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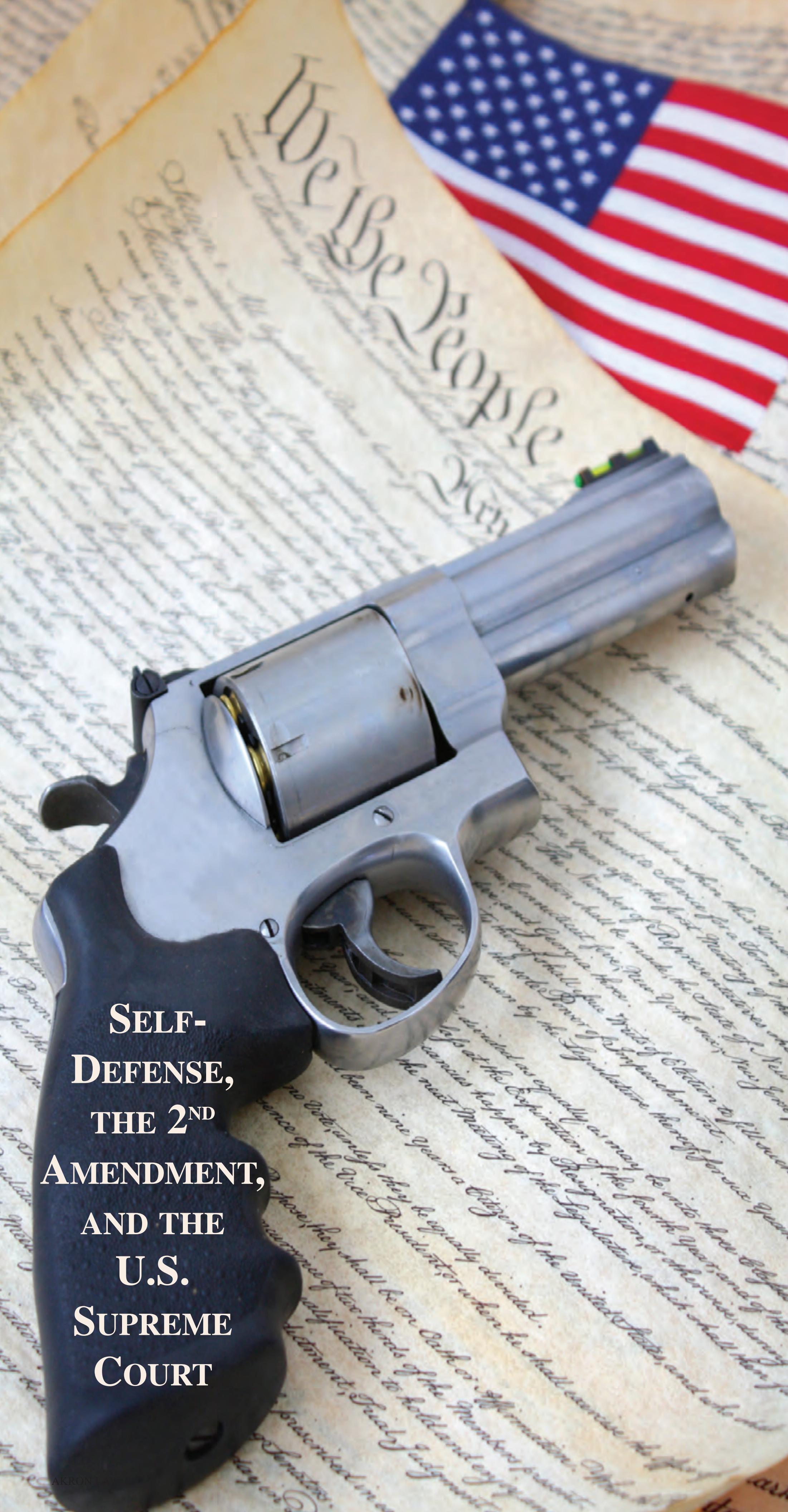

Self-Defense, the 2nd Amendment, and the U.S. Supreme Court

The Supreme Court's decision in *District of Columbia v. Heller*, is both more and less than what either its admirers or detractors claim. Of course, no one can predict where *Heller* will actually lead. But if one looks at *Heller* alone, one can put it into context which indicates that, at least for the present, *Heller* is a rather unremarkable decision.

By:
Richard L. Aynes

In recent times, some legal scholars have borrowed a term from statistics and pursued the idea of "outliers." The application to law is a simple one: the Supreme Court is more likely to find unconstitutional the action of an "outlier" than it is the action of a governmental unit that is in step with the overwhelming majority of other governmental units.

If one looks at gun ownership and regulations in America, there is a remarkable and strong consensus about gun ownership as expressed through the regulations of the 50 states. If the actions of their representatives are even in some rough way representative of the views of the majority of the citizens of those states, then a majority of the people in the 50 states believe at least some rather large group of citizens ought to be able to own guns. These views are probably based upon what individuals deem to be good public policy, whether the ultimate claims are grounded upon the 2nd Amendment, some other provision of the U.S. Constitution, state constitutions, or simply the legislation that is or is not passed by the state legislatures.

At the same time, the very same legislative process suggests a large majority of the people in each of the 50 states believe access to guns and gun use must be regulated in some way. Regulations that are common to all of the states includes a limitation on what type of weapons can be owned, where they can be fired and who can own them. For example, it is commonly accepted that mentally ill people and felons should not be able to possess firearms.

The District of Columbia has a somewhat unique position, not being simply a city and yet not quite being a state. However, the District could be analogized to a state, having a population larger than that of Wyoming and close to the populations of Vermont and North Dakota. Notwithstanding its unique status, if one looks at D.C. as analogous to a state, what the District did was go where no state had gone before and completely outlaw handguns. Further, as interpreted by Justice Scalia and the majority, it outlawed the use in self-defense of weapons that were allowed to be kept in one's home.

As a result, the D.C. legislation made its restrictions on weapons possession and use go far beyond what the national and state governments had done. Indeed, Justice Scalia states that "[f]ew laws in the history of our Nation have come close to the severe restrictions of the District's handgun ban." This made the D.C. legislation an "outlier" and ripe for being suspect under the Constitution.

Of course, the Court does not simply declare a statute unconstitutional because it is an outliner. There must a constitutional basis for taking that action. In this case, that basis began in the 2nd Amendment and found that it guaranteed what has frequently been called an "individual" right to bear arms. While the majority opinion had support in its interpretation of the 2nd Amendment, it does little more than require the renegade District to conform to the views of the 50 states.

At the same time, Justice Scalia's opinion upholds the other portion of the national consensus, by reassuring the nation that the right is "not unlimited" citing English and American authorities. Indeed, Justice Scalia goes out of his way to try to reassure people that not much would change, and as examples that are not exhaustive states:

> ". . . nothing in our opinion should be taken to cast doubt on longstanding prohibitions of the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Indeed, on the last page of the majority opinion he writes: "The Constitution leaves the District of Columbia a variety of tools for combating [handgun violence], including some measures regulating handguns."

Though I understand why they did so, D.C. probably made a strategic mistaken in banning handguns from one's home while allowing disassembled rifles to be present. Justice Scalia writes an "ode" to the handgun as a weapon of self-defense, especially in one's own home. Though it was in the context of the rifle that was required to be disassembled or trigger locked, Justice Scalia found that it could not be used in emergency needs for self-defense in one's home. Yet if handguns were allowed and a lock requirement were imposed, they could be stored in a "biometric safe," which fits in a drawer and only opens upon the reading of one's fingerprint. At least as advertised in Sportys.com, this provides "[i]nstant access with just one finger" and "[r]ecognition takes less than a second for quick access."

No own knows for sure where the line will be drawn, but it is at least reasonable to think that if D.C. had banned handguns outside of the home and had required "biometic safes" inside of the home, both gun regulation and instant access for home self-defense would have been served.

It appears the allowance of rifles (unassembled or with a trigger lock), was a concession to those who may have owned weapons they wanted to use elsewhere. In oral argument the counsel for the District "conceded" that the rifle could be made operative and used in self-defense. However, because of its greater range the rifle would actually be a greater menace to innocent bystanders and because of its length, a less effective weapon for self-defense.

This is not to say that Justice Scalia's opinion is without its flaws – if it was this would not be a 5-4 decision.

First, on the very first read I wondered why the opinion did not stop earlier at a natural stopping point. I assume that perhaps Justice Scalia felt compelled to continue in order to answer some issues posed by some of the briefs, the oral argument, or even discussion at the Court's conference. But it struck me as not only a stylistic mistake to drone on after he had made his key points but also an unwitting admission that he knew there was weakness in his basic opinion.

Second, the text of the 2nd Amendment is at least open to debate, and its meaning turns upon what role one attributes to the militia portion of the clause. The history of the amendment, and its meaning, is fiercely debated by people holding competing views. On one hand we have seen at least a decade in which there have been concerned efforts by pro-gun advocates to publish research that supports the view the Court reached. On the other hand anti-gun advocates have produced numerous articles including one 600-page symposium in which every author concluded the 2nd Amendment has a meaning contrary to that of the majority. Yet, Justice Scalia writes as if this was a very clear case with which no one could reasonbly disagree.

Third, one of the least acceptable aspects of Justice Scalia opinion is his reading of the D.C. statute. When Justice Breyer, in dissent, cites statutes with prohibitions on gun use from our early history, Justice Scalia wrote in one instance that it was "inconceivable" that the law would have been applied in a self-defense situation and in another instance he found it "unlikely."

Yet, even when the counsel for the D.C. government "conceded" that the law on shotguns and rifles allowed one to use those weapons in self-defense, Justice Scalia refused to accept the concession and insisted on reading the D.C. statute – unlike the historical statutes – as prohibiting self-defense.

A fourth problem with the decision was Justice Scalia's linkage of the right to bear arms to self-defense. To be sure, this has political advantages. The national consensus upon the right to act in self-defense is even greater than the national consensus upon the ability to have arms. Thus, linking the two was rhetorically and politically powerful. But the 2nd Amendment makes no mention of self-defense. Moreover, there is no mention of self-defense in the debates *cont. on Page 7*

in Congress or ratification about self-defense.

I am not suggesting the national consensus on self-defense is incorrect. However, it rests more firmly upon the 5th and 14th Amendments due process clauses. One of the few decisions to address this issue is *State v. Hardy*, 60 Ohio App. 2nd 325, 329 (1978):

> " The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his life, liberty or property without due process of law. Obviously, the state may not require and does not intend that an individual succumb to his attacker and possibly forfeit his life rather than act in self-defense."

Thus, if the state required one to die rather than act in self-defense, it would be depriving those who obeyed the statute of their life without due process of law. There are other provisions that would more properly support self-defense such as the 9th Amendment, the privileges and immunities clause of Article IV, and the privileges or immunities clause of the 14th Amendment. Any of these approaches would be more textually related and more doctrinally sound than linking self-defense to the 2nd Amendment.

I am not suggesting there is no link between self-defense and the use of a gun. But I am suggesting the link is not an inevitable one. We know there are many instances in which people act in self-defense when no gun is involved; where some other weapon is used; or, in some instances, where someone unarmed acts in self-defense against someone who is armed.

This is not to say the dissent had the better part of the argument. Yet, at this point the dissent is less important in trying to find out what the case actually changed. When one thinks about the future of the *Heller*, the question of enforcing the 2nd Amendment against the states (commonly called incorporation, though the better term is nationalizing the right), it is unclear whether there is a majority upon the Court that would extend the right to apply against states. Given the philosophical proclivities of the Justices in the majority and reservations expressed in past opinions, one could not predict with certainty that the majority could be mustered to apply *Heller* to the states.

On the other hand, Justice Breyer (with whom Justices Stevens, Souter and Ginsberg joined) is able to dismiss the link between practice in using weapons and militia service only by noting that people in D.C. can still own rifles and shotguns and use them outside of the District. This argument loses its force outside of urban D.C. The briefs of former military officers indicated that "[m]ilitary recruits with previous firearms experience and training are generally better marksmen and accordingly better soldiers." Indeed, many historians believe that the success of the Soviet Union at the battle of Stalingrad was based upon its snipers and the success of its snipers was based upon the civilian hunting experience of its soldiers.

If they are going to be intellectually consistent, then when the incorporation case comes up – as it will—one of these four Justices might well vote to extend the protections of *Heller* to apply against the states. In his book *The Bill of Rights,* Yale's Southmayd Professor Akhil Amar makes a powerful case that whatever the meaning of the Second Amendment, the Fourteenth Amendment was designed to protect the weapons of African Americans and other Unionists to be used in self-defense against the terrorists during Reconstruction.

While discounted by the majority, Justice Stevens' dissent is surely correct when he suggests the number of federal cases on gun regulations will increase dramatically. Given past history where we see, sometimes for better and for worse, an initially limited decision expanded by later decisions, it is impossible to believe that any attorney worth his/her salt will not feel obligated to assert a *Heller* defense in almost every gun regulation case. There has already been an unsuccessful challenge where it was claimed that *Heller* allowed guns to be present in a certain portion of the Atlanta airport. Mr. Heller himself is back in court challenging the revised D.C. statute. Until such time as a majority of the Court reaffirms its position on the limited nature of *Heller*, counsel have no other choice but to raise this defense.

Justice Stevens also referred to not knowing what other "dominoes" will fall after *Heller*. But the simple response is that we never know. No matter what the Court says by way of limiting its current opinion, we never know whether the Court will extend that opinion in later cases or whether it will adhere to its articulated limitations.

Thus, I think for now *Heller* is best viewed as simply reining in an outlier. If the lower courts go too far in interpreting the reach of *Heller*, the Court will have an opportunity to rein them in just as it reined in the D.C. or take the next step by expanding *Heller.* People of differing views may have reasonable hopes and fears about *Heller.* But we really will not know whether those will be realized for many years. □

About the Author

Richard L. Aynes earned Bachelor and Juris Doctor degrees from Miami University and Cleveland-Marshall College of Law before joining The University of Akron School of Law in 1976 as Coordinator of the Appellate Review Office and a Lecturer. He was Associate Dean from 1984 – 1993 and has held the rank of Professor since 1986. He served as UA's interim athletics director in 1993-94 and returned to The University of Akron School of Law where he held the John F. Seiberling Chair of Constitutional Law for the balance of 1994. Professor Aynes was appointed Dean of The University of Akron School of Law in 1995, a position he held through 2007. In summer 2008 he returned to the faculty as holder the John F. Seiberling Chair of Law and Director of the Constitutional Law Center. Professor Aynes' research and teaching interests include constitutional law, the 14th Amendment and legal history. He has written numerous articles in the area of Constitutional Law including articles published in the *Yale Law Journal*, the *Journal of Southern Legal History*, the *Chicago Kent Law Review* and the *Catholic University Law Review*. Professor Aynes has been admitted to the bar for the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth Circuit and U.S. District Court for Northern Ohio. Among his current and past memberships are the American Bar Association, Ohio State Bar Association, Akron Bar Association, Western Reserve Legal Services (Board of Trustees), ABA Special Committee of Evaluation of Judicial Performance (reporter), and consultant to the ABA Victim's Committee, Ohio Supreme Court Racial Fairness Implementation Committee, Ohio Supreme Court Continuing Legal Education Committee and Scanlon Inn of Court.