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## **The Second Amendment: An Analysis of District of Columbia v. Heller**

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## The Second Amendment: An Analysis of District of Columbia v. Heller

Cover Page Footnote

25-2

**THE SECOND AMENDMENT:  
AN ANALYSIS OF *DISTRICT OF COLUMBIA V. HELLER***

*Eileen Kaufman*\*

Some years ago, few would have predicted that we would be devoting a major segment of this conference to the Second Amendment. But the year is 2008, and guns and the Second Amendment are headline news, figuring prominently into electoral politics and producing a landmark decision in which the Supreme Court held that the Second Amendment protects an individual's right to bear arms, at least in the home.

The case is *District of Columbia v. Heller*,<sup>1</sup> a 154-page decision absolutely overflowing with sharply conflicting accounts of history and the principles of linguistics, not to mention competing views on the meaning of earlier Supreme Court pronouncements regarding the Second Amendment and the role of the courts in second-guessing policy judgments made by the elected branches of government.<sup>2</sup> Although this was a truly historic decision that opens a whole new chapter of constitutional law, it leaves open more questions than it resolves, and thus, invites many rounds of litigation for years to come.<sup>3</sup>

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<sup>1</sup> 128 S. Ct. 2783 (2008).

<sup>2</sup> See *id.* at 2788-2870 (discussing the history and interpretations of the Second Amendment).

<sup>3</sup> Linda Greenhouse, *Justices, Ruling 5-4, Endorse Personal Right to Own Gun*, N.Y.

The issue in the case was the constitutionality of Washington D.C.'s gun control law, considered the strictest in the country.<sup>4</sup> The law prohibits the possession of handguns and requires that other firearms in the home be disassembled or secured by a trigger lock.<sup>5</sup> In other words, the law requires that all firearms in the home be rendered inoperable. The constitutionality of the law, of course, is dependent on the larger issue of whether the Second Amendment protects an individual's right to bear arms, or, whether it only guarantees the right to bear arms in connection with military service. The decision definitively resolved that question, finding the Second Amendment does protect an individual's right to bear arms for personal use, but it offers very little guidance as to what kind of restrictions the government can place on that right. Additionally, it leaves unresolved the incorporation issue—whether the Second Amendment applies to the states or only to the federal government. That basic question was not presented or resolved in *Heller* because at issue in *Heller* was a D.C. law, and the District of Columbia is a federal enclave.

We must begin with the language of the Second Amendment, which is rather tortured, plagued by commas and unusually placed capital letters: “[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.”<sup>6</sup> Three distinct interpretations of the Second Amendment have been advanced over the years: 1) the “individual

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TIMES, June 27, 2008, at A1.

<sup>4</sup> See *Heller*, 128 S. Ct. at 2788; D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001).

<sup>5</sup> D.C. CODE § 7-2507.02 (1976).

<sup>6</sup> U.S. CONST. amend. II.

rights” model, which holds that the Amendment guarantees to individual citizens the right to possess firearms for any lawful purpose subject to limited governmental regulation,<sup>7</sup> a view not adopted by any circuit court until 2001;<sup>8</sup> 2) the “limited individual rights” model, also known as the “sophisticated collective rights” model, which holds that the Amendment protects the individual’s right to bear arms, but only in connection with militia service;<sup>9</sup> and 3) the “collective rights” model, which holds that the Second Amendment protects the right of the state to arm its militia (this is the model, that until June 2008, dominated).<sup>10</sup>

As the headlines declared, the individual rights model emerged from a sharply divided five-to-four Supreme Court last term,<sup>11</sup> with Justice Scalia writing what some consider to be his single most significant opinion in twenty-two years on the bench. Indeed, one commentator referred to it as “the magnum opus of Justice Scalia’s tenure on the Court.”<sup>12</sup>

Justice Scalia analyzed virtually every one of the twenty-seven words contained in the Second Amendment. He divided the

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<sup>7</sup> See *Parker v. Dist. of Columbia*, 478 F.3d 370, 379 (D.C. Cir. 2007).

<sup>8</sup> *Heller*, 128 S. Ct. at 2823 n.2 (“Until the Fifth Circuit’s decision in *United States v. Emerson*, 270 F.3d 203 (2001), every Court of Appeals to consider the question had understood . . . that the Second Amendment does not protect the right to possess and use guns for . . . civilian purposes.”).

<sup>9</sup> Robert A. Levy, *Reviving the Second Amendment*, CATO INST., Oct. 27, 2001, [http://www.cato.org/pub\\_display.php?pub\\_id=3859](http://www.cato.org/pub_display.php?pub_id=3859).

<sup>10</sup> *Parker*, 478 F.3d at 379.

<sup>11</sup> See, e.g., Robert Barnes, *Justices Reject D.C. Ban on Handgun Ownership—5-4 Ruling Finds 1976 Law Incompatible With Second Amendment*, WASH. POST, June 27, 2008, at A1 (“The [C]ourt’s landmark 5 to 4 decision split along ideological grounds and wiped away years of lower court decisions that had held that the intent of the amendment, ratified more than 200 years ago, was to tie the right of gun possession to militia service.”).

<sup>12</sup> Colloquy, *Sizing up the 2007-08 Supreme Court Term*, 31 LEGAL TIMES 9 (2008).

text into its prefatory clause and its operative clause.<sup>13</sup> A lot of this is linguistics, and indeed, Justice Scalia relied on an amicus brief submitted by professors of linguistics to conclude that the prefatory clause—“[a] well regulated Militia, being necessary to . . . a free State”—merely announces a purpose.<sup>14</sup> In other words, it could be rephrased as “because a well regulated Militia is necessary to the security of a free State.” It states a purpose, but it does not control the meaning of the operative clause. Justice Scalia relied on the rule of construction that a preamble cannot control the enacting part of the law, unless the enacting part is ambiguous.<sup>15</sup> He illustrated this point by providing the following example: “[t]he separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence.”<sup>16</sup> He said the prefatory clause would be used to make clear that the word “canons” in the operative clause refers to the canons of clergy as opposed to the canons of interpretation.<sup>17</sup> But the Second Amendment’s operative clause contains no comparable ambiguity, so the prefatory clause plays no role beyond merely stating a purpose.

Justice Scalia then parsed the meaning of the operative clause: “the right of the people to keep and bear Arms, shall not be infringed.”<sup>18</sup> He first addressed who is the holder of that right and

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<sup>13</sup> *Heller*, 128 S. Ct. at 2789.

<sup>14</sup> *Id.* See U.S. CONST. amend. II; Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., et al. as Amici Curiae Supporting Petitioners, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 157194 at \*3.

<sup>15</sup> *Heller*, 128 S. Ct. at 2789.

<sup>16</sup> *Id.*

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

<sup>18</sup> *Id.* at 2789-90; U.S. CONST. amend. II.

concluded that “the right of the people” means the people as individuals, not as a collective.<sup>19</sup> He then addressed the substance of the right—“to keep and bear arms”—and concluded “keep and bear” means to have and carry weapons outside of an organized militia.<sup>20</sup> It protects the “individual right to possess and carry weapons in case of confrontation.”<sup>21</sup> What is the meaning of the word “arms”? “Arms” means weapons and not just those designed for military use or in existence in the eighteenth century. “We do not interpret Constitutional rights that way,” Justice Scalia declared.<sup>22</sup> If we did, then the First Amendment would not apply to modern forms of communication, and the Fourth Amendment would not apply to modern forms of searches.<sup>23</sup>

Justice Scalia is characteristically sharply critical of the dissent’s interpretation, which would limit “bear arms” to the military context. In fact, he devoted a substantial portion of his opinion refuting the dissent’s linguistic analysis, which, according to Justice Scalia, is “unknown this side of the looking glass.”<sup>24</sup>

The majority relied not just on the text of the Second Amendment, but also on history to support the conclusion that the operative clause protects the individual right to bear arms.<sup>25</sup> The historical background of the Second Amendment is relevant, Justice

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<sup>19</sup> *Heller*, 128 S. Ct. at 2790.

<sup>20</sup> *Id.* at 2792.

<sup>21</sup> *Id.* at 2797.

<sup>22</sup> *Id.* at 2791-92 (“[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”).

<sup>23</sup> *Id.*

<sup>24</sup> *Heller*, 128 S. Ct. at 2795.

<sup>25</sup> *Id.* at 2797.

Scalia explained, because like the First and Fourth Amendments, the Second Amendment merely codified a pre-existing right.<sup>26</sup> In this portion of his opinion, he extensively reviewed centuries of history, going back to the abuses of the Stuart Kings in the mid-seventeenth century, kings who would select militias loyal to them to suppress political dissidents by disarming them.<sup>27</sup> For example, King James II, a Catholic, ordered the disarmament of his Protestant enemies. These practices led to the assurance in 1689, which was eventually codified in the English Bill of Rights, “[t]hat the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.”<sup>28</sup> Blackstone, who is extensively cited in the opinion, later referred to this as “one of the fundamental rights of Englishmen.”<sup>29</sup> Indeed, a century later, American colonists reacted to King George III’s attempt to disarm them by relying on “their rights as Englishmen to keep arms” for their own defense.<sup>30</sup>

The right that this history gave rise to, according to the majority, was the right of the individual “to possess and carry weapons in case of confrontation,” an individual right, not a right confined to the militia.<sup>31</sup> Understood in this manner, the prefatory clause fits perfectly, because “history show[s] that the way tyrants had eliminated a militia . . . was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to sup-

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2798 (“[T]he Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.”).

<sup>28</sup> *Heller*, 128 S. Ct. at 2798 (internal quotes omitted).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2799.

<sup>31</sup> *Id.* at 2797.

press political opponents.”<sup>32</sup> The prefatory clause merely announces the purpose for which the right was codified: to prevent elimination of the militia. This interpretation is, according to the majority, also supported by comparable provisions in state constitutions.<sup>33</sup>

The majority then exhaustively examined how the Second Amendment had been interpreted in each era since its enactment and concluded that the interpretation in every stage of history supported the individual rights approach, with the exception of one lonely nineteenth century commentator who interpreted the Second Amendment’s right to bear arms as restricted to the militia.<sup>34</sup>

One aspect of this historical analysis I found particularly interesting related to what went on in the post-Civil War period, when there was considerable discussion of the Second Amendment as it related to the newly freed slaves.<sup>35</sup> Many states, including, for example, Kentucky and South Carolina, were disarming the recently freed slaves.<sup>36</sup> Indeed, the 1866 Freedmen’s Bureau Act included a provision that guaranteed the right to have full and equal benefit of all laws, including the constitutional right to bear arms to all citizens “without respect to race or color, or previous condition” of servitude.<sup>37</sup>

Having concluded that linguistics and history both support an individual rights model, Justice Scalia then analyzed whether the in-

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<sup>32</sup> *Id.* at 2801.

<sup>33</sup> *Heller*, 128 S. Ct. at 2802-03 (noting Pennsylvania, Vermont, North Carolina, and Georgia were among the first states to provide the individual with the right to bear arms).

<sup>34</sup> *Id.* at 2807.

<sup>35</sup> *See id.* at 2809-12.

<sup>36</sup> *Id.* at 2810.

<sup>37</sup> *Id.*

dividual rights interpretation is consistent with earlier Supreme Court pronouncements.<sup>38</sup> In what to me is the least convincing portion of the majority opinion, Justice Scalia concluded that the individual rights interpretation is fully consistent with precedent, even *United States v. Miller*,<sup>39</sup> a 1939 case widely viewed as rejecting the individual rights approach. In *Miller*, the Court upheld a federal conviction for transporting an unregistered short-barreled shotgun in interstate commerce in violation of the National Firearms Act.<sup>40</sup> The *Miller* Court rejected a Second Amendment challenge stating:

[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun . . .’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.<sup>41</sup>

Justice Scalia read *Miller* as merely standing for the proposition that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, weapons such as short-barreled shotguns.<sup>42</sup> What about the “hundreds of judges” who had read *Miller* quite differently, as rejecting the individual rights approach? Justice Scalia believed they simply misread *Miller*, and “their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans . .

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<sup>38</sup> See *Heller*, 128 S. Ct. at 2812-16.

<sup>39</sup> 307 U.S. 174 (1939). See also *Heller*, 128 S. Ct. at 2813-14.

<sup>40</sup> *Miller*, 307 U.S. at 174, 177, 183.

<sup>41</sup> *Id.* at 178.

<sup>42</sup> *Heller*, 128 S. Ct. at 2814.

. upon the true meaning of the right to keep and bear arms.”<sup>43</sup>

Justice Scalia also pointed out that it is not surprising the true meaning of the Second Amendment has gone unresolved for so long, because for most of our constitutional history, the Bill of Rights was thought to be inapplicable to the states, and the federal government rarely regulated “possession of firearms by law-abiding citizens.” Thus, “[f]or most of our history the question did not present itself.”<sup>44</sup>

That brings us to the District of Columbia statute and the question of the extent to which the individual right to bear arms is subject to state regulation. There is little dispute that the right is not absolute, just as the right to free speech is not absolute, or the right to reproductive freedom is not absolute. But, to what extent the Second Amendment right to bear arms is subject to regulation is a question that prompted a schism even among proponents of the individual rights model. Paul Clement, the Solicitor General, took a position at odds with other members of the Bush Administration, and he was roundly criticized for it.<sup>45</sup> He argued the Second Amendment permitted reasonable regulation of firearms, for example, federal regulation of machine guns, and the Court should not apply strict scrutiny to review gun regulation.<sup>46</sup> Unfortunately, the Court declined to provide any meaningful guidance as to how to measure the constitutionality of gun control laws, which means the litigation has only just begun.<sup>47</sup>

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<sup>43</sup> *Id.* at 2815 n.24.

<sup>44</sup> *Id.* at 2816.

<sup>45</sup> *See id.* at 2814.

<sup>46</sup> Brief for the United States as Amici Curiae Supporting Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 157201 at \*21, 24-25.

<sup>47</sup> *Heller*, 128 S. Ct. at 2821.

Here is what the Court did say. First, the right secured by the Second Amendment is not absolute. Indeed, nineteenth century courts routinely upheld restrictions on the right, such as “prohibitions on carrying concealed weapons.”<sup>48</sup> The Court also indicated that the following regulatory measures would all be constitutional: “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>49</sup> But, we are given absolutely no explanation of why those restrictions are constitutional nor any standard by which we can determine what other regulations would be constitutional.<sup>50</sup>

A second limitation on the right to bear arms, derived from *Miller*, is that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”<sup>51</sup> This limitation has interesting implications. It means the weapons most used in military service, weapons like M-16 rifles, may be banned. These weapons are not protected by the Second Amendment because they are not typically possessed by law-abiding citizens for lawful purposes, even though they are most useful in military service today. Does that not defeat the purpose expressed in the Second Amendment’s prefatory clause? If the purpose of the Second Amendment is to prevent elimination of the militia, it is cer-

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<sup>48</sup> *Id.* at 2816.

<sup>49</sup> *Id.* at 2816-17.

<sup>50</sup> *See id.* at 2846 (Stevens, J., dissenting); *see id.* at 2851 (Breyer, J., dissenting).

<sup>51</sup> *Heller*, 128 S. Ct. at 2815-16 (majority opinion).

tainly rather anomalous to interpret the Amendment as not protecting the weapons most likely to be used by a militia. Justice Scalia candidly acknowledged that his interpretation does indeed produce this peculiar result.<sup>52</sup> His response was merely to note that “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”<sup>53</sup>

What does this mean for the D.C. law? Remember, the ordinance does two things: it prohibits handgun possession in the home, and it requires other firearms in the home be rendered inoperable. Both provisions violate the Second Amendment. The handgun prohibition is unconstitutional because it is a wholesale prohibition of the type of gun considered by the American people to be the quintessential self-defense weapon, and “[t]he prohibition extends . . . to the home, where the need for defense of self, family, and property is most acute.”<sup>54</sup> The second provision requiring all “firearms in the home be rendered and kept inoperable at all times” is also unconstitutional because “[t]his makes it impossible for citizens to use [the weapon] for the core lawful purpose of self-defense.”<sup>55</sup>

Although a considerable portion of the oral argument had been devoted to the question of what governing standard should be used to evaluate gun restrictions, the majority, unfortunately, declined to announce what level of scrutiny applies; it did, however, re-

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<sup>52</sup> *Id.* at 2817.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2817.

<sup>55</sup> *Id.* at 2818.

ject rational basis as the governing standard and reject Justice Breyer's proffered interest-balancing approach.<sup>56</sup> Justice Scalia argued that since this is the Court's first foray into the field we should not expect the Court "to clarify the entire field."<sup>57</sup> This view reflects the comment Justice Roberts made at oral argument: "[i]'m not sure why we have to articulate some very intricate standard. . . . I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?"<sup>58</sup>

All we know for sure from this ground-breaking decision is that laws that prohibit possessing loaded firearms in the home for self-defense violate the Second Amendment; but, laws prohibiting concealed weapons do not; laws prohibiting the possession of firearms by felons and the mentally ill do not; laws forbidding guns in schools and government buildings do not; and laws imposing conditions and qualifications on commercial sale of arms do not. Further, since Justice Scalia seems to have interpreted the Second Amendment as not applying to weapons not customarily possessed by law-abiding citizens, the federal ban on possessing machine guns would presumably be upheld.

Let us spend a few minutes on the dissents. There were two: one by Justice Stevens, focusing primarily on the meaning of the

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<sup>56</sup> *Heller*, 128 S. Ct. at 2821 ("[The] 'interest-balancing inquiry' asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.") (citations and internal quotations omitted).

<sup>57</sup> *Id.*

<sup>58</sup> Transcript of Oral Argument, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 731297 at \*44.

Second Amendment,<sup>59</sup> and one by Justice Breyer, focusing exclusively on the standard the Court should use in determining whether a particular gun control law violates the Second Amendment.<sup>60</sup>

Justice Stevens wrote a vigorous dissent in which he said the Second Amendment does not confer an individual right to bear arms, but rather, it was “today’s law-changing decision” that accomplished this result.<sup>61</sup> He characterized the majority’s interpretation of the Second Amendment as overwrought, novel, “strained and unpersuasive,” and he said that “[e]ven if . . . arguments on both sides of the issue were evenly balanced,” principles of stare decisis “would prevent most jurists from endorsing such a dramatic upheaval in the law.”<sup>62</sup>

Like Justice Scalia, Justice Stevens closely parsed the text of the Second Amendment and painstakingly examined precedent and history. Like Justice Scalia, Justice Stevens relied on state declarations and constitutional provisions; but, unlike Justice Scalia, Justice Stevens concluded that they show that the Second Amendment was not meant to protect civilian use of weapons.<sup>63</sup> For example, he pointed to the declarations of rights of Pennsylvania and Vermont, both of which expressly protect the civilian’s “right to use firearms for hunting or personal self-defense.”<sup>64</sup> Justice Stevens also pointed to the many formulations of the Second Amendment that James

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<sup>59</sup> See generally *Heller*, 128 S. Ct. at 2822-48 (Stevens, J., dissenting).

<sup>60</sup> See *id.* at 2847-70 (Breyer, J., dissenting).

<sup>61</sup> *Id.* at 2846 (Stevens, J., dissenting).

<sup>62</sup> *Id.* at 2823, 2824; see *id.* at 2826, 2828, 2831.

<sup>63</sup> See *id.* at 2825, 2831.

<sup>64</sup> *Heller*, 128 S. Ct. at 2825 (Stevens, J., dissenting).

Madison, its drafter, considered and rejected, including versions that explicitly protected nonmilitary, civilian use of weapons.<sup>65</sup> He relied on a conscientious objector clause that Madison included in the original draft of the Second Amendment as further evidence of the view that the right to bear arms was limited to military service.<sup>66</sup> To Justice Stevens, the history of the adoption of the Second Amendment unmistakably demonstrated that the overriding concern that led to the adoption of the Amendment was

the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger. But state militias could not effectively check the prospect of a federal standing army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed.<sup>67</sup>

Thus, the historical analysis demonstrated that the framers of the Second Amendment had a single purpose in mind—the preservation of the militia—and the framers did not intend to limit the ability of Congress to regulate the civilian use of weapons.

Justice Stevens criticized the majority for denigrating and ignoring the importance of the prefatory clause. He wrote:

[w]ithout identifying any language in the text that even mentions civilian uses of firearms, the Court proceeds to “find” its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court’s

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<sup>65</sup> *Id.* at 2835.

<sup>66</sup> *Id.* at 2835-36.

<sup>67</sup> *Id.* at 2836.

approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.<sup>68</sup>

Justice Stevens is also harshly critical of the Court's pronouncement that the right " 'to keep and bear arms' " protects the right in cases of confrontation, not the "right to possess arms for 'lawful, private purposes,' " which is how the D.C. Court of Appeals had interpreted the Second Amendment.<sup>69</sup> Justice Stevens stated, "[n]o party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth."<sup>70</sup>

He analogized Justice Scalia's word-for-word parsing of the Second Amendment to the parable of the six blind men and the elephant: a blind man touches one part and decides it is a tree, and another man touches a different part and concludes it is a snake, and so on.<sup>71</sup> The point, of course, is a failure to fundamentally grasp the nature of the beast. The nature of the Second Amendment the majority failed to grasp, according to Justice Stevens, is that the Second Amendment "secure[s] to the people a right to use and possess arms in conjunction with service in a well-regulated militia."<sup>72</sup>

There are many sharp differences between the majority and the dissent, but the most pointed concerns the meaning of *Miller*, which as Justice Stevens pointed out, had been interpreted by courts and commentators alike to signify a rejection of the individual rights

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<sup>68</sup> *Id.* at 2826.

<sup>69</sup> *Heller*, 128 S. Ct. at 2828 (Stevens, J., dissenting).

<sup>70</sup> *Id.* at 2828.

<sup>71</sup> *Id.* at 2831 n.14.

<sup>72</sup> *Id.* at 2831.

model of the Second Amendment.<sup>73</sup> The majority's reinterpretation of *Miller*, Justice Stevens said, represents a lack of "respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself."<sup>74</sup>

Justice Breyer's dissenting opinion focused exclusively on the question of how a Court should go about determining the constitutionality of a particular firearm regulation.<sup>75</sup> Assuming the Second Amendment protects an individual right to bear arms, "what kind of constitutional standard should the court use" in evaluating gun regulations?<sup>76</sup> "How high a protective hurdle does the Amendment erect?"<sup>77</sup>

In an attempt to answer that question, he relied on historical evidence showing gun regulation is consistent with the Second Amendment. He described laws in effect in colonial times, which significantly limited firearms in urban areas. New York City, for example, imposed severe restrictions on how gunpowder could be stored in the home.<sup>78</sup>

Ultimately, the standard Justice Breyer proposed was an interest-balancing approach, similar to the analysis used in procedural due process cases or cases involving government employees' speech.<sup>79</sup> This analysis would balance competing interests and con-

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<sup>73</sup> See *id.* at 2822-23, 2839.

<sup>74</sup> *Heller*, 128 S. Ct. at 2824 (Stevens, J., dissenting).

<sup>75</sup> See *id.* at 2850-55 (Breyer, J., dissenting).

<sup>76</sup> *Id.* at 2851.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2850 (citing Act of April 13, 1784, ch. 28, 1784 N.Y. Laws p. 627).

<sup>79</sup> *Heller*, 128 S. Ct. at 2852-53 (supporting the use of an interest-balancing approach in determining the constitutionality of the District of Columbia handgun law). See also

sider whether there are less restrictive alternatives. Applying that approach to the DC law, Justice Breyer found that it was a proportionate response to compelling life-preserving, public-safety interests that did not disproportionately burden the interests which the Second Amendment was designed to protect.<sup>80</sup> To the extent that the Second Amendment was primarily designed to preserve the militia, there is absolutely nothing in the DC law that burdens that interest.<sup>81</sup> The respondent, Dick Heller, is 66 years old and even in the unlikely event that the District of Columbia were to call upon its citizenry to form a militia, respondent's service would not be requested.<sup>82</sup> A second interest that arguably could be encompassed in the Second Amendment is an interest in hunting. However, the DC law does not prohibit possessing rifles or shotguns, so that interest is not burdened.<sup>83</sup> What is burdened by the DC law is the interest in keeping a loaded handgun in the home for purposes of self-defense. Justice Breyer examined whether there are less restrictive alternatives, and he concluded that there are none, because what makes handguns so useful for self-defense is precisely what makes them particularly dangerous.<sup>84</sup>

Justice Breyer criticized the majority for severely limiting the ability of democratically elected legislatures to deal with gun-related

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Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (utilizing an interest-balancing approach in analyzing a procedural due process claim); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968) (advancing an interest-balancing approach to ascertain the constitutional limits of government employees' speech).

<sup>80</sup> *Heller*, 128 S. Ct. at 2861, 2865.

<sup>81</sup> *Id.* at 2861.

<sup>82</sup> *Id.* at 2861-62.

<sup>83</sup> *Id.* at 2863.

<sup>84</sup> *Id.* at 2864.

problems.<sup>85</sup> He argued that courts should show more deference to legislative judgment because of their better fact-finding capacity. He said:

I can understand how reasonable individuals can disagree about the merits of strict gun control as a crime-control measure, even in a totally urbanized area. But I cannot understand how one can take from the elective branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order.<sup>86</sup>

Finally, Justice Breyer described the unfortunate consequences of the majority's decision. By failing to provide clear standards, the majority opinion "will encourage legal challenges to gun regulation throughout the nation."<sup>87</sup> He said "litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time."<sup>88</sup>

What was the reaction to this historic decision? President Bush and both presidential candidates expressed support for the decision.<sup>89</sup> Indeed, both the Republican and Democratic platforms of

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<sup>85</sup> *Heller*, 128 S. Ct. at 2868 (Breyer, J., dissenting).

<sup>86</sup> *Id.*

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

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

<sup>89</sup> See Statement on the United States Supreme Court Ruling on Individual Gun Rights, 44 WEEKLY COMP. PRES. DOC. 921 (June 26, 2008). President Bush declared: "As a longstanding advocate of the rights of gun owners in America, I applaud the Supreme Court's historic decision today confirming what has always been clear in the Constitution: the Second

2008 recognized the Constitutional right to bear arms, although the two platforms offered radically different versions of the right.<sup>90</sup> The Republican platform specifically calls on the next president to appoint judges who will continue to respect the right, and who will oppose the federal licensing of law-abiding gun owners and national gun registration as violative of the Second Amendment.<sup>91</sup> The Democratic platform embraces the right to bear arms as a part of the American tradition, but emphasizes the importance of reasonable regulations to keep communities safe.<sup>92</sup>

It has been less than four months since the Supreme Court announced the decision in *Heller*, but there have already been literally dozens of cases where criminal defendants have attempted to have their convictions reversed on the strength of *Heller*.<sup>93</sup> In each case thus far, the courts have rejected the Second Amendment argument.<sup>94</sup> All of the following gun laws have been upheld against a Second

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Amendment protects an individual right to keep and bear firearms.” *Id.* See also Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 253, 263 (2007) (recognizing Barack Obama’s and John McCain’s general enthusiasm for the *Heller* decision). Senator McCain said the decision was “a landmark victory for Second Amendment freedom in the United States” that “ended forever the specious argument that the Second Amendment did not confer an individual right to keep and bear arms.” Posting of Tom Bevan to Real Clear Politics, [http://www.realclearpolitics.com/politics\\_nation/2008/06/scotus\\_rules\\_for\\_guns.html](http://www.realclearpolitics.com/politics_nation/2008/06/scotus_rules_for_guns.html) (June 26, 2008) (last visited April 5, 2009). Senator Obama praised the Court for finding that the right is not absolute, but is “subject to reasonable regulations enacted by local communities to keep their streets safe.” *Id.*

<sup>90</sup> Compare 2008 Republican Platform—Values, <http://www.gop.com/2008/Platform/> (last visited Jan. 31, 2008), with The 2008 Democratic National Platform: Renewing America’s Promise, <http://www.democrats.org/a/party/platform.html> (last visited Jan. 31, 2008).

<sup>91</sup> 2008 Republican Platform, *supra* note 90.

<sup>92</sup> 2008 Democratic National Platform, *supra* note 90.

<sup>93</sup> See, e.g., *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 WL 4534226 (W.D.N.C. Oct. 6, 2008); *United States v. Westry*, No. 08-20237, 2008 WL 4225541 (E.D. Mich. Sept. 9, 2008).

<sup>94</sup> See, e.g., *Guerrero-Leco*, 2008 WL 4534226, at \*1; *Westry*, 2008 WL 4225541, at \* 2.

Amendment attack: a law prohibiting possession of a firearm within a thousand feet of a school;<sup>95</sup> a law prohibiting felons from possessing guns;<sup>96</sup> a law prohibiting gun possession by persons who have been convicted of a misdemeanor crime of domestic violence;<sup>97</sup> a law prohibiting gun possession on federal postal property;<sup>98</sup> a law prohibiting possessing guns by an individual subject to an order of protection involving domestic abuse;<sup>99</sup> a law prohibiting the possession of a sawed-off shotgun;<sup>100</sup> a law criminalizing traffic in stolen firearms;<sup>101</sup> and a law prohibiting carrying a concealed weapon without a permit.<sup>102</sup>

One case, a little out of the ordinary because it actually involved a militia, is *United States v. Fincher*,<sup>103</sup> where the Eighth Circuit held the Second Amendment does not extend to machine guns or sawed-off shotguns used in connection with an unsanctioned militia.<sup>104</sup> The defendant, Fincher, was convicted of violating federal statutes which prohibit the possession of unregistered sawed-off

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<sup>95</sup> See *United States v. Lewis*, No. 2008-45, 2008 WL 5412013 (D.V.I. Dec. 24, 2008) (prohibiting possession near school zone).

<sup>96</sup> See *United States v. Abner*, No. 3:08cr51-MHT, 2009 WL 103172 (M.D. Ala. Jan. 24, 2009) (prohibiting possession by felons).

<sup>97</sup> See *United States v. Lippman*, No. 4:02-cr-082, 2008 WL 46641514 (D.N.D. Oct. 20, 2008) (prohibiting possession where there is a domestic violence restraining order).

<sup>98</sup> See *United States v. Dorosan*, No. 08-042, 2008 WL 2622996 (E.D. La. June 30, 2008) (prohibiting possession on postal property).

<sup>99</sup> See *United States v. White*, No. 07-00361-WS, 2008 WL 3211298 (S.D. Ala. Aug. 6, 2008) (prohibiting possession in domestic violence situations).

<sup>100</sup> See *United States v. Fincher*, 538 F.3d 868 (8th Cir. Aug 13, 2008) (prohibiting possession of sawed-off shotgun).

<sup>101</sup> See *LaRoche v. United States*, Nos. CV 407-054, CR402-234, 2008 WL 4222081 (S.D. Ga. Sept. 15, 2008) (criminalizing the traffic in stolen firearms).

<sup>102</sup> See *United States v. Davis*, No. 05-50726, 2008 WL 4962926 (9th Cir. Sept. 10, 2008) (prohibiting concealed weapon).

<sup>103</sup> 538 F.3d at 868.

<sup>104</sup> *Fincher*, 538 F.3d at 873-74.

shotguns and machine guns.<sup>105</sup> Fincher argued that his possession of those weapons was in connection with his membership in the Washington County Militia, a group that he helped found for the ostensible reason of assisting local law enforcement, though he had been unsuccessful in obtaining approval or any official sanction of the militia.<sup>106</sup> The Eighth Circuit rejected his Second Amendment challenge, finding that (a) his gun possession was not reasonably related to a well-regulated militia, since the Washington County Militia was an unorganized militia, and (b) drawing on *Heller*, since machine guns are not in common use by law-abiding citizens for lawful purposes, they are not within the protection of the Second Amendment.<sup>107</sup>

Clearly, gun control laws are at risk after *Heller*. A Chicago ordinance, which is considered the second strictest after *Heller*, bans the possession of handguns acquired after 1983 and requires the re-registration of older guns every two years. A challenge to the Chicago law, *McDonald v. City of Chicago*,<sup>108</sup> was filed hours after the *Heller* decision was announced and that case directly presents the incorporation issue. In fact, Alan Gura, the same attorney who represented *Heller*, has said he is ready for that fight; *McDonald* is the case to resolve that.<sup>109</sup> Many Chicago suburbs also ban handgun possession, but most of those towns repealed their bans in the aftermath of *Heller* in an effort to avoid costly litigation.<sup>110</sup> Toledo, Ohio also

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<sup>105</sup> *Id.* at 870.

<sup>106</sup> *Id.* at 871-72.

<sup>107</sup> *See id.* at 872-74.

<sup>108</sup> No. 08C3645, 2008 WL 5111112 (N.D. Ill. Dec. 4, 2008).

<sup>109</sup> Interview by Glenn Beck with Alan Gura, in Washington, D.C. (June 26, 2008).

<sup>110</sup> *See* Christopher Keleher, *District of Columbia v. Heller: The Death Knell for Illinois Handgun Bans?*, 96 ILL. B.J. 402, 406 (2008).

has a gun control law that may be vulnerable after *Heller*.<sup>111</sup>

The bottom line is that *Heller* is truly a landmark decision, but one certain to usher in a new era of gun litigation. The first round will be devoted to the question of incorporation—the threshold question that the Supreme Court will ultimately resolve. What follows, I suspect, will be litigation throughout the nation attempting to tackle the thornier question of how to evaluate the constitutionality of firearm regulations. What standard should the courts use? How deferential should the courts be to legislative fact-finding? Although the Supreme Court ducked that issue in *Heller*, it is only a matter of time until the Court will have to establish the standard used to evaluate governmental regulation of firearms.

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<sup>111</sup> See *Heller*, 128 S. Ct. at 2865.