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ARMS AND THE MAN: THE US SUPREME COURT ANNO DOMINE 2008

Heather Kurzbauer*

Commas and other grammatical inflections are more often associated with the basics of legal English than with the lofty decisions of a high court. Yet as every eager law student knows, a grammatical interpretation of legal documents is one of the most important tools for juridical analysis. The placement of a single comma is at the very crux of the controversial case *District of Columbia v. Heller* that the US Supreme Court has been scrutinizing over the last few months. Heller is about guns and individual rights, subjects close to the hearts of us red-blooded Americans. A security guard named Dick Heller living in the nation's crime-ridden capital petitioned for the right to keep a handgun loaded and unlocked in the privacy of his own home in violation of the District of Columbia's strict gun control ordinances. The United States Court of Appeals for the District of Columbia Circuit upheld Heller's right, ruling that Washington's gun control legislation violated the Second Amendment to the US Constitution, the 'right to keep and bear arms'. The district court found that the amendment extends personal rights granting the individual the permission to keep a gun for self-defense.

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Almost seventy years have passed since the Supreme Court turned its attention to the hotly contested Second Amendment 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.' The question that has puzzled the pundits for two hundred years remains: does the amendment endow the right of the individual to keep a gun for private use or grant a collective right to bear arms as a Militia (organized military force)? The Supreme Court's decision¹ will revolve

more on consideration of a single grammatical sign than on the justices' political views on the nation's capital's gun-toting citizenry.

Entering the grammatical fray with the full force of his important position, the circuit court's Judge Laurence H. Silberman wrote that the placement of comma #2 (after the word 'State') proves that the Second Amendment grants citizens an individual right to carry a gun even if they are not a member of a local 'Militia'. That court found that the all-important second comma divides the amendment into two separate sections, a 'prefatory' first clause and an 'operative' second clause. Thus the opening portion of the amendment concerning a 'well-regulated Militia' is seen as an introductory justification, a mere prologue to the real nitty-gritty subject matter, the operative or second clause that turns our attention to 'the right of the people [...] shall not be infringed'.

Does the Second Amendment endow the right of the individual to keep a gun for private use or grant a collective right to bear arms as an organized military force?

A guide to the Second Amendment (SA), a mini-SA for dummies proves that there is no such thing as clear textual analysis. Each turn of phrase, word and certainly comma has given the District of Columbia and its challenger, Heller backed by the affluent libertarian lawyer, Robert Levy, the opportunity to present conflicting interpretations as tens of thousands of Americans take sides in the hotly contended case. The District maintains that the opening declaration, 'A well regulated Militia' proves that the amendment centers on the militia and not the ordinary person's rights. No other amendments open with such linguistic force quite appropriate to 'regulated militias' in other words, specially designated forces. Heller et al. respond with the observation that the declamatory style of the amendment's opening merely points to an obsolete writing style common to many 18th century documents.

According to the District, the words 'well-regulated' underline the Framers' (the founding fathers who wrote or 'framed' the Constitution) intention to refer

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1 The Supreme Court granted the petition for a writ of certiorari 'limited to the following question: Whether the following provisions, D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?'



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.

Amendment II

to a fighting force that is both organized and trained. Heller takes a historical approach to the term militia presenting arguments to support the theory that the militia in colonial America was a collective formed by members of the general public, *not* a specialized force. The separation between a trained and organized government forces and militia is a construct of modern warfare.

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The District argues that the pair of words, 'bear Arms' refers directly to the use of weapons for military purposes and that the clause as a whole (following the second comma after State) places the 'people' in a military context. Heller counters that the right to 'keep arms' should be read taking the ordinary meaning of keep (to possess) in mind. Turning to 18th century lexicons for support, Heller emphasizes that the expression 'to bear arms' was a normal turn of phrase that denoted carrying arms. In closing the District posited: 'The question is not whether individuals can enforce the right protected by the Second Amendment. The question is instead whether this right is limited to the possession of militia-related weapons.' Narrowing the discussion to an assertion that would force the Supreme Court to define the Second Amendment once and for all, Heller asserts that the text of the amendment 'confirms the people's right to arms and explains that the right is necessary for free people to guarantee their security by acting as militia.'

According to the District of Columbia's line of reasoning, more guns equal more violence thus gun-owners must sacrifice individual rights for the public good

The stakes *in casu* are high: District of Columbia residents were granted the privilege to govern themselves in 1973. Three years later, the District passed the strictest gun control law in the United States basing its restrictions on public policy concerns. According to the District's line of reasoning, more guns equal more violence thus gun-owners must sacrifice individual rights for the public good. The law bans private possession of handguns and requires shotgun and rifle owners to keep their guns unloaded and disassembled at the home place. The named challenger, Dick Heller, works as a security guard, a crime watcher who claims that these strict measures have had disastrous impact on cutting crime and have thwarted ordinary citizens in their attempts at self-defense in a city plagued by high homicide rates.

The rights protected by the Second Amendment occupy a curious place in the context of federal versus state or local laws. The Supreme Court incorporated most other guaranteed rights enshrined in the Bill of Rights (the first ten amendments to the Constitution) within the scope of the Fourteenth Amendment.² The Court, however, has avoided a consideration of the binding power of the Second Amendment on the states since 1886 (*Presser v. Illinois*, 116 U.S. 252 (1886)) when it held that the Amendment was *not* binding on the states.

The Supreme Court has avoided a consideration of the binding power of the Second Amendment on the states since 1886 when it held that the Amendment was *not* binding on the states

The Court might well have to speak out on another issue it so judiciously avoided in 1939. To come to terms with *Heller*, the Supreme Court will have to determine whether the *Miller* case,³ in which a citizen was indicted for transporting a sawed-off shotgun in violation of the 1934 National Firearms Act, is a binding precedent in terms of the real meaning of the Second Amendment. According to Chief Justice John G. Roberts, Jr., 'the *Miller* case sidestepped' the issue of individual versus collective rights by holding that the amendment 'provides only a collective right [...]'. [P]eople try to read into the tea leaves about

- 2 Fourteenth Amendment, Citizenship rights. Section 1 (in part) 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'
- 3 *United States v. Miller*, 307 U.S. 174(1939).

Amendment II '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.'

Miller [...], but that's still very much an open issue.⁴ A plethora of additional questions comes to mind: does the word 'people' refer to individuals or a group of persons? If the precedent cases concerning the Second Amendment have studied laws enacted by the federal government, should the District of Columbia as the seat of national government, certainly not one of the fifty US states enjoy a special status? If the District is a unique entity does that relate to the application of the Second Amendment? Or, if the District holds a special 'city state' status, does the ruling in the important precedent case *Presser* case take effect?

Analysis of the views of several of Supreme Court justices referred to by US legal eagles as 'the Supremes' could help us in our quest to second-guess the case's outcome. The controversial master of strict interpretation, Justice Antonin Scalia, shed light on his views concerning the Second Amendment in his book, *A Matter of Interpretation* (1997). To this master of judicial restraint, the amendment serves 'as a guarantee that the federal government will not interfere with the individual's right to bear arms for self-defense.' For Scalia and his archconservative colleague Clarence Thomas, *Heller* hinges on an interpretation of federal authority under the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution that states, 'Congress has the exclusive authority to manage commerce between the states.'

The founding fathers, Latin scholars to the hilt, might well have favored a rhetorical metaphorical approach to the amendment

In *United States v. Lopez*⁵, the Supreme Court held that Congress had narrow regulatory powers under the Commerce Clause. Arguments rage within the Court and throughout academia as to how the Commerce Clause impacts federal control over states and individual rights. To add another twist to the increasingly complex nexus of issues in *Heller*, if the Court finds that the Commerce Clause does not mandate federal control over areas in which the states (or districts) should exercise control, the District would be free to restrict gun ownership and bypass the Second Amendment altogether.

Ruth Bader Ginsburg, the most liberal thinking amongst her august colleagues, has called for a literal rather than a military interpretation of the phrase, 'bear arms'. Justice Samuel Alito Jr. has applied precedent to uphold the constitutionality of federal restrictions on the personal possession of machine guns during his many years as a lower court judge. Justice Anthony Kennedy has been averse to share any information on his Second Amendment views. He did support the narrow (5-4) majority in *Printz v. United States*⁶, a case in which the Court struck down parts of a federal bill that regulated handgun sales. The equally silent Stephen Breyer supported the minority in the *Printz* case asserting, 'there is

neither need nor reason to find in the Constitution an absolute principle, the inflexibility of which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem.'

The founding fathers, Latin scholars to the hilt, might well have favored a rhetorical metaphorical approach to the amendment. If so, an analysis of the comma construction according to the ablative absolute or bracketed independent circumstance, 'the Rolls-Royce of Latin constructions'⁷, could lead to the conclusion that the security of a free state depends on a well-regulated military that in turn depends on the right of the people to keep and bear arms in defense against what the Constitution's founding fathers called 'the oppressive mechanism of a tyrannical government'⁸.

Following the closing oral arguments presented on March 20th, six Supreme Court justices lent their support to the idea that the Second Amendment implies recognition of the individual's right to keep and bear arms. Such recognition, however, does not automatically lead to a victory for *Heller* or to a revision of the District of Columbia's gun control laws. Yale University Professor Jack Balkin⁹ observed, '[...] just because you say there is an individual right, you have not resolved the case. Is it an individual right to keep and bear arms that might be useful in militia service, a right to keep and bear arms that might be used for self-defense, or both?' Further, every right set forth in the Constitution can be subject to some form of limitation.

Public policy and the bitter status quo of gun-related crimes in the District provide compelling arguments in favor for the District's strict gun laws. A majority decision advocating the individual rights approach behooves the Supreme Court to adopt a legal standard that can be applied to determine the constitutionality of the District's gun law and point to a standard that permits the regulation of weapons and firearms in the civilian sector. Then again, the Court might avoid any kind of declaration concerning the Second Amendment and focus on a consideration of 'fair and reasonable' lawmaking.¹⁰ No matter how far the Amendment might reach, surely it would not rule out 'reasonable' legislation in the interest of the public good?

No matter how far the Amendment might reach, surely it would not rule out 'reasonable' legislation in the interest of the public good?

From across the ocean, one might observe that the US Militia (read military) is the force that should be regulated over and above the individual's right to bear arms. Or as rhetorician par excellence Alexander Hamilton would have it, 'by a curious refinement upon the spirit of republican jealousy, we are even taught to apprehend danger from the militia itself, in the hands of the federal government.'¹¹

4 Taken from transcripts, United States Senate Committee on the Judiciary, Nomination of John G. Roberts (September 12, 2005).

5 *United States v. Lopez*, 514 U.S. 549 (1995).

6 *Printz v. United States* (95-1478), 521 U.S. 898 (1997).

7 www.rhbc.ac.uk/Classics/NJL/latin. For example, 'His rebus perfectis, Caesar transivit flumen' ['With these things done, Caesar crossed the river'].

8 See Alexander Hamilton, 'Concerning the Militia', *Federalist Papers*, no. 29, 1787.

9 ABC Nightly News, March 19, 2008.

10 The common law version of the 'redelijkheid en billijkheid' consideration.

11 See Alexander Hamilton, 'Concerning the Militia', *Federalist Papers*, no. 29, 1787.