A cavalier attitude; 'D.C. V. HELLER'

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"Today’s opinion will almost certainly cause more Americans to be killed.” - Justice Antonin Scalia.

District of Columbia v. Heller was the first U.S. Supreme Court case in nearly 70 years to consider the validity of a firearms regulation under the Second Amendment. While much commentary has been devoted to the groundbreaking holding of the case - that the Second Amendment confers an individual right to "keep and bear Arms" for purely private purposes - too little attention has been paid to what the court did not decide and the significant uncertainties that remain in Second Amendment jurisprudence.

In the spirit of full disclosure, we note that the quoted language above was not taken from Scalia’s majority opinion in Heller, but rather from his scathing dissent in Boumediene v. Bush, two weeks earlier, in which the court held that prisoners held as enemy combatants at Guantánamo Bay, Cuba, had a right to habeas corpus review (or an adequate alternative). The quotation seems apt, however, because Heller left unanswered significant questions about gun control laws at a time when there are unacceptable levels of handgun violence in the United States.

Given the current composition of the court, it came as little surprise that five justices agreed that the Second Amendment conferred an individual right to keep and bear arms for purely private purposes - essentially overturning one of the central holdings of U.S. v. Miller, decided in 1939. What was surprising is that on such a critical issue, the court left so much undecided. Despite striking down portions of the District of Columbia’s handgun law, the court did not articulate the standard of scrutiny (rational basis, intermediate scrutiny or strict scrutiny) for Second Amendment challenges to gun control laws. As we have seen in other contexts, this determination is critical.

Despite noting that certain long-standing prohibitions on Second Amendment rights might be appropriate - e.g., prohibiting felons and the mentally ill from possessing guns, “imposing conditions and qualifications on the commercial sale of arms” and “forbidding the carrying of firearms in sensitive places” - the court gave no guidance as to when, how, and in what circumstances government might impose such reasonable restrictions.

Despite noting that “dangerous and unusual weapons,” such as “M-16 rifles and the like” may be banned, the court did not say what “and the like” meant and gave no guidelines as to which weap-
ons are so dangerous that they fall outside of the amendment’s scope. Instead, the court held that the “sorts” of weapons protected are “those in common use at the time [of the drafting of the Second Amendment].” But were the handguns used during the recent Virginia Tech shootings, where a single individual wielding two handguns fired more than 170 rounds in nine minutes (killing 32 people and wounding 17 more), of the “sorts” used in the 1780s?

By failing to provide clear standards and guidelines, the court invites a spate of new litigation and years of uncertainty, which, set against the reality of handgun violence in many cities, feels cavalier.

Ban was in response to violence

The district’s handgun ban was a response to high handgun violence. Deaths and injuries from firearms-related violence are highly concentrated in densely populated urban areas, where handguns - because they are compact, portable and easy to conceal - pose special dangers. The ban was adopted in 1976, three years after the district obtained home rule, in response to some alarming patterns: A handgun was used in 88% of armed robberies in the district in 1974 and 1975; in 1974, handguns were involved in 155 of the record 285 murders in the district; and that year every rapist in the district who used a firearm to facilitate his crime used a handgun.

While there will always be legitimate debate about the effectiveness of specific gun control laws, studies have concluded that the district’s handgun ban had positive effects. For the decade after the law took effect, gun-related homicides decreased by about 25%, and gun-related suicides decreased by 23%. A study in the New England Journal of Medicine ruled out other factors for these gains, noting that the enactment of the ban was accompanied by an abrupt decline in firearms-caused homicides in the district, but not elsewhere in the metropolitan area. And although violent crime in the district rose from 1980 to 1987, those numbers mirrored nationwide trends caused by the emergence of crack cocaine and related gang activity. Today, 30 years after enacting the ban, the district has the lowest gun ownership rate and, not coincidentally, the lowest suicide rate in the nation.

The Heller decision answered one big question but left dozens of equally important questions unanswered. We hope the court will soon articulate clear standards that will allow legislatures to continue to place reasonable restrictions on gun ownership while respecting Second Amendment rights.

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