2008

The Year of the Gun: Second Amendment Rights and the Supreme Court

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The Supreme Court's grant of certiorari in the District of Columbia gun-ban case promises to make this Term "The Year of the Gun."[1] Though the Court will review many other important cases, the *Heller* case presents a unique constellation of characteristics: It involves the scope of a right that many Americans regard as highly important, but that has not been significantly addressed by the Supreme Court before, and it does so in an unusually open national election year, with no incumbent or obvious successor running for president. Though the Court did address Second Amendment issues somewhat in the 1939 case of *United States v. Miller*,[2] the treatment was limited, and uninformed by opposing counsel because only the federal government was represented.[3] The Court's decision in *Heller* will thus give the Justices a chance to address—or to duck—a number of important Second Amendment issues and may also pose potential difficulties for the Court's existing jurisprudence of unenumerated rights, in a setting in which the political ramifications are likely to be obvious and immediate.

I. Issues that Can Be Avoided

One issue that the Court will be able to duck, because it isn't present here, involves the incorporation of the Second Amendment into the Fourteenth. Because the District of Columbia is not a state, but part of the federal government, no incorporation issue appears. Of course, that also means that, regardless of the decision in *Heller*, the incorporation question will remain for future cases.

In addition, the often-discussed question of what sort of weapons fall within Second Amendment protection should be easy for the Court to avoid should it choose to do so. The *Heller* plaintiffs are not asking for the right to

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1. *See* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *cert. granted sub nom.* District of Columbia v. Heller, No. 07-290 (U.S. Nov. 20, 2007).

2. 307 U.S. 174 (1939).

3. *See* Brannon P. Denning & Glenn H. Reynolds, *Telling* Miller*'s Tale*, 65 LAW & CONTEMP. PROBS. 113 (2002).

possess machine guns, bazookas, or nuclear weapons, but ordinary firearms whose inclusion within any individual-rights view of the Second Amendment is unlikely to raise difficult questions.

The *Heller* case may also allow the Court to avoid, for the moment, any line drawing regarding the extent to which state or federal laws involving licensing or registration of firearms, or requiring licenses for public carrying of firearms, are permissible under an individual-rights view of the Second Amendment. The District of Columbia gun ban under question is so draconian that it can plausibly stand only if the Court finds no individual right to arms at all.

II. Issues that Cannot (Easily) Be Avoided

Other issues will require a decision. The most significant is the question whether the Second Amendment protects some sort of individual right to own guns, or merely a "collective right" of states to arm militias. That question is squarely presented in *Heller*, as is recognized by the Court's own statement of the issue:

> Whether the following provisions — D.C. Code secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — 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.

Some observers read the Court's statement of the issue to presuppose the existence of some sort of individual right,[4] but that seems less clear to us. But the Court can hardly avoid answering this question in deciding the case—or, at least, it cannot do so without contortions that would have made it more politic to simply deny the petition for certiorari.

Even if the Court concludes that the Second Amendment protects an individual right, it must then articulate a standard of review to, in Richard Fallon's usage, "implement" the Amendment[5] by articulating "decision rules" to guide it and lower courts in future cases.[6] The Court could thus recognize an individual right while prescribing a deferential standard of review that permits anything short of outright prohibition[7]—think *Kelo*'s review of "public use."[8] Even if the Court were to announce a more rigorous standard,

4. Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/uncategorized/court-agrees-to-rule-on-gun-case/ (Nov. 20, 2007, 13:02 EST)

5. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

6. *See* Mitchell A. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 15 (2004) (describing a two-stage process of constitutional interpretation: the fixing of constitutional meaning and the articulation of decision rules to implement that meaning).

7. *See, e.g.*, Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

8. *See* Kelo v. City of New London, 545 U.S. 469 (2005).

there is always the possibility that it will be applied in a relaxed fashion. Pace Gerry Gunther, "strict in theory" is not necessarily "fatal in fact."[9]

III. The Lower Courts' Role

Even if the Court prescribes a nondeferential standard of review, lower courts—dismissive of, even hostile to, Second Amendment claims in the past[10]—will have the responsibility for applying it. Unless the Supreme Court is willing to reverse judges who don't toe the line, applications of the Court's rules in particular cases could sap an individual-rights decision of its strength. To cite a recent example, lower courts' stingy applications of *Lopez*[11] and *Morrison*,[12] which limited the scope of the Commerce Clause, were barely distinguishable from willful defiance.[13]

IV. Enumerated and Unenumerated Rights

Last summer, before the Supreme Court granted certiorari, Professor Michael O'Shea wrote on the Concurring Opinions blog that the Supreme Court would face a problem if it rejected an individual-rights reading of the Second Amendment. Most Americans, he argued, would compare:

> the Court's handling of the enumerated rights claim at issue in *Parker*, and its demonstrated willingness to embrace even non-enumerated individual rights that are congenial to the political left, in cases like *Roe* and *Lawrence*. "So the Constitution says *Roe*, but it doesn't say I have the right to keep a gun to defend my home, huh?"[14]

We found this argument compelling enough to predict—wrongly—that the Supreme Court would probably choose not to hear the case. But the tensions that a rejection of the individual-rights position would raise regarding the Court's jurisprudence of unenumerated rights in areas like abortion, sodomy, or contraception may encourage some Justices to go along with an individual right in the Second Amendment context (perhaps fudging on the

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9. *Cf.* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

10. *See* Brannon P. Denning, *Can the Simple Cite Be Trusted? Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961 (1996).

11. United States v. Lopez, 514 U.S. 549 (1995).

12. United States v. Morrison, 529 U.S. 598 (2000).

13. *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez*, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 939 (2000).

14. Posting of Mike O'Shea to Concurring Opinions, http://www.concurringopinions.com/archives/2007/07/the_second_amen_1.html (July 16, 2007, 19:10 EST).

standard of review) rather than face the political consequences that Professor O'Shea pointed out. On the other hand, some members of the Court who are unfriendly to the jurisprudence of unenumerated rights might find such an obvious contradiction congenial. And those—if there are any—on the Court who consider decisions in light of national elections might weigh the likelihood that a finding of no individual right could affect the elections by energizing gun-rights supporters, or possibly gun-control supporters, to become more involved and to turn out in higher numbers.

V. Conclusion

Arguably, gun-rights supporters have much more at stake in *Heller* than their opponents. The Court's adoption of the individual-rights reading may be little more than symbolic; if not, it may take years before the Court deigns to clarify its decision. But a *rejection* of their position would virtually repeal the Amendment, perhaps emboldening gun-control proponents whose initiatives were often stymied by legislators' invocation of the Second Amendment. On the other hand, a loss might galvanize political action, as losses in *Kelo* and *Bowers v. Hardwick* did for property-rights and gay-rights activists.

But the Court, too, has something at stake—its legitimacy. If the Court ignores millions of Americans' belief that the Amendment protects *some* individual right while continuing to invalidate laws infringing on unenumerated rights, the Court might hazard its de facto interpretive supremacy. As Laurence Tribe reminds us, when there is "a deep national dissatisfaction with the way constitutional *law* . . . has . . . resolved a matter," "We the People" seek constitutional amendments.[15] Four times in the past, Article V has been used to reverse Supreme Court cases deemed deeply flawed. *Heller* could occasion a fifth.

15. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 436 (1983).