

In

District of Columbia v. Heller,

**Does a "collective rights" view of the Second Amendment breach
Montana's contract for statehood?**

The United States Supreme Court (Court) will soon consider *D.C. v. Heller*, on appeal from the D.C. Circuit Court of Appeals. The Court has agreed to resolve the narrow issue of: "Whether D.C. laws violate 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."

Although having narrowed the question under consideration, the Court must necessarily confront and decide whether the Second Amendment to the United States Constitution secures an individual right to keep and bear arms, or a collective right for states to arm their National Guards.

Viewing this question from the perspective of geographically diverse citizens, the current state of law is different, depending on where the citizen lives. The various federal circuit courts of appeals have ruled differently on this question, causing the Second Amendment to mean something quite different for a person residing in San Diego, California than it does for a person residing in San Diego, Texas. To resolve this difference is at least part of what will result from the Court's consideration of *Heller*.

About the facts in *Heller* much has been written. It is not necessary to reproduce that discussion here, nor the many arguments to be made persuasively by other.

What is important here is that what the Court rules in *Heller* will have import far beyond the narrow focus of the Court's declared intent. The Court's ruling will have an impact on all states, and upon all people living those states. It is the purpose of this essay to disclose one considerable impact that may not be apparent unless this argument is advanced to the Court.

Although the argument made here is specific to the State of Montana, this argument may be valid for most, if not all, other states.

Synopsis of argument

A collective right interpretation of the Second Amendment by the Court would breach Montana's Compact with the United States, a contract entered into in 1889, a time when no authority seriously held a collective right view and therefore no part of the intent of the contracting parties.

Compact with the United States

When Montana entered into statehood, that event was accomplished via the legal mechanism of the Compact with the United States, now preserved at Article I of the Montana Constitution[1]. Other documents which will enter into this discussion include the Organic Act[2], the Enabling Act[3], Ordinance 1[4], and the Proclamation of Montana statehood by president Harrison[5].

Montana's Compact with the United States (Compact) is a bilateral, written contract or agreement that binds the parties thereto. Compact defined: Bouvier's, 1839[6]; Bouvier's, 1856[7]; Webster's, 1884[8]; and Black's, 1910[9]. "The terms 'compact' and 'contract' are synonymous. Green v. Biddle, 8 Wheat. 1, 92, 5 L, ed. 547."

The only difference between a compact and a contract in any reasonable usage of the terms as they apply here is that a compact is more generally an agreement between or among states.

Montana's Compact shares many points in common with usual, bilateral contracts. It includes competent parties, subject matter, legal considerations, mutuality of agreement, and mutuality of obligation.

In this context, the term compact also has considerable overlap with the term "treaty." For some aspects of consideration of the effect of a compact, treaties are more nearly analogous, because treaties are always between nations or states, or the treaty-making authorities of nations or states. Further, treaties often contemplate a longer time span than usual contracts, as does Montana's Compact. Treaty defined: Black's, 1910[10]; and Bouvier's. 1856[11].

It is a bedrock principle of contract interpretation that contracts must be interpreted so as to give credence to the intent of the contracting parties. This principle is so well established as to need no elaboration here. The same principle applies to treaties. From Bouvier's Law Dictionary of 1914, "Treaties should be liberally construed, so as to carry out the apparent intention of the parties to

secure equality and reciprocity between them; *Geofroy v. Riggs*, 133 U.S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642. When made with an Indian tribe its words are to be construed as an Indian would understand them; *Jones v. Meehan*, 175 U.S. 1, 20, Sup. Ct. 1, 44 L. Ed. 49." and "While they are to be liberally construed, they are to be read in the light of conditions existing when entered into, with a view to effecting the objects of the parties; *Rocca v. Thompson*, 223 U.S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453."

Intent of the contracting parties

When Montana entered into statehood and adopted the Compact as a part of the Montana Constitution of 1889[12], included was a provision guaranteeing the right to bear arms to "any person." [13]. The right to bear arms reservation was at Article III, Section 13 of the 1889 Montana Constitution. This was exactly the same language as used in the territorial Montana Constitution of 1884[14]. The language was unchanged in the revision and readoption of the Montana Constitution in 1972, with the RKBA provision being lodged at Article II, Section 12[15].

To be clear, the wording of the right to bear arms reservation in the Montana constitution is exactly the same today as it was in 1884, and as it was in 1889 upon adoption of the Compact. This reservation of right clearly and unambiguously contemplates an individual right for "any person," language that simply cannot be respun to somehow mean a right of state government. As the Montana Supreme Court has said, the individual rights reserved by the people to themselves in the Montana Constitution are specifically a direct bar to government actors. (*St. v. Long*, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985)) This is contradictory to any theory that when the people of Montana reserved themselves this right they somehow meant to confer authority to government actors.

Militia Act of 1903 was the beginning of the National Guard and directed the federalization of the National Guard. "The National Defense Act of 1916 ... transformed the militia from individual state forces into a Reserve Component of the U.S. Army - and made the term "National Guard" mandatory". [16] Since the National Guard was not invented or authorized until after 1900, there could have been no understanding in 1889 that the purpose of the Second Amendment was to authorize the states to arm the National Guard.

According to the Organic Act[2], the people of the Montana Territory were required to devise a constitution that met certain requirements in order for Montana to become eligible for statehood.

Therefore, Congress, acting as agent for the several states, had full opportunity to review the proposed Montana Constitution as a result of passing the Enabling Act (February 22, 1889) [3] that allowed Montana to become a state. That is, Congress knew full well that the people of Montana had reserved the right of "any person" to bear arms, and found that reservation not inconsistent with the federal system and the Second Amendment. "It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties." (Rocca v. Thompson, 223 U.S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453.)

Further, before Montana was allowed statehood, and as a part of the contract, the Montana territorial legislature, on behalf of the people of Montana, was required to approve Ordinance 1[4]. In its fifth paragraph, Ordinance 1 declared, " Fifth. That on behalf of the people of Montana, we in convention assembled, do adopt the constitution of the United States." This adoption was on February 22nd, 1889. Certainly, the Second Amendment, in the exact same verbiage as it occurs today, was a part of the "constitution of the United States" that was adopted and accepted by Montana in 1889 via Ordinance 1.

In the proclamation of Montana statehood, by President Benjamin Harrison, dated November 8, 1889[5], President Harrison specified that Montana had been required to prepare and adopt a constitution that "not be repugnant to the Constitution of the United States ...". Further, he declared, "Now, therefore, I, Benjamin Harrison, President of the United States of America, do, in accordance with the provisions of the act of Congress aforesaid, declare and proclaim the fact that the conditions imposed by Congress on the State of Montana to entitle that State to admission to the Union have been ratified and accepted and that the admission of the said State into the Union is now complete." It was accepted in contract that in Montana, "any person" had the right to bear arms.

Conclusion

In 1889, Montana and the other several states entered into a contract - struck a bargain. That contract was reduced to writing and is found today as Montana's Compact with the United States and is recorded at Article I of the Montana Constitution. That contract has not been amended. In that contract, via adoption of the corollary and required Ordinance 1, Montana adopted the U.S. Constitution, definitely including the second amendment. Congress and the President, acting

as agents for the states, allowed Montana into the union contingent upon Montana proffering an acceptable state constitution. That constitution, as it was accepted by Congress and the President, included the reservation of the right of "any person" to bear arms, a clearly individual right maintained and asserted today in exactly the same verbiage used in 1889.

There is no question that the contract into which Montana entered for statehood was predicated upon an understanding that the people of Montana would benefit from an individual and personal right to bear arms, protected from governmental interference by both the federal and Montana constitutions. That was the clear intent of the parties to the contract.

Therefore, any holding that the second amendment merely gives the power to the state to arm its National Guard or other state's militia would violate Montana's contract, because it would be in conflict with the intent of the parties of the contract, at the time the parties entered into that contract.

Some speak of a "living constitution," the meaning of which may evolve and change over time. However, the concept of a "living contract," one to be disregarded or revised at the whim of one party thereto, is unknown. A collective rights holding in *Heller* would not only open the Pandora's box of unilaterally morphing contracts, it would also poise Montana to claim appropriate and historically entrenched remedies for contract violation.

End

Endnotes

[1] Montana Constitution, Article I: "All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana."

[2] Organic Act:
http://www.leg.mt.gov/content/mtcode_const/organic_act.pdf

[3] Enabling Act:

http://www.leg.mt.gov/content/mtcode_const/enabling_act.pdf

[4] Ordinance 1:

<http://www.umt.edu/law/library/Research%20Tools/ORDINANCE%201.doc>

[5] Proclamation: <http://courts.mt.gov/library/proclam.pdf>

[6] Bouvier's Law Dictionary, 1839; "COMPACT, contracts. In its more general sense, it signifies an agreement; In its strict sense, it imports a contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. Story, Const. B. 3, c. 3; Rutherf. Inst. B. 2, c. 6, 1. 2."

[7] Bouvier's Law dictionary, 1856; "COMPACT, contracts. In its more general sense, it signifies an agreement. In its strict sense, it imports a contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. Story, Const. B. 3, c. 3; Rutherf. Inst. B. 2, c. 6, 1. 2. The constitution of the United States declares that " no state shall, without the consent of congress, enter into agreement or compact with another state, or with a foreign power." See 11 Pet: 1; 8 Wheat. 1 Bald. R. 60; 11 Pet. 185."

[8] Webster's Unabridged Dictionary, 1884; "Com'pact, n. [Lat. compactum, from compacisci, compactum, from com, for con, and pacisci and pangere.] An agreement between parties; covenant or contract; - either of individuals, or of nations.

"The law of nations depends on mutual compacts, treaties, leagues &c. Blackstone.

Wedlock is described as the indissoluble compact. Macaulay.

"Syn. See COVENANT."

[9] Black's Law Dictionary, 1910; "COMPACT. An agreement or contract. Usually applied to conventions between nations or sovereign states.

"A compact is a mutual consent of parties concerned respecting some property or right that is the object of the stipulation, or something that is to be done or forborne. Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1.

"The terms "compact" and "contract" are synonymous. Green v. Biddle, 8 Wheat. 1, 92, 5 L, ed. 547."

[10] Black's Law dictionary, 1910; "TREATY. In international law. An agreement between two or more independent states. Brande (Brande's Dictionary of Science. GM). An agreement, league or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state. Webster; Cherokee Nation v. Georgia, 5 Pet. 60, 8 L. Ed. 25; Edye v. Robertson, 112 U.S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; Holmes v. Jennison, 14 Pet. 571, 10 L. Ed. 579; U.S. v. Rauscher, 119 U.S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425; Ex parte Ortiz (C.C.) 100 Fed. 962."

[11] Bouvier's Law Dictionary, 1856; " TREATY, international law. A treaty is a compact made between two or more independent nations with a view to the public welfare treaties are for a perpetuity, or for a considerable time. Those matters which are accomplished by a single act, and are at once perfected in their execution, are called agreements, conventions and pactions."

[12] Montana Constitution, 1889:
<http://courts.mt.gov/library/1889cons.pdf>

[13] "Right to bear arms. The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons."

[14] Montana Constitution, 1884:
<http://courts.mt.gov/library/1884const.pdf>

[15] Montana Constitution 1972;
http://leg.mt.gov/css/mtcode_const/const.asp

[16] National Guard:
http://en.wikipedia.org/wiki/Militia_Act_of_1903