

JUSTICE JOHN PAUL STEVENS (Ret.)

**BRADY CENTER TO PREVENT GUN VIOLENCE
LEGAL ACTION PROJECT LUNCHEON**

**The Capital Hilton
Washington, D.C.
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Before answering whatever questions may occur to you, I shall make three brief comments - two relating to the Supreme Court's 2008 decision in *District of Columbia v. Heller*, 554 U.S. 570, and the third to the Court's 1997 decision in *Printz v. United States*, 521 U.S. 898 (1997).

As I'm sure you all remember, the central issue in *Heller* concerned the scope of the Second Amendment's protection of the right to keep and bear arms. Over the years guns have been used for military purposes, for hunting, for self defense, for criminal activities, and occasionally to fight duels. In *United States v. Miller*, 307 U.S. 174, decided in 1939, the Court held that Congress could prohibit the possession of a sawed-off

shotgun because that sort of weapon had no reasonable relation to the preservation or efficiency of a well-regulated militia. When I joined the Court in 1975, that holding was generally understood as limiting the scope of the Second Amendment to uses of arms that were related to military activities. Four years ago, however, in *Heller*, the Court concluded that the Amendment also protects the right to keep a handgun in one's home for purposes of self-defense.

While the post-decision commentary by historians and other scholars has reinforced my conviction that the Court's decision to expand the coverage of the Second Amendment was incorrect, two good things about the Court's opinion merit special comment. First, the Court did not overrule *Miller*. Instead, it "read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as

short-barreled shotguns." 554 U.S. at 625. On the preceding page of its opinion, the Court had made it clear that even though machineguns were useful in warfare in 1939, they were not among the types of weapons protected by the Second Amendment because the protected class of weapons was limited to those in common use for lawful purposes like self-defense. Even though a sawed-off shotgun or a machinegun might well be kept at home and be useful for self-defense, neither machine guns nor sawed-off shotguns satisfy the "common use" requirement. Thus, even as generously construed in *Heller*, the Second Amendment provides no obstacle to regulations prohibiting the ownership or use of the sorts of automatic weapons used in the tragic multiple killings in Virginia, Colorado and Arizona in recent years. The failure of Congress to take any action to minimize the risk of similar tragedies in the future cannot be blamed on the Court's decision in *Heller*.

A second virtue of the opinion in *Heller* is that Justice Scalia went out of his way to limit the Court's holding, not only to a subset of weapons that might be used for self-defense, but also to a subset of conduct that is protected. The specific holding of the case only covers the possession of handguns in the home for purposes of self-defense. Part III of the opinion adds emphasis to the narrowness of that holding by describing uses that were not protected by the common law or state practice. Prohibitions on carrying concealed weapons, on the possession of firearms by felons and the mentally ill, and laws forbidding the carrying of firearms in sensitive places such as schools and government buildings or imposing conditions and qualifications on the commercial sale of arms are specifically identified as permissible regulations.

Part III of the opinion is admittedly pure dicta, and it is embarrassingly inconsistent with

the earlier argument in the opinion that the word "people" as used in the Second Amendment has the same meaning as when used in other provisions of the Constitution. On page 581 the opinion confidently asserts that the term "unambiguously refers to all members of the political community, not an unspecified subset." That assertion accurately describes the category of persons protected by the First Amendment because felons and the mentally ill have the same right to worship as they please as do law-abiding citizens, and no citizen need obtain a license to express his views publicly. Nevertheless, I believe Justice Scalia deserves praise for including his advisory opinion in Part III.

My comment on the *Printz* case will be brief. The case was the subject of a talk that I gave to the Chicago Bar Association a few days ago that I should have reserved for this audience because it involved the constitutionality of the provision of

the Brady Act that required local law enforcement officers to make background checks of prospective gun purchasers during the period that the federal government was developing its own enforcement procedures. Relying on a judge-made "anti-commandeering rule" totally unsupported by constitutional text, the five-justice majority held the statute unconstitutional. In my talk I described scholarly criticism of the rule and its potential impact on the federal government's ability to respond to terrorist attacks and natural disasters as well as the efficient administration of federal programs, and recommended a four-word amendment to Article VI of the Constitution to nullify the rule. I shall not repeat what I said in Chicago, but I do want to call your attention to one provision of the Constitution that is significant for reasons that had not previously occurred to me.

All of you I am sure are familiar with the

great compromise made by the Framers who created a bicameral legislature including a Senate in which both large and small States have equal representation. I am not sure, however, that you are also aware of the fact that Article V of the Constitution, which describes the procedures for amending that document, contains a proviso prohibiting any amendment that would deprive any State, without its consent, of its equal suffrage in the Senate. That provision constitutes powerful evidence that the Framers regarded the Senate as the branch of the federal government having the most significant responsibility for protecting the sovereignty of the several states, both small and large. As I said in my Chicago talk: "The notion that they expected federal judges to fashion additional rules for the protection of the sovereignty of the several states is really quite absurd."