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Ignoring the legal history of North Carolina in the Supreme Court’s interpretation of the Second Amendment to the United States Constitution.

A. Jamie Cuticchia, *Duke University*
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Casenote on District of Columbia v. Heller.

A. James Cuticchia
Duke University School of Medicine
North Carolina Central School of Law

Introduction

“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.”\(^1\) Those twenty-seven words of the Second Amendment to the U.S. Constitution have arguably constituted the most challenging phrase for legal interpretation. While there are many approaches to interpreting the Constitution, the court has chosen to take an original intent approach in this matter. This approach commands that the Court take on the roles of both linguists and archaeologists in developing its ruling.

Here the Court has dissected each word of the phrase with the same scrutiny early physicians did when attempting to discern human anatomy. One significant difference, however, is that the findings of an anatomist can later be tested to determine if they are correct; while the dissection of the Constitution in this manner is nothing more than an untestable hypothesis taken as truth. To place this dissection in context, the Court has looked at the environment under

\(^1\) U.S. CONST. amend. II.
which the Constitution was written, including the manner in which States addressed this issue. In doing so, the Court has relied on early North Carolina law as a way to give insight to the original text. However it is not clear that there is any evidence by looking at North Carolina legal history to support the Court’s holding.

This note shall address the Court’s use of North Carolina State Constitution and resulting laws to interpret this case. Both the letter of the law and the “environmental” evidence will be studied in order to critically examine the Court’s interpretation of North Carolina law as it relates to the right to bear arms. The role of North Carolina law in supporting the ruling of this case will be dissected for any inconsistencies. First, the facts and procedural history of this case will be presented as well as a brief background of the law as it relates to the case. The ruling of the court will be analyzed as to the use of North Carolina law in it, followed by a synopsis of the findings.

The Case

On March 31, 2004 the U.S. District Court, District of Columbia granted the District of Columbia’s motion to dismiss a lawsuit filed by six private citizens challenging its strict gun control laws.\(^2\) In this complaint, Plaintiff Heller “applied for a permit to possess a handgun in his home and has been rejected.”\(^3\) The three laws challenged were as follows:

\(^3\) *Id* at 103.
First, “A registration certificate shall not be issued for a … (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976.”

Second, “Except for law enforcement personnel … each registrant shall keep any firearm in his possession unload and disassembled or bound by trigger lock unless such firearm is kept at his place of business, or while being used for lawful recreational purposes ….”

Third, “No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law…”

In dismissing the complaint, the court held that:

Because this court rejects the notion that there is an individual right to bear arms separate and apart from service in the Militia and because none of the plaintiffs have asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment to the United States Constitution.

The case was appealed to the U.S. Court of Appeals for the District of Columbia where the motion was reversed and remanded as to the Plaintiff Heller. The court previously held that “plaintiffs bringing a pre-enforcement challenge to the District’s gun laws had not yet suffered an injury-in-fact, therefore they lacked constitutional standing” to challenge the laws. The court, however, found a distinction between appellant Heller and the other five appellants in that

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4 D.C. CODE § 7-2505.02 (2001).
5 D.C. CODE § 7-2507.02 (2001).
7 Parker, 311 F.Supp.2d at 109.
Heller “had applied for and been denied a registration certificate to own a handgun.”

Additionally, the court found that since the prohibitions of carrying a pistol without a license and the disassembly/trigger lock requirement “would amount to further conditions on the certificate Heller desires, Heller’s standing to pursue the license denial would subsume” those additional claims.

The U.S. Supreme Court granted certiorari and affirmed the decision of the appellate court holding that “the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self defense.”

Background

The Second Amendment states that “A well regulated Militia, being necessary for the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” This sentence consists of both an operative and a prefatory clause.

“The first salient feature of the operative clause is that it codifies a ‘right of the people.’” This phrase can be found two other times in the Constitution, in the Assembly-and-Petition clause of the First Amendment and in the Search-and-Seizure Clause in the Fourth Amendment.

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10 Parker, 478 F.3d at 376.
11 Id.
13 U.S. Const. amend. II.
14 The prefatory clause, which gives meaning to the operative clause is “A well regulated Militia, being necessary for the security of a free State.” The operative clause which sets out the right is “the right of the people to keep and bear arms shall not be infringed.”
15 Heller at 2790.
Amendment.\textsuperscript{16} The Court determined that in all three provisions the “rights” referred to individual rights, which would be inconsistent with an interpretation that clause referred only to the rights of people making up a militia.\textsuperscript{17}

If the word “arms” was limited only to weapons which would be used in a military capacity, it would support an interpretation that the right to bear arms was limited to use in military service. The Court did not make this finding. It held that in defining arms:

“The 18\textsuperscript{th}-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined “arms” as “weapons of offence, or armour of defense.” 1 Dictionary of the English Language 107 (4\textsuperscript{th} ed.).”\textsuperscript{18}

Similarly, “Timothy Cunningham’s important 1771 legal dictionary defined ‘arms’ as ‘any thing that a mean wears for his defense, or takes into his hands, or useth in wrath to cast as or strike another.’”\textsuperscript{19}

Both of these sources refuted the implication that “arms” would apply solely to weapons carried by a militia.

The Court again turned to Johnson’s dictionary for guidance on the interpretation of “keep arms” and “bear arms.” “Johnson defined ‘keep’ as, most relevantly, ‘[t]o retain; not to

\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 2791.
\textsuperscript{19} Id.
lose,’ and ‘[t]o have in custody.’”\textsuperscript{20} Moreover, the Webster American Dictionary of the English Language (1828) defined “keep” as “[t]o hold; to retain in one’s possession.”\textsuperscript{21}

Since the Constitution was written “to be understood by voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning,” that principle guides its interpretation.\textsuperscript{22} “Normal meaning may of course include an idiomatic meaning, but it excludes secret of technical meanings that would not have been known to ordinary citizens in the founding generation.”\textsuperscript{23} Since the Court was not “apprised … of an idiomatic meaning of ‘keep arms,’ the Court relied on the dictionary references and concluded that the “most natural reading of ‘keep arms’ in the Second Amendment is to ‘have weapons.’”\textsuperscript{24}

In his dissent, Justice Stevens pointed out that “the phrase to ‘bear arms’ … [did] have at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: “to serve as a soldier, do military service, fight” or to “wage war.”\textsuperscript{25} The majority was not moved by this interpretation holding that the phrase “\textit{unequivocally} bore that idiomatic meaning only when followed by preposition ‘against,’ which was in turn followed by the target of the hostilities.”\textsuperscript{26} Therefore when the Court combined each of the textual elements together it found “the guarantee the individual the right to possess and carry weapons in case of confrontation.”\textsuperscript{27}

\textsuperscript{20} \textit{Id} at 2792.
\textsuperscript{21} \textit{Id} at 2792.
\textsuperscript{22} \textit{United States v. Sprague}, 282 U.S. 716, 731 (1931).
\textsuperscript{23} \textit{Heller} at 2788.
\textsuperscript{24} \textit{Id} at 2792.
\textsuperscript{25} \textit{Id}. at 2794.
\textsuperscript{26} \textit{Id}.
\textsuperscript{27} \textit{Id}.
Having made this determination, the Court provided similar analysis to the prefatory clause: “A well regulated Militia, being necessary to the security of a free State.”

The Court previously held that “the Militia comprised all males physically capable of acting in concert for the common defense” basing its holding partly on an examination of dictionary meanings. By making this interpretation, the Court rejected a narrower view that “[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses,” of the Constitution.

As for the words “well regulated” the Court held that it “implies nothing more than the imposition of proper discipline and training,” having no significant relevance to the analysis of the Second Amendment.

Finally, the Court held that “security of a free state” meant “‘security of a free polity,’ not security of each of the several States….” The Court also looked to the writings of Joseph Story who in his treatise on the Constitution wrote that “the word ‘state’ is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community.”

When combining the prefatory with the operative clause “it is therefore entirely sensible that the Second Amendment’s prefatory clause announces the purpose for which the right was coded: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right … [b]ut the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms

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28 Id. at 2799.
30 Heller at 2799.
31 Id. at 2800.
32 Parker, 478 F.3d, at 405.
33 Heller at 2800.
was the reason that the right-unlike some other English rights-was codified in a written Constitution."

Understanding the analysis taken by Court, one may now look at the legal history of North Carolina and its proposed changes to the Second Amendment as it applies to the holding in *Heller*.

In the original draft of the Second Amendment, James Madison proposed the inclusion of a conscientious-objector clause that “no person religiously scrupulous of bearing arms shall be compelled to render military service in person.” In conjunction with Virginia, North Carolina proposed an amendment which stated “any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.” In his dissent, Justice Stevens unpersuasively used this information to bolster his argument that the Second Amendment focused solely on “militia” as it pertains to a military role.

The 17th proposal sent by the Virginia Ratifying Convention of the United States Constitution read:

17th, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is proper, natural and safe defense of a free State. That standing armies are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in cases the military should be under strict subordination to and be governed by the civil power.

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34 *Id.* at 2801.
35 *Id.* at 2796.
36 *Id.*
37 *Id.* at 2797.
38 *Id.* at 2833.
North Carolina adopted this proposal and “sent them to Congress as its own.”

In his dissent, Justice Stevens asserts that:

The preamble to the Second Amendment makes three important points. It identifies the preservation of the militia as the Amendment’s purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be “well regulated.” In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously.

North Carolina’s 1777 militia statute has a similar preamble: “Whereas a well regulated Militia is absolutely necessary, to the Safety, peace, and prosperity, of this State.” Thus, Justice Stevens held this as evidence supporting a military meaning of the Second Amendment.

Moreover, the North Carolina Second Amendment proposals were “embedded ... within a group of principles that are distinctly military in meaning.” The majority, however, felt that such a finding was not persuasive in supporting a military meaning of the Second Amendment.

In the Declaration of Rights Section XVII drafted in 1776, North Carolina codified a right to bear arms: “That the people have a right to bear arms, for the defense of the State....” The Court in its ruling held that “this could plausibly be read to support only a right to bear arms in a militia—but that is a peculiar way to make a point in a constitution that elsewhere repeatedly mentions the militia explicitly.” In 1843 the North Carolina Supreme Court clarified its right to bear arms as one given for broad public safety.

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39 Id.
40 Id. at 2824.
41 Heller at 2824.
42 Id. at 2802.
43 Id.
44 Id.
The North Carolina Constitution embodies the Second Amendment in Article I, Section 30 entitled “Militia and right to bear arms.” It states:

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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.  

The article goes farther in differentiating the role of the military as compared to the Second Amendment by including such phrases as “security of a free State,” “standing armies,” “military shall be kept under strict subordination.”

Analysis

Attempting to interpret the Constitution through analytical techniques meant to produce the understanding of the meaning that the framers gave to the document is an inexact science at its best. And the courts have not been consistent in taking this approach as exemplified by many canons of constitutional interpretation. Taken at its face value, if the Court’s holding that the right to bear arms applies to citizenry and not solely to a “militia,” then one should find concordance in extrinsic evidence supporting this view upon the drafting of the Second Amendment.

Focusing on a single State, North Carolina, there is exculpatory evidence supporting that the framers did in fact *not mean* for the Second Amendment to be applied outside a military environment.

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47 *Id.*
Starting with the drafting of the Second Amendment, there is evidence that North Carolina meant for the right to bear arms to be for the protection of the State. This is exemplified by the 17th proposal to the amending of the Constitution. The comparison of the safety of having a free militia in comparison to dangers of a standing army support the intention that North Carolina believed the Second Amendment applied to militia’s and there is no evidence to support that North Carolina believed the Second Amendment could also be applied to general citizens.

Secondly, in 1776, in the Declaration of Rights Section XVII North Carolina codified a right to bear arms: “That the people have a right to bear arms, for the defense of the State….” Followed by a clarification in 1843 by the North Carolina Supreme Court that the right to bear arms as “one given for broad public safety.” In both of these circumstances the focus was on protecting the State, not the individual – a task most likely to be performed by a militia.

Thirdly, the North Carolina 1777 Militia statute used a similar preamble as the Second Amendment. This could likely lead, again, to the presumption that the Second Amendment was to apply exclusively to militias.

These facts, alone show inconsistencies with the Court’s holding in *Heller*. The Court has arguably failed to give proper credence to the arguments expressed by Justice Stevens in his dissent, looking to focus on facts which support the expansion of the Second Amendment outside the scope of militias. However, there is little indication to support this holding based on the

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48 *Heller* at 2833.
49 *Id.* at 2802.
50 *Huntly* at 422-423.
framers’ intention by looking historically at the approach North Carolina took regarding the Second Amendment.

Conclusion

The ruling in *Heller* is significant. It presents a clear expression from the Supreme Court that broad laws banning the possession of firearms are unconstitutional. While it goes short of universally abandoning any gun control, it certainly supports the right of citizens to bear arms. The Court reached its conclusions by attempting to discern the meaning the framers of the Constitution gave to the Second Amendment; drawing upon linguistic canons and historical evidence to reach their conclusions. However, in his dissent, Justice Stevens brought forth numerous arguments to limit the scope of the Second Amendment. One such group of arguments centered on evidence that North Carolina perceived that the Second Amendment was written to be construed narrowly.

As one of the original colonies and ratifiers of the Constitution, it is disturbing that there is such a disconnect between the Court’s interpretation of the Second Amendment in its ruling in *Heller* and that of North Carolina.