The Washington Post

Opinions

The five extra words that can fix the Second Amendment

By John Paul Stevens April 11, 2014

John Paul Stevens served as an associate justice of the Supreme Court from 1975 to 2010. This essay is excerpted from his new book, "Six Amendments: How and Why We Should Change the Constitution."

Following the massacre of grammar-school children in Newtown, Conn., in December 2012, high-powered weapons have been used to kill innocent victims in more senseless public incidents. Those killings, however, are only a fragment of the total harm caused by the misuse of firearms. Each year, more than 30,000 people die in the United States in firearm-related incidents. Many of those deaths involve handguns.

The adoption of rules that will lessen the number of those incidents should be a matter of primary concern to both federal and state legislators. Legislatures are in a far better position than judges to assess the wisdom of such rules and to evaluate the costs and benefits that rule changes can be expected to produce. It is those legislators, rather than federal judges, who should make the decisions that will determine what kinds of firearms should be available to private citizens, and when and how they may be used. Constitutional provisions that curtail the legislative power to govern in this area unquestionably do more harm than good.

The first 10 amendments to the Constitution placed limits on the powers of the new federal government. Concern that a national standing army might pose a threat to the security of the separate states led to the adoption of the Second Amendment, which provides that "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."

For more than 200 years following the adoption of that amendment, federal judges uniformly understood that the right protected by that text was limited in two ways: First, it applied only to keeping and bearing arms for military purposes, and second, while it limited the power of the federal government, it did not impose any limit whatsoever on the power of states or local governments to regulate the ownership or use of firearms. Thus, in *United States v. Miller*, decided in 1939, the court unanimously 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. During the years when Warren Burger was chief justice, from 1969 to 1986, no judge or justice expressed any doubt about the limited coverage of the amendment,

and I cannot recall any judge suggesting that the amendment might place any limit on state authority to do anything.

Organizations such as the National Rifle Association disagreed with that position and mounted a vigorous campaign claiming that federal regulation of the use of firearms severely curtailed Americans' Second Amendment rights. Five years after his retirement, during a 1991 appearance on "The MacNeil/Lehrer NewsHour," Burger himself remarked that the Second Amendment "has been the subject of 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."

In recent years two profoundly important changes in the law have occurred. In 2008, by a vote of 5 to 4, the Supreme Court decided in *District of Columbia v. Heller* that the Second Amendment protects a civilian's right to keep a handgun in his home for purposes of self-defense. And in 2010, by another vote of 5 to 4, the court decided in *McDonald v. Chicago* that the due process clause of the 14th Amendment limits the power of the city of Chicago to outlaw the possession of handguns by private citizens. I dissented in both of those cases and remain convinced that both decisions misinterpreted the law and were profoundly unwise. Public policies concerning gun control should be decided by the voters' elected representatives, not by federal judges.

In my dissent in the *McDonald* case, I pointed out that the court's decision was unique in the extent to which the court had exacted a heavy toll "in terms of state sovereignty. . . . Even apart from the States' long history of firearms regulation and its location at the core of their police powers, this is a quintessential area in which federalism ought to be allowed to flourish without this Court's meddling. Whether or not we can assert a plausible constitutional basis for intervening, there are powerful reasons why we should not do so."

"Across the Nation, States and localities vary significantly in the patterns and problems of gun violence they face, as well as in the traditions and cultures of lawful gun use. . . . The city of Chicago, for example, faces a pressing challenge in combating criminal street gangs. Most rural areas do not."

In response to the massacre of grammar-school students at Sandy Hook Elementary School, some legislators have advocated stringent controls on the sale of assault weapons and more complete background checks on purchasers of firearms. It is important to note that nothing in either the *Heller* or the *McDonald* opinion poses any obstacle to the adoption of such preventive measures.

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." On the preceding page of its opinion, the court made it clear that even though machine guns were useful in warfare in 1939, they were not among the types of weapons protected by the Second Amendment because that protected class was limited to weapons in common use for lawful purposes such as self-defense. Even though a sawed-off shotgun or a machine gun 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 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 Antonin 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 covers only the possession of handguns in the home for purposes of self-defense, while a later part 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, or 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.

Thus, Congress's failure to enact laws that would expand the use of background checks and limit the availability of automatic weapons cannot be justified by reference to the Second Amendment or to anything that the Supreme Court has said about that amendment. What the members of the five-justice majority said in those opinions is nevertheless profoundly important, because it curtails the government's power to regulate the use of handguns that contribute to the roughly 88 firearm-related deaths that occur every day.

There is an intriguing similarity between the court's sovereign immunity jurisprudence, which began with a misinterpretation of the 11th Amendment, and its more recent misinterpretation of the Second Amendment. The procedural amendment limiting federal courts' jurisdiction over private actions against states eventually blossomed into a substantive rule that treats the common-law doctrine of sovereign immunity as though it were part of the Constitution itself. Of course, in England common-law rules fashioned by judges may always be repealed or amended by Parliament. And when the United States became an independent nation, Congress and every state legislature had the power to accept, to reject or to modify common-law rules that prevailed prior to 1776, except, of course, any rule that might have been included in the Constitution.

The Second Amendment expressly endorsed the substantive common-law rule that protected the citizen's right (and duty) to keep and bear arms when serving in a state militia. In its decision in *Heller*, however, the majority interpreted the amendment as though its draftsmen were primarily motivated by an interest in protecting the common-law right of self-defense. But that common-law right is a procedural right that has always been available to the defendant in criminal proceedings in every state. The notion that the states were concerned about possible infringement of that right by the federal government is really quite absurd.

As a result of the rulings in *Heller* and *McDonald*, the Second Amendment, which was adopted to protect the states from federal interference with their power to ensure that their militias were "well regulated," has given federal judges the ultimate power to determine the validity of state regulations of both civilian and militia-related uses of arms. That anomalous result can be avoided by adding five words to the text of the Second Amendment to make it unambiguously conform to the original intent of its draftsmen. As so amended, it would read:

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms *when serving in the Militia* shall not be infringed."

Emotional claims that the right to possess deadly weapons is so important that it is protected by the federal Constitution distort intelligent debate about the wisdom of particular aspects of proposed legislation designed to minimize the slaughter caused by the prevalence of guns in private hands. Those emotional arguments would be nullified by the adoption of my proposed amendment. The amendment certainly would not silence the powerful voice of the gun lobby; it would merely eliminate its ability to advance one mistaken argument.

It is true, of course, that the public's reaction to the massacre of schoolchildren, such as the Newtown killings, and the 2013 murder of government employees at the Navy Yard in Washington, may also introduce a strong emotional element into the debate. That aspect of the debate is, however, based entirely on facts rather than fiction. The law should encourage intelligent discussion of possible remedies for what every American can recognize as an ongoing national tragedy.

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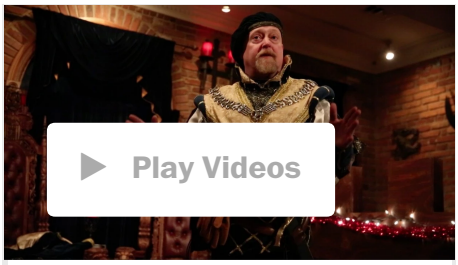

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