

## *District of Columbia v. Heller:* The Second Amendment Is Back, Baby

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*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. Const., Amend. II

For more than 200 years, the Second Amendment was a sort of constitutional Loch Ness Monster: Despite occasional reported sightings, many people—and certainly most judges—were inclined to believe it did not really exist. But that changed dramatically on June 26, 2008, when the Supreme Court handed down *District of Columbia v. Heller*,<sup>1</sup> in which it unambiguously held, for the first time in history, that the Second Amendment protects an individual right to keep and bear arms.

As with any newly discovered constitutional right, the precise scope and content of the Second Amendment remain unclear and will have to be fleshed out in subsequent litigation. Within hours of the Court's announcement of the *Heller* decision (which struck down Washington, D.C.'s handgun ban), my co-counsel Alan Gura

\*Senior Attorney, Institute for Justice, and co-counsel for the plaintiffs in *District of Columbia v. Heller*. I would like to thank my co-counsel Bob Levy and Alan Gura for their extraordinary work on this case and their unflagging commitment to vindicating our clients' constitutional right to have a gun in their homes for self-defense. I would also like to thank our clients, Dick Heller, Shelly Parker, Tom Palmer, Tracey Ambeau, Gillian St. Lawrence, and George Lyon, each of whom has been a sincere, passionate, and articulate champion of the Second Amendment.

<sup>1</sup> 554 U.S. \_\_\_\_ , 128 S. Ct. 2783 (2008).

## CATO SUPREME COURT REVIEW

filed suit against Chicago's handgun ban.<sup>2</sup> And along with two other D.C. residents, Heller has challenged the District's new licensing rules that forbid, among other things, the registration of any semiautomatic pistol. Other lawsuits in other jurisdictions are sure to follow.

It is too soon to know what effect *Heller* will have on the vast thicket of federal, state, and local firearms regulations in America. Indeed, the Supreme Court did not even announce what standard of review it will apply in future Second Amendment cases, though it expressly ruled out its most deferential standard, the so-called rational basis test. As always, much will turn on how the Court evaluates the competing governmental and individual interests, how much deference it cedes to legislatures, and—of particular importance given the abundance of empirical data in this area—the extent to which it favors actual evidence over unsupported speculation or junk science in the resolution of future cases.

This article has five parts. First, I set the stage for the *Heller* litigation by briefly reviewing the history of Second Amendment jurisprudence and scholarship. Next, I explain how and why the *Heller* case was filed and what happened in the lower courts. Then I describe the Supreme Court proceedings, including the extraordinary outpouring of scholarship in the form of amicus briefs from across the ideological spectrum. The fourth part summarizes the majority and two dissenting opinions in *Heller*, and the fifth part offers a critique of those opinions and some thoughts about the implications of the decision and the future of Second Amendment litigation.

## I.

Until 2001, the Second Amendment was essentially a dead letter in constitutional law, at least among the federal courts. The Supreme Court had confronted it only once, in a 1939 case called *United*

<sup>2</sup> Information about that case, *McDonald v. City of Chicago*, may be found at [www.chicagoguncase.com](http://www.chicagoguncase.com). Challenges were brought against handgun bans in several Chicago suburbs as well, which all moved to repeal those laws rather than try to defend them in court. See, e.g., Susan Kuczka & Hal Dardick, *Wilmette repeals gun ban*, Chicago Tribune, July 25, 2008, at W1. Chicago's Mayor Richard Daley, by contrast, has announced his intent to defend the city's handgun ban all the way to the Supreme Court if necessary. James Oliphant & Jeff Coens, *Daley vows to fight for Chicago's gun ban*, Chicago Tribune, June 27, 2008, at C1.

*The Second Amendment Is Back, Baby*

*States v. Miller*.<sup>3</sup> As discussed below, that decision produced a legal Rorschach test upon which nearly any interpretation of the amendment could be projected. The resulting jurisprudential vacuum was quickly filled by a series of federal circuit court decisions holding that the Second Amendment provides no meaningful protection for individual gun ownership. Legal academia, to the extent it gave the matter any attention at all, mostly echoed and supported that understanding through what came to be called the “collective rights” model. But neither the court decisions nor the academic literature advocating the collective rights model were very persuasive, and the door remained open to serious examination of the Second Amendment’s true meaning, which commenced in earnest about 25 years ago.

The modern saga of the Second Amendment begins with a small-time bank robber from Oklahoma named Jackson Miller. Miller and his associate Frank Layton were arrested in 1938 for transporting an untaxed sawed-off shotgun across state lines in violation of the National Firearms Act of 1934.<sup>4</sup> In what may have been a deliberate test case designed to vindicate the law’s constitutionality, a federal district judge in Arkansas quashed the indictment against the men on the grounds that the NFA violated the Second Amendment.<sup>5</sup> The government appealed directly to the Supreme Court, which overruled the lower court in a unanimous decision upholding the constitutionality of the NFA. But the Court did not hold, as later misrepresentations of *Miller* would contend, that the Second Amendment protects only a collective or militia-based right to possess firearms. Nor did the Court even hold that the sawed-off shotgun at issue fell outside the definition of constitutionally protected “arms” covered by the amendment. Instead, the Court simply found that it was “not within judicial notice” that a short-barreled shotgun “is any part of the ordinary military equipment or that its use could contribute to the common defense” and remanded the case to the

<sup>3</sup> 307 U.S. 174 (1939).

<sup>4</sup> Brian L. Frye, *The Peculiar Story of United States vs. Miller*, 3 N.Y.U. J. L. & Liberty 48, 58–59 (2008).

<sup>5</sup> *Id.* at 60, 65.

## CATO SUPREME COURT REVIEW

district court for further proceedings, presumably including the receipt of evidence on that point.<sup>6</sup>

As noted in Justice Scalia's majority opinion in *Heller*, two features of the *Miller* case are particularly significant. First, the Supreme Court only heard from the government in that case because the defendants had apparently run out of money to pay their lawyer and were not represented by counsel before the Court.<sup>7</sup> Second, the lead argument in the government's brief was that neither Miller nor Layton could invoke the Second Amendment because they were not in active militia service at the time of their arrest.<sup>8</sup> That is, of course, the collective rights theory, and despite the Court's failure to embrace it, later judges and academics would nevertheless read *Miller* as having adopted that interpretation of the Second Amendment. Indeed, until *Heller*, all but three of the twelve federal circuits endorsed some version of the collective rights model.<sup>9</sup> State appellate courts were more evenly split, with about ten cases on either side of the individual rights versus collective rights divide.<sup>10</sup>

<sup>6</sup> *Miller*, 307 U.S. at 178, 183. Somewhat ironically, Mr. Miller was shot to death, apparently by fellow criminals, before his case could proceed any further in the district court. See Frye, *supra* note 4 at 68–69. His co-defendant Frank Layton pleaded guilty to the NFA charge and received five years in prison, thus terminating the *Miller* litigation. *Id.* at 69.

<sup>7</sup> As explained in a suitably brief telegram from their former attorney to the Clerk of the Supreme Court, "Suggest case be submitted on [government's] brief. Unable to obtain any money from clients to be present and argue case." *Id.* at 67.

<sup>8</sup> *Parker v. District of Columbia*, 478 F.3d 370, 393 (D.C. Cir. 2007); see also *Heller*, 128 S. Ct. at 2814.

<sup>9</sup> *Cases v. United States*, 131 F.2d 916, 921–23 (1st Cir. 1942); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Hale*, 978 F.2d 1016, 1019–20 (8th Cir. 1992); *Silveira v. Lockyer*, 312 F.3d 1052, 1086 (9th Cir. 2003); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Wright*, 117 F.3d 1265, 1273–74 (11th Cir. 1997). The Second Circuit declined to address the collective-rights versus individual-rights dispute and instead held that whatever its content, the right may not be invoked against state governments. *Bach v. Pataki*, 408 F.3d 75, 84–85 (2d Cir. 2005). As discussed below, the Fifth Circuit was the first to adopt the individual rights view. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

<sup>10</sup> See *Parker*, 478 F.3d at 381 n.6 (collecting cases); see also Brief in Response to Petition for Certiorari in *District of Columbia v. Heller* at 15–16 (identifying several more individual rights cases) (available at [http://www.gurapossesky.com/news/parker/documents/petition\\_response.pdf](http://www.gurapossesky.com/news/parker/documents/petition_response.pdf)).

*The Second Amendment Is Back, Baby*

Meanwhile, historical and legal scholarship, such as it was, favored the collective rights model during that era. Writing in a 2000 symposium issue of the *Chicago Kent Law Review* promoting the collective rights model, Professor Robert Spitzer describes an exhaustive literature survey from which he concluded that “a total of eleven articles on the Second Amendment appeared in law journals from 1912 to 1959,” all of which endorsed some version of the collective rights model.<sup>11</sup> But that would change.

As described by leading collective rights proponent Carl Bogus in the same symposium issue, the period 1970 to 1989 saw a rough parity in the law review literature, with 27 articles supporting the individual rights model and 25 supporting the collective right view.<sup>12</sup> Then came an unmistakable shift. As more and more scholars looked more and more carefully at the Second Amendment, a growing majority concluded that the Second Amendment does protect an individual right to keep and bear arms outside the context of military service. So complete was this reversal that the individual rights interpretation soon came to be known as the “Standard Model.”<sup>13</sup>

Many people contributed to the resurgence of the individual rights interpretation, including Stephen Halbrook, Dave Kopel, Joyce Lee Malcom, and Randy Barnett, to name just a few. But most agree that the seminal work was Don Kates’s “Handgun Prohibition and the Original Meaning of the Second Amendment,” which appeared in the *Michigan Law Review* in 1983.<sup>14</sup> Acknowledging that the individual rights model was then endorsed “by only a minority of legal scholars,” Kates provided a comprehensive and devastating critique of what he called the “exclusively state’s right” interpretation of the Second Amendment. There followed an outpouring of new scholarship supporting the individual rights model and thoroughly undermining the historical, linguistic, and structural premises of the various militia-centric interpretations that had gained largely uncritical acceptance since *Miller* was decided in 1939.

<sup>11</sup> Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 *Chi.-Kent L. Rev.* 349, 366 (2000).

<sup>12</sup> Carl T. Bogus, *Fresh Looks: The History and Politics of Second Amendment Scholarship: A Primer*, 76 *Chi.-Kent L. Rev.* 3, 8 (2000).

<sup>13</sup> See, e.g., Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 *Tenn. L. Rev.* 461, 463 (1995).

<sup>14</sup> 82 *Mich. L. Rev.* 204 (1983).

## CATO SUPREME COURT REVIEW

Particularly damaging to the collective rights camp was the perceived defection of several high-profile liberal academics, whose stature and lack of personal or professional bias towards gun ownership made them difficult to dismiss as mere shills for the National Rifle Association.<sup>15</sup> The two most prominent examples are University of Texas law professor Sanford Levinson and Harvard's Laurence Tribe. Levinson created a stir with his 1989 essay in the *Yale Law Journal* titled "The Embarrassing Second Amendment,"<sup>16</sup> where he candidly surmised that he could not

help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.<sup>17</sup>

Ten years later, Professor Tribe released the third edition of his influential treatise on American constitutional law in which he acknowledged, for the first time, that the Second Amendment protects "a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes."<sup>18</sup> Others followed, including Yale's Akhil Amar and Duke's (now William and Mary's) William Van Alstyne.

The resurgence of academic interest in the Second Amendment produced a body of scholarship that could neither be ignored nor dismissed by opponents of the individual rights model—or, it turns out, by the federal courts. Remarkably, despite the rejection by nine federal circuit courts of the proposition that the Second Amendment protects an individual right to keep and bear arms, none of those decisions contained any serious analysis of the amendment itself.

<sup>15</sup> See, e.g., Bogus, *supra* note 12 at 9–10.

<sup>16</sup> 99 *Yale L. J.* 637 (1989).

<sup>17</sup> *Id.* at 642.

<sup>18</sup> 1 Laurence H. Tribe, *American Constitutional Law* 902 n. 211 (3d ed. 2000).

*The Second Amendment Is Back, Baby*

In 2001, the Fifth Circuit became the first federal appellate court to undertake that analysis, in *United States v. Emerson*.<sup>19</sup>

The case arose when Dr. Timothy Joe Emerson was charged with violating a federal law that forbids persons under a domestic restraining order from possessing firearms. He challenged the prosecution on several grounds, including that it violated his rights under the Second Amendment, at least in the absence of any express judicial finding that he posed a danger to his estranged wife.<sup>20</sup> In a thorough, scholarly decision, Judge Will Garwood conducted an exhaustive analysis of the Second Amendment and concluded that it “protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training.”<sup>21</sup>

Turning to the specific facts of the case, the panel expressed “concern[]” about the lack of express findings in the restraining order upon which Emerson’s prosecution was based,<sup>22</sup> but ultimately construed both the federal and state laws at issue as having implicitly required a specific showing of likely future harm before the restraining order could issue.<sup>23</sup> The court thus concluded that while the prosecution implicated Emerson’s Second Amendment right to own a firearm, it did not violate that right under the particular facts of his case.<sup>24</sup>

Although there is some question whether the Fifth Circuit’s Second Amendment analysis was mere dicta, as Judge Robert Parker argued in his special concurrence,<sup>25</sup> the effects of the decision were swift and dramatic. Among other things, the U.S. Department of Justice, under Attorney General John Ashcroft, reversed its earlier position and acknowledged in its brief opposing Emerson’s petition for certiorari that the Second Amendment protects an individual right to “possess and bear” firearms, subject to “reasonable

<sup>19</sup> 270 F.3d 203 (5th Cir. 2001).

<sup>20</sup> *Id.* at 261.

<sup>21</sup> *Id.* at 260.

<sup>22</sup> *Id.* at 261.

<sup>23</sup> *Id.* at 262–64.

<sup>24</sup> *Id.* at 265.

<sup>25</sup> See, e.g., *id.* at 272–74 (Parker, J., specially concurring).

## CATO SUPREME COURT REVIEW

restrictions” designed to prevent possession by “unfit persons.”<sup>26</sup> But there was one very specific reaction to *Emerson* that would ultimately give rise to the *Heller* case: Criminal defense attorneys throughout the country began asserting Second Amendment defenses to gun charges.<sup>27</sup>

## II.

The idea to file what would become the *Heller* case originated with my colleague Steve Simpson and me and solidified when we presented it to our friend and colleague Bob Levy. Steve and I are attorneys at the Institute for Justice, a libertarian public interest law firm based in Arlington, Virginia, that litigates to promote property rights, economic liberty, free speech, and school choice. Although neither of us had ever done any Second Amendment work, we stayed generally abreast of developments in that area. Like many other Americans, we were delighted by the *Emerson* decision. But as public interest lawyers, we were also concerned.

By creating a split of authority among federal courts over the proper interpretation of the Second Amendment, *Emerson* dramatically increased the likelihood of the Supreme Court accepting a case to review the issue and perhaps clarify its murky *Miller* decision. DOJ’s change in policy increased those odds still further, and the fact that criminal defense attorneys were now routinely asserting Second Amendment defenses to gun charges added elements of urgency and uncertainty. In short, we believed it was only a matter of time before the Supreme Court accepted a Second Amendment case, and it seemed clear that the odds of a favorable outcome would be better if the issue went up on behalf of law-abiding citizens instead of an accused criminal.

At the time, Washington, D.C., had the most draconian gun laws in the nation. Besides banning handguns outright, D.C. law required even lawfully owned shotguns and rifles to be unloaded and either

<sup>26</sup> See Opp’n to Pet. for Cert. in *United States v. Emerson*, No. 01-8780, at 19 n.3 (available at [www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf](http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf)).

<sup>27</sup> See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1065 (9th Cir. 2002) (noting that Second Amendment defenses have been raised by criminal defendants throughout the nation as a result of the Justice Department’s new position on the amendment) (citing Adam Liptak, Revised View of Second Amendment Is Cited As Defense in Gun Cases, N.Y. Times, July 23, 2002, at A1).

*The Second Amendment Is Back, Baby*

bound by a trigger lock or disassembled at all times.<sup>28</sup> Steve and I knew about those laws, and we knew the D.C. Circuit was one of the few federal appellate courts that had not yet interpreted the Second Amendment. We began to think seriously about what it would take to challenge D.C.'s functional firearms ban. One of the first people we approached was Bob Levy, a former entrepreneur, senior fellow in constitutional studies at the Cato Institute, and member of the Institute for Justice's board of directors. Bob and I became friends in 1994 while we were both clerking for Judge Royce Lamberth of the D.C. District Court. Bob immediately agreed to back the case, both financially and personally, and that was the watershed moment.

Steve's IJ-related duties prevented him from taking an active role in the actual litigation, but IJ's president Chip Mellor agreed to let me work on the case on my own time so long as I maintained a sufficiently low profile to avoid giving the impression that it was an Institute for Justice case.<sup>29</sup> Bob enlisted his Cato colleague Gene Healy, and the three of us began searching for potential clients. Before long, we received phone calls from various interested parties and from people who knew people who might be interested. We spent considerable time in the summer of 2002 interviewing potential clients and looking for people with the sincerity, character, and commitment to stay the course.

The lead plaintiff was an African-American woman of strong principles and iron will named Shelly Parker, who had tried to rid her neighborhood of drug dealers through community activism. For her efforts, Parker was labeled a "troublemaker" by the drug dealers, who began threatening her and even threw rocks through the windows of her house and car to make sure she got the message. Parker joined the lawsuit because she wanted to be able to keep a pistol at home to defend herself from those criminals, one of whom came to

<sup>28</sup> D.C. Code § 7-2502.02(a)(4) (forbidding registration of handguns); § 7-2507.02 (trigger lock requirement) (1981) (amended 2008).

<sup>29</sup> While the Institute for Justice litigates constitutional cases to promote individual liberty, the Second Amendment is not one of its core mission areas. In the Supreme Court, IJ filed an amicus brief supporting *Heller* and addressing the history and relevance of the Fourteenth Amendment as it relates to the right to keep and bear arms.

## CATO SUPREME COURT REVIEW

her front door shortly after the lawsuit was filed and tried to force his way inside yelling, “Bitch, I’ll kill you, I live on this block too.”<sup>30</sup>

Dick Heller was working as a security guard at the Federal Judicial Center in Washington, D.C. when we first spoke with him. D.C. law allows privately employed “special police officers” to carry pistols on the job but generally forbids them from taking their weapons home at night. Heller found it outrageous that the District allowed him to carry a pistol to protect the lives of government officials during the day, but forbade him from taking that same weapon home at night to defend his own life. On the advice of a friend, Heller went down to the Municipal Police Department in July 2002 and attempted to register a .22 caliber revolver that he kept at a location outside of D.C. The application was summarily rejected.

The remaining plaintiffs each had their own reasons for challenging D.C.’s gun ban. For example, Tom Palmer, who is Vice President for International Programs at the Cato Institute, believes he saved his own life years before in another state by brandishing a pistol at a gang of homophobes who assaulted him and a companion for being gay. Tracey Ambeau and Gillian St. Lawrence both wanted access to a functional firearm to protect themselves when their husbands were away, and St. Lawrence actually owned a shotgun for that purpose. But D.C. law prohibited her from ever loading it, even in self-defense.<sup>31</sup> Finally, George Lyon is a lawyer who lives and works in Washington, D.C. and believes he has the right to keep a pistol at home to defend himself and his family.

As word spread of our plan to challenge D.C.’s gun ban, we were somewhat surprised at the amount of pushback we received from people within the conservative and libertarian movement. That response was understandable to an extent. After all, there were not five clear votes on the Court to embrace a robust individual rights interpretation of the Second Amendment, and there was a very real risk that a majority of justices would either reject that model outright or render it meaningless by characterizing the right as non-fundamental. On the other hand, none of the skeptics we spoke with had a persuasive response to our concern that a criminal case was likely

<sup>30</sup> The biographical information about each of the six clients is taken from the declarations filed on their behalf in the district court proceedings. Those declarations are available, along with all of the other relevant pleadings in the Parker/Heller litigation at [www.dcguncase.com/blog/case-filings](http://www.dcguncase.com/blog/case-filings).

<sup>31</sup> D.C. Code § 7-2507.02 (1983) (amended 2008).

### *The Second Amendment Is Back, Baby*

to get to the Supreme Court first if no one seized the opportunity to bring a civil challenge.

The remaining member of the *Heller* team was Alan Gura, whom Bob hired to lead the litigation when it became clear that I would be unable to do so while carrying a full workload of IJ cases. A graduate of the Georgetown Law Center, Alan ran a successful litigation practice from his office in Alexandria, Virginia. Alan had a diverse employment history, having served as counsel to the Senate Judiciary Committee, an associate at Sidley Austin, and as a deputy attorney general for the state of California. Most important, he had a reputation as a smart, aggressive litigator who was interested in and knowledgeable about the Second Amendment. He signed on immediately.

Styled *Parker v. District of Columbia*, the complaint was filed in the U.S. District Court for the District of Columbia on February 10, 2003, and assigned to Judge Emmet Sullivan. It presented a single claim: that D.C.'s gun ban violated our clients' Second Amendment right to keep functional firearms in their homes. The District's lawyers immediately moved to dismiss the complaint on the ground that the Second Amendment does not protect an individual right, and we filed a summary judgment motion arguing that it does.

Two months after we filed the *Parker* case, a separate group of plaintiffs filed another federal court challenge to D.C.'s gun ban. The new challenge was called the "Seegars" case, after its lead plaintiff Sandra Seegars.<sup>32</sup> Represented by veteran Second Amendment advocate Stephen Halbrook, the *Seegars* plaintiffs drew a different judge, Reggie Walton, and Halbrook immediately moved to consolidate the two cases. We opposed that motion because we did not believe it was in our clients' best interests for the two cases to proceed as one. Of particular concern to us was the fact that the *Seegars* plaintiffs had named Attorney General John Ashcroft as a defendant, which meant the Department of Justice, with its greater resources and generally more sophisticated legal acumen, would help defend the case. Although the consolidation effort was denied and the cases proceeded on different tracks before their respective judges, our concerns about picking what we believed was an unnecessary fight with DOJ were soon borne out.

The only argument raised by the District's lawyers in their motion to dismiss the *Parker* case was that the Second Amendment protects

<sup>32</sup> *Seegars v. Ashcroft*, 297 F. Supp.2d 201 (D.D.C. 2004).

## CATO SUPREME COURT REVIEW

only a collective, not an individual, right to keep and bear arms. But the DOJ lawyers in *Seegars* raised a new defense that would very nearly derail both cases: standing.

In order to have standing to bring a federal lawsuit, a plaintiff must allege a concrete injury caused by the defendant that is redressable by the court. The point of standing doctrine is to ensure that courts only resolve actual cases and controversies and do not become embroiled in abstract policy disputes where their rulings would amount to mere advisory opinions. When misapplied, however, it can amount to little more than a “get out of court free” card for the government, which is precisely what happened to the *Seegars* plaintiffs and why *Parker* became *Heller*.

Although *Seegars* was filed two months after *Parker*, it proceeded more rapidly through the district court. After holding a hearing in October 2003 on D.C.’s and DOJ’s motions to dismiss, Judge Walton found that none of the five *Seegars* plaintiffs had standing to challenge D.C.’s handgun ban.<sup>33</sup>

The week after the *Seegars* argument before Judge Walton, Judge Sullivan held a hearing in the *Parker* case to resolve the District’s motion to dismiss and the plaintiffs’ motion for summary judgment. He began the hearing by noting that neither the District nor its amici had raised the issue of standing in their briefs, prompting this exchange:

- The Court: You didn’t raise [standing] as a basis for your motion to dismiss.
- D.C.’s Counsel: No, we did not . . . .
- The Court: When were you planning to raise it? Had I not raised it, were you going to raise it today?
- D.C.’s Counsel: No, I was not planning on raising it today.
- The Court: When were you going to raise it? On appeal?<sup>34</sup>

<sup>33</sup> Judge Walton found that one of the *Seegars* plaintiffs, Gardine Hailes, had standing to challenge the trigger lock requirement for her lawfully registered shotgun, but he dismissed that claim on the grounds that the Second Amendment neither protects an individual right to possess firearms nor applies to the District of Columbia in any event. *Seegars*, 297 F. Supp.2d at 235–39.

<sup>34</sup> This exchange is quoted at greater length, with citations to the hearing transcript, on pages 12–14 of the plaintiffs’ Motion to Issue Briefing Schedule and Set Oral Argument on the Merits, available on the “Case Filings” page of [www.dcguncase.com](http://www.dcguncase.com).

*The Second Amendment Is Back, Baby*

After a similar colloquy with counsel for one of D.C.'s amici, Judge Sullivan said he found it "mystifying" that everyone on that side of the case agreed that the plaintiffs lacked standing to pursue their Second Amendment claims but that none of them had raised it in their briefs. After requesting more briefing on the standing issue, Judge Sullivan dismissed the case not for lack of standing but on the substantive ground that the Second Amendment does not protect an individual right to keep and bear arms.<sup>35</sup>

Both *Seegars* and *Parker* went up on appeal to the D.C. Circuit around the same time, with *Seegars* slightly in the lead. The District successfully moved to stay proceedings in *Parker* until the *Seegars* appeal was finally resolved, as a result of which *Parker* ground to a halt for nearly two years. Meanwhile, things went from bad to worse for the *Seegars* plaintiffs.

Despite Supreme Court precedent clearly providing that would-be plaintiffs need only show a credible threat of prosecution under the law they wish to challenge, the D.C. Circuit applied a much narrower version of standing doctrine in *Seegars* that required Second Amendment plaintiffs to show they had been personally threatened with prosecution or otherwise singled out in some way by the government.<sup>36</sup> Of course, that rule has the perverse effect of requiring anyone who wishes to challenge a given law to first break it and then notify government officials so they can receive the requisite threat of prosecution. Notwithstanding two judges' stated belief that the standing rule applied in *Seegars* departed from Supreme Court precedent,<sup>37</sup> the D.C. Circuit declined to reconsider the ruling en banc,<sup>38</sup> and the Supreme Court denied certiorari. *Seegars* was over.

The District immediately filed a motion for summary affirmance in *Parker*, arguing that because none of the *Seegars* plaintiffs were found to have standing, none of the *Parker* plaintiffs did either. The D.C. Circuit rejected that motion and directed the parties to submit briefing on both standing and the merits of the Second Amendment claim. The court heard oral argument on December 12, 2006.

<sup>35</sup> *Parker v. District of Columbia*, 311 F. Supp.2d 103 (D.D.C. 2004).

<sup>36</sup> *Seegars v. Gonzales*, 396 F.3d 1248, 1252–56 (D.C. Cir. 2005).

<sup>37</sup> 413 F.3d 1, 2–3 (D.C. Cir. 2005) (Sentelle, J., dissenting from the denial of rehearing en banc and statement of Williams, J., calling for rehearing en banc).

<sup>38</sup> *Id.* at 1.

## CATO SUPREME COURT REVIEW

In the briefs and at oral argument, Alan hammered home the point that unlike any of the *Seegars* plaintiffs, one of our clients, Dick Heller, had actually attempted to register a handgun and had his application denied. It worked. As Senior Circuit Judge Silberman wrote in his majority decision, the D.C. Circuit has “consistently treated a license or permit denial pursuant to a state or federal administrative scheme as an Article III injury.”<sup>39</sup> Accordingly, Dick Heller’s act of filling out a perfectly meaningless application whose denial was a foregone conclusion under D.C. law meant he had standing to challenge D.C.’s gun ban, while the other five *Parker* plaintiffs did not.<sup>40</sup>

Judge Silberman’s opinion striking down the District’s functional firearms ban was an intellectual tour de force. After summarizing the history of the struggle between the individual and collective rights interpretations of the Second Amendment, Silberman undertook a close textual and historical analysis in which he systematically engaged and rejected each of the District’s arguments against the individual rights position. He concluded that the Second Amendment protects a right to keep and bear arms that predated the Constitution and is not “contingent upon [a citizen’s] continued or intermittent enrollment in the militia.”<sup>41</sup> Finding D.C.’s functional firearms ban inconsistent with that right, Judge Silberman (joined by Judge Griffith, over Judge Henderson’s dissent) remanded the case to the district court with instructions to enter summary judgment for Mr. Heller.<sup>42</sup>

No federal court of appeals had ever struck down a gun control law on Second Amendment grounds before, and with the denial of the District’s petition for rehearing en banc, the stage was set for a momentous decision by the city: whether to appeal the decision to the Supreme Court. The stakes were enormous, and there were conflicting considerations. On the one hand, it was clearly galling

<sup>39</sup> *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007).

<sup>40</sup> *Id.* 375–76. Cf. *Seegars*, 413 F.3d at 2 (statement of Williams, J.) (observing that D.C. law “plainly, unequivocally” forbids the issuance of pistol permits and explaining that “it is mysterious to me how plodding through the charade of seeking permits would render the threat of prosecution . . . one iota more imminent”).

<sup>41</sup> *Parker*, 478 F.3d at 395.

<sup>42</sup> *Id.* at 401.

### *The Second Amendment Is Back, Baby*

to Mayor Fenty and many D.C. Council members to have the centerpiece of the District's zero-tolerance gun policy swept aside by the federal courts. And while there is no credible evidence that the policy did anything to reduce crime or prevent gun-related deaths in D.C., the regulations served as a powerful symbol of the District's attitude towards individual gun ownership and its stance in the culture clash engendered by that issue. On the other hand, a loss in the D.C. Circuit could be contained because, other than regarding the federal government (which was not Mayor Fenty's concern), the effects of the decision would be limited to Washington, D.C. But a loss in the Supreme Court could have national implications.

On July 16, 2007, Mayor Fenty announced that the District of Columbia would seek review of the *Heller* decision in the Supreme Court.

### III.

In hindsight, it seems almost inevitable that the Supreme Court would agree to review *Heller*, but it certainly did not appear that way at the time. Many knowledgeable observers expressed doubt about the Court's willingness to involve itself in such an emotionally and politically charged issue, especially in an election year. Nevertheless, the case captured the popular imagination and there appeared to be a public consensus that it was finally time for the Supreme Court to clarify the Second Amendment's meaning one way or the other.

Perhaps reflecting that sense of inevitability was the District's decision to devote the bulk of its cert petition to explaining not why the Supreme Court should take the case, but instead why the D.C. Circuit's decision was wrong. Normally, arguing the merits of one's case in a cert petition is considered a classic rookie blunder, but D.C.'s legal team, which by this time included veteran Supreme Court litigators Walter Dellinger, Alan Morrison, and Tom Goldstein, certainly knew what it was doing. They might simply have assumed that in a case of such magnitude, with such clearly drawn battle lines, the Court's decision whether to grant certiorari was unlikely to be influenced significantly by the parties themselves, and therefore the most effective tactic would be to preview the District's substantive arguments and try to set the terms of the debate from the beginning.

## CATO SUPREME COURT REVIEW

That is certainly the impression one gets from the District's framing of the question presented, which asked: "Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns." Thus, from the District's (new) perspective, this case was not mainly about individual versus collective rights or banning the possession of all functional firearms within the home, but simply whether the government may ban a particular class of firearm that it considers uniquely dangerous and unsuitable for civilian use in urban environments so long as it leaves people with reasonable alternatives. It was a clever makeover.

Of course, we framed the issue quite differently, asking: "Whether the Second Amendment guarantees law-abiding adult individuals a right to keep ordinary, functional firearms, including handguns, in their homes." And despite having prevailed below, we supported the District's request for Supreme Court review and devoted our response, as the District had with its petition, to setting the terms of the debate in the event of a cert grant.<sup>43</sup>

On November 20, 2007, the Supreme Court announced that it would hear the case. As framed by the Supreme Court, the question presented was whether the challenged provisions of the D.C. Code, including its handgun ban and trigger lock requirements, "violate 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?"<sup>44</sup> Against long odds, we had succeeded in our goal of presenting a carefully crafted, well-framed Second Amendment case to the Supreme Court before a criminal case got there first.

Although there is much to tell about the preparation, strategy, and work that went into the presentation of *Heller*'s case to the Supreme Court, of perhaps greater interest to most readers is the extraordinary outpouring of Second Amendment scholarship that attended this case in the form of amicus briefs filed with the Court.

<sup>43</sup> We also filed a Conditional Cross-Petition for a Writ of Certiorari on behalf of the five plaintiffs whom the D.C. Circuit ruled did not have standing to challenge D.C.'s gun ban. The District opposed that cross-petition, and the Supreme Court held it in abeyance until after it announced the *Heller* decision in June 2008, then dismissed it without explanation.

<sup>44</sup> *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (grant of certiorari).

### *The Second Amendment Is Back, Baby*

A total of 68 amicus briefs were filed: 19 for the District, 48 for *Heller*, and one by the United States purporting to take neither side. Besides their sheer number (apparently a record<sup>45</sup>), the briefs were notable both for their quality and for the remarkable array of people, organizations, and perspectives they represented. While there is not space to give all of the briefs their proper due, a few bear special mention.

From a purely symbolic standpoint, the two most remarkable amicus briefs had to be the ones filed on behalf of a majority of members of the U.S. Congress and on behalf of 31 states. The “Congress brief” was prepared by Stephen Halbrook, and it was submitted on behalf of 55 senators, 250 representatives, and Dick Cheney in his capacity as president of the Senate. The “States Brief” was headed up by then-Texas Solicitor General Ted Cruz, a veteran Supreme Court litigator who worked indefatigably to persuade other states to join the brief. Both briefs are extraordinary in that they were filed on behalf of government officials who would normally be quite reluctant to cede power to another branch of government. Thus, while it is one thing for politicians to acknowledge limits on their power in theory, it is quite another for them to urge the Supreme Court to impose concrete, enforceable limits on that power. And yet, that is precisely what the Congress and States briefs did in *Heller*.

Other briefs remarkable as much for their symbolism as their substance were those submitted by the Congress of Racial Equality (CORE), GeorgiaCarry.org, and the Pink Pistols, a gay and lesbian firearms advocacy group. Together, the CORE and GeorgiaCarry briefs showed that “[t]he history of gun control in America has been one of discrimination, disenfranchisement, and oppression of racial and ethnic minorities, immigrants, and other ‘undesirable’ groups.”<sup>46</sup> Extending and updating that history of discrimination, the Pink Pistols brief not only provided disturbing statistics about gays’ and lesbians’ heightened risk of and greater vulnerability to violent

<sup>45</sup> According to the editor of this *Review*, the Michigan affirmative action cases, *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), together generated 104 amicus briefs, but neither of those cases, which were consolidated for argument, garnered more briefs than *Heller* did alone. See Ilya Shapiro, “Friends of the Second Amendment: A Walk Through the Amicus Briefs in *D.C. v. Heller*,” 20 J. Firearms & Pub. Policy \_\_\_\_\_ (Sept. 2008).

<sup>46</sup> Brief of Amicus Curiae Congress of Racial Equality at 2.

## CATO SUPREME COURT REVIEW

assault because of their sexual orientation, but also showed how the District's militia-centric conception would "eradicate any Second Amendment right" for gays and lesbians on account of the federal government's "Don't Ask, Don't Tell" policy.<sup>47</sup>

Among the most persuasive were those written by Professor Nelson Lund for the Second Amendment Foundation and Professors David Hardy and Joe Olson on behalf of Academics for the Second Amendment. Those briefs exposed what is arguably the deepest and most fundamental problem with D.C.'s theory of the case: that no one has ever devised a militia-centric interpretation of the Second Amendment that can be squared with the historical record and that does not lead to absurd results.

As explained in the Academics for the Second Amendment brief, Madison and other Federalists who agreed to add a bill of rights to the Constitution adamantly opposed any attempt to revisit the issue of how power over the militia was to be allocated between the federal and state governments, even though this was among the principal concerns of the Anti-Federalists whom the proposed bill of rights was intended to mollify. And yet that is precisely what militia-centric interpretations—including the District's—ultimately contend: that the Second Amendment represents a devolution of militia control from the federal government to the states. By contrast, Madison and the other Federalists had no qualms about disclaiming any power on the part of the federal government to disarm citizens, because they did not think the government had that power in the first place. As the Academics' brief explains: "In 1789, for Congress to renounce any intent to disarm Americans would be no real loss; the same cannot be said of reopening the fight over control of the militia."<sup>48</sup>

Given the centrality of history to both Justice Scalia's and Justice Stevens's opinions, another key amicus brief was the one filed by the Cato Institute and historian Joyce Lee Malcolm.<sup>49</sup> Professor Malcolm's book *To Keep and Bear Arms: The Origin of an English-American Right* has been a key resource in the debate over the

<sup>47</sup> Brief of Pink Pistols and Gays and Lesbians for Individual Liberty as Amici Curiae in Support of Respondent at 2, 28–34.

<sup>48</sup> Brief of Amicus Curiae Academics for the Second Amendment in Support of the Respondent at 2.

<sup>49</sup> Brief of the Cato Institute and Historian Joyce Lee Malcolm as Amici Curiae in Support of Respondent.

*The Second Amendment Is Back, Baby*

meaning of the Second Amendment because it documents the right of armed self-defense in England and explains how that right influenced the Framers' conception of the natural right to arms they codified in the Second Amendment. The Cato-Malcolm brief describes how various English monarchs sought to limit their subjects' right to own weapons and demonstrates that the Framers were both well aware of that history and determined not to repeat it in America. Of particular importance to the debate between Scalia and Stevens over the *scope* of the right, the Cato-Malcolm brief thoroughly debunks the notion that the English right to arms was in any way limited to or dependent upon militia service.<sup>50</sup>

Finally, there is the amicus brief submitted by Solicitor General Paul Clement on behalf of the United States. Like most Republicans, President Bush identified himself as an ardent supporter of the Second Amendment who understood it to protect an individual right to keep and bear arms. Assuming that is true, the brief filed on behalf of his administration was a huge disappointment, and one that speaks volumes about the difference between *saying* that one supports a particular constitutional right and actually meaning it.

The essence of the solicitor general's brief was this: While the Second Amendment does protect an individual right to keep and bear arms, that right is subject to reasonable regulation, the legitimate scope of which will depend on the "practical impact" on citizens' ability to possess firearms for lawful purposes and the strength of the government's law enforcement interests.<sup>51</sup> To the casual observer, that might seem like an appropriate framework. But the more worldly reader quickly identifies the serpent in the garden: the word "reasonable," which appears in the solicitor general's brief nearly a dozen times. "Reasonable" can be a slippery and dangerous term in constitutional litigation, one that can easily be used to drain a right of all meaningful content while pretending to embrace it. That risk is vividly illustrated by the solicitor general's brief, which, though it purported to invoke a heightened standard of review, nevertheless argued that the case should be remanded to the lower courts to determine whether the most sweeping imposition on gun

<sup>50</sup> See *id.* at 4–12.

<sup>51</sup> Brief for the United States as *Amicus Curiae* at 8, 20–27.

## CATO SUPREME COURT REVIEW

ownership in America since the British disarmed the colonists at Boston was “reasonable.”<sup>52</sup>

Merits briefing by the parties continued through March 2008, and the Court heard oral argument on March 18. Preparation on our side was intense. Besides devouring seemingly everything written about the history of the Second Amendment, Alan participated in five separate moot courts, which were attended by some of the leading Supreme Court practitioners, academics, and Second Amendment experts in the country. Critical issues were identified, potential weaknesses examined, themes honed, and strategic decisions made. Among other things, a consensus emerged that a protracted discussion regarding the proper standard of review should be avoided if possible. While we had argued for strict scrutiny in our merits brief, there was general agreement that the best approach during the argument itself would be to say that under any appropriately robust standard of review a complete ban on all functional firearms in the home—or even just handguns—was unconstitutional. The key, as always, was to stake out no more territory than absolutely necessary to win the case.

*Heller* was the only case set for argument on March 18, and the justices were engaged, focused, and well prepared. The questioning from the bench was lively, as one would expect given the magnitude and the novelty of the issue, and the Chief Justice extended the argument time accordingly. There is little point in recounting the back-and-forth between the justices and the three advocates—Walter Dellinger for the District, Solicitor General Paul Clement for the United States, and Alan Gura for *Heller*—other than to repeat here what others have recognized: Alan’s performance, particularly for a first-time advocate in the Supreme Court, was outstanding.

## IV.

The Supreme Court handed down its *Heller* decision on Thursday, June 26, 2008. Writing for a 5–4 majority that included Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito, Justice Antonin Scalia conducted an exhaustive analysis of the Second Amendment’s text, history, and purpose that spanned some 64 pages in the slip opinion. Concluding that the

<sup>52</sup> *Id.* at 27–32.

*The Second Amendment Is Back, Baby*

Second Amendment protects an individual right to possess a firearm unrelated to militia service, the Court struck down D.C.'s handgun ban and trigger lock requirement. Justice John Paul Stevens authored a dissent in which Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer joined, and Justice Breyer authored a dissent in which Justices Stevens, Souter, and Ginsburg joined. Justice Stevens adopted a version of the militia-centric collective rights model, while Justice Breyer argued that even if the Second Amendment does protect a non-military individual right—which he denied for the reasons stated by Justice Stevens—the District's regulation of firearms represented an appropriate balancing of the competing interests at stake and was thus immune from constitutional challenge.

Anyone with enough interest in the Second Amendment to read a law review article about it has probably already read—and certainly should read—the majority and dissenting opinions in *Heller*. Accordingly, I will provide only a brief summary of the three opinions before moving on to the final part of this article, in which I offer some thoughts about those opinions and the likely future of Second Amendment litigation in the wake of *Heller*.

Justice Scalia's majority decision is everything a Second Amendment supporter could realistically have hoped for. The reasoning is meticulous, precise, and well supported. And while the majority concedes a fairly broad scope of government authority to regulate gun ownership—disarming felons and outlawing "dangerous and unusual weapons," for example<sup>53</sup>—there is simply no plausible basis to expect that the Court would ever have done otherwise (and might well have done worse had the issue arrived in a less favorable setting).

Beginning with the text of the Second Amendment, Justice Scalia first demonstrates that "the people" whose right to keep and bear arms is not to be infringed refers to "all members of the political community, not an unspecified subset," such as those engaged in active militia service.<sup>54</sup> Next he dispatches the argument that the terms "bear arms" or "keep and bear arms" had an exclusively military connotation at the time of ratification. Putting those points together and examining them against the backdrop of the history

<sup>53</sup> *Heller*, 128 S. Ct. at 2816–17.

<sup>54</sup> *Id.* at 2790–91 (2008).

## CATO SUPREME COURT REVIEW

relevant to the Framers—including particularly the disarmament of political dissidents by the Stuart kings in 17th-century England—Justice Scalia concludes the Second Amendment codified a widely recognized, pre-existing right of individuals “to possess and carry weapons in case of confrontation.”<sup>55</sup>

Examining the prefatory clause next, Justice Scalia describes the political tensions that gave rise to the Second Amendment and argues persuasively that while maintaining a well-regulated militia happens to be the specific reason mentioned in the text of the amendment for prohibiting the government from infringing the people’s right to keep and bear arms, it was certainly not “the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”<sup>56</sup> He then shows that the drafting history of the Second Amendment is inconclusive at best, with at least as many clues pointing towards an individual rights interpretation as otherwise.

Among the most devastating points in Justice Scalia’s opinion—and one for which the collective rights camp has never had much of a response—is the raft of historical evidence showing that all the major commentators from the time of ratification through the early 20th century understood the Second Amendment as protecting an individual, not a collective or militia-centric, right to arms. As Stephen Halbrook has quipped, “if anyone entertained [the collective rights] notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.”<sup>57</sup>

Next, Justice Scalia critiques Justice Stevens’s reading of *Miller* and shows that Stevens, like many commentators and courts before him, dramatically overstates *Miller*’s holding in order to find within it the militia-centric interpretation he favors.<sup>58</sup>

<sup>55</sup> *Id.* at 2797.

<sup>56</sup> *Id.* at 2801.

<sup>57</sup> Stephen P. Halbrook, *That Every Man May Be Armed: The Evolution of a Constitutional Right* 83 (1984).

<sup>58</sup> *Heller*, 128 S. Ct. at 2814–16.

### *The Second Amendment Is Back, Baby*

Turning to the specific laws at issue, Justice Scalia notes that D.C.'s handgun ban outlaws the class of weapons "overwhelmingly chosen by American society" for lawful self-defense, while the District's trigger lock requirement requires that even lawfully owned firearms be kept inoperable at all times with no exception for self-defense.<sup>59</sup> Without announcing a specific standard of review, Scalia simply declares the trigger lock requirement unconstitutional on its face and says of the handgun ban that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to 'keep' and use for protection would fail constitutional muster."<sup>60</sup>

Not surprisingly, I find much to disagree with in the dissenting opinions of Justice Stevens and Justice Breyer. While I will preview some of those disagreements in the summaries that follow, my main critiques come in the next section. As noted above, all four dissenting Justices—Stevens, Souter, Ginsburg, and Breyer—signed on to each of the two dissenting opinions, which, taken together, constitute arguments in the alternative for why the Second Amendment's right to keep and bear arms should not receive the same protection as some of those justices' more preferred rights like free speech, intimate association, and abortion.

Justice Stevens begins with a rather extraordinary assertion about the nature of the right protected by the Second Amendment, the implications of which he never explores. According to Justice Stevens, "[t]he Second Amendment plainly does . . . encompass the right to use weapons for certain military purposes."<sup>61</sup> Consider what that would mean if it were true. Military operations are necessarily run by the government. They involve troops—sometimes conscripted troops—serving under the command of officers whose lawful orders must be obeyed on pain of death (in some cases), and whose discretion about how to conduct combat operations—including specifically how to arm and deploy their soldiers—is virtually unbounded. The notion that soldiers have a *constitutionally enforceable right* "to use weapons for certain military purposes" in that setting

<sup>59</sup> *Id.* at 2817–19.

<sup>60</sup> *Id.* at 2817–18 (internal quotations and citation omitted).

<sup>61</sup> *Id.* at 2822 (Stevens, J., dissenting).

## CATO SUPREME COURT REVIEW

is mind-boggling. Just try to imagine a scenario in which the courts might actually enforce such an oddly conceived right on behalf of an aggrieved citizen. Inconceivable.

Justice Stevens's dissent strikes another false note when he describes the *Miller* decision as having upheld a conviction under the National Firearms Act.<sup>62</sup> In fact, *Miller* arrived at the Supreme Court in a much different procedural posture: The indictment against Miller and Layton had been quashed, as specifically noted in the first paragraph of the Court's opinion, so there was no conviction to uphold.<sup>63</sup>

Moving beyond these initial hiccups, Justice Stevens begins his analysis, like Justice Scalia, with the text of the amendment itself. Unlike Scalia, however, Stevens starts with the prefatory clause, in which he finds a "single-minded focus" on the Framers' part to protect "military uses of firearms."<sup>64</sup> He then imports that assumption into his interpretation "the people" in the operative clause, which refers "back to the object announced in the Amendment's preamble," namely, protecting "the collective action of individuals having a duty to serve in the militia." But the ultimate purpose of the Second Amendment, says Stevens, "was to protect the States' share of the divided sovereignty" over control of militia forces.<sup>65</sup> Finally, he analyzes the phrase "keep and bear arms" and concludes that it is essentially a term of art with an exclusively military connotation.

Justice Stevens then turns to the ratification history, in which he discerns two relevant themes: First, a widespread fear of the standing army the Constitution empowered the federal government to create; and second, a recognition "of the dangers inherent in relying on inadequately trained militia members as a primary means of providing for the common defense."<sup>66</sup> Stevens concludes that a compromise was reached to address those twin concerns under which Congress would retain the authority to maintain a standing army *and* have

<sup>62</sup> *Id.* at 2822–23. Justice Scalia makes the same mistake about *Miller*, but he does so in the midst of critiquing Justice Stevens's interpretation of the case. *Id.*, slip op. at 49, 128 S. Ct. at 2814 (Scalia, J.).

<sup>63</sup> *Miller*, 307 U.S. at 177.

<sup>64</sup> *Heller*, 128 S. Ct. at 2826 (Stevens, J., dissenting).

<sup>65</sup> *Id.* at 2827.

<sup>66</sup> *Id.* at 2831–32.

*The Second Amendment Is Back, Baby*

considerable control over state militias, including the power to organize, arm, discipline, and call them up for service. Meanwhile, the states retained the limited powers (which Stevens dubiously refers to as a “significant reservation”) to appoint militia officers and to train their militias “in accordance with the discipline prescribed by Congress.”<sup>67</sup> But the concern remained that Congress had not specifically been prohibited from disarming the militia, and this, according to Stevens, was the oversight the Second Amendment was designed to correct.<sup>68</sup> But it is difficult to reconcile that assertion with the fact that Madison and the first Senate both considered—and rejected—language that would have unambiguously addressed that precise concern.<sup>69</sup> Stevens’s failure to engage that point, which was made in several of the briefs, further diminishes the persuasiveness of his argument.

Justice Stevens next confronts the majority’s historical arguments in what amounts to a series of vignettes discussing the English Bill of Rights, Blackstone’s *Commentaries*, post-enactment commentaries, and post-Civil War legislative history—all of which contradict, to one degree or another, any militia-centric reading of the Second Amendment. He then returns to *Miller*, where he fails to address the fact that the government’s brief in that case actually led with the very militia-centric theory he espouses.<sup>70</sup> As Justice Scalia points out, if the *Miller* Court had truly meant to embrace that interpretation, “it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen.”<sup>71</sup>

Justice Stevens concludes with a warning that D.C.’s gun laws may be “the first of an unknown number of dominoes to be knocked off the table” of firearms regulation and worries that the decision

<sup>67</sup> *Id.* at 2832.

<sup>68</sup> *Id.* at 2833.

<sup>69</sup> See, e.g., Brief of Amicus Curiae Academics for the Second Amendment in Support of the Respondent at 6–9 (describing Madison’s and the First Senate’s rejection of a proposed amendment stating “[t]hat each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same”).

<sup>70</sup> Parker, 478 F.3d at 393 (noting that the brief submitted to the Supreme Court by the government in *Miller* argued that the Second Amendment right only exists where the arms in question “are borne in the militia or some other military organization. . . .”) (internal quotations and citations omitted).

<sup>71</sup> Heller, 128 S. Ct. at 2814.

## CATO SUPREME COURT REVIEW

to enforce individual rights under the Second Amendment may “increase the labor of federal judges to the ‘breaking point.’”<sup>72</sup> Of course, those concerns apply equally to the enforcement of virtually any constitutional right; why the Second Amendment should be singled out to carry that baggage is unclear.

Justice Breyer begins his dissent by expressing his agreement with Justice Stevens’s militia-centric interpretation of the Second Amendment. He then argues that even if the amendment does protect a non-military individual right to keep and bear arms, restrictions should be evaluated under a balancing test that asks whether they “*disproportionately* burden Amendment-protected interests.”<sup>73</sup> Applying that proposed test to D.C.’s handgun ban and trigger lock requirement, he concludes that neither restriction impermissibly interferes with citizens’ Second Amendment rights.

Justice Breyer starts with four propositions to which he believes the entire Court subscribes: (1) the Second Amendment protects an individual right that may be “separately enforced by each person upon whom it is conferred”; (2) the amendment was adopted “[w]ith obvious purpose” to ensure the effectiveness of militia forces; (3) the amendment must be interpreted with that end in view; and (4) the right protected by the Second Amendment is not absolute.<sup>74</sup> The first point seems tendentious because the “individual right” the dissenting justices have in mind is one that can only be exercised (they never explain just how) in the context of *government-directed* military service. The second and third points seem trivial since no one disputes that a purpose of the Second Amendment is to promote militia effectiveness—the question is whether it serves other purposes as well. The fourth point likewise states a mere truism that applies to all constitutional rights. One might just as well note that the entire Court subscribes to the proposition that the Second Amendment contains both nouns and verbs.

Seeking to establish a parallel between the District’s functional firearms ban and Founding-era practices, Justice Breyer points out that Boston, Philadelphia, and New York City “all restricted the

<sup>72</sup> *Id.* at 2846–47 (Stevens, J., dissenting).

<sup>73</sup> *Id.* at 2865 (Breyer, J., dissenting) (emphasis in original).

<sup>74</sup> *Id.* at 2848.

*The Second Amendment Is Back, Baby*

firing of guns within city limits to at least some degree” and regulated the storage of gunpowder.<sup>75</sup> Having thus established the existence of at least some Founding-era impositions on armed self-defense, Breyer concludes that the question is essentially one of degree: What restrictions are reasonable for the legislature to adopt in light of the goals it seeks to achieve? Breyer believes this will inevitably be an interest-balancing analysis, one that he would adopt explicitly. The question, he says, is whether the challenged restriction burdens the protected interest in a way that is “out of proportion to the statute’s salutary effects,” with due consideration being given to the existence of “any clearly superior less restrictive alternative.”<sup>76</sup> And while Breyer disclaims any explicit presumption of constitutionality or unconstitutionality,<sup>77</sup> his repeated invocation of “deference” to and “judicial confidence” in the reasonableness of legislatures makes clear which way the playing field is tilted.

Having articulated his proposed test, Justice Breyer applies it to the facts of the case, comparing the empirical data offered by the parties and various amici for and against D.C.’s gun ban, and concluding that it amounts to a wash at best.<sup>78</sup> After dispensing with the trigger lock requirement by inferring a self-defense exception, Breyer considers the avowed purposes of the District’s handgun ban. Finding that one of those purposes is to “reduce significantly the number of handguns in the District,” he concludes, ineluctably, that “there is no plausible way to achieve that objective other than to ban the guns.”<sup>79</sup> Breyer concludes his analysis by asking whether the District’s ban “disproportionately” burdens any Second Amendment-protected interests and finds that it does not.<sup>80</sup>

V.

The majority and two dissenting opinions in *Heller* have already proved a rich source of material for scholarship, debate, and reflection. They have provoked fascinating—and hopefully fruitful—discussions about the nature of originalism, its limits, and the extent

<sup>75</sup> *Id.* at 2848–49.

<sup>76</sup> *Id.* at 2852.

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

<sup>78</sup> *Id.* at 2860.

<sup>79</sup> *Id.* at 2864.

<sup>80</sup> *Id.* at 2865–68.

## CATO SUPREME COURT REVIEW

to which other interpretive methodologies should supplement or perhaps even supplant it. From the standpoint of a libertarian constitutional litigator, I find two things especially interesting about the *Heller* opinions: First what they suggest about the Court's current conception of liberty, and second, the ease with which even enumerated rights may be drained of all meaning through application of ostensibly even-handed constitutional balancing tests.

A well-known thought experiment has us travel back in our minds to the period between the adoption of the Constitution in 1789 and the ratification of the Bill of Rights in 1791. Did citizens during that time have only the handful of rights specifically mentioned in the unamended Constitution, such as habeas corpus? Most people reject that view, and correctly so. The Framers believed in natural rights—the “unalienable rights” famously invoked in the Declaration of Independence—and government can neither create nor abrogate those rights. The notion that the federal government in 1790 could ban books, outlaw newspapers, or seize private property at will simply because those things were not specifically enumerated as rights is, by most lights, absurd.

So did citizens have a right to own guns in 1790, even though the Constitution did not yet address that subject? The answer is plainly yes, as the Supreme Court recognized in an 1876 case where it explained that the right to keep and bear arms “is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”<sup>81</sup> The notion that the Second Amendment was intended to circumscribe—rather than merely codify—that preexisting right seems obviously preposterous, which presents a real conundrum for those seeking to drain the amendment of any meaningful content.

The only solution to that problem is the one Justice Stevens attempts in his dissent, which is to characterize the *natural* right to keep and bear arms—that is, the one that predated the ratification of the Second Amendment—as being limited to military uses only. But as Justice Stevens's opinion demonstrates, there is no sound historical basis for that limited conception, which is really just an artifact of the Court's rather offhanded treatment of the Second Amendment in *Miller*. The idea that colonial-era Americans seriously

<sup>81</sup> *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

*The Second Amendment Is Back, Baby*

believed they had a right to own guns for one lawful purpose (participating in militia service), but not for other lawful purposes (shooting game, resisting highwaymen, target practice) is not only ahistorical, but idiosyncratic as well.

For example, while some have argued that the First Amendment's free speech provisions were only intended to cover political speech, that view has been thoroughly rejected by the Supreme Court, especially the more liberal justices—much to their credit. Nevertheless, one could certainly troll through Founding-era history and cobble together an argument at least as persuasive as the one in Justice Stevens's *Heller* dissent for why the preexisting natural right to freedom of speech and the press was limited to specifically political, democracy-promoting purposes. An even easier mark would be the right to "intimate sexual conduct" approved by all four of the dissenting *Heller* justices in *Lawrence v. Texas*.<sup>82</sup> As between the right to own guns and the right to have sex, it seems far more likely that Founding-era Americans would have viewed the latter as applying to some purposes (procreation, marital intimacy) but not others (employment, entertainment).

It appears the dissenting justices' only basis for construing the natural right to arms narrowly when they construe other natural rights like speech and sex quite broadly is the 13-word preamble to the Second Amendment containing the word "Militia." In other words, the *Heller* dissenters departed from their traditionally expansive conception of liberty because they find in the Second Amendment's militia clause evidence of a national consensus among Founding-era Americans that the natural right to keep and bear arms was a strictly limited one—indeed a "right" that exists *only* in the context of government-controlled military service.

But the evidence against that position—which includes the English Bill of Rights, Blackstone's *Commentaries*, contemporaneous writings of influential thinkers, and the utterly commonplace status of guns in colonial America—is simply too overwhelming to be swept aside by such a thin reed. And perhaps that accounts for Justice Breyer's rather unusual "in the alternative" dissent, to which I now turn.

<sup>82</sup> 539 U.S. 558 (2003).

## CATO SUPREME COURT REVIEW

Reading Justice Breyer's dissent—which he begins by affirming his agreement with Justice Stevens's militia-centric analysis but then explains why D.C.'s handgun ban would not violate an individual-rights model of the Second Amendment either—I could not help but think of Groucho Marx's famous line where he says, "Those are my principles, and if you don't like them . . . well, I have others." The fact that the same four justices signed on to both dissenting opinions seems odd, even troubling, particularly in such a momentous context. Can it really be that Justice Stevens's and Justice Breyer's much different takes on the Second Amendment are both correct? Is one more correct than the other?

It is one thing for lawyers to argue alternative theories—after all, our assigned role is simply to win cases however we can, consistent with our various ethical duties, including candor towards the tribunal. But the same is not true of judges, and certainly not U.S. Supreme Court justices; in our system they are charged with saying what the Constitution *means*. There is something unsettling about the spectacle of four justices confronting an essentially blank constitutional slate regarding what many consider to be the quintessentially American right and saying, in effect, "Maybe it means this, or maybe it means that; but either way it doesn't mean very much."

All of this lends a distinctly preordained feeling to the whole enterprise, which is only reinforced by Justice Breyer's deference-heavy interest-balancing test. Under the framework he proposes, the constitutionality of gun laws would be evaluated by determining whether a particular restriction "burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects," with due consideration being given to the existence of "any clearly superior less restrictive alternatives."<sup>83</sup>

There are many reasons to be wary of such a test, starting with the fact that scientific-looking "support" may be ginned up for literally any social policy. For example, consider the debate over teaching creationism in public schools. When the Supreme Court ruled that out-of-bounds, creationism came back as "intelligent design," complete with its own set of purportedly scientific underpinnings. One suspects that Justice Breyer would be much more skeptical of empirical claims from the Discovery Institute than he appears to have

<sup>83</sup> Heller, 128 S. Ct. at 2852 (Breyer, J., dissenting).

*The Second Amendment Is Back, Baby*

been in reviewing the data—one cannot call it evidence—offered to support D.C.’s gun ban. But after reviewing each side’s empirical submissions, Breyer concludes that “[t]he upshot is a set of studies and counterstudies that, at most, could leave a judge uncertain about the proper policy conclusion.”<sup>84</sup> Unlike with most other enumerated rights, however, with the Second Amendment, Umpire Breyer says the tie goes to the government.

Another problem with Justice Breyer’s proposed interest-balancing test is that it apparently does not consider the effect of challenged restrictions on particular individuals, which it ought to do if the concept of “balancing” is to make any sense at all. Thus, Breyer rather casually dismisses the hardship of being prevented from having a loaded handgun in one’s home for self-defense, but does so in the abstract. But imagine a person could show that: (a) she is at unusual risk of a violent confrontation—say, because she lives in an under-policed high-crime area where a serial rapist has been preying on victims<sup>85</sup>; and (b) she is unable due to her stature or other physical limitations to wield a shotgun or rifle effectively within the confines of her small apartment. It seems quite clear that D.C.’s handgun ban would interfere much more seriously with that person’s constitutional interests in self-defense than, say, with that of a person living in a gated community patrolled by armed security guards. But based on the way he applies it in his *Heller* dissent, there appears to be no room in Breyer’s calculus for such fine-tuning.

Finally, the “clearly superior least restrictive alternative” adds no real teeth to Justice Breyer’s test, particularly the way he applies it in his opinion. Thus, as Breyer himself acknowledges, the District’s crime rate soared in the years following enactment of the handgun ban,<sup>86</sup> and so did its murder rate, which in 2006 was more than five times higher than the national average and more than double the rate in comparably sized cities.<sup>87</sup> Assuming Breyer is correct that the handgun ban’s “basic purpose” was to save lives,<sup>88</sup> those numbers

<sup>84</sup> *Id.*, 128 S. Ct. at 2860.

<sup>85</sup> See, e.g., Aaron Davis, *Serial Rape Suspect’s Trail Of Clues Leads to Violent End*, Washington Post, July 28, 2008, at A1.

<sup>86</sup> *Heller*, 128 S. Ct. at 2858–59 (Breyer, J., dissenting).

<sup>87</sup> Brief of Criminologists, Social Scientists, Other Distinguished Scholars and the Claremont Institute as Amici Curiae in Support of Respondent at 7.

<sup>88</sup> *Heller*, 128 S. Ct. at 2854 (Breyer, J., dissenting).

## CATO SUPREME COURT REVIEW

suggest it failed to do so. Justice Breyer has a ready answer for that, namely the principle that “*after it* doesn’t mean *because of it*.”<sup>89</sup>

But that sort of epistemological agnosticism, which also shows up in Justice Breyer’s refusal to evaluate the quality of the competing studies offered for and against the gun ban, makes it hard to imagine any litigant ever establishing that some alternative regulation would have been “clearly superior” to any given restriction. In other words, D.C.’s gun ban appears to have done nothing to promote the legislative goal of saving lives; if so, then it would seem that *any* alternative—comprehensive registration requirements together with zealous enforcement against illegal pistol possession, for example—would be superior to the District’s feckless handgun ban.

And that takes us to the implications of the *Heller* decision, which I think will be fairly modest in terms of their impact on existing gun laws, but hopefully more significant from a symbolic standpoint. Perhaps the most immediate effect of *Heller* will be on D.C.’s recalcitrant effort to maintain as many of its draconian restrictions on gun ownership as possible. Thus, despite the Court’s clear recognition of handguns’ utility for lawful self-defense, D.C. has announced that it intends to enforce its absurd statutory definition of prohibited “machine gun” as including any firearm that can shoot “[s]emiautomatically, more than 12 shots without manual reloading”—which means essentially all semiautomatics.<sup>90</sup> The new lawsuit filed by *Heller* and others challenges not only that provision but also certain administrative features of the registration process that seem unduly burdensome and more plausibly intended to discourage citizens from exercising their newfound right to own firearms than to address any genuine law enforcement or public safety concerns.

In the wake of *Heller*, Chicago appears to be the only jurisdiction in America that completely bans handguns (now that its suburbs have repealed their handgun bans in response to suits filed by the NRA in the wake of *Heller*), and the only defense it has now for that law is the argument that the Second Amendment right to keep and bear arms should not be applied against state and local governments—the way nearly every other provision of the Bill of Rights

<sup>89</sup> *Id.*, at 2859 (emphasis in original).

<sup>90</sup> D.C. Code § 7-2501.01(10) (1981); see also § 7-2502.02(a)(2) (forbidding registration of any statutorily defined “machine gun”) (1983).

*The Second Amendment Is Back, Baby*

has been. Most commentators consider that a losing argument, in part because the Fourteenth Amendment's ratification history shows quite clearly that that is precisely what it was intended to do.

Even assuming that the Second Amendment is incorporated against the states through the Fourteenth, relatively few kinds of firearms restrictions are likely to fall. Certainly reasonable licensing and registration procedures will remain viable, but not so-called discretionary permitting systems like those in New York and California where the decision whether to issue someone a concealed-carry permit is left to the utterly arbitrary authority of local officials. Arbitrary, unreviewable government discretion over the enjoyment of a right has always been anathema in American constitutional law, and so I predict it will be with the Second Amendment.

As I said, while the practical effects of *Heller* will likely be fairly modest, its symbolic value is tremendous. America went over 200 years without knowing whether a key provision of the Bill of Rights actually meant anything. We came within one vote of being told that it did not, notwithstanding what amounts to a national consensus that the Second Amendment means what it says: The right of *the people* to keep and bear arms shall not be infringed. Taking rights seriously, including rights we might not favor personally, is good medicine for the body politic, and *Heller* was an excellent dose.

