THE HUFFINGTON POST

Judicial Activism and the Second Amendment

By: D. Robert Worley – January 4th, 2013

"A well regulated militia, being necessary to the security of the State, the right of the people to keep and bear Arms, shall not be infringed."

The Second Amendment appears to have a plain meaning to the lay person. For most of American history the amendment has protected a state's right to maintain an armed militia. But the notion that it protects an individual's right to keep and bear arms independent of military service is a very recent innovation.

Although there are several modes of constitutional interpretation, three modes dominate. Two are originalist: original meaning (textualist) and original intent (intentionalist) interpretations. The third interprets the Constitution as a living document. Those who self-identify as Conservative tend to textualism or intentionalism. Those who self identify as Liberal or Progressive tended to the living document interpretation, but in the last quarter century they have reverted to a new form of originalism relying on original principles. The Constitution is silent on matters of interpretation.

The doctrine of original intent forces interpreters of the constitutional text to seek meaning from the intentions of the framers, including the debates during the summer of 1787 captured in Madison's notes, the Federalist and Anti-Federalist papers that accompanied the ratification process, and even the Declaration of Independence. Some opponents doubt the underlying assumption that the 50-plus men who attended the convention ever arrived at unified intent. Ironically, there's evidence that the framers did not intend for their intentions to govern.

Textualists reject the doctrine of original intent, instead following the text that is written rather than the rationale that produced it. They search founding-generation texts for the plain meaning of terms rather than for intentions. They rely on the written words and the meaning of those words at the time they were written, i.e., what ratifiers thought they were agreeing to rather than what the framers intended.

Rather than the literal text or inferred intentions, others emphasize the principles underlying the Constitution. Adherents believe that the framers could not have anticipated the technological advances of two centuries -- industrial age, nuclear age, information age -- and that the text must be open to interpretation in the modern context. They subscribe to the living document school. Not the text, not the intentions, but the principles underlying the text should be applied to contemporary issues. But more recently, Progressives have found that the original text provides a sound basis for the same underlying principles.

Critics argue that straying from either the literal text or the framers' intentions allows the contemporary values of judges to govern. In the extreme it represents the rule of man over the rule of law, and a court operating on the living document school is activist and legislating from the bench. It's the legislature's job to decide which policies to pursue, to make policy, and to evaluate the efficiency of policy. The Court's job, judicial review, is limited to determining the constitutionality of the law in question.

To create a document of enduring value, the framers used both general, abstract language and very specific, concrete language. An example of concrete language is the requirement that the president be at least 35 years of age. When specific language is used, no interpretation is required or allowed. An example of abstract language is the prohibition of "cruel and unusual punishment" rather than an explicit list of excluded techniques. What is unusual changes over time -- flogging and burning at the stake, for example -- were once usual. Where general language is used, the framers invited, demanded, interpretation.

The Interpretive Tension. Earl Warren, former Republican governor of California and a progressive, was appointed chief justice by Eisenhower. The Warren Court (1953-1969) was a catalyst for change promoting civil liberties and an egalitarian society. The Court heard *Brown v Board of Education* and *Miranda v Arizona,* upheld the Civil Rights Act and Voting Rights Act, decided on reapportionment of congressional districts to achieve one-man-one-vote, banned school prayer, and extended federal protections to state jurisdictions.
Political Conservatives, citing what they saw as the excesses of the Warren Court, launched a counteroffensive. The Heritage Foundation was established in 1973 to advance a Conservative agenda. To avoid a "liberal bias" below, I rely heavily on *The Heritage Guide to the Constitution*. Edwin Meese's name stands alone on the cover as chairman of the Foundation's editorial advisory board. Meese, as Reagan's attorney general, argued vigorously for original intentionalism. Thebook's prologue explicitly lays claim to intentionalism.

Legislative History and Case Law. The Constitution and the Bill of Rights were written with the experiences of the Revolutionary War still fresh in memory. There was strong opposition to a standing army. King's with standing armies were fond of using them. And the 13 states had a distrust of encroachment by a new federal government.

The solution to these potential abuses was to maintain military power in the state militias. The federal army would be a small professional force that would keep the arts alive during times of peace and bring the militias up to professional standards in time of war. At the time of writing, state laws required able-bodied men to own and maintain a kit, which they would bring to bear to repel invasion and quiet insurrection. The Second Amendment prohibited the federal government from disarming state militias by disarming the citizenry. The Third Amendment prohibited quartering of federal troops in private homes. Congress was given the authority to raise an army, call forth the militia, and make rules governing the militia, but no appropriation for a period of more than two years was allowed. Raise an army, use it for the prescribed purpose, and return it to the states. In contrast, Congress was given the authority to maintain a navy with no time restriction on appropriations -- a standing navy was acceptable.

Having dealt with the significant matter of a standing army, the issue was settled. Accordingly, there was little Supreme Court case law relevant to the Second Amendment after ratification of the Constitution and adoption of the Bill of Rights.

According to *Heritage*, the first and still the most significant Supreme Court ruling is *United States v Miller* (1939). Prohibition put military grade weapons in the hands of gangsters when most FBI agents were unarmed. Only after the St. Valentine's Day Massacre of 1929 and the Kansas City Massacre of 1933 did Congress authorize FBI agents to carry weapons and make arrests. Still they were outgunned. The National Firearms Act (1934) criminalized possession of "gangster weapons" by imposing prohibitively high excise taxes and requiring registration of machineguns, short-barreled rifles and shotguns, which could be concealed, and silencers.
Jack Miller and Frank Layton were convicted of carrying a sawed-off double-barrel shotgun across the Oklahoma-Arkansas state line. The conviction worked its way through the appellate process on Second Amendment grounds. The Supreme Court ruled that no evidence was presented that the shotgun was "ordinary military equipment" and therefore not a "militia weapon" protected by the Second Amendment. Some constitutional scholars cite the shortcomings of *Miller*, including the fact that Miller was not present during arguments having been murdered before the case came before the Supreme Court. Many say the opinion supports both sides.

But from 1939 forward the lower courts consistently interpreted *Miller* as having upheld the government's authority to regulate weapons for non-military uses. One line of cases interpreted the Amendment as guaranteeing the states' right to maintain an armed militia. The other line interpreted the Amendment as guaranteeing an individual's right to keep and bear arms only if the individual was a member of a state's militia. According to *Heritage*, "Every [lower federal] court that considered the question concluded that the Second Amendment does not protect any meaningful individual right to keep or bear arms."

The National Firearms Act of 1968 replaced the 1934 Act and included regulation of other "destructive devices," for example, hand grenades and rocket launchers.

The next most important piece of case law, according to *Heritage*, came in *United States v Emerson* (2001) from the Fifth Circuit Appeals Court (Mississippi, Louisiana, Texas). *Emerson*interpreted the Second Amendment as protecting an individual's right and overturned decades of legal consensus. In *Silveira v Lockyer* (2002), the Ninth Circuit Appeals Court (spanning nine western states) retained the long-established interpretation. The issue was percolating upward, but a broad challenge had not yet reached the Supreme Court by the time the Heritage guide was published (2005).

Robert Levy of the libertarian Cato Institute personally financed a deliberate attempt to bring a broad challenge to the Supreme Court. District of Columbia law required registration of handguns with strong restrictions, including protections like trigger locks on weapons in the home. A qualified individual, Dick Heller, in compliance with the law, applied for a handgun permit for home defense but was denied. As it worked its way upward, *Parker v District of Columbia* (2007) overturned the "gun ban." The case was then brought before the Supreme Court.

The majority opinion, written by Justice Scalia, decided the case on very narrow grounds. The handgun, according to Scalia, had become the public's preferred weapon for self defense and the permit denial violated Heller's right of self defense. The two dissenting opinions, written by Breyer and Stevens, saw the case more broadly asking if the Second Amendment protects the right to possess and use guns for other than military purposes like hunting and self defense.

The majority and dissenting opinions hinged on the text of the amendment itself. As used elsewhere in the Constitution, the prefatory clause establishes the framers' purpose for the operational clause that follows. According to Scalia, the prefatory clause neither limits nor expands the operational clause, i.e., it's the operational clause that matters. But according to the Breyer and Stevens opinions, the prefatory clause is part and parcel with the operational clause, and *Miller* "does not curtail the power of Congress to regulate civilian use" of weapons. The right of self defense may derive from common law or natural law, but it does not derive from the Second Amendment.

Assuming a textualist interpretation, the amendment means exactly what it says. If the framers meant to guarantee the right to keep and bear arms for the purpose of self defense or hunting, they would have said so, but they didn't. Assuming an intentionalist interpretation, the Amendment means exactly what it says. The framers had a fear of a standing army and saw a high constitutional value in maintaining state militias. They considered and rejected prefatory clauses of broader purpose. And according to both textualist and intentionalist thinking, if the Amendment was written poorly, legislators should rewrite it, but the courts should abide by what is written rather than an activist court legislating from the bench.

Given all that, Scalia's majority opinion is remarkable. The Roberts Court interpreted the Second Amendment as protecting an individual's right to own a gun independent of military purpose and for self defense. The Conservative justices can be legitimately characterized as activist and legislating from the bench. Ironically, the Liberal justices argue more consistently from textualism and intentionalism and responded conservatively to uphold over two centuries of settled law.