Court Nominee, Guns, And Constitutional Illiteracy

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In another pledge, threatening another shutdown, this time of the Senate and U.S. Supreme Court, Judiciary Committee Republicans vowed in February not to hold hearings this year on any nominee to succeed Justice Antonin Scalia. Sen. Ted Cruz, a committee member running for the presidency, argued "we're one justice away from the Second Amendment being written out," referring to a right to guns newly found in District of Columbia v. Heller, 554 U.S. 570 (2008). Three days before the pledge, an Uber driver in Kalamazoo killed six in the 42nd mass shooting this year, on pace with daily mass shootings in 2015. Two days after, a rampaging Kansas driver left four dead, 18 wounded. Two days later, a Virginia man shot his wife and three police officers, miles from Capitol Hill.

Undeterred, Sen. Cruz also vowed last week in an op-ed to filibuster any vote to protect this "long-cherished" right (of eight years), which "even nonlawyers can't miss," unlike those "invented" by liberal courts "that are nowhere in the Constitution." Not mentioned is Heller's "judicial activism," criticized by conservative Judge Harvie Wilkinson on the appeals court where Cruz once clerked, "creat[ing] a new blockbuster right not apparent

to the court for over two centuries," much less nonlawyers. Also unstated, the day before, the Idaho pastor Cruz prayed with hours earlier was shot. Two days after, a mass shooting in Pittsburgh left six dead, three wounded.

Overlooked in the GOP pledge, filibuster threat, and raging court and political battles over gun rights and control, are the amendment itself, and rudimentary constitutional terms of art. Every day dozens of ordinary Americans, denied public safety that government exists to provide, pay the price.

Same Amendment, Overlooked Text

For past generations, there was no "long-cherished" right to "write out." On the bicentennial of this amendment to the Militia Clauses — as much relics as the other military (Third) amendment on quartering soldiers in homes — former Chief Justice Warren Burger, who knew the difference between his common law right to the shotgun he cherished and the Second Amendment, called a right to guns a "fraud" on "the American public by special interest groups." Five attorneys general reminded 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."

Judge Robert Bork agreed, no small irony after Democrats savaged his nomination: "The National Rifle Association is always arguing" the Second Amendment, when "it really is people's right to bear arms in a militia." And the justice whom Bork would have succeeded, Lewis Powell (of the Burger court that unanimously reaffirmed there was no right to guns), questioned why the amendment and "notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number" of gun deaths.

In an abrupt turnabout, Heller — a sharply divided 5-4 decision overturning D.C.'s ban and two centuries of law and legislative practice — found in the amendment an implied right to handguns for self-defense in the home.

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." Justice Scalia, writing for the majority, began in the middle with the "operative clause," addressing the "holder of the right" ("the people") and "substance" ("to keep and bear Arms"). He dismissed the preamble ("A well regulated militia" for "the security of a free State"), though the only preamble in the Bill of Rights, and did not construe the prohibition and real operative text: "shall not be infringed."

Heller elevated a right found in varying English and state common law to a guarantee shorn of variations, an approach James Madison, who drafted the Bill of Rights, impugned as an "impracticable," "dishonoraoble and illegimate guide." To imply a right to guns, a common feature of the day (unlike modern implied rights), also ignored Chief Justice John Marshall's admonition that the framers would "have expressed" it "in plain and intelligible language," and further, when amendments proposed in Congress and the states carried no general sentiment, or fears extensively entertained, as true of squirrel guns and pistols, "This court cannot so apply them."

Remarkably, as shown in my prior article, 2nd Amendment Still Undecided, Hiding in Plain View, Law360 (Jan. 11, 2016), Heller did not address, much less decide, the full amendment. Nor did Heller consider, in roiling settled law if not domestic tranquility, the whole constitutional and founding record, which is more extensive and clear than believed.

For openers, one would think in construing the right “to keep and bear Arms” which “shall not be infringed,” Heller determined the meaning of “infringed.” Yet nowhere did the court even address it.

Instead Heller transposed “infringed” to “abridged” (“abridge the ancient right of individuals to keep and bear arms”). An even more splintered court in McDonald v. City of Chicago, 561 U.S. 742 (2010), extended this newfound right to strike down Chicago’s ban, again equating them.

Transposing terms “may sometimes be tolerated” to achieve the intent of ordinary legislation, not the Constitution. “In expounding the Constitution,” Marshall said, “every word must be given its due force, and appropriate meaning[.]”

Infringed vs. Abridged

“Infringed” and “abridged” are different words, have different meanings, and are not even synonyms. Where words “cannot, in any appropriate sense, be said to be synonimous,” Justice Joseph Story once warned, to “suppose them to signify the same thing,” as Heller did, “would be to defeat the obvious purposes of both.”

Why did the framers use, even insist on “abridged” and not “infringed,” when they intended an individual right? As urged by Story: “It must have been the result of some determinate reason; and it is not very difficult to find,” in drafting history and founding documents Heller never addressed.

“Abridge” received its classic usage in the First Amendment to protect the “great” rights, as Madison introduced them, and is the little-known term of art Congress invoked in all amendments thereafter for individual rights: the Fourteenth, Fifteenth, Nineteenth,

Twenty-fourth, Twenty-sixth, and proposed Equal Rights Amendments (apart from juridical rights in the Fourth through Eighth).

“Infringed,” used in an amendment associated with federalism, is the constitutional term for protecting sovereignty, which individuals did not possess, unlike states that did. As one example, nothing is more American than the cries for self-representation during the decade of encroachments by Parliament on the sovereignty of colonial legislatures, which led to the Revolution. Similarly distinctive is the term used to protest them.

The Heller majority, applying its own “historical reality” that the amendment codified a common-law right “inherited from our English ancestors” from the 1600s, overlooked not only the verb on which the amendment rests, but much of the American canon of the late 1700s that explains it.

In sum Heller, mistaken on many levels, never reached the question presented: whether D.C.’s ban “infringed” any Second Amendment right, and may have no authoritative effect. Because Heller construed none of the words it did expound in relation to “infringed,” little may be left that does not require reconsideration. Construing “the people” with the sovereign usage of “infringed” permits only a collective, not individual meaning, and constitutional right.

Forgotten Terms of Art

Why have these terms of art been so long overlooked? The reason in the case of “abridge,” given its recurrent usage, is hard to fathom. For “infringed,” the nonlawyers’ expression “you had me at” is an apt explanation. For two centuries the amendment’s unique preamble was enough: declaring the necessity of a “well regulated Militia,” it clarified any ambiguity in the clauses that followed. Canons of construction like those in

Justice Scalia's book, Reading Law: The Interpretation of Legal Texts, disregarded in Heller, mandated that result.

The clause "keep and bear Arms" fortified that understanding. Even the Texas Supreme Court, unlike its junior senator and former attorney general, had considered the notion "simply ridiculous" that "pistols" and similar personal weapons were "proper or necessary arms of a 'well regulated militia,'" in the waning years of that institution. In English v. State, 35 Tex. 473 (1872), it held that "arms" in the Constitution "is used in its military sense," and means "the musket and bayonet[.]" That's how Marshall, the future chief justice, and Patrick Henry, a wartime governor and militia leader, used the term in debating the effect of the Militia Clauses on procuring muskets for Virginia's militia, at its ratifying convention in 1788, months before Madison drafted the amendment. In contrast the Heller majority, over a century and a half after the militia era, termed the conventional military construction of "keep and bear Arms" an "absurdity," "incoherent" and "Grotesque."

Constitutional illiteracy among nonlawyers is unsurprising. But for lawyers to advocate a constitutional position, in this case the Second Amendment, without addressing the constitutional wording, borders on malpractice. That includes Judiciary Committee members who do not know or understand Congress' constitutional terms, a problem that created the groundwork for Heller. Senior member Orrin Hatch, who sponsored a 1982 Senate Report "The Right to Keep and Bear Arms," said his Subcommittee on the Constitution would give "proper recognition" to the right, citing laws "which abridged it," and "the assistance of constitutional scholars" funded by the NRA. (Its Wayne LaPierre, making the same mistake, declared on Meet the Press it would be an "absolute abridgement" to regulate assault weapons, after the Sandy Hook massacre that left 26 first-graders and teachers dead.)

Misinformed Insurgencies

Sen. Cruz in his op-ed, attempting to justify the Republican blanket refusal to consider any nominee, insists the voters should get to decide if they want “a justice who adheres to the unchanging text, history and structure of the Constitution,” unaware that Heller itself did not adhere to, or even consider, the actual text, history or structure of the Second Amendment.

“This is serious business,” Judge Wilkinson reminded in United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011). Raising the “dilemma” faced by lower courts, whether Heller “applies outside the home,” and by legislatures, whether to ban guns whose dangers “rise exponentially” in public places, without “shouldering the burdens of litigation, he preferred where possible “to await direction” from the Supreme Court. That has yet to come, half a decade later, eight years after Heller. Meanwhile he wrote: “We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”

Fiddling with the wrong term, while lawyers slumber or lead another misguided insurgency against constitutional government, the republic bleeds. After Heller, guns exploded past the population for the first time, to 357 million as of the latest 2013 data. Experiencing now an “epidemic of gun violence,” decried in historic front-page and presidential op-eds, 33,000 Americans die every year from guns, or 88 each day.

Unlike our approach, gun violence is almost unheard of in developed nations, including those sharing our heritage. Canada, which restricts most guns and has few homicides, is tightening the border against our handguns and assault rifles. “Few Australians would deny that their country is safer today,” says its former prime minister, since bans

following its mass shootings. And Great Britain, the direct descendent of “our English forefathers” in whom Heller found its history, has among the strictest controls and lowest violence in the world. British media assail “America’s shame” and “obscene proliferation of guns.”

Speaking of misinformed insurgencies, Sen. Cruz last year proclaimed the Second Amendment also “serves as a fundamental check on government tyranny,” misciting Story, who stressed “the importance of a well regulated militia[.]” All but inciting individuals to armed revolt against the government he would lead, as then occurred in Oregon, is at least irresponsible. Giving “aid or comfort” to “insurrection or rebellion” could even disqualify the senator from his office or the presidency under another constitutional provision he overlooks (the Fourteenth Amendment disqualification clause, still operative after Congress lifted it for Civil War conduct). A power to “suppress Insurrections” was expressly written into the Constitution shortly before the Second Amendment was drafted, triggered by a tax rebellion, and invoked throughout our history, including at Ruby Ridge, Waco, and now Oregon. A constitutional republic “leaves no room for insurrection,” explained Thomas Paine, whose pamphlets Common Sense and Rights of Man inspired the revolution and founding. “America has the high honor of” giving “the world the example of forming a written constitution by” elected conventions “and improving them by the same procedure.” Abraham Lincoln cited the same “great lesson,” that what men “cannot take by an election, neither can they take” by rebellion, a principle upheld by the court. Tellingly, lawyers for the Oregon insurrectionists cite the First Amendment, not the Second, in their defense.

There is no Second Amendment to “write out,” but to actually read and understand, including text even lawyers can’t miss. There is no insurrection rationale to protect. And there is no reason to block confirmation to what could be another unanimous Supreme

Court, like the Burger court that reaffirmed the previous unanimous court, noting nothing in it prevents sensible “legislative restrictions” on deadly guns.

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