**D.C.’s Strict Handgun Ban Violates 2nd Amendment**

**SUMMARY:** The District of Columbia’s handgun law, making handguns illegal even for defense of the home, violated the Second Amendment protection of the right to bear arms. The United States Supreme Court decided *District of Columbia v. Heller* on June 26, 2008.

**BACKGROUND:** In response to a serious problem with violence, the District of Columbia passed a very strict gun law. Carrying an unregistered firearm is illegal, and handguns cannot be registered. No person may carry a handgun without a license. The chief of police may issue licenses for 1-year periods. Lawfully owned firearms must be kept unloaded and disassembled in the home, or they must be bound by a trigger lock. The locking and loading laws do not apply if the gun is located in a place of business or is being used for lawful recreation, such as at a shooting range.

Dick Heller works at the Federal Judicial Center as a special police officer. This position allows him to carry a handgun while on duty. He applied for a registration certificate to keep a handgun at his home. The District denied his request. He then sued the District, arguing that the law against registering a handgun and keeping an assembled firearm in the home without a lock violated the Second Amendment. The district court dismissed his complaint but the District of Columbia Circuit Court of Appeals reversed. The U.S. Supreme Court granted review to resolve the Second Amendment issue.

**ANALYSIS:** The number of deaths and injuries linked to guns, particularly handguns, has led to widespread regulation of their use across the United States. The laws in turn have prompted much discussion and debate in society and the courts over what limits may and may not be imposed on firearm use and ownership. At the heart of this debate lies the strangely worded Second Amendment:

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 controversy surrounds the “militia” language. Those in favor of restrictive gun laws have argued that the militia wording limits protection of firearms to the military: the government may not interfere with the right of men and women defending the nation to own and use firearms. Gun rights advocates argued in response that the militia language has historical relevance but is not a restriction.

In an opinion by Justice Scalia, a bare (5-4) majority of the Court analyzed the historical background of the Second Amendment. The majority drew on a number of references in interpreting what the Drafters intended in crafting the curious wording at issue. First, however, the Court looked at the words themselves. The amendment’s wording does not create a right, the majority reasoned. Instead, it prevents government from infringing a right already in existence—the right to keep and bear arms. This right predates the United States and derives from English law, which recognized the people’s right to use weapons for hunting and defense of home and property.

Drawing from state constitutions and laws, as well as the federal militia act, Scalia concluded that gun use within the militia was simply a subset of the larger and longstanding right of individuals to own and use firearms. While the militia language was intended to prevent the government from disarming the populace, it recognized that the gun right belonged to the people—not the militia itself. Militias, which could be called together to defend the nation, were drawn from the general population which, to form a competent fighting force, needed to be knowledgeable about firearms and skillful in their basic use. The Second Amendment was a measure against tyranny, prohibiting the government from disarming the people because they needed their weapons to form a militia in time of need. There was not a standing militia whose disarming the amendment was designed to prohibit. Rather, the militia would be assembled from able-bodied men using, at least in part, their own firearms. To preserve the militia capability, the Second Amendment protected the public’s right to keep and bear arms.

The majority noted that the Second Amendment does not protect ownership and use of all weapons for all purposes. Establishing the full scope of the right was not the Court’s duty or purpose here. The majority limited its holding to a determination that the D.C. law violated the Second Amendment in prohibiting Heller from registering and possessing a handgun in his home, assuming he met the valid limitations of not being insane and not being a felon.

Four justices dissented. They opined that the militia language was not superfluous. That language specifically ties gun use and ownership to militia service. Whatever private right to own and use guns the public enjoyed apart from the military context, the Second Amendment did not address it. By its language, the dissent reasoned, the amendment protected only an armed militia, not armed individuals.

**EXCERPTS FROM THE MAJORITY OPINION** (By Justice Scalia): “The Amendment could be rephrased, ‘Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.’ . . . Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, ‘A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed.’ That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause. But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. ‘It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.’
“[T]he Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’ As we have said, ‘[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed . . . .’

“Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. Under the auspices of the 1671 Game Act, for example, the Catholic James II had ordered general disarmaments of regions home to his Protestant enemies. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed: ‘That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.’ This right has long been understood to be the predecessor to our Second Amendment. It was clearly an individual right, having nothing whatever to do with service in a militia. To be sure, it was an individual right not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament. But it was secured to them as individuals, according to ‘libertarian political principles,’ not as members of a fighting force.

“By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works we have said, ‘constituted the preeminent authority on English law for the founding generation,’ cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, ‘the natural right of resistance and self-preservation,’ and ‘the right of having and using arms for self-preservation and defence’; Other contemporary authorities concurred. Thus, the right secured in 1689 as a result of the Stuarts’ abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.

“And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760s and 1770s, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that ‘[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence.’ They understood the right to enable individuals to defend themselves.

“As the most important early American edition of Blackstone’s Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repe[] force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’

**EXcerPTS FROM THE DISSENT** (By Justices Stevens and Breyer): “The question presented by this case is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

“Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller*, provide a clear answer to that question.

“The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

“In 1934, Congress enacted the National Firearms Act, the first major federal firearms law. Upholding a conviction under that Act, this Court held that, ‘[i]n the absence of any evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.’ The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment’s text and the interpretation most faithful to the history of its adoption.

“Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, would prevent most jurists from endorsing such a dramatic upheaval in the law. As Justice Cardozo observed years ago, the ‘labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.’
**COMMENTS & QUESTIONS**

1. What did Heller do for a living?
2. Did Heller have a right to possess a firearm?
3. Did he have this right in his home?

This case was a very significant decision by the United States Supreme Court. It declared for the first time that the Second Amendment protects an individual right – not a collective or militia right – to keep and bear firearms for self-defense. It had been nearly 70 years since the Supreme Court had considered a second amendment case. The case centered around the strangely worded second amendment and its “well regulated militia” language. The decision determined the following question: Whether the provisions of the District of Columbia’s strict handgun law violated the second amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

In a close 5-4 decision, the court determined that the District of Columbia Law did violate the Second Amendment. The effect of the law was to strike down the districts strict ban on handguns and its trigger-why requirement on other firearms, which the city had said were essential to contain violence in the nation’s capital. How do you feel about this result? Many cities that have similar handgun laws feel that this decision could result in increased violence in their cities. Do you think it is important to enforce individual rights protections in the Constitution if there will be potentially detrimental effects on society? Or, is the failure to enforce individual rights a detrimental effect in and of itself?

While the court did find that the right to bear arms is an individual right, it also stated that this newly recognized constitutional right was not unlimited. There can still be restrictions on the possession of firearms and the use of certain types of weapons can be restricted without violating the Second Amendment. However, the court did not set forth guidelines to measure these restrictions, though. How would you measure the restrictions on firearm possession and use without running a foul of the Second Amendment?

Do you agree with the majority opinion or do you think the dissent was correct in its interpretation of the oddly worded Second Amendment? Why do you think the founding fathers included the “militia” phrase in the Amendment? Do you think that the right to bear arms is an individual right? Doesn't the entire Bill of Rights deal with individual rights?

What do you think the result of this decision will be in the long run? Do you think that the District of Columbia's lot just went too far in completely banning handguns? What restrictions, short of an outright prohibition, do you think should be allowed on the possession of handguns?

This was a 5-4 decision of the United States Supreme Court. It seems that more and more 5-4 decisions are being handed down in controversial cases. Do you think that political ideology is becoming part of the decision process of the United States Supreme Court? Do you think this is good?
School Could Ban Confederate-Flag Clothing

**SUMMARY:** School officials did not violate students’ constitutional rights in prohibiting clothing bearing the Confederate flag where racial tensions were high in the school and administrators concluded that such clothing would cause substantial disruption of the learning environment. The Sixth Circuit Court of Appeals decided *Barr v. Lafon* on August 20, 2008.

**BACKGROUND:** In December 2003, the Blount County Board of Education issued a student dress code. The code prohibited clothing that promoted drugs, alcohol or tobacco, was crude, vulgar or sexually suggestive, or that disrupted the educational process.

In February 2005, an argument between black and white students playing basketball at William Blount High School led to some pushing and shoving. Two groups of students divided by race were on the verge of a larger altercation. Teachers rushed to the gym, separated the students and told everyone to go to class. This incident escalated racial tensions at the school.

In the months that followed, school officials observed graffiti in the boys and girls restrooms. This graffiti including drawings of a noose, “hit lists” purporting to list students who should die, and the statements “all niggers must die” and “The South Will Rise Again.” Students testified that the hit lists included white as well as black student names. Also among the images were drawings of the Confederate flag. Police contacted by the school photographed some of this graffiti.

The sense of increased racial tension at the school prompted many phone calls and discussions with parents and police. There was at least one fight between students that was linked to the tension. Parents told Principal Lafon that they were concerned about the risks to their children and did not feel he was taking the matter seriously enough. In response, Lafon ordered a school lockdown, during which numerous police officers monitored students and school grounds, checking for weapons. None were found, though one student was sent to juvenile detention after telling authorities he had planned to bring in a gun and shoot black students.

At the start of the 2005-06 school year, the school sent a copy of the dress code home with each student. Principal Lafon also called an assembly, during which he announced that students would not be permitted to wear clothing bearing the Confederate flag or anything else that disrupted the school.

In September 2005, Derek Barr wore a shirt to school featuring a picture of the Confederate flag, two dogs, and the slogan, “Guarding our Southern Heritage.” Teachers told him that the shirt violated the dress code and that he either had to take it off or turn it inside out. In January 2006, Chris White wore a shirt showing the Confederate flag. School officials told her to cover it with a jacket for the rest of the day or she would be sent home and suspended.

Barr and White sued, arguing that the school violated their rights under the First Amendment and Equal Protection Clause. The trial court granted the school’s motion for summary judgment and plaintiffs appealed to the Sixth Circuit Court of Appeal.

**ANALYSIS:** Because students are under the care and protection of school authorities, who are charged with educating them and ensuring their safety, students’ expressive rights at school are not as broad as the rights they later enjoy as adults. The rights students possess as individuals sometimes conflict with the powers school officials wield for the benefit of the student body as a whole.

Barr and White argued that their clothing caused no disruption before teachers ordered them to remove or cover it. Therefore, authorities were not quelling disruption, but suppressing their right to express pride in their region of the country. This violated their right to free expression under the First Amendment. Plaintiffs also argued that the school singled out the Confederate flag but did not prohibit students from showing other flags, such as Canada or Mexico, nor did the school ban other clothing with a racial undertone, such as Malcolm X shirts. By singling out their message, but not banning other flags or racial messages, the school also violated their right to Equal Protection under the laws, plaintiffs asserted.

Beyond school, in the adult world, government suppression of speech on the basis of content is tightly controlled. Government can do this only under very limited circumstances, such as to prevent imminent lawless action—for example, speakers inciting a large crowd to riot and burn cars and demolish stores. Within school, public officials have more leeway. Where they reasonably believe certain speech will disrupt the school and hinder the educational process or harm other students, officials can limit it for its disruptive content—however, in undertaking such restrictions, officials must not single out particular disruptive viewpoints for suppression while leaving other views on the same subject matter uncontested.

The court ruled that school officials did not violate plaintiffs First Amendment rights. The school had presented evidence of racially related violence, threats, and graffiti, and that black students felt threatened. Some of the threatening graffiti included drawings of the Confederate flag. Attendance records showed increased absenteeism among African American students following the heightened racial tension. These facts were enough to demonstrate that Confederate symbolism was disruptive. It did not matter that no disruption was linked to Barr’s or White’s shirts in particular. Officials do not need to wait until actual upheaval occurs; they have the authority to intercede first to maintain an educational atmosphere and protect students.

Plaintiffs’ arguments with respect to other flags and clothing of other sorts with racial messages were tricky to resolve. The “content” issue from the school’s perspective was the potential for particular images to cause disruptions or violence. Absent some showing that another flag, such as Canada’s or Mexico’s, had potential to incite controversy, the school did not violate equal protection by naming one flag that had proven disruptive—the Confederate flag. Schools may ban particular contents, such as drug or alcohol promotions or vulgarity, but they cannot ban particular viewpoints on a subject. Had another flag proven contentious, the school would have violated equal protection had they not also prohibited students from displaying it.

The judges looked carefully at the isolated allegations that other students had worn Malcolm X shirts and not been punished. If that were true, the school would have violated Barr’s and White’s rights by singling them out for punishment but letting other potentially contentious racial clothing go unpunished. The court found plaintiffs’ evidence on this point contradictory and unconvincing, however. In unsigned declarations, Barr and White had asserted that the school had let Malcolm X clothing go unpunished. But in deposition testimony, Barr had said that the one or two times he saw such clothing he told teachers and “it came to a stop.” He also
said that the penalties would apply to other types of potentially disruptive clothing beyond the Confederate flag and that he never saw the policy enforced any differently. In her deposition, White said that she couldn’t remember any students wearing Malcolm X clothing. Because sworn depositions showed no viewpoint discrimination, the court refused to use unsigned statements to undermine them.

The court affirmed the lower court’s ruling dismissing plaintiffs claims.

**EXCERPTS FROM THE COURT’S OPINION** (By Judge Moore): “Plaintiffs-Appellants argue that there is no evidence ‘that the Confederate flag ever caused any disruption at the school,’ even when worn by students during the ban. Plaintiffs-Appellants’ contention that the Confederate flag itself had to cause disruption in the past for the school to justify the ban, however, ‘misapplies [Supreme Court precedent, which] does not require disruption to have actually occurred.’ Rather than evaluating competing claims about whether disruption occurred in the past, we must evaluate the circumstances to determine if the school’s forecast of substantial disruption was reasonable. The rationale for this standard lies in the fact that requiring evidence of disruption caused by the banned speech would place ‘school officials . . . between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation.’

“In deposing [Director of Schools Alvin] Hord, the attorney for Plaintiffs-Appellants tried to show that racist graffiti had not specifically caused disruption. When asked if he knew if any classes had been disrupted as a result of the graffiti, Hord stated that ‘[t]he only disruption I think it does have is that just by the fact that a Principal and teachers if they have those kids they are pulling kids out questioning them there, they are trying to get to the bottom of it. So in that sense it is a disruption, but I don’t know specifically here is the class, here is the kids, that kind of thing.’ Hord stated that he did not know whether any fights resulted from the graffiti or ‘hit lists.’ We are wary of concluding, however, that the racist graffiti had to cause violent disruption to the school for the school reasonably to forecast that images of the Confederate flag would cause disruption. . . . There is no requirement that disruption . . . be violent. Hord presents uncontested testimony that investigation of the graffiti disrupted classes. Furthermore, the racist graffiti was violent in character: the graffiti contained examples of the most demeaning racial slurs, accompanied by threats against the lives of African-Americans generally, an image of a noose next to that of a Confederate flag, and ‘hit lists’ containing specific students’ names. One might plausibly argue that such racist graffiti containing violent threats is inherently disruptive to a school environment. We do not need to reach such a conclusion today, however, because Hord presented evidence that the racist graffiti including the hit lists produced secondary disruptions. ‘There was a lot of school disruption because of the hit lists, parents coming to school, parents calling me, calling the administrator, calling people in the Central office and it was time consuming.’ Hord also gave unrefuted deposition testimony that fear of racial violence caused an increase in absenteeism among African-American students, the epitome of disruption in the educational process.

“Perhaps the most compelling evidence of the racial tension that existed at the school immediately prior to the clothing ban comes from Plaintiffs-Appellants’ own deposition testimony. Barr stated that he felt ‘friction’ and ‘racially related tension’ in the school in the spring of 2005. He said he could feel ‘the intensity’ as ‘people walk[ed] by.’ Craig White, another student bringing this suit, conceded in his deposition that his Confederate flag clothing could create disruptive behavior at school if others found his clothing ‘offensive.’

“That there exists a relationship between the offensiveness of the Confederate flag, in the eyes of some students, and its disruptive potential does not change our holding. We note that our decision evinces greater sensitivity to the effect of the regulated speech on its student audience than that ordinarily accorded to the targets of speech in our general First Amendment jurisprudence. First Amendment standards applicable to student speech in public schools, however, are unique, and courts accord more weight in the school setting to the educational authority of the school in attending to all students’ psychological and developmental needs. Plaintiffs-Appellants’ free-speech rights ‘coll[de] with the rights of other students to be secure and to be let alone.’ The fact of this collision would almost certainly not be enough to justify government regulation of the speech, if the parties in this case were adults in a public forum. ‘If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.’ We caution, however, that our decision today does not establish a precedent justifying a school’s ban on student speech merely because other students find that speech offensive: we simply hold that the school’s dress code as applied to the Confederate flag is constitutional because of the disruptive potential of the flag in a school where racial tension is high and serious racially motivated incidents, such as physical altercations or threats of violence, have occurred.”
COMMENTS & QUESTIONS

1. Why did the Blount schools pass a dress code?
2. Who were Derek Barr and Chris White? How did they get in trouble?
3. Did the dress code prohibit students from displaying any flag on their clothing?

One of the pivotal cases courts refer to when considering limitations on student dress is *Tinker v. Des Moines School District*, which the U.S. Supreme Court decided during the Vietnam War. Some Des Moines students had decided to wear black arm bands to show their opposition to the war. School officials decided to prohibit the arm bands and the students sued. The Supreme Court ruled that the school violated the students’ First Amendment rights. The Court’s statement that ‘students do not shed their right to freedom of speech at the schoolhouse gate’ is among the most often quoted passages in this area of law.

In later cases, the Court has clarified that the absence of disruption was central to the holding in *Tinker*. School officials had not convinced the Court that they feared significant disruption of the learning environment or interference with other students’ rights arising from the arm bands. Absent that showing, and with expression directly tied to important social and political events, the school violated the First Amendment. It is a public-school purpose to prepare students for social and political participation in the adult world; political speech that does not unduly upset the learning environment is constitutionally protected.

The most important issues in society the ones everyone agrees on, or the ones over which there is sharp disagreement. If school is the place where we prepare ourselves to adult life, shouldn’t we start considering contentious social issues in our formative years?

Does a ban on wearing Confederate-flag clothing prohibit classroom discussions of the Confederacy, slavery, the Civil War? What’s the difference between Confederate pictures in a history book and a flag on a shirt?

Could a teacher have a mock diplomacy meeting with half the class (not divided by race) arguing the South’s pre-Civil-War position for keeping a slave-based economy and the other half arguing why slavery must be abolished? Could a teacher have students read the Lincoln-Douglas debates aloud in class?

Could a school prohibit students from discussing racial issues in the hallways, between themselves? Could they do they prohibit an after-school meeting on school premises between black and white students to discuss their differences?

Would this case have been decided differently if there had been no history of racial tensions in the school?

Why, after centuries of upheaval, do racial issues continue to surface again and again—why can’t our society get past them? The Constitution protects all races equally. How can schools help students get beyond superficial differences between individuals to make a better society tomorrow?
Medical Doctor Could Not Discriminate in Treatment

SUMMARY: The claim of First Amendment freedom of religion rights did not allow a doctor at a fertility clinic to deny a lesbian woman procreative assistance in violation of California's anti-discrimination law. The California Supreme Court decided North Coast Women's Care Medical Group v. San Diego Superior Court on August 18, 2008.

BACKGROUND: Guadalupe Benitez and Joanne Clark are domestic partners in San Diego. They decided that they wanted to have a child and that Benitez would serve as the biological mother. She attempted to become pregnant at home using simple implantation equipment and sperm from a sperm bank. When this method proved ineffective, Benitez consulted her doctor, who diagnosed her with irregular ovulation and referred her to a clinic, North Coast Women's Care Medical Group for assistance.

Benitez met with clinic doctor, Christine Brody. During the course of their conversation, Benitez mentioned that she was a lesbian. Dr. Brody explained that with Benitez's irregular ovulation, she may require “intruterine insemination” (IUI) to become pregnant. (This process involves inserting a catheter into the patient’s uterus through which donor semen is passed.) Dr. Brody said that should this become necessary, her religious beliefs would prevent her from performing the procedure. She said another doctor, Fenton, shared her objections that two other North Coast physicians, Stoopak and Langley, would be available to assist her with the procedure.

Dr. Brody prescribed a medicine designed to promote ovulation. Benitez took this medicine while continuing to try to become pregnant at home with sperm from a sperm bank. In May of 2000, Benitez stopped using sperm-bank semen and continued trying to become pregnant using semen donated from a male friend. She then missed a menstrual period, suggesting she might be pregnant, but the clinic confirmed she was not. Benitez decided it was time to try IUI. She told Dr. Brody she wanted to move forward using a friend's donated sperm.

Dr. Brody said there could be delays because she was unsure the clinic’s license allowed it to use sperm that did not come from a spouse or a licensed sperm bank. Benitez replied that she would then use the sperm bank. Dr. Brody noted this and then left for a vacation. Benitez turned to Dr. Fenton, who refused on religious grounds to proceed. When Benitez inquired about the other two other physicians, Dr. Fenton said they did not have proper licensing to assist her. (Dr. Fenton claimed that he did not know Benitez had decided to try again with sperm bank semen; his colleagues were not licensed to deal with fresh sperm, which requires different handling from frozen semen that has already been screened for suitability.) Dr. Fenton referred her to a doctor outside North Coast. That doctor performed IUI, which did not result in pregnancy. Finally, that doctor (Kettle) performed in vitro fertilization, which made Benitez pregnant in June 2001.

Benitez sued North Coast, arguing that they discriminated against her on the basis of sexual orientation. The clinic argued that its doctors were entitled to withhold treatment under the First Amendment. Benitez moved for summary judgment as to the First Amendment defense and the trial court granted the motion. The clinic appealed and the appeals court reversed and Benitez appealed to the California Supreme Court.

ANALYSIS: At the time of the incidents in this case, California’s civil rights law, known as the Unruh Act, provided that ‘All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.’ Although the act did not mention sexual orientation discrimination specifically in 2001, California courts had held that it was covered under the act. Refusing to provide services on a prohibited basis if a violation of the act.

North Coast argued that while its doctors had refused to perform IUI on Benitez, their objections were rooted in religious and expressive beliefs protected by the Constitution's First Amendment. Because the Constitution is the highest law in the land, California could not punish the doctors for their refusal of services.

In evaluating the controversy, California looked at U.S. Supreme Court decisions addressing the conflict between constitutional rights and state laws. In two cases from 1963 and 1972, the Court had invalidated laws withholding unemployment benefits and requiring children to attend public schooling beyond the eighth grade. In the first case, a man refused to work on Saturdays and in the second the Amish withheld their children from school after eighth grade based on sincere religious beliefs. The Court held that to infringe on religious beliefs, the government needed to show that it had a compelling interest in forcing compliance with the law.

Later, the Court modified its position in cases challenging laws prohibiting use of the illegal drug peyote and the practice of ritual animal sacrifice. In those cases, the Court upheld the laws, ruling that otherwise valid and neutral laws of general applicability (that is, not targeting particular groups) were not unconstitutional just because they incidentally burdened some religious practice.

North Coast argued that language in one of those opinions indicated that a compelling interest might be required where a law burdened one or more additional constitutional rights beyond the freedom of religion. The clinic argued that that was the case here because their freedom of expression rights permitted them to say they would not treat Benitez and entitled them not to be forced into making the implied statement that they would help lesbians or unmarried women become pregnant. The court rejected this “hybrid rights” argument. If infringement of an additional asserted right allowed affected parties a higher level of protection, almost everyone violating a law could find some additional constitutional claim to add to their religion claim. The court disagreed that forcing North Coast to abide by a generally applicable law created the implied expression that they agreed with the law. Providing medical services equally and without discrimination was not speech. If complying with a neutral law was First Amendment speech, the court reasoned, people could pick and choose which laws to obey based on whether they agreed or disagreed with them. Such an approach would be unreasonable and unworkable.

Finding no constitutional basis for defenses to the discrimination charge, the state supreme court reversed. The clinic could not assert a First Amendment religion or expression defense to Benitez’s claim.
EXCERPTS FROM THE COURT’S OPINION (By Justice Kennard): ‘[[In 1990 . . . the high court . . . that the First Amendment’s right to the free exercise of religion ‘does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or prescribes).’ Three years later, the court reiterated that holding, stating that ‘a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.’

‘Thus, under the United States Supreme Court’s most recent holdings, a religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector’s religious beliefs.

‘Just four years ago, we considered the claim of a nonprofit entity affiliated with the Roman Catholic Church (Catholic Charities) that the First Amendment’s guarantee of free exercise of religion exempted it from complying with a California law, the Women’s Contraception Equity Act (WCEA), which required employers that provide prescription drug insurance coverage for their employees to include coverage for prescription contraceptives.

In rejecting that claim, we applied the test the United States Supreme Court had adopted in its 1990 decision in Smith. We explained: ‘The WCEA’s requirements apply neutrally and generally to all employers, regardless of religious affiliation, except to those few who satisfy the statute’s strict requirements for exemption on religious grounds. The act also addresses a matter the state is free to regulate; it regulates the content of insurance policies for the purpose of eliminating a form of gender discrimination in health benefits. The act conflicts with Catholic Charities’ religious beliefs only incidentally, because those beliefs happen to make prescription contraceptives sinful.’

‘California’s Unruh Civil Rights Act, from which defendant physicians seek religious exemption, is ‘a valid and neutral law of general applicability.’ As relevant in this case, it requires business establishments to provide ‘full and equal accommodations, advantages, facilities, privileges, or services’ to all persons notwithstanding their sexual orientation. Accordingly, the First Amendment’s right to the free exercise of religion does not exempt defendant physicians here from conforming their conduct to the Act’s antidiscrimination requirements even if compliance poses an incidental conflict with defendants’ religious beliefs.’

COMMENTS & QUESTIONS

1. What was the relationship between Guadalupe Benitez and Christine Brody?
2. Did Dr. Brody refuse Benitez all forms of medical treatment?
3. Whom did Benitez see when Dr. Brody was on vacation? What procedure did the doctors refuse to perform on her?
4. Did Benitez ever get pregnant?

California law offers broad protection against discrimination by business establishments, guaranteeing all persons in the state “full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” This law is the California Unruh Civil Rights Act. It is much broader than similar laws in other states. While some similar state laws protect primarily or only against race discrimination, California’s law bans discrimination on the basis of sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation. For purposes of this case, there was no question as to whether discrimination based on sexual orientation was covered. The law expressly banned sexual orientation discrimination. Do you think that such a wide reaching law is good public policy? Would you exclude any of the stated categories from the law? For example, why is national origin covered?

The California law applies to “any business establishment”. Do you think that medical doctors should be included within the definition of business establishments? Obviously, the court concluded that medical doctors are covered by the act. If a medical doctor offers a particular treatment to one individual, they cannot discriminate in violation of the Unruh Act to deny the treatment to another. The doctors had to provide full and equal access to all patients. Do you think it is good public policy to require doctors to make such a decision? Should doctors be treated differently? Or is this case similar to a restaurant that would refuse to serve food only to white people?

In this case, the doctor’s fundamental freedom of religion is involved. Do you think that the antidiscrimination law should trust the doctor’s fundamental freedom of religion right? The effect of the California law is to promote tolerance. For example, people are not to discriminate against black people. Men are not supposed to discriminate against women. Heterosexuals are not to discriminate against homosexuals. Do you think it is fair for Benitez to demand that her homosexual lifestyle be tolerated, but she does not tolerate the religious beliefs of her doctor?

Should it make any difference that this was a nonessential, elective procedure? Should a more flexible standard apply?

Would the doctors be able to discriminate on the basis of marital status? What if the doctors only performed this fertility procedure on married women? Would such a distinction be allowed?

Can you think of some situations where a claim of religious freedom might allow discrimination?
South Carolina 19 Year-Old Could Own Handgun

**SUMMARY:** A South Carolina law prohibiting people under 21 from owning handguns violated the state constitutional provision granting full rights to citizens aged 18 and older. The South Carolina Supreme Court decided *State v. Bolin* on May 19, 2008.

**BACKGROUND:** In 2006, Berry Bolin was attending a party in Clover, South Carolina. A car arrived and shots were fired. The car's back window was shot out and Bobby Hovis and Travis Falls, passengers, were hit. Falls suffered a gunshot wound to the wrist. Hovis was shot in the back of the head and died from the injury.

Police identified 19-year-old Berry Bolin as the man who shot Hovis and Falls. He was indicted for murder, assault and battery with intent to kill, possession of a firearm during commission of a violent offense, assault with intent to kill, discharging a firearm into an occupied vehicle and possession of a handgun by a person under 21 years of age.

Bolin moved to quash the indictment for possession of a handgun by someone under 21. He argued that the law violated two provisions of the state constitution: his right to keep and bear arms, and his right to full legal rights and responsibilities as a person 18 or older.

The trial court granted the motion to quash and the State appealed. The South Carolina Supreme Court granted review.

**ANALYSIS:** There is a hierarchy to laws in the states and the federal government. Constitutions are the foundational documents for both entities, establishing the boundaries within which all laws and regulations within the jurisdiction must fall. A state law that contradicts rights granted in the state constitution is void. Because, under the Supremacy Clause, the federal Constitution is the highest law in the land, no federal or state law or state constitution may impinge rights granted by the United States Constitution.

Bolin brought his claims only under the state constitution. The state legislature had passed a handgun law forbidding anyone to provide a handgun to a person under 21. (There was an exception in the law for guns used by South Carolina citizens performing military service.)

That law, Bolin argued, violated two of his state constitutional rights. South Carolina has a provision identical to the U.S. Constitution's Second Amendment forbidding infringement of the right to bear arms because they are necessary for militia service. Bolin asserted that this provision prohibited the state legislature from outlawing his ownership of a handgun.

Bolin also provided a second argument for finding the handgun law invalid. Another provision of the state constitution accords full adult rights to persons when they reach the age of 18. Persons 21 or older were allowed to own handguns in the state. Bolin argued that to deny him the right to own a handgun at the age of 19 violated this constitutional provision. The legislature could not deny him that constitutional right.

The court rejected Bolin's first argument. The disputed law did not forbid persons under 21 from owning guns altogether. It forbade only handguns for citizens in this age range. Because Bolin had a right to own other types of guns, such as rifles or shotguns, he still enjoyed the right to keep and bear arms. He just did not enjoy the right to bear a handgun.

However, the court accepted Bolin's second argument. The constitutional provision granting full adult rights to persons age 18 or over excepted only alcoholic beverages. It did not limit gun ownership. Finding the handgun law in conflict with the state constitution, the court ruled it invalid and affirmed the motion to quash.

**EXCERPTS FROM THE COURT'S OPINION** (By Justice Moore): "When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution.

"Section 16-23-30(A) provides:

1. it is unlawful for a person to knowingly sell, offer to sell, deliver, lease, rent, barter, exchange, or transport for sale into this State any handgun to . . . a person under the age of twenty-one, but this shall not apply to the issue of handguns to members of the [military or other like organizations or to those receiving instruction on handgun use under the immediate supervision of a parent or adult instructor].

2. Subsection (B) states that '[i]t is unlawful for a person enumerated in subsection (A) to possess or acquire handguns within this State.'

3. Respondent argues that because he was old enough to be sui juris and the state constitution granted him the right to bear arms, then he could not be charged with a crime for handgun possession.

4. The portions of § 16-23-30 regarding persons under the age of 21 do not violate the constitutional right of a person under the age of 21 to keep and bear arms. While a person under the age of 21 is prohibited from possessing a handgun, except in certain circumstances, this does not prevent a person under the age of 21 from possessing other types of guns. Our constitution simply requires that a person's right to keep and bear 'arms' not be infringed upon. The legislature's regulation of who may have access to handguns does not infringe upon that right because persons under the age of 21 have access to other types of guns. Accordingly, § 16-23-30 does not violate S.C. Const. Art. I, § 20, regarding a person's right to keep and bear arms.

5. Respondent further argues that § 16-23-30 violates the state constitution because the age group of 18-20-year-olds is being treated differently than adults aged 21 and above. South Carolina Const. Art. XVII, § 14, provides:

6. Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed sui juris and endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

"Article XVII, § 14, specifically makes reference to the fact the General Assembly can restrict the sale of alcoholic beverages to persons until age 21. By expressly allowing the regulation of the sale of alcoholic beverages to the 18- to 20-year-old age group and not stating any other situation in which the General Assembly may restrict the rights of this age group, the state constitution precludes the General Assembly from prohibiting this age group's possession of handguns."
COMMENTS & QUESTIONS

1. Who were Bobby Hovis and Travis Falls?
2. Under what authority did Bolin challenge the handgun indictment?
3. Does South Carolina adhere to the Second Amendment?

Federal and state constitutions do not tolerate most forms of discrimination. The government cannot, for example, pass a special tax on people under five feet tall or require people of Irish descent to wear green arm bands or prohibit men with beards from voting. A few forms of discrimination are allowed, however. People deemed “incompetent” may not enter legally enforceable contracts and may be excluded from jobs and government positions on that basis.

Constitutions will also tolerate discrimination against children. Children cannot vote, they cannot buy or consume alcohol, they cannot drive cars or pilot planes, they cannot decide not to attend school. Age is considered a form of incompetence under the law. Because of their short time in the world, children lack the knowledge and experience to make informed decisions and granting them full rights could cause them to be exploited or to injure themselves or others.

Bolin argued—and the court agreed—that the state law prohibiting him from owning a handgun was unconstitutional under provisions of the South Carolina constitution. Actually, it is a fairly straightforward case. If you look at the law, it expressly conflicts with the controlling constitution. From that perspective, it is not a very difficult case to decide. However, there are some other issues that arise when you are talking about the rights and responsibilities of 18 to 21-year-olds.

The South Carolina state constitution grants full rights to 18-year-olds with the exception of alcohol. If it is appropriate for the Legislature to stop a 19-year-old from having a Budweiser, why wouldn’t it be appropriate under the same power to prohibit the same 19-year-old from having a semi-automatic pistol? On the other hand, it has been said many times, “if you are old enough to go to war, you are old enough to drink”.

After this case, South Carolina law (including its constitution) allows a 19-year-old to own a handgun but not to buy a beer. Is that logical? Which offers a greater benefit to the teenager? Which poses a greater threat? What are the meaningful differences between guns and alcohol that cause legislatures to draw different age limitations regarding them?

Do you think there are public safety or self-defense considerations in allowing an 18-year-old to own a handgun? What about a 19 year old female who works in a service station in the evenings? Should she be able to possess a handgun for her own protection?

Do you think there should be any age limits on the possession of handguns? South Carolina is one of 18 states to have set a 21 year old limit. Wyoming has no age limitations for the possession of handguns. In Montana, the age limit is 14. In Vermont, the age limit is 16.

One interesting aside to this case is the fact that although the new law in South Carolina lowers the age for legal possession of a handgun, it does not trump federal law banning those younger than 21 from buying handguns.

Do you think that the age of adulthood should be lowered to 18, including alcohol and everything?