New Gun Case Triggers Senate War Over NRA Supreme Court “Project” And Warning The Court Is On “Thin Ice”

Meanwhile in a timely Law360 article, “Time To Heed Justice Stevens’ Criticism of Gun Decision,” Robert Ludwig of the American Enlightenment Project discusses the Heller decision that started that project, which Justice Stevens called the Court’s “worst self-inflicted wound,” urging a way “to overrule Heller is desperately needed.” As the article explains, what actually is on thin ice is Heller.

WASHINGTON (PRWEB) September 11, 2019 -- An op-ed in Sunday's Washington Post, “The newest political arm of the GOP” by Sen. Sheldon Whitehouse (D-R.I.), referring to the Supreme Court, is the latest salvo in a Senate war of words over the Court’s first Second Amendment case in a decade, New York State Rifle & Pistol Ass’n v. City of New York. If the Court does not drop the case as moot, as New York City urged last month, it could extend the constitutional right to guns in the home to public carry.

The op-ed was in reply to an August 29 letter by all 53 Senate Republicans calling on the Court not to be “cowed” by an amicus (friend-of-the-court) brief, filed August 12 by five Senate Democrats, from exercising judicial independence to “guard the Constitution and the rights of individuals,” quoting Alexander Hamilton in Federalist No. 78. Dubbed an “Enemy-of-the-Court” brief in a Wall Street Journal editorial, it cited the National Rifle Association’s brief exhorting the Court to continue “The project this Court began in District of Columbia v. Heller” to undo gun regulations, and suggested that “on the urgent issue of gun control, a nation desperately needs [the Court] to heal,” or as Sen. Whitehouse said in an interview, face “thin ice” ahead.

Just as extraordinary, two other amicus briefs suggest the Court reconsider its 2008 decision in Heller that declared the blockbuster new right to possess guns in the home, initiating legal movement that is years overdue, says AEP's counsel, Mr. Ludwig. In fact, to heal the nation and end the sudden epidemic of gun violence that erupted after Heller, it is time to recognize that Heller rests on remarkably thin ice.

For example, as the Senate GOP letter overlooks, Hamilton also wrote in Federalist No. 78 that the Court lacks power “to annoy or injure” the “political rights of the Constitution,” that is “the judiciary has no influence over the sword”—what the Court after 200 years purported to give individuals in Heller. Rather Hamilton said, “The executive...holds the sword of the community,” together with Congress and a subordinate people’s right of the states to maintain and arm their militia, as he and James Madison indicated elsewhere in the 85 Federalist essays, all addressed “To the People of the State of New York.”

Heller turned America’s “Gun Problem” into a “Gun Epidemic”

In a recent tribute to Justice Stevens, Time to Heed Justice Stevens’ Criticism of Gun Decision (Law360 July 19, 2019), Mr. Ludwig notes nothing “would have gratified him more than for the country to finally look to Heller to understand how it worsens gun violence, as he warned to the end. Better yet, find a way to overturn it.” Justice Stevens called Heller the “worst self-inflicted wound in the Court’s history,” as an ill-advised “radical change in the law that greatly ties the hands” of lawmakers seeking “solutions to the gun problem.”

As Justice Stevens anticipated, America’s “gun problem” soon became a “Gun Epidemic,” declared in a page-one New York Times editorial in 2015, that grows worse every year.
“The numbers tell the story,” Mr. Ludwig writes. “After Heller declared a right to guns in 2008, extended to the states by McDonald v. Chicago in 2010, guns and annual gun deaths surged in tandem, from 310 to 400 million and 31,500 to 40,000,” as a graph in the article shows. Thanks to Heller, the nation now is an abattoir of gun violence, daily mass shootings, and weekly school shootings, triggering last year’s March for Our Lives.

A Way to Overturn Heller Is “Desperately Needed”

In a memoir just before he died in July, Justice Stevens was emphatic: An amendment “to overrule Heller is desperately needed to prevent [more] tragedies.” Treating Heller and the amendment as the rock and a hard place, he “viewed revision as the easier course,” Mr. Ludwig notes. Yet the amendment "doesn’t need changing, and means something other than what [the justices] believed.”

“There is a way to overrule Heller, hiding in plain sight,” he says. “Heller never decided the full Second Amendment. And having overlooked pivotal text, it cannot legally stand.”

A Historic Legal Blunder

As Mr. Ludwig previously explained in The Historic Legal Blunder that Enabled Our Gun Epidemic (Law360 Apr. 25, 2018), Heller surprisingly did not address the full text before the Court. “Overlooking the verb on which the amendment rests,” the majority “transposed ‘shall not be infringed’ to ‘abridged,’” though not synonyms as is obvious from any thesaurus, but constitutional terms of art,” as should be. “Infringe,” he notes, was invoked in the Second Amendment and throughout the Founding “to protect public rights, of states over their militia.” “‘Abridge’ has been used the last 230 years — for the ‘great rights’ in the First Amendment, where the First Congress rejected the substitution of ‘infringe,’ and in all such amendments since — to protect private rights.”

Overlooking text is “the strongest reason for not following a decision,”” the California Supreme Court said in correcting a 140-year “failure of the adversary system,” holding its prior case “cannot stand.” Having not addressed the full text, nor can Heller.

A Better, Validated Approach

As Mr. Ludwig further observes, “Heller’s oversights of legal distinctions — infringe and abridge, public and private rights — are part of a larger failure to understand founding and Enlightenment principles that underlie American constitutionalism.”

He cites as validation a near-unanimous decision last year in the related area of “patent infringement.” Justice Thomas wrote: "This Court has long recognized the grant of a patent is a ‘matter involving public rights,’” not “private rights,” correcting the fallacy that “most everyone considered a patent a personal right,” as Justice Gorsuch wrote in dissent.

Like Heller, the Court did not consider the obvious question: why “infringement” has been used in relation to patents since the Founding, or why the doctrine is not referred to as “patent abridgement.” Yet, he notes, that 7-2 decision “shows how quickly misconceptions can be corrected, even by justices in the Heller majority like Thomas.” And “correcting Heller will be even more decisive, finally putting to rest any notion of a private right.”
Mr. Ludwig adds, “these are but some of the many blind-spots and systemic oversights of conventional wisdom today. Others include the real meaning and sources of the Second Amendment: who determined its ‘baffling’ (actually clear) wording, when and why.”

Stakes Set to Increase Dramatically, and with Them the Epidemic

Heller is poised for extension to public carry, with government litigants still not challenging its oversights and legal fictions in the lower courts, or even in the new pending New York State Rifle case. In response, New York City announced it has changed its regulation over transporting guns, fearing another major loss like D.C. suffered in Heller and Chicago in McDonald, and urged that the case be deemed moot.

Without a better approach,” Mr. Ludwig cautions, that is textually and historically accurate, and “raises and allows the Court to correct historic error, such cases greatly increase the odds it will “soon expand Heller from the home to the streets, creating a new blockbuster right and level of gun violence.”

Concluding, he writes: “Chief Justice Roberts has from time to time called out ‘when this Court needs to say enough is enough.’”

It’s “past time for the courts, bar and academy to address the full Second Amendment. To stop assuming away text and longtime meaning. To stop turning a ‘gun problem’ into a ‘gun epidemic,’ and one blockbuster right into another, sensibly called a ‘fraud’” only the decade before by Chief Justice Burger.

"And pay Justice Stevens an ultimate tribute: Overrule Heller."

For the article, visit http://www.ludwigrobinson.com/pdf/Law360HeedJustice2.pdf

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The American Enlightenment Project (www.americanenlightenmentproject.org), is a 501(c)(3) nonprofit dedicated to ending the gun epidemic, by challenging conventional wisdom and the Supreme Court’s decision in Heller that triggered it.

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