IDEAS

The Supreme Court's Worst Decision of My Tenure

District of Columbia v. Heller recognized an individual right to possess a firearm under the Constitution. Here's why the case was wrongly decided.

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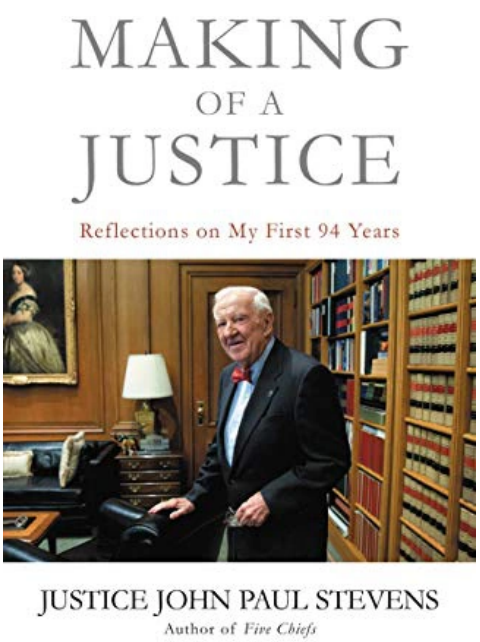
District of Columbia v. Heller, which recognized an individual right to possess a firearm under the Constitution, is unquestionably the most clearly incorrect decision that the Supreme Court announced during my tenure on the bench.

The text of the Second Amendment unambiguously explains its purpose: "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." When it was adopted, the country was concerned that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several states.



This article was adapted from *The Making of a Justice: Reflections on My First 94 Years,* by John Paul Stevens.

Throughout most of American history there was no federal objection to laws regulating the civilian use of firearms. When I joined the Supreme Court in 1975, both state and federal judges accepted the Court's unanimous decision in *United States v. Miller* as having established that the Second Amendment's protection of the right to bear arms was possessed only by members of the militia and applied only to weapons used by the militia. In that case, the Court upheld the indictment of a man who possessed a short-barreled shotgun, writing, "In the absence of any evidence that the possession or use of a 'shotgun having a barrel of less than eighteen inches in length' has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

Colonial history contains many examples of firearm regulations in urban areas that imposed obstacles to their use for protection of the home. Boston, Philadelphia, and New York—the three largest cities in America at that time—all imposed restrictions on the firing of guns in the city limits. Boston enacted a law in 1746 prohibiting the "discharge" of any gun or pistol that was later revived in 1778; Philadelphia prohibited firing a gun or setting off fireworks without a governor's special license; and New York banned the firing of guns for three days surrounding New Year's Day. Those and other cities also regulated the storage of gunpowder. Boston's gunpowder law imposed a 10-pound fine on any person who took any loaded firearm into any dwelling house or barn within the town. Most, if not all, of

those regulations would violate the Second Amendment as it was construed in the 5–4 decision that Justice Antonin Scalia announced in *Heller* on June 26, 2008.

[Read: Why the Supreme Court won't impact gun rights]

Until *Heller*, the invalidity of Second Amendment–based objections to firearms regulations had been uncontroversial. The first two federal laws directly restricting the civilian use and possession of firearms—the 1927 act prohibiting mail delivery of handguns and the 1934 act prohibiting the possession of sawed-off shotguns and machine guns—were enacted over minor Second Amendment objections that were dismissed by the vast majority of legislators participating in the debates. After reviewing many of the same sources that are discussed at greater length by Scalia in his majority opinion in *Heller,* the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have "some relationship to the preservation or efficiency of a well regulated militia." And in 1980, in a footnote to an opinion upholding a conviction for receipt of a firearm, the Court effectively affirmed *Miller*, writing: "[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"

So well settled was the issue that, speaking on the PBS *NewsHour* in 1991, the retired Chief Justice Warren Burger described the National Rifle Association's lobbying in support of an expansive interpretation of the Second Amendment in these terms: "One of the greatest pieces of fraud, I repeat the word *fraud*, on the American public by special-interest groups that I have ever seen in my lifetime."

Even if the lobbyists who oppose gun-control regulation actually do endorse the dubious proposition that the Second Amendment was intended to limit the federal power to regulate the civilian use of handguns—that Burger incorrectly accused them of "fraud"—I find it incredible that policy makers in a democratic society have failed to impose more effective regulations on the ownership and use of firearms than they have.

And even if there were some merit to the legal arguments advanced in the *Heller* case, all could foresee the negative consequences of the decision, which should have provided my colleagues with the justification needed to apply stare decisis to *Miller.* At a minimum, it should have given them greater pause before announcing such a radical change in the law that would greatly tie the hands of state and national lawmakers endeavoring to find solutions to the gun problem in America. Their twin

failure—first, the misreading of the intended meaning of the Second Amendment, and second, the failure to respect settled precedent—represents the worst self-inflicted wound in the Court's history.

It also represents my greatest disappointment as a member of the Court. After the oral argument and despite the narrow vote at our conference about the case, I continued to think it possible to persuade either Justice Anthony Kennedy or Justice Clarence Thomas to change his vote. During the drafting process, I had frequent conversations with Kennedy, as well as occasional discussions with Thomas, about historical issues, because I thought each of them had an open mind about the case. In those discussions—particularly those with Kennedy—I now realize that I failed to emphasize sufficiently the human aspects of the issue as providing unanswerable support for the stare decisis argument for affirmance. After all, Kennedy had been one of the three decisive votes that had saved *Roe v. Wade* from being overruled in *Planned Parenthood v. Casey.*

[Read: What Clarence Thomas gets wrong about the Second Amendment]

Before the argument, I had decided that stare decisis provided a correct and sufficient basis for upholding the challenged gun regulation, but I nonetheless asked my especially competent law clerk, Kate Shaw, to make a thorough study of the merits of the argument that an independent review of the historical materials would lead to the same result. I wanted that specific study to help me decide which argument to feature in my dissent, which I planned to complete and circulate before Scalia completed his opinion for the majority. Shaw convinced me that *Miller* had been correctly decided; accordingly, I decided to feature both arguments in my dissent, which we were able to circulate on April 28, 2008, five weeks before Scalia circulated the majority opinion on June 2, 2008. In the cover memorandum for my probable dissent, I wrote:

> The enclosed memorandum explains the basis for my firm belief that the Second Amendment does not impose any limit whatsoever on the power of the federal government to regulate the non-military use or possession of firearms. I have decided to take the unusual step of circulating the initial draft of a probable dissent before [Scalia] circulates his majority because I fear the members of the majority have not yet adequately considered the unusual importance of their decision.

> While I think a fair reading of history provides overwhelming support for Warren Burger's view of the merits, even if we assume that the present majority is correct, I submit that they have not given adequate consideration to the certain impact of their proposed decision on this Court's role in preserving the rule of law. We have profound differences over our role in areas of the law such as the Eighth Amendment and substantive due process, but I believe we all agree that there are areas of policy-making in which judges have a special obligation to let the democratic process run the show …
>
> What has happened that could possibly justify such a massive change in the law? The text of the amendment has not changed. The history leading up to the adoption of the amendment has not changed … There has been a change in the views of some law professors, but I assume there are also some professors out there who think Congress does not have the authority to authorize a national bank, or to regulate small firms engaged in the production of goods for sale in other states, or to enact a graduated income tax. In my judgment, none of the arguments advanced by respondents or their numerous amici justify judicial entry into a quintessential area of policy-making in which there is no special need or justification for judicial supervision.
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> This is not a case in which either side of the policy debate can be characterized as an "insular minority" in need of special protection from the judiciary. On the contrary, there is a special risk that the action of the judiciary will be perceived as the product of policy arguments advanced by an unusually powerful political force. Because there is still time to avoid a serious and totally unnecessary self-inflicted wound, I urge each of the members of the majority to give careful consideration to the impact of this decision on the future of this institution when weighing the strength of the arguments I have set forth in what I hope will not be a dissent.

In the end, of course, beating Scalia to the punch did not change the result, but I do think it forced him to significantly revise his opinion to respond to the points I raised in my dissent. And although I failed to persuade Kennedy to change his vote, I think our talks may have contributed to his insisting on some important changes before signing on to the Court's opinion.

That's cold comfort. I have written in other contexts that an amendment to the Constitution to overrule *Heller* is desperately needed to prevent tragedies such as the massacre of 20 grammar-school children at Sandy Hook Elementary School on

December 14, 2012, from ever happening again. But such tragedies have indeed happened again. In the course of writing the chapter of my memoir that discusses *Heller*, on October 1, 2017, a gunman fired from the 32nd floor of a hotel in Las Vegas, killing at least 58 people and injuring more than 500 more who were attending an outdoor concert. I had not yet finished the chapter when another mass shooting occurred, this one involving the death of 26 people—including three generations of a single family—at a church on November 5, 2017, in Sutherland Springs, Texas. More shootings have happened since.

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