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SUMMARY OF D.C. V. HELLER

By: Veronica Rose, Principal Analyst

You asked for a summary of *District of Columbia v. Heller*, the U.S. Supreme Court decision upholding a federal district ruling that a Washington, D.C. law banning handguns and requiring other firearms to be stored unloaded or locked was unconstitutional on Second Amendment grounds.

SUMMARY

In *Heller*, the U.S. Supreme Court answered a long-standing constitutional question about whether the right to "keep and bear arms" is an individual right unconnected to service in the militia or a collective right that applies only to state-regulated militias.

By a five to four margin, the Court held that the Second Amendment protects an individual right to possess firearms for lawful use, such as self-defense, *in the home* (emphasis ours). Accordingly, it struck down as unconstitutional provisions of a D.C. law that (1) effectively banned possession of handguns by non law enforcement officials and (2) required lawfully owned firearms to be kept unloaded, disassembled, or locked when not located at a business place or being used for lawful recreational activities.

According to the Court, the ban on handgun possession in the home amounted to a prohibition on an entire class of 'arms' that Americans overwhelmingly choose for the lawful purpose of self-defense. Similarly, the requirement that any firearm in a home be disassembled or locked made “it impossible for citizens to use arms for the core lawful purpose of self-defense.” These laws were unconstitutional “under any of the standards of scrutiny the Court has applied to enumerated constitutional rights.” But the Court did not cite a specific standard in making its determination, and it rejected the interest-balancing standard; proposed by Justice Breyer, and a “rational basis” standard.

The Second Amendment right is not absolute and a wide range of gun control laws remain “presumptively lawful,” according to the Court. These include laws that (1) prohibit carrying concealed weapons, (2) prohibit gun possession by felons or the mentally retarded, (3) prohibit carrying firearms in sensitive places such as schools and government buildings, (4) impose “conditions and qualifications on the commercial sale of arms,” (5) prohibit “dangerous and unusual weapons,” and (6) regulate firearm storage to prevent accidents. Justice Scalia wrote the majority opinion. He was joined by Justices Alito, Kennedy, Roberts, and Thomas.

Justices Stevens and Breyer filed separate dissenting opinions. Stevens asserts that the Second Amendment (1) protects the individual right to bear arms only in the context of military service and (2) does not limit government's authority to regulate civilian use or possession of firearms. He describes the majority's individual-right holding as “strained and unpersuasive”; its conclusion, “overwrought and novel.” Stevens was joined in his dissent by Justices Breyer, Ginsberg, and Souter.

In his dissent, Breyer argues that even if the Second Amendment, in addition to militia-related purposes, protects an individual's right of self-defense, that assumption should be the beginning of the constitutional inquiry, not the end. Breyer contends that there are no purely logical or conceptual ways to determine the constitutionality of gun control laws, such as the District's law. Thus, a sounder approach would be a “balancing test” that focuses on “practicalities” to determine what gun control laws would be consistent with the amendment even if it is interpreted as protecting a “wholly separate interest in individual self-defense.” Breyer concludes that under a balancing test that takes into account the extensive evidence of gun crime and gun violence in urban areas, the District's gun law would be constitutionally permissible. Breyer was joined in his dissent by Justices Ginsberg, Souter, and Stevens.

BACKGROUND

D.C. Gun Law and Court Challenges

The Second Amendment states that “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. Cons. Amend. II). In *Parker v. District of Colombia* (311 F. Supp. 2d 103 (D.D.C. 2004)), six D.C. residents, on Second Amendment grounds, filed a lawsuit challenging the provisions of a 1975 D.C. law that:

1. generally banned handgun possession by making it a crime to carry unregistered guns and banning registration of guns not registered before 1976 (with an exception for D.C. law enforcement officials) (D.C. Code §§ 7-2501.01(12), 7-2502.01(a), and 7-2502.02(a)(4));

2. prohibited carrying handguns anywhere in D.C. without a license (which a police chief could issue for up to one year) (D.C. Code §§ 22-4504(a) and 22-4506); and

3. required all firearms to be stored unloaded, disassembled, or bound by a trigger lock or other similar device, unless they were located at a business place or being used for lawful recreational activities (D.C. Code § 7-2507.02).

The plaintiffs sought to enjoin the district from enforcing the ban on handgun registration; the licensing requirement, insofar as it prohibited the carrying of a firearm in the home without a license; and the trigger lock requirement, insofar as it prohibited the use of “functional firearms within the home.” The district court dismissed the complaint on the grounds that the Second Amendment does not provide an individual right to bear arms separate and apart from service in an organized militia, such as the National Guard.

The Appeals Court Decision

On appeal, a three-judge panel of the U.S. Appeals Court for the District of Colombia, by a two to one vote, reversed the lower court's ruling (*Parker v. District of Columbia* (478 F. 3d 370 (D.C. Cir. 2007)). The appeals court held that the Second Amendment “protects an individual right to keep and bear arms” and that the District's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense violated that right (*Id.*, at 395, 399-401).

With regard to the handgun ban, the appeals court said: “[o]nce it is determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them” (*Id.*, at 400). With regard to the license requirement, the court stated: “just as the District may not flatly ban the keeping of a handgun in the home, obviously it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon which the right was premised-i.e, self-defense” (*Id.*, at 400). Finally, the court said the requirement that lawfully firearms be kept unloaded,

disassembled, locked amounted to a complete ban on the lawful use of handguns for self-defense (*Id.*, at 401).

When the court denied the District's petition (by a six to four vote) for a rehearing by the full court, both the District and plaintiffs petitioned the U.S. Supreme Court to review the case.

MAJORITY OPINION

Issue on Appeal

On November 20, 2007, the U.S. Supreme Court agreed to hear the case. The question before the Court was whether the D.C. laws being challenged violated "violated the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes."

Holding

On June 26, 2008, by a five to four decision, the Court upheld the federal appeals court decision, striking down two provisions of the D.C. gun law as unconstitutional (*District of Columbia v. Heller,* 128 S. Ct. 2783 (2008)). The Court held that the District's "ban on handgun possession in the home violated the Second Amendment as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense" (*Id.*, *at* 2821, 2822).

The handgun ban, according to the majority opinion, amounted to a prohibition of an entire class of "arms" overwhelmingly chosen by Americans for the lawful purpose of self defense. Moreover, the ban extended to the home, where the need for self defense is most acute. It would fail constitutional muster under any of the standards the Court had applied in the past to enumerated constitutional rights (*Id.,* at 2817,

2818). Similarly, the requirement that firearms in the home be rendered and kept inoperable at all times was unconstitutional because it made it impossible for citizens to use them for the core lawful purpose of self-defense (*Id.*, at 2818).

The Court did not address the licensing requirement (D.C. Code § 22-4504) on the grounds that Heller had indicated that the requirement would be acceptable if not enforced in an arbitrary and capricious manner (*Id.*, at 2819). It ruled that as long as Heller was not disqualified from exercising Second Amendment rights, the District had to allow him to register his handgun and issue him a license to carry it in the home (*Id.*, at 2822).

Majority Reasoning

After conducting an extensive review of the Second Amendment text and historical record, Scalia concluded that the individual right interpretation is supported by (1) the historical record; (2) the amendment's drafting history; and (3) interpretations of the amendment by scholars, courts, and legislators through the late nineteenth century (*Id.*, at 2802-2812).

Operative Clause. In Scalia's view, the text and history of the amendment's operative clause (i.e., "the right of the people to keep and bear Arms, shall not be infringed") is controlling. "The people" refers to all members of the political community, not an unspecified subset, such as the militia; the phrase to "keep and bear arms" means to have weapons and carry them, and not just in a military context; and "the right of the people" refers to a preexisting right. Scalia reasons that these textual elements show that the amendment "guarantee(s) the individual right to possess and carry weapons in case of confrontation," and that the amendment's text implicitly recognizes the preexistence of the right and declares only that it "shall not be infringed" (*Id.,* at 2790-2797). Congress merely codified a widely recognized right; it did not create a new right (*Id.*, at 2797).

Prefatory Clause. According to Scalia, the prefatory clause ("well regulated Militia, being necessary to the security of a free State") comports with the meaning of the operative clause and refers to a well-trained citizen militia as being necessary to deny Congress the power to abridge the individual right to keep and bear arms. And while the reason for codifying the prefatory clause "was to ensure the preservation of a

well-regulated militia, this does not suggest that preserving the militia was the only reason Americans valued the right to bear arms; most undoubtedly thought it even more important for self-defense and hunting" (*Id.*, at 2801).

Interpretation of the Second Amendment. Scalia argues that the individual right interpretation of the Second Amendment is supported by scholars, courts, and legislators. Also, none of the Supreme Court's precedents forecloses the Court's individual right interpretation. He rejects Stevens' notion that that *Miller* (*United States v. Miller,* 307 U.S. 174 (1939)) held that the Second Amendment "protects the right to keep and bear arms for certain military purposes, but that it does not curtail the legislature's power to regulate the nonmilitary use and ownership of weapons" (*Heller*, at 2814). *Miller* "did not hold that and cannot possible be read to have held that. . . It is particularly wrongheaded to read *Miller* for more than what is said, because the case did not even purport to be a thorough examination of the Second Amendment" (*Id.,* at 2814). Rather, the *Miller* holding is consistent with and "positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that

“have some reasonable relationship to the preservation or efficiency of a well regulated militia”) (*Id.*, at 2814).

Limitations on the Right to Keep and Bear Arms

Second Amendment rights are not absolute, according to Scalia. Thus, the amendment does not grant the “right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose” (*Heller.*, at 2816). Among “presumptively lawful” regulatory measures are laws that (1) prohibit carrying concealed weapons, (2) prohibit the possession of firearms by felons and the mentally ill, (3) forbid the carrying of firearms in sensitive places such as schools and government buildings, or (2) impose conditions and qualifications on the commercial sale of arms. He adds that he could also find “support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons” (*Id.*, at 2816, 2817). In a footnote, Scalia says the list of presumptively lawful measures “does not purport to be exhaustive.”

Standard of Determination

The Court did not identify the specific standard it used to make its individual-right determination. But it rejected the rational basis standard. And it rejected Breyer's interest-balancing approach, which asks whether a law “burdens a protected interest in a way or to an extent that is out or proportion to the statute's salutary effects upon other important governmental interests” (*Id.*, at 2852). According to Scalia, the Second Amendment is the *“product* of an interest-balancing by the people . . . and it elevates above all other interests the right of law–abiding, responsible citizens to use arms in defense of hearth and home” (*Heller* at 2821). The enumeration of that right, Scalia reasons:

> takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject of future judges' assessments of its usefulness is no constitutional guarantee at all (*Id.*, at 2821).

While acknowledging the serious problem of handgun violence, Scalia asserts that the Second Amendment “necessarily takes certain policy choices off the table,” including an absolute ban on handguns in the home for self-defense (*Id.*, at 2822).

STEVENS' DISSENT

In a strongly worded dissent, Justice Stevens, after conducting his own extensive analysis of the Second Amendment's text, history, and purpose, disparaged Scalia's

historical analysis, stating that the Court had based its holding on "a strained and unpersuasive reading" of the amendment. In Stevens' opinion, the amendment protects the individual right to bear arms only for certain military purposes and does not limit the authority of legislatures to regulate private, civilian use of firearms (*Id.*, at 2822).

Stevens contends that not a word in the constitutional text supports the Court's "overwrought and novel description" of the Second Amendment as elevating above all other interests "the right of law-abiding responsible citizens to use arms in defense of hearth and home" (*Id.*, at 2831). Rather, when each word in the text is given full effect, "the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia"(*Id.*, at 2831). And there is no indication that the "Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution" (*Id.*, at 2822). Instead, the historical record confirms that "the Framers' single-minded focus in crafting the constitutional guarantee to keep and bear arms' was on military uses of firearms, which they viewed in the context of service in state militias" (*Id.*, at 2826).

Stevens argues that, in adopting the individual-right view, the Court had granted a "new constitutional right to own and use firearms for private purposes" (*Id*., at 2846) and had overturned long-standing precedent in *Miller.* In contrast to Scalia, Stevens interprets *Miller* to mean that the Second Amendment protects the right to keep and bear arms for certain military purposes, but it does not limit government's power to regulate nonmilitary use and ownership of weapons (*Heller*, at 2823).

Stevens contends that many courts have relied on *Miller,* which is both the most natural reading of the amendment's text and the interpretation most faithful to the history of its adoption. He contends that "even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court and for the rule of law itself would prevent most jurists from endorsing such a dramatic upheaval in the law" (*Heller*, at 2824). The dissent concludes:

> The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons and to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice (*Id.*, at 2847).

BREYER'S DISSENT

Justice Breyer dismisses the notion of an “untouchable constitutional right guaranteed by the Second Amendment to keep loaded handguns in the house in crime-ridden urban areas" (*Id*., at 2870). He argues that the Second Amendment protects “militia-related, not self-defense related, interests.” But even if it protects self-defense interests, the District's handgun ban and trigger lock requirements would be permissible because (1) the protection is not absolute and (2) the District's law falls “within the zone that the Second Amendment leaves open to regulation by legislatures” for the following reasons:

> The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelming favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted (*Id.*, at 2847, 2848).

Breyer reviewed, among other things, colonial laws regulating civilian firearm usage in various scenarios, noting that “the historical evidence demonstrates that a self-defense assumption is the *beginning,* rather than the *end* of any constitutional inquiry” (*Id.*, at 2850). According to Breyer:

> That the district law impacts self-defense merely raises *questions* about the law's constitutionality. But [whether the law is unconstitutional] requires us to focus on practicalities, the problems that called it into being, its relation to those objectives—in a word, the details (*Id.*, at 2850).

Breyer asserts that the District's law would not be unconstitutional under a rational-basis test, which requires a court to uphold a regulation so long as it bears a rational relationship to a legitimate government purpose. But the fact:

> that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-bases review) or unconstitutionality (as in strict scrutiny). Rather, “where a law significantly implicates competing constitutionally protected interests in complex ways,” the Court generally 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 (*Id.*, at 2852).

Breyer advocates that the court adopt an explicit interest-balancing approach, an approach it has taken in “various constitutional contexts, including election-law cases,

speech cases, and due process cases" (*Id.*, at 2852). This approach would review gun laws and balance the interest of Second Amendment protections against the government's compelling interest of preventing crime. Applying a balancing test that takes into account extensive empirical evidence of the magnitude of gun crimes and violence would show that the D.C. law targeting handguns in high-crime urban areas, was a constitutionally permissible legislative response "which sought to further the sort of life-preserving and public-safety interests that the Court has called compelling," according to Breyer (*Id.*, at 2861). Breyer concludes that:

> the District's objectives are compelling; its predictive judgments as to its law's tendency to achieve those objectives are adequately supported; the law does impose a burden upon any self-defense interest that the Amendment seeks to secure; and there is no clear less restrictive alternative (*Id.*, at 2865).

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