

up in ARMS



by JOSH BLACKMAN

Our Gun-Shy Justices

The Supreme Court abandons the Second Amendment.

AFTER TWO HUNDRED years of solitude, the Second Amendment now means what it has always said: Our Constitution guarantees the people a right to keep and bear arms. But since *McDonald v. City of Chicago*, the Supreme Court's landmark decision of 2010, the justices seemingly have taken a vow of silence on the meaning of this fundamental right.

Over the last four years, in case after case, lower courts have accepted interpretations of the Second Amendment that have rendered it weak or nonexistent. Each time, a gun control scheme was found constitutional. Each time, once Second Amendment advocates reached the final request for appeal, the Supreme Court declined to review the ruling.

With each additional attempt, a sense of déjà vu sets in, always with the same emptiness: "The petition for a writ of certiorari is denied." There is no indication whether the lower courts are right or wrong, whether they have strayed from precedent or followed it faithfully. The Supreme Court, content with the status quo, has knowingly and willingly abandoned the Second Amendment to the judges below.

IN THE 2008 CASE *District of Columbia v. Heller*, the Supreme Court invalidated D.C.'s complete ban on the ownership of handguns. For the first time in its existence, the Court recognized a constitutional guarantee to individual ownership of a firearm. But the legal battle was just getting started.

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Because *Heller* nixed only a federal law covering D.C., a second ruling was needed to determine whether the right would extend (or be "incorporated," in legal lingo) to the states. Thus, immediately after *Heller* was decided, a follow-up lawsuit was filed in Chicago, challenging the Windy City's handgun ban. In 2010, the Supreme Court ruled in *McDonald v. City of Chicago* that the right to keep and bear arms protected by *Heller* did indeed apply to the states as well. Chicago's ban on handguns went out the window.

Second Amendment advocates, now two for two before the high court, drew up a comprehensive, multi-stage litigation strategy to challenge various types of gun regulations: licensing regimes that bar or unreasonably burden carrying firearms outside the home; excessively high registration fees; onerous registration requirements; restrictions unduly infringing the sale of firearms; and countless others. It was understood that this litigation would take time, and that different courts of appeals would likely split and fracture on the questions in various ways. But the plan all along was that the Supreme Court would take one case at a time and incrementally clarify the scope of gun rights—starting with the threshold issue of whether the Second Amendment even applies outside the home. Indeed, this is the Court's preferred path in many other contexts: Hand down a broad

ruling, wait for arguments over the minutiae to trickle back up, and then clarify. Patience is the name of the game.

But this patience has been met with total silence. In the four years since *McDonald*, citizens denied the right to bear arms outside the home have challenged gun control laws in California, Illinois, Maryland, Massachusetts, New Jersey, New York, and elsewhere. Lower courts have grappled with the meaning and scope of *Heller*, and implored the high court for further guidance, but to no avail. The Second Amendment is trapped somewhere between legal limbo and constitutional purgatory.

Let's examine eight of the most high-profile cases that the justices turned away.

1. In *Williams v. Maryland* (2010), the Maryland Court of Appeals limited the Second Amendment to the four walls of one's home, finding that the right to bear arms elsewhere was "outside the scope of the Second Amendment." Pleading for clarification from the justices, the court concluded, "If

the Supreme Court... meant its holding [in *Heller* and *McDonald*] to extend beyond home possession, it will need to say so more plainly." The Court did not speak plainly, since it denied review on October 3, 2011.

2. In *United States v. Masciandaro* (2010), the Fourth Circuit Court of Appeals similarly declined to recognize a Second Amendment right to bear arms outside the home: "On the question of *Heller*'s applicability outside the home environment,

we think it prudent to await direction from the Court itself." Imprudently offering no direction, the Supreme Court denied review on November 28, 2011.

3. The Second Circuit Court of Appeals, in *Kachalsky v. Westchester County* (2012), upheld New York's onerous handgun licensing system, which requires an "applicant to demonstrate 'proper cause' to obtain a license to carry a concealed handgun in public." This "proper cause" mandates that a person jump through countless hoops to exercise his constitutional right of self defense. The Sec-

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ond Circuit, like its sister courts, recognized that *Heller* “raises more questions than it answers.” The Supreme Court let them remain unanswered and denied review on April 15, 2013.

4. In *Woollard v. Gallagher* (2012), the Fourth Circuit Court of Appeals upheld Maryland’s handgun licensing rules that limit the right to carry a concealed weapon to those who have proven a “good and substantial reason.” In the absence of clear standards, the judges “merely assume[d] that the *Heller* right exists outside the home.” Letting that assumption stand, or maybe not, the Supreme Court denied review on October 15, 2013.

5. In *Chardin v. Police Commissioner of Boston* (2013), the Massachusetts Supreme Judicial Court upheld the Commonwealth’s firearm licensing statute, which requires an applicant to show a “good reason to fear injury to his person or property.” The ruling found that this high burden “does not infringe on a right protected by the Second Amendment.” Without comment, the Supreme Court denied review on November 4, 2013.

6 & 7. In *National Rifle Association v. McCraw* (2013), the Fifth Circuit Court of Appeals upheld a Texas law denying the right to carry handguns outside the home to those between the ages of eighteen and twenty. The court based its ruling on a previous decision, *NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (2012), finding constitutional a federal law that bans adults between those ages from purchasing handguns. Six judges from the court who dissented on the latter case wanted it to be reheard and found the implications of the majority’s reading of *Heller* “far-reaching” and “simply wrong.” They lost by a margin of one vote. Right or wrong, we cannot know—the Supreme Court simply denied review of both cases on February 24, 2014.

8. *Drake v. Jerejian* (2013) is the most recent appellate decision that upheld a draconian limitation on the right to bear arms. New Jersey is a “may issue” state, meaning that a license to carry a firearm outside the home may only be granted if the applicant proves

a “justifiable need,” as determined by law enforcement. This is a high burden, which requires the applicant to show a specific, immediate threat to his safety, and to demonstrate that the *only* way to avoid that threat

restrictions on the right to keep and bear arms. According to the Brady Center to Prevent Gun Violence, since *Heller* there have been 800 challenges to gun laws, and the lower courts have upheld 96 percent of them. The

Supreme Court, with the exception of *McDonald*, has not deemed a single case worthy of reconsideration.

Several of the cases mentioned earlier involved messy facts—defendants, for example, who had been convicted of gun crimes. This may have given the justices reason enough to pass. The principles may have been worthy of debate, but the cases suffered what are known in business as “vehicle problems.” But many of the recent petitions were well-crafted “test cases.” They were designed by organizations—the National Rifle Association, the Second

Amendment Foundation—that know how to present issues to the justices cleanly. The cases were brought against the most onerous gun regulations, with law-abiding plaintiffs, in jurisdictions where the legal issue had not yet been settled. Yet the Court has continued to demur.

Alan Gura, the attorney who successfully argued *Heller* and *McDonald* before the Supreme Court, places the impact of these unguided lower court opinions in context. “Unless the Supreme Court decides to enforce its pronouncements, the Second Amendment will apply only to the extent that some lower courts are willing to honor Supreme Court precedent.” In other words, the Second Amendment means different things to different people in different states, at the discretion of lower court judges. This is not how any other fundamental constitutional rights work.

But gun control advocates have taken this as encouragement. Jonathan Lowy of the Brady Center has said that the Court’s refusal to take any Second Amendment cases reaffirms its “satisfaction with lower courts upholding all gun laws that have been challenged, so long as they allow responsible citizens to keep a gun in the home.” The Brady Center’s research arm notes that, “These denials make clear that states still retain the discretion to pass strong laws regulating the carrying of firearms in public even after the *Heller* decision.”



Dick Heller after the 2008 ruling in the case that bears his name.

is by carrying a firearm, as opposed to calling 911. Even assuming the police chief grants the permit—which seldom happens—the process is not over. Next, the applicant must appear before a judge to state his case. To make it even tougher, the local prosecutor can oppose the permit. And even if the applicant can navigate this labyrinth, the permit is only valid for two years, and the process must be begun over from scratch. If the right to keep and bear arms means anything outside the home, this gauntlet could not possibly be constitutional. Yet, remarkably, the Third Circuit Court of Appeals upheld this tortuous process. The impossible-to-satisfy burden of seeking the approval of two branches of New Jersey’s government, the court found, “does not burden conduct within the scope of the Second Amendment.” Effectively, carrying a firearm outside the home is beyond the “scope” of the Second Amendment. Over a strong dissent, the majority “decline[d] to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home.” Continuing its practice, on May 5, 2014, the Supreme Court denied review.

There are hundreds of other ongoing challenges to gun laws, and lower courts across the country are continuing to weigh in on the Second Amendment without guidance from the Supreme Court. And, in virtually every single case, the lower courts have upheld re-

GENERALLY, when the Court denies review of a given case, it is a fool's errand to try to figure out why. But when the Court denies, in sequence, many cases that address the same constitutional issue, one that has divided lower courts, a pattern becomes clear. So what do we make of the Supreme Court standing idly by while other judges fire away at the right to keep and bear arms?

It only takes four justices to grant *certiorari* on a case, in contrast with the five votes needed to craft a majority opinion. Perhaps there are four justices who would rule that the Second Amendment protects a right to carry outside the home, but those same justices know that there are also five votes to place a limit on the Second Amendment. Perhaps, then, four or five justices would rather maintain the awkward status quo than see *Heller* rolled back.

All hope is not lost, though. There are several cases still in the Second Amendment pipeline (or barrel, as it were) that will afford the Supreme Court an opportunity to rectify the situation. In *Peruta v. County of San Diego*, a divided panel of the Ninth Circuit Court of Appeals found that the Second Amendment protects the right to a handgun carry license. The court threw out San Diego's system that required applicants to demonstrate "good cause" prior to receiving permits.

In an odd procedural move, California Attorney General Kamala Harris (who was not a party in the proceedings) intervened, and asked the entire Ninth Circuit to rehear the case. If this petition is granted, a nine-judge panel of the Ninth Circuit, known as an *en banc* court, will rehear the case. The decision may well be reversed, and the *en banc* Ninth Circuit may in turn uphold the law. If this comes to pass, as I suspect it will, then at some point in 2015 *Peruta* will land, like so many cases before it, at the steps of 1 First Street NE, Washington, D.C.

But if the Supreme Court denies review in *Peruta*, we may find ourselves running out of options. By ignoring this issue, the Court will have left the Second Amendment to wither on the vine. The right to keep and bear arms will be reduced to a hollow privilege in many states. Regardless of how the Court would resolve the tangled mess of lower precedents, the failure to even confront it, and rule on it, stands as a jurisprudential abdication of the Second Amendment. ❧

POLITICS



by GROVER G. NORQUIST

What GOP 'Establishment'?

Republicans are unified. The Tea Party won.

REPUBLICANS ARE POISED TO capture the Senate this year, and the mainstream press has already telegraphed that it will report this as a terrible defeat for conservatives. According to the false narrative peddled by reporters, we live in the midst of a titanic struggle between the Tea Party movement and establishment Republicans—either a repeat or a continuation of the battle between the Republican wings of Robert Taft and Eisenhower in the 1940s and '50s, or Goldwater and Rockefeller in the 1960s and '70s.

The truth is that there is no such battle. Never has the Republican Party been more unified around a conservative agenda than it is today. The Tea Party movement, which rose up in February of 2009 and exploded that summer, demanding that "spend less" be added to "cut taxes" in the Republican catechism, has been an absolute success.

The Tea Party movement burst onto the political scene just short of three months into the Obama administration in reaction to TARP spending (half by Bush and half by Obama), the \$800 billion stimulus bill, the trillion-dollar hike in Obama's first budget for domestic discretionary spending, and the health care "debate" that ultimately led to Obamacare. America had witnessed tax revolts going back to the original Boston Tea Party and the Whiskey Rebellion, and more recently California's Proposition 13 in 1978 and the Reagan-led Kemp-Roth tax cut. But a political movement targeting government *spending* was new. Before the Tea Party movement, taxpayers slept through enormous outlays and

only awoke in anger when the tax hikes arrived to cover the bill.

The first casualty of this change in the political winds was Senator Arlen Specter of Pennsylvania. Specter was trying to maneuver for re-election in 2010 between the Scylla of a possible conservative challenger in the GOP primary and the Charybdis of the Democrat machine in Philadelphia in the general election. Specter had committed to voting with the GOP against liberal judges, against all tax hikes, and against card check legislation that would have allowed unions to bypass elections in forcing workers to pay dues. This, he felt with some justification, would get him past the GOP primary. The likely challengers took a pass. Then Obama promised to stay out of Philly get-out-the-vote efforts in return for Specter's vote for the stimulus. In normal times, Specter might well have been correct in believing that this deal would secure his re-election. Instead his poll numbers plunged.

Did the Tea Party shift the bulk of the congressional Republicans or did they move at the same time? One notes that the entire Republican caucus in the House voted against the stimulus bill on February 13, 2009, months before any Tea Party rallies. Imagine the temptation facing Republican appropriators who were offered billions in goodies to share with the courthouse boys back home. Yet only three Republican senators succumbed to the pressure: Specter and Maine's Susan Collins and Olympia Snowe. The entire Republican caucus in the House voted "nay." At the time, Republicans looking forward to the 2010 elections believed they would lose several Senate seats and saw no likely pickups. Yet the caucus held strong even staring into what looked like the mouth of an abyss.

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