

Law and the Public's Health

DISTRICT OF COLUMBIA v. HELLER: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

JOEL TEITELBAUM, JD, LL.M.
ERICA SPECTOR, JD

This installment of *Law and the Public's Health* concerns one of the most hotly contested constitutional issues underpinning public health policy and practice: the meaning and reach of the Second Amendment of the U.S. Constitution. The Second Amendment—"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"¹—has long been the subject of intense debate. One side of the argument maintains that the language of the Amendment confers an individual right to possess firearms for private use; the other side claims that possession and use of guns can only be tied to a collective right—namely, the right to preserve and arm state militias.² Because the constitutionality of many gun regulations turns on this distinction, the public health policy implications of adopting one interpretation over the other are enormous.

Prior to its June 2008 decision in *District of Columbia v. Heller*,³ which considered the constitutionality of a District of Columbia (D.C.) law banning the possession of handguns, the U.S. Supreme Court had never directly ruled on which interpretation of the Second Amendment was correct. Indeed, there is scant Supreme Court jurisprudence concerning the Amendment generally. Only a few times has the Court interpreted the Second Amendment; its most recent occasion was in 1939 in *U.S. v. Miller*,⁴ upholding a provision of the National Firearms Act requiring registration of sawed-off shotguns without fully addressing the individual/collective right distinction. In *Heller*, the Court addressed this division directly, holding that the Second Amendment protects an individual right to possess and use a gun for reasons unrelated to militia service.

BACKGROUND

In 1975, the Council of D.C. passed the Firearms Control Regulation Act ("the Act"), which, in response to increasing gun violence and accidental deaths, limited firearm use and possession. Because of handguns'

connection to both risks, the law specifically banned ownership of handguns, including sawed-off shotguns, machine guns, short-barreled rifles, and pistols,⁵ and required that lawful firearms (e.g., shotguns and rifles) be registered with the city. The law also required firearms kept in the home to be unloaded and disassembled or secured with a trigger lock.⁶ Taken together, these restrictions were viewed by many as the toughest in the nation.

In 2006, six D.C. residents who wished to keep handguns for self-defense purposes challenged the Act as violating the Second Amendment. The federal trial court ruled in favor of D.C., holding that "the Second Amendment does not bestow any rights on individuals except, perhaps, when an individual serves in an organized Militia, such as today's National Guard."⁷ The residents appealed. Though the appellate court dismissed five of the residents from the lawsuit for technical reasons, it reversed the trial court's decision with respect to Dick Anthony Heller, a D.C. Special Police Officer whose application for handgun registration was denied by the city. The appellate court ruled that the Second Amendment protects an individual right to possess firearms and that D.C.'s handgun ban, along with the requirement that firearms in the home be kept nonfunctional, violated that right. D.C. appealed this ruling to the U.S. Supreme Court.

THE SUPREME COURT DECISION

By a 5-4 margin and reflecting a conservative-liberal breakdown, the Court affirmed the appellate court's ruling. Writing for the majority and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, Justice Scalia concluded that the Second Amendment provides citizens with "an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self defense within the home."⁸ Scalia reached this result after undertaking a lengthy survey of historical documents in an attempt to identify the "original" meaning of the Second Amendment.⁸ (While this attempt at "originalism" is consistent with Justice Scalia's personal judicial philosophy, it is not without its detractors and potential pitfalls.) Based on his interpretation, Justice Scalia determined that self-defense lay at the heart of the Second Amendment, although he acknowledged that the Amendment's purpose appeared to have been related to the raising of a militia.³

Justice Scalia went on to explain that, like all legal rights, Second Amendment rights are not absolute; he recognized states' legitimate interest in regulatory interventions such as licensure requirements, prohibitions on firearms possession by felons and the mentally ill, and restrictions on carrying laws in certain places such as schools and government. At the same time, however, the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."³ Thus, even statistical evidence related to handgun violence would, in Justice Scalia's view, not justify certain types of restrictions on Americans' Second Amendment rights.

In two separate dissents, Justices Stevens, Breyer, Souter, and Ginsberg concluded that the rights addressed by the Second Amendment relate only to military service. The dissenters argued that neither the Amendment's text nor its contextual history suggest that the Constitution's drafters intended to create an individual right to self-defense. For example, they offered evidence that contemporaneous state constitutions specifically identified the possession of weapons for self-defense as lawful (a logical provision given the states' role in enforcing public safety and defining criminal conduct), but that such a provision was absent from the Second Amendment. The dissenters further concluded that even were the Second Amendment to be interpreted as establishing a right of self-defense, elevated crime rates and extensive data linking handguns to urban gun deaths and injuries are sufficient to give the state a legitimate interest in a gun ban, and that D.C.'s law was sufficiently targeted to lawfully remedy the problem.³

IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

Heller underscores the extent to which even extensive statistical evidence of health risk may be insufficient to support the constitutionality of regulation of individual freedoms where Constitutional rights are concerned. D.C.'s handgun law, recognized as the nation's toughest, imposed a total ban on ownership of certain types of guns and strict limits on access to others. Less restrictive laws may survive. For example, on February 24, 2009, in its first decision concerning gun rights since *Heller*, the Supreme Court upheld a federal law barring individuals convicted of crimes involving domestic violence from owning guns.⁹ The 7–2 decision sidestepped the opportunity to flesh out *Heller*'s meaning, never once even referring to the decision. This is not surprising, as it can take years before

the Court returns to a landmark case such as *Heller* to further flesh it out.

This is not to say, however, that the immediate effects from *Heller* have not been apparent. For example, three Illinois municipalities with handgun prohibitions have already acted to rescind the bans. In California, the San Francisco Housing Authority (SFHA) reached an out-of-court settlement with the National Rifle Association (NRA) permitting residents within SFHA apartment buildings to possess firearms, reversing gun bans contained in preexisting lease terms. Furthermore, it appears that judges may be rethinking whether they can continue to force a defendant to surrender a firearm in his possession as a condition of pretrial release; prior to *Heller*, this was standard practice. Some criminal defense lawyers may begin using *Heller* to argue against the constitutionality of the federal "felon in possession" law, which prohibits gun or ammunition possession by most convicted felons.¹⁰

Yet, these and many other practical implications of the *Heller* decision beg an important constitutional question left unaddressed by the *Heller* majority: Does the Second Amendment even apply to states, or is it only a constraint on the federal government (of which D.C. is considered a part)? In 1833, the Supreme Court ruled that the Bill of Rights (the first 10 Amendments to the Constitution) applied only to the federal government,¹¹ and two other Supreme Court cases from 1875¹² and 1886¹³ held that the Second Amendment specifically did not apply to the states. However, not long after these later decisions were handed down, the Court introduced a legal doctrine known as "incorporation," by which provisions of the Bill of Rights are applied to the states through the Due Process Clause of the Fourteenth Amendment. The Court's limited attention to the Second Amendment during the past 110 years means that the question has gone unaddressed in this context; as a result, it is unclear whether the analysis in *Heller* extends to the states. Several lawsuits already have been filed by the NRA seeking to assure the decision's explicit application to state laws.

Another question raised by *Heller* is the extent to which the decision permits the government to regulate firearms possession in public spaces. Although the D.C. gun ban was not directed solely at firearms in private homes, the majority opinion referenced only that aspect of the law: "[T]he District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."³ Read alongside Justice Scalia's statement that gun possession limits in places like schools would be permissible, it is possible that

Heller's reach will be ruled not to extend far beyond the front doors of private residences. This question remains open because of the self-defense emphasis reflected in the decision.

Regardless of the types of regulations that survive a *Heller* analysis, and irrespective of whether the Second Amendment is eventually found to apply to the states, it is evident that the decision affects the ability to rely solely on strict firearms restrictions as a means of addressing gun violence. *Heller* thus brings into sharp relief the need to combine the regulation of weapons and greater resources for law enforcement with preventive intervention strategies aimed at high-risk populations and communities.

Joel Teitelbaum is Associate Professor and Vice Chair for Academic Affairs, and the Managing Director of the Hirsh Health Law and Policy Program, at the Department of Health Policy, School of Public Health and Health Services, George Washington University Medical Center in Washington, D.C. Erica Spector is an attorney in Washington, D.C., and a student in the Graduate Certificate program at the Department of Health Policy, School of

Public Health and Health Services, George Washington University Medical Center.

Address correspondence to: Joel Teitelbaum, JD, LL.M., George Washington University Department of Health Policy, 2021 K St. NW, Ste. 800, Washington, DC; tel. 202-994-4100; fax 202-994-3504; e-mail <joelt@gwu.edu>.

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