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We're Asking the Supreme Court to Reverse a Death Sentence that Was Wrongly Decided

A Message from the President of Americans Against Gun Violence

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In a study published in 2014 in the *Proceedings of the National Academy of Science*, researchers from Stanford University estimated that at least 4% of prison inmates convicted of capital offenses were wrongly convicted.[1] In a number of cases, prosecutors knowingly withheld information that that would have proved that an inmate on death row was factually innocent. This is one of the reasons why the death penalty should be abolished in the United States. But this is not the main reason for my sending this message, and the wrongful conviction of a single innocent person for a capital offense, as terrible as that may be, is not the kind of death sentence to which I'm referring in the title of this message. I'm writing about a single Supreme Court decision that is effectively a death sentence for tens of thousands of innocent Americans every year.

In 2008, in a narrow 5-4 decision, the U.S. Supreme Court reversed over 200 years of legal precedent, including four prior Supreme Court decisions[2] and scores of lower court decisions, in ruling in the case of *District of Columbia v. Heller* that Washington DC's partial handgun ban violated the Second Amendment.[3] This was the first time in U.S. history that the Court had ever ruled that the Second Amendment conferred any kind of individual right to gun ownership that was not directly related to service in a "well regulated militia."

The majority opinion in *Heller*, written by the late Justice Antonin Scalia, has been publicly condemned by respected constitutional authorities as a "radical departure" from prior legal precedent,[4] an example of "snow jobs" produced by well-staffed justices,[5] and "gun rights propaganda passing as scholarship."[6] In his book, *The Making of a Justice,* the late Supreme Court Justice John Paul Stevens wrote, "*Heller* is unquestionably the most clearly incorrect decision that the Court announced during my tenure on the bench." Stevens added that *Heller* decision was consistent with an interpretation of the Second Amendment that the late Supreme Court Chief Justice Warren Burger had called, "One of the greatest pieces of fraud, I repeat the word, 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime."[7] More than one constitutional expert has privately described the *Heller* decision to me as an "abomination."

But the *Heller* decision is worse than all this. By creating a constitutional obstacle, where none previously existed, to the enactment of stringent gun control laws in the United States comparable to the laws that have long been in effect in every other high income democratic country of the world – countries in which mass shootings are rare or non-existent[8] and in which the rate of gun deaths is, on average, one tenth the rate in the United States[9] - *Heller* is effectively a death sentence for tens of thousands of Americans annually.

In the upcoming case of the *New York State Rifle and Pistol Association v. New York City (NYRPA v. NYC),* the Supreme Court will be re-examining the Second Amendment and the *Heller* decision. Americans Against Gun Violence has filed an *amicus curiae* (friend of the court) brief in this case calling on the Supreme Court to overturn the *Heller* decision and return the Second Amendment to its original meaning by stating, as the Court ruled in *United States v. Miller* in 1939[10] and reiterated in *Lewis v. United States* in 1980, that:

> The Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia."[11]

In the *NYRPA v. NYC* case, the gun lobby is claiming that New York City's prior handgun law, which prevented gun owners from carrying handguns anywhere in the city other than to and from certain City-approved firing ranges, violated the Second Amendment, as the Amendment was interpreted by the Supreme Court in the *Heller* decision. In our *amicus* brief in support of New York City, we present evidence that *Heller* was not only wrongly decided, but that it created a constitutional obstacle to the adoption of gun control laws that could save over 35,000 American lives every year. We urge the Court to not only rule in favor of New York City, but to take the opportunity of the *NYRPA v. NYC* case to overturn the *Heller* decision. (You can read our *amicus* brief in full on the Supreme Court website. It's the third document from the bottom, dated August 12, 2019, in the *Proceedings and Orders* section of the docket for the *NYRPA v. NYC* case.)

The *NYRPA v. NYC* case is highly significant in that it is the first time since the 2010 case of *McDonald v. Chicago,*[12] in which the same 5-4 majority of the Court ruled that the *Heller* decision applied not only to the District of Columbia but to the rest of the United States as well, that the Supreme Court has agreed to review a case involving the Second Amendment. Three members of the *Heller* and *McDonald* majority, Justices Alito, Roberts, and Thomas, are still on the Court, and the two newest justices, Gorsuch and Kavanaugh, were nominated by a president who promised to "never, ever" let the NRA down.[13] Court watchers believe that the Supreme Court agreed to review the *NYRPA v. NYC* case in order to expand the right to keep a handgun in the home created by *Heller* to a much broader right to own and carry firearms. Attorneys for the City of New York fear that the Court watchers are right, and in response to their recommendation, the City and State of New York agreed to change its handgun law in an effort to make the case moot, but the *NYRPA* has refused to drop the case.

If the Supreme Court expands the right to keep a handgun in the home in the *NYRPA v. NYC* case a little beyond the right that it created in *Heller,* it will expand this right further and further in future cases. In our opinion, the fraud to which Chief Justice Burger referred should stop here. We filed our *amicus* brief in the hope that it will help persuade at least five of the nine justices currently on the Supreme Court to demonstrate the necessary common sense and integrity to take the opportunity of the *NYRPA v. NYC* case to overturn *Heller* and to return the Second Amendment to its original meaning.

The Supreme Court will hear oral arguments in *NYRPA v. NYC* case soon. Forty-two *amicus* briefs were filed by the August 12 deadline, with 23 of these in support of the NYRPA and 14 in support of New York City. Five *amicus* briefs, discussing technical aspects of the case, were filed in support of neither party. Only two gun violence prevention organizations other than Americans Against Gun Violence filed an *amicus* brief in support of New York City – Everytown for Gun Safety and the March for Our Lives Action Fund. The Giffords and Brady organizations filed briefs in support of neither party. **Americans Against Gun Violence is the only organization to file a brief making the point that *Heller* was wrongly decided and should be overturned.**

I went through the *Heller* decision line by line in helping our attorney write our *amicus* brief. Justice Scalia's lengthy majority opinion is truly an abomination. It is replete with egregious errors, omissions, and distortions of historical facts. Like others who have obtained death sentences on false grounds, Scalia omits the extensive evidence that refutes the validity of the Court's final judgement in *Heller*. It's particularly ironic that Scalia, who claimed to be an "originalist,"[14] ignores almost all of the records of debates during the Constitutional Convention in Philadelphia in 1787,[15] debates in key state ratification conventions following the writing of the Constitution,[16] debates concerning the Second Amendment in the first session of Congress,[17] and the letters and notes of James Madison who wrote the initial draft of what would become the Second Amendment.[18] All of these records clearly demonstrate that the Founders who wrote, debated, and eventually voted to ratify the Second Amendment never intended for it to confer an individual right to possess firearms outside of service in a well regulated militia.

At best, the Second Amendment was intended by the Founders to establish a mechanism for the state and federal governments to avoid maintaining a standing army, relying instead on citizens militias that could be called forth when needed to put down internal insurrections or defend against foreign armies. But the Founders knew, or should have known, that citizens militias had been almost entirely ineffective during the Revolutionary War. George Washington, who commanded the professional Continental Army, repeatedly disparaged the militia. For example, in an open letter that he sent to fellow Founders in October of 1780, midway through the Revolutionary War, Washington wrote that the idea of substituting a volunteer militia for a professional army was "chimerical," explaining:

> Tis time we should get rid of an error which the experience of all mankind

> has exploded, and which our own experience had dearly taught us to reject….We have frequently heard the behavior of the Militia extolled…by visionary Men whose credulity easily swallowed every vague story in support of a favorite Hypothesis….I solemnly declare I never was witness to a single instance that can countenance an opinion of Militia or raw troops being fit for the real business of fighting.[19]

At worst - and more likely - the main reasons for including the Second Amendment in the Bill of Rights were much darker ones. Although militias were ineffective in fighting British troops, they were effective in killing Native Americans and driving them from their lands, often in the name of "self defense." One particularly egregious example of a quasi-military militia killing peaceful Native Americans in the name of self defense was the massacre of members of the Conestoga tribe by the "Paxton Boys" in western Pennsylvania in 1764. Benjamin Franklin described the massacre and the public support it engendered in a letter to a British Member of Parliament, Richard Jackson, in February of 1764. Franklin wrote:

> In my last [letter] I mention'd to you the Rioting on our Frontiers, in which 20 peaceable Indians were kill'd, who had long liv'd quietly among us. The Spirit of killing all Indians, Friends and Foes, spread amazingly thro' the whole Country: The Action was almost universally approved of by the common People; and the Rioters thence receiv'd such Encouragement, that they projected coming down to this City [of Boston], 1000 in Number, arm'd, to destroy 140 Moravian and Quaker Indians, under Protection of the Government.[20]

George Washington, while being highly critical of the militia's ability to fight the British, acknowledged its effectiveness in committing armed aggression against Native Americans. Washington wrote in a letter to Patrick Henry in 1776, while Henry was Governor of Virginia:

> I own my fears [that victory against the British is not possible] when our dependence is placed on men, enlisted for a few months, commanded by such officers as party or accident may have furnished; and on militia, who as soon as they are fairly fixed in the camp, are impatient to return to their own homes; and who, from an utter disregard of all discipline and restraint among themselves, are but too apt to infuse the like spirit into others.[21]

Washington added, however:

> I would not wish to influence your judgement with respect to militia, in the management in Indian affairs, as I am fully persuaded that the inhabitants of the frontier counties in your colony are, from inclination as well as ability, peculiarly adapted to that kind of warfare.[22]

The other purpose for which the militia was effective was keeping slaves in subjugation. In the southern colonies with large slave populations, the militia and

slave patrols were one and the same.[23] There was extensive debate during the Constitutional Convention in Philadelphia in 1787 concerning whether southern states would be allowed to continue the practice of slavery if they were admitted to the Union. As James Madison stated, while he was a delegate to the convention:

> It seemed now to be pretty well understood that the real difference of interests lay, not between the large & small but between the N. & Southn. States. The institution of slavery & its consequences formed the line of discrimination.[24]

Ultimately, it was agreed that four separate clauses would be included in the Constitution to assure the southern states that the practice of slavery could continue unimpeded until at least 1808. In each of these four clauses, a euphemism was deliberately employed in place of the words, "slave" or "slavery." The four clauses (with euphemisms for the words "slave" or "slavery" highlighted in bold print and italics) were:

> Article I, Section 2: …Representatives and direct Taxes shall be apportioned among the several States which may be included within the Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, ***three fifths of all other Persons***….
>
> Article I, Section 9 (first clause): The Migration or Importation of ***Such Persons as any of the States now existing shall think proper to admit***, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for ***each Person***….
>
> Article lV, Section 2: …***No Person held to Service or Labour in one State, under the Laws thereof***, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such ***Service or Labour***, but shall be delivered up on Claim of the Party to whom ***such Service or Labour may be due***.
>
> Article V: [The Constitution can be amended by a process outlined in this article] Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the *first* and fourth Clauses in the ***Ninth Section of the first Article***….

Despite the assurances in the Constitution that the practice of slavery would be

allowed to continue, the southern states remained wary that northern states would find some other way to abolish slavery, including by disarming the militia or removing it from state control. There was particularly acrimonious debate on this topic at the state ratification convention in Richmond, Virginia, in June of 1788. James Madison and Patrick Henry, both slaveowners, were delegates to the convention, and both participated in the debate. Henry warned fellow delegates:

> In this state, there are two hundred and thirty-six thousand blacks, and there are many in several other states. But there are few or none in the Northern States….Slavery is detested….they [the northern states] will search that paper [the Constitution] , and see if they have the power of manumission. And have they not, sir? Have they not the power to provide for the general defence and welfare? May they not think that these call for the abolition of slavery? May they not pronounce all slaves free, and will they not be warranted by that power?...This paper speaks to the point; they have the power in clear, unequivocal terms, and will clearly and certainly exercise it….The majority of Congress is to the north, and the slaves are to the south.[25]

At another point during the Richmond ratification convention, Henry spoke specifically about the fear that Congress would nullify the power of the militia which in Virginia and the other slave states was essential to keeping slaves in check.

> Let me here call your attention to that part [of the Constitution] which gives the Congress power 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States – reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.' By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither – this power being exclusively given to Congress.[26]

According to the 19th Century Virginia historical scholar Hugh Blair Grigsby:

> I was told by a person on the floor of the Convention at the time, that when Henry had painted in the most vivid colors the dangers likely to result to the black population from the unlimited power of the general government wielded by men who had little or no interest in that species of property, and had filled his audience with fear, he suddenly broke out with the homely exclamation: *'They'll free your [racial slur for Negroes]!'* The audience passed instantly from fear to wayward laughter; and my informant said that it was most ludicrous to see men who a moment before were half frightened to death, with a broad grin on their faces."[27]

James Madison spoke in favor of ratification of the Constitution in its current form, minimizing the likelihood that Congress would abolish slavery by nullifying the

power of the state militias.

> I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive.[28]

The delegates to the Richmond convention ultimately voted to ratify the Constitution without amendments by a vote of 89-79. James Madison subsequently won a tightly contested election to become a U.S. Representative from Virginia in the first U.S. Congress, and in order to win, he was forced to commit to introducing a bill of rights as amendments to the Constitution. He made good on the promise in June of 1789, when he introduced a bill of rights in the first session of the U.S. House of Representatives. It's highly likely that the debate at the Richmond ratification convention in June of 1788 was still on his mind when he drafted the original version of what would become the Second Amendment to the U.S. Constitution.[29]

The final version of the Second Amendment that was ultimately included in the Bill of Rights states:

> 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.

The thesis that the Second Amendment was included in the Bill of Rights in part, at least, to reassure the southern states that they could keep their slaves, might on first consideration seem blasphemous, if not downright treasonous. If one considers the following facts, however, the likelihood that this thesis is true becomes not only possible, but highly probable.

- Four separate clauses in the main body of the Constitution were indisputably included specifically to reassure the southern states that they could keep their slaves, but euphemisms were deliberately used in all four clauses in place of the words, "slave" or "slavery."
- The original draft of the Second Amendment was written and introduced by James Madison, a slave owner from Virginia who was aware that his fellow slave owners were concerned that Congress would abolish slavery indirectly by nullifying the power of state militias, which were one and the same as slave patrols; and who had committed to introducing a bill of rights to the Constitution in order to win election to the first U.S. Congress.
- The "right of the people to keep and bear Arms," whether it was meant to confer an individual right or a collective right, refers only to white people. Slaves were not accorded any constitutional rights.
- Virginia, Georgia, South Carolina, and North Carolina were not "free states," in the usual sense of the term. They were slave states.

Replacing the euphemism, "the people," with the more accurate term, "white

people," and replacing the euphemism, "free State," (in the cases of Virginia, Georgia, South Carolina, and North Carolina) with the more accurate term, "slave State," the Second Amendment would read:

> A well regulated Militia, being necessary to the security of a slave State, the right of white people to keep and bear Arms, shall not be infringed.

In his majority opinion in *Heller,* Scalia makes no mention of the protections of slavery incorporated into the body of the Constitution, the concerns of the southern states that Congress might indirectly abolish slavery by nullifying the power of their militias, or the fact that the author of the original draft of the Second Amendment was a slave owner. Instead, Scalia attempts to put an anti-slavery spin on the Second Amendment, claiming:

> Antislavery advocates routinely invoked the right to bear arms for self-defense.[30]

This claim is patently false. During the Founding Era, Quakers were the leading advocates for the abolition of slavery, and they were also religiously opposed to carrying or using lethal weapons. In fact, Madison's original draft of the Second Amendment included a clause to exempt Quakers from militia service: "…but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[31] It was not until the pre-Civil War era that a small faction of radical abolitionists advocated armed conflict as a means of preventing the spread of slavery westward into new territories.

Scalia cites three examples from the pre-Civil War era in support of his claim that anti-slavery advocates "routinely invoked the right to bear arms for self-defense."[32] The first two, Joel Tiffany and Lysander Spooner, both published treatises (Tiffany in 1845[33] and Spooner in 1848[34]) claiming, contrary to all objective evidence, that the Constitution prohibited slavery. Scalia quotes a portion of a sentence from Tiffany's treatise, implying that Tiffany supported the view that the Second Amendment conferred an individual right to own firearms for self defense. Scalia fails to acknowledge, though, that the section of Tiffany's treatise from which this partial quote is taken is entitled, "Militia."[35] Scalia also fails to acknowledge that Spooner was an anarchist who, following the Civil War, expressed as much sympathy for the slaveholders who had lost the war as for the slaves who had, in theory at least, been emancipated by it.[36]

Scalia's third example of an anti-slavery advocate who "routinely invoked the right to bear arms for self-defense" is an excerpt from a two day long speech by U.S. Senator Charles Sumner of Massachusetts on the floor of the Senate on May 19-20, 1856.[37] Sumner referred to the "right to bear arms" once in this two day long speech concerning the armed conflict between pro-slavery and anti-slavery advocates in the territory of Kansas. Sumner was, indeed, a staunch abolitionist. But in the digital version of *the Complete Works of Charles Sumner*, which includes 6,944 digital pages, the term, "Second Amendment," doesn't appear a single time, and the terms, "right to bear arms," "right to keep and bear arms," or

"right of the people to keep and bear arms," occur only three times – once in Sumner's two day long *Crime Against Kansas* speech on the Senate floor in May of 1856, and twice in a speech on the Civil War presented in New York on September 9, 1863.[38] In all three cases, Sumner's use of the term, "right to bear arms," is most consistent with the interpretation of the Second Amendment as conferring a collective right for the common defense, not an individual right for personal self defense.

Scalia conveniently omits any mention of America's best known radical abolitionist, John Brown. Brown and his followers not only advocated "keeping and bearing arms," they used lethal weapons to kill people during the pre-Civil War era. Brown was born in Connecticut but traveled to Kansas in 1855 to engage in the conflict there between pro-slavery and anti-slavery advocates. In May of 1856, just a few days after Senator Sumner's *Crime Against Kansas* speech, Brown and eight accomplices, including five of his sons, committed a surprise, night-time attack on pro-slavery neighbors, fatally shooting one of them and hacking the other four to death with swords.[39] Brown claimed that the killings were committed in self defense, and he was never prosecuted for the crimes.

The murders committed by Brown and his accomplices sparked widespread violence between pro-slavery and anti-slavery forces in Kansas. Brown and his small group of followers gained more notoriety in December of 1858 when they raided farmhouses in Missouri near the Kansas-Missouri border and liberated about a dozen slaves, killing at least one slave owner in the process.[40] Brown's most well known – and final – raid was on the federal armory at Harper's Ferry in Virginia in October of 1859. Brown's plan in attacking the armory was to obtain enough weapons and additional recruits from the surrounding slave population to start a slave revolt that would spread rapidly throughout the South and result in the complete abolition of slavery in the United States.

Brown shared his plan in advance with a number of prominent abolitionists. Some supported him with arms and money, but most, including Frederick Douglass, tried to convince him that his plan was doomed to failure.[41] Brown, however, would not be deterred. He and a group of just 18 other men, including three of his sons and a few former slaves, successfully seized the armory at Harpers Ferry, which was guarded by just a single sentry, on the night of October 16, 1858. Portending a bad final outcome, Brown's men inadvertently shot and killed a free Black railroad worker as they were in the process of crossing a railroad trestle into the town.[42] By morning, news of the raid had spread throughout the region, but the slave insurrection that Brown expected did not occur. Brown and his party, including hostages they had taken the night before, were trapped inside the armory by a hastily assembled local militia. President Buchanan was informed of the raid, and he sent about 90 U.S. Marines under the command of Colonel Robert E. Lee to retake the armory. When Brown refused to surrender, the Marines stormed the armory, killing several of Brown's men and taking the rest into custody, including Brown himself, who suffered serious but non-fatal wounds. In the final toll, six civilians, one Marine, and eight militiamen were killed, along with 10 members of Brown's group. Brown and the other surviving members of his

party were quickly tried, convicted of murder and treason, and sentenced to death by hanging.

Brown carried with him a provisional constitution that he had written for the new government he envisioned forming in the South after the slave revolution had succeeded. Article 44 stated:

> All persons known to be of good character and of sound mind and suitable age, who are connected with this organization, whether male or female, shall be encouraged to carry arms openly.[43]

Article 45 prohibited civilians not authorized by the government from carrying concealed weapons.

Given the notoriety of John Brown's raid on Harper's Ferry, Scalia's failure to mention Brown in his majority opinion in *Heller* as an example of an anti-slavery advocate who not only "invoked," but also exercised a "right to bear arms" is unlikely to be accidental. Elsewhere in his majority opinion, Scalia does cite a Georgia Supreme Court decision in the 1837 case of *Nunn v. State* as "perfectly" capturing the true meaning of the Second Amendment.[44] The ruling in *Nunn v. State,*[45] in which Justice Joseph Henry Lumpkin not only overturned a Georgia law banning open carry of lethal weapons, but actually encouraged such open carry, while at the same time ruling that the state's ban on concealed carry was constitutional, also "perfectly captures" the intent of Articles 44 and 45 in John Brown's provisional constitution, with one important exception. Lumpkin was a flagrant racist and fierce advocate for the continuation of slavery, and his ruling on the open carry of lethal weapons applied only to white people, a fact that Scalia fails to mention.[46]

At another point in his majority opinion in *Heller,* Scalia claims that one of the reasons for the inclusion of the Second Amendment in the Bill of Rights is that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."[47] John Brown and his followers claimed that they had armed themselves and attacked the armory at Harper's Ferry in an effort to abolish the tyranny of slavery. But at his trial, John Brown's attorneys didn't argue that his attack on the federal armory was an exercise of his Second Amendment rights. Instead, they argued that Brown was insane, and they cited his provisional constitution, including the right to carry arms openly clause, as evidence of his insanity.[48] Brown himself denounced the insanity defense. He was executed on December 2, 1859.

The actions of John Brown and his followers are widely viewed by historians as contributing to the inevitability of the Civil War.[49] Brown himself presaged the Civil War in a note that he handed to his jailer as he was being escorted to the horse-drawn wagon that would take him to the gallows. Brown wrote:

> I John Brown am now quite certain that the crimes of this guilty , land : will never be purged away ; but with Blood.[50]

John Brown's role in contributing to the inevitability of the Civil War is memorialized in a mural, *Tragic Prelude,* by John Steuart Curry on a wall of the Kansas State Capitol building. John Brown, with a flowing beard, a maniacal expression on his face, a rifle in one hand and his provisional constitution in the other, is the central figure in the mural.

The armed violence that John Brown, his followers, and his enemies engaged in should also be seen as a potential danger of the kind of widespread civilian firearm ownership that Justice Antonin Scalia endorses in his majority opinion in the *Heller* decision. This is not the future that we at Americans Against Gun Violence envision for the United States of America.

Before closing, I'd like to address a couple of other examples of the many deliberate distortions of the truth in Scalia's majority opinion in the *Heller* decision. Scalia cites the following excerpt from the 1833 Pennsylvania case of *Johnson v. Tompkins* in support of the individual right interpretation of the Second Amendment:

> [Supreme Court Justice] Baldwin, sitting as a Circuit Judge, cited both the Second Amendment and the Pennsylvania analogue for his conclusion that a citizen has "a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either."[51]

Here's the full paragraph in the *Johnson v. Tompkins* decision from which Scalia takes the excerpt above, with just the portion Scalia quotes highlighted in bold italics:

> Jack was the property of the plaintiff, who had a right to possess and protect his slave or servant, whom he had a right to seize and take away to his residence in New Jersey by force, if force was necessary, he had a right to secure him from escape, or rescue by any means not cruel or wantonly severe—he had ***a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either***; he had a right to come into the state and take Jack on Sunday, the act of taking him up and conveying him to [a nearby town] was no breach of the peace, if not done by noise and disorder, occasioned by himself or his party—and their peaceable entry [on false pretenses] into the house of [his employer] was lawful and justifiable, for this purpose in doing these acts they were supported by laws which no human authority could shake or question.[52]

Jack was a former slave who claimed that he'd been freed through the will of his original "owner," but he was sold to Johnson nevertheless. Jack escaped from Johnson in New Jersey and fled to Pennsylvania where he was living and working peacefully. Johnson and his accomplices tracked Jack down and forcibly abducted him on a Sunday, gaining entry into the home in which Jack was living by lying to the homeowner, who was also Jack's employer. Upon trying to take Jack back to New Jersey, Johnson was "assailed with such force, numbers or violence" by residents of the town where Jack had been living who were outraged by the actions of Johnson and his accomplices. The residents forced Johnson to go to the home of a local judge on Sunday evening to prove that he "owned" Jack. The judge ordered Tompkins, the justice of the peace, to arrest Johnson and put him in jail. Johnson subsequently sued Tompkins for false arrest, and Judge Baldwin awarded Johnson both compensatory and punitive damages.

Baldwin also served as a Supreme Court justice. In *Groves v. Slaughter,* another case involving slavery, Johnson dissented from the other justices, writing:

> Other judges consider the Constitution as referring to slaves only as persons, and as property, in no other sense than as persons escaping from service; they do not consider them to be recognized as subjects of commerce, either “with foreign nations,” or “among the several states;” but I cannot acquiesce in this position…. That I may stand alone among the members of this Court, does not deter me from declaring that I feel bound to consider slaves as property, by the law of the states before the adoption of the Constitution, and from the first settlement of the colonies; that this right of property exists independently of the Constitution, which does not create, but recognizes and protects it from violation, by any law or regulation of any

> state, in the cases to which the Constitution applies.[53]

In other words, rather than supporting Scalia's argument that the Second Amendment was intended to confer an individual right to own firearms outside of service in a well regulated militia, a full reading of Justice Baldwin's opinion in *Johnson v. Tompkins* along with Baldwin's other writings supports the thesis that the Second Amendment was included in the Bill of Rights in part, at least, to perpetuate the institution of slavery.

Finally, I'd like to address Scalia's repeated claims that the Second Amendment to the U.S. Constitution is an analogue of the 1689 English Declaration of Rights, and that for this reason, the Second Amendment should be viewed as conferring a broad individual right to own firearms for personal use.[54] There are multiple serious fallacies in this claim.

The Second Amendment is not an analogue of the English Declaration of Rights. The 1689 English Declaration of Rights was a contract between an autocratic monarch and his subjects. The Second Amendment is a contract between the citizens of the United States and their democratically elected leaders.

The 1689 English Declaration of Rights does not begin with the phrase, "A well regulated militia, being necessary to the security of a free state." The Second Amendment clearly states that the reason the people have a right to keep a bear arms is to maintain state militias for the common defense. There is no such statement in the 1689 English Declaration of Rights.

Even if the Second Amendment were an analogue of the 1689 English Declaration of Rights, according to Scalia's own "important founding-era legal scholars,"[55] the English Declaration of Rights did not confer a broad right of individual firearm ownership. For example, Scalia claims that the prolific 19th century American writer, "St. George" Tucker supported the individual right interpretation of the Second Amendment. Scalia fails to note, however, that according to Tucker, under the 1689 English Declaration of Rights, "…not one man in five hundred can keep a gun in his house without being subject to a penalty."[56] (Scalia also fails to note that "St. George" Tucker, like many of the other "important founding-era legal scholars" he quotes, was a slave owner and an apologist for slavery.)[57]

Finally, the 1689 English Declaration of Rights was never repealed, but the English have long had some of the strictest gun control laws of any high income democratic country of the world. Despite these laws, in March of 1996, a man armed with several handguns killed a teacher and 16 five and six year old students and wounded three other teachers and 10 other children in an elementary school in Dunblane, Scotland.[58] Like Australia, the United Kingdom (England, Scotland, Wales, and Northern Ireland) already had much stronger gun control regulations than the United States, including a ban on assault rifles and stringent regulations regarding who could own a handgun. The Dunblane shooter, 43 year old Thomas Hamilton, owned handguns legally as a result of his membership in a local target

shooting club. After a thorough investigation into what steps should be taken to prevent further mass shootings of this nature, the UK decided to completely ban civilian ownership of handguns in 1998. Since the ban, there have been no further mass shootings with handguns in the United Kingdom.

There is no reason to believe that we could not reduce our country's rate of firearm related deaths to levels comparable to those in the UK if we were to adopt similarly stringent gun control laws. In 2015, the last year for which data are available for both the UK and the United States, the rate of gun deaths in the US was 56 times higher than in the UK. If the US rate had been the same as the UK rate in 2015, instead of 36,352 people being killed by guns,[59] 643 would have been killed: a difference of 35,609 lives saved. The *Heller* decision created a constitutional obstacle, where none previously existed, to the adoption of gun control laws in the United States comparable to the laws in the UK. It is not an exaggeration to state, therefore, that *Heller* is a death sentence for more than 35,000 Americans annually. And because of the many egregious errors, omissions, and gross distortions of the truth in the *Heller* majority opinion that I've discussed above, as well as many other similar falsehoods in the *Heller* decision that are beyond the scope of this president's message, it's also no exaggeration to state that the *Heller* decision is truly an abomination and must be overturned.

And now comes the part about how you can help us overturn *Heller* and achieve the adoption of stringent gun control laws in our country comparable to the laws in the UK, Australia, and other high income democratic countries.

First, I'll be frank. We need donations. We awarded a total of $16,000 to 24 students in our annual high school essay contest this year, and despite the fact that our attorney donated a great deal of his time, we spent about $14,000 in legal fees and printing costs in order to file our *amicus* brief in the Supreme Court Second Amendment case. We need to raise at least $30,000, therefore, to restore our financial reserves to the point that we can offer our essay contest again next year and file other *amicus* briefs in important cases. Any donation is appreciated, but please contribute as generously as you can. We keep our overhead and administrative expenses to a bare minimum, so you can be assured that 100% of contributions to the essay contest fund will go directly to student awards and the vast majority of other donations to the general fund will go to program related activities, not administrative overhead.

Second, please urge family members, friends, and colleagues to join Americans Against Gun Violence along with you. I'm frequently asked, "How many members do you have?" Having more members attracts more members, and the more members we have, the more clout we have when we meet and talk with other organizations and elected officials.

Third, help educate others, including your elected officials, concerning the need to overturn the rogue *Heller* decision and to adopt stringent gun control laws in the United States comparable to the laws that have long been in effect in every other

high income democratic country of the world. These kinds of conversations are not trivial. We know from congressional staff members that as few as 20 phone calls on a given issue can influence the way a member of Congress votes. Also, by talking with friends, family, and colleagues, we can change public sentiment. And as a famous American once said:

> Public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed. Consequently, he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed.[60]

These are the words of Abraham Lincoln.

Finally, don't give up. Some day, we will succeed in overturning *Heller* and in adopting definitive gun control laws that will finally stop the shameful epidemic of gun violence that afflicts our country. The only question is how many more innocent people will be killed by guns before that day arrives. You can take pride in doing your part to make that day come sooner rather than later.

Sincerely,

Bill Durston, MD
President, Americans Against Gun Violence

Note: Dr. Durston is a board certified emergency physician and a former expert marksman in the U.S. Marine Corps, decorated for courage under fire during the Vietnam War.

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