

Guns, rights, and the U.S. Constitution

On March 18th, the Supreme Court will hear arguments about the meaning of one of the Constitution's most contentious provisions, which 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.”

In the *District of Columbia v. Heller* case, the Supreme Court will confront the question of whether Washington DC's strict gun laws violate the right “to keep and bear arms” protected by the Second Amendment. At issue in *Heller* are city ordinances that provide a near total ban on handguns purchased after 1976, and which criminalize the possession of functional rifles and shotguns – even in one's own home. While the outcome of *Heller* will doubtlessly impact the legal landscape of gun rights in this country, the *Heller* decision will also have broader ramifications. In fact, the direction that the *Heller* opinion takes will serve as a prime indicator of the overall health of our Constitution.

For those unfamiliar with the state of Second Amendment debate, *Heller* stands at the crossroads of a clash of perspectives about the underlying meaning of the Second Amendment itself. These perspectives fall largely into two camps:

Individual vs. collective rights

The “individual rights” perspective holds that the Second Amendment guarantees the right to keep and bear arms to individual citizens, much like the First Amendment guarantees the right of free speech to individuals.

The competing “collective rights” view holds that the Second Amendment simply represents a right of states to organize armed militias. From this perspective, the “keep and bear” language refers only to collective purposes related to the maintenance of “well regulated” militias.

Each of these interpretations holds its own consequences for gun ownership in America, and only one will ultimately prevail at the Supreme Court. A victory for the individual rights perspective would likely invalidate Washington DC's gun laws, and would also make it more difficult to pass gun control legislation at a federal level, since such laws would potentially infringe upon a Constitutionally protected right. Alternately, a victory for

the “collective rights” theory would have just the opposite effect, and could embolden Congress to pass stricter gun regulations, without fear of meaningful court review.

Despite the split in legal opinion over the meaning of the Second Amendment, the debate over what this section of the Constitution means is easily solved if one looks to its original principles. The case for an individual Second Amendment right is strong, starting with the basic grammatical structure of the amendment itself, which places “the people” within the operative clause of that sentence:

“ ... the right of the people to keep and bear arms shall not be infringed.”

The Bill of Rights is replete with other references to “the people,” which have always been understood to refer to individual rights, rather than to collective or “states’ rights.” Tellingly, the authors of the Bill of Rights chose to differentiate between “the people” and “the states” very clearly in the Tenth Amendment, when they noted that:

“The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people.”

Gun ownership as fundamental right

Finally, the context in which the Second Amendment was written illuminates and clarifies its true purpose. The most influential members of the founding generation were explicit in their support for individual firearms ownership, which they viewed as a fundamental right. For instance, Thomas Jefferson said of the American people that,

“... it is their right and their duty to be at all times armed; that they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of the press.”

Despite this compelling textual and historical evidence, federal appellate courts have seen fit to uphold the “collective rights” theory for the past several decades, at the expense of the clear purpose of the Second Amendment, not to mention the rights of private gun owners. The collective rights theory has been also been championed by many gun control advocacy groups, due to the fact that it has aided them in achieving their

political goals of instituting more restrictive firearms regulations. This sort of activity – the willing re-interpretation of Constitutional provisions to denude them of their basic meaning – has long been aimed at the Second Amendment. However, that amendment is not the only part of the Constitution to have suffered this fate. Vast areas of the document have been chiseled away by successive generations of politicians, attorneys, and judges, who have sought to interpret out politically “inconvenient” parts of the Constitution as they have pursued their disparate agendas. The arenas of law enforcement and national security provide us with some ready examples of how this has occurred - particularly in relation to Fourth Amendment protections.

Protection from unreasonable intrusion

The Constitution aims to protect Americans from unreasonable governmental searches through the Fourth Amendment, which reads:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fourth Amendment contemplates a close relationship between “reasonableness” in police searches, and the use of search warrants in police investigations. Years of case law have held that these two concepts are closely linked, and that the warrant requirement is the rule, rather than the exception, in police searches. Under the Constitution, a judge must typically authorize search requests by police, and issue warrants based upon “probable cause” that evidence of criminal activity will be uncovered by a particular search. Warrants serve an important function; that they provide a check on police authority, and prevent baseless fishing expeditions or invasions of privacy. In the past, courts allowed some departures from the use of warrants, but these were generally limited to emergency circumstances - such as when officers witnessed an unfolding crime, and had to enter a home in hot pursuit of a suspect. Recent years have seen a substantial broadening of these kinds of “exigent circumstances” exceptions to the warrant requirement, which have served to devalue the warrant requirement itself.

Within the past few decades, the Supreme Court has permitted police to set

up random, warrantless sobriety check points to search for drunk drivers, without requiring even a basic showing of probable cause. The Court has also held that similar random checkpoints are permissible for detecting illegal immigrants. In both of these cases, the Court held that the mere purpose of these stops was enough to render them reasonable and Constitutional, despite the Fourth Amendment's stern language about warrants and probable cause requirements. Similarly, courts have used the "War on Drugs" as a rationale to further decouple the warrant requirement from overall reasonableness in police searches. Court decisions involving drug cases were responsible for broadening the exigent circumstances doctrine to cover not only hot pursuit, but also the prevention of contraband destruction. Through a series of federal court opinions, police have been allowed to sidestep the warrant process if they believe that suspects might possibly try to destroy narcotics that could later be used as evidence.

More recently, advocates of a hard-line approach to counter-terrorism have argued for still more exceptions to the warrant requirement. These voices have insisted, for instance, that systems of broad-based, warrantless surveillance of international telephone calls with a domestic nexus comply with the Constitution because their purpose (protecting us from terrorism) is reasonable, and thus they should fall into the growing bin of exigent exceptions to the warrant requirement. Of course, if we followed this logic to its ragged end, it would essentially eliminate the need for warrants of any kind, for as long as the state asserted that its actions were in the service of national security (and were therefore "reasonable"), then warrants would not be necessary to trigger any of its search and seizure powers. Courts have yet to bite on this particular theory, but it has nonetheless been used by the White House and its allies to justify wiretapping activities that were expressly prohibited by U.S. law.

Too much creative interpretation

All of this legal tinkering has had the net effect of weakening large portions of the Constitution, by allowing exceptions to swallow rules, and by rendering some provisions of the document nearly moot through creative interpretation. These sorts of legal games have been viewed as permissible by both sides of the political aisle, largely because liberals and conservatives have been extremely selective in their defense of the Constitution. Both sides have fought to preserve only those parts of the Constitution that they value, and have actively attacked those provisions that they dislike. Liberals have sought to weaken the Second Amendment and the property

rights protections of the Fifth Amendment, while conservatives have reliably assaulted the criminal procedural protections of the Fourth, Fifth, and Sixth Amendments.

The American political process needs to move away from this kind of interpretive combat, or the end result will be the mutually assured destruction of the entire Constitution. Whatever our political persuasions might be, we would do well to view the Constitution as something made of whole cloth, rather than something that can be dismembered and re-interpreted for the sake of political expedience.

If the Constitution says “X”, we cannot pretend that it says “Y” simply to accommodate our short-term goals. Instead, we need to deal with the document as it is, and we need to craft our public policies and legal arguments in concert with its the careful mandates. This approach matters because, ultimately, we are the caretakers of the Constitution, and not its end-users. We are obligated to preserve the document’s integrity, so that those who follow us can benefit from its guidance and protections. A Supreme Court ruling in *Heller* which upholds the original, individual rights understanding of the Second Amendment would be one sign that the nation’s legal elite might be ready to take this obligation seriously.

Originally published by Minnpost.com | February 28, 2008