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## COMMENTS

### *DISTRICT OF COLUMBIA V. HELLER:* THE INDIVIDUAL RIGHT TO BEAR ARMS

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.

— The Second Amendment to the United States Constitution

Over forty million Americans own a gun.<sup>1</sup> Between 55,000 and 120,000 times a year, an American uses his gun in self-defense.<sup>2</sup> Gun ownership is perhaps one of the oldest and most prevalent characteristics of American culture,<sup>3</sup> and for well over two hundred years the Second Amendment has protected some right of Americans to “keep and bear Arms.”<sup>4</sup> Yet, in nearly every state, gun owners must comply with some form of gun control laws.<sup>5</sup> Last Term, in *District of Columbia v. Heller*,<sup>6</sup> the Supreme Court for the first time squarely addressed the scope of the Second Amendment’s right to bear arms in striking down D.C. laws that strictly regulated handguns and other firearms. The Court unanimously held that the Second Amendment confers an individual right,<sup>7</sup> and a bare majority of the Court held that this right includes possessing weapons in the home for self-defense.<sup>8</sup>

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<sup>1</sup> Christine Cadena, *Presidential Campaign Platforms 2008: The Issues of Gun Control*, ASSOCIATED CONTENT, July 2, 2008, [http://www.associatedcontent.com/article/294410/presidential\\_campaign\\_platforms\\_2008.html](http://www.associatedcontent.com/article/294410/presidential_campaign_platforms_2008.html).

<sup>2</sup> DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 69 (2004). That said, gun accidents account for thousands of deaths a year and accounted for over sixty thousand deaths between 1965 and 2000. *See id.* 27–28 tbl.3.1.

<sup>3</sup> *See generally* Richard Hofstadter, *America As a Gun Culture*, AM. HERITAGE, Oct. 1970, at 4, 4–11, 82–85.

<sup>4</sup> U.S. CONST. amend. II.

<sup>5</sup> *See generally* LEGAL COMMUNITY AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS (2008), available at [http://www.lcav.org/library/reports\\_analyses/RegGuns.entire.report.pdf](http://www.lcav.org/library/reports_analyses/RegGuns.entire.report.pdf); *see also* Legal Community Against Violence, State & Local Laws, [http://www.lcav.org/content/state\\_local.asp](http://www.lcav.org/content/state_local.asp) (last visited Oct. 5, 2008).

<sup>6</sup> 128 S. Ct. 2783 (2008).

<sup>7</sup> *Id.* at 2799 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”); *id.* at 2822 (Stevens, J., dissenting) (“Surely [the Second Amendment] protects a right that can be enforced by individuals.”); *id.* at 2848 (Breyer, J., dissenting) (“In interpreting and applying this Amendment, I take as a starting point the . . . proposition[ that t]he Amendment protects an ‘individual’ right — *i.e.*, one that is separately possessed, and may be separately enforced, by each person on whom it is conferred.”).

<sup>8</sup> *See id.* at 2821–22 (majority opinion).

Prior to *Heller*, “[t]he District of Columbia generally prohibit[ed] the possession of handguns.”<sup>9</sup> D.C. law prohibited citizens both from carrying unregistered firearms and from registering handguns,<sup>10</sup> thereby creating a de facto blanket ban on handgun possession. D.C. also had a separate law prohibiting the carrying of handguns without a license and granting sole licensing power to the chief of police.<sup>11</sup> Moreover, D.C. law required that owners of lawful firearms keep them “‘unloaded and dissembled or bound by a trigger lock or similar device’ unless they are located in a place of business or are being used for lawful recreational activities.”<sup>12</sup>

Dick Heller, a special police officer in the District, was licensed to carry a handgun during his shifts at the Federal Judicial Center.<sup>13</sup> However, when Heller sought to register a handgun for possession in his home, his application was denied.<sup>14</sup> Following this denial, Heller filed suit in federal district court.<sup>15</sup> He challenged D.C.’s gun control laws on Second Amendment grounds and sought to have them enjoined as unconstitutional.<sup>16</sup> The district court rejected the challenge, holding that the Second Amendment confers no individual right to bear arms outside the militia.<sup>17</sup> The D.C. Circuit reversed, holding that the Second Amendment does confer an individual right to possess arms and that all three D.C. gun law prohibitions violate that right.<sup>18</sup>

The Supreme Court affirmed. Writing for the Court, Justice Scalia<sup>19</sup> rooted his opinion in an originalist analysis of the Second Amendment.<sup>20</sup> He began by addressing the two key phrases in the operative clause of the amendment: “right of the people” and “keep and bear Arms.”<sup>21</sup> Based on structural implications,<sup>22</sup> a natural interpreta-

<sup>9</sup> *Id.* at 2788.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (quoting D.C. CODE ANN. § 7-2507.02 (LexisNexis 2001)).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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

<sup>17</sup> *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (D.D.C. 2004).

<sup>18</sup> *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007).

<sup>19</sup> Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined Justice Scalia’s opinion.

<sup>20</sup> *See, e.g., Heller*, 128 S. Ct. at 2793 (“At the time of the founding, as now, to ‘bear’ meant to ‘carry.’ . . . From our review of *founding-era sources*, we conclude that this *natural meaning* was also the meaning that ‘bear arms’ had in the 18th century.” (emphases added)); *see also* Legal Theory Blog, <http://lsolum.typepad.com/legaltheory/2008/06/heller-and-the.html> (June 28, 2008, 10:50) (“The opinion of the Court by Justice Scalia provides the clearest expression of public meaning originalism to be found in a Supreme Court decision.”).

<sup>21</sup> *Heller*, 128 S. Ct. at 2790–91 (quoting U.S. CONST. amend. II).

<sup>22</sup> *See, e.g., id.* at 2790 (“Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.” (footnote omitted)).

tion of the words,<sup>23</sup> a multitude of Founding-era sources,<sup>24</sup> and the historical background of the amendment,<sup>25</sup> Justice Scalia concluded that the operative clause confers an “individual right to possess and carry weapons in case of confrontation.”<sup>26</sup> Next, Justice Scalia turned to the prefatory clause of the amendment, which reads: “A well regulated Militia, being necessary to the security of a free State . . . .”<sup>27</sup> Upon conducting a similar originalist analysis of this clause, he concluded that the two clauses “fit[] perfectly” in that the protection of a right to bear arms individually was a means of protecting the people’s collective ability to form a militia.<sup>28</sup> Thus, rather than suggesting that the right to bear arms exists only *specifically* within the militia, the amendment *generally* preserves the right to bear arms, in large part to ensure that the people can always form a militia if necessary. Justice Scalia then drew on similar provisions in Founding-era state constitutions<sup>29</sup> and nineteenth-century commentary on the amendment<sup>30</sup> to confirm his reading. Following this analysis, Justice Scalia turned to whether the Court’s precedents foreclosed his interpretation, and he concluded that they did not.<sup>31</sup> He then reasoned that the individual right to bear arms is limited to the possession of weapons “in common use.”<sup>32</sup> Based on this analysis, Justice Scalia concluded that the D.C. gun laws violated Heller’s Second Amendment right to possess and carry a handgun in the home for self-defense.<sup>33</sup>

Justice Stevens filed a dissenting opinion,<sup>34</sup> agreeing with the majority that the Second Amendment confers an individual right, but dis-

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<sup>23</sup> See, e.g., *id.* at 2792 (“[T]he most natural reading of ‘keep Arms’ in the Second Amendment is to ‘have weapons.’”).

<sup>24</sup> *Id.* at 2793 (“From our review of founding-era sources, we conclude that this natural meaning was also the meaning that ‘bear arms’ had in the 18th century.”).

<sup>25</sup> *Id.* at 2797 (“This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”).

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

<sup>27</sup> *Id.* at 2799 (omission in original) (quoting U.S. CONST. amend. II) (internal quotation marks omitted).

<sup>28</sup> *Id.* at 2801; see also *id.* (“[H]istory show[s] that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.”).

<sup>29</sup> See *id.* at 2802–04.

<sup>30</sup> See *id.* at 2804–12.

<sup>31</sup> See *id.* at 2816.

<sup>32</sup> *Id.* at 2817 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (internal quotation mark omitted).

<sup>33</sup> See *id.* at 2822.

<sup>34</sup> Justices Souter, Ginsburg, and Breyer joined Justice Stevens’s opinion.

agreeing as to the scope of that right.<sup>35</sup> Based on his reading of “[t]he text of the Amendment, its history,”<sup>36</sup> and his application of *United States v. Miller*,<sup>37</sup> he concluded that the Second Amendment does not protect an individual right to possess and carry a handgun outside of the context of the militia.<sup>38</sup> Like Justice Scalia, Justice Stevens conducted a close reading of the amendment’s text, focusing specifically on the prefatory clause and each of the two key provisions of the operative clause.<sup>39</sup> However, unlike Justice Scalia, Justice Stevens thought that “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.”<sup>40</sup> Following his textual analysis, Justice Stevens turned to historical evidence from state ratification debates and the amendment’s drafting and acceptance processes, all of which he argued confirmed his reading.<sup>41</sup> After critiquing the majority’s use of English sources,<sup>42</sup> Justice Stevens turned to the post-ratification history of the amendment and Supreme Court precedent dealing with the amendment to further confirm his analysis.<sup>43</sup> Justice Stevens concluded that the Second Amendment does not prohibit D.C.’s laws and characterized the majority’s conclusion as activist and unfounded.<sup>44</sup>

Justice Breyer also filed a dissenting opinion,<sup>45</sup> identifying two chief disagreements with the majority. First, he agreed with Justice Stevens that the individual right to bear arms was limited to militia service.<sup>46</sup> Second, he reasoned that, even if the amendment protects an individual right to bear arms for self-defense, the D.C. gun laws

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<sup>35</sup> See *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting) (“The question presented by this case is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.”).

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

<sup>37</sup> 307 U.S. 174.

<sup>38</sup> See *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).

<sup>39</sup> See *id.* at 2824–31.

<sup>40</sup> *Id.* at 2831.

<sup>41</sup> See *id.* at 2831–36.

<sup>42</sup> See *id.* at 2837–39.

<sup>43</sup> See *id.* at 2839–46.

<sup>44</sup> See *id.* at 2846–47. In Justice Stevens’s words:

[The majority’s decision] will surely give rise to a *far more active judicial role* in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries. . . . 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 authorize this Court 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 (emphases added).

<sup>45</sup> Justices Stevens, Souter, and Ginsburg joined Justice Breyer’s opinion.

<sup>46</sup> See *id.* at 2847 (Breyer, J., dissenting).

were not “unreasonable or inappropriate in Second Amendment terms.”<sup>47</sup> Focusing on the second reason, Justice Breyer argued that the Court should adopt an “interest-balancing” approach to Second Amendment cases that “would take account both of the statute’s effects upon the competing interests and the existence of any clearly superior less restrictive alternative.”<sup>48</sup> This standard, he explained, would be similar to the standard the Court already employs in certain election law, speech, and due process cases,<sup>49</sup> and would allow “[e]xperience as much as logic” to drive the Court’s analysis.<sup>50</sup> Using this method,<sup>51</sup> Justice Breyer concluded that the D.C. law would satisfy the balancing test and therefore did not violate the Second Amendment.<sup>52</sup>

Many questions arise from the Court’s first direct attempt at identifying the rights protected by the Second Amendment. Was the Court’s conclusion correct? What do we make of the Court’s methodology? And what are the practical implications of the Court’s decision? The following three Comments address these questions as well as many others. The Comments seek not only to describe and discuss the Court’s opinions, but also to situate the case within a methodological, cultural, and historical context. In doing so, they contribute to the debate surrounding *Heller*, the Second Amendment, and gun rights in a meaningful and enduring fashion.

In *Heller*, *HLR*, and *Holistic Legal Reasoning*, Professor Akhil Reed Amar argues that none of the opinions in *Heller* employed a sufficiently holistic approach to the methodological and substantive issues in the case. His Comment also takes account of the *Harvard Law Review*’s connection to the case, in that four of the *Review*’s alumni sit on the Court and two of those alumni, Justice Scalia and Justice Breyer, along with the *Review*’s most loyal reader on the Court, Justice

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

<sup>48</sup> *Id.* at 2852 (citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

<sup>49</sup> See *id.* (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 388 (2002) (Breyer, J., dissenting) (commercial speech); *Nixon*, 528 U.S. at 403 (collecting cases); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (election regulation); *Mathews v. Eldridge*, 424 U.S. 319, 339–49 (1976) (procedural due process); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (government employee speech)).

<sup>50</sup> *Id.* at 2852.

<sup>51</sup> Justice Breyer stated that this method was similar to the intermediate scrutiny applied in cases like *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), in which the Court reviewed restrictions on corporate speech. See *Heller*, 128 S. Ct. at 2860.

<sup>52</sup> See *Heller*, 128 S. Ct. at 2853–68 (concluding that the D.C. laws “properly seek[] to further the sort of life-preserving and public-safety interests that the Court has called ‘compelling,’” *id.* at 2861 (quoting *United States v. Salerno*, 481 U.S. 739, 750, 754 (1987)), and do not unduly burden the Second Amendment’s interests in preserving the militia and protecting the individual use of firearms for sporting and self-defense purposes, see *id.* at 2861–68).

Stevens, authored the three opinions in the case. Not a single member of this “*HLR* group,” Professor Amar argues, provided an approach to the Second Amendment that adequately dealt with conflict between precedent and constitutional meaning or considered the intratextual importance of the Ninth, Fourteenth, or Nineteenth Amendments. Drawing on historical sources and Supreme Court case law, Professor Amar exposes these weaknesses in each Justice’s approach to *Heller* and explains how they might have been avoided.

In *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, Professor Reva B. Siegel analyzes *Heller* through the lens of social movement. In particular, Professor Siegel argues that Justice Scalia’s majority opinion is internally inconsistent and flawed in its emphasis on sources in the centuries before and after ratification of the Second Amendment, rather than the views of the Amendment’s drafters themselves. Moving beyond the *Heller* opinions, Professor Siegel then recounts twentieth-century social movements surrounding gun rights and considers how the use of authority shaped those movements. Through this historical analysis, Professor Siegel demonstrates how modern social movements influenced the Court’s opinions in *Heller*. Professor Siegel concludes by considering the consequences of a constitutional culture in which social movements can influence the methodology and substance of judicial opinions.

In *Second Amendment Minimalism: Heller As Griswold*, Professor Cass R. Sunstein analyzes the Court’s methodology in *Heller* and argues that the case is best characterized as a minimalist decision that vindicates a national consensus in favor of an individual right to own guns. In this sense, he argues, the Court’s decision is most like *Griswold v. Connecticut*,<sup>53</sup> as both struck down laws that were clear outliers to contemporary national values. In advancing this reading of *Heller*, Professor Sunstein prefers it to two alternative readings of the case: *Heller* as neutrally originalist like *Marbury v. Madison*<sup>54</sup> and *Heller* as overriding democratic will like *Lochner v. New York*.<sup>55</sup> These alternative views, he says, fail to account for the Court’s minimalist approach and the fact that it took until 2008 for the Court to recognize individual gun rights. Building on his characterization of *Heller* as *Griswold*, Professor Sunstein predicts that Second Amendment jurisprudence will proceed like privacy jurisprudence in a series of minimalist decisions tracking the limits of public consensus.

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<sup>53</sup> 381 U.S. 479 (1965).

<sup>54</sup> 5 U.S. (1 Cranch) 137 (1803).

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