

# **Gun Regulation and the Second Amendment**

---

## **Moving Forward After *District of Columbia* *v.* *Heller***

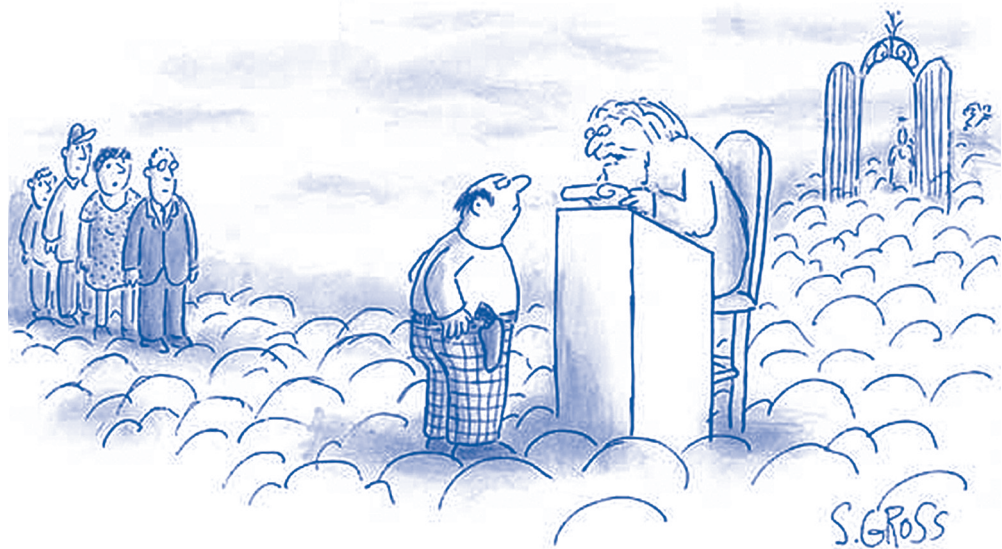


A Publication of

**Legal Community Against Violence**

---

expertise, information & advocacy to end gun violence



*“Trust me. It’s not a God-given right.”*

---

*The views expressed in this publication are those of Legal Community Against Violence.  
This publication is not intended as legal advice to any person or entity, and should  
not be regarded as such.*

© 2008 Legal Community Against Violence. All Rights Reserved. 10/08

268 Bush Street, #555 • San Francisco, CA 94104 • (415) 433-2062 • [www.lcav.org](http://www.lcav.org)

## The *District of Columbia v. Heller* Decision

“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.”  
– Second Amendment to the U.S. Constitution

In 2003, Dick Anthony Heller and other plaintiffs challenged the District of Columbia’s decades-old laws banning possession of handguns and requiring firearms in the home to be stored locked or disassembled. After the D.C. Circuit Court of Appeals ruled the laws unconstitutional under the Second Amendment<sup>1</sup> – the only time a federal appellate court had ever invalidated a gun law on Second Amendment grounds – the U.S. Supreme Court agreed to hear the case. This set the stage for the Court’s first ruling on the Second Amendment in almost 70 years.

**The Court’s Holding:** The Supreme Court issued its historic decision in *District of Columbia v. Heller* on June 26, 2008.<sup>2</sup> In a 5-4 ruling written by Justice Antonin Scalia, the Court held that the Second Amendment confers an individual right to possess firearms unrelated to service in a well-regulated state militia. The Court struck down the District’s ban on handgun possession, finding that “the inherent right of self-defense has been central to the Second Amendment” and that handguns are “overwhelmingly chosen by American society” for self-defense in the home, “where the need for defense of self, family, and property is most acute.”<sup>3</sup> The Court also struck down the District’s requirement that firearms in the home be stored unloaded and disassembled or bound by a trigger lock or similar device, because the law contained no exception for self-defense.

**An Abrupt About-Face From Prior Precedent:** The Court’s ruling in *District of Columbia v. Heller* represents a radical departure from the Court’s previous interpretation of the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939). In the *Miller* case, the Court stated, in a unanimous decision, that the “obvious purpose” of the Second Amendment was to “assure the continuation and render possible the effectiveness of” the state militia, and the Amendment “must be interpreted and applied with that end in view.”<sup>4</sup> In reliance on *Miller*, hundreds of lower federal and state appellate courts have rejected Second Amendment challenges to our nation’s gun laws over the last seven decades.<sup>5</sup>

<sup>1</sup> *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

<sup>2</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

<sup>3</sup> *Id.* at 2817.

<sup>4</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939).

<sup>5</sup> The *Heller* Court dismissed the *Miller* case as not “a thorough examination” of the Second Amendment, and limited *Miller* to the proposition that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.” *Heller*, *supra* note 2, at 2814.

**The Right is Not Unlimited:** Although the *Heller* decision establishes a new individual right to “keep and bear arms,” the opinion makes clear that the right is not unlimited, and should not be understood as “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>6</sup> The Court provides examples of gun laws that it deems “presumptively lawful” under the Second Amendment, including those which:

- Prohibit the possession of firearms by felons and the mentally ill;
- Forbid firearm possession in sensitive places such as schools and government buildings;
- Impose conditions on the commercial sale of firearms.

The Court makes clear that this list is not exhaustive.<sup>7</sup> The Court also concludes that the Second Amendment is consistent with laws banning “dangerous and unusual weapons” not “in common use at the time,” such as M-16 rifles and other firearms that are most useful in military service.<sup>8</sup> Finally, the Court declares that its analysis should not be read to suggest “the invalidity of laws regulating the storage of firearms to prevent accidents.”<sup>9</sup>

**The Standard of Review:** The *Heller* decision fails to articulate a legal standard of review, or test, to be applied in evaluating other laws under the Second Amendment. Thus, the decision provides little guidance to lower courts or legislators, creating new uncertainty in this area and inviting litigation.<sup>10</sup>

**The Second Amendment Applies Only to the Federal Government:** Because *Heller* considered laws of the District of Columbia (a federal enclave), the Court stated that the question of whether the Second Amendment applies to the states is “a question not presented by this case.”<sup>11</sup> While the *Heller* Court did not rule on whether the Second Amendment applies to state or local governments, the Court did note its earlier decisions holding that “the Second Amendment applies only to the Federal Government.”<sup>12</sup> These decisions remain the law of the land.

---

<sup>6</sup> *Id.* at 2816.

<sup>7</sup> *Id.* at 2817 n. 26.

<sup>8</sup> *Id.* at 2817.

<sup>9</sup> *Id.* at 2820.

<sup>10</sup> Immediately after the *Heller* decision was issued, the gun lobby filed suits challenging handgun possession bans in San Francisco, Chicago and other Illinois communities. The San Francisco prohibition applies only to public housing.

<sup>11</sup> *Heller*, *supra* note 2, at 2813 n. 23.

<sup>12</sup> *Id.*, citing *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1876).

## What the Decision Means for Our Nation's Gun Laws

Following the *Heller* decision, we must redouble our efforts at the state and local levels to promote effective, commonsense laws as a means to reduce the growing gun violence epidemic in our country.

While the *Heller* decision leaves many questions unanswered, one thing is clear: Gun regulation is alive and well in the United States. Elected officials and community leaders can feel confident that most common sense gun laws will be upheld. A strong legislative record – including facts regarding the problem sought to be addressed and the reasons why the proposed law is an appropriate response – is critical to maximizing the likelihood that a gun law will be affirmed by the courts.

Given our nation's tragic epidemic of gun violence, elected officials should have no difficulty describing the problem. The undisputed facts show:

- More than 30,000 Americans die from firearm-related injuries each year – an average of 80 deaths each day<sup>13</sup> – and nearly 70,000 others are treated for gunshot wounds.<sup>14</sup>
- Young people up to 24 years of age constitute over 40% of all firearm deaths and non-fatal injuries each year.<sup>15</sup> The number of children and teens in America killed by guns in 2005 would fill 120 public school classrooms of 25 students each.<sup>16</sup>
- On average, 46 gun suicides were committed each day for the years 1999-2005. During that time, over 5,300 people in the United States died from unintentional shootings.<sup>17</sup>

---

<sup>13</sup> U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Injury Mortality Reports, 1999-2005 (2008)*, at [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html).

<sup>14</sup> U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Nonfatal Injury Reports (2008)*, at <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html>.

<sup>15</sup> *Id.*; *WISQARS Injury Mortality Reports, 1999-2005*, *supra* note 13.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

- The U.S. has the highest rate of firearm deaths among 25 high-income nations.<sup>18</sup>
- Guns are used to commit nearly 400,000 crimes every year and nearly 70% of all murders in the U.S. are committed with a firearm.<sup>19</sup>
- Medical costs related to gun violence are estimated at \$2.3 billion annually, half of which are borne by American taxpayers.<sup>20</sup> Factoring in all the direct and indirect medical, legal and societal costs, the annual cost of gun violence in our nation amounts to \$100 billion.<sup>21</sup>

Fortunately, a variety of common sense regulatory options exist to address this national crisis. Many jurisdictions across the country already have adopted laws to require background checks on all gun purchasers; to ensure that guns are not sold to criminals and other prohibited purchasers; to prohibit the sale of military-style weapons (such as assault weapons and 50 caliber rifles); to require gun owners to obtain a license and register their firearms; to regulate guns as a consumer product; and to regulate firearms dealers through licensing and other requirements.

Legal Community Against Violence (LCAV) believes that these types of laws and many others should be upheld as consistent with the Supreme Court's holding in the *Heller* case.



---

<sup>18</sup> Wendy Cukier and Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47s*, 17 (2006).

<sup>19</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Key Facts at a Glance: Crimes Committed with Firearms, 1973-2006*, at <http://www.ojp.usdoj.gov/bjs/gjance/tables/guncrimetab.htm>.

<sup>20</sup> Philip Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447 (Aug. 4, 1999).

<sup>21</sup> Philip J. Cook and Jens Ludwig, *Gun Violence: The Real Costs* 115 (2000).

## How LCAV Can Help

LCAV is a national law center formed in the wake of the July 1, 1993 assault weapon massacre at a law firm in downtown San Francisco. We provide free legal assistance to elected officials, government attorneys and activists working to promote laws and policies to reduce gun violence. LCAV is proud to provide the legal expertise, information and advocacy that make it possible for community leaders to advance effective, legally defensible reforms. Specifically, we:

- Conduct legal and policy research and analysis;
- Assist in the drafting of firearms laws;
- Arrange for *pro bono* litigation assistance, for example, when a governmental entity is sued following the adoption of a violence prevention regulation;
- File *amicus curiae* (“friend of the court”) briefs in support of governmental entities and individuals in firearm-related litigation;
- Develop model laws.

LCAV’s web site, [www.lcav.org](http://www.lcav.org), provides detailed summaries of federal and state gun laws and summaries of local firearms laws in selected states. The site also provides an in-depth discussion of the Second Amendment and more than 30 firearm-related policies. In addition, the site includes model laws, case studies and links to *amicus* briefs we have filed.

LCAV also publishes reports, such as the 2008 Edition of *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws*, to educate community leaders about the issue of gun violence prevention. LCAV’s publications are available on our web site.

## Join LCAV Today

LCAV is only as strong as the people who stand behind us. Four years ago, we launched a national membership program to unite the gun violence prevention community and broaden our base of support, in both financial and human terms. Since then, nearly 1,000 people have joined LCAV. And while most of our members are attorneys, a growing number are professionals from a wide range of fields.

LCAV welcomes all who support our work to prevent gun violence. Members receive a range of benefits including: regular LCAV communications; invitations to educational events on critical issues in the gun violence prevention movement; participation in forming regional LCAV chapters to connect locally with LCAV members; and more. Members who wish to become more involved in LCAV’s work may inquire about opportunities for *pro bono* work or other ways to participate. *Please help make an immediate difference by joining or renewing your membership this year.*

**To learn more about membership, visit [www.lcav.org](http://www.lcav.org) or call (415) 433-2062.**