Law360 Expert Analysis

Heller Sequels And 2nd Amendment, Still Undecided: Part 2

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Part 1 of this article discussed the absence of guidance a decade after D.C. v. Heller (2008), in which the U.S. Supreme Court "creat[ed] a new blockbuster" individual right to arms "not apparent to the court for over two centuries," as critiqued by Fourth Circuit Judge Harvie Wilkinson, but seems not to want "to deal with any of the more unpleasant consequences of such a right." As generally overlooked, the narrow 5-4 majority, lacking guidance from academics who consider the Second Amendment "baffling," and taking legislative "policy choices off the table," based its new "right" wholly upon implication and guesswork, perpetuating mass oversights. Also overlooked is another unpleasant consequence: Heller never decided the full amendment, namely the verb on which it rests, and can have no binding effect.

States Got What They Asked For

Overlooking the full text and other things, academics and the courts have been unable to explain something nearly as obvious: what the states demanded they got from its drafter James Madison and the First Congress.

Col. George Mason, militia leader and political thinker who drafted Virginia's widely emulated Declaration of Rights (1776), was one of three non-signers at the Constitutional Convention, explaining to Thomas Jefferson: "There are many other things very objectionable in the proposed new Constitution; particularly [Congress'] almost unlimited

Authority over the Militia of the several States[.]" He argued at the Virginia ratifying convention, in terms repeated in others: "Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c. ... Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? … I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline them."

Patrick Henry, wartime governor, militia leader and fiery defender of states' rights, warned the Virginia convention: "Your militia is given up to Congress … ; of what service would militia be to you, when, most probably, you will not have a single musket in the state?" Objecting to assurances that "the states have the right of arming" their militia, as left to implication and future dispute, he thundered: "implication will not save you, when a strong army of veterans comes upon you. You would be laughed at by the whole world, for trusting your safety implicitly to implication." Henry implored: "May we not discipline and arm them, as well as Congress, if the power be concurrent? … If gentlemen are serious when they suppose a concurrent power, where can be the impolicy to amend it? … This is my object. I only wish to bring it to what they themselves say is implied."

Mason drafted, and the Virginia convention proposed, both a declarative amendment ("That the people have a right to keep & to bear arms; that a well regulated Militia, composed of the body of the people, trained to arms, is the proper natural and safe defence of a free State"), and a corresponding structural amendment ("That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.")

Rep. Madison, denied a Senate seat and narrowly elected to the First Congress on the promise he would introduce amendments, honored Mason's request for an "express declaration" to "arm and discipline the militia" but ignored the structural amendment,

unwilling to alter the careful balance and compromises struck at the Constitutional Convention. His draft read: “The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” House and Senate committees and stylists inverted the first and second clauses, changed “country” to “State,” eliminated the conscientious-objector to "bear arms" clause, dropped “well armed” as redundant and tightened language. What resulted was the Second Amendment.

The above is well known, though generally misinterpreted (and incomplete). So too is the fact that Mason, whose leading objection to the Constitution was the absence of an explicit states’ right to arm their militia, expressed “much Satisfaction from the Amendments” he had a hand in drafting, including the Second Amendment.

But why were the generally expressed and extensively entertained fears of Mason and most Anti-Federalists (states’ rights advocates) quieted by the declaration alone, without the structural amendment? That question has never been answered. Instead it has been assumed away, like the term “infringed.”

Presumed Lost Record and Meaning

The record that might explain the amendment, while more extensive than assumed, is not what might otherwise exist for a founding institution. That is because the militia system, a republican alternative to a despised standing army, began an early march to obscurity as the amendment was being ratified. As early as 1776, Gen. George Washington had warned the Continental Congress that “to place any dependence on the Militia is, assuredly resting upon a broken staff,” noting “Men just dragged from the tender scenes of domestick life; unaccustomed to the din of Arms … when opposed to Troops regularly train’d, disciplined, and appointed … makes them timid, ready to fly from their own shadows.” Light-Horse

Harry Lee reminded the Virginia convention that “Cornwallis, instead of surrendering at Yorktown, would have laid down his arms at Guildford,” but “What did the militia do? The greatest number of them fled.” Alexander Hamilton argued in "The Federalist No. 25" that rather than a “natural bulwark,” militia doctrine nearly “lost us our independence. It cost millions … that might have been saved.”

Much of history is economic, like the myriad causes of the revolution, the founding, and even today’s gun epidemic (driven largely by the gun industry and its NRA trade group). Decades of “taxation without representation,” protested as “infringements” on the sovereignty of colonial legislatures, to pay for the French and Indian War, a theatre in the first world (Seven Years’) war, led to the revolt against imperial tyranny. Crushing war debt and taxes on unpaid veterans led to rebellions, including an “insurrection in Pennsylvania, whereby Congress was insulted … and left the state” (fleeing to New Jersey), and Shays' rebellion against Massachusetts taxes and farm foreclosures, seizing courthouses and nearly its Supreme Court and a federal armory, which led to the secret conclave known as the Constitutional Convention and the Constitution itself (with an express power to “suppress Insurrections”). Government insolvency also explains the indirect taxation experiment known as the Militia Act of 1792, abandoned in the next decade, which attempted to conscript militiamen to supply their own muskets and bayonets, rather than the states as previously required by the Articles of Confederation.

Then, a month before the amendment was ratified on Dec. 15, 1791, in one of the country’s worst, forgotten military disasters, an Indian confederation (bearing British muskets) wiped out nearly a third of the nation’s forces at today’s Fort Wayne after militiamen ran, leading to the first cabinet meeting by President Washington, congressional investigation, and creation of a standing army that became the U.S. Army. Its march was hastened by the War of 1812 (or “Mr. Madison’s War”) when 7,500 militiamen, fleeing 4,000 British regulars at the “Bladensburg Races,” thousands never firing a shot and overtaking President Madison en route, did not stop the burning of the Capitol (with the Supreme Court) and the White

House. Not long after, a young Illinois militia captain noticed the institution had been all but "ridiculed out of existence" like chivalry, "'laughed to death' by fantastic parades and caricatures" and mottos, for example "We'll fight till we run, and we'll run till we die," as Abraham Lincoln recounted in 1852.

Though a decade later President Lincoln called out the militia to suppress a southern rebellion, the institution soon "passed away in almost every State of the Union," already "a memory of the past" (Andrews v. State (Tenn. 1871)). As a result, Congress' Militia Clause power under the Constitution, partially exercised in the early 1790s, had largely "lain dormant" (Smith v. Turner (1849)). It did not vanish without telltale traces, as generally assumed.

Not Squaring the Circles

Opaqueness is not limited to the Second Amendment. As said of the Compact Clause: "Whatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost. In 1833" in his Commentaries on the Constitution, lacking "any clue as to the categorical definitions the Framers had ascribed to them, Mr. Justice Story developed his own theory" (U.S. Steel Corp. v. Multistate Tax Commission (1978)).

But academics never have been able to square the circles or mysteries of the amendment. Rather than re-examine assumptions, questions asked, and worn paths through their (abridged) founding record, the general tendency has been to blame the record, or the framers themselves, otherwise regarded as unparalleled political theorists and stylists.

Michael Waldman in "The Second Amendment, A Biography" suggested "the eloquent men who wrote … the First Amendment did us no favors in the drafting of the Second Amendment. One reason it was ignored for so long is that it is so inscrutable." That premise overlooks, among other things, the term of art "infringed" they invoked to protect state

sovereignty in the Second, doing the favor of making even clearer what should have been clear from other wording and the record. They likewise made clearer the First, when the Senate reinstated Madison's term "abridge" for protecting individual rights, rejecting the House substitution of "infringe" — an ungrammatical usage they would have called a "solecism."

Waldman offered another reason in asking "what did the Framers think" the amendment meant: "We are faced with a maddening paucity of explanation." That premise overlooks the extensive record that explains "infringed" and shines a revelatory light on original intent. It also fails to consider how the amendment soon became largely a relic, like the other military amendment on "quartering" soldiers in homes. Though not explained in ways academics wish, it was in telling ways generally overlooked.

The first circle academics have been unable to square is the amendment's (first two) seemingly contradictory clauses, or as Yale law professor Akhil Reed Amar asked: "How do the two main clauses with different subject nouns fit together?" That is, how does "A well regulated Militia, being necessary to the security of a free State," fit with "the right of the people to keep and bear Arms"? Or as Waldman wrote: "Start with the commas." Then, "modern readers are brought up short by 'well regulated.' And, "Who are 'the people'?" "Finally, what did 'keep and bear arms' mean?" "We cannot clearly know what the Framers intended."

Actually, we can. Professor Amar like others never considered the last clause and its transitive verb, whose past participle modifies those subject nouns. Waldman's biographical story ends with "Finally, what did 'keep and bear arms' mean?," reflecting the mass disinterest, even the least curiosity, over the actual "final" word, hiding in plain sight.

Verbs matter. The constitutional commands "shall not be infringed" and "shall not be abridged" have different meanings and are not even synonymous. Ignoring not just the

modifying verb, but a forgotten term of art connoting a sovereign right, academics and courts have assumed away the meaning of “infringe,” and with it the last half of 18th-century American history that explains it. Impermissibly transposing it to the solecism “abridge,” they’ve also assumed away that other term of art, connoting individual rights, and two centuries of constitutional history.

A second circle academics have not squared relates to Madison’s draft. “Why did Madison phrase it this way? We don’t know,” Waldman said. Actually, we do. What’s already apparent from the Virginia debates and congressional drafting is further shown by Madison’s addition of “shall not be infringed” to Mason’s draft declaration, and by other mass oversights.

A third circle relates to what the states got, and why it quieted the fears generally expressed and extensively entertained. When the states were given their requested declaratory amendment but not the corresponding structural amendment, why was no objection raised by Col. Mason, one of the few who refused to sign the Constitution citing that omission, or by most other Anti-Federalists?

Academics have been unable to say. Instead they assume the states didn’t get the right to arm militia they demanded, but only a “‘tub to the whale’ — a concession to popular discontent,” as Waldman concluded his story, citing no “popular discontent.” He earlier suggested in a chapter devoted to that metaphor that Federalists “did not give the Anti-Federalists the structural changes they sought, but rather steered public energy into something else,” not identifying the “public energy” or “something else,” either. Noting “The arms amendment drew little notice,” he cited only one instance implying the metaphor was directed at it, quoting Massachusetts Congressman Fisher Ames’ letter scorning “the small talk of [the state] debates” and Madison’s draft amendments generally, adding: “O. I had forgot, the right of the people to bear Arms.” Rep. Ames merely reflected the dismissive Federalist argument that an express states’ right to arm their militia was unnecessary, which

right of “the people” (“to keep and to bear arms”) went without saying as found in his own state constitution, limited to the “common defence” and “governed by” the "civil authority” of the “legislature,” a precursor to the terms of art and compressed wording of this “arms amendment” to the Militia Clauses, themselves subject to the “common Defence.” Waldman did note that “one would have to look far to find” evidence of concern over private gun use. So did Fordham University's Saul Cornell, observing “most eighteenth-century Americans did not fear that the individual right of self-defense might be threatened,” a fear neither generally expressed nor extensively entertained. This empty rationalization for not understanding, an easy out, is itself a “tub to the whale.”

Misleading Worn Paths to Understanding

Whether applying Justice Louis Brandeis’ precept, “Knowledge is essential to understanding; and understanding should precede judging,” or Justice Antonin Scalia’s dogmatic textual originalism, or the canons of construction lawyers are trained to apply, any approach requires a careful, critical review of primary sources, legal and historical. The more opaque the constitutional wording, certainly as to matters known at founding, the more searching must be the review.

As Justice Scalia explained in “Originalism, The Lesser Evil” (1989) it can be “exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material,” and “an evaluation of the reliability of that material — many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere … . It is, in short, a task sometimes better suited to the historian than the lawyer.”

Reliability is “a problem.” Besides ratifying debates, "Madison’s Notes," the most detailed source of the Constitutional Convention, covered but one-tenth and were “fiddled with” for a

“half century” before posthumous printing in 1840, as long suspected and examined by Boston College Law School professor Mary Sarah Bilder (“Madison’s Hand, Revising the Constitutional Convention” (2015)). The amendment debates in the First Congress were not recorded in the Senate. The House debates, published decades later in 1834, were transcribed by an “ardent Federalist” reporter whose skills were “dulled by excessive drinking,” as Library of Congress archivist James Hutson recounted in “The Integrity of the Documentary Record.” Madison himself complained of contemporaneous reporting to Jefferson: “You will see at once the strongest evidence of mutilation & perversion, and of the illiteracy of the Editor.”

Even modern commentaries and anthologies, uncritically cited by academics and courts upon little or no independent review, are an issue. That includes the seminal B. Schwartz, "The Bill of Rights: A Documentary History" (1971) and "The Complete Bill of Rights" (N. Cogan ed. 1997), each cited in Heller. Deemed authoritative, their analysis and curated founding laws, debates, news accounts and writings contain, and perpetuate, another mass oversight, as significant to understanding as the overlooked text.

Then there is the leading individual-right collection, "The Origin of the Second Amendment: A Documentary History" (D. Young ed., 2d ed. 2001), awarded the Gun World Book Prize, whose selective editing contributes to the same mass oversight. According to Young, his anthology was cited “six times” in Heller, and “over one hundred times” in United States v. Emerson (5th Cir. 2001). Until Emerson, as the Heller dissents noted, “every Court of Appeals … understood” the amendment provided no right to guns. Heller’s key finding: “The Second Amendment right, protecting only individuals’ liberty to keep and carry arms, did nothing to assuage Antifederalists’ concerns about federal control of the militia” — discarding the established “federalism-based interpretation through sheer ipse dixit,” as condemned by Judge Wilkinson and the Heller dissents — cited only Young’s reproduction of one newspaper article, not the founding record.

Had the Heller court and Fifth Circuit known what their sources omitted, doubtless they never would have bought the individual-right theory that Chief Justice Warren Burger the decade before called a “fraud.”

Blinkered Approach to Superficial Understanding

The narrow focus of textual originalism, of which Justice Scalia called Heller its “best example,” is itself a problem. That blinkered doctrine holds that original meaning is to be divined from the words used, through their historical meanings, shorn of purpose and context revealed by legislative history. Justice John Paul Stevens for the dissenting justices, as noted in Part 1, parodied the Heller majority’s “atomistic, word-by-word approach,” like “blind men” failing “to grasp the nature of the creature.” In a prior case, he called it interpretation through “thick grammarian’s spectacles.”

Similarly critical of Heller and the dictionary school was conservative Judge Richard Posner, whose review of Justice Scalia’s treatise, “Reading Law: The Interpretation of Legal Texts," was titled “The Incoherance of Antonin Scalia” (2012). Judge Posner, echoing Brandeis’ contemporaries, Justice Oliver Wendell Holmes and Judge Learned Hand, acidly termed dictionaries “mazes in which judges are soon lost. A dictionary-centered textualism is hopeless.”

Judge Posner in his own book “Reflections on Judging” (2013), further cited “an unrecognized tension between Justice Scalia’s angry disdain for legislative history as an aid in interpreting statutes,” involving drafting history, reports and debates, “and his enthusiastic mining of … ancient history when it comes to interpreting the eighteenth-century Constitution,” which Scalia himself described as “an enormous mass of material,” including “ratifying debates” in 13 states, a wider quest than for a single legislature.

“Unrecognized” by Judge Posner is that Heller did not even apply originalism, at least not in the sense Scalia’s article said was “required.” In implying its new right, Heller did not address the ratifying debates at all. Only afterward, 50 pages in, did it briefly respond to the dissents, stating: “Justice Stevens relies on the drafting history ... the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right[.]”

Justice Scalia, after implying a literal “right to possess and carry weapons in case of confrontation” from dictionaries (or “out of whole cloth” as derided by the dissents), explained its “meaning is strongly confirmed by the historical background of the Second Amendment,” citing not the debates and drafts of the amendment, but the “history” of the English Declaration of Rights of 1689 a century earlier. That act of Parliament, providing "the Subjects which are Protestants may have Armes for their defence Suitable to their condition and as allowed by Law,” involved neither militia, states nor federalism, and was expressly limited by group (“Protestants”), class (“their condition”) and law (“as allowed”), that is by statutes before and after, including today’s strict British gun controls. And in the only Heller sequel to date (McDonald v. Chicago (2010)), Justice Stephen Breyer, citing new historical evidence that Sir William Blackstone rejected this “important link in the Heller majority’s historical argument,” concluded the English Declaration “concerned the right of Parliament (representing the people) to form militia to oppose a tyrant (the King) threatening to deprive the people of their traditional liberties[.]” Still myopically focused on an individual right (through his own literal reading of “the people”), Breyer remarkably failed to draw the obvious parallel: to the right of state legislatures (representing the people) to arm their militia, the purpose and wording of the Second Amendment, which sovereign right Madison added could not be “infringed.”

Even Madison in introducing his draft amendments in the First Congress reportedly warned “there is too great a difference” between them and the English Declaration, and that “arguments drawn from that source were in great measure inapplicable.” One difference

between the English statute and the Second Amendment, even under Justice Breyer's new understanding, is that the former involved a right between branches of government, whereas what Madison drafted was a right between governments in a new federal system, part of the genius of the American Enlightenment.

Speaking of Madison ... well, Justice Scalia didn't. He mentioned the Father of the Bill of Rights only in response to the dissents. Same with Mason, considered by some the real Father of the Bill of Rights. By contrast, in a case not long after Heller involving video-game violence, Justice Samuel Alito remarked at argument: "What Justice Scalia wants to know is what James Madison thought about video games." Justice Scalia shot back: "No, I want to know what James Madison thought about violence."

But on the amendment, what Madison thought … not so much. The originalist Scalia did not quote or even address Madison's "original" draft — expressly declaring the militia be "well armed" just as states demanded, adding the right not be "infringed" — except its conscientious-objector clause, again only in answer to the dissents. (Nor did the D.C. Circuit decision that was the road map for and affirmed by Heller (Parker v. D.C.)) So too Mason's "original" proposal. And the nearly identical state proposals that "originated" the amendment.

It's little wonder historians like Pauline Maier called Heller an "abuse of history," Joseph Ellis termed it "legalistic legerdemain," and Jack Rakove deplored "Scalia's professed disdain for what was actually being debated." Even Judge Posner, who called it a "snow job," meaning a "long opinion" intended to "convince, or perhaps just overwhelm, doubters" through a "breathtaking" "range of historical references," was snowed. He observed Heller failed to apply originalism in creating (19th and 20th-century-based) exceptions to its implied right, when it didn't apply originalism in creating the right itself.

As Heller demonstrates, dictionaries are superficial substitutes for substantive knowledge, and no shortcut for understanding essential to judging. As Justice Stevens dissented in McDonald: “Justice Scalia’s method invites not only bad history, but also bad constitutional law.”

Paraphrasing Brandeis, the Heller majority had “merely to acquaint [itself] with the art of” terms in the amendment, their “usages,” and “the problems” that “confronted public officials” who proposed it. But Heller’s majority (and dissents) showed no acquaintance with terms of art like “infringed” and others, no knowledge of usages found throughout revolutionary and founding history, and having disregarded its drafting and debates, no understanding of the problems confronting the Framers, which had nothing to do with an individual right.

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