

# A *Heller* Overview

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This Article provides a brief summary of the Supreme Court's decision in *District of Columbia v. Heller*, some background about the case, and some thoughts about issues likely to be raised post-*Heller* litigation on the Second Amendment. The case that became *D.C. v. Heller* was the brainchild of Robert A. Levy, an attorney who is a Senior Fellow in Constitutional Studies at the Cato Institute, a Washington think tank. Levy also serves on the Board of Directors of the Institute for Justice, a libertarian public interest law firm in Washington, D.C. Levy teamed up with Clark Neilly, a staff lawyer at the Institute for Justice, and together they found Alan Gura, who served as the lead attorney on the case. The case was filed in the federal district court for the District of Columbia in February 2003. There were six plaintiffs in the original case, which was then known as *Parker v. District of Columbia*; lead plaintiff Shelly Parker was a neighborhood activist who had been threatened by drug dealers.

The plaintiffs challenged three separate parts of D.C.'s gun control laws:

The ban on registration (which is required for legal possession) of any handgun that was not already registered in 1976 to its current owner. In the fall of 1976, the D.C. City Council had banned handguns, but had allowed current owners to keep their current handguns.

The gun storage law, which required that all lawful firearms (registered rifles, registered shotguns, and registered pre-1977 handguns) in homes in D.C. be kept unloaded, and either trigger-locked or disassembled that all times. The prohibition on functional firearms had no exception to allow use of a gun self-defense within the home.

The D.C. law for the licensed carrying of handguns. The law required a license, which was almost never granted, to carry a handgun. Without the license, it was illegal for the owner of a registered handgun to move the handgun from one room to another within her own home.

In March 2004, federal district Judge Emmet Sullivan ruled in favor of the D.C. government. His opinion stated that the Second Amendment has no application except to persons in a militia, and that none of the six plaintiffs were members of the D.C. militia. (All the documents from the entire case are available at [dcguncase.org](http://dcguncase.org).)

The case was appealed to the federal Circuit Courts of the Appeals for the District of Columbia.

Circuit Court of Appeals cases are heard by a randomly-selected panel of three judges, drawn from the pool of all the appellate judges in the Circuit. Oral argument for the appeal was held on December 7, 2006, and the appellate panel announced its decision on March 9, 2007. Senior Circuit Judge Laurence H. Silberman wrote the decision for the 2-1 majority.

The legal doctrine of “standing” prevents plaintiffs from bringing a case in which they do not have a genuine, personal, legal interest. If the government does something which harms Mr. X, then Mr. X can sue. But Ms. Y cannot sue, even if the oppression of Mr. X offends her sense of constitutional propriety.

The Circuit Court held that five of the six plaintiffs did not have standing, and so the Court could not address the merits of their constitutional claims. Relying on D.C. Circuit precedent for standing in Second Amendment cases, the *Parker* court ruled that the mere threat of a criminal prosecution (as opposed to an actual prosecution) was insufficient for standing. Thus, although the D.C. government had explicitly threatened to criminally prosecute Ms. Parker and others if they did what they wanted to do (e.g., have operable firearms in their homes), the plaintiffs did not have standing.

The lone plaintiff with standing, according to the appellate court, was Dick Heller. He had actually attempted to register a gun (a 9-shot .22 caliber revolver) which he already owned, and kept outside the District. Because the D.C. Metropolitan Police Department had denied his registration application, Heller had suffered a concrete legal injury as the result of the D.C. government’s decision, and so he had standing.

Reaching the merits of the case, the appellate panel ruled 2-1 that the Second Amendment applies to ordinary individuals. The court held that the handgun ban, the self-defense ban, and the carrying ban (as applied within the home) were unconstitutional.

In September 2007, D.C. petitioned the Supreme Court for a writ of certiorari. This is the standard procedure by which an appeal is brought to the Supreme Court.

D.C. Mayor Adrian Fenty rejected the entreaty of the Brady Campaign not to appeal the case. According to the Associated Press, the Brady group urged Fenty just to accept the D.C. Circuit decision, rather than give the Supreme Court a chance to make a nationally-applicable ruling on the Second Amendment. Indeed, ever since the Brady Campaign was created in the 1970s, as the “National Council

to Control Handguns,” the group had worked assiduously to keep the Second Amendment out of the Supreme Court.

Yet the Supreme Court granted certiorari in November 2007. The name for the case was recaptioned *District of Columbia v. Heller*. Mr. Heller was the only one of the original plaintiffs left. Because D.C. was the losing party at the previous stage of the case, and had filed the petition for the writ of certiorari, D.C.’s name now appeared first in the caption. In the case, D.C. is “petitioner” and Heller is “respondent.”

Briefs for the parties, as well as 67 amicus briefs, were filed in early 2008, and oral argument was held on March 18, 2008. The decision in *District of Columbia v. Heller* was the last one announced at the end of the Supreme Court’s 2007-08 term. Justice Scalia, recognized by his colleagues as the Court’s expert in firearms law and policy, wrote the majority opinion, which was joined by Chief Justice Roberts, and by Justices Thomas, Kennedy, and Alito.

The opinion held that the Second Amendment guarantees an individual right of all Americans, and is not limited to militiamen or National Guardsmen. The D.C. ordinances which ban handguns, and which prohibit self-defense in the home with any gun at all, violate the Second Amendment, the Court ruled.

Justice Stevens authored a dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer; they argued that the Second Amendment protects only a miniscule individual right which applies, at most, to actual militia duty.

Justice Breyer wrote an additional dissent, which was joined by the other three dissenters. They contended that even if the Second Amendment protects all law-abiding citizens, the handgun ban should be upheld because it is reasonable.

*Heller* was a decision clearly influenced by tremendous amount of scholarly research on firearms law and policy in the last three decades. Justice Scalia’s majority opinion cited the research of Stephen Halbrook, Joseph Olson, Clayton Cramer, Joyce Malcolm, Eugene Volokh, Randy Barnett, and Don Kates. (The last three serve on the Board of Advisors of the *Journal on Firearms and Public Policy*.)

Justice Breyer’s dissent, surveying social science research, cited, among others, Gary Kleck (also on the Board of Advisors of this *Journal*) and me (my amicus brief for the International Law Enforcement Educators and Trainers Association and other pro-rights law enforcement groups).

The Scalia opinion begins with meticulous textual analysis of the words of Second Amendment. The analysis was supplemented

by careful attention to the many early American and English sources which demonstrated the meaning of the various words.

Both Scalia and Stevens agree that there are times when the context of “bear arms” shows that it means “carry guns while serving in the militia,” and other times when the context shows a broader meaning, as in “carrying guns while hunting.” Stevens insists on an interpretive rule by which “bear arms” must mean “militia-only” unless there is a specific invocation of non-militia use. He further argues that the first clause of the Second Amendment means that the main clause must be militia-only.

Scalia argues that the first clause points to an important purpose of the right to keep and bear arms, but does not limit the right to only militia uses.

Both Scalia and Stevens brush off the “collective right” theory of the Second Amendment as obviously wrong. Under the collective right theory, no individual has a Second Amendment right; rather the right belongs only to state governments.

Scalia and Stevens strongly disagree about the nature of the Second Amendment individual right. Scalia sees the right as a normal right, akin of the individual right of freedom of speech or free exercise of religion. Stevens believes that the Amendment pertains only to individual gun ownership for purposes of militia service. He does not explain the scope of this militia-only right.

English legal history is an important part of both the Scalia majority and the Stevens dissent. Scalia points to the 1689 English Declaration of Right, and to William Blackstone’s very influential treatise, as proof of common law right to own firearms for personal defense. Blackstone had explained that the Declaration of Right protects the “natural right of resistance and self-preservation.”

Stevens retorts that the Second Amendment was not written to address self-defense, but instead was written in response to state ratification conventions’ concerns about the potential that the new U.S. federal government would abuse its extensive powers over the state militia.

After analyzing the text and the pre-1791 history of the Second Amendment, the majority opinion details the interpretation of the Second Amendment in the first half of the nineteenth century. Quoting the words of St. George Tucker, William Rawle, and Joseph Story, Justice Scalia shows that every legal scholar (except for the obscure Benjamin Oliver), along with state and federal courts, recognized the Second Amendment as an individual right to have guns for various purposes, including self-defense.

The Scalia opinion continues with explication of the public view of the Second Amendment in the latter part of the nineteenth century. After the Civil War, Congress passed the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1871, and then the Fourteenth Amendment—all with the explicit purpose of stopping southern governments from interfering with the Second Amendment rights of former slaves to own firearms to protect their homes and families. All the scholarly commentators of the late 19<sup>th</sup> century—including the legal giants Thomas Cooley and Oliver Wendell Holmes, Jr.—recognized the Second Amendment as an individual right.

The Stevens opinion is at its weakest on the nineteenth century issues. At most, Stevens shows that some of the sources cited by Scalia are not necessarily incompatible with the narrow individual right. But Stevens never really addresses Scalia's proof that the overwhelming body of nineteenth century legal writers, including judges, viewed the Second Amendment as a broad individual right.

Justice Stevens' examination of legal sources is highly selective. For example, the great Justice Joseph Story wrote two legal treatises on the U.S. Constitution. The majority opinion quotes both treatises, and the latter treatise plainly describes the Second Amendment as an ordinary individual right. The Stevens opinion only discusses the first treatise, which (if tendentiously read) is ambiguous enough not to rule out the narrow individual right.

Significantly, the *Heller* majority observes that the Constitution does *not* grant a right to arms. Instead, the Constitution simply recognizes and protects an inherent human right: "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'"

The Stevens dissent places great reliance on its claim that the Supreme Court's 1939 decision *United States v. Miller* had conclusively found that Second Amendment has no application outside the militia. But as Justice Scalia points out, the *Miller* opinion turned on whether the particular *type* of gun was protected by the Second Amendment, and did not declare that only militiamen had a right to arms. Besides, Scalia notes, the reasoning in *Miller* was cursory and opaque. Significantly, as detailed in a law review article cited by Justice Scalia, *Miller* was apparently a collusive prosecution in with the defendants' lawyer and the trial judge cooperated with the U.S. Attorney's scheme to send the weakest possible Second Amendment case to the Supreme Court as a test case, thus ensuring that the Na-

tional Firearms Act of 1934 would be upheld. Miller's lawyer did not even present a brief to the Supreme Court.

In response to Justice Stevens' complaint that "hundreds of judges" have relied on the narrow individual rights interpretation of *Miller*, Scalia fires back: "their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms."

Interestingly, Justice Stevens supplies a long footnote of some of the lower federal court decisions which have supposed "relied" on *Miller*. Over half the cases in the footnote are "collective right" cases which claim that there is *no* Second Amendment individual right (not even a right for militiamen). All nine Justices of the Supreme Court agree that there is at least *some* individual right in the Second Amendment. None of the Justices claim that *Miller* provides an iota of support for the state government "collective right" theory.

It is difficult to see why the erroneous lower court collective right precedents are treated with such deference in the Stevens opinion.

The Scalia opinion provides a definitive construction of the meaning of *Miller*: "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."

Finally, the opinion addresses the particular laws being challenged in the *Heller* case. The handgun ban is a violation of the Second Amendment because it a "prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."

The trigger lock law is unconstitutional because it prohibits self-defense. One of the important aspects of *Heller* is making clear that self-defense itself is a constitutional right.

As for the handgun carry law, the Scalia majority accepts Mr. Heller's concession that he would be content (for purposes of this particular case) to have a permit to carry in his home. The majority opinion states that Heller must be issued a home-based carry license, unless there is some reason why he is ineligible (e.g., a felony conviction).

In response to the Supreme Court decision, the D.C. City Council amended the carry law so that licenses are not needed for carry in one's home. D.C. and its amici had argued that a handgun ban was alright because people could still have long guns for self-defense in the

home. But the *Heller* majority observed: “There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upperbody strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” The dissenting opinion written by Justice Breyer contends that courts should perform an ad hoc balancing test on the merits of gun bans or gun controls. Detailing the social science evidence which had been presented by the parties and their amici, Justice Breyer writes that there is lots of social science on both sides of the issue. Accordingly, the courts should not interfere with the D.C. City Council’s decision. Justice Scalia responds that the Breyer approach would negate the decision to enact the Second Amendment: “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”

The *Heller* decision is very clear that not all gun controls are unconstitutional. Bans on “dangerous and unusual weapons” or “weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns” are valid.

The *Heller* opinion does not explicitly rule on the federal ban on machine guns manufactured after 1986, but the opinion can be read to imply that the automatic M-16 rifle can be outlawed.

It is unclear how courts will resolve challenges to bans on non-automatic guns, such as small handguns (dubbed “Saturday night specials” by the gun ban lobbies), or cosmetically incorrect guns (“assault weapons”), or centerfire rifles (“sniper rifles”). The broader the scope of a gun ban, the more likely a court following the *Heller* decision would find that the prohibition involves guns “typically possessed by law-abiding citizens for lawful purposes.”

As for the constitutionality of other gun controls: “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”

By affirming the validity of bans on gun carrying in “sensitive” locations such as schools and government buildings, the Court seems to imply that a total ban on gun carrying in ordinary public places is unconstitutional. Nothing in the opinion suggested that there was a constitutional problem in requiring licenses for gun carrying.

Very significantly, *Heller* did not attempt to answer the question of whether the Fourteenth Amendment makes the Second Amendment enforceable against state and local governments. By longstanding Supreme Court interpretation, each of the provisions of the Bill of Rights applies directly only to the federal government. A provision becomes a limit on state and local governments only if the Supreme Court chooses to “incorporate” that provision into the Fourteenth Amendment (which forbids states to deprive persons of life, liberty, or property without due process of law).

The Supreme Court has not definitively ruled on whether the Second Amendment is incorporated. Some 19<sup>th</sup> century cases rejected applying the Second Amendment to the states, but these cases predate the Supreme Court’s current method of Fourteenth Amendment analysis.

The Second Amendment Foundation and the National Rifle Association are already bringing legal cases against local gun bans, such as Chicago’s handgun ban, and San Francisco’s gun ban for residents of public housing. These cases may give the Supreme Court the opportunity to issue a decisive ruling on incorporation.