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# High Court Gun Rights Case Ignores Key Case Law Problem

By **Robert Ludwig** (November 5, 2021)

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On Nov. 3, the U.S. Supreme Court heard argument in New York State Rifle & Pistol Association v. Bruen, the most consequential gun case in a decade, drawing a near-record 80-odd briefs and the attention of every segment of the country, from families, schools and businesses devastated by gun violence to governments, police, hospitals and insurers left to pick up the costs.

It was all a legal farce. The participants just didn't know it. But talking around the underlying problem, they are sleepwalking the country into a deepening, self-inflicted crisis.

The court is reviewing New York's "good cause" statute for concealed carry licenses, and many expect the conservative supermajority to extend its 2008 holding in District of Columbia v. Heller, which articulated a right to bear arms in the home,[1] and recognize a right to bear arms in public places. The argument gave little reason to expect otherwise.

In 2017, when the court declined review of California's good-cause law in Peruta v. California, dissenting Justice Clarence Thomas, joined by Justice Neil Gorsuch, noted it "extremely improbable that the framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen,"[2] referring to Heller's 2008 holding that it guarantees a right to handgun possession and to carry it in the home.[3]

That odd holding, extended nationwide in 2010 in the Supreme Court's McDonald v. Chicago decision, turned America's gun problem into a gun epidemic, as declared in a 2015 New York Times front-page editorial.

Until Heller, there was no individual right or unrestrained proliferation. Federal courts had held for most of the 20th century, as the U.S. Court of Appeals for the Ninth Circuit summarized in 1996 in Hickman v. Block, that the Second Amendment of the U.S. Constitution was "meant solely to protect the right of the states to keep and maintain armed militia."[4]

Odder still, the 5-4 majority overturned that state right without addressing it, or any party or 66 amici curiae arguing it.

Heller also produced what then-Judge Gorsuch once called "rococo jurisprudence," based on a hypothetical the framers "might've — but clearly didn't" write,[5] applied in 2,000 cases since, with perilous consequences.

It's time litigants take a different approach.

### Misplaced Fight Over the Statute of Northampton

In Bruen, gun rights and gun control advocates are dueling over the 1328 Statute of Northampton, which provided that no man could "go nor ride armed by night nor by day, in Fairs, Markets ... [or] elsewhere."[6]

New York's brief argues that 700 years of Anglo-American criminal law "[f]rom the Middle Ages onward ... restricted the public carrying of ... deadly weapons, particularly in populous places."

The New York State Rifle and Pistol Association, or NYSRPA, likewise uses Northampton and its progeny to argue that inspiring terror was a requirement.

That argument ignores a unanimous Supreme Court decision in 1986 in McLaughlin v. U.S., not cited by New York, recognizing that guns are characteristically dangerous and that "the display of a gun instills fear in the average citizen,"[7] like earlier historical precedent.

In any event, both sides, as well as the more than 80 amici, overlook 1,000 years of Anglo-American military law governing the militia system, dating to the Assize (Statute) of Arms of 1181, which organized sovereign-controlled militia for defense of the state.

The militia system and Assize, unmentioned in Heller, were the focus of the Supreme Court's unanimous 1939 decision in U.S. v. Miller, which led to uniform recognition of the state right.

Contrary to their unexamined premise, Northampton and criminal law have little to do with the militia system and Second Amendment.

Coexisting for centuries, one governed civilian conduct, the other the militia, as different as civil and military law today. Militiamen were exempted from Northampton and later criminal statutes, like in the Fifth Amendment.

**Heller's Rewrite of the Second Amendment**

More concerning is the constitutional artifice Heller made of the Second Amendment. The amendment reads:

> 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.[8]

In over 150 pages, the court, applying textualism to those 27 words, rewrote the text to mean:

> A disciplined citizens' militia, being necessary to the security of a free polity, the right of individuals to possess and carry a handgun in the home, shall not be abridged.

The majority relied largely on dictionaries and two cases sub silentio,[9] addressing little relevant founding law or history, much less what the framers understood.

***Well Regulated***

The majority dismissed the first term in one sentence, with Justice Antonin Scalia writing that "'well-regulated' implies nothing more than ... proper discipline and training."[10]

That conjecture can likewise be debunked in one sentence. The Articles of Confederation provided that "every state shall always keep up a well-regulated and disciplined militia."[11] To equate "well regulated" and "disciplined," as Heller did, would reduce the first constitution that governed the American Revolution and founding to "disciplined and disciplined militia," — an imbecility, according to former Justice Joseph Story.[12]

Heller cited only a dictionary, commentator, and oblique reference in Virginia's Declaration of Rights to "a well-regulated militia ... trained to arms" — overlooking its 1777 militia statute, "An act for regulating and disciplining the Militia," reducing that to an imbecility, too.

James Madison, who drafted the amendment, warned in "The Report of 1800": "[I]t can never be supposed that when copied into this constitution, a different meaning ought to be attached to" terms taken from the original.[13] Rules of construction require the organic laws be read in pari materia.

Justice Scalia recognized a decade earlier, "Many of Congress's powers under [Article I, Section 8] were copied almost verbatim from the Articles of Confederation."[14]

In Heller, he never mentioned them.

***Militia***

The majority next supposed that "militia" meant citizens' militia, not regulated military forces it called organized, contradicting its definition of "regulated," and despite affirming that militia meant the same thing as in the Constitution.[15]

It hypothesized that "organized militia may consist of a subset" should Congress "not conscript every able-bodied man,"[16] leaving a kind of citizens residue. But a conditional hypothetical — applicable if Congress did not exercise its full power — cannot alter constitutional terms.

It again ignored the Articles of Confederation, which used the identical term "well regulated militia."

The term "citizen militia" is not found in any reported decision until the Oregon Supreme Court's 1980 ruling in a billy club case — State v. Kessler — on which Heller generally relied, and which miscited law reviews and conflated the concepts of citizen soldiers and militia into flapdoodle.[17]

Absent rewriting "well regulated militia" as "disciplined citizen militia" — foreclosed by the Articles' use of the exact term — the majority conceded that an "organized militia ... fits poorly" with an "operative clause that creates an individual right."[18]

***Infringed***

Overlooking the verb on which the Second Amendment rests, the majority impermissibly transposed "infringed" to "abridged,"[19] though they are not synonyms, as is obvious from any thesaurus, but terms of art.

Nor was its meaning addressed by the dissents, parties or 66 amici, or two years later in McDonald, which also equated them.[20]

"Abridge" was used for the great rights in the First Amendment — the Senate rejecting the House of Representatives' substitution of "infringe" — and in all amendments since that guarantee individual rights.

"Infringed" was used only in the Second Amendment, to enshrine a sovereign right.

It was used earlier in the Articles of Confederation, providing "that the legislative right of any state ... be not infringed,"[21] and in decades of protests against British taxation without representation, expressed as infringements of the sovereignty of colonial legislatures, and distinguished from abridgements of individual rights.

To this day, "infringe" is used for sovereign rights. Bryan A. Garner's 1995 "A Dictionary of Modern Legal Usage" defines it as "infringe on [read encroach or impinge on] British sovereignty." Garner was a frequent co-author of Justice Scalia, who used dictionaries to define every term but "infringed."

Correcting a related misconception in 2018, the Supreme Court in Oil States Energy Services LLC v. Greene's Energy Group LLC reaffirmed that it has long recognized that patent infringement involves a public right, overruling Justice Gorsuch's dissent that "most everyone considered an issued patent a personal right."[22] That 7-2 decision by Justice Thomas did not ask why the right is not called patent abridgement.

Virtually everything about Heller distorts the text and founding record, which present a very different historical picture and constitutional right.

**Overlooking Text, Heller Cannot Stand**

Not construing the final clause, Heller can have no stare decisis effect.

Overlooking text is "probably the strongest reason for not following a decision," as the California Supreme Court noted in its 2015 Fluor Corp. v. Superior Court decision about a similar 140-year oversight in holding that its prior decision could not stand.[23]

And in 2007, the Supreme Court of Oregon in State v. Sandoval held in its prior opinion, which did not "even consider the words ... we now recognize to be pivotal," has "nothing to contribute."[24]

**Untenable Holdings**

Heller addressed variants of an individual right the decade after former Chief Justice Warren Burger denounced that notion as "the greatest piece of fraud."[25]

The majority found an implied right of self-defense, of which there is not a word in the text or founding debates, as dissenting Justice John Paul Stevens later noted, calling it "really quite absurd."

The dissents' conjecture that "surely it protects a right" to bear arms for militia duty — was mocked by Justice Scalia as an absurdity,[26] for which there was not a word in the debates, either.

***Self-Defense***

Heller's primary right to a handgun in the home for self-defense, overlooking and rewriting text, was premised on the supposed ancient right of individuals to keep and bear arms, and the English Declaration of Rights as the predecessor to the Second Amendment.[27]

The historian Heller cited wrote that for 500 years, Englishmen had a duty to be armed, not a right, and conceded that since strict militia and game laws remained in force after the

1689 Declaration, any "assertion of a guaranteed right ... seems empty rhetoric."[28]

***Lawful Purposes***

Heller's right to guns "typically possessed by law-abiding citizens for lawful purposes" is another invention.

Heller misread what Miller described as "ordinary military equipment ... in common use at the time" to mean guns in the home, ignoring its citations to the militia system and statutes requiring specific arms.

Heller's notion that militia and personal weapons "'were one and the same'" quoted Kessler, the billy club case, which miscited a swords encyclopedia that contradicts it.[29]

That fiction was used in Heller to overturn the District of Columbia's handgun ban, and in cases since to decide whether firearms like assault rifles are protected.

***Safeguard Against Tyranny***

Heller's final right of "citizens' militia as a safeguard against tyranny," "if the constitutional order broke down,"[30] ignores bedrock.

Alexander Hamilton explained in Federalist 28 that it is

> an axiom of our political system that ... State governments will ... afford complete security against invasions of the public liberty by the national authority.

Madison echoed this in Federalist 46, writing: "State Governments ... would be able to repel the danger."

The English jurist William Blackstone repudiated as overzealous the notion that "allowed to every individual the right of determining [when order is endangered], and of employing private force to resist" as a "doctrine productive of anarchy."

Meant as justification for a citizens' militia, Heller's error emboldens insurgencies like the Jan. 6 assault on the U.S. Capitol, and armed pseudo-militias that intimidate statehouses, polling places and protests, often turning deadly.

**The Actual Amendment**

The Second Amendment does not, and never has, guaranteed a right to own guns.

The amendment preserved the states' right to keep an armed militia. Its wording, and how exactly it gave states what they demanded, have long mystified courts, with lawyers relying uncritically on academics, and academics recycling assumptions, guesswork and groupthink.

**Misplaced Fight Over Individual Rights**

Both sides in Heller fought over individual rights — to self-defense or to serve in the militia — the pro-gun control side having dropped the state right.

Each assumed "the people" meant individuals, as in other amendments, despite the framers' warnings that meaning depended on context, shown by the Second Amendment's

unique preamble, text and history.

The new right of gun control advocates rested on academic theory, dubbed "the sophisticated collective rights model," that republican thinking conceived of compulsory duties of militia and jury service as carrying reciprocal rights. The academics offered no real support, nor explained how the right could be subject to imprisonment if not exercised unlike any other, or why it was never debated.

Nonetheless, the District of Columbia presented the court with the false choice: whether its handgun laws violate the Second Amendment rights of individuals, not whether it was a state right, or infringed as written.

Its lawyer argued: "What is at issue" is "the individual right protected," asserting a right "invokable in court," citing no support. Simple research would have revealed its repudiation.

As the Supreme Court observed in 1827 in Martin v. Mott, militia service is a military service, and if

> every inferior officer and soldier ... [could] subject [commanders] to responsibility in a civil suit ... [it] would be subversive of all discipline, and expose ... [them to] ruinous litigation.[31]

Research likewise would show it "well established that jury service is not a fundamental right," but as the court has said, a "duty, honor, and privilege."[32]

The half-baked argument of gun control advocates should never have been attempted. The court, presented no support, adopted practically by default the gun-rights' argument for self-defense. The state right never stood a chance.

**A Dangerous Decision**

The historian Heller cited for its right called it a dangerous public freedom, which "for obvious reasons very few governments have ever been prepared to grant."[33] Our Constitution never did, until Heller rewrote it.

Since Heller opened the floodgates, the number of guns surged from 305 million to over 393 million and annual gun deaths rose from 31,500 to 43,500.[34] About 600,000 Americans have died, and counting, approaching the Civil War carnage sparked by the Supreme Court's infamous 1857 decision in Dred Scott v. Sandford.

Given that nearly 30% surge, perhaps 200,000 have died from this legal travesty, with hundreds of thousands more injured.

Beyond casualty counts, Heller is fueling the hardening and arming of schools, churches and businesses; a growing battle between corporate America and the gun industry, with severed ties and boycotts; and a war among conservative jurists.

In a recent New York Times op-ed, retired Judge Michael Luttig and attorney Richard Bernstein warned the court that to decide "where and when a person has a right to carry a handgun in public would be to establish [itself] as ... a National Review Board for Public-Carry Regulations," in a "constitutional commandeering of the democratic process" left for centuries to the states.[35]

That overlooks what has been in effect Heller's Review Board for Home-Carry, or perhaps Judge Luttig considers that a fait accompli. It's not.

Unseen contradictions abound under Heller, proving it hopelessly unworkable outside the home — as it is inside the home in the context of domestic violence, suicide and accidents.

At the Bruen argument, Chief Justice John Roberts questioned needing a license to exercise a Bill of Rights freedom, though in Heller the respondent had no problem with licensing.[36] No one questions licensing for hunting, and removing licensing would moot Justice Brett Kavanaugh's concern— "Why isn't it good enough to say I live in a violent area, and I want to be able to defend myself?" — as anyone could have a concealed gun.

As for that concern, if good faith representations were enough, anyone could, and would, make them. Even if somehow screened, licenses are statewide, and licensees for violent areas could then flood populous areas and venues.

The same goes for Justice Thomas' concern — "It's one thing to talk about Manhattan. It's another to talk about rural upstate," — which overlooks that rural licensees across most of the state could flood Manhattan and other cities, unless he intends they be ringed by magnetometers.

That may be what the NYSRPA's counsel, Paul Clement, advocates, conceding states do have a right to ban guns from sensitive places like university campuses and possibly where alcohol is served or football stadiums, as raised by Justice Roberts, or Times Square on New Year's Eve, as raised by Justice Amy Coney Barrett.

Clement did not explain how campuses, bars, restaurants, stadiums or public squares could otherwise enforce concealed carry restrictions, body searches being illegal without probable cause.

Nor could Clement refute Justice Stephen Breyer's point that concealed carry would allow carrying a loaded concealed weapon around the streets of any town just for fun, spawning gun-related chaos, other than to offer some comfort by pointing to unrestricted Chicago, Houston and Phoenix — cities beset by mass shootings and gun violence.

Such dilemmas bring home Judge Luttig's warning about a court review board for public carry, and more basically how Heller's Review Board for Home-Carry, which Bruen may extend, was unworkable and unconstitutional to begin with.

**Failure of the Adversary System**

Heller isn't solely responsible for the gun epidemic, but it is central to it, having struck down and shackled gun regulation, unleashed deregulation and allowed guns nationwide, inflicting untold damage.

And central to Heller were myopic failures of the adversary system that assumed away the state right, full text, first constitution, federalism, militia system, even "the people" as the state. Other blind spots include the amendment's real antecedents, plain meaning, and who determined its wording and why.

The real tragedy is that Heller didn't have to happen, had academics, lawyers and courts not abandoned the longtime state right and taken greater pains to understand it.

Another tragedy is that Americans still don't see the elephant in the room, or question whether Heller was correctly decided. New York's Solicitor General Barbara Underwood, when asked that question in Bruen by Justice Barrett — the only time it came up — responded that Heller has a "lot of support historically ... so I'm quite content to treat it as rightly decided."

Only two of the 80 briefs suggested reconsideration, each persisting with gun control's self-defeating right.

Last weekend, George Will observed in The Washington Post that the "[c]ourt's nine fine minds are about to ponder the meaning of a verb," or "what it means to 'bear' arms."[37]

That barely came up, New York having conceded a right to carry. What the court's fine minds should be pondering is the meaning of the final verb, and Heller's other glaring errors.

The court, with its institutional authority at stake, should recognize it has not addressed the full Second Amendment, and set a rehearing to decide what the Constitution actually means.

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[1] District of Columbia v. Heller, 554 U.S. 570 (2008).

[2] Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting).

[3] 554 U.S. at 635.

[4] Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996) (citing United States v. Miller, 307 U.S. 174 (1939)).

[5] Prost v. Anderson, 636 F.3d 578, 596 (10th Cir. 2011) (Gorsuch, J.).

[6] 2 Edw. III, ch. 3 (1328).

[7] McLaughlin v. United States, 476 U.S. 16, 17-18 (1986).

[8] U.S. Const. amend. II.

[9] Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007) (since called a "road map"), aff'd sub nom., District of Columbia v. Heller, 554 U.S. 570 (2008); State v. Kessler, 614 P.2d 94 (Ore. 1980).

[10] 554 U.S. at 597.

[11] Art. of Confed., art. VI, cl. 4.

[12] Joseph Story, Story on Rules of Constitutional Interpretation 190 (1833).

[13] J. Madison, Report on the Virginia Resolutions (Jan. 1800).

[14] Printz v. United States, 521 U.S. 898, 920 n.10 (1997).

[15] 554 U.S. at 596, 599-600.

[16] Id. at 596.

[17] 614 P.2d 94 at 96-97 (Ore. 1980) (misciting Weatherup, Standing Armies and Armed Citizens; An Historical Analysis of the Second Amendment, 2 Hastings Const L Q 961, 975-978 (1975) (referring to organized colonial and state militia); id. at 97 & n.11 (misciting Rohner, The Right to Bear Arms: A Phenomenon of Constitutional History, 16 Cath U L Rev 53, 72 (1966) (referring to "role of the citizen-soldier, and of his independent state militia outfit").

[18] 554 U.S. at 581, 598.

[19] 554 U.S. at 599 ("Congress was given no power to abridge the ancient right of individuals to keep and bear arms").

[20] 561 U.S. at 758, 759, 761, 769, 788 (Alito, J.) (e.g., protection "against state infringement sometimes differed from" that "against abridgment by the Federal Government," inverting their meanings).

[21] Art. of Confed., art. IX, cl. 4.

[22] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373-74 (2018); id. at 1380 (Gorsuch, J., dissenting).

[23] Fluor Corp. v. Super. Ct., 354 P.3d 302, 304, 333 (Cal. 2015).

[24] State v. Sandoval, 156 P.3d 60, 64 (Or. 2007).

[25] "The Making of a Justice" 483 (quoting 1991 appearance on PBS MacNeil/Lehrer News Hour).

[26] 554 U.S. at 586.

[27] 554 U.S. at 593, 599.

[28] J. Malcolm, To Keep and Bear Arms 1, 9, 120 (1994).

[29] See id. at 624-25 ("'In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.' State v. Kessler, 289 Ore. 359, 368 [] (1980) (citing G. Neumann, Swords and Blades of the American Revolution 6-15, 252-254 (1973)).").

[30] 554 U.S. at 599-600.

[31] Martin v. Mott, 25 U.S. 19, 30-31 (1827).

[32] Cain v. Woodford, 2003 U.S. Dist. LEXIS 29512, *68-69 (C.D. Cal. 2003) (quoting Powers v. Ohio, 499 U.S. 400, 409 (1991) (characterizing jury service as a "duty, honor, and privilege")).

[33] Malcom, supra at ix-x.

[34] https://americanenlightenmentproject.org/guns-a-problem-becomes-epidemic/.

[35] J, Michael Luttig & Richard D. Bernstein, "If the Supreme Court Claims Power Over Gun Carry Laws, It Will Be Making a Grave Mistake" (N.Y. Times Nov. 3, 2021).

[36] 554 U.S. at 630, 635.

[37] George Will, "Now the court will decide what it means to 'bear' arms" (Wash. Post. Oct. 31, 2021).