance challenge drops away as a practical matter. Ruling for the state affirms its right to do whatever it is already doing. As this factor reaffirms, power-preserving minimalism counsels narrow rulings and minimally demanding remedies once certain legal decisions have already been made. It ought not to—and I do not believe it does—affect the Court's resolution of discrete legal issues.

<sup>112</sup> As mentioned, *supra* note 24, another example is the Court's recent decision on the constitutionality of the Affordable Care Act.

<sup>113</sup> For instance, I argue in Part III that the holding in *Brown v. Board of Education*, 347 U.S. 483 (1954), was an example of power-preserving minimalism. For the suggestion that *Brown* was an example of foot-in-the-door minimalism, see Sunstein, *supra* note 11, at 262-63, 266-67.

of the law (such as privacy or the Second Amendment) can create an opportunity for the Court to evolve that doctrine more significantly over time and with more decisions.<sup>114</sup> This idea is itself innovative. The Court, in order to *maximize* its impact, must perhaps *minimize* its initial splash.<sup>115</sup>

I do not disagree. As with foot-in-the-door minimalism, power-preserving minimalism suggests that maximal eventual impact can at times require a delicate initial touch. But power-preserving minimalism goes a step further by suggesting that the effect of minimalism is not necessarily localized to any particular doctrine.<sup>116</sup> Rather, maintenance of the Court's maximal authority "to say what the law is"<sup>117</sup>—what *any* part of the law is—depends on its judicious deployment of minimalism.<sup>118</sup> Thus, while foot-in-the-door minimalism is concerned with the particular doctrine before the Court, power-preserving minimalism is concerned with the Court's role in our constitutional system.

### III. HISTORICAL EXAMPLES OF POWER-PRESERVING MINIMALISM: *MARBURY* AND *BROWN*

Below I argue that *Heller* and *McDonald* are examples of power-preserving minimalism. First, however, it is worthwhile to identify other instances of this kind of minimalism in the Court's history, lest the theory seem fitted to two cases, post hoc.<sup>119</sup> The examples also allow us to analyze the tactic in greater depth.

One example is *Marbury v. Madison*.<sup>120</sup> William Marbury had been appointed justice of the peace by the outgoing President Adams, but had then been denied his commission by newly elected President Jefferson's Secretary of State, James Madison.<sup>121</sup> Marbury petitioned the Supreme

<sup>114</sup> See Sunstein, *supra* note 11, at 264 ("Minimalism . . . is a common starting point for doctrinal innovation.").

<sup>115</sup> See *id.* (arguing that "new [doctrinal] departure[s]" must be "drawn in narrow terms that fit well with public convictions").

<sup>116</sup> For this point I am indebted to Professor Sophia Z. Lee.

<sup>117</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>118</sup> Cf. Michiko Kakutani, *9 Justices Who Sit in the Eye of Storms*, N.Y. TIMES, Oct. 23, 2012, at C1 (reviewing JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* (2012)) (crediting Mr. Toobin and other Court observers with the view that, in upholding the Affordable Care Act, "the chief justice was actually playing the long game" and preserving the court's power for future cases).

<sup>119</sup> At worst, the theory is fitted to *four* cases, post hoc.

<sup>120</sup> 5 U.S. (1 Cranch) 137. For a discussion of how *Marbury* and other decisions throughout the Court's history have helped to shape the Court's role and solidify its credibility among the American people, see Breyer, *supra* note 102, at 2000-03.

<sup>121</sup> Breyer, *supra* note 102, at 2001-02.

Court for a writ of mandamus directing Madison to deliver the commission.<sup>122</sup> The case presented an early challenge to the Court's power: clearly the President or his surrogate, Madison, was legally obligated to deliver the commission,<sup>123</sup> but, as Chief Justice Marshall knew, if the Court ruled as much, Jefferson would not comply.<sup>124</sup>

Enter power-preserving minimalism—or, in Justice Breyer's words, "Chief Houdini Marshall."<sup>125</sup> The Court determined that Jefferson was obligated to deliver the commission,<sup>126</sup> but it declined to order him to do so. Holding that the Judiciary Act of 1789, which had provided Marbury with jurisdiction to sue, was unconstitutional under Article III, the Court dismissed the petition.<sup>127</sup> Compliance was guaranteed: "Jefferson could not defy the Court, for he had won."<sup>128</sup> Yet, in the background, the Court had (1) asserted the awesome power to invalidate acts of Congress it deemed unconstitutional, and (2) reached the legal conclusion it felt obligated to reach.<sup>129</sup> *Marbury* displays the qualities of power-preserving minimalism discussed in Part II. The Court was compelled to rule against Marbury (and Jefferson, the Executive), but it did so without requiring any action. As a result, Jefferson could not defy the Court and thus could not deplete its power.

Another example is *Brown v. Board of Education*.<sup>130</sup> *Brown*, of course, was the 1954 case that challenged many states' practice of segregating schools on the basis of race.<sup>131</sup> Ultimately, the Justices declared that segregating schools on the basis of race violates the Equal Protection Clause<sup>132</sup> and charged the states with ending the practice "with all deliberate speed."<sup>133</sup>

That decision was not reached without due consideration of the Court's ability to compel action. In deciding *Brown*, the Court was aware of the

<sup>122</sup> *Id.* at 2002.

<sup>123</sup> *Marbury*, 5 U.S. (1 Cranch) at 162.

<sup>124</sup> Breyer, *supra* note 102, at 2003.

<sup>125</sup> *Id.*

<sup>126</sup> *Marbury*, 5 U.S. (1 Cranch) at 168.

<sup>127</sup> *Id.* at 175-80.

<sup>128</sup> Breyer, *supra* note 102, at 2003.

<sup>129</sup> *Id.* Discussions of *Marbury* frequently border on the obsequious, *see, e.g.*, BICKEL, *supra* note 102, at 1 (crediting Chief Justice Marshall with having "summoned [the judiciary] up out of the constitutional vapors"), but it has not escaped criticism. *See, e.g.*, JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 17 (2011) ("I have never found satisfying Marshall's explication of why the statute was unconstitutional.").

<sup>130</sup> *Brown I*, 347 U.S. 483 (1954); *see also* *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

<sup>131</sup> *Brown I*, 347 U.S. at 487-88.

<sup>132</sup> *Id.* at 495.

<sup>133</sup> *Brown II*, 349 U.S. at 301.

“perceived importance of avoiding unenforceable orders.”<sup>134</sup> For although the public as a whole supported desegregation,<sup>135</sup> it was disfavored in the South by a ratio of four to one.<sup>136</sup> And the South, of course, was where segregation was most entrenched and where a judicial decree would have to do the most work.<sup>137</sup> In a memorandum written to the Conference before the Court issued its decision, Justice Jackson expressed doubt that declaring segregation unconstitutional would be “self-executing,” and he feared that an ignored mandate could bring “the judicial process into discredit.”<sup>138</sup> Any declaration invalidating segregation, he wrote, should allow for gradual progress, for “it would retard acceptance of this decision” for the Court to promulgate “a needlessly ruthless decree.”<sup>139</sup> The legal issue was comparatively simple. Although the Court’s ultimate reasoning has been criticized,<sup>140</sup> its conclusion that segregation was unconstitutional was undoubtedly correct.<sup>141</sup>

Given the constraints it faced, the Court took a minimalist tack. It “announced its principle,”<sup>142</sup> and then, a year later, issued a vague remedy which required little immediate action and delegated to the states the power to determine the proper pace and method of desegregation.<sup>143</sup> This judicial

<sup>134</sup> MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* 80 (2007).

<sup>135</sup> See FRIEDMAN, *supra* note 107, at 245 (noting that polls indicated that slightly more than half of the country agreed with the *Brown* decision at the time).

<sup>136</sup> See *Timeline of Polling History: Events That Shaped the United States, and the World*, GALLUP, <http://www.gallup.com/poll/9967/Timeline-Polling-History-Events-Shaped-United-States-World.aspx> (last visited Nov. 16, 2011) (providing poll data from 1955 indicating that “72% in [the] East favor[ed] desegregation, 61% in the Midwest, 77% in the West, 20% in the South” (emphasis added)).

<sup>137</sup> Cf. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 90 (2d ed. 2008) (“Southern judges were in a difficult position. . . . [T]he federal [judges] in the Southern states were required to dismantle a social system they had grown up with . . .”).

<sup>138</sup> Memorandum by Mr. Justice Jackson to the Conference 12-13 (Mar. 15, 1954) [hereinafter Jackson Memo] (copy on file with author).

<sup>139</sup> *Id.* at 4.

<sup>140</sup> See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1484-89 & n.49 (2004) (cataloguing grounds on which the Court’s reasoning has been criticized).

<sup>141</sup> See STEVENS, *supra* note 129, at 99 (calling the decision “dead right”). Disagreements about the treatment of race in the law persist, but everyone marshals *Brown* as support for their side of the debate. Compare *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (plurality opinion) (citing *Brown* as support for the Court’s invalidation of a school integration program), with *id.* at 804 (Breyer, J., dissenting) (pointing to precedent in which *Brown* was read to require race-conscious integration programs).

<sup>142</sup> BICKEL, *supra* note 102, at 254.

<sup>143</sup> See *Brown II*, 349 U.S. 294, 300-01 (1955) (permitting courts to “find that additional time is necessary to carry out the ruling” and listing several acceptable justifications for the delay).

delegation blunted the risk of defiance. It showed restraint by refusing to prescribe a “constructive policy”<sup>144</sup> but allowed the Court to remain in (apparent) control, since even modest progress had the Court’s imprimatur.

For all of its strategy, *Brown* encountered massive resistance. “Virtually nothing happened next.”<sup>145</sup> One governor brazenly announced that segregation would continue in his state, while many other states engaged in so-called “token integration”—admitting just a few black students across entire school districts.<sup>146</sup> However, this cold reception could have been much more damaging in terms of power preservation had the Court issued a more demanding remedy.<sup>147</sup>

Overly prescriptive remedies are problematic because, insofar as compliance gets harder, defiance gets easier. And defiance, recall, is the biggest threat to judicial supremacy. *Roe v. Wade* illustrates the danger of issuing too broad a ruling. In *Roe*, the Court invalidated a Texas law banning abortions and, in doing so, established a specific, trimester-based framework against which all abortion laws were to be measured.<sup>148</sup> The result was to declare invalid abortion laws across the country, and many states resisted.<sup>149</sup> Because *Roe* was so specific, to resist the decision at all was to defy the Court. *Brown*, on the other hand, was much more vague. *Any* desegregation that followed the decision had the Court’s backing (for better or worse), which allowed the Court to remain ostensibly in control and led to modest progress. For example, token integration, as small a step as it was, took political courage on the part of Southern moderate school board members—

---

<sup>144</sup> Jackson Memo, *supra* note 138, at 13.

<sup>145</sup> Breyer, *supra* note 102, at 2006.

<sup>146</sup> KLARMAN, *supra* note 134, at 95-101.

<sup>147</sup> For the view that a more expedient, more demanding decree would have actually been more effective (notwithstanding power-preservation concerns), see STEVENS, *supra* note 129, at 99-101. Cf. KLARMAN, *supra* note 134, at 100-01 (suggesting that by putting its imprimatur on gradual desegregation, the Court gave cover to Southern resistance, rather than forcing them to choose between integration and open—and potentially politically costly—defiance).

<sup>148</sup> 410 U.S. 113, 153, 162-65 (1973).

<sup>149</sup> Cf. Jason A. Adkins, Note, *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 MINN. L. REV. 500, 516 (2005) (noting that, for two decades following *Roe*, state abortion laws continued to be challenged and overturned). Resistance to *Roe* has hardly abated. See generally, e.g., Monica Davey, *South Dakota to Revisit Restrictions on Abortion*, N.Y. TIMES, Apr. 26, 2008, at A14 (reporting that four states have “trigger laws” which would ban abortion immediately upon *Roe*’s reversal); Erik Eckholm, *Voters in Mississippi to Weigh Amendment on Conception as the Start of Life*, N.Y. TIMES, Oct. 26, 2011, at A16 (describing proposed state “personhood” amendments); B.A. Robinson, *Major U.S. Laws Concerning Abortion*, RELIGIOUS-TOLERANCE.ORG, [http://www.religioustolerance.org/abo\\_supr.htm](http://www.religioustolerance.org/abo_supr.htm) (last updated Jan. 31, 2008) (“At least 16 states still have pre-1973 anti-abortion laws on the books even though they are clearly unconstitutional . . .”).

courage surely heartened by the Court's mandate.<sup>150</sup> Declaring token integration unconstitutional would have withdrawn that political cover and, therefore, could have backfired.<sup>151</sup> Sanctioning minor progress enlarged the group of people considered to be furthering *Brown's* mandate.

The difference is not purely cosmetic. The public's perception of the opinion affects the public's perception of the *Court*, which in turn affects the Court's power.<sup>152</sup> *Roe's* inflexible framework stole focus from the general constitutional issue; defiance was too easy.<sup>153</sup> *Brown*, on the other hand, decided very little aside from the constitutional question. True defiance was difficult except for those taking the uncompromising position that the Constitution *permits* segregated schools.<sup>154</sup>

Finally, and precisely because it left so much undecided, the *Brown* Court reserved for itself additional political capital to reinforce its understanding of equal protection as resistance to the decision eroded. *Roe* left no such room.<sup>155</sup> As Professor Sunstein has observed, it is "relevant to the evaluation of *Brown* that the Court did not impose its principle all at once, and that it allowed room for other branches to discuss the mandate and to adapt themselves to it."<sup>156</sup>

When the political tide started to turn, the Court, having initially asked for so little, possessed unused reserves. After President Kennedy took office and bemoaned the "painfully" slow pace of integration,<sup>157</sup> the emboldened Court struck down a Virginia segregation scheme, declaring that "[t]here

<sup>150</sup> See KLARMAN, *supra* note 134, at 98 (explaining that politicians who advocated integration in the South put themselves in "risky positions").

<sup>151</sup> See *id.* at 95-100 (explaining that political pressures necessitated "gradualism" in integration).

<sup>152</sup> See *supra* Section II.C.

<sup>153</sup> As a result, the opinion has drawn criticism from all sides of the political spectrum. See, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) ("Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades is *Roe v. Wade*." (footnote omitted)); Wilkinson, *supra* note 51, at 289-93 (arguing that the Court in *Roe* usurped the legislative role).

<sup>154</sup> *Brown* is certainly susceptible to the critique that its lax remedial decree allowed segregation to linger longer than it otherwise might have. See *supra* note 147. But from a compliance perspective, asking too little is less risky than asking too much.

<sup>155</sup> *Roe's* rigidity (and perhaps the Court's rightward shift) may explain why the decision has been continually cabined in later abortion cases. See *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (upholding the federal Partial-Birth Abortion Ban Act); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876-78 (1992) (discarding *Roe's* trimester framework in favor of an "undue burden" standard that could permit interference with the right to have an abortion before viability).

<sup>156</sup> Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 51 (1996); see also BICKEL, *supra* note 102, at 254 (arguing that the Court set a low bar and provided a rebuke "only when a suggested expedient amounted to the abandonment of principle").

<sup>157</sup> KLARMAN, *supra* note 134, at 101; see also *id.* (chronicling the political change that permitted the pace of desegregation to accelerate).

has been entirely too much deliberation and not enough speed in enforcing . . . *Brown*.”<sup>158</sup> The Court had left itself room to fortify its mandate over time, while insulating itself from power-draining defiance. Although this tactic resembles foot-in-the-door minimalism from a distance, it is distinguishable when analyzed in terms of its motivation. On my view, the Court’s willingness to reinforce *Brown* with stronger language stemmed from its determination that such forcefulness would effectuate the central holding of *Brown* without harming the Court’s influence. On a foot-in-the-door account, the Court’s motivation would be to expand *Brown* doctrinally and make new law.

#### IV. *HELLER* AS *BROWN*

Professor Sunstein is correct to connect *Heller* to *Griswold* in light of the minimalist qualities they share. However, *Heller* may also be compared to *Brown* with respect to the factors that motivated that minimalist approach. Forced to make a controversial decision on a topic of public interest, the *Heller* and *McDonald* Courts, like the *Brown* Court, pronounced a new legal principle and demanded very little else. They did this in the service of preserving their status as supreme constitutional interpreters. I argue above that power-preserving minimalism is most appropriate when a case is important to the public, public opinion is divided, and the Court feels compelled to rule against the state. All three factors were present in *Heller* and *McDonald*.

As in *Brown*, compliance with a sweeping mandate would have been difficult because gun control is an issue of public importance. The federal

---

<sup>158</sup> *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 229 (1964); *see also Goss v. Bd. of Educ.*, 373 U.S. 683, 689 (1963) (recounting its mandate that integration be achieved with “all deliberate speed” but noting that “eight years after this decree was rendered . . . the context in which we must interpret and apply this language to plans for desegregation has been significantly altered”).

The eventual widespread acceptance of *Brown* required shifts in politics and public opinion, as well as increasingly forceful Supreme Court opinions. *Brown* probably served as an impetus for some of those shifts, but public acceptance also permitted bolder rulings. *See supra* note 145. The questions of causation in this situation are extremely complicated and beyond the scope of this Comment. Scholars dispute whether the Supreme Court shapes public opinion or is merely shaped by it. Compare FRIEDMAN, *supra* note 107, at 370 (arguing that, as a practical matter, the Court is bound to public sentiments), and ROSENBERG, *supra* note 137, at 108 (cautioning that just because segregation ended *after Brown* does not mean it ended *because of Brown*), with Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1216 (2010) (“[I]f the Court moves the law three steps to the left and the political reaction leads the Court . . . two steps back to the right, the world is not quite as it was before the Court first intervened.”).

government enacted its first major gun control law in 1934,<sup>159</sup> and the states have been regulating gun ownership since well before then.<sup>160</sup> Currently, every state in the Union regulates gun ownership to some extent,<sup>161</sup> and most of those regulations are more stringent than existing federal law.<sup>162</sup> A sweeping ruling—for instance, that the Second Amendment requires any gun control law to satisfy “strict scrutiny”—could have invalidated dozens of gun control laws and, like *Roe*, would have starkly contrasted with the Court’s typical caution and gradualism in big cases. And had they gone that route, any resistance<sup>163</sup> would have given the impression of a weak Court.<sup>164</sup>

This risk was particularly palpable for the *McDonald* Court. First, an incorporation ruling affects fifty governments while a ruling interpreting federal law applies to just two. Second, forty-two states already “ha[d] constitutional provisions guaranteeing an individual right to bear arms,” and the courts in *all of those states* reviewed gun regulations under a “reasonableness” standard.<sup>165</sup> To demand strict scrutiny would have been either to declare that the federal Constitution protects a different right than forty-two similarly worded documents, or to imply that forty-two state judiciaries had erred.

Moreover, public opinion was divided. As Professor Sunstein notes, a majority of the national population supported an individual right.<sup>166</sup> However, *Brown* demonstrates that consensus at the highest level of generality is not the only relevant statistic.<sup>167</sup> When it comes to rulings

<sup>159</sup> *District of Columbia v. Heller*, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting).

<sup>160</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3113 (2010) (Stevens, J., dissenting) (recounting the history of state and municipal firearms regulations).

<sup>161</sup> See ATF REPORT, *supra* note 1 (documenting various state gun ownership regulations).

<sup>162</sup> Brief for the States of Illinois, Maryland, and New Jersey as Amici Curiae in Support of Respondents at 19-20, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 59029.

<sup>163</sup> It must be noted that mass invalidation of gun control laws would not require “implementation” in quite the same way as did *Brown*’s desegregation mandate. The invalidation would have been self-enforcing insofar as prosecutions under invalid laws would fail in any court. Nevertheless, as demonstrated by the backlash to *Roe*, resistance to a broad ruling can take forms short of literal defiance and can curtail or chill the public’s exercise of a right.

<sup>164</sup> Cf. Breyer, *supra* note 102, at 2006 (“Recognizing that compliance might take time, the Court held in *Brown II* that desegregation must proceed ‘with all deliberate speed.’” (citing *Brown II*, 349 U.S. 294, 301 (1955))).

<sup>165</sup> Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 711 (2007).

<sup>166</sup> See Sunstein, *supra* note 11, at 263. *Heller* was decided during the 2008 presidential campaign, during which both major-party candidates, Barack Obama and John McCain, expressed support for the decision. *Id.*

<sup>167</sup> See *supra* notes 135-39 and accompanying text. *But cf.* BICKEL, *supra* note 102, at 250 (“[E]ven if the task of the Court were . . . to follow the election returns, surely the relevant returns would be those from the nation as a whole, not from a white majority in a given region.”).

affecting local laws, local politicians—not national focus groups—are ultimately charged with compliance. And key local politicians opposed limitations on their ability to regulate gun ownership as a means of promoting public safety. The nonpartisan United States Conference of Mayors<sup>168</sup> wrote an amicus brief in *McDonald* opposing incorporation. They expressed concern that limiting states' ability to regulate gun ownership "could become a critical obstacle to the cities' efforts to combat violent crime."<sup>169</sup> And New York City Mayor Michael Bloomberg's reaction to the decision conveyed a similar sentiment. He did not focus on the newly articulated right but instead emphasized how much power localities seemed to retain.<sup>170</sup>

Finally, in both cases the Court felt legally compelled to rule against the laws being challenged and did so on the strength of a new constitutional rule. Whether one believes that *Heller* vindicated the original public meaning of the Second Amendment<sup>171</sup> or effected an unjustified about-face,<sup>172</sup> the Court had never before held that the Second Amendment protects an individual right to bear arms.<sup>173</sup> The innovation in *McDonald* was all the more explicit, because the Court had long before held, albeit on different grounds, that the Amendment did *not* restrain state governments.<sup>174</sup>

That left only the question of the holding's breadth. In *Heller*, the Court invalidated the D.C. handgun ban but went out of its way not to touch certain "longstanding prohibitions" on gun ownership.<sup>175</sup> And in *McDonald*, the Court ruled solely that the Second Amendment was incorporated

---

<sup>168</sup> See *About the U.S. Conference of Mayors*, U.S. CONF. MAYORS, <http://www.usmayors.org/about/overview.asp> (last visited Nov. 16, 2011).

<sup>169</sup> Brief of the United States Conference of Mayors as Amicus Curiae Supporting Respondents at 21, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 59030.

<sup>170</sup> See Press Release, NYC.GOV, Statement of Mayor Michael R. Bloomberg on Decision by U.S. Supreme Court in *McDonald v. Chicago* (June 28, 2010), available at [www.nyc.gov/html/om/html/2010a/pr291-10.html](http://www.nyc.gov/html/om/html/2010a/pr291-10.html) ("*Heller* and *McDonald* make clear that we can work to keep guns out of the hands of criminals and terrorists while . . . respecting . . . the constitutional rights of law abiding citizens. *That's what New York City has always done.*" (emphasis added)).

<sup>171</sup> See, e.g., Randy E. Barnett, Opinion, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (praising Justice Scalia's *Heller* opinion as "exemplary" and grounded in "extensive evidence of original meaning").

<sup>172</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 637-38 (2008) (Stevens, J., dissenting) (arguing that the Court in *Heller* abandoned its previous interpretation of the Second Amendment, from *United States v. Miller*, 307 U.S. 174 (1939), which was "the most natural reading" of the text and the "most faithful to the history of its adoption"); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 153-54 (2000) (providing "two major challenges to the individual right interpretation").

<sup>173</sup> See *Heller*, 554 U.S. at 625 (calling the question of the meaning of the Second Amendment "long judicially unresolved").

<sup>174</sup> See *supra* notes 44-45 and accompanying text.

<sup>175</sup> See *supra* notes 37-39 and accompanying text.

against the states and remanded the case for an examination of the challenged municipal laws. In neither case did the Court set a standard to steer lower courts in reviewing gun laws.<sup>176</sup> As the dissents presaged,<sup>177</sup> many lawsuits followed.<sup>178</sup> But those challenges have not fared well in the lower courts.<sup>179</sup>

Given the hot-button nature of the issue, the Court did well to rule narrowly and hence make only minimal demands of citizens and the political branches. On a divisive issue, the more the Court had asked for, the more influence it would have had to leverage. Instead, the Court's approach enunciated a principle and effectively delegated the responsibility for effecting and defining that principle to the democratic branches of the federal and state governments. It left those bodies in charge of gun policy while nonetheless preserving the power to review future rights violations. The *Heller* and *McDonald* decisions thus conformed to the power-preserving minimalist model. Like *Marbury* and *Brown*, both opinions were issued out of an awareness of the "perceived importance of avoiding unenforceable orders."<sup>180</sup> Justice Stevens's concern that courts would engage in "case-by-case judicial lawmaking to define the contours of acceptable gun-control"<sup>181</sup> has proven unfounded; those contours remain the purview of the democratic branches of government.

To be sure, the Court's lack of guidance leaves open the question of whether lower courts are giving proper effect to the Court's rulings.<sup>182</sup> It could be that the Supreme Court intended to delegate much of the job of interpreting the Second Amendment to the political branches, as seems to have happened, *or* it could be that lower courts are under-enforcing the Second Amendment to the Court's chagrin (which could itself be power preservation by lower courts—applying the right rule while avoiding unenforceable holdings). However, there are good reasons to think that the

<sup>176</sup> See *supra* note 72 and accompanying text; see also Nina Totenberg, *High Court Extends Gun Owners' Rights Nationwide*, NPR (June 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=128172317> (noting that the Court provided "little guidance" as to what types of gun regulations were permissible).

<sup>177</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3115 (2010) (Stevens, J., dissenting) ("[T]oday's decision invites an avalanche of litigation . . ."); *Heller*, 554 U.S. at 680 (Stevens, J., dissenting) (predicting that the decision "will surely give rise to a far more active judicial role in making vitally important national policy decisions").

<sup>178</sup> See *supra* note 69.

<sup>179</sup> See *supra* notes 70-72 and accompanying text.

<sup>180</sup> KLARMAN, *supra* note 134, at 80.

<sup>181</sup> *Heller*, 554 U.S. at 680 (Stevens, J., dissenting).

<sup>182</sup> *Brown* was an easier case in that respect: the Court explicitly countenanced gradual progress.

lower courts are applying the law correctly. First, a permissive rule aligns the federal Constitution with the forty-two state constitutions that already protect an individual right to bear arms.<sup>183</sup> Second, even the narrow holding was a significant change in the law. The survival of most gun control legislation did not dampen the victory for gun-rights advocates.<sup>184</sup> In particular, the Bush Administration, which filed an amicus brief in *Heller* supporting the individual right, concurrently listed the prosecution of gun crimes as one of its top enforcement priorities.<sup>185</sup> Consistent with that priority, the government's brief proposed an even *more* cabined interpretation of the Second Amendment than the one the Court ultimately provided.<sup>186</sup> In short, gun-rights advocates did not see *Heller* as a victory in name only.<sup>187</sup>

### CONCLUSION

In 2011, Dick Heller—of *Heller* fame—lost his appeal before the D.C. Circuit.<sup>188</sup> He had argued that D.C.'s emergency legislation, enacted in the wake of *Heller I*, as it might now be called, failed to cure the original constitutional defect.<sup>189</sup> Dissenting from the panel opinion, Judge Kavanaugh

<sup>183</sup> See *supra* note 165 and accompanying text; see also *Heller*, 554 U.S. at 691 (Breyer, J., dissenting) (pointing to state courts' treatment of gun rights as "instructive").

<sup>184</sup> Among gun-rights supporters, there is considerable variance from the view espoused in 1975 by then-California Governor Ronald Reagan, who said that the Second Amendment "appears to leave little if any leeway for the gun control advocate." Siegel, *supra* note 5, at 210 (citation omitted).

<sup>185</sup> See U.S. DEP'T OF JUSTICE, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT II-11 (2008), available at <http://www.justice.gov/ag/annualreports/pr2008/sect2/p38-63.pdf> (listing and describing the ATF's gun-control efforts).

<sup>186</sup> See Brief for the United States as Amicus Curiae at 20-26, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157201 ("Like Rights Conferred By Surrounding Provisions of the Bill of Rights, The Individual Right Guaranteed by the Second Amendment is Subject to Reasonable Restrictions and Important Exceptions"); *Supreme Court Strikes Down Gun Ban*, HERALD-TRIB. (Sarasota, Fla.) (June 26, 2008, 11:43 AM), <http://www.heraldtribune.com/article/20080626/BREAKING/627114967> ("The decision went further than even the Bush administration wanted, but probably leaves most firearms laws intact."). The Obama Administration continues to advocate deference to democratically enacted gun-control laws. See Lyle Denniston, *U.S.: Less Protection for Gun Rights*, SCOTUSBLOG (Oct. 19, 2011, 7:24 PM), <http://www.scotusblog.com/2011/10/u-s-less-protection-for-gun-rights> ("[T]here was no reason to judge gun controls beyond the home by anything other than mid-level scrutiny . . . ." (citing Brief for the United States in Opposition, *Masciandaro v. United States*, 132 S. Ct. 756 (2011) (No. 10-11212), *cert. denied*, 132 S. Ct. 756 (2011))).

<sup>187</sup> See, e.g., Totenberg, *supra* note 176 ("Reaction to the decision was predictable—elation from gun-rights organizations, and concerned caution from law enforcement and gun-control groups." (emphasis added)); *Supreme Court Strikes Down Gun Ban*, *supra* note 186 ("Gun rights supporters hailed the decision.").

<sup>188</sup> See *Heller II*, 670 F.3d 1244, 1260 (D.C. Cir. 2011) (remanding the case to the district court).

<sup>189</sup> *Id.* at 1248-49.

wrote in twenty words what I hope I have conveyed in a few thousand: “*Heller*, while enormously significant jurisprudentially, was not revolutionary in terms of its immediate real-world effects on American gun regulation.”<sup>190</sup> In my view, that was precisely the point. The Court never intended to effect “a dramatic upheaval in the law”<sup>191</sup>—only to announce an important new rule and preserve its power. On that score, it appears to have succeeded. The Court made a strong legal statement in uncharted constitutional waters, and it did so narrowly. It commanded very little action and thus largely avoided the risk of defiance.

If power-preserving minimalism was at play, it may not have been to the exclusion of other minimalist forces. Professor Sunstein has written—and Justice Frankfurter would likely agree—that “minimalism is the appropriate course for [adjudicating] large-scale moral or political issues” because it is “democracy-forcing.”<sup>192</sup> This approach may have been particularly prudent with respect to gun control, since “the cultural contingency of the gun debate makes it a difficult dispute for the Court to ‘settle’ through constitutional law.”<sup>193</sup> In other words, right up to the discrete legal boundary set by the Court, Americans ought to decide what gun control laws are necessary through their elected representatives. On the other hand, the Court may have been wedging its figurative foot in the door, preparing its own effort to chip away at the legality of gun control. There is support for the argument that foot-in-the-door minimalism was *not* at play here,<sup>194</sup> but it may be too early to say. In any event, given its historical and jurisprudential similarities to *Brown* and *Marbury*, *Heller* can be accurately categorized as an instance of power-preserving minimalism.

I am certainly not the first to suggest that the Court is concerned about its public perception.<sup>195</sup> I have, however, tried to provide a framework that helps categorize the Court’s decisions in a way that accounts for their

---

<sup>190</sup> *Id.* at 1270 (Kavanaugh, J., dissenting). Judge Kavanaugh addressed only *Heller*, since the court’s review of a D.C. law required no analysis of *McDonald*’s incorporation holding. Nevertheless, I think the point applies equally well to both cases.

<sup>191</sup> *District of Columbia v. Heller*, 554 U.S. 570, 639 (2008) (Stevens, J., dissenting) (citation omitted).

<sup>192</sup> Sunstein, *supra* note 156, at 50, 82.

<sup>193</sup> Denning, *supra* note 53, at 432 (writing after certiorari was granted but before the decision in *Heller*); see also Winkler, *supra* note 165, at 714-15 (arguing that striking the right balance between individual rights and gun control requires “highly complex socio-economic calculations” that legislatures are better suited than courts to make).

<sup>194</sup> See Lyle Denniston, *Government Prayer Cases Passed Up*, SCOTUSBLOG, <http://www.scotusblog.com/2012/01/government-prayer-cases-passed-up> (Jan. 17, 2012, 1:18 PM) (reporting that the Court consistently turns down opportunities “to spell out further how far the personal right to have a gun reaches”); see also *supra* notes 182-89 and accompanying text.

<sup>195</sup> See, e.g., *supra* note 107.

impact on the Court's role and influence. That framework is a subtle expansion on Cass Sunstein's observation that narrow decisions are "a common starting point for doctrinal innovation."<sup>196</sup> Narrow decisions are also sometimes key to the Court's power over legal doctrine more generally. That the Court may need to take deliberate steps to preserve its influence should not be surprising in light of the foundations of judicial supremacy.<sup>197</sup> Without power, judgments are mere opinions without practical force. Understanding when power preservation is at play, and (perhaps more critically) when it is *called for*, matters because judicial supremacy is a "national treasure."<sup>198</sup>

By preserving its soft power in cases that permit that tactic, the Court retains the ability to exert a more forceful checking function on the other branches in cases *unlike Heller*—cases in which the luxury of minimalism is unavailable. These cases may include, as Justice Stone wrote in the famous Footnote Four, laws that affect "discrete and insular minorities," the very enactment of which reflect a failure of the democratic process.<sup>199</sup> Cases like these are, by hypothesis, countermajoritarian and thus stretch the Court's power to require change. These cases present problems that cannot be solved through politics. When they arise, the Court's ability to settle the law and enforce constitutional justice where no other branch can do so is crucial. And although we tend to take that power for granted, history teaches that preserving it is harder than it looks.

---

<sup>196</sup> Sunstein, *supra* note 11, at 264.

<sup>197</sup> See *supra* text accompanying notes 102-08.

<sup>198</sup> Breyer, *supra* note 102, at 2011.

<sup>199</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). For an example of such a case, see *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (invalidating an Alabama state constitutional amendment which had the effect of limiting the voting rights of black citizens and the undisguised purpose of which was, in the words of the president of the state constitutional convention, "to establish white supremacy in th[e] State" (citation omitted)). It bears repeating that *Brown*, too, may have been one of these cases. See *supra* note 147. I have tried to offer a descriptive account of what motivated the *Brown* Court, but I do not address whether the path it chose was the most effective way to eradicate segregation.