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HELLER, NEVADA AND THE SECOND AMENDMENT: MINIMALISM, TRADITION AND MODERN CONSTITUTIONAL JURISPRUDENCE

BY PROF. THOMAS B. MCAFFEE, ESQ.

In the last few years, it has become increasingly unclear whether the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) is best conceived as a decision to assimilate the right to keep and bear arms into the modern tradition of fundamental rights adjudication or, instead, as a strong form of minimalist and deferential substantive decision-making.

See Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 Harv. L. Rev. 246 (2008) [hereinafter *Heller as Griswold*]. Although the decision in *Heller* purports to be rooted in constitutional originalism, the court explicates the meaning and application of the Second Amendment primarily based on a constitutional traditionalism. If the decision is rooted in constitutional traditionalism and deferentialism, its purposes might well have included:

1. Vindicating "originalism" as doing more than merely preventing an over-expansive construction and application of individual rights, and
2. Lodging the claim that the original understanding stakes a position in the modern culture wars that embraces the pro-gun position.

Justice Scalia's opinion captured the gist of an increasingly strident view of contemporary gun rights advocates. Thoughtful students would likely agree with historian Jack Rakove's assertion that, "neither of the two main opinions in *Heller* would pass muster as serious historical writing." Jack Rakove, on Balkinization (June 27, 2008). So it takes a side in what he describes as the culture wars.

In the *Heller* decision, of course, the court held that the Second Amendment secured an individual right to keep and bear arms, and not merely a "state right" (or collective right) prohibiting the disarming of the states or their militias. But there are those who decided *Heller* adopted an ambiguous methodology, and hereafter the reader should have an

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enhanced appreciation of that ambiguity; and the reader will learn how these ambiguities may play out in Nevada.

For at least the last 20 years, the legal academy has engaged in a fiery debate about the originally intended meaning of the Second Amendment. Gun control advocates contend that the key to the amendment is its “preamble,” which states that the militia is “necessary” for a free state. The amendment states its operative right: “the right of the people to keep and bear arms, shall not be infringed.” The restrictive reading of the people’s right to “keep and bear arms” closely links these clauses, arguing that the right is extended only to those who participate in a “well-regulated militia.” But even if this state’s-rights view was

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the original understanding, over time Americans began to perceive a citizen's right to use firearms in self-defense, including collective self-defense, as in opposing federal tyranny. Nineteenth-century state constitutions often worded right to arms provisions in ways that unequivocally referred to an individual, personal right to have guns to defend individual citizens. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. L. Rev. L. & Pol. 191 (2006). Most states today have arms provisions, which cut against the idea that the Second Amendment was merely to protect states.

As a constitutional law teacher of 30 years, the most striking impact of *Heller* has been its use in the culture wars that are part of our ultra-partisan political discourse. Thus, the proposed law for universal background checks for purchasing guns was not enacted, and even law-trained senators (Cruz and Lee) based their filibuster threats on the Second Amendment.

But the assertion that background checks violate the Second Amendment is preposterous. Republican senators have suddenly made the Second Amendment central to questioning Supreme Court nominees — even though the issue was never even raised from the time of the Bork nomination through all the Bush appointments to the court. A federal judicial appointment here in Nevada was stopped by Senator Heller because the nominee had stated, prior to the court's decision in *Heller*, that she did not think the amendment secured a personal right to firearms. See *Cadish Out, Political Extremism In*, March 11, 2013, in McAfee's *Machinations* (blog).

Judges look for original meaning partly to promote the rule of law, but almost equally to advance the cause of deference to the other

branches. A related goal is to prevent a "morphing" Constitution, in which judges virtually create new limits on government. In support of this sort of deference, Justice Scalia in *Heller* emphasized that from Blackstone through the 19th century, "commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. And "the majority of 19th century courts" ruled that "prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* Finally, laws forbidding "the carrying of firearms in sensitive places such as schools and government buildings" should also not be subject to a careful re-thinking. But the court's dictum on this point was significantly critiqued in a paper written by my student: *Does the Second Amendment Protect a Citizen's Right to Carry a Firearm in Nevadan Colleges and Universities*. Somewhat more broadly, the court added: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."

In fairness, Justice Scalia has never grappled sufficiently with questions about the role of precedent in judicial constitutional decision-making. When he is most inclined toward judicial restraint, and deference to the other branches, restrictive precedent becomes decisive and is virtually equated with original understanding. But consider that Justice Scalia also



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embraces expansive readings of both text and precedent when they conform to his preferred judicial role in a substantive area – a judicial role that often comports with his political ideology – in spite such a holding’s dubious relationship to the original understanding. Examine his decisions as to affirmative action and the free speech rights of corporations.

But the court’s reliance on deferential originalism is as likely to disappoint the conservative political movement as much as the basic ruling in *Heller* satisfied it. The jury on the scope and application of *Heller* really is not fully in, but I think it remains true that “[m]ost courts, dutifully following dicta in *Heller* itself, have concluded that regulations short of absolute bans or that ban ownership for discrete classes of persons pass muster.” Brannon P. Dennin & Glenn H. Reynolds, *Heller, High Water (Mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 *Hastings L.J.* 1245, 1246 (2009). Some thoughtful commentators have suggested that the court take the alternative path of analogizing Second Amendment questions to issues arising in other fundamental rights areas. See Volokh, *Implementing the Right to Keep*

and Bear Arms for Self-Defense, 56 *U.C.L.A. L. Rev.* 1443 (2009). My student author contended that, if the court does so, it will re-think its apparent endorsement of the view that gun possession prohibitions as to public buildings and schools may be prohibited — weighing closely the justification for such restrictions and the impact of such prohibitions on the right of self-defense. *Does the Second Amendment Protect a Citizen’s Right to Carry a Firearm on Nevada Colleges and Universities in a Post-Heller and McDonald World?*

The Nevada Legislature has attempted to create “gun free zones” on university and college campuses throughout the state. *Nev. Rev. Stat. § 202.265* (2007). The state law prohibits a person from carrying or possessing a “dangerous weapon . . . while on the property of the Nevada System of Higher Education, a private or public school or child care facility, or while in a vehicle of a private or public school or child care facility.” *Id.* Although the statute allows a university president to grant written permission, such requests are summarily denied or simply ignored. As illustrated by the massacres that have occurred on college campuses, however, the statute presents a serious question of whether or not it strips citizens of their only capacity to employ self-defense while in the school, where they virtually have to be. Professor Volokh defends

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the position that, at the least, such laws should be closely scrutinized since they so burden the right of self-defense.

Those most critical of adopting an expansive interpretation of the right to “keep and bear arms” – switching places with modern conservatives – emphasize that all courts, state and federal, have been quite deferential through the years to legislative judgments about the need to limit or qualify the liberty of citizens as to the use of guns. This use of history is accurate enough; but America has only gradually learned through the years how to “take rights seriously” enough. If you consult the best histories of the judicial treatment of speech and press down through American history, you’ll find that a given speech’s perceived “bad tendencies” were often treated as an adequate ground for limiting First Amendment rights. More recently, courts have demonstrated the capacity to weigh the significance of honoring important rights against how compelling the state interest is in curtailing the exercise of those same rights. See the Volokh article cited above. While I personally would not construe and apply the Second Amendment to secure as broad a right as at least some I have spoken with would, I am comfortable with the idea that courts are capable both of honoring the important role of legislative bodies as well as the fundamental rights that all citizens should have. ■



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