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A Right To Carry Everywhere, On A Road To Nowhere

By **Robert W. Ludwig** (August 10, 2018, 4:30 PM EDT)

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The first weekend in August, 74 Chicagoans were shot, 30 in five mass shootings over three hours, with 11 killed and 63 wounded overall, "the worst I've ever seen it" according to one officer.[1] Most or all involved handguns, whose possession a 5-4 U.S. Supreme Court in District of Columbia v. Heller[2] in 2008, for the first time in 200 years, found guaranteed by the Second Amendment. In 2010, striking down Chicago's handgun ban, an even more divided plurality in McDonald v. Chicago extended Heller to the states.[3] In 2012, Heller's right to "handgun possession" and "to carry it in the home," its odd precise holding,[4] was expanded to public carry by a divided Seventh Circuit panel that tossed out an Illinois carry ban.[5]

A week before Chicago's latest demonstration of mass gun violence, Heller's right "to carry in the home" was expanded to public carry by the Ninth Circuit, joining the Seventh and D.C. Circuits. A 2-1 panel in Young v. Hawaii,[6] conjecturing like Heller and scholars who deem the amendment "baffling," reasoned from its text that "keep" arms "implies a right to carry those arms to some extent," and "bear" arms "should therefore protect something more than carrying incidental to keeping arms," ergo "some level of carrying" for "conflict outside the home."[7] Judge Diarmuid O'Scannlain, who wrote the majority opinion, earlier held unconstitutional California's "good cause" requirement for concealed carry, overturned en banc in Peruta v. San Diego.[8]

Meanwhile, the Senate is considering the Supreme Court nomination of Judge Brett Kavanaugh, the dissent on a 2-1 D.C. Circuit panel[9] that upheld a ban on assault weapons like the AR-15s used in school massacres at Sandy Hook Elementary and Stoneman Douglas High. Judge Kavanaugh read Heller's "text" to mean, since "the vast majority of handguns are semi-automatic" and there is "no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles," it "follows" AR-15s are protected as "the most popular semi-automatic rifle."[10]

Too little noticed after Heller and McDonald declared a right to guns, proliferation and shootings skyrocketed, creating by 2015 what prior generations never had: a sudden "Gun Epidemic."[11] Proliferation exploded from 310 to 360 million, "now more guns than people,"[12] and gun deaths averaging 31,500 surged to "epidemic" levels at 36,252 in 2015, then to 38,658 in 2016.[13] Thanks to two court decisions, the nation has become an abattoir of worsening handgun violence (suicides, domestic violence, grievance shootings), daily mass shootings and weekly school shootings, triggering a March for Our Lives.

Celebrated as a "vindication" of "textual originalism" by the late Justice Antonin Scalia, Heller is more a testament to the folly of legal wordplay, and how that superficial doctrine is no substitute for "knowledge essential to understanding" that "should precede judging."[14] Judge Richard Posner, who wrote the Seventh Circuit decision on public carry, has otherwise called Justice Scalia's "dictionary-centered" doctrine "hopeless," and Heller "law office history" and a "snowjob." Yet "constrained" by Heller, Judge Posner acidly concluded a Chicagoan "has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress."[15]

To end the senseless epidemic, it's past time to turn a spotlight on its root cause: legal carelessness and oversights of text even nonlawyers can't miss. It's also time to recognize what even Judge Posner did not: Heller is no constraint. Whether because stare decisis does not apply where pivotal text is missed, or that and other obvious oversights warrant it be overruled 9-0 in the Supreme Court, the conclusion is the same: Heller can have no legal effect.

Most glaringly, Heller never addressed the meaning of the last clause and verb on which the amendment rests as pointed out in my prior articles, including "**The Historic Legal Blunder That Enabled Our Gun Epidemic**" (Law360, April 28, 2018). Instead, Justice Scalia transposed "shall not be infringed" to "abridged" ("Congress was given no power to abridge the ancient right of individuals to keep and bear arms"),[16] though not synonyms, like changing "shall not kill" to "maim." "Abridge," a forgotten term of art, was used in the First Amendment and every amendment since that protects individual rights. "Infringe," another term of art, was used in its classic sense to protect state sovereignty.

The District of Columbia's lawyers invited the error, asking the court to decide: "Whether [D.C. handgun laws] violate the Second Amendment rights of individuals," not whether they were "infringed" as written. Thus the court decided: "In sum, we hold that the District's ban

on handgun possession in the home violates the Second Amendment." Nor was the meaning of "infringed" briefed by the District, the appellees, or 60 amici curiae. Because Supreme Court decisions are bounded by the question presented, and the court did not consider the full text, Heller never decided the actual amendment.

Had Justice Scalia considered legislative history disdained by doctrinaire textualism, he would have found that the First Congress in drafting the First Amendment rejected the substitution of infringed for abridged. Or had he consulted some of his usual period dictionaries, or even his frequent co-author Bryan Garner's "Dictionary of Modern Legal Usage" he'd have found: "infringe on [read encroach or impinge on] British sovereignty" (Garner's emphasis and brackets), just what states feared Congress would do to their sovereignty over their militia.

Overlooking pivotal text is "probably the strongest reason for not following a decision," the California Supreme Court said in 2015 when correcting a 140-year oversight "announced in ignorance" of an 1872 statute, a "'remarkable failure of the adversary system,'"[17] like Heller. Noting "It is better that wisdom, or at least controlling authority, come to our attention late, rather than not at all," the court held that because "relevant language and history" was not addressed, its prior case "cannot stand." Having not addressed the full text, among many things in plain sight, there is no legal way Heller can stand.

Much of the problem is that lawyers and judges do not understand rudimentary founding history and concepts, even those still applied today. They blithely assume "infringe" protects a private right, as in "patent infringement." That, like all easy assumptions about the amendment, would be wrong. The authority? The justice who dissents most from refusals to review cases like Peruta that "flout" Heller, even rebuking his colleagues a week after the Stoneman Douglas High massacre for rendering the amendment a "constitutional orphan."[18] Justice Clarence Thomas wrote in April: "This Court has long recognized the grant of a patent is a 'matter involving public rights'" or "public franchises," not "private rights."[19] And Justice Thomas in February recognized the sovereign meaning of infringe, addressing whether Congress "infringed the judicial power" under Article III, where infringe isn't found,[20] still missing that meaning in the Second Amendment, where it is.

The effects of courts fiddling with the wrong term are devastating. Since Heller opened the floodgates, there have been 300,000 deaths and counting, half the Civil War carnage sparked by Dred Scott v. Sandford, with millions more wounded or traumatized. Citing "the slaughter caused by the prevalence of guns" in 2014, retired Justice John Paul Stevens stressed how "profoundly important" it is to recognize that Heller and McDonald "curtail the government's power to regulate the use of handguns that contribute to the 88 [now 96] firearm deaths every day."[21] Another legal travesty, Korematsu v. United States, was just renounced by Chief Justice John Roberts as "gravely wrong the day it was decided" and having "'no place in law under the Constitution,'" quoting dissenting Justice Robert Jackson.[22] Neither of those historic blunders missed constitutional text, like Heller.

Justice Jackson later warned "if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the Bill of Rights into a suicide pact."[23] Expanding Heller and its epidemic to public carry, as textualist courts insist, can only make more commonplace a mom pulling a gun over that last back-to-school item as went viral last August, or the customer shot dead over a parking space two weeks ago in Florida: practical results of mixing everyday grievances and conflicts with ready guns. More dystopian still would be a textualist Kavanaugh court that allows everyone who wants one an AR-15. Justice Oliver Wendell Holmes once said, "If my fellow citizens want to go to Hell" it was his job to "help them." Fortunately that is not what the amendment provides.

Heller's blunders are not only a serious legal and public safety problem, but an institutional one. The court's authority depends on public confidence, which is lost when it misses something as simple as constitutional text and leaves it uncorrected. Should the Ninth Circuit reconsider Young en banc as it did Peruta, the question should be not just whether Heller's odd right to carry in the home should be extended everywhere (in Hawaii or the Ninth Circuit, as in Chicago), but whether Heller prevents deciding the full Second Amendment, which plainly has nothing to do with an individual right.

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[1] Business Insider, Aug. 6, 2018.

[2] 554 U.S. 570 (2008).

[3] 561 U.S. 742 (2010),

[4] Heller, 554 U.S. at 635.

[5] Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012), reh'g en banc denied, 708 F.3d 901 (7th Cir. 2013).

[6] 2018 U.S. App. LEXIS 20525 (9th Cir. Jul. 24, 2018).

[7] Id. at *13-14.

[8] 742 F.3d 1144 (9th Cir. 2014), vacated en banc, 824 F.3d 919 (9th Cir. 2016).

[9] Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011).

[10] Id. at 1269-70, 1287.

[11] New York Times, Dec. 4, 2015.

[12] Washington Post, Oct. 5, 2015.

[13] See Centers for Disease Control and Prevention, "Fatal Injury Reports," Injury Prevention & Control: Data & Statistics (WISQARS), accessed Dec. 23, 2017 http://1.usa.gov/1plXBux'.

[14] Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting).

[15] Moore, 702 F.3d at 936, 937.

[16] Heller, 554 U.S. at 599.

[17] Fluor Corp. v. Super. Ct., 354 P.3d 302, 333 (Cal. 2015).

[18] Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting).

[19] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018).

[20] Patchak v. Zinke, 138 S. Ct. 897, 907 (2018),

[21] J.P. Stevens, "Six Amendments – How and Why We Should Change the Constitution" (2014).

[22] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

[23] Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).