DISTRICT OF COLUMBIA V. HELLER:

A DISPUTE OVER HISTORICAL FACT

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"Americans have the right and advantage of being armed-unlike the citizens of other countries whose governments are afraid to trust the people with arms."

James Madison, Federalist Papers 46

There are few rights more fundamental to the spirit of the United States and the self-reliance of its citizenry than the right to bear arms. To deprive a population of this basic right is to prevent it from defending itself against tyranny and crime. The Framers of the Constitution of the United States were conscious of this fact.

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They knew, as George Mason stated ominously in June 1788, "To disarm the people…was the best and most effectual way to enslave them."[1] In order to protect the right of the American people to possess firearms, they enacted the Second Amendment of the Bill of Rights. Over the years, however, advocates of strict gun control have misconstrued and manipulated the vaguely worded amendment and diminished its ability to fulfill its purpose. In the landmark case of *District of Columbia v. Heller*, 554 U.S. ___ (2008), however, the Supreme Court broke with precedent and reasserted the plain truth of the Second Amendment.

The debate in the Supreme Court case *District of Columbia v. Heller* centered on a disagreement over historical data rather than a clash between differing methods of constitutional interpretation. Justices Scalia and Stevens differed on a number of historical points, including their interpretation of the purpose of the Second Amendment, the state constitutions and proposals of the foundational era, and the specific wording of the amendment. Justice Scalia employed an originalist interpretation of the text as the analytical approach and driving force of his opinion, while Stevens reached his dissent through a contextual interpretation of the original text.

Dick Anthony Heller, a D.C. special policeman, applied to register a handgun he wanted to keep at his home, but the District

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1 David Thomas Konig, *The Second Amendment: The Missing Transatlantic Context for the Meaning of the 'The Right of the People to Keep and Bear Arms'*, 22 LAW & HIST. REV. 151 (2004), *available at* http:// www.jstor/org/ stable/4141667.

denied his request. Heller filed a lawsuit, challenging the 1976 District of Columbia statute that banned handgun possession by making it a crime to carry an unregistered handgun and prohibiting the registration of handguns. The law also requires residents to keep all firearms they own unloaded and disassembled or bound by something like a trigger lock.[2] The District Court dismissed the suit, but upon appeal, the D.C. Circuit Court reversed the decision and "held that the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right."[3]

The case arrived at the United States Supreme Court where, in a 5-4 vote, the Justices ruled that the District ban was a violation of the Second Amendment, which states, "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."[4] This landmark decision was the first ruling the Court had made on the substantive understanding of the Second Amendment in over five decades. Justices Scalia and Stevens drafted the opinions of the Court. In their lengthy statements, both of the justices spent an extensive amount of time examining the historicity of their position and the original intent of the Second Amendment. Although

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2 Heller v. District of Columbia, No. 07-290, 2010 U.S. Dist. LEXIS 29063 (U.S., Mar. 26, 2008).

3 *Id.* (Stevens, J., dissenting).

4 Kenneth Jost, Gun Rights Debate, CQ Researcher, Oct. 31, 2008, http://library.cqpress.com/cqresearcher/cq resrre200 8103100.

they agreed on their approaches to a large extent, Stevens and Scalia disagreed on the meaning of the information they uncovered. First, their differing opinions on the purpose of the Second Amendment created a foundational discrepancy in the reading of history. Justice Stevens, in the dissenting opinion, offers that upon a survey of individual states' constitutions and constitutional proposals, the drafters of the Constitution could have explicitly given any – and all – citizens the right to firearms, without contest or regulation.[5] Justice Scalia, on the other hand, emphasizes the Founders' desire to give citizens the resources for self-defense and the ability to rebel against a tyrannical government if necessary.[6] Writing for the majority, Scalia states that the Second Amendment provided an individual right for "law-abiding, responsible citizens to use arms in defense of hearth and home."[7] Concerns about the creation of a standing army were undoubtedly discussed at the drafting of the Constitution, but a careful historical analysis provides more substantial support for Scalia's argument.

The Framers of the American Constitution were heavily influenced by English law and history. Many of the men who gathered to script the founding document and its amendments were only a few generations removed from the first European immigrants. In England, the right to possess a firearm was commonplace, as it was in early America. In fact, during the 12th century, King Henry II required all citizens to own certain arms because they

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5 *Heller*, 2008 U.S. Dist. LEXIS 29063.
6 *Id.* (Stevens, J., dissenting).
7 Jost, *supra* note 4.

did not have a regular army and police force.[8] It was the duty of the people to defend themselves and their king if England was attacked. In 1671, Parliament essentially deprived the people of this right by imposing an extensive property requirement on the right to hunt. The process of disarming the citizenry was continued by King Charles II and his Catholic successor James II, who banned firearms for all Protestants.[9]

These actions by the British monarchy, as Scalia explains, instilled a concern among the Founding Fathers over the concentration of military forces and a desire to protect the right to own arms. After the removal of James II in the Glorious Revolution of 1689, his successor, William of Orange, signed the Declaration of Rights, which included the provision, "That the Subjects which are Protestants, May have Arms for their Defense suitable to their Conditions and as allowed by Law."[10] Heavily drawn upon by the Founders, the English Bill of Rights' inclusion of the right to bear arms stands as a frontrunner to the Second Amendment. In his *Commentaries on the Laws of England,* Sir William Blackstone, a preeminent English scholar, comments on the importance of the right to arms. He writes that the rights of Englishmen are rooted in "the natural right of resistance and self-preservation" when the sanctions of society and laws are found insufficient to "restrain the

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8 Leonard W. Levy, *Origins of the Bill of Rights 136* (1999).

9 *Id.* at 137.

10 Gordon Lloyd & Margie Lloyd, The Essential Bill of Rights: Original Arguments and Fundamental Documents 59 (1998).

violence of oppression."[11]

Historically it is evident that the right to keep and bear arms also aligns with the concept of popular sovereignty, which is foundational to the American republic. In addition to the influences of English law, many of the Framers were highly impacted by the writings of philosopher John Locke. In his 1694 *Second Treatise of Government*, Locke outlines the right of the people to change or abolish a tyrannical government if necessary.[12] In order to overthrow an oppressive government, arms would, at times, be vital. The birth of the United States is a testament to this Lockean theory. In the 1700s, among other repressive deeds, King George III attempted to disarm the most rebellious areas of the colonies prior to the American Revolution.[13] Thomas Jefferson wrote in the Declaration of Independence that, "To secure these rights [life, liberty and the pursuit of happiness], Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive to these ends, it is the Right of the People to alter or to abolish it."[14] Unfortunately, there are times, as in the case of the American Revolution, when abolishment of an oppressive government can only occur through the use of violence. The Framers were aware of this fact and therefore enacted the Second Amendment in order

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11 Carl T. Bogus, The Second Amendment in Law and History 188 (2000).
12 Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 47 (1998).
13 Jost, *supra* note 4.
14 1 Julian P. Boyd, The Papers of Thomas Jefferson 429 (1950).

to protect their means of defense against tyranny.

At the time of the ratification of the Constitution, an English minister wrote, "Rifles, infinitely better than those imported, are daily made in many places in Pennsylvania, and all the gunsmiths everywhere constantly employed. In this country, my lord, boys, as soon as they can discharge a gun, frequently exercise themselves therewith, some a fowling and others a hunting."[15] The use of guns for non-military means was widespread in early America. The people, therefore, would easily understand the right to bear arms in the Second Amendment based upon their experience.

Second, Justices Scalia and Stevens disagreed over the interpretation of the wording used by the Framers in the Second Amendment. One of the most significant disparities is between their views of the phrase to "bear arms." While Stevens argues that to "keep and bear arms" was unequivocally related to a military purpose, Scalia asserts that to "keep arms" was simply a common means of referring to possessing arms for everyone.[16] To bear arms, Scalia continues, refers to carrying a weapon for confrontation. After examining sources from the 18th century, Scalia demonstrates that on numerous occasions, "bear arms" referred to carrying a weapon outside of an organized militia.[17] In the Linguistics Brief prepared for the *Heller* case, "every example given by petitioners' amici for the idiomatic meaning of "bear arms" from the founding period either includes the preposition 'against' or is not

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15 Levy, *supra* note at 8, 140.

16 *Heller*, 2008 U.S. Dist. LEXIS 29063.

17 *Id*.

clearly idiomatic."[18] Scalia quickly dispensed of the examples Stevens provided of the right to "bear arms" referring solely to military purposes because they were all federal legal sources. As Scalia logically pointed out, these sources would have few other occasions to mention bearing arms outside of conversations about the militia and standing army.[19]

Third, Justices Scalia and Stevens differed on their perception of the state conventions and constitutions surrounding the founding of the country. On May 15, 1776, the Second Continental Congress sent a resolution to the assemblies of the thirteen colonies that declared each state should create a separate government that best protected and ensured the happiness of its constituents.[20] Over the next four years, representatives met in each of the colonies across the nation and adopted formal state governments. Eleven of the colonies chose to shape governments that were dedicated to the preservation of rights.[21] That preservation was so essential that the delegates of seven states attached a proposed declaration of right. The declarations of Pennsylvania, Virginia, Delaware, and Massachusetts all included statements referring to the right to bear arms.[22]

In his dissent, Stevens acknowledges the inclusion of the right to bear arms in many of the original state declarations but sug-

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18 *Id*.
19 *Id*.
20 Lloyd & Lloyd, *supra* note at 10, 183.
21 *Id.*
22 *Id*. at 184.

gests that because many of them contain qualifiers, they are different from the Second Amendment. For example, the Pennsylvania Declaration of Rights states that since "the people have a right to bear arms *for the defense of themselves and the state*," they are different than the amendment being debated. Stevens contends that if the Second Amendment right "to keep and bear arms" was meant for any non-military purpose, the Framers would have included a qualifier that indicated as much.[23] It is interesting, however, that the "the right to bear arms" first appeared in the state constitution of Pennsylvania in 1776—a state that did not even have a state militia.[24] In this case at least, the expression clearly had a non-military significance. The inclusion of the qualifiers in the state documents was likely for the sake of clarity, rather than inclusive regulation. These statements strengthen the claim that the Second Amendment was intended to defend the individual right of citizens to keep and bear arms for purposes outside of the military because they demonstrate that such purposes were under common consideration among the states.

In the third draft of the Declaration of Rights which was attached to the 1776 Virginia Constitution, Thomas Jefferson stated that, "No freeman shall be debarred the use of arms [within his own lands or tenements]. There shall be no standing army but in time of actual war."[25] Although the review committee changed Jefferson's wording before the final draft of the Constitution, just

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23 *Heller*, 2008 U.S. Dist. LEXIS 29063.
24 Levy *supra* note at 8, at 135.
25 Boyd *supra* note at 14, at 363.

the initial inclusion of the phrase shows that Jefferson, one of the more forward-thinkers of his time, believed a constitutional right to the possession of arms was necessary.

In Massachusetts, the delegates emulated the emphasis placed on collective defense by Pennsylvania and Virginia but added the word "keep" to their constitution. "The people have the right to keep and bear arms for the common defense."[26] According to Saul Cornell, an Associate Professor of History at The Ohio State University, the Massachusetts convention included "keep" based on the assumption that many of the state's citizens would purchase their own arms in order to fulfill their duty and serve in the militia.[27] The delegates wanted to ensure that it was clearly permissible for these citizens to then keep their weapons at home. The Massachusetts citizens wanted even further protection; one citizen of Williamsburg wrote in protest that, "we esteem it an essential privilege to keep Arms in our houses for Our Own Defense and while we continue honest and Lawful Subjects of Government we Ought Never to be deprived of them."[28]

In the years preceding the landmark decision of *District of Columbia v. Heller*, relatively few Supreme Court cases dealt with the Second Amendment. In 1876, the Court first confronted the topic in the case of *United States v. Cruikshank*, 92 U.S. 542

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26 Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun control in America 23 (2006).

27 *Id.* at 24.

28 Stephen P. Halbrook, The Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees 42 (1989).

(1876). As a result of this case, the Supreme Court established two principles. The Second Amendment allows for limited regulation of firearms, and because the amendment is not incorporated it only applies to federal power.[29] Ten years later in *Presser v. Illinois*, 116 U.S. 252 (1886), the Supreme Court reaffirmed that the Second Amendment did not apply to the states when it ruled in favor of an Illinois law that prohibited paramilitary organizations from parading or drilling in cities without a license from the governor.[30] The *Presser* case also substantiated the belief that the right to bear arms was only related to the formation and management of the militia by the government. In the late 19th century the Supreme Court in the cases of *Miller v. Texas*, 153 U.S. 535 (1894), and *Robertson v. Baldwin*, 165 U.S. 275 (1897), affirmed the ruling that the Second Amendment did not apply to the states.[31]

The most significant Supreme Court decision on this issue prior to *District of Columbia v. Heller* was the 1939 case of *United States v. Miller*. Jack Miller and Frank Layton were convicted of transporting firearms across the state border between Oklahoma and Arkansas.[32] The Court unanimously upheld the constitutionality of mandated firearm registrations and the 1934 National Firearms Act, which regulated the interstate transportation of some weapons. In his opinion, Justice Woods wrote:

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29 Robert J. Spitzer, The Right to Bear Arms: Rights and Liberties under the Law 32 (2001).

30 Robert J. Cottrol, Gun Control and the Constitution: Sources and Explorations on the Second Amendment 13-29 (1994).

31 Spitzer, at 35.

32 Cottrol, at 174-83.

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserved militia of the United States as well as of the States; and, in view of this prerogative…the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government. But, as already stated, we think it clear that the sections under consideration do not have this effect.[33]

In his dissent, Stevens asserts that the Court's reasoning in *Heller* was not substantial enough to overturn the *Miller* decision. Stevens states that in *Miller* the Court held that "the Second Amendment did not apply to the possession of a firearm that did not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[34] Scalia contends that this was not the central holding of *Miller*. More accurately, *Miller* centered upon the type of gun used, not the purpose for which they were using the weapon. The Court stated that Second Amendment does have limits and that this particular weapon did not seem to be part of "ordinary military equipment" or an item that would contribute to the common defense. *Heller* completely shifted the legal discussion by striking down a ban on handguns.

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33 SPITZER, *supra* note at 28, at 34.
34 *Heller*, 2008 U.S. Dist. LEXIS 29063 (Stevens J. dissent).

Furthermore, the *Heller* decision now serves as the foundation for a larger ruling. In 2010, the Supreme Court's ruling in *McDonald v. Chicago*, 561 U.S. ___ (2010), upheld the *Heller* decision and expanded the application of the Second Amendment's right to bear and keep arms for self-defense to include the states, as justified by the Fourteenth Amendment.[35]

Justice Scalia's originalist interpretation of the facts surrounding the framing of the Constitution in the landmark 2008 *District of Columbia v. Heller* case was consistent with the original intent of the Second Amendment. In response to the decision made in the case of *Heller*, Stevens wrote:

> The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilians use of weapons, and to authorize this Court…to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.[36]

It is evident, however, that the Framers made an intentional decision to limit the ability of the federal government to disarm the people. The Framers wanted to avoid the dangers of a government with too much power, and they wanted to permit a means

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35 McDonald v. City of Chicago, No. 08-1521, 2010 U.S. LEXIS 5523 (2010).

36 Jost, *supra* note 4.

for self-defense. The Second Amendment guards one of the most fundamental resources for protection—the possession of a fire-arm. Though dissenters claim its ambiguity, the Supreme Court defended the essential freedom of American citizens and created precedent in the case *District of Columbia v. Heller*.[37]

37 Scalia and Stevens continue to disagree on this issue. Scalia and Stevens split from the majority and dissenting opinions, respectfully, to engage one another further on the differences between their interpretations.