military, it would seem odd that military arms would be easier to ban than other weapons.

Second, the Ninth and Fourteenth Amendments are more modern and democratically responsive. The Ninth invites us to consider not only rights that have long been part of the American tradition but also rights that have emerged in actual modern practice and in state constitutional clauses of relatively recent vintage that are relatively easy to amend. The Fourteenth directs our attention to the still-relevant problems of race and police protection, or the absence thereof. By contrast, the Second Amendment harkens back to a lost eighteenth-century America, where citizens regularly mustered for militia service on the town square and where the federal army was rightly suspect. This is not our world.

Finally, a focus on the Ninth and Fourteenth Amendments is simply more honest. The open-ended language of the Ninth and Fourteenth Amendments really did aim to invite Americans to ponder state constitutional provisions that declare rights, and these provisions really do focus on individual self-defense. The framers of the Fourteenth Amendment really did focus intently on self-defense in the home. The framers of the Second Amendment did not.

GUN CONTROL AFTER NEWTOWN[8]

New York Daily News, Wednesday, December 26, 2012

As gun controllers and gun enthusiasts continue their conversation in the wake of the Newtown tragedy, several recent Supreme Court rulings may loom large. Ironically, gun controllers can strengthen their case for sensible reform by invoking a pair of pro-gun decisions handed down by the Court's conservatives. In turn, gun lovers should invoke a landmark gay-rights case where the Court's liberals won out.

When Congress last seriously debated gun control in the mid-1990s, the Second Amendment was a virtual dead letter in court. The justices had never used the amendment to invalidate anti-gun legislation, and most scholars read both the Constitution and the case law as providing virtually no protection for ordinary individuals to keep and carry guns. According to then conventional wisdom, only organized state militias were protected by the Second Amendment.

But in the 2008 case *District of Columbia v. Heller*, a challenge to the national capital's restrictive gun laws, the Supreme Court read the Second Amendment to affirm an individual's right to have a gun, especially in his home, for self-defense. Two years later, in a case called *McDonald*, the Court ruled that this basic right applies not just against federal officials—the original target of the Second Amendment—but also against state and local governments.

In both *Heller* and *McDonald*, the Court's five most conservative members—Antonin Scalia, Samuel Alito, Clarence Thomas, John Roberts, and Anthony Kennedy—narrowly prevailed over four vigorous liberal dissenters.

Here's why political liberals tempted to emulate their judicial heroes should resist this temptation and instead embrace *Heller* and *McDonald*: Both cases focused on the right of a law-abiding person to have a handgun in his or her home for self-protection. Neither case foreclosed reasonable gun regulations short of total prohibition—bans on military weapons wholly unnecessary for ordinary self-defense; caps on the amount of firepower a person may stockpile; limits on the size of gun clips; registration and permit requirements; insurance requirements, regular mental health checkups, and so on.

In fact, these two landmark cases not only allow sensible gun regulation, they actually make such regulation *easier* to accomplish. Before *Heller*, many gun enthusiasts sincerely worried that any regulation, however modest, would be the first step on a dangerous, slippery slope that could end in total confiscation. Because the pre-*Heller* Court didn't take gun rights seriously, the only place to defend such rights was in the legislature, and here a hard line had to be maintained. The outer walls of the fortress had to be manned, because once these walls were breached, the inner citadel of gun possession in homes might be at risk. After the rulings, this slippery slope argument no longer works. Precisely because the Court has declared total confiscation off limits, there's no legitimate fear that reasonable regulation will slide into tyrannical confiscation. If sensible liberals embrace *Heller* and *McDonald* instead of trashing them, they can earn the political trust of those who might otherwise resist even the tamest of reforms.

In turn, conservative gun-lovers would do well to embrace an iconic liberal Supreme Court case affirming gay rights, *Lawrence v. Texas*. In that 2003 decision, the Court protected the right of consenting adults to engage in sexual relations in the privacy of their own homes. In this case, the Court's

most conservative members—Scalia, Thomas, and then chief justice William Rehnquist—dissented.

Gun enthusiasts who like Scalia's and Thomas's ideas in *Heller* and *McDonald* should side with the liberals in *Lawrence*. For in this case, the liberals recognized that not all rights—in that case, the right of sexual privacy—are explicitly listed in the Constitution itself. Some unenumerated rights deserve protection as well. And to find these unenumerated rights, the Court properly canvassed state laws, state constitutions, and the lived experiences of ordinary citizens. Many state constitutions affirm a right to "privacy"—a word not found in the federal Constitution. Sexual privacy is an important part of American culture and practice, the *Lawrence* Court recognized. Ditto with guns. *Heller* and *McDonald* focused tightly on guns for self-protection, but many state laws and constitutions recognize other aspects of gun use—hunting and sport, for example. Even if the Second Amendment's text did not exist, guns would remain an important part of American culture.

Thus, thanks to three sharply divided cases in the modern culture wars involving guns and gays, conservative justices could end up helping today's political liberals, and liberal justices may have given today's conservatives additional ammunition. Legal arguments, like bullets, can sometimes ricochet.

THE SHAM CALLED CAMPAIGN FINANCE REFORM

American Lawyer, October 2002

If the ballyhooed McCain-Feingold campaign finance bill signed into law this spring is real reform, exactly what would business as usual or retrogression look like?

One large chunk of the law—the Snow-Jeffords "electioneering" amendment—censors political exhortation during the two months before an election. This amendment openly discriminates against political discourse: A TV spot detailing why challenger Smith is better than incumbent Jones on the key issues of our day is treated worse than an advertisement pushing Pepsi over Coke. The political ad might be an extended infomercial, with enlightening graphs and charts, but no matter. It is legally disfavored compared to spots featuring Britney Spears singing mindless consumerist jingles.

This turns the First Amendment on its head. Political discourse is at the heart of constitutional self-government, especially speech about the elections