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To Heller and Back

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Abstract
Extensive legal research confirmed a Standard Model of the Second Amendment: the Founders' intended to recognize and protect a preexisting individual right to own and use firearms for self-defense. Although most gun laws will remain constitutional, despite their irrelevance to crime control, the Supreme Court's 2008 decision in District of Columbia v. Heller invalidated the nation's most restrictive law, which had banned the possession of handguns and had banned the use of any firearm for home protection. It remains to be seen whether the Supreme Court will "incorporate" the Second Amendment in the Fourteenth Amendment so that it limits excessively restrictive state and local laws as well. Criminologically, Heller will probably lead to an increase in gun use against home invasions and a possible decrease of such invasions. Unfortunately, specific data about home invasions are not collected, so the results may be impossible to measure.

Thirty years ago, there was almost no legal historical research regarding the Second Amendment. Once scholars turned to the question in earnest, the evidence in support of an ordinary individual right was overwhelming. The opening clause about the militia was recognized as typical of early American state constitutions: announcing an important purpose for the right, but not limiting the right solely to that purpose (Volokh, 1998). Just as physics has a "Standard Model," so does the Second Amendment; although questions remain about the boundaries, the core right of individuals to own guns for lawful purposes, including self-defense, is clear (Reynolds, 1995). The majority opinion in *District of Columbia v. Heller* (2008) follows the Standard Model.

Prior to *Heller*, about half the courts that had rejected the Standard Model claimed that the Second Amendment is only a right of state governments. The claim is hard to square with the text affirming "the right of the people," not "of the states." None of the nine Justices in *Heller* claimed that the states right (also called "the collective right") had any support in text, precedent, or history.

Although the collective right theory is defunct, many of the judges who wrote or joined collective right opinions are still on the bench. Their embrace of the collective right, despite the absence of evidence, suggests such a visceral hostility to gun ownership that these judges are

unlikely to find any gun control law, no matter how severe, to be a Second Amendment violation.

The other theory that challenged the Standard Model was known as the "narrow individual right" or "civic right" model. Confusingly, it was also sometimes called "collective right." The theory posits that there is a right to gun ownership only insofar as it relates to militia service; the only individuals with Second Amendment rights are National Guardsmen.

The narrow individual right theory was adopted by Justice Stevens' dissent. One weakness of the theory is that there are no statements from the Founding era describing the Second Amendment in such narrow terms, whereas there are many sources from the Founding era and the early Republic which plainly describe the Second Amendment in accord with the Standard Model.

Historical sources made it clear that James Madison and the other framers, and the American people, saw the Second Amendment as guaranteeing a pre-existing Common Law right, which had been codified in the 1689 English Declaration of Rights. Madison's purpose, as shown by his notes for his speech introducing the Bill of Rights into the House of Representatives, was to expand on the English Declaration by remedying two key flaws: the English right was for Protestants only (since the tiny English Catholic population was considered potentially subversive), and the right limited the King but not Parliament (since the English Declaration was a mere statute, subject to revision by future Parliaments)(Hobson & Rutland, 1979, pp. 193-94). As the *Heller* majority noted, the Supreme Court's decision in *United States v. Cruikshank* (1876) likewise recognized the right to arms as pre-existing the Constitution.

Justice Stevens admitted that there was a pre-existing right, but asserted that it was a right to serve in the militia. He could not provide any evidence in support of this claim. To the contrary, over two centuries of case law on militia issues affirms federal supremacy over the militia, and that there are no individual or state rights which trump federal power (Heath, 2001).

Heller and his associates were challenging the most restrictive gun law in the nation; only a few other jurisdictions (Chicago and five of its suburbs) banned handguns, and no legislative body, except the D.C. City Council, had banned the use of registered, legally-owned guns for self-defense in the home. Also, since the District of Columbia is part of the federal government (the D.C. City Council's powers are only those which are granted by Congress), there is no question that the Bill of Rights applies to it. Most, but not all, of the Bill of Rights has been made enforceable against states by "incorporation" into the Fourteenth Amendment.

Whether to incorporate the Second Amendment will be a decision for a future case. Some cases from the 19th century refused to apply the Second Amendment to the states – *Presser v. Illinois* (1886) and *Miller v. Texas* (1894) – but those cases predate the Supreme Court's modern theory of incorporation.

The majority opinion in *D.C. v. Heller* indicated that some restrictive gun laws, however poor as public policy (Kleck, 1997), are probably constitutional. As the gun control lobby has made abundantly clear over the decades, most "gun control" laws are not terribly restrictive. Most non-felon adults can readily acquire and use most types of firearms for sport and protection. The National Rifle Association and its allies benefit from the fact that their general political position is widely supported by the constituents who influence lawmakers.

Even before *Heller*, all but a few states already had their own state constitutional provisions protecting the right to keep and bear arms; under these provisions, most gun controls had been upheld, while there are about two dozen cases finding some particularly excessive gun controls

to be unconstitutional (Dowlut & Beard, 2008, pp. 10-11). These state cases may provide templates for federal court cases on the Second Amendment.

Because *Heller* currently applies only to federal law, and because most congressional gun control laws, and the regulations thereunder, are probably constitutional under *Heller*, the decision is unlikely to have much criminological impact outside the District of Columbia itself. If *Heller* were applied to state and local laws, it would eliminate the Chicago handgun ban, probably end the gun bans that exist in some public housing facilities, and might require New York City to make its handgun licensing procedures less cumbersome. It would also end the practice of some Massachusetts police chiefs who mandate that gun licensees may never have a loaded gun in the home.

The overwhelming weight of criminological evidence indicates that handgun bans, gun show bans, and the other gun controls most likely to be prohibited under *Heller* have no net positive impact on crime reduction anyway, primarily because they only affect the law-abiding portion of the population. (Kleck, 1997, 1991).

More citizens keeping guns for protection in some metropolitan areas will probably mean more uses of guns for protection. The cultural signal sent by *Heller* may also lead to greater willingness to admit to gun ownership and protective uses to survey researchers. Comparative national data suggest that criminals knowing that homeowners are more likely to be armed might reduce the number of home-invasion burglaries. (Kopel & Michel, 2008, pp. 7-12). The impact would be difficult to measure, because data on whether the victim was home during a burglary are not normally collected by the FBI's Uniform Crime Reports, and even the more detailed NIBRS data are not collected in D.C. or Chicago.

Making lemons from lemonade, the Brady Campaign now claims that *Heller* will be a great boon to the gun control movement, even though the movement and its allies had filed 19 amicus briefs on the losing side of *Heller.* By making it clear that a handgun ban was unconstitutional, the Court would rebut the gun lobby's "slippery slope" assertion that X gun policy could lead to a ban. The response would be that a restriction cannot be a ban, to paraphrase Justice Holmes's famous assertion that the power to tax does not involve the power to destroy "while this Court sits."

Yet the gun banning temptation appears to be irresistible, as the D.C. Mayor and City Council, in cooperation with the Brady Campaign, have demonstrated. Instead of enacting legislation to conform to the Court's edict, D.C. defied the Court. The City Council's corrective law passed in July 2008 barely allowed gun use for protection. Guns still had to be kept unloaded and either disassembled or locked up until the moment they must be used for protection from a home invader. Even putting aside the problem of the time it might take to make the gun functional, the revised law made it a crime to use a gun against criminal who attacked a family during a backyard barbeque. D.C. authorities made it clear they knew the new law could not pass constitutional muster, but decided to force challengers to go back to court (Pierre & Stewart, 2008). The burden of having to go to court to fight a ban on constitutionally-protected activity turns the lemonade to vinegar, and the slippery-slope argument retains at least some of its power.

Also in defiance of the standards set forth in *Heller*, D.C. continued to ban semi-automatic handguns and rifles. In *Heller*, the Court repeatedly emphasized the constitutional protection of commonly owned firearms that are not "dangerous and unusual weapons," and the importance of the right to have and use guns for protection. Semi-automatic actions have more built-in safety features than other types of firearms, making them less "dangerous." Semi-automatic handguns are not only inherently safer than revolvers and derringers, they constitute at least three-fourths

of the handgun market; it would be ludicrous to argue that they are "unusual." They are the side arms used most police departments and private citizens (for sport as well as protection) for over a quarter century.

Under the threat of Congressional action, the D.C. City Council in September 2008 passed an "emergency" bill to repeal the semi-automatic and self-defense bans. But that law only has a temporary effect, and it remains to be seen whether D.C. will permanently comply with the *Heller* decision.

A new court challenge to the D.C. laws has already been filed, with Mr. Heller again as one of the plaintiffs. There is a good chance that the city's ordinance will be overturned at the federal circuit court of appeals level, with the Supreme Court declining further review. If the case did go to the Supreme Court, the decision against D.C. might get six or seven votes, for sometimes Justices have come to the Court's own institutional defense. For example, when Alabama continued to deny the Scottsboro Boys a fair trial following the Court's decision overturning the first convictions by a 7-2 margin (*Powell v. Alabama*, 1932), one of the dissenters joined the majority and the other abstained in the follow-up case (*Norris v. Alabama*, 1935).

Hypothesizing that the Second Amendment is eventually incorporated against the state and local governments, the *Heller* rule allowing bans only on "dangerous and unusual" guns might be used to invalidate New York City's air-gun ban. Air guns are far less dangerous than powder guns, and are ubiquitous in all of the United States except New York City. Since the air guns are almost never used in crime (except for petty property vandalism), no significant change in crime will occur should the restriction be invalidated.

A more difficult issue is raised by the laws in a few states and localities which ban some but not all semi-automatics, by labeling them as "assault weapons." Proponents of the bans contend that the guns are much more dangerous than other semiautomatics. Opponents counter that the guns are functionally indistinguishable from other guns, and that the bans simply target guns that are "cosmetically incorrect" because their stocks are black plastic rather than brown wood, or because the guns have minor accessories like bayonet lugs. If opponents prove their case, then a court sincerely trying to follow *Heller* would have to rule against bans on so-called "assault weapons." As with other gun laws, there was no advance evidence the restriction was likely to improve the situation and no evidence the restrictions, when imposed, altered the amount of criminal violence. (Kleck, 1997).

Thirty years ago, there was very little criminological research on the effectiveness of gun control or the benefits of gun ownership. This is constitutionally irrelevant, as Justice Scalia's majority opinion noted. The balancing of social utilities has already been conducted by the American people, in creating the constitutional right. If guaranteeing criminal suspects all the rights envisioned in the Fourth, Fifth, Sixth, and Eighth Amendments is associated with an increase in crime, that is a price we pay for the liberties guaranteed to the rest of us. If the price seems too high, the remedy is to amend the Constitution, not for legislative, executive, or judicial bodies to defy it.

Nevertheless, Justice Breyer's dissent argued for an ad hoc balancing test, with the scales weighted in favor of gun bans. As long as *some* social science supported the ban (even if the great weight of evidence were on the other side), then the ban would be constitutional, unless there were a clearly superior less restrictive alternative. In light of the last 30 years of research, the Breyer dissent could not contend that the D.C. handgun ban, or gun controls in general, were actually effective. Instead, the policy-related dissent acknowledged that the benefits of restrictive

gun laws were in doubt, and cited research on both sides of the issue (*D.C. v. Heller*, 2008, pp. 2853-65).

After the 1976 enactment of the D.C. handgun ban, there were three widely publicized studies claiming that the ban was effective. Two were so patently flawed that neither D.C. nor its *amici* mentioned them in their briefs. All that was left was a single study which showed that D.C. had fewer gun homicides and suicides after the ban than before (Loftin, McDowall, Wiersema, & Cottey, 1991). The study claimed as a benefit of a law taking full effect in February 1977 a sharp drop in homicide occurring between 1974 and 1976. Other flaws included comparing a city to its suburbs rather than to a comparable city and using a limited time frame for a law that, in theory, should have been gradual in its impact. Expanding the time frame cost any imagined statistical significance (Britt, Kleck, & Bordua, 1996).

Indeed, as detailed in an amicus brief, before the ban D.C.'s murder rate was about 28% higher than the rate in the 49 other largest American cities. After the ban, D.C.'s rate was 144% higher (Gardiner, 2008, 7-10). Justice Breyer mused that without the ban, D.C. might have been even worse. But if are going to take the Constitution seriously, there comes a point at which conjecture ends, and enforcement of the law begins. The Supreme Court majority reached that point on June 26, 2008, in *District of Columbia v. Heller.*

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