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The Federal Courts and Constitutional Interpretation

A Second Amendment Case Study

Mark Kemper



During the recent presidential election campaign, political commentators and voters speculated on the type of jurists that the candidates would, if elected, nominate to serve in the federal judiciary.

Unsurprisingly, since it sits at the apex of the federal judiciary, most attention was placed on the type of Supreme Court justices the candidates would select. At the moment, 5 members of the Supreme Court are age seventy or older, so there is a significant likelihood that President-elect Barack Obama will have the opportunity to nominate at least 1 or 2 persons to fill vacancies on that court. And, on a court that has decided many of its most important cases over the last several years by either 5–4 or 6–3 votes, altering the direction of 1 or 2 votes is important; it means that Mr. Obama’s ability to influence the direction of constitutional policy enunciated by the Supreme Court (and the federal judiciary in general) could be immense.

Concern with how the new president can, through his nominations of federal judges, influence the nation’s public policy was on display at one campaign event at which both candidates appeared, and during which the host asked the candidates which members of the current Supreme Court he would not have nominated. The answers were telling. Barack Obama said he would not have nominated Clarence Thomas because he did not think that Justice Thomas possessed the distinguished legal resumé to merit an appointment to the U.S. Supreme Court. One might speculate on why Mr. Obama, the more liberal of the two major party candidates running for president, chose Justice Thomas. Is it because Justice Thomas happens to cast more conservative votes than any other member of the current Supreme Court? In contrast, John McCain said that he would not have nominated Justices Ruth Bader Ginsburg, Stephen Breyer, David Souter, and John Paul Stevens. These justices, perhaps (not) coincidentally, are the 4 who cast the most liberal votes in cases, and thus constitute the entire left flank of the current Supreme Court.

What do these answers provided by Obama and McCain say about the presidential candidates’ views (and, by extension, the views of public officials in general) about the proper role of courts in our political

system, about how courts should decide cases, and about the type of judicial philosophies that judges should possess? In particular, are presidents and members of the U.S. Senate (the body that must confirm, by a majority vote, a president’s nominations to fill vacant judgeships) interested in finding the most qualified and capable jurists? Or, alternatively, are presidents, senators, and their political supporters more concerned with finding individuals who have a propensity to decide cases consistent with a favored political ideology? Perhaps political elites believe that both goals are possible, and that judges who use the “proper method” of judicial decision making—and thus fulfill the definition of “qualified and capable”—will have a natural propensity to decide cases consistent with a particular political ideology?

To help answer these questions, one must first identify the various types of methods that one would want judges to use when identifying and interpreting the laws that are relevant to the resolution of cases appearing before their respective courts. This is a substantial undertaking. In an effort to make it more manageable, we can narrow our focus to identifying the methods that we think judges might use when they interpret constitutional provisions. After all, many people are most concerned with the authority that judges have to interpret the U.S. Constitution and the power that that gives them to shape public policy in the United States. So this seems like a good place to start.

What types of legal methods, or “tools,” might judges use to interpret constitutional provisions? What devices do they have in their “tool box of constitutional interpretation”? There are many possible interpretive tools, but many students of law agree that a focus on a constitution’s text, its original understanding at the time it was enacted, legal precedent (i.e., case law), and the nation’s historical practices and traditions are



legitimate factors for consideration by judges. Legal scholars might disagree about how much each of these interpretive tools should be emphasized, as well as what constitutes the proper use of each tool, but they typically agree that such tools constitute valid methods for interpreting constitutional provisions. More controversial are the arguments encouraging judges to incorporate into their constitutional decisions the latest developments in political, economic, and moral philosophy, general pragmatic considerations about what constitutes “good public policy,” the domestic legal policies of foreign nations, and the various treaties and agreements that comprise the vast realm of international law.

The U.S. Supreme Court’s decision in *District of Columbia vs. Heller*, announced on June 26, 2008, provides a useful example of the justices using several of these tools of constitutional interpretation. Since the Court was divided over the proper resolution of the case, the *Heller* decision also illustrates how the justices can use the same methods of constitutional interpretation to reach starkly different conclusions about the correct interpretation of the law. At issue in *Heller* was a District of Columbia regulation that prohibited individuals, outside of a few narrow exceptions, from possessing handguns either on their person or in their homes. *Heller*, a resident of the District, wanted to carry a firearm as well as keep it in his home, and so he instigated a lawsuit in which he asked the courts to issue an injunction prohibiting the District from enforcing its firearms regulation against him and other similarly situated residents.

The U.S. District Court for the District of Columbia dismissed *Heller*’s claim, after which he appealed to the U.S. Court of Appeals for the District of Columbia. The appellate court subsequently ruled in his favor by arguing that the Second Amendment to the U.S. Constitution protects an individual’s right to possess firearms, and that the D.C. handgun regulation was in violation of this right. The District of Columbia appealed the case to the U.S. Supreme Court and that court affirmed the Circuit Court’s ruling, concluding that individuals have a constitutional right to possess handguns in their homes and that complete bans on such possession are unconstitutional. Let’s take a closer look at how the majority and dissenting opinions in the case used several of the interpretive tools mentioned above to justify their very different conclusions about the proper construction of the Second Amendment.

CONSTITUTIONAL TEXT

Not surprisingly, most people agree that an examination of the Constitution’s text is the first place to start in a

case involving a constitutional challenge to governmental actions. But, if one is seeking clarity, the Constitution’s text can often disappoint. In fact, even the provisions of the document that appear clear on first inspection turn out to be fraught with potential ambiguity. For example, the Constitution says that the President must be 35 years of age. Simple enough. But how do we know what constitutes the proper method for calculating the age of a person running for that office? When, precisely, does the age clock start? The text of the Constitution does not tell us. This means that we will have to go outside of the text to derive meaning from even the most “simple” constitutional provision.

Of course, this problem is compounded when the text is manifestly ambiguous. The Second Amendment is this type of text. As that amendment 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.” In *Heller*, the majority argued that settled principles of legal interpretation in the United States require that the amendment be construed by placing primary emphasis on the operative clause that addresses the right of the people to “keep and bear Arms,” and that the prefatory clause discussing a “well regulated Militia” should be examined only to the extent necessary to clarify ambiguities in the operative clause. The one caveat is that judges should not interpret the operative text in a way that contradicts the prefatory text.

So here we see the majority drawing instantly from something outside of the text (i.e., the interpretive rule about how judges should treat prefatory and operative provisions in laws) to provide meaning to the Second Amendment. The majority went on to argue that, because there were no ambiguities in the meaning of the operative clause given its original understanding at the time of enactment (more on this below), the prefatory clause had limited impact on the proper resolution of this case. The majority also argued that the consistency requirement between the prefatory and operative clause was also satisfied, for recognizing that the operative clause protects an individual’s right to keep and bear arms is not inconsistent with the prefatory clause’s focus on well-regulated Militias. After all, citizens who possess firearms in their homes can readily participate in a citizen militia.

In contrast, the dissenting justices thought that the prefatory and operative clauses should be read together (particularly since they thought the operative clause was ambiguous), and that the meaning of the latter is strongly shaped by the former. According to Justice Stevens, the prefatory clause constitutes the overriding purpose of the Second Amendment, and that purpose

was to protect the state's interest in maintaining an armed militia comprised of its citizens. State militias would serve to counter any effort by the national government to institute a standing national army, and to use that army in a tyrannical fashion to destroy the sovereignty of state governments and the liberty of its citizens. The amendment was not designed, nor was it understood by citizens at the time of its enactment, to constitutionalize an individual right to possess firearms for one's personal defense.

ORIGINAL UNDERSTANDING

This brings us to the tool of original understanding. Justice Scalia, the author of the majority opinion, wrote in *Heller* that "we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." According to Justice Antonin Scalia and the other members of the majority, judges should interpret the words in constitutional provisions as they were generally and typically understood by ordinary citizens at their respective time of enactment.

After examining founding era dictionary definitions of words such as "keep," "bear," and "arms," along with the English common law, state constitutions, state and federal statutes, and legal commentary circa 1791, the *Heller* majority concluded that the Second Amendment was designed to protect both state militias and the individual's right to use firearms to defend one's home. The majority emphasized how the founding generation was aware of the historical tendency of governments to disarm their citizens and then, using standing armies, to impose tyrannical rule. And, again, since the possession of firearms was useful toward the maintenance of state militias and self-defense, there is no conflict between the prefatory and operative clauses of the Second Amendment.

Reviewing the same historical record as the majority, the four justices in dissent disagreed with the majority's conclusions about the founding era's understanding of the Second Amendment. In particular, they argued that the term "bear arms" was typically understood as bearing arms as a soldier in a military context, and that the term "keep" was inseparable from the term bear—



it did not add anything to the Second Amendment's sole purpose of protecting state militias. As such, the Second Amendment recognizes a collective right to keep and bear arms, not the individual right that the majority identifies.

The dissenting justices understood that individuals may keep arms in their homes as part of a well-regulated state militia so that they can "bear" them on a moment's notice when the militia is mustered as part of a defensive effort to keep the peace in the state. Yet because the drafters of the Second Amendment recognized that state militias need to be well regulated in order to be effective, they left it ultimately in the hands of state governments to decide how firearms should be distributed. As such, a state government (but not the federal government) has the authority to unilaterally limit the degree to which its citizens may keep arms in their homes; in fact, as Judge Richard Posner has noted, it might in some circumstances make more public security sense for the state to store arms at a central depot where they are easily retrieved rather than let them be scattered throughout the land in private homes. In short, the dissenting justices thought that the Second Amendment, as ordinarily understood at the time of its enactment, was designed to prevent the federal government from disarming state militias. Nor more, and no less.

LEGAL PRECEDENT

The *Heller* majority examined 19th century case law, and concluded that those "cases that interpreted the Second Amendment universally support an individual right unconnected to militia service." The majority also concluded that its interpretation of the Second Amendment was not inconsistent with the limited number of Supreme Court decisions interpreting that amendment. The most important of these precedents is

a 1939 case, *United States vs. Miller*, in which the Court unanimously held that an individual could be prosecuted for violating a federal law prohibiting the transportation of certain guns across state lines. In that case, Miller was prosecuted for transporting a sawed-off shotgun, and the Court upheld his conviction by emphasizing that the weapon was not one typically used in a military context. In reviewing this case, the *Heller* majority argued that the *Miller* decision was not inconsistent with the notion that individuals have Second Amendment rights to possess weapons for self-defense, as long as those weapons have a reasonable military use and are the type that are ordinarily possessed by the citizenry (thus, sawed-off shotguns, fully automatic machine guns, and shoulder-mounted rocket launchers would not qualify). The majority concluded that most handguns meet these two requirements.

In contrast, the dissenting opinion in *Heller* thought that the *Miller* precedent was based on the principle that the Second Amendment was designed to protect state militias, and that it did not in any way support the idea that individuals have the right to possess firearms independent from their participation in a state's militia. After all, the dissent argued, many firearms that do not have a common military use could be used to protect one's personal safety inside or outside of their home (including sawed-off shotguns, machine guns, and, conceivably, shoulder-mounted rocket launchers!). Therefore, the Second Amendment's sole mission must be that of protecting state militias, otherwise the *Miller* decision's focus on weapons that are suitable for military use does not make sense. If the amendment was designed to protect both state militias and provide for personal self-defense, then it would not be sensible for courts to recognize only those weapons that are useful for one of those purposes.

HISTORY AND TRADITION

The majority in *Heller* also spent considerable time examining 18th, 19th and 20th century laws, legal commentary and customs pertaining to the regulation of firearms. On balance, it concluded from its analysis that there was a long practice recognizing the individual's right to possess firearms—including handguns. Indeed, the majority emphasizes that a culture of handgun ownership has evolved to make handguns "the most popular weapon chosen by Americans for self-defense in the home." In dissent, Justice Breyer took issue with this approach. He wrote: "*According to the majority's reasoning, if Congress and the States lift restrictions on the possession and use of machine guns, and people buy machine guns to protect their homes, the Court will have to reverse course and find that the Second Amendment does, in fact, protect the individual self-defense-related right to possess a machine gun. On the majority's reasoning, if tomorrow*

someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning."

WHAT LEGAL DOCTRINE WAS ESTABLISHED IN *HELLER*?

In his dissent, Justice Breyer argued that the majority did not provide a clear enunciation of the rule or standard that it was using to reach its conclusion that the D.C. regulation violated the Second Amendment. Yet a variety of standards exist that the Court might have adopted. For instance, in some contexts courts will assess the constitutionality of governmental actions by applying what is known as the rational-basis test. When using this test, the court asks whether the government is acting in a way to promote its interests (which we hope, in a democracy, are aligned with the public's interests!) by (1) exercising its authority to promote government interests that are reasonably related to a power granted to the government in the Constitution, where (2) the law in question is rationally related to furthering those interests. This is a very deferential standard of judicial review and it normally results in a court upholding the constitutionality of the government's action. In *Heller*, the majority stated that the Second Amendment requires a standard more demanding than rational-basis review, but it declined to specify what that standard is.

Justice Breyer did not think that the majority was advocating the adoption of the most stringent standard of judicial review, commonly referred to as strict scrutiny (although the majority didn't explicitly say that it was not using this standard). This standard of review is used when a litigant challenges a government's actions by arguing that the government has infringed upon a fundamental constitutional right and/or acted on the basis of "suspect" classifications (e.g., the government has discriminated along racial/ethnic or religious lines). When using strict scrutiny, a court will evaluate whether the government has acted constitutionally by asking whether the government's actions are designed to promote a compelling state interest (not just an ordinary, hum-drum state interest), and whether its actions are narrowly tailored to promote that interest (e.g., does the government encroach upon the fundamental right or discriminate along racial or religious lines more than is necessary to effectively accomplish its compelling state interest). The court will declare the government's actions unconstitutional if it

concludes that the government is not seeking to further a compelling interest or if the law is not narrowly tailored to further that interest.

So, for the majority in *Heller*, the rational-basis test was not sufficiently protective of the individual's right to "keep and bear arms," while the strict scrutiny standard was seemingly too protective. Since the Court did not identify what standard of review or legal doctrine would be employed in Second Amendment cases, one can only guess that it is something in between rational-basis review and strict scrutiny. Justice Breyer argued, in dissent, that the Court should adopt an "interest balancing" approach by asking "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." But the majority did not think much of Justice Breyer's standard (referring to it as "judge-empowering" and a "freestanding" approach that provides "no constitutional guarantee at all" to Second Amendment rights), and instead explained that the standard of review in these types of cases will need to be developed over time, on a case-by-case basis, as the Court decides cases involving Second Amendment challenges to firearms regulations.

CONCLUDING THOUGHTS

The rule of law has many facets but one critical component is that neutral judges decide cases based on legitimate sources of law rather than their personal policy preferences or some other arbitrary, non-legal criteria. With this in mind, many of the tools of constitutional interpretation are designed to constrain the discretion that judges have when deciding constitutional cases. When judges encounter ambiguous constitutional text, they are expected to turn to things such as the text's original understanding, legal precedent, and historical practice and tradition—as opposed to considering their own ideological leanings or personal biases. In *Heller*, we see both the majority and dissenting justices attempting to utilize such tools, yet, in doing so, reaching very different conclusions.

One can speculate on why this is the case. For instance, one might surmise that these tools are merely window dressings designed to hide the fact that the personal policy preferences of the justices are the principal forces behind their votes. There is a significant body of research arguing—and supporting with empirical data—that this is indeed the case. Specifically, Judge Richard Posner has questioned the validity of originalism as a tool of constitutional interpretation by arguing that its results are typically the product of shoddy "law office history," and that it serves as nothing more than "the historicizing glaze on personal values and preferences." Yet Judge Posner does not offer an alternative

method for interpreting constitutional texts that does not have its own serious problems—particularly that of granting judges even more discretion than they have when using the methods discussed above.

What we did not see in *Heller* was a member of the Court resorting to some of the more controversial methods for deriving the meaning of constitutional text, such as by examining the domestic laws in other nations or those of the international order, by examining current social mores and opinions (although to some extent the *Heller* majority did this when it mentioned the prevalence of handguns in the contemporary United States) or by delving into the latest developments in moral and political philosophy. These criteria have been used by judges in other cases, but they often trigger intense opposition from critics who contend that the judges are exceeding their legitimate authority by not applying previously established laws, and that they are instead legislating from the bench (something that many find inappropriate behavior for life-tenured federal judges in a constitutional democracy premised on the rule of law).

In any event, one thing is clear: citizens need to pay more attention to what courts are doing and how judges attempt to justify and explain their decisions. Public officials and political activists have long recognized the importance of the judiciary and that is why we hear the courts being discussed so frequently during presidential campaigns. It also explains the vicious battles over judicial nominations that we have witnessed during the last 25 years. For better or for worse, the power that judges have to interpret the U.S. Constitution gives them the ability to radically shape the contours of public policy in the nation.

This is clearly demonstrated in the *Heller* case; the menu of gun regulation policies available to federal policy makers was truncated substantially by the Court's decision in that case (and if the decision is extended to cover state and local governments—as most suspect it will be—its effect on public policy will be even more pronounced). But other areas of public policy can be equally constrained (or unconstrained if the courts do not limit the scope of governmental power) by the constitutional decisions of courts. Consequently, it is imperative that citizens pay critical attention to the work of courts and judges if they want to preserve for future generations the rights and liberties of individuals, the republican system of government, and the core principles of the rule of law that are provided by the U.S. Constitution.

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