Law360 Expert Analysis

Heller Sequels And 2nd Amendment, Still Undecided: Part 1

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July 20, 2017, 3:07 PM EDT

It has been nearly a decade since District of Columbia v. Heller, 554 U.S. 570 (2008), overturned D.C.'s handgun ban and 200 years of understanding. The Second Amendment to the U.S. Constitution's Militia Clauses (providing for "common Defence" and "calling forth the Militia" to "suppress Insurrections") was traditionally held to protect the states' right to "keep and bear Arms" through "well regulated Militia." A bare (5-4) conservative majority of the U.S. Supreme Court implied in the amendment, in dicta, an individual right of self-defense, "to possess and carry weapons in case of confrontation," limited by its holding to a right of "handgun possession" and "to carry it in the home." As extraordinary as that phrasing, it further implied, in dicta, a related right to insurrection as a safeguard against tyranny. In 2010, an even more splintered plurality extended the new right (or rights) against the states (McDonald v. Chicago, 561 U.S. 742), striking down Chicago's ban.

Today's Right, Yesterday's Fraud

A generation before Heller, a conservative court said "legislative restrictions" do not "trench upon" the amendment, reaffirming it "guarantees no right to keep and bear a firearm" not in service to a "'well regulated militia'" (Lewis v. United States (1980)). A decade later Chief Justice Warren Burger, who knew the difference between the amendment and his common law right to the shotgun he cherished, called a constitutional right to guns a "fraud." Justice Lewis Powell questioned why the amendment "should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number" of gun deaths. His

nominated replacement, Judge Robert Bork, noting the "National Rifle Association is always arguing" the amendment, said its intent "was to guarantee the right of states to form militia, not for individuals to bear arms." He added in a 1997 book the amendment "was designed to allow states," not individuals, to defend against a "tyrannical national government." Five bipartisan attorneys general advised the nation not to "let the gun lobbies' distortion of the constitution cripple" gun control, when for "more than 200 years, the federal courts have unanimously" held it "concerns only the arming of the people in service to an organized state Militia."

Contrary to common belief post-Heller, that hasn't changed. Dissenting Justice John Stevens, joined by another Republican appointee, Justice David Souter, and two liberal justices, characterized the majority's approach as "advocacy, … surely an unusual approach for judges to follow." Conservative Judge Harvie Wilkinson on the Fourth Circuit criticized Heller in a 2009 law review as "judicial lawmaking" and "activism" that "created a new blockbuster right" complete with "embedded" exceptions, "not apparent to the Court for over two centuries." Agreeing with the dissents that the text was ambiguous "at best," he faulted how the majority "cut loose" the preamble on state militia that "reflected the Framer's views" and "set the context in which the amendment was to be read," tossing federalism "overboard like tea." Conservative Judge Richard Posner of the Seventh Circuit in Chicago likewise derided Heller as "faux originalism" and "law office history." Both said judicial restraint dictated that puzzling old passages be construed to uphold established law, absent clear evidence to the contrary. But Posner went further in his book "Reflections on Judging" (2013), noting the author of Heller, Justice Antonin "Scalia and his staff labored mightily to produce a long opinion" that "would convince, or perhaps just overwhelm, doubters. The range of historical references … is breathtaking, but it is not evidence of disinterested historical inquiry; it is evidence of the ability of well-staffed courts to produce snow jobs."

No Blockbuster Sequels, or Even Sequels

Since Heller and McDonald, the Supreme Court has seemed reluctant to revisit its newly created right(s), though it also created what the dissents predicted: a litigation explosion in the courts and struggle to apply it. Just a year later, as Judge Wilkinson noted: “The cases filed since Heller and the multitude of federal, state, and municipal gun control regulations threaten to suck the courts into a quagmire.” A string of denials of certiorari followed. And in 2015, when the court declined to review a Chicago-area assault weapons ban and a San Francisco law requiring gun locks, Justices Clarence Thomas and Scalia dissented, finding the one “flouted” and the other was in “serious tension” with Heller. Last year, the court per curium did briefly address a Massachusetts ruling upholding a stun-gun ban, remanding for reconsideration whether the amendment extended to public carry, at least for non-lethal guns. Justices Samuel Alito and Thomas concurred to suggest the ban was unconstitutional on its face.

Most courts have resisted expanding the new right, some even rebelliously. Wilkinson, having noted “even simple cases foreshadow complicated questions” of whether it “applies outside the home — for example, in the car?”, then held it didn’t, at least not to loaded guns in national parks (U.S. v. Masciandaro (4th Cir. 2011)). Citing the “dilemma” faced by courts, and legislatures whether to ban guns whose dangers “rise exponentially” in public while “shouldering the burdens of litigation,” he preferred “to await direction” from the Supreme Court. “This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because ... we miscalculated as to Second Amendment rights.” Judge Posner didn’t wait in striking down a carry ban, archly noting 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.” Chicago today has the worst gun violence in the country, which the president, an NRA supporter, blames on local failures, not guns on its streets. Even after he sent federal assistance this month, Chicago suffered 100 people shot in one of its most violent Independence Day weekends.

Meanwhile, Posner's colleague, Judge Frank Easterbrook, upheld an assault weapons ban in the decision Thomas and Scalia said "flouted" Heller. The Ninth Circuit en banc in Peruta v. San Diego (9th Cir. 2016), upholding a carry ban, said it was constrained to apply Heller's exception for "concealed weapons" that Heller called only "presumptively lawful," not its constructs for determining constitutionality. The Fourth Circuit en banc did likewise in Kolbe v. Hogan (4th Cir. 2016), applying Heller's (presumptive) weapons-of-war exception to civilian equivalents, joining the Second Circuit in upholding assault weapons bans passed in the wake of the Sandy Hook Elementary School massacre of 26 first-graders and teachers in Newtown, Connecticut.

Last month, on the last day of its term, the Supreme Court denied certiorari in Peruta. Justice Thomas dissented, joined by Scalia's successor, Justice Neil Gorsuch, contending the "approach taken by the en banc court is indefensible," and review should have been taken when "four other Courts of Appeals and three state courts" had "produced thorough opinions on both sides[.]" He added, "Even if other Members of the Court do not agree" the amendment "likely protects a right to public carry, the time has come for the Court to answer this important question," a telling coda to a dissent not joined even by Alito.

Answers and even guidance have yet to come, nearly a decade after Heller. As Judge Wilkinson said, the "Heller majority seems to want to have its cake and eat it, too — to recognize a right to bear arms without having to deal with any of the more unpleasant consequences of such a right."

Still Undecided Second Amendment

Another unpleasant consequence of Heller: what really awaits decision is the full amendment. As shown in my article "2nd Amendment Still Undecided, Hiding in Plain View" (Law360 Jan. 11, 2016), published a month before Justice Scalia's death, the Supreme

Court has yet to address much less decide the full text, one of several major oversights, each showing the amendment has nothing to do with an individual right.

The amendment reads: “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.” Heller dismissed the preamble about state militias, previously enough for “hundreds of judges,” to focus on the “operative” middle clause “to keep and bear Arms,” and rejecting the military argot of the militia era, found an implied right to self-defense. Heller never addressed the last clause — the actual prohibition and verb on which the amendment rests.

Constitutional text, much less its operative verb, cannot be ignored. One should think that before implying a civil right “to keep and bear Arms,” which the amendment commands “shall not be infringed,” Heller would have decided the meaning of “infringed.” Far from heeding the command of the Constitution, the court completely overlooked it.

Infringed vs. Abridged

Perpetuating popular usage, Justice Scalia for the Heller majority transposed “infringe” to “abridge” (“Congress was given no power to abridge the ancient right of individuals to keep and bear arms”), an approach not tolerated in constitutional construction. So did McDonald, with Alito and Thomas in plurality opinions conflating the terms. “Infringe” and “abridge” are different words, have different meanings, and are not even synonyms. When words “cannot … be said to be synonimous,” Justice Joseph Story once warned, to “suppose them to signify the same thing … would be to defeat the obvious purposes of both.”

Heller’s loose transposition overlooked not only the text, but decades of American revolutionary and founding usages which distinguish the terms. “Abridge,” a forgotten term of art, was used in the First Amendment and in every amendment for 200 hundred years since that protected individual rights (the 14th, 15th, 19th, 24th, 26th and proposed Equal

Rights Amendments). “Infringe,” another term of art, was given its usual meaning in the Second Amendment to protect sovereignty, which individuals did not possess, but states, jealously guarding it, did.

The court often transposes “infringed” and “abridged.” In free speech cases, it has decided that a flag-burning ban was an “infringement on First Amendment rights,” not that they were “abridged” as written (United States v. Eichman (1990)), and Justices Thomas and Scalia in dissent called a campaign finance law an “infringement” (Nixon v. Shrink Missouri Government PAC (2000)). Transplanting “infringed” to other amendments, it has held the Sixth Amendment applies when “judicial power infringes on the province of the jury” (Blakely v. Washington (2004) (Scalia, J.)), the concept it should have applied to the Second Amendment.

Sovereign usage of infringed abounds in forgotten tracts. While not always consistent, like the court, variations are similarly explained. And the derivation of “infringed,” and how it was understood by the framers should be obvious for several reasons. For one, nothing is more distinctly American than the cry “No taxation without representation” against encroachments by Britain’s Parliament on the sovereignty of colonial legislatures. Similarly distinctive is the term “infringements” used to protest them.

Had Scalia consulted his frequent co-author Bryan Garner’s "Dictionary of Modern Legal Usage," he would have found examples of “*infringe* on [read *encroach* or *impinge* on] British sovereignty,” or a “city *infringes* upon [read *encroaches* or *impinges upon*] a county’s governmental function” (Garner’s emphasis and brackets). That is just what colonial legislatures protested, and the states debated at ratification conventions, demanding an amendment to protect their sovereignty over militia.

Or had Stevens for the dissenting justices applied the majority’s “atomistic, word-by-word approach” he parodied to the last word (citing the parable of the “blind men and the

elephant," each "touching a different part" and failing "to grasp the nature of the creature"), he would have revealed the amendment. Rightly insisting the Militia Clauses and amendment are "quintessential examples of the Framers' 'split[ting] the atom of sovereignty'" into "'two political capacities, one state and one federal, each protected from incursion by the other,'" he cited only its preamble, not its prohibition, overlooking that "infringed" carried that meaning, and guaranteed a sovereign right.

This "was not entirely the Court's fault" as Scalia wrote of the last court that decided the amendment on only the government's brief (U.S. v. Miller (1939)). The oversight was invited by the petitioner (and dozens of supporting amici) in the question presented: "Whether [D.C. gun laws] violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia," not asking the court to decide whether D.C.'s handgun ban "infringed" any Second Amendment right.

Not Applying Usual Canons, Even a Justice's Own

Until Heller, no one had to consider the amendment's prohibition. Its preamble about state militia, unique in the Bill of Rights, had been enough. Justice Scalia's own treatise with lexicographer Garner, "Reading Law: The Interpretation of Legal Texts" (2012), recognizes in its Prefatory Materials Canon that a "prologue does set forth the assumed facts and purposes that the majority of the" legislature "had in mind, and these can shed light on the meaning of the operative provisions that follow."

Yet as Scalia's treatise explained his deductive reasoning in Heller: "the right of the people" clause, "implying a preexisting right … triggered historical inquiry showing that the right to have arms for personal use," was viewed at "framing as one of the fundamental rights of Englishmen." "Once the history was understood, it was difficult to regard the guarantee" as "the right to join a militia." That "historical inquiry," sparked by the article in "the right" to bear arms (contraindicated by "the" right to counsel newly created by the Sixth Amendment),

should have taken a more direct path: examining the “preexisting right” of the colonies and states to armed militia, the “purpose” “set forth” in the “prologue.”

Justice Stevens made that rebuttal in dissent: “the Court's emphatic reliance on the claim” the amendment “‘codified a pre-existing right,’ is of course beside the point because the right to keep and bear arms for service in a state militia was also a pre-existing right.” The majority’s response that “there was no pre-existing right in English law … to use arms in an organized militia,” unrefuted by Stevens, was even more beside the point: the states’ right to arm state militia, not found in England, did exist under the federal system created by the framers. Either way, this “triggered history” rationale is among those Stevens rightly called “really quite absurd” in his own book, "Six Amendments – How and Why We Should Change the Constitution" (2014). Though he proposes to add five words (“when serving in the Militia”), the amendment doesn’t need amending, and means something else.

Justice Scalia’s treatise adds: “At all times in English history it was an extremely common practice,” as in this country, “to set forth the purpose in elaborate detail in the preamble,” which “gives us a fairly definite notion of what the statute means to accomplish.” Further, “a preamble or purpose clause can clarify an ambiguous text” but “cannot expand it beyond its permissible meaning.” Here, since the right of the people by their state legislatures to keep and bear arms in the militia was a pre-existing right, the preamble declaring the necessity of militia, far from expanding the meaning, expressed it. The preamble clarified ambiguity in the operative clause just as his treatise, at least, holds.

His treatise even emphasizes: “The purposivist approach assumes that legal instruments make complete sense. Of course they should be so interpreted where the language permits[.]” That is just what the amendment’s “language permits,” does (make “complete sense”), and “of course” required, even without reaching the text of the prohibition Heller missed.

In fact, Scalia applied that canon in Heller but only in dismissing an example cited in the separate dissent by Justice Stephen Breyer of a 1783 Massachusetts law regulating firearms, noting “its prologue … makes clear … the purpose[.]” This is just what the Second Amendment’s preamble made clear for 200 years. Its prohibition “infringed,” and other major oversights, make it even clearer.

Decision by Conjecture Over (Two-Thirds of) Amendment

“Knowledge is essential to understanding; and understanding should precede judging,” warned Justice Louis Brandeis. Yet the court, in its most consequential decision for American lives today that took “seriously the concerns” over “the problems of handgun violence in this country,” in finding the “enshrinement of constitutional rights” take “certain [legislative] policy choices off the table,” guessed.

The majority’s conjecture was evident in implying a right. It reasoned: “The very text … implicitly recognizes the pre-existence of the right,” which it defined as the “individual right to possess and carry weapons in case of confrontation,” a questionable statement even at common law, and “novel” variant that “lacks support in the text” as Justice Stevens said in dissent. “No party or amicus urged this interpretation; the Court appears to have fashioned it out of whole cloth.” In another example, it opined “the adjective ‘well-regulated’ implies nothing more than … proper discipline and training,” when it as easily “implies” also proper military arms, as actually debated in state conventions, and the Militia Act of 1792 required months after ratification. Or for “bear arms,” the majority wrote: “Although the phrase implies that the carrying of the weapon is for the purpose of ‘offensive or defensive action,’ it in no way connotes participation in a structured military organization.” Even the D.C. Circuit decision it affirmed recognized that “‘bear Arms’ is obviously susceptible to a military construction[.]”

For the majority to imply a private right ignores not only the warning of Brandeis, but also of Chief Justice John Marshall that if such were the intent, the framers would “have expressed” it, “in plain and intelligible language.” And to imply the unstated disregards his further admonition: when amendments proposed in the states and Congress carried no “sentiment … generally expressed, to quiet fears thus extensively entertained,” as true of the personal use of guns, “This court cannot so apply them.”

The dissents were also guesswork. Justice Stevens wrote: “The question presented … is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ Surely it protects a right that can be enforced by individuals.” That meant, Justice Breyer explained, it “protects militia-related, not self-defense-related, interests,” to “assure 18th-century citizens that they could keep arms for militia purposes,” not “keep arms that they could have used for self-defense as well,” which “is not the Amendment's concern.” But “surely” is conjecture, and militia service was required by law, not a right. The dissents’ parsing of a right to use arms in common defense but not “self-defense as well” — an idealized break-glass notion — was impractical for muskets kept in homes, also not generally debated, and dismissed by the majority as “no more than a … right to join a militia,” as Scalia wrote in his treatise.

Yet in positing an individual right, the dissents gave the majority carte blanche to find one, too. Panning the “centerpiece of the Court's textual argument” and “insistence that the words ‘the people’ … must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments,” they fell captive to those words as well, the only possible basis for their own semblance of an individual right, lacking sufficient evidence otherwise to even persuade themselves.

Unfortunately the Heller majority and dissents purported to “decide” (two-thirds of) the amendment without knowledge essential to understanding, or judging. Both were correct in one sense: the conjecture advanced by the other was untenable, even absurd.

Academic Bafflement Over (Two-Thirds of) Amendment

Unlike the Supreme Court, legal academics publicly state the amendment is “baffling,” as Columbia law professor Michael Dorf put it, with “no definitive answer to what” it means, as Harvard’s Mark Tushnet wrote in "Out of Range." The “most mysterious provision” colleague Cass Sunstein agreed. But they go further, and assert there can be no knowledge or understanding essential to judging. Perpetuating received wisdom in academic circles, they insist that to contend otherwise is “blowing smoke” (Tushnet), and courts should defer to a “deeply felt commitment” to gun rights of some and “reasonable restrictions” sought by others, “without purporting to untangle the Amendment’s deepest mysteries” (Sunstein).

Most historians do contend otherwise. Pauline Maier called Heller an “abuse of history,” not what James Madison and the First Congress meant and the states approved. Saul Cornell wrote “there can be little doubt that Scalia got his history badly wrong and Stevens got it mostly right.” Joseph Ellis called Heller “legalistic legerdemain.” Jack Rakove deplored “Scalia’s professed disdain for what was actually being debated,” noting if the framers had addressed a personal right directly, gun groups “would not have to recycle the same handful of references” or “rip promising snippets” from texts and speeches.

But historians offer no definitive explanation either, calling it a “collective” right of the people to an armed militia, without defining who the people are: the state, the militia, or some community. In lieu of collective and individual-right theories, Cornell has advanced as the “lost” “original understanding” a “civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia,” in other words, a right to comply. Yet militia duty like jury duty, another civic institution enshrined in the Constitution, carried no right to serve. Reverting to academic orthodoxy, Cornell cites the “tangled history” of the right to bear arms “as a cautionary warning to both sides,” for if “history seems to provide clear and unambiguous

support for one ideological preference in the great American gun debate, then the history is likely to be wrong.”

But orthodoxy often is wrong, as when it fails to consider, among other things, the full text. Yale Law School professor Akhil Reed Amar stresses it “should be evident that we need to understand how all the words of the amendment fit together and also how they dovetail with other words in the Constitution.” Yet in extensive writings, Professor Amar, like other scholars, never considered the “need to understand” the final word.

Common wisdom only a generation ago held it settled that the amendment protected no individual right. As Michael Waldman, president of the Brennan Center for Justice at NYU School of Law, put it in his book, "The Second Amendment, A Biography," “[f]or 218 years, judges overwhelmingly concluded that the amendment authorized states to form militias[.]” The most widely used treatise, "American Constitutional Law" (1978) by Harvard law professor Lawrence Tribe, noted the congressional debates “indicate that the sole concern of the second amendment’s framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and … destruction of local autonomy.” So does the preamble and qualifying phrase “well regulated,” Tribe added in his second edition in 1988.

This changed after two decades of articles largely “written by lawyers … employed by or represent[ing] the NRA or other gun rights organizations,” often not so identified, as recounted by Carl Bogus, professor at Roger Williams University School of Law, in “The History and Politics of Second Amendment Scholarship.” Then Yale law professor Sanford Levinson, in “The Embarrassing Second Amendment” (1989), citing Washington and Lee University law professor Lewis LaRue that the amendment “is not taken seriously by most scholars,” explored the tendentiousness of both “NRA advocates” and “elite, liberal” scholars, “reflected in Professor Tribe's offhand treatment.” But as Professor Bogus noted, Levinson also “made clear [his] affinity … for the individual rights model” and “insurrectionist

theory," in what historian Garry Wills called a "frivolous but influential article." Coming from an established liberal scholar, it altered the narrative just when conservative jurists were labeling NRA advocacy a "fraud," based on its own superficial analysis, an academic drive-by shooting.

Professor Levinson, in a follow-up article, reproved by Judge Posner in "Reflections on Judging," acknowledged his paramount reason for supporting an individual right was to avoid harming the electoral prospects of Democrats. Despite that, or because of it, other liberal scholars joined the new academic bandwagon, including his colleague Professor Amar, Duke's William Van Alstyne, Professor Sunstein, and Professor Tribe himself, whose third edition in 2000 reversed course, citing a "right (admittedly of uncertain scope) on the part of individuals to possess and use fire-arms in the defense of themselves and their homes," again on cursory analysis.

Not all joined in, particularly historians. Assailing Levinson in a 1995 article, "Why We Have No Right To Bear Arms," Wills defined each word of (two-thirds of) the amendment by comparing period English usage and Latin roots, noting: "Every term … has as its first and most obvious meaning a military meaning. Taken together, each strengthens the significance of all the others[.]" Had Wills not also missed the term "infringed," he could have stemmed the revisionist tide.

Wills, chiding the "simple-minded literalism" of individual-right theorists, noted one could as well "argue that a good eighteenth-century meaning for 'quarter' shows that the Third Amendment" (the other military amendment, providing "No Soldier shall … be quartered in any house") was "intended to prevent soldiers from having their limbs lopped off in private homes."

It is that sort of textual literalism, parodied by Stevens and the dissenting justices, which led to Heller's right to possess a handgun and "carry it in the home." As did textual originalism,

that Scalia esteemed “vindicated” by Heller and defended in his treatise, which Posner scorned in "Reflections on Judging" as a linkup of “literalism and historicism” (or “‘gotcha’ jurisprudence”), offering an alternative between the “extremes illustrated by the Scalia” book and Amar’s “obviously unanchored” academic approach.

Like Chief Justice Burger, Wills did “not deny any private right to own and use firearms. Perhaps that can be defended on other grounds —natural law, common law, tradition, statute.” But “common law or statute may yield to common sense and specific cultural needs. That is why the gun advocates appeal, above pragmatism and common sense, to a supposed sacred right enshrined in a document Americans revere.” They “love to quote Sanford Levinson, who compares the admitted ‘social costs’ of adhering to gun rights with the social costs of observing the First Amendment.” “So we must put up with” irresponsible speech and “world-record rates of homicide, suicide, and accidental shootings because, whether we like it or not, the Constitution tells us to. Well, it doesn’t.”

This past Independence Day weekend, Wills in a New York Times essay explained the amendment protects the “right of a state to keep” arms “in an armory and bear those arms in state militias,” which is very nearly correct. Still not fully able to show why, he advanced Professor Bogus’ theory, that “the most passionate demand for a militia guarantee came from the Southern states,” and “was meant” for “internal problems, especially … a large slave population.” But two-thirds of slave states sought no militia amendment at all, while as many northern states as southern proposed its language. And slave states supported the Northwest Ordinance (1787) governing the western lands, which included a slavery ban (and a bill of rights thought essential that foreshadowed the Bill of Rights, providing no private right to guns, either).

Challenging as the amendment appears, concluding there can be no definitive exegesis is no answer. Especially when the consequences of Heller’s evident guessing are so grave, resulting in record tens of thousands of Americans killed each year and millions more

wounded, mostly by the handguns their Supreme Court has now guaranteed they can “carry in the home” and (in dicta) the streets. Yet still following the herd, in group-think symposia, thousands of peer-reviewed legal and historical articles, reviews and books, and hundreds of friend-of-the-court briefs, academics largely recycle or expand upon the same worn assumptions, including the self-defeating notion there can be no clear answer. They seem to have lost sight of an essential truth: the framers knew what the amendment meant and why.

While Americans pay the price, the amendment remains confounding to academics and the courts and legislators that rely on them because — like the Heller majority, dissents, parties and over 60 amici, influenced by two centuries of myopic focus on the prefatory and rights clauses — no one ever considered the significance of the final clause, or other mass oversights.

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