



SUMMARY AND ANALYSIS OF *DISTRICT OF COLUMBIA V. HELLER** JULY 2008

In *District of Columbia v. Heller*, No. 07-290 (June 26, 2008), the United States Supreme Court considered the meaning and scope of the Second Amendment for the first time since 1939. In a 5-4 decision authored by Justice Scalia,¹ the Court held that the District of Columbia's ban on handgun possession in the home, as well as the District's requirement that firearms in the home be stored "unloaded and disassembled or bound by a trigger lock or similar device," violate the Second Amendment. The Court interpreted the Second Amendment to protect the right of individuals to keep and bear arms, unconnected with service in a militia. The Court made clear that this right has limits, but, as explained below, the contours of those limits remain unclear.

A. The Text of the Second Amendment

The Second Amendment reads: "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."

B. The Majority Opinion

Justice Scalia devotes the greater part of the opinion in *Heller* to a selective historical analysis concerning the meaning of the text of the Second Amendment. The Court frames the principal issue raised by the case as whether the right secured by the Second Amendment arises only in the context of a person's service in the militia, or whether it encompasses a right to possess firearms for private purposes. The Court answers that question by dissecting the Amendment and analyzing its two major provisions separately.

Essentially, the Court concludes that the second clause of the Amendment ("the right of the people to keep and bear Arms, shall not be infringed") refers to a pre-existing right of individuals "to possess and carry weapons in case of confrontation," which cannot be limited by the first clause ("A well regulated Militia, being necessary to the security of a free State"). *Heller, slip op.* at 19. The Court states that this right "was not unlimited" and that the Amendment does not protect "the right of citizens to carry arms for *any sort* of confrontation." *Id.* at 22 (emphasis in original).

* LCAV thanks David Fry and his colleagues at Munger, Tolles & Olson LLP for their assistance in preparing this analysis, and for their efforts in authoring the *amicus curiae* brief submitted on behalf of LCAV, the U.S. Conference of Mayors, and eleven major U.S. cities, in support of the District of Columbia. A copy of the *amicus* brief is available at http://www.lcav.org/library/amicus_briefs/D_C_v_Heller_Amicus_Brief.pdf.

¹ The majority opinion is joined by Chief Justice Roberts and Justices Alito, Kennedy and Thomas.

The majority opinion dismisses the Court’s principal precedent concerning the interpretation of the Second Amendment, *United States v. Miller*, 307 U.S. 174 (1939), as not “a thorough examination” of the Amendment. *Id.* at 50. The Court limits *Miller* to the proposition that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.” *Id.* at 53.²

Turning to the general question of the scope of the Second Amendment right, the Court reiterates that the right is not unlimited. *Id.* at 54. The Court states 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 such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 54-55. Moreover, the opinion expressly states that this list of “presumptively lawful” restrictions should not be viewed as exhaustive. *Id.* at 55 n.26. In keeping with its interpretation of *Miller*, the Court also states that the Second Amendment’s protection is limited to arms “in common use at the time.” *Id.* at 55 (quoting *Miller*, 307 U.S. at 179).

Finally, the Court applies its analysis to the ordinances at issue. The Court holds that the District’s ban on handguns violates the Constitution because “the inherent right of self-defense has been central to the Second Amendment” and handguns are the class of firearms “overwhelmingly chosen by American society for that lawful purpose.” *Id.* at 56. Allowing possession of other firearms does not render the ban permissible because “the American people have considered the handgun to be the quintessential self-defense weapon.” *Id.* at 57.

The majority opinion states that the handgun ban would fail any standard of scrutiny that the Court has previously applied in evaluating the constitutionality of legislation, but does not articulate a standard that should be applied in evaluating other laws under the Second Amendment. *Id.* at 56-57. In a footnote, however, the opinion strongly suggests that application of the rational basis test would be nonsensical. *Id.* at 56 n.27. The majority also rejects an “interest-balancing” analysis suggested in Justice Breyer’s dissent – stating that, whatever the Second Amendment leaves for future evaluation, “it surely elevates above all other interests the right of law-abiding responsible citizens to use arms in defense of hearth and home.” *Id.* at 63.

The Court also invalidates the District of Columbia’s ordinance requiring that registered firearms be disabled by means of a trigger lock or that they be stored disassembled and unloaded. The majority opinion states that this provision “makes it impossible for citizens to use [registered firearms] for the core lawful purpose of self-defense.” *Id.* at 58. The opinion goes on to say, however, that its analysis does *not*

² In *United States v. Miller*, 307 U.S. 174 (1939), the U.S. Supreme Court rejected a Second Amendment challenge brought by two individuals charged with violating a federal law prohibiting the interstate transportation of sawed-off shotguns. The Court in *Miller* held that the “obvious purpose” of the Second Amendment is to “assure the continuation and render possible the effectiveness” of the state militia, and the Amendment “must be interpreted and applied with that end in view.” *Id.* at 178.

“suggest the invalidity of laws regulating the storage of firearms to prevent accidents.”
Id. at 60.

C. The Dissents

Two dissenting opinions were filed – one written by Justice Stevens and one written by Justice Breyer. All four dissenting Justices (Justices Breyer, Ginsburg, Souter and Stevens) joined both opinions. Justice Stevens outlines the historical evidence demonstrating that the Second Amendment’s purpose was to prevent the federal government from disarming the state militias. He also notes that the majority opinion deviates from the Court’s prior precedent, most particularly *United States v. Miller*, without showing any basis for the revised interpretation. In the dissenters’ view, the Court should have abided by its prior judgment that the Second Amendment must be construed in accordance with its purpose – the protection of the state militias – and should be read to secure to the people a right to use and possess arms only in conjunction with service in a well-regulated militia.

Although he agrees that the Second Amendment is limited to the militia context, Justice Breyer writes that, even if the majority is correct that the Second Amendment protects an individual right to own guns for self-defense, the District of Columbia’s ordinances should be upheld. Applying an interest-balancing inquiry, Justice Breyer finds that the ordinances, which focus on the dangers of handguns in a high-crime urban area, “represent[] a permissible legislative response to a serious, indeed life-threatening, problem.” *Heller, slip op.* at 2 (Breyer, J., dissenting).

D. Implications of the Court’s Analysis for Other Gun Laws

The majority opinion in *Heller* provides no overall analytical structure for lower courts to apply in assessing the validity of other gun regulations not at issue in the case, expressly declining to articulate a standard of review for future cases. In *dicta*, however, the Court suggests the following:

- Laws barring possession of firearms by convicted felons or the mentally ill will be upheld;
- Laws barring the carrying of firearms in government buildings, schools and other, unspecified, “sensitive places” will be upheld;
- Generally, laws imposing requirements on commercial sales of firearms will be upheld;
- Laws banning possession of “dangerous and unusual” weapons that are not “in common use at the time” – specifically including machine guns – will be upheld; and
- Laws regulating the storage of firearms to prevent accidents may be upheld.

Other than the specific provisions struck down by the Court, the majority does not provide clear guidance on the types of laws that could be invalidated under *Heller*. Given the majority's rhetoric, it appears that the right guaranteed by the Second Amendment would apply with strongest force in the context of the home.

The Court also left open the question of whether the Second Amendment applies to states and local governments other than the District of Columbia, through the legal doctrine of incorporation. Because the District is a federal enclave, the Court had no occasion to decide the issue in this case. The Court noted that its pre-*Miller* precedents found that the Second Amendment does not apply against the states, but raised a question concerning the continued vitality of those holdings. *Heller, slip op.* at 48 n.23.

In light of the many questions left unanswered by the Court, LCAV agrees with Justice Breyer's assessment that "[t]he decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. . . . And 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." *Heller, slip op.* at 40 (Breyer, J., dissenting).

As the nation's only organization devoted exclusively to providing legal assistance in support of gun violence prevention, LCAV stands ready to provide free legal support to jurisdictions facing challenges to existing gun laws, and to elected officials seeking effective, legally-defensible solutions to the problem of gun violence in their communities. For more information or to request assistance, contact requestassistance@lcav.org.