



Supreme Court of the United States

State of California v. William Wells

By Tyler Hall

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 52-5600

STATE OF CALIFORNIA
Petitioner-Appellant

v.

WILLIAM WELLS
Respondent-Appellee

PRIOR HISTORY: Appeal from the US District Court for the Southern District of California.

DISPOSITION: Affirmed

OPINION BY: BAUER, John
DISSENT BY: ROTH, Joshua
DISSENT BY: LAZARUS, Kirk

BACKGROUND

William Wells is a United States citizen residing in the city of Los Angeles, California. He is accused of possessing a Beretta 93R assault pistol in violation of California's Roberti-Roos

Assault Weapons Act (hereafter "California Assault Weapons Ban"). Both the Petitioner and the Respondent agree that Wells bought the gun legally in Nevada, then transported it to California, where his possession of it was in violation of the California Assault Weapons Ban. Respondent Wells does not dispute the fact that he was in possession of the Beretta 93R in violation of the California Assault Weapons Ban. He instead contends that the statute is an unconstitutional violation of the individual rights accorded to him in the Second Amendment to the United States Constitution.

Wells is a retired high school teacher and Vietnam War Veteran who currently resides with his wife in the Compton neighborhood of Los Angeles. He argues that he lives in an area with high crime rates and gang warfare. Because these criminals and gangs have begun obtaining assault weapons, Wells contends that he is unable to protect himself, his family, and his property without the use of the Beretta 93R assault pistol.

The case was first heard in the California District Court for Los Angeles County. The State Court, ruling on the facts, found Wells guilty of violating the Assault Weapons Ban and required him, as a first-time offender, to pay a \$500 dollar fine. Wells appealed to the United States Court of Appeals for the Ninth Circuit, where his case was heard before a panel of three circuit justices. With a 2-1 decision, the panel ruled in favor of Wells. Arguing that a split ruling on such a contentious issue would create inter- and intra-jurisdictional conflict, the State of California petitioned for a rehearing *en banc*. An *En Banc* rehearing is a hearing before all the judges on a circuit court, rather than just a three judge panel. This record is of the *En Banc* decision.

THE ASSAULT WEAPONS BAN

On January 17, 1989, Patrick Purdy, a drug addict with a history of criminal offenses and mental problems, walked into an elementary school playground in Stockton, California and opened fire with an AK-47 assault rifle, killing five children and wounding thirty others before turning the gun on himself.¹

The shooting, which came to be known as the Stockton massacre, gained national publicity, provoking outrage over the fact that someone like Purdy could legally purchase an assault weapon. This helped prompt the California legislature to pass the Roberti-Roos Assault Weapons Act. This statute was relatively narrow, and simply banned a list of individual assault weapons, such as the AK-47.²

The California Assault Weapons Ban was followed by several broader bans in other states, and, in 1994, a far-reaching Federal Assault Weapons Ban. This federal ban not only banned nineteen individual weapons (such as the AK-47 and the Uzi), but also laid out broad guidelines that would render guns with specific characteristics illegal. For example, any pistols and rifles with a barrel shroud (an alteration that facilitates higher rates of fire) were rendered illegal by the 1994 federal statute. Though the Federal Assault Weapons Ban expired in 2004, the California Ban is still in effect. In fact, in 1999, California strengthened its 1989 Assault Weapons Ban. The new amendment to the ban worked much like the federal ban because it banned general assault weapon characteristics rather than simply individual assault weapons.

William Wells is challenging this new amendment. He contends that the portions of the statute banning characteristics of pistols are unconstitutional. The section in question renders illegal:

"(4) A semiautomatic pistol that has the capacity to accept a detachable magazine and any one of the following:

(A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.

(B) A second handgrip.

(C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning his or her hand, except a slide that encloses the barrel.

(D) The capacity to accept a detachable magazine at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds"³

Wells' Beretta 93R, though not one of the weapons individually named in the law, is clearly in violation of this general provision, as it has a 20 round magazine, a threaded barrel, and a second handgrip.⁴

THE SECOND AMENDMENT

The Second Amendment to the United States Constitution 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." The Second Amendment was established, along with the rest of the bill of rights, shortly after the ratification of the Constitution.

The US Supreme Court first addressed the Second Amendment in the famous 1939 case *United States v. Miller*. *Miller* involved a criminal prosecution under—and a constitutional challenge to—the National Firearms Act of 1934. The National Firearms Act required owners of a set list of weapons to register their guns and pay a \$200 tax on them.⁵ Because \$200 was an enormous sum at the time (most of the guns on the list only cost around \$10), the purpose of the National Firearms Act was generally considered to be to prevent the ownership of firearms rather than to collect revenue from gun owners. *Miller*, the defendant, was arrested for owning an unregistered sawed-off shotgun. He claimed that the National Firearms Act was unconstitutional in part because it restricted the individual ownership of guns, which would be a violation of the Second Amendment. In essence, *Miller* argued that the Second Amendment protected the right of an individual to own guns for his own purposes rather than the right of gun ownership only within the context of a state militia.⁶

The Supreme Court disagreed. In a unanimous decision, the Court held that "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time 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."⁷

The implication in *Miller* is that the Second Amendment protects the right to own guns only so far as those guns are related to the preservation of a militia. The Court justified this reading of the Second Amendment by examining the purpose of the militia during the time the amendment was written. Unlike in modern times, countries in the eighteenth century did not typically keep large standing armies; instead, they relied on citizen-militias for defense of their lands. The importance of the militia is codified in Article I, Section 8, which lists the enumerated powers of the United States Congress. As the *Miller* Court notes, among these powers is the power...

"[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

The Supreme Court in *Miller* views this passage together with the Second Amendment, holding that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." The Court further went on to explain that the men in a militia "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."⁸ This holding established a second requirement that a weapon must meet in order to be protected by the Second Amendment. In addition to having a relationship to use in a militia, a gun must be in common use in the present-day.

The Court's holding in *Miller* went unchallenged for more than seventy years. Though the Supreme Court never specifically addressed the Second Amendment during that time, it did mention and reinforce *Miller* several times, most notably in the cases of *Lewis v. United States* (1980) and *Adams v. Williams* (1972). In

Adams v. Williams, Justice Rehnquist stated that “[c]ritics say that proposals [like the holdings in *Miller*] water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia.”⁹

DISTRICT OF COLUMBIA V. HELLER AND INDIVIDUAL SECOND AMENDMENT RIGHTS

Thirty years ago, the District of Columbia, one of the poorest and most crime-plagued cities in America, enacted the Firearms Control Regulations Act of 1975. This effectively banned the ownership of handguns inside the District.¹⁰ In 2003, six Washington, DC residents filed a lawsuit challenging the constitutionality of the District’s handgun ban. The suit was dismissed in the District Court, but the six residents appealed to the US Court of Appeals for the DC Circuit.

The DC Circuit ruled in favor of the plaintiffs, stating that the Second Amendment was “premised on the private use of arms for activities such as hunting and self-defense.”¹¹ In response, the District of Columbia appealed the case to the United States Supreme Court.

The question before the Supreme Court was related to the scope of the Second Amendment’s protections. Was the right an individual one, allowing a citizen to own a firearm for self-defense or hunting purposes, as the DC Circuit Court had held? Or was it a collective right, allowing a citizen to own a firearm only for the purpose of using that firearm in a state militia?

In a narrow 5-4 decision, the Court upheld the Circuit Court ruling, holding that the Second Amendment protected an individual right to self-defense. Writing for the majority, Justice Scalia held that the first clause of the amendment, which states “[a] well regulated militia, being necessary to the security of a free state...” simply exists in order to announce a purpose of the amendment. It does not, he states, limit the scope of the second clause, which states that, “...the right of the people to keep and bear arms, shall not be infringed.”

Justice Scalia based this holding largely on historical sources, which, in his interpretation, show that the original intent and understanding of the Second Amendment was that it protected an individual right. For example, Scalia cites the Anti-Federalist papers, which show that a primary concern of those opposed to the ratification of the US Constitution was the possibility that the federal government would impose its rule through a standing army. The protection against this despotic rule would logically be a country where every citizen carried a firearm. Thus, as Scalia says, "[i]t is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia."¹²

It is also worthwhile to examine the dissent authored by Justice Stevens. Though not a binding precedent, the dissent's logic is important to consider, particularly in a close 5-4 decision like *Heller*. Justice Stevens argues that the question in *Heller* is not of whether the Second Amendment protects an individual or collective right, but of what firearm uses the Second Amendment protects. He states that "The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes." He then relies upon both the precedent set in *United States v. Miller* and historical sources to show that the Second Amendment protects a right to bear arms only for the purpose of using them in a state militia. For example, Justice Stevens, examining the direct history of the amendment, notes that "a review of the drafting history of the Amendment demonstrates that its Framers *rejected* proposals that would have broadened its coverage."¹³

PRECEDENTS AND THE ASSAULT WEAPONS BAN

The precedent most directly related to the California Assault Weapons Ban is a 1992 case from the US Court of Appeals for the Ninth Circuit. In that case, a group of plaintiffs challenged the constitutionality of the unmodified 1989 Assault Weapons Ban. The Circuit Court dismissed the challenge and upheld the ban. However, the Ninth Circuit did not address whether Second Amendment protections might apply to restrictions on Assault

Weapons. It instead held that the Second Amendment did not apply to the states, citing the 1875 Supreme Court precedent *United States v. Cruikshank*, which held that the First and Second Amendment were only applicable to the federal government.¹⁴ *Cruikshank*, however, predated the Court's adoption of the incorporation doctrine, and its holding on the First Amendment has since been overturned. Consequently, the applicability of the Second Amendment to the States is somewhat murky.

The precedents of *Miller* and *Heller* mention assault weapons only tangentially. Importantly, though, the Court noted in *Heller* that "the right secured by the Second Amendment is not unlimited."¹⁵ However, the majority takes care not to specifically endorse assault weapon bans, mentioning only that:

"nothing in our opinion should be taken to cast doubt on longstanding prohibitions on 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."

Justice Scalia does, however, strongly endorse one part of *United States v. Miller*. He agrees that "the sorts of weapons protected were those 'in common use at the time.'" Again drawing on historical references, he also seems to support restrictions on the "carrying of 'dangerous and unusual weapons.'"¹⁶ The use of the conjunction "and" implies that a weapon must be both dangerous *and* unusual to be unprotected, rather than simply one or the other. Of course, both "dangerous" and "unusual" are flexible, indeterminate terms that are open to the Court's interpretation.

PRACTICAL CONSIDERATIONS

The Supreme Court does not operate in a legal bubble completely independent from the outside world. In reality, the decisions of the Court affect the world beyond Court's marble steps, and the Justices must consider the practical ramifications of their decisions.

Advocates in favor of the Assault Weapons Ban cite the immense danger of assault weapons. The Brady Campaign, a US anti-gun organization, argues that semi-automatic assault weapons, unlike hunting rifles, "are designed to maximize lethal effects through a rapid rate of fire."¹⁷ Most police officers are also in favor of the ban—a logical reaction, since roughly twenty percent of fatal shootings of officers are committed using assault weapons.¹⁸ Warning about the danger of assault weapons, Jim Pasco, the executive director of the Fraternal Order of Police noted that:

"An AK-47 fires a military round. In a conventional home with dry-wall walls, I wouldn't be surprised if it went through six of them...Police are armed with weapons that are effective with criminals in line of sight. They don't want and don't need weapons that would harm innocent bystanders."¹⁹

Criminals armed with assault weapons have significant advantages over handgun-wielding officers. Yet if police forces were to give in to the proliferation of assault weapons and arm officers with high-powered weapons, the amount of collateral damage and civilian deaths might increase.

On the other hand, many pro-gun groups counter that assault weapons are extremely rare. Some studies suggest that less than .2% of violent crimes involve assault weapons, so banning them will have a negligible impact on crime.²⁰ Furthermore, the Bureau of Alcohol, Tobacco, and Firearms estimate that there are 215 million guns in the United States. Such a daunting figure may demonstrate the futility of trying to prevent criminals from obtaining firearms. If that is the case, then the California ban hurts only the law-abiding citizens, who no longer have the means to protect themselves from gang members and drug dealers who may be armed with high-powered assault weapons.

OPINIONS OF THE NINTH CIRCUIT

BAUER, Circuit Judge, joined by MASON, ALMEIDA, PALMER, MYERS, DESSLER, MANNING, BUCHANON, Circuit Judges:

We consider here whether a ban on generally defined "assault pistols" violates the Second Amendment to the Constitution. In question is California Penal Code Section 12280, also known as the Roberti-Roos Assault Weapons Act. Penal Code Section 12280b contains a provision that bans "assault pistols" with generic characteristics, such as a silencer, a second handgrip, and a magazine that can hold more than ten bullets.

Respondent Bill Wells is a Vietnam veteran and retired schoolteacher who lives in the Compton are of Los Angeles. He bought a Beretta 93R pistol in Nevada with the intention of keeping it to defend himself and his family in the crime-ridden neighborhood that he lives in. He was charged with and subsequently convicted of violating the California Assault Weapons Ban. Respondent Wells appealed to this appeals court, and a three judge panel held the assault pistol portions of the Assault Weapons Ban to be unconstitutional and threw out Wells' conviction. California petitioned to be reheard *en banc*, and we accepted the petition.

The question in this case can be broken down into several smaller questions:

1. Does the Second Amendment protect an individual right to bear arms?
2. If so, does that right apply against the states?
3. Finally, is that right broad enough to encompass a right to bear assault handguns?

Only if we answer "yes" to all of these questions can we find in favor of the respondent.

We will first consider the scope of the Second Amendment's protection. The Supreme Court recently addressed this question in *District of Columbia v. Heller*, finding that there exists a right to self-defense and, concurrently, a right to bear arms outside of a militia setting. The holdings of this clear, recent, and binding precedent are sufficient to settle the question of the Second Amendment's scope.²¹

We would, however, like to express our disagreement with the logic used by the Supreme Court in *Heller*. In his majority opinion, Justice Scalia relied almost exclusively on analysis of historical sources to justify the Court's opinion. He cited, among other sources, the amendment's drafting history, which included proposals for explicit guarantees of an individual right to bear arms. He further noted that there existed "analogous arms-bearing rights in state constitutions"²² at the time of the Second Amendment's creation. We do not believe that these sources support the belief that the founders envisioned a right to bear arms outside of a militia setting. On the contrary, the fact that language explicitly protecting an individual right existed—and indeed, was presented during the amendment's writing—but was not adopted in the final draft of the Second Amendment indicates that the founders chose not to protect a right to bear arms outside of a militia setting.

Yet historical analysis is not the only way to interpret the sometimes seemingly vague language of the Constitution. The Constitution is a living document. The great Justice Oliver Wendell Holmes Jr. eloquently stated that the founders, in writing the Constitution, "created an organism...they created a nation." The Constitution, he argues, "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."²³

We no longer live in the times of the founders, and so the Second Amendment cannot be considered solely with their intentions and their society in mind. The militia mentioned in the Second Amendment is a relic of a bygone age—yet the amendment survives in modern society. Forty percent of Americans own guns, and they need them²⁴. The population of the United States has increased from four million people in 1790 to

more than 300 million people today. Furthermore, those people have moved from quiet rural areas to overcrowded, crime-ridden urban ones. We live in a society with more need for—and more acceptance of—the right to self-defense. An individual right to bear arms for self-defense may not have existed in 1790, but the Constitution has evolved with America and with American society, and we believe that such a right exists today.

We next turn to the question of the right's applicability. *Heller*, the defining precedent in any Second Amendment case, was a challenge to a Washington, DC law. The District of Columbia was established in Article I of the Constitution, which states that:

"Congress shall have power...to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States"

Washington, DC is not a sovereign state, but a federal province. Consequently, *Heller* does not necessarily settle the question of whether the Second Amendment is applicable to all the states. *United States v. Cruikshank* (1875) held that the First and Second Amendments only restrict the powers of the federal government.²⁵ The Second Amendment holding was reinforced ten years later in *Presser v. Illinois* (1886).²⁶

We must, though, consider *Cruikshank* and *Presser* within the proper context. Both decisions took place before the advent of the incorporation doctrine. This doctrine provides that many of the first ten amendments were to apply equally to the powers of state governments, as a consequence of the Fourteenth Amendment, which provides that "No State shall deprive any person of life, liberty, or property." Additionally, the Supreme Court later overturned part of *Cruikshank* when, in *DeJonge v. Oregon* (1937), it held that the First Amendment right to freedom of assembly applies to the states²⁷. This seems to imply that *Cruikshank* did not represent a decision against Second Amendment incorporation, but a decision against the incorporation doctrine itself. Since

the Court has unquestionably endorsed the idea of incorporation as a whole, we feel comfortable rejecting the *Cruikshank* holdings. Furthermore, while *Heller* did not consider a state law, the District's handgun ban was passed not by Congress, but by the local DC government²⁸. This local government is, in the spirit of the law and of federalism, more closely analogous to a state government than to Congress.

Finally, *Cruikshank* and *Presser* were decided during the same time as some of the Court's terrible mistakes, such as *Plessy v. Ferguson* (1896), the appalling decision that legalized segregation. Indeed, *Cruikshank* was an attempt by the federal government to prosecute a group of white, southern racists who massacred more than a hundred black civilians.²⁹ It could be said that *Cruikshank* was as much a decision about incorporation and the Second Amendment as it was a decision designed to halt the march towards equal rights and equal justice. These facts, particularly when read in tandem with the history of the incorporation doctrine, leave no doubt in this court's mind that the *Cruikshank* precedent of non-incorporation for the Second Amendment should not be followed.

Given that the Second Amendment protects an individual right to bear arms, and that the individual right applies against the states, the remaining question is whether or not that right encompasses assault pistols. As the Supreme Court noted in *Heller*, "the right secured by the Second Amendment is not unlimited."³⁰ Justice Scalia, in his majority opinion, then went on to explain that...

"nothing in our opinion should be taken to cast doubt on longstanding prohibitions on 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."³¹

Though the opinion qualifies this passage by noting that their "list does not purport to be exhaustive," the absence of the Assault Weapons Ban in this list is glaring. Laws banning

assault weapons are quite high profile, and have been adopted by several state legislatures as well as the United States Congress. Furthermore, the passage cited several gun control laws that are merely restrictions rather than broad bans. Preventing felons from purchasing firearms simply and justifiably restricts the rights of a small class of citizens. Similarly, forbidding the carrying of guns in school zones restricts rights only within a small physical area, and does not seriously infringe upon the basic Second Amendment right to bear arms for the purpose of self-defense. The California Assault Weapons Ban, on the other hand, is a blanket ban on an entire class of weapons—something clearly disapproved of by the Court in *Heller*. The majority specifically states:

"The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose [of self-defense]." ³²

Notably, the Court in that passage points out that handguns, which the law in question in *Heller* banned, are commonly used for self-defense. This harkens back to the precedent of *United States v. Miller*. In *Miller*, the Court held that one prong of the test to determine whether or not a weapon was protected by the Second Amendment was the question of "common use."³³ This is logical, as members of a militia would be using their own personal firearms rather than ones supplied by the government. The Court in *Heller* also supported the "common use" test, stating that the common use "limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" ³⁴

"Common use" is, of course, a subjective term. Handguns are present in fewer than half of the homes in the United States, yet they are certainly "in common use." Assault weapons, meanwhile, comprise roughly 1% of the privately owned guns in the United States. That 1%, however, still amounts to 1.9 million assault weapons, a considerable figure.³⁵

Furthermore, one must inquire into why assault weapons are less commonly used than other firearms. We believe they are relatively uncommon not because of consumer choice but because government action has made them uncommon. Not only have several states and the federal government passed Assault Weapons Bans, but the National Firearms Act has been in place since 1934. The NFA placed high taxes on the transfer of many firearms—including numerous assault pistols and assault rifles—across state lines.³⁶ Consequently, the NFA discouraged possession of these assault weapons and directly caused the comparatively low number of assault weapons that are privately owned today. Even if one chooses to believe that the existence of 1.9 million assault weapons does not constitute “common usage,” the reason for that relative rarity is certainly government regulation, not the unhindered choices of citizens.

To refuse assault weapon owners refuge under the protective shield of the Second Amendment would be to disregard completely the amendment’s purpose. Such a ruling would, in effect, allow the government to render a weapon uncommon through taxes and similar legitimate measures, and then ban it outright once the firearm no longer satisfied the “common use” requirement established in *Miller* and *Heller*.

In sum, we hold that the entirety of the State of California’s Assault Weapons Ban is an unconstitutional violation of the Second Amendment. We hereby vacate the conviction of William Wells.

We affirm the judgment of the panel of the Ninth Circuit Court.

So ordered.

* * *

ROTH, Circuit Judge, Joined by DRESSER, SOUZA, ATTANASIO, COOPER, and MULLANEY, Circuit Judges DISSENTING:

I firmly believe that the majority has erred in handing down an incorrect, overreaching, and dangerous decision. I have no disagreement with the majority’s holdings that the Second

Amendment protects an individual right and is applicable to the states. I disagree, however, with the unprecedented and unjustified broadening of that right to include assault weapons.

The majority first declares that because Justice Scalia neglected to specifically mention the Assault Weapons Ban in his list of permissible gun control laws, the Assault Weapons Ban is likely unconstitutional. Not only, though, did the *Heller* opinion note that the "list does not purport to be exhaustive,"³⁷ but the federal assault weapons ban was, at the time *Heller* was decided, far from high-profile. Indeed, it was not even in existence, since Congress allowed it to expire in 2004. There is no reason that Justice Scalia would have had to specifically mention the assault weapons ban in his opinion.

The majority in this case then proceeds to trample upon the "common use" restriction. 1.9 million assault weapons—one percent of the total guns in America—is a pittance when juxtaposed with the roughly 200 million firearms that are estimated to exist in this country.

Judge Faulk further argues that if not for the National Firearms Act and Assault Weapons Ban, Americans would be running off to their local gun stores to purchase assault weapons. Yet he neglects to mention that 78% of adults support an outright ban on assault weapons—and it is highly unlikely that all of the 22% Americans who don't support a ban want to own an assault pistol or assault rifle themselves.³⁸ Thus, even if the government did not regulate and ban assault weapons, it is highly improbable that they would ever reach the point of "common use."

Finally, the practical consequences of eliminating the California Assault Weapons Ban—particularly on the majority's questionable legal grounds—could be devastating.

In 1989, Patrick Purdy murdered five children and wounded twenty-nine others with a semi-automatic AK-47 assault rifle purchased legally. Purdy shot 106 rounds in less than two minutes.³⁹

In 1993, Gian Luigi Ferri killed eight people and wounded six more at a San Francisco law office. Ferri used two Tec-DC9 assault pistols, each of which had fifty-round magazines. Again, the weapons were purchased legally in Nevada.⁴⁰

In 1993, federal agents traveled to the Branch-Davidian compound in Waco, Texas, attempting to serve federal search warrants. The cult members who resided there opened fire with numerous assault weapons, killing four agents and wounding sixteen others. It was later revealed that the cult had accumulated more than two hundred assault weapons, all of which were purchased legally.⁴¹

If the populations of Great Britain, France, Germany, Japan, Switzerland, Sweden, Denmark and Australia are combined, the population will be roughly the size of the United States. They have fewer than 200 gun deaths each year. We have more than 30,000. Even if the legal arguments for and against the Assault Weapons Ban were balanced, we cannot throw out a law that will help reduce that immense and unconscionable figure.

The majority's decision in this case is not only an affront to the Constitution and our legal system, but a devastating ruling that will increase gun deaths and place Americans in danger.

Therefore, I respectfully **dissent**.

* * *

LAZARUS, Circuit Judge, DISSENTING:

I strongly disagree not just with the decision of this court to legalize assault weapons, but also with its holdings that the Second Amendment protects a right to bear arms outside of a militia setting and that the Second Amendment applies to the states. The interpretation of the majority flies in the face of the spirit and the intended purpose of the Second Amendment.

In 1789, when the Second Amendment was first being constructed; the founding fathers had just finished fighting a war for their liberty. They fought a long war in order to escape from the tyranny of a despotic king who attempted to rule them from an

ocean away. Naturally, their greatest fear was that the federal government would grow too powerful and terrorize the people. To prevent this, the founders created the Bill of Rights. The founders hoped and believed that if the people were always guaranteed a fair trial, freedom of speech, and other constitutional rights, the federal government would never be able to overpower the states and subjugate the people. As Justice Stevens notes in his *Heller* dissent, the Second Amendment:

"was a response to concerns raised during the ratification of the Constitution 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."⁴²

This is why the founders made a point to include the clause in the Second Amendment noting that a well-regulated militia is "necessary to the security of a free state." Certainly, the founders believed, a state could exist with a standing army controlled by a powerful federal government, but such a state would not be free and just. This clause is far more than a useless preamble. As the great Chief Justice John Marshall once stated, "it cannot be presumed that any clause in the constitution is intended to be without effect."⁴³

The purpose of the Second Amendment was not to allow individuals to unconditionally own guns for sport, self-defense, or their own personal pleasure. Instead, the Second Amendment was designed to be a bastion of federalism—a shield to protect the states and the people from the tyranny that an all-powerful federal government could inflict.

Given that the Second Amendment was created for this purpose, the holdings of the majority are clearly groundless. Since the purpose of the amendment was to allow state militias to protect themselves and the states against the tyranny of a nationalized standing army, it clearly does not protect individual uses of firearms.

Furthermore, as the purpose of the Second Amendment was solely to protect the states from the federal government, it would be completely illogical to incorporate the amendment and hold it as binding against California. We must remember above all that the purpose of the Bill of Rights is to protect the people against tyranny. The Supreme Court has incorporated rights such as free speech and protection against double jeopardy because the states can, in violating those rights, become the perpetrators of tyranny against the people. Incorporating the Second Amendment would not protect the states against federal encroachment, would not protect the people against the tyranny of the government, and would not help form a more perfect union. I cannot, in good conscience, agree with the decision passed down by the majority, or even with the Supreme Court in *Heller*.

Therefore, I **dissent**.

ENDNOTES

- ¹ Editors (June 24, 2001) "Slaughter in a Schoolyard." *Time*.
- ² California Office of the Attorney General. "Assault Weapons Identification Guide." *California Department of Justice*. November 2001. <http://ag.ca.gov/firearms/forms/pdf/awguide.pdf>.
- ³ California Penal Code Section 12280.
- ⁴ Kleck, Gary. *Targeting Guns: Firearms and Their Control*. New York: Walter de Gruyter, Inc., 1997.
- ⁵ *United States v. Miller*. 307 U.S. 174 (1939).
- ⁶ *Ibid.*
- ⁷ *Ibid.*
- ⁸ *Ibid.*
- ⁹ *Adams v. Williams*, 407 U.S. 143 (1972).
- ¹⁰ *District of Columbia v. Heller*. 54 U.S. ____ (2008).
- ¹¹ *Ibid.*
- ¹² *Ibid.*
- ¹³ *District of Columbia v. Heller*, 54 U.S. ____ (2008) *Dissent*.
- ¹⁴ *United States v. Cruikshank*. 92 U.S. 542 (1875).
- ¹⁵ *District of Columbia v. Heller*. 54 U.S. ____ (2008).
- ¹⁶ *Ibid.*
- ¹⁷ The Brady Campaign to Prevent Gun Violence. *Brady Campaign - Assault Weapons Ban*. 2008. <http://www.bradycampaign.org/facts/faqs/?page=awb>.
- ¹⁸ Kristoff, ND (2004, August 18). Who Needs Assault Weapons? *The New York Times*
- ¹⁹ "Police fear a future of armored enemies," *USA Today*, March 3, 1997.
- ²⁰ Roth, JA, Koper, CS, "Impacts of the 1994 Assault Weapons Ban: 1994-96," National Institute of Justice Research in Brief, U.S. Department of Justice, March 1999.
- ²¹ *District of Columbia v. Heller*, 554 U.S. ____ (2008).
- ²² *Ibid.*
- ²³ *Missouri v. Holland* 252 U.S. 416 (1920).
- ²⁴ Harris Interactive. "Harris Poll: Gun Ownership." Telephone Survey, 2001.
- ²⁵ *United States v. Cruikshank*, 92 U.S. 542 (1875).
- ²⁶ *Presser v. Illinois*, 116 U.S. 252 (1886).
- ²⁷ *DeJonge v. Oregon*, 299 U.S. 353 (1937).
- ²⁸ *District of Columbia v. Heller*, 554 U.S. ____ (2008).
- ²⁹ *United States v. Cruikshank*, 92 U.S. 542 (1875).
- ³⁰ *District of Columbia v. Heller*, 554 U.S. ____ (2008).
- ³¹ *Ibid.*
- ³² *Ibid.*
- ³³ *United States v. Miller*. 307 U.S. 174 (1939).
- ³⁴ *District of Columbia v. Heller*, 54 U.S. ____ (2008).
- ³⁵ Kristoff, ND (2004, August 18). Who Needs Assault Weapons? *The New York Times*.
- ³⁶ 73rd Congress, Sess. 2, ch. 757, 48 Stat. 1236, enacted 1934-06-26, currently codified as amended as 26 U.S.C. ch.53.
- ³⁷ *District of Columbia v. Heller*, 54 U.S. ____ (2008).
- ³⁸ *Majority Backs Ban on Assault Weapons*, Washington Times, April 26, 2004.
- ³⁹ "School Killer's Last Days" and "The Kinds of Guns School Killer Used," *San Francisco Chronicle*, January 19, 1989.
- ⁴⁰ "Ferri used guns that California ban does not forbid," *San Francisco Examiner*, July 4, 1993.
- ⁴¹ "CIA Killings Prompt Scrutiny on 2 Fronts; Fairfax Loophole Expedited Gun Purchase," *Washington Post*, February 11, 1993.

⁴² *District of Columbia v. Heller*, 54 U.S. ____ (2008) *Dissent*.

⁴³ *Marbury v. Madison*, 1 Cranch 137, 174 (1803).