

BOOKS IN REVIEW

To Heller and Back

By David Hogberg from the May 2009 issue

Gun Control on Trial: Inside the Supreme Court Battle Over the Second Amendment

By Brian Doherty

(National Book Network, 181 Pages, \$16.95)

When the Supreme Court last June handed down its ruling in *District of Columbia v. Heller*, a friend of mine sent out an e-mail exclaiming, "I'm Legal!"

Shortly before moving to our nation's capital, he had purchased a handgun for self-defense. As far as he was concerned, D.C. law said one thing about owning firearms and the Second Amendment said something else. Thus, he was excited when the Supreme Court ruled 5-4 that the Second Amendment protected an individual right to own a firearm, thereby tossing out D.C.'s odious handgun ban.

Alas, his joy was short-lived. A few weeks later, he sent out another e-mail with the word "Crap!" in the subject line. The D.C. City Council had rewritten its gun law, this time banning any handgun that held more than 12 bullets in the magazine. Let's just say that his holds a few more than that.

The outcome of *Heller* is much like the circumstances surrounding it: confusing and complex, with more questions than answers. That point is driven home in Brian Doherty's fine new book, *Gun Control on Trial: Inside the Supreme Court Battle over the Second Amendment*. In addition to examining the history of *Heller*, Doherty, a senior editor for *Reason* magazine, examines the history of gun rights before the Second Amendment, how anti-gun legal scholars twisted the original meaning of the Second Amendment and how more recent scholarship has revived it, the ineffectiveness of gun-control laws, and the cultural divide between Second Amendment supporters and opponents.

It is remarkable how much Doherty packs into 181 pages. The District of Columbia is the epicenter of the anti-Second Amendment culture. The D.C. City Council passed its handgun ban in 1976. City officials tend to treat those who disagree with it with condescension and contempt. When an employee on the Taxicab Commission once suggested that taxicab drivers be able to arm themselves for self-defense, a spokesman for

then mayor Anthony Williams said, "The proposal is nutty, and obviously, it would not be entertained seriously by any thinking person." After D.C. readjusted its laws in the wake of *Heller* so that guns were no longer prohibited but regulated to the point of making ownership exceedingly difficult, Mayor Adrian Fenty justified it thusly: "I don't think [the people of D.C.] intended that anybody who had a vague notion of a threat should have access to a gun." Apparently the mayor doesn't know or doesn't care that once a threat is real, it's probably too late to go through all of the city's regulatory hoops.

It wasn't always this way. As Doherty states, the "U.S. was a country where the idea that its citizens had a right that the government was not permitted to abrogate to possess arms for their personal use should have been unsurprising and obvious. And it was." The right to possess a firearm was (and still is) essential for "defending that most basic of classical liberal rights: that of self-preservation."

Unfortunately, this clear understanding of the Second Amendment was eventually obscured by scholars and activists who misused the amendment's first 13 words: "A well-regulated militia, being necessary for the security of a free state..." Opponents of gun rights have insisted that under the Second Amendment people have the right to own a guns only insofar as they belong to a militia. They explained away the latter part of the amendment, "the right of the people to keep and bear arms, shall not be infringed," by claiming that "the people" referred to a collective, not an individual.

Doherty demonstrates the absurdity of that interpretation by first pointing out that the use of the term "the people" in other amendments in the Bill of Rights, including the First and Fourth, clearly refers to an individual right. Next, he shows that the first part of the Second Amendment was in no way intended to restrict the latter part. In the late 18th century, it was common for the constitutions of state governments "to contain explanatory prefaces that were not meant to restrict the right laid out in the substantive, or operative, clause." At that time, militias were considered to be the bulwark of the people's liberties and were considered preferable to standing armies—something long forgotten in our society. The maintenance of militias was one reason that an individual had a right to bear arms, but far from the only one.

In the last 20 years or so, this more traditional view of the Second Amendment has taken hold among many legal scholars, and was one reason why Robert Levy felt the time was right for a legal challenge to D.C.'s handgun ban. Levy, a constitutional scholar at the libertarian Cato Institute, initially was dismissive of mounting such a challenge. But he was eventually sold on the idea by two other attorneys involved in the case, Clark Neily and Steve Simpson of the libertarian nonprofit legal firm Institute for Justice. Levy also recruited another Cato legal scholar, Gene Healy, and an attorney in private practice, Alan Gura, to the case.

The attorneys were careful to pick plaintiffs who were sympathetic, and not criminals trying to reduce their sentences by having a weapons charge thrown out. Primarily through word of mouth they recruited Shelly Parker, an IT worker; Tom Palmer, a senior editor at Cato; George Lyon and Gillian St. Lawrence, both attorneys; Tracey Hanson, a federal bureaucrat; and Dick Heller, a Special Police Officer for D.C. The lawsuit, when

filed in 2003, was called *Parker v. District of Columbia*.

It became *District of Columbia v. Heller* after the case reached the D.C. appellate court. The appellate court ruled that only Dick Heller had standing in the case because he was the only one who could show actual harm due to D.C.'s handgun ban. Heller only qualified because he had applied for a gun permit in D.C. and had been denied. Luckily, he had a friend who understood the legal concept of standing and knew Heller had wanted to challenge D.C.'s ban for some time. It was this friend who pushed Heller to apply for a permit.

This was not the only instance of the *Heller* case hanging by a thread. Surprisingly, the National Rifle Association at first opposed *Heller* because it felt that the time was wrong for a Second Amendment case. It tried many legal maneuvers to block it.

Leading up to his final discussion of *Heller*, Doherty examines the academic research on gun control laws, research that has yet to find any serious evidence that such laws are effective. Here Doherty isn't as comprehensive as elsewhere in the book.

He neglects to mention John Lott's seminal work, *More Guns, Less Crime*, which changed the thinking on gun rights by popularizing the notion that criminals were less likely to commit crimes in areas where they believed citizens were armed.

While *Heller* established that the Second Amendment protects an individual right, Doherty notes it leaves open the extent to which government can regulate guns. Waiting periods, background checks, whether the Second Amendment applies not just to the federal government but also states and municipalities—these are all matters to be resolved in future cases. So too with many of D.C.'s new restrictions, which include not only a prohibition on any handgun that holds more than 12 bullets, but also a registration process that can drag on for months and must be repeated annually.

My friend will have to wait.

David Hogberg is a reporter living in Washington, D.C.