TEXTUALISM AND *DISTRICT OF COLUMBIA V. HELLER*

EUGENE VOLOKH*

The text of the Second Amendment has played a large role both in judicial debates about the Amendment and in public ones. The majority opinion and dissents in *District of Columbia v. Heller*[1] talk extensively about the constitutional text. Lower courts continue to talk about it.[2] The public talks about it, too. Indeed, Second Amendment textualism has been kept alive (while it was largely dormant in the courts and among scholars) by people who thought, "Well, we read the text, and we think it means something other than what many courts have said."

So let me talk a bit about some of the textual issues that came up in *Heller* and that have come up since. I don't want to focus on repeating the arguments in *Heller*—those of you who are interested have read *Heller* for yourselves. Rather, this Essay will address some of the things we mean when we say "textualism," and some of the ways in which good textualists must go beyond the text of the particular document being considered.

Right of the people: Let's begin with the text, the "right of the people." The Supreme Court looked closely at this phrase,[3] but, as with much text, the phrase is facially ambiguous. The Seventh Amendment, for example, talks about the right to trial in "Suits at common law."[4] When I talk about textualism and

* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu).

1. District of Columbia v. Heller, 554 U.S. 570 (2008). This Essay was adapted from remarks given at the Federalist Society's National Lawyers Convention in Washington, D.C., on November 14, 2013.

2. *See, e.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 88–92 (2d Cir. 2012).

3. *See Heller*, 554 U.S. at 579–81.

4. The Seventh Amendment provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

originalism, I sometimes ask people: what are the possible meanings of "common law"?

"Common law" could mean common law as opposed to statutes. It could mean common law in the sense of English law, as opposed to the continental European civil law. It could mean common law in the sense of the rules generally accepted in the late 1700s, as opposed to modern law.[5] Or "common law" could refer to the sorts of claims that were historically litigated in the common-law courts—because of the remedies sought, such as damages—as opposed to other claims (seeking remedies such as injunctions) that were litigated in equity courts, or still other claims that were litigated in admiralty courts. And it turns out that, even though laypeople probably almost never think about common law as opposed to equity or admiralty, the Court has interpreted "Suits at common law" as referring to precisely this distinction.

The Court is likely correct, because that was probably the original meaning of the text.[6] To the extent that you're going to be a textualist, you ought to be an originalist. You may reject both originalism and textualism, but if you care about textualism, it's hard to say, "We're going to interpret that text because it was enacted into law by the Framers, but we are going to use modern meanings for words that the Framers never contemplated." That would be constitutional law by pun—a strange way of interpreting a legal provision. If you care about the text because that's what the Framers enacted, you rightly resolve the ambiguities in the text by considering what the text meant at the time it was made into law, rather than importing a modern, ahistorical understanding.

Likewise, the Court in *Heller* resolved the ambiguity by looking at original meaning, and in particular one important source of original meaning: the way the phrase was used in the rest of

5. For example, in criminal law, we often distinguish "the common law rule" from the "Model Penal Code rule." This doesn't so much distinguish nonstatutory law from statutory law, because most American states have embodied most of the "common law crimes" in statutes, starting in the 1800s. Rather, "the common law rule" generally refers to rules that were historically developed by common-law judges and then codified, as opposed to the rules newly minted by legislatures or the American Law Institute.

6. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996).

the document.[7] The Court recognized that "the people" could mean the people collectively, as in "we the People of the United States," the ones who ordained the Constitution, or it could mean the people in the sense of each person individually. And when "right of the people" is used in the First Amendment as to petitioning the government, in the Fourth Amendment as to searches and seizures, and in the Ninth Amendment as to retained rights (whatever those might be), it generally refers to an individual right.[8]

Now, the dissent disagreed, arguing that the Petition Clause right is actually a collective right.[9] I don't think that is correct; but, in any event, the important point is that, when we talk about the text, we should generally look at the whole text—not just this one provision, but the ones around it as well.

Arms: The Court also asked whether "arms" means military weapons used for military purposes, or whether it means arms in the sense of weapons more generally.[10] The majority said that "arms" includes civilian weapons.[11] How did the Court figure that out? It looked at the way these terms were used in documents around that time.[12]

Now we are living in perhaps the best time ever for textualism, partly because the Justices are more interested in textualism than they have been for decades before, but partly because you can do textualism without working really hard. It used to be that to do textualism, you had to read a lot of books, cover to cover. Books—you know, the old-fashioned ones, the ones on paper—don't have a search function. (Bad design, I know.)

But today, it's very easy to do a search and see how "arms" has been used in various contexts. That is what the Court, and those who argued to the Court, did; and the Court considered evidence and said that "arms" means "weapons" generally.

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7. *See Heller*, 554 U.S. at 579–81; Akhil Reed Amar, *Intertextualism*, 112 HARV. L. REV. 747 (1999).

8. *See Heller*, 554 U.S. at 579–81.

9. *See id.* at 645 (Stevens, J., dissenting).

10. *See id.* at 581–82 (majority opinion).

11. *See id.*

12. *See id.*

Interestingly, the Court also said that "arms" might mean defensive tools, such as armor.[13] The Court's argument on this is persuasive, but it's the sort of thing you probably wouldn't think of just by reading the text, until you actually look at dictionaries and other evidence of contemporaneous usage. And this issue is now coming up in some lower court cases with regard to bans on felons possessing body armor.[14] Does body armor count as "arms"? The Court's reasoning suggests it might.[15]

Some people have argued that "arms" means only those weapons that existed at the time, such as flintlocks. The Court said this argument borders on the frivolous,[16] and that criticism seems correct. Nobody takes that view with regard to commerce. Nobody thinks that the Free Press Clause protects only materials printed with late 1700s printing presses. Few people would say that the constitutional authorization for the Army and the Navy excludes the Air Force.

Indeed, people around the time of the Framing recognized that there would be technological change. They realized, for instance, that the printing press was once a new technology. There is an excellent passage on this from Francis Holt's 1812 *Law of Libel*:[17]

> [T]he rights of nature, that is to say, of the free exercise of our faculties, must not be invidiously narrowed to any single form or shape. They extend to every shape, and to every instrument, in which, and by whose assistance, those faculties can be exercised. I have a right to walk, I have the same right to run, and, if by the exertion of ingenuity I could invent any way to fly, I have the same natural right to fly. The same character, therefore, of natural rights is conveyed to every right which is natural in its origin and principle, through all the possible modes and instruments of exercising and launching it into action and employment.[18]

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13. *See id.* at 602.

14. *See, e.g.*, United States v. Bogle, 717 F.3d 281 (2d Cir. 2013).

15. *See Heller*, 554 U.S. at 602–03.

16. *Id.* at 582.

17. This was an English treatise, but highly influential in America in the early 1800s, and my sense is that the views expressed there were mainstream on both sides of the Atlantic.

18. FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 38–39 (1812); FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 60 (New York, Stephen Gould 1818).

The same is true of arms technology as much as of press technology.

Keep and bear: The meaning of "keep and bear" was another important textual issue. The *Heller* dissent argued, and others have as well, that "bear arms" refers solely to military service.[19]

But the majority disagreed. To "keep . . . arms," the majority reasoned, usually means to possess in one's own home; many contemporaneous sources used it this way. And it would be very strange, the majority concluded, that "keep" in "keep and bear arms" would mean an individual private right, and "bear" in the same phrase would mean just a military right.[20] The majority had the better of this particular argument, but the broader point is that the grammatical relationship between provisions is an important clue as to the meaning of each provision.

Indeed, this is visible not just as to the Second Amendment, but as to the First. Some people have argued that the "freedom . . . of the press" refers not to the freedom of everyone to use the printing press and its technological heirs (such as the Internet), but rather to the freedom of "the press" as a profession or institution.

Yet, as Justice Scalia argued in *Citizens United*,[21] this can't be right. "Freedom of speech" in "freedom of speech, or of the press" means the freedom of all to speak; this suggests that "freedom . . . of the press" in the same phrase means the freedom of all to use the press. Reading "freedom" to mean "freedom of every person to engage in an activity" when "freedom" relates to "speech," but reading the same word in the same place as meaning "the freedom of some particular group of people" when it relates to "the press" is not how users of the English language use these kinds of closely connected clauses, except when they are joking.[22]

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19. *See Heller*, 554 U.S. at 637–38 (Stevens, J., dissenting).

20. *See id.* at 582–91 (majority opinion).

21. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 390 (2010) (Scalia, J., concurring).

22. *See* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 472–74 (2012) (arguing that, historically, "freedom . . . of the press" was consistently seen as the freedom of all to use the press as a technology).

Militia and well-regulated: The Court likewise looked closely at what "militia" and "well-regulated" might mean, relying heavily on contemporaneous sources.[23] I won't repeat that debate here, except to say that the Court (I think quite persuasively) concluded that, in the language of the time, "militia" meant basically the entire armed adult male citizenry, and "well-regulated" meant well-trained or well-functioning (rather than subject to many restrictions).[24]

Free state: "Free state" is another example.[25] What does "free state" mean? Does it mean "state of the union, free of undue federal control"—what we might today call an "independent state"? Or does it mean something akin to "free country"—a country that secures freedom to its citizens? The historical evidence of how the term was used around that era overwhelmingly points to the "free country" interpretation and the Court agreed.[26]

The two clauses: The other thing, of course, that the Court famously discussed is the relationship between the clauses. Does the right clause govern the interpretation of the militia clause? Does the militia clause govern the interpretation of the right clause? Can they be reconciled, and if so, how?[27] That, too, took a good deal of interpretation of the text, and of how similar texts were used and understood at the time.[28]

"The" and "infringed": The Court did not discuss two words: "the" and "infringed." People often argue that the Second Amendment clearly forbids all gun controls. "What part of 'shall not be infringed' don't you understand?," they say.

My answer to that question is "infringed." I don't really know exactly what "infringed" means, and I'm also not entirely sure about the "the" in "the right of the people."

Some have pointed out that the First Amendment talks about *the* freedom of speech, and of the press. It sounds like the Framers were talking not so much about freedom to speak and

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23. *See Heller*, 554 U.S. at 595–97.

24. *See id.*

25. *See* Eugene Volokh, *"Necessary to the Security of a Free State,"* 83 NOTRE DAME L. REV. 1 (2007).

26. *See Heller*, 554 U.S. at 597–98.

27. *See id.* at 598–99.

28. *Id.*; *see also* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998).

print in general, but rather about some preexisting legal concept that they labeled "the freedom of speech, or of the press."

That preexisting concept may well have come combined with an acceptance of some of the preexisting restraints on what one can speak and print. We don't have a lot of evidence about this, but the text is consistent with this notion that "the freedom" doesn't mean unlimited freedom. Likewise, in the Second Amendment, "the right of the people to keep and bear arms" might not be anybody's right to have any gun, but rather a legal concept that was to be preserved, perhaps together with some of the limitations that were present at the time (though, again, we aren't positive what they are).

Indeed, judges in the early Republic often concluded that not every regulation of the bearing of arms is an infringement.[29] The Framers doubtless thought the rights in the First Amendment, Second Amendment, and the rest were tremendously important. But the Framers wouldn't have thought that no one could ever regulate speech or the press.[30] "Of course, some re-

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29. *See, e.g.*, State v. Reid, 1 Ala. 612, 616 (1840) (concluding that a legislature may "regulat[e] the manner of bearing arms," but may not enact a law that, "under the pretence of regulating, amounts to a destruction of the right"); Aymette v. State, 21 Tenn. (2 Hum.) 154, 159 (1840) ("And, although this right must be inviolably preserved, yet it does not follow that the Legislature is prohibited altogether from passing laws regulating the manner in which these arms may be employed."); *see also* Nunn v. State, 1 Ga. 243, 251 (1846) (concluding that a ban on concealed carry was constitutional "inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms," but that the ban on open carry is unconstitutional). *But see* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822) (striking down a ban on concealed carry, on the grounds that "Not merely all legislative acts, which purport to take [the right to keep and bear arms] away; but all which diminish or impair it as it existed when the constitution was formed, are void").

30. Some have argued that "freedom of the press" was understood as categorically prohibiting all laws restricting the press; all regulation of the press, the argument went, had to be conducted at the state level. But the same "freedom of the press" was also protected against *state* governments by state constitutions. *See, e.g.*, GA. CONST. of 1789, art. IV, § 3 ("Freedom of the press and trial by jury shall remain inviolate."); MASS. CONST. of 1780, pt. the first, art. XVI ("The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth."); MD. CONST. of 1776, art. XXXVIII ("That the liberty of the press ought to be inviolably preserved."); N.C. CONST. of 1776, § 15 ("That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained."); N.H. CONST. of 1784, pt. 1, art. 1, § XXII ("The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved."); PA. CONST. of 1776, art. XII ("That the

strictions are permissible," they would have said, "so long as they do not abridge the freedom."[31] They would likely have said the same as to the Second Amendment—regulations are allowed, so long as they do not infringe the right of the people to keep and bear arms.

That doesn't, unfortunately, answer the question of just when a regulation becomes an infringement. But if we are textualists, we have to be textualists with real attention to the text and what it may have meant, rather than just taking some of the words and assuming that they mean something they might not.

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people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."); VA. CONST. of 1776, § 12 ("That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."). Yet no one thought that this "freedom of the press" categorically banned all regulations, such as libel law.

31. *See, e.g.*, Respublica v. Dallas, 1 U.S. (1 Dall.) 319, 325–26 (1788); Territory v. Nugent, 1 Mart. (o.s.) 108 (Orleans Terr. 1810).