salon

Amy Coney Barrett and the Second Amendment: Why her "expansive view" is utter BS

Barrett claims she's looking for the original meaning of the text — so let's read that 27-word text, shall we?

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"Pro-life" Judge Amy Coney Barrett, who will almost certainly be seated on the Supreme Court this week, seems to have no problem putting guns in the hands of individual Americans who want to buy them — every Tom, Dick and Kyle. She reportedly takes "an expansive view" of the Second Amendment, writing in her only ruling on gun regulation that it should not be considered "a second-class amendment."

A number of groups advocating gun control and gun safety, including Everytown for Gun Safety, Moms Demand Action, and the Brady Campaign Against Gun Violence, expressed their deep concerns with Barrett's nomination in a recent letter sent to leading members of Congress.

The 2008 Supreme Court ruling in District of Columbia v. Heller expanded the meaning of the Second Amendment far beyond militias — regulated or not. And that 5-4 majority opinion was written by Barrett's mentor, Justice Antonin Scalia.

It might be useful to look back on that ruling to take another look at the "textualist" approach to reading statutes and the "originalist" approach to reading constitutional questions, and to learn what one might then expect of a Justice Barrett.

There are a number of things one might find admirable about Barrett. She was a seriously engaged student at all levels of her education, taking an English degree at Rhodes College and graduating at the top of her law school class at Notre Dame. She's a mother (of *seven*) who manages to work in a demanding career. At her gym, she's apparently known for her commitment to doing *pull-ups*, for gosh sakes.

Barrett is also a self-proclaimed "textualist" or "originalist" when she looks at statutes or the Constitution. In rendering decisions as a judge, she says she believes in adhering to precedent but also in closely reading the text of an enacted statute or the Constitution, seeking the *reasonable meaning* of that text, in the context of what most people at the time it was written would consider it to be.

In speaking to Sen. Joni Ernst, R-Iowa, during the confirmation hearings, Barrett put it this way: "My own approach to it would be textualism. The intent of a statute is best expressed through the words — so, looking at what the words would communicate to a skilled user of the language."

Barrett works both as a textualist and as a particular kind of "originalist," one who focuses on the original meaning, not the intent, of the founders, taking the same approach most recently popularized by Scalia, for whom she clerked in 1998-1999. (Apparently, the "intent" approach

had been discredited in the 1990s, so conservative judges moved on to a seemingly paradoxical "new originalist" approach of looking for original meaning.)

To understand how this can work, a look at the language of the Second Amendment may be instructive, followed by a brief discussion of the Heller decision resulting from Scalia's divining of the text of the framers, as ratified by Congress as part of the Bill of Rights in 1789.

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.

As we all know, that's it — 27 words with some oddly placed commas and capitalized terms. (Odd for us, but *not for that era*; look, you are newly on your way to being a new originalist!)

Given that Barrett has a bachelor's in English, from Rhodes College in Memphis, it seems fair to turn to a well-regarded reference here. According to "Fowler's Modern English Usage," there should be, in this case, no comma after "Militia" because what we see in the amendment is an instance of something called "absolute construction." Fowler defines it this way:

Defined by the OED [Oxford English Dictionary] as 'standing out of the usual grammatical relation or syntactical construction with other words', it consists in English of a noun or pronoun that is not the subject or object of any verb or the object of any preposition but is attached to a participle or an infinitive, e.g., *The play being over,* we went home./Let us toss for it, *loser to pay*.

That might be a bit dizzying, but given that Barrett was an English literature major and is a textualist, her imperative to avoid misinterpretation here would seem like a piece of cake.

To me (and to many others, including a number of Supreme Court justices), the obvious sense here is "In that a well-regulated Militia is necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." The latter thing, the right, is contingent on the former thing, the well-regulated militia and the need for such.

The original Congress that passed the Bill of Rights might have chosen to turn it around, as in "The right of the people to keep and bear Arms shall not be infringed because a well-regulated Militia is necessary to the security of a free State" (and it *was* in that order in an original draft by Madison), but they chose to emphasize the "well-regulated Militia being necessary" clause, which in effect makes it a conditional clause —*if this is true, then this other thing follows*.

But a textualist and/or originalist looks not at what the text reasonably means to people today but to the people at the time the provision or statute was enacted. The argument is that in doing so, they are honoring the enacted law, as explained in a 2019 article on The Federalist Society blog:

… the bottom-line principle of textualism is that the enacted text of a law is to be given supreme deference as the ultimate repository of the law's purpose. Because the object of textualist interpretation is enacted text, many mainstream textualists reject the use of legislative history — history that has never been enacted into law.

Hold that thought, because when the text is considered to be not as clear as it needs to be, the textualist then is able to hunt for more information — in history, traditions and, if things are still murky, in more esoteric areas, say, sea shanties. (Okay, likely not *sea shanties*, unless the statute has to do with, say, whaling or piracy. Then maybe so.)

Speaking of militias, the Militia Act of 1903, also known (somewhat hilariously) as the Dick Act, for Ohio congressman Charles Dick, was passed after militia groups sent by states proved untrained and disorderly and generally lacking standards (e.g., different uniforms) during the Spanish-American War. Unfortunately, the act mentioned the creation of both an "organized" and an "unorganized" militia, and thereby confused the issue.

The organized militia became the National Guard; what was meant by the "unorganized militia" was simply a reserve of all men 17 to 45 years of age who might be called into service, if needed. It certainly did not mean a ragtag militia that gathers together for regular gun-fondling sessions or, just for instance, to concoct a plot to kidnap, "try" and execute a duly elected state governor. (You know, for *tyranny*.)

The "Dick Act" works on a few levels, then — it's all male, and it's a bit confused, like many men (I include myself). Although that particular Dick served long ago, it seems we still have a slew of Dicks in Congress purposely drawing up vaguely worded legislation, the very bane of a textualist.

Muscle-bound ponytailed oldsters riding around on choppers and those odd insect-like three-wheeled motorbikes as "militia" members often claim that the Dick Act gives them an absolute right to amass a personal armory as part of an unorganized militia. But, again, that is not what was meant.

By the way, The Southern Poverty Law Center (SPLC) estimates there are at least 300 private militia groups in the United States, nearly all of them far-right so-called patriot groups.

According to the SPLC blog Hatewatch, far-right militia member Ryan Balch, who was photographed walking with Kyle Rittenhouse before Rittenhouse killed two protesters in Kenosha, Wisconsin, in August, said they were not part of a well-regulated militia:

"There was not a whole lot of communication [that night], and that was even within the protesters themselves," Balch told Hatewatch. Asked what he would need to call a militia well-regulated, Balch said, "There would have to be some organization."

That last bit is worth repeating: *"There would have to be some organization."*

The Scalia-led Heller decision took gun ownership beyond even the contested context of a well-regulated militia, extending it to personal ownership of handguns in defending "hearth and home." Further, it dispensed with the part of the law in Washington, D.C., that called for guns in the home to be locked up or otherwise secured when not in use.

Soon after Heller, states began to pass laws allowing citizens to carry guns nearly anywhere they desired. Walmart? City Hall? Church? Sure, why not?

But despite Scalia's freewheeling textualist reading of the Second Amendment, ownership outside the context of service in that annoyingly modified militia was *never mentioned* in the Constitution or in Madison's drafts preparing for the convention. According to author Michael Waldman,

Many are startled to learn that the U.S. Supreme Court didn't rule that the Second Amendment guarantees an individual's right to own a gun until 2008, when *District of Columbia v.*

Heller struck down the capital's law effectively banning handguns in the home. In fact, every other time the court had ruled previously, it had ruled otherwise.

It's also worth repeating that last line: *In fact, every other time the court had ruled previously, it had ruled otherwise.*

As you will see, Scalia's originalist reading somehow dispensed with the idea of a militia. The prefatory clause ("A well-regulated Militia, being necessary…") was reduced to a mere *example* of why Americans need to keep and bear arms:

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The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms.

Once you take that leap, well, you can go anywhere you like. Scalia was likely humming the "Theme of the Fast Carriers" from "Victory at Sea" when he got over *that* hump. The justice looked to history and tradition, to philosophy and English law and "natural law" in justifying his decision to divorce the meaning of the right from the idea of a militia. He invokes an "ancient right of individuals to keep and bear arms" and notes that most state constitutions allowed gun ownership. All of that may be true, but none of it can be found in the enacted text.

Scalia might as well have just gone ahead and adopted the NRA's concept of gun ownership as a "God-given right."

Speaking of that, a 2019 paper on the NRA and religious nationalism published in Nature notes:

Over the last 40 years, the NRA has deliberately pivoted to protecting the Second Amendment, not as something merely important but as something sacred to be defended at all costs from the profane hands of the government. The NRA has done this by deliberately using religious imagery, language, and icons such as Charlton Heston, that map onto the largely Protestant religious beliefs and religious nationalism tracing back to the founding of the nation.

Judge Barrett piously promises that she will not make law from the bench, that she will mostly be guided by precedent. But if textualism/originalism got us to a unprecedented precedent that has resulted in people brandishing guns in schools, churches and city halls, how much stock should we *reasonably* put into this technique? Whose right to life, liberty and the pursuit of happiness obtains here — the gun fetishist or the family of the murdered child? The family of the teenager whose suicide was made perfectly efficient by the presence of a handgun in the home?

The late Chief Justice Warren Burger, a Nixon appointee, famously wrote that the NRA had promulgated fraud about the meaning of the Second Amendment:

The Second Amendment of the U.S. Constitution guarantees a "right of the people to keep and bear arms." However, the meaning of this clause cannot be understood apart from the purpose, the setting, and the objectives of the draftsmen. At the time of the Bill of Rights, people were apprehensive about the new national government presented to them, and this helps explain the language and purpose of the Second Amendment. It guarantees, "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 need for a State militia was the predicate of the "right" guarantee, so as to protect the security of the State. Today, of course, the State militia serves a different purpose. A huge national defense establishment has assumed the role of the militia of 200 years ago.

In an 2018 opinion piece published in response to the student-led nationwide March for Our Lives, retired Supreme Court Justice John Paul Stevens wrote that the original fears of a national standing army creating problems for states was no longer a legitimate concern. Stevens called the Second Amendment "a relic of the 18th century" and advocated that it should be repealed.

Even the NRA itself has tacitly admitted what the opening clause means for the rest of the statement. According to Waldman, who writes of the takeover of NRA leadership by gun-rights radicals in 1977, the NRA dropped that portion of the Second Amendment on their headquarters in Fairfax, Virginia, posting only the latter part in large letters in the lobby, as if there were no contingency: *... the right of the people to keep and bear arms, shall not be infringed.*

Nice trick, that, just removing the offending clause — as Scalia, in essence, did as well. The Second Amendment's "well regulated" may be the most willfully ignored modifier in history. The Heller decision also ensured that no one had to store guns at home with safety in mind.

In his book "American Dialogue: The Founders and Us," historian Joseph Ellis, a Pulitzer Prize winner, criticized Scalia's Heller decision as a kind of parlor trick used to push a political agenda:

If *Heller* reads like a prolonged exercise in legalistic legerdemain … that is because Scalia's preordained outcome forced him to perform three challenging tasks: to show that the words of the Second Amendment do not mean what they say; to ignore the historical conditions his originalist doctrine purportedly required him to emphasize; and to obscure the radical implications of rejecting completely the accumulated wisdom of his predecessors on the court.

On a larger level, a number of the founders — James Madison and Thomas Jefferson in particular — saw the Constitution as a living document. Jefferson wrote that "laws and institutions must go hand in hand with the progress of the human mind." In a review of Ellis' book for the New York Times, Jeff Shesol wrote:

It would never have occurred to Madison … that the Constitution should dictate every answer or foreclose all debate, no matter what is said at meetings of the Federalist Society or in Supreme Court confirmation hearings. As Ellis argues, the prevailing conservative doctrine of "originalism" is a pose that rests on a fiction: the idea that there is a "single source of constitutional truth back there at the founding," easily discovered by any judge who cares to see it.

Another American historian, Heather Cox Richardson, covering the confirmation hearings for her "Letters from an American" newsletter, addressed Barrett and the real purpose of originalism, which is to serve "a radical capitalism":

The originalism of scholars like Barrett is an answer to the judges who, in the years after World War Two, interpreted the law to make American democracy live up to its principles, making all Americans equal before the law. With the New Deal in the 1930s, the Democrats under Franklin Delano Roosevelt had set out to level the economic playing field between the wealthy and ordinary Americans. They regulated business, provided a basic social safety net, and promoted

infrastructure…. Their desire to roll back the changes of the modern era serves traditional concepts of society and evangelical religion, of course, but it also serves a radical capitalism. If the government is as limited as they say, it cannot protect the rights of minorities or women. But it also cannot regulate business. It cannot provide a social safety net, or promote infrastructure, things that cost tax dollars and, in the case of infrastructure, take lucrative opportunities from private businesses. In short, under the theory of originalism, the government cannot do anything to rein in corporations or the very wealthy.

If I were to try to play "textualist" myself, I would find it notable that the framers capitalized "Militia" in the amendment. Though they were also a bit "cap-happy" in those days, the fact that they capitalized the word is an intriguing clue as to what they intended. To me, that "well regulated Militia" reads as one entity — something perhaps in existence in all 13 states, but to be organized into a whole in defense of one nation — not the innumerable little "militias," heavily armed and running amok in their QAnon T-shirts and mail-order camouflage, that we despairingly see today.

Judge Barrett is smarter than I am. I have no doubt she can do more pull-ups, both physically and linguistically. But I'll stand on the side of a multitude of other very intelligent people who read the right to bear arms as constituting a right only when, and *if*, it is done as part of a well-regulated militia. And we have that — it's called the National Guard. You want to play with people-killing weapons? Join the Guard. Otherwise, grab a rifle or shotgun and go hunting, if that's your thing.

If you read anything else into that while claiming to be an originalist, you are perpetrating a very solemn-sounding con on the American public and likely should wear a tricorn hat when out in *publick*. You know, so we can see you coming.

Conservatives naturally want to keep the founders alive and the Constitution dead. Unless it serves a purpose for them; then, with originalism, they perform a kind of séance to bring the document back to a sort of sham life — and if the words themselves are a burden, they blithely look to English common law, philosophy and elsewhere for guidance.

I myself have cherry-picked some quotes for this piece. It's human nature — and I'm trying to keep this article from becoming so long that no one reads it. We may all be textualists now, as Justice Elena Kagan put it in her 2015 Scalia Lecture at Harvard (to the glee of the Federalist Society and some of her conservative colleagues), but we are also human — sometimes we see what we want to see. Or as Paul Simon put it, "A man hears what he wants to hear and disregards the rest."

What will Justice Barrett find in the words of the founders to help her rule on challenges to the Affordable Care Act, or Medicare, or the environmental regulations so critical to addressing climate change?

The way I read it, if Barrett were to be faithful in her reading of the amendment, she would stand less on the recent precedents funded by the Cato Institute and the NRA — precedents that have caused unending misery and grief and have made our society much less safe — and actually begin to curtail the so-called rights of gun owners.

In that last sentence, Barrett and other textualists might note that I purposively use the subjunctive. It is a mood that is already disappearing from the language, but *in my time* it was often used for contrary-to-fact statements.