Debashish Bakshi [dbakshi@uchastings.edu]
First Annual Dean & Chancellor's Essay Contest
March 14, 2016

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 15-___

CITY AND COUNTY OF SAN FRANCISCO,
PETITIONER
v.
RICHARD JOSEPH SMITH.

[March 14, 2016]

JUSTICE SCALIA, with whom CHIEF JUSTICE ROBERTS, JUSTICE ALITO, and JUSTICE THOMAS join, dissenting.

Be warned: the majority's opinion is flat-out flimflam. While this Court claims "not [to] overturn our precedent in *Heller v. District of Columbia*," it simultaneously admits to "overrul[ing] the basic principles of *Heller*." But just as a bread bowl is not a full loaf, we cannot pretend to preserve precedent while hollowing out its very core. Worse yet, the Court has filled our sourdough with a fishy concoction of questionable origin. Do not bite.

"Overruling precedent is never a small matter. *Stare decisis* – in English, the idea that today's Court should stand by yesterday's decisions—is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015) (citation omitted). "[This doctrine] promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

"While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and *only* when the Court has felt obliged 'to bring its opinions

into agreement with *experience and with facts newly ascertained*.'" *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (emphases added) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

Indeed, "an argument that we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then." *Kimble*, 135 S. Ct. at 2409. To that end, "[t]o reverse course, we require as well what we have termed a '*special justification*' – over and above the belief 'that the precedent was wrongly decided.'" *Id.* (emphasis added).

So *surely* my esteemed brothers and sisters must have had a compelling reason to make such an erratic detour. In 2008, we held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation" because the amendment "codified a pre-existing right." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). But in the last eight years, what "experience" has the Court gained on this issue that would explain their departure? Or which "facts newly ascertained" support the majority's position that the Second Amendment is now idiosyncratic to militias? After thoroughly scanning the opinion for the requisite special justification, here is what you will find: bupkis. Instead, gaze upon a betrayal of principle that would turn Benedict Arnold a deep shade of beet-red.

Per *Heller*, the San Francisco ordinance plainly violates the Second Amendment. While the law likely passes muster for its prohibitions on heavy weaponry, it is invalid as a matter of law for its restrictions on the ability of citizens to possess and carry firearms for traditional lawful purposes.[1] In fact, the provision requiring that registered firearms are "unloaded and dissembled or bound by a trigger lock or similar device" outside of business and

[1] We recognized States may place historically consistent limitations on "unusual and dangerous weaponry" that have no lawful self-defensive purpose. *Heller*, 554 U.S. at 627. Indeed, federal law already restricts machineguns despite their use in modern warfare. *See id.* at 624.

recreation is nearly identical to the District of Columbia's ban that the Court struck down.

Given that we settled this matter years ago, I need not waste time, space, or energy explaining why the majority here is wrong on the language and history of the Second Amendment. But if the Court's strained reasoning sounds familiar, it should be: the majority are now peddling the same faulty wares as it did when it was *Heller*'s minority view. And just as the minority did eight years ago, today's rehash artificially constrains an enumerated right that is engrained in our culture. In light of *stare decisis*, my colleagues do not get another bite at the apple simply because Justice KENNEDY turned coat. So in absence of a principled and logical justification, why is the Court so keen to jettison the People's right to keep and bear arms?

"Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members." *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting). Just as *Obergefell v. Hodges* "[stood] for nothing whatever, except those freedoms and entitlements that this Court *really* likes," 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting), today's decision is about those constitutional rights that the majority *really* dislikes. As with the Court's personal disapproval of the death penalty in *Atkins*, the majority here have made clear their abundant distaste and disregard for guns, gun ownership, and gun culture. Never mind that generations of law-abiding Americans have chosen to keep and bear arms to protect themselves, their families, and their property. What is more important, of course, is that Our Rulers have spoken: guns make us feel *icky*, so your inalienable rights are now expendable privileges.

"The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize." *Board of County Commissioners v. Umbehr,* 518 U.S. 668, 711 (1996) (Scalia, J., dissenting). And I doubt that those proud men who wrote our charter of liberties would recognize it either. Perhaps one day the United States will descend into European-style

statism that is presumptively distrustful of its own people and actively denies them any means to defend themselves in a dangerous world. But so long as I sit on this bench, I will take no part in this systematic evisceration of our most cherished American values.