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## CASE COMMENT

### STARE DECISIS: BROADENING THE SCOPE OF THE JUDICIARY'S POWER

*Stacey Waldorf\**

Respondent's application to register a handgun he wished to keep at home was denied under District of Columbia law.<sup>1</sup> Subsequently, Respondent filed an action in the Federal District Court for the District of Columbia on Second Amendment grounds to enjoin the city from enforcing the bar on handgun registration, the licensing requirement, and the trigger-lock requirement.<sup>2</sup> The District Court dismissed the complaint.<sup>3</sup> The Circuit Court of Appeals for the District of Columbia reversed, holding that the Second Amendment protects an individual's right to possess firearms, and the city's restrictions violated that right.<sup>4</sup> The U.S. Supreme Court granted certiorari and, in affirming the appellate court's decision, HELD that the Second Amendment protects an individual right to possess firearms unconnected to service in the Militia.<sup>5</sup>

The Second Amendment provides that "[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."<sup>6</sup> Throughout history, the

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\* For my parents, Ash and Michelle Waldorf. Their continued love, support, and guidance inspire me to strive for my goals with perseverance and integrity.

1. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008). Under District of Columbia's statutory scheme, handgun registration is prohibited. *Id.* (citing D.C. Code §§ 7-2501.01(12), 7-2501.01(a), 7-2502.02(a)(4) (2001)). The chief of police has authority to issue licenses for one-year periods. *Id.* (citing D.C. Code §§ 22-4504(a), 22-4506 (2001)). Furthermore, those that lawfully own firearms, other than handguns, are required to keep them disassembled or bound by a trigger-lock. *Id.* (citing D.C. Code § 7-2507.02 (2001)). Respondent was a District of Columbia police officer authorized to carry a gun while on duty. *Id.*

2. *Id.*

3. *Id.* (citing *Parker v. District of Columbia*, 311 F. Supp. 2d. 103, 109 (2004)).

4. *Id.* (citing *Parker v. District of Columbia*, 478 F.3d 370, 401 (2007)). The Circuit Court of Appeals for the District of Columbia held that the Second Amendment protects an individual's right to possess firearms. *Id.*

5. *See id.* at 2816 (concluding that nothing in Supreme Court precedent prevents such interpretation as that in the original understanding of the Second Amendment).

6. U.S. CONST. amend. II.

interpretation of the Second Amendment has been disputed.<sup>7</sup> Some claim that the Amendment protects the right to possess firearms only in connection with service in the Militia.<sup>8</sup> Others assert that it protects an individual's right to possess firearms, unconnected with service in the Militia.<sup>9</sup>

In determining what the law is, the Court has explained that the doctrine of *stare decisis* is pertinent to developing the law in a principled and intelligible manner, thus preventing erratic change.<sup>10</sup> Under *stare decisis*, principles are founded in the law rather than based on social or personal influences, thereby contributing to the integrity of the judicial system.<sup>11</sup> Although the law is not rigid, any past departures from *stare decisis* have occurred for articulable reasons.<sup>12</sup> The Court has departed from *stare decisis* only when it has felt obligated to "bring its opinions into agreement with experience and with facts newly ascertained."<sup>13</sup>

In *United States v. Miller*,<sup>14</sup> Respondents were charged under the National Firearms Act with unlawfully transporting an unregistered firearm in interstate commerce. Respondents challenged the indictment, claiming that the Act unconstitutionally violated their Second Amendment rights.<sup>15</sup> In its interpretation of the Second Amendment, the Court looked to the debates in the Constitutional Convention, the history and legislation of the colonies and states, and commentators' writings to ascertain the true meaning of the Militia.<sup>16</sup> Moreover, the Court looked to state provisions, protecting a right to keep and bear arms and found that, even though there

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7. See generally *Heller*, 128 S. Ct. 2783 (discussing the inconsistent historical treatment of the Second Amendment and evincing the general arguments on both sides of the debate in the majority and dissenting opinions).

8. See *id.* at 2789.

9. See *id.*

10. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

11. *Id.* at 265-66.

12. *Id.* at 266.

13. *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). The *Vasquez* Court explained that those advocating a departure have assumed a "heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Id.*

14. 307 U.S. 174, 175 (1939). The firearm at issue in *Miller* was a double-barrel, twelve-gauge Stevens shotgun with a barrel less than eighteen inches in length. *Id.*

15. *Id.* at 176. The District Court held that the Act violated the Second Amendment, thereby quashing Respondents' indictment. *Id.* at 177.

16. See *id.* at 178-82. The Court determined from this evidence that "the Militia comprised all males physically capable of acting in concert for the common defense," and that, "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves." *Id.* at 179.

were pertinent language variations, none of the provisions materially supported an individual right unconnected with service in the Militia.<sup>17</sup>

The Court held that the Second Amendment's interpretation must adhere to its "obvious purpose" of ensuring and rendering possible Militia forces.<sup>18</sup> Thus, the Court held that the Act at issue did not violate the Second Amendment because Respondents' possession of the firearm lacked a reasonable relationship to the preservation of a well-regulated Militia.<sup>19</sup>

Recently, the Court readdressed the issue of Second Amendment rights in *Lewis v. United States*.<sup>20</sup> Petitioner was charged under a convicted felon statute with knowingly receiving and possessing a firearm.<sup>21</sup> The Court addressed whether Petitioner's charge under the statute may be challenged based on the constitutionality of his prior conviction.<sup>22</sup> The Court held that the statute was valid under the rational basis test regardless of whether the prior conviction was subject to constitutionality issues.<sup>23</sup> Relying on its decision in *Miller*, the *Lewis* Court explained that the convicted felon statute restricting the possession of firearms was not based upon constitutionally suspect criteria and did not infringe on any constitutionally protected right.<sup>24</sup> Thus, *Lewis* seemed to uphold and verify the Court's holding in *Miller* which provides that there is no individual right to possess a firearm unconnected with service in the Militia.<sup>25</sup>

In the instant case, the Court rejected *Miller* and *Lewis* as precedent in its interpretation of the Second Amendment, reasoning that neither opinion specifically determined the nature of the Amendment's protected right.<sup>26</sup> Instead, the Court presented evidence to demonstrate that the Second

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17. *See id.* at 182. Furthermore, the Court cited important Second Amendment case law contributing to its analysis and holding. *See id.*

18. *Id.* at 178. The Court explained that this "obvious purpose" was the reason for the creation of the Second Amendment. *Id.*

19. *Id.*

20. *See* 445 U.S. 55, 65 n.8 (1980).

21. *Id.* at 57-58. Petitioner attacked the charge, claiming that his right to counsel had been violated for the previous conviction, and, therefore, a violation under the convicted felon statute could not be predicated on that prior, unconstitutional conviction. *Id.*

22. *Id.* at 58.

23. *Id.* at 65-66.

24. *Id.* at 65 n.8. Specifically, the Court stated that there is no constitutional right to possess a firearm without a reasonable relationship to the preservation of a well-regulated Militia. *Id.* (citing *Miller*, 307 U.S. at 178).

25. *See id.*

26. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815-16 (2008).

Amendment protects an individual right to possess firearms unconnected with service in the Militia.<sup>27</sup>

The instant Court began with a textual analysis in which it scrutinized the wording of the Amendment.<sup>28</sup> First, it found that the operative clause's text connoted an individual right to possess firearms.<sup>29</sup> Next, the Court affirmed that the operative clause was consistent with the purpose set out in the prefatory clause.<sup>30</sup> The Court then confirmed its interpretation that the Second Amendment protects an individual right to possess firearms by analyzing the interpretation of the Second Amendment from its ratification until the end of the nineteenth century.<sup>31</sup> This included looking at state constitutions preceding and immediately following the ratification of the Amendment,<sup>32</sup> the Amendment's interpretation by scholars, courts, and legislators immediately after its ratification through the late nineteenth century,<sup>33</sup> and nineteenth-century Second Amendment case law.<sup>34</sup>

Finally, the instant Court addressed Supreme Court precedent and determined that none of the Second Amendment cases barred its

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27. *See id.* at 2788-2813 (examining the textual construction of the Second Amendment and the historical treatment of the Amendment from post-ratification through the late nineteenth century).

28. *See id.* at 2789-2804.

29. *Id.* at 2799. "The Second Amendment is naturally divided into two parts." *Id.* at 2789. The operative clause states, "the right of the people to keep and bear arms." *See id.* at 2790-91. The instant Court broke this clause into two phrases, first addressing "the right of the people." *See id.* The Court analyzed an unamended Constitution, the Bill of Rights, and founding-era documents and determined that this phrase referred to an individual right unconnected with service in the Militia. *See id.* at 2790-91. Next, the Court addressed "keep and bear arms." *See id.* at 2791-97. The Court addressed "keep arms" first and determined that the few examples of founding-era documents used this phrase in relation to an individual right as well. *See id.* at 2791-93. Next, the Court addressed "bear" and found that nine constitutional state provisions used this word in relation to an individual right. *See id.* at 2793-94. The Court held that the meaning of this entire phrase guaranteed an individual right to possess firearms, and that this meaning was strongly confirmed by the Amendment's historical background. *Id.* at 2797.

30. *Id.* at 2800. The prefatory clause announces a purpose. *Id.* at 2789. It states, "A well regulated Militia, being necessary to the security of a free State . . ." *Id.* at 2799. The Court again broke the prefatory clause into two phrases and analyzed them separately to generate a whole meaning, as with the operative clause. *See id.* at 2799-2804.

31. *See id.* at 2804-12.

32. *See id.* at 2802-04. Such constitutions included Pennsylvania and Vermont, which the Court claimed clearly adopted individual rights unconnected with service in the Militia. *Id.* at 2802.

33. *See id.* at 2805-07, 2809-12. The Court looked to post-ratification commentary, post-Civil War legislation, and post-Civil War commentary. *See id.*

34. *See id.* at 2807-09. The Court determined that these cases "universally support[ed]" an individual right unconnected with service in the Militia. *Id.* at 2807. *See generally* *Houston v. Moore*, 18 U.S. 1 (1820); *Nunn v. State*, 1 Ga. 243 (Ga. 1846); *Aymette v. State*, 21 Tenn. 154 (S.W. 1840).

interpretation that the Second Amendment protects an individual right to possess firearms.<sup>35</sup> Specifically, the Court asserted that *Miller* was not binding precedent for two reasons.<sup>36</sup> First, the Court claimed that the *Miller* decision addressed only the types of weapons protected under the Second Amendment and not the nature of the right itself.<sup>37</sup> Second, the instant Court criticized the *Miller* Court for failing to conduct a thorough examination of Second Amendment evidence.<sup>38</sup>

Likewise, the instant Court abruptly rejected *Lewis* as inadequate precedent.<sup>39</sup> The Court rested its argument on two factors.<sup>40</sup> First, it determined that there was no Second Amendment issue raised in *Lewis*, and second, that the *Lewis* Court chose to comment on the nature of the right protected by the Second Amendment in a single footnote.<sup>41</sup>

In an ardent dissent, Justice Stevens attacked the majority opinion for failing to identify new evidence that would justify a departure from precedent case law.<sup>42</sup> The dissent insisted that the *Miller* Court's true interpretation was that the Second Amendment protects the right to possess firearms in connection with service in the Militia.<sup>43</sup> The dissent advocated that this interpretation was the most natural reading of the text itself and was the most faithful interpretation in relation to the history of the Amendment's ratification.<sup>44</sup> The dissent further explained that since the

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35. *Heller*, 128 S. Ct. at 2812-16. *See generally* *Lewis v. United States*, 445 U.S. 55 (1980); *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875).

36. *See Heller*, 128 S. Ct. at 2814-16.

37. *Id.* The Court claimed that its basis for ruling that the Second Amendment did not apply in *Miller* was that the type of weapon at issue was not afforded Second Amendment protection. *Id.* at 2814.

38. *Id.* at 2814-15. The instant Court claimed that it is "particularly wrongheaded" to view *Miller* as holding that the Second Amendment provides a right to possess firearms in connection with service in the Militia, especially considering that the *Miller* Court did not exhibit extensive research on the history of the Second Amendment. *Id.*

39. *See id.* at 2816 n.25.

40. *See id.*

41. *Id.* The constitutional issues were raised under the Fifth and Sixth Amendments. *See Lewis v. United States*, 445 U.S. 55, 57-58 (1980).

42. *Heller*, 128 S. Ct. at 2823 (Stevens, J., dissenting). Specifically, the dissent maintained that the majority's holding was based on a "strained and unpersuasive reading of the Amendment's text." *Id.*

43. *Id.* The dissent explained that most of the evidence presented by the instant Court was considered in *Miller*. *Id.* at 2837. Furthermore, the evidence upon which the instant Court relied most heavily was available to the *Miller* Court. *Id.* at 2845.

44. *Id.* at 2823. The dissent argued that "[w]hen each word in the text is given full effect, the Amendment is most naturally read to secure . . . a right to use and possess firearms in conjunction with service in a well-regulated Militia." *Id.* at 2831. Furthermore, the dissent reasoned that it is

*Miller* decision, hundreds of judges have relied on that interpretation.<sup>45</sup> The dissent presented an analysis of the Second Amendment similar to that of the majority's to show that evidence weighed in favor of the *Miller* interpretation.<sup>46</sup> Regardless of whether the evidence was equally supportive of both interpretations, the dissent would have adhered to a policy of judicial restraint rather than disrupting the settled understanding of the Second Amendment.<sup>47</sup>

By holding that the Second Amendment secures an individual right to possess firearms unconnected with the Militia,<sup>48</sup> the instant Court has broadened the scope of its power. The Court has done so by disregarding its guiding principle of *stare decisis*, which operates as a judicial limitation, and by failing to provide newly ascertained evidence to justify such a departure.<sup>49</sup>

The instant Court abandoned Second Amendment Supreme Court precedent without adequate justification.<sup>50</sup> The Court's argument is weak because of the two contradicting avenues it took to negate the *Miller* holding.<sup>51</sup> First, the Court misinterpreted *Miller* by narrowly construing the holding as protection afforded only to certain types of weapons.<sup>52</sup> Thus, the Court claimed that *Miller* did not engage in any interpretation of the right

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unlikely that the Framers would have intended to limit the tools available to courts in regulating firearms by protecting an individual right. *Id.* at 2847.

45. *Id.* at 2823. The dissent argued that even if the Second Amendment evidence was evenly balanced in favor of both interpretations, respect for a settled understanding of the law "would prevent most jurists from endorsing such a dramatic upheaval in the law." *Id.* at 2824. Furthermore, Justice Stevens noted that "[e]ven if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure . . . from settled law to come forward with persuasive new arguments or evidence." *Id.* at 2831.

46. *See generally id.* at 2823-46. The dissent reviewed the same Supreme Court Second Amendment case law, similarly broke apart and analyzed the text of the Amendment, and confirmed its interpretation with similar legislative history and commentaries. *See id.*

47. *See id.* at 2846. The dissent asserted that "judicial restraint would have been far wiser than the bold decision announced" by the majority. *Id.* at 2846 n.39. The dissent reasoned that the majority's holding upset a settled understanding, thereby leaving "future cases [with] the formidable task of defining the scope of permissible regulations." *Id.* at 2846.

48. *See id.* at 2814-16 (majority opinion).

49. *See generally id.* at 2787-822. The *Vasquez* Court explained that any departures from *stare decisis* in the past have occurred for articulable reasons and because of newly ascertained evidence. *Vasquez v. Hillery*, 747 U.S. 254, 266 (1986).

50. *See generally Heller*, 128 S. Ct. at 2787-822. The instant Court failed to present articulable reasons and newly ascertained evidence in support of its departure. *Id.*

51. *See generally id.* at 2813-16.

52. *See id.* The instant Court held that it only reads *Miller* to hold that the Second Amendment does not protect weapons that are "not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 2815-16.

itself.<sup>53</sup> Nevertheless, the instant Court proceeded to criticize the *Miller* Court for its failure to perform adequate research and analysis in interpreting the Second Amendment.<sup>54</sup> In doing so, the instant Court thereby negated its prior argument for a narrower holding.<sup>55</sup> Regardless of the weaknesses or flaws found in the *Miller* decision,<sup>56</sup> what is most important to note is that the instant Court failed to sufficiently address the overwhelming number of courts that have relied on *Miller* as interpreting a right to possess firearms only in connection with service in the Militia.<sup>57</sup> In effect, the instant Court has disrupted a settled understanding of the Second Amendment and failed to offer any articulable reason for doing so.<sup>58</sup>

Furthermore, the instant Court rejected *Lewis* for trivial reasoning, claiming that the *Lewis* Court's acknowledgment of Second Amendment protection was inadequate.<sup>59</sup> The *Lewis* Court made a conscious effort to address the nature of the right protected under the Second Amendment.<sup>60</sup> This conscious effort by the Supreme Court cannot reasonably be diminished in weight or value solely because of the way it was presented. The instant Court has misread and misapplied both of these Supreme Court decisions.<sup>61</sup> In doing so, it has unjustifiably departed from *stare decisis*.<sup>62</sup>

As explained in *Vasquez*, a departure from *stare decisis* only has occurred in the past when the Court felt obligated "to bring its opinions into agreement with experience and with facts newly ascertained."<sup>63</sup> The instant Court, however, failed to present any newly ascertained evidence

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53. *Id.* at 2814-16.

54. *See id.* The Court claimed that *Miller* did not review many of the same sources and did not discuss the history of the Second Amendment. *Id.*

55. *See id.* at 2813-16.

56. *See generally supra* text accompanying note 52.

57. *See generally Heller*, 128 S. Ct. at 2823 n.2. The dissent explained that hundreds of judges have relied on *Miller*'s holding that the Second Amendment protects a right to possess firearms only in connection with service in the Militia. *Id.* at 2823 (Stevens, J., dissenting).

58. *See generally id.*

59. *See id.* at 2816 n.25. The instant Court claimed that it was inconceivable that it would rest its Second Amendment interpretation upon "footnoted dictum in a case where the point was not at issue and was not argued." *Id.*

60. *See generally Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (addressing whether a legislative restriction on firearms infringed on a constitutionally protected liberty).

61. *See generally supra* text accompanying note 50-58.

62. *See supra* text accompanying note 61; *see generally infra* text accompanying note 63.

63. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

that would provoke such a “dramatic upheaval” of settled law.<sup>64</sup> Moreover, the instant Court failed to provide any articulable reasons for such a departure.<sup>65</sup> Instead, it interpreted the Second Amendment in a strained and unpersuasive manner in an attempt to conclude that the meaning of the Second Amendment is clear and concise.

For example, the Court manipulated the wording of the two clauses in the Second Amendment to fit its interpretation.<sup>66</sup> The dissent performed this same technique of analysis and verified its interpretation with similar evidence.<sup>67</sup> Thus, the dissent demonstrated that with some parsing, the wording in the Second Amendment can validate both interpretations. The majority failed to acknowledge this and, instead, relied on its findings as substantial evidence that its interpretation was the true original meaning.<sup>68</sup>

The instant Court’s holding – not bound by precedent and without adequate, newly ascertained evidence – has broadened the scope of judicial power. The *Vasquez* Court adamantly asserted that to maintain the “integrity of our constitutional system of government,” the law cannot be founded upon social or personal influences, and such a departure from precedent cannot be justified absent articulable reasons and newly ascertained evidence that would justify the change.<sup>69</sup> Although the true motive of the instant Court is unclear, the Court seemed to have determined its holding prior to its analysis, and then manipulated the evidence to reach the desired outcome.<sup>70</sup>

The results of the instant Court’s interpretation may have initiated a variety of adverse and unintended consequences. First, it has undermined the Supreme Court’s judicial integrity.<sup>71</sup> The instant Court’s unpersuasive arguments, lack of candor, and failure to adhere to the guiding principle of *stare decisis*<sup>72</sup> may result in a loss of confidence in the Court. Moreover, the instant Court’s lack of judicial restraint has now, more than ever, raised the question of what realistically limits the Court’s power.

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64. *Heller*, 128 S. Ct. at 2824 (Stevens, J., dissenting). Much of the evidence presented in the instant case was available to or reviewed by the *Miller* Court. *Id.* at 2837.

65. *See generally id.* at 2787-822 (majority opinion).

66. *See generally supra* text accompanying notes 29-30.

67. *See supra* text accompanying notes 43-45.

68. *See Heller*, 128 S. Ct. at 2816.

69. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

70. *See generally Heller*, 128 S. Ct. at 2788-816.

71. *See generally id.* at 2787-822 (explaining that a court undermines its judicial integrity by departing from *stare decisis* and failing to give articulable reasons or present newly ascertained evidence).

72. *See Heller*, 128 S. Ct. at 2788-2816.

The instant Court's holding has opened the door to a wholly new interpretation of the Second Amendment<sup>73</sup> under which courts will likely have to apply a higher standard of review in defining permissible regulations. Although gun regulation is of utmost necessity and urgency, the instant Court's holding has restricted the tools by which a legislature may properly regulate gun use and possession.<sup>74</sup> Moreover, such additional litigation is unwarranted in an already over-burdened court system, especially without adequately articulable reasoning for departing from precedent.<sup>75</sup>

Ultimately, the instant Court has failed to adhere to *stare decisis* or to present any adequate, newly ascertained evidence in support of its departure. In effect, the instant Court has disrupted a settled understanding of the Second Amendment, undermined the Supreme Court's judicial integrity, and placed added burdens on the court system. Without any adequate, newly ascertained evidence and articulable reasoning, the instant Court should have practiced judicial restraint and followed settled Second Amendment precedent.

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73. *Id.* at 2846 (Stevens, J., dissenting).

74. *See supra* text accompanying note 44.

75. *See generally Heller*, 128 S. Ct. at 2846-47 (Stevens, J., dissenting) (questioning whether the majority's ruling will burden the workload of federal judges).

