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LIVING OR DEAD? SPECIFICS OF THE LANGUAGE OF THE SECOND AMENDMENT TO THE U.S. CONSTITUTION

Abstract. The original text of the Constitution of the United States of America, written over 200 years ago, constitutes the supreme source of law in the American legal system. The seven articles and twenty seven amendments dictate understanding of fundamental principles of the federation's functioning and its citizens' rights.

The paper aims to present the evolution of the U.S. Constitution's language interpretation as provided by its final interpreter – the Supreme Court of the United States. Example of the Second Amendment will be analyzed to present the change in understanding of the language grammar and, as a consequence, the sense of the right to keep and bear arms in the light of the Supreme Court's decision in the case of *District of Columbia v Heller* (554 U.S. 570 (2008)).

It will argue for the accuracy of statement of Charles Evans Hughes, former Chief Justice of the U.S. Supreme Court: "We are under a Constitution, but the Constitution is what the judges say it is...".

Keywords: U.S. Constitution, Second Amendment, originalism, gun control laws, U.S. Supreme Court.

Basic history and language facts about the US Constitution

The text of the Constitution of the United States of America was born together with the idea of federation framed as the United States of America. During the Philadelphia Convention in 1787 two major visions concerning the future of the country fought a long and difficult battle. As the past of confederation brought disappointment, the Federalists (authors of the proposed draft of the Constitution) saw the future system as a federal division of powers between somewhat strong central government and states which would transfer some of their powers to the central level. Antifederalist group feared that the strong central government would slowly want to de-

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prive states of the rest of their powers and promoted the model of stronger states, less dependent from the central government.

What emerged from dynamic discussions and negotiations was a compromise based on the federal model.

The text of the Constitution itself is very short but the documents, publications, or even memoires written back then are unique supplements allowing better and deeper understanding of the times and problems at stake.

The Constitution of the United States of America is the shortest constitution in the world. The original text of seven articles consists of (depending on the source providing information) around 4.500 words including signatures (Constitution Facts). There are total of 27 amendments to the Constitution adopted (as a list below the original text) between 1791 and 1992. The number of words almost doubles with the amendments and comes up to total of around 7.600. In comparison, the Constitution of the Republic of Poland consists of over 13.800 words.

The US Supreme Court as the final interpreter of the US Constitution

Legal system of the United States is a common law system. Its most significant difference from the civil law system lies in the existence of precedent. It is based on the doctrine of *stare decisis et non quieta movere* which translates to "stand by the thing decided and do not disturb the calm". As a result and as a standard rule, lower courts within a geographical jurisdiction are bound by relevant precedent announced by higher courts within that jurisdiction. (Field III, 1999–2000:204; Dobbins, 2009–2010:1455). The judge handling a case is bound not only by the statutory provisions relevant to the issue but also by the prior decisions of higher courts concerning such issue. The precedential principle applies on both – state and federal – levels.

Expressed in Article VI of the Constitution supremacy clause establishes one of the most important principles in the American legal system, according to which the Constitution, federal legislation and international treaties are the "supreme law of the land". In other words, all the state laws (including constitutions of states) must comply with federal law and federal Constitution. Judges in all courts across the country, both on state and federal level, must obey this rule. When a problem of conflict of law with the U.S. Constitution occurs, the United States Supreme Court acts as

the final interpreter of the problem and its decision is binding to all courts and all judges in the United States.

The Supreme Court composes of nine Justices (it is the term used when referring to the judges of this particular court) including the Chief Justice and eight Associate Justices appointed by the President of the United States with the advice and consent of the Senate (28 U. S. C. § 1 and Art II Sec 2 of the US Constitution).

The Constitution confirms a very strong position of the Justices. According to Article III as supreme judges they "hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office" (Art III Sec 1 of the US Constitution). The "good behaviour" appointment has been interpreted as lifetime appointment. As long as the Justice maintains good behavior there is no possibility to end his/her term under some limits of age or years of service. The only possibility of ending the term is through the constitutionally established process of congressional impeachment, where the House of Representatives acts as prosecution and the Senate gives final decision on the removal or acquaintance of the federal officials including the US President and Supreme Court's Justices (Art II Sec 4 of the US Constitution). It seems that such solutions underlying the independence of the Justices aimed at strengthening of the judicial branch in the relations with the executive and legislative branches. Thus it became an element of the checks and balances system incorporated in the American model of the separation of powers on federal level.

The jurisdiction of the Court includes original jurisdiction of some specific cases (such as those between two or more states) and appellate jurisdiction (obligatory in cases where the decision of the district court was issued by a panel of three judges and not obligatory in other cases). Most of the Supreme Court's decisions are issued in a way of certiorari. As Burnham summarizes, "by exercising its appellate certiorari jurisdiction over cases involving issues of federal law coming from the lower federal courts and the highest courts of the states, the Court maintains its supremacy and consistency of federal law" (Burnham, 2006:174).

The Supreme Court is therefore performing the final judicial review of American law. It functions not only as a court dealing with conflicts but also or even mostly, as a court controlling the consistency of law with the Constitution (the role played by separately established constitutional courts or tribunals in the civil law countries). Such power was confirmed in one of the most significant decisions of the Court written by Chief Jus-

tice John Marshall back in 1802 (*Marbury v Madison* 5 U.S. 137 (1803)). Once the Supreme Court issues a decision interpreting one of the constitutional provisions, as a result of precedential principle, it becomes binding to all other courts and has power equal to the interpreted provision itself. Only a future decision of the Supreme Court may change it as the Supreme Court is the highest court in the federal judiciary structure. Short in its length and language the US Constitution has become an endless source of judicial interpretations and decisions on the constitutionality of other binding acts.

An example of such change in interpretation will be presented below with regards to the understanding of the language of the Second Amendment to the U.S. Constitution.

Constitutional interpretation – introductory notes

Interpretation of the United States' Constitution is the art performed by the judges across the country but most importantly by the U.S. Supreme Court Justices in their everyday work.

There are two types of activities strongly connected to that work: constitutional interpretation and constitutional construction. Even though those two terms are often used as own substitutions, a clear distinction between them is also noted among scholars. According to Solum, constitutional interpretation discovers the communicative content or linguistic meaning of the constitutional text (it is a discovery of the meaning) whereas constitutional construction determines the legal effect given the text, including constitutional law's doctrines, constitutional decisions or issues by judges and other officials (Solum, 2013:453).

Methods or modes used while performing the unique practice of constitutional interpretation and construction developed with time and dynamics of American legal system and they may be differently categorized and titled. The theories and methods are used by judges across the country but there is no definitive list of constitutional theories and there is no agreement on how these theories should be applied (Thomas, 2011:1–2). This article will introduce three main methods of interpretation and then focus on one of the two contrary schools or theories of constitutional interpretation. Methods and theories become necessary introduction to the understanding of the dynamics of the story of the Second Amendment.

Main methods of constitutional interpretation

There are three methods mostly used for the interpretation of the written constitution, that is textual method, structural (also known as functional) method and historical method. Textual method is based on the literal understanding of the constitutional provisions. The words of the text must be understood as meaning what they meant to the authors. In addition, the "spirit" of the provision may or should be taken into account, and the interpreter must be sure of the purposes of the text (Kelso, 1994:128–129). Structural interpretation focuses on the structure of the entire document. It is not solely based on the interpreted provision but has to be considered in the light of the structure of the constitution, division into parts, relevance of the articles, as well as on the general principles derived from the constitution (Westover, 2005:694). Historical method moves away from the strict and close attachment to the text and allows for interpreting the text in the light of the historical circumstances of the constitution. It takes into account the processes of negotiations, drafting, ratifications as well as the judicial developments form the past. Such method is most often associated with one of the leading theories of constitutional interpretation – originalism (Thomas, 2011:2–3).

Constitutional interpretation in the originalism theory

Originalism as a theory has been widely described and defined in the literature. For the purpose of this article, originalism will be understood according to Solum's definition as a "family of constitutional theories united by two core ideas". The "Fixation Thesis" as the first idea is that the original meaning of the constitutional text is fixed at the time each provision is framed and ratified while the "Constraint Principle" as the second idea provided that constitutional actors (such as judges) should be constrained by the original meaning when engaged in constitutional practice (Solum, 2013:456). With time a school of "new originalism" appeared which comprises two additional notions: one stating that original meaning is a function of the public meaning of the constitution and the other one focusing on the recognition of a distinction between interpretation and construction (Solum, 2013:457).

There is a theory which stands on the completely other side and supports a dynamic interpretation of the constitution as a "living" document, a document that should adjust to the development of social, economic, po-

litical circumstances of the times. The non-originalism stands behind a more liberal and flexible approach to the constitutional reading although it obviously starts its analysis from the original text of the constitutional provision (Smith, 2011:709–710).

Originalism, which is essential for the purpose of this article, as a constitutional theory is very often associated with conservative politics and the conservative side of the U.S. Supreme Court's composition (Whittington, 2011:29). More conservative justices believe that the heart of the constitutional understanding lies in the exact and literal interpretation of the constitution in its original language and circumstances.

Justice Antonin Scalia has been appointed to the US Supreme Court by President Ronald Reagan in 1986, clearly as a right wing, republican statement and confirmation of the stable, limited in dynamics constitutional interpretation. He is the author of some significant majority opinions in the recent years including the 2006 opinion in *LULAC v. Perry* (548 U. S. 399 (2006)) dealing with voting rights issues. He often comes into arguments with other justices of the Supreme Court. His dissenting opinions (such as the one in 1988 in *Morrison v. Olson* (487 U.S. 654 (1988)), where he was the only dissenting justice or the 2003 landmark decision *Lawrence v. Texas* (539 U.S. 558 (2003)) striking down sodomy law in the state or the recent ones: 2012 *Arizona v. United States* (567 U.S. ___ (2012)) striking down parts of Arizona's immigration law and 2013 *United States v. Windsor* (570 *U.S.* ___ (2013)) holding the federal interpretation of "marriage" unconstitutional) are strongly motivated, very well argued and passionately written therefore widely quoted and loved by media (Liptak, 2009:A13). To no one's surprise, it is often strongly criticized by other lawyers, justices and distinctive scholars (Chemerinsky, 2000:385–401). Justice Scalia's name is strongly associated with the originalism in constitutional interpretation as well as the textualism in its reading. In one of the recent press interviews he admitted himself to the strongest views on the reading of the constitution as a legal text. "Words have meaning. And their meaning doesn't change. I mean, the notion that the Constitution should simply, by decree of the Court, mean something that it didn't mean when the people voted for it-frankly, you should ask the other side the question! How did they *ever* get there?" (Senior, 2013)

Justice Scalia, it has to be emphasized, wrote the majority opinion in the analyzed for the purpose of the article case – *District of Columbia v Heller*.

Language and interpretation of the Second Amendment in the past

To fully understand the language and content meaning of the 2008 opinion in the *District of Columbia v Heller* a short look must be taken at the history of the Second Amendment itself. It is included in the Bill of Rights – the first ten amendments to the U.S. Constitution passed only two years after the ratification of the Constitution itself. Bill of Rights is known as a catalogue of fundamental guarantees of individual liberties. It was prepared by James Madison (originally as necessary changes to the main text of the Constitution) as a response to the strong requests of states which argued for the better protection of citizens and limitations of the federal government's power over the people. Bill of Rights contains list of freedoms provided for American citizens under the federal law including: freedom of speech, freedom of religion, freedom of assembly, freedom of press, several rights of the accused in the criminal proceedings. Among those provisions Second Amendment concerns the right to keep and bear arms.

The Amendment reads: "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."

It is a one-sentence Amendment, a little twisted in its grammar and stylistics, especially for the non-lawyers. Non-native speakers usually feel there is a verb missing in the opening part. The 27 words are confusing and have caused serious legal debates to be finalized in the *District of Columbia v Heller* and immediate subsequent opinion of the U.S. Supreme Court in *McDonald v City of Chicago* in 2010 (561 U.S. 3025 (2010)).

The essential issue in the interpretation of the Second Amendment comes down to the question: does the provision guarantee collective right to keep and bear arms in connection with militia service or does it guarantee an individual right of every citizen of the United States to possess firearm, keep it and use it, regardless of the connection to the militia, naturally in a legal way (protection, self-defense). Further, if the answer to this question confirms the right of individual, then does it also apply to state lever through Fourteenth Amendment? (Jones, 2009:509–520).

As the language of the Amendment itself leave some space for interpretation, it became subject to courts' analysis and battlefield for the two groups: those who believe that everyone is entitled to possess a gun to be able to protect themselves, their families and their property and those who

are strongly against such freedom arguing it increases the crime rate and no real control is possible over the firearm possession. According to the theory of individual right, no prohibition of the possession of guns is allowed to be imposed by local, state or federal level. Contrary, according to theory of collective rights, people (meaning citizens) do not have such right guaranteed by the Constitution. The right is solely connected to the service in militia.

The battle between the theories has been as long as the existence of the Amendment, therefore one should look for its origins in the history and the intentions of the Constitution's authors. What was the initial idea behind the provision? Is there any evidence that the Founding Fathers (especially the author of the Second Amendment himself) had a clear, firm and doubtless concept of the freedom?

As described below, interpretation is the key. For the supporters of the freedom to carry guns, the drafters of the Constitution wanted it to be the right guaranteed to all people. For those who are against such freedom or believe that is should be strictly limited, the same drafters wanted the militia – the military forces of the country back in time to be guaranteed the freedom and the limits are to be set for federal government only. One may find several arguments in the texts of the Federalists Papers, especially those by Hamilton and Madison. An interesting perspective arguing that "no freeman shall be debarred the use of arms (within his own lands or tenements)" is also given by Tomas Jefferson, in his draft of the state constitution for Virginia. (Cornell, 2006:73–108). The wording of the Second Amendment meant to preserve state sovereignty comes along the compromise between the two groups working on the future state system of the federation: the Federalists and Anti-Federalists (Jones, 2009:512–514).

The final interpretation and binding understanding of the Amendment had to wait for the decision of the final interpreter.

The question of Second Amendment's purpose and scope of application was for the first time picked up by the U.S. Supreme court over 70 years ago in a case of *United States v. Miller* (307 U.S. 174 (1939)). The National Firearms Act of 1934 (26 U.S.C. § 5801 et seq) was being challenged and the Supreme Court's justices took the collective rights position. In this very short opinion the problem is argued very narrowly. The writing is very formal and the opinion consists mostly of quotes and lacks a throughout analysis of the Amendment itself as well as of the wider interpretation of the National Firearm Act. The argument for the federal government control over the guns comes from the paragraph stating that the "obvious purpose"

of the Second Amendment was "to assure the continuation and render possible the effectiveness of militia". As a result, as the majority opinion of Justice McReynolds states, "it must be interpreted and applied with that end in view".

For almost 70 years, there was no other case in the U.S. Supreme Court directly challenging such interpretation of the Second Amendment. Moreover, for almost 70 years it was the only U.S. Supreme Court case construing the Second Amendment. *United States v. Miller* was quoted only a few times in other, future judgments of the federal courts, including the Supreme Court, with the prevailing (although not solely existing) understanding was that the holding of the opinion provided federal constitutional guarantee of the right to keep and bear arms as strictly associated with the militia service. The case has been considered a difficult and confusing one, or even regarded as "impenetrable mess" (Frye, 2008:49–50).

Under such legal circumstances, states were allowed to regulate the access and possession of the firearms in their own legal orders. Even prior to 1939 The Supreme Court issued some opinions stating that the Second Amendment does not prohibit states to regulate firearms (*United States v. Cruikshank*, 92 U.S. 542, 553 (1875), *Presser v. Illinois*, 116 U.S. 252, 265 (1886)). The decisions confirmed the limitations of the federal government only. Amendment Fourteenth (through which states were bound by most of the Bill of Rights' provisions) was never applied to the Second Amendment.

According to the "gun laws map" provided by the National Rifle Association (a very powerful American organization promoting the right to possess and carry firearms as a civil right of Americans), those orders differed extensively throughout the country. States historically rooted in the tradition supporting ownership and use of guns for protection allowed for their purchase, possession and use by their citizens, of course in accordance with the state law and requirements. On the other hand, there were (and are) states where the authorities and societies are against such individual freedom and the purchase, possession and use of the firearms was either very limited or not possible for an average citizen. States passed different regulations concerning the right to carry guns (again, requirements are specified in each act) and issuance of permission by state authorities. In few states (such as California or New York) state law completely prohibits carrying firearms for personal protection outside the house or place of work (NRA Gun Laws).

Second Amendment after Heller: "new-old" language of the Constitution

Things changed in 2008. Dick Heller was a special police officer authorized to carry a handgun while on duty. He wanted to get permission to keep it also at home but the District of Columbia law practically prohibited it, so Heller was refused to register a gun. He filed a lawsuit in the federal court, seeking to, inter alia, enjoin the city from enforcing the bar on registration of handguns based on the Second Amendment grounds. Through appeals it had made it to the U.S. Supreme Court which granted the petition for certiorari and heard the case.

The five to four majority decided that the "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.".

The opinion gives an extensive and very throughout textual analysis of the language of the Amendment based on the historical evidence and grammar interpretation. It is guided by the principle formulated in other Supreme Court's judgments that "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" (*United States v. Sprague*, 282 U.S. 716, 731 (1931)).

The majority reasoning (authored by Justice Antonin Scalia who wrote the opinion) is based on the assumption that the Second Amendment's sentence is divided into two parts: prefatory clause ("A well regulated Militia, being necessary to the security of a free state,") and operative clause ("the right of the people to keep and bear arms shall not be infringed").

According to the Justice Scalia's majority opinion, the division into two clauses is natural and "prefatory clause announces a purpose but does not limit or expand the scope of the second part, the operative clause". Analysis of the prefatory clause is built around the interpretation of the key terms in this part: "militia" and "security of a free state".

The textual analysis of the operative clause constitutes basis for the individual right of the U.S. citizens to be guaranteed the right to keep and bear arms. The judgment provides a long and detailed analysis of the two terms" the right of the people" as well as "to keep and bear arms". As stated in the opinion "... in all six other provisions of the Constitution that mention 'the people', the term unambiguously refers to all members of the political community, not an unspecified subset". And further on the term "to keep and bear arms": "Although the phrase implies that the carrying of

the weapon is for the purpose of 'offensive or defensive action', it in no way connotes participation in a structured military organization". The Court argues that the Amendment could be rephrased, as suggested is some earlier writings, as "Because 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".

Such conclusions in the opinion are based on analysis of the Second Amendment's drafting and ratification history, as well as on the fact that some state constitutions included similar provisions (North Carolina, Massachusetts). In addition, the Court pointed that interpretation of the Second Amendment (done by courts, scholars and legislators) right after its ratification until late 19th century also supports the individual right approach.

It must be added that although a good two thirds of the lengthy opinion is dedicated to the arguments for the freedom to keep and bear arms as a freedom of all the citizens, not only those serving in the militia, the Court clearly confirms that "like most rights, the right secured by the Second Amendment is not unlimited". It is not the right to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose". Access to this right should not be granted to felons, mentally ill. Firearms should not be allowed in "sensitive places" like schools and the commercial sale of arms may and should be regulated. Further, it should be determined what kind of weapons are subject to the Second Amendment and "dangerous and unusual weapons" are certainly outside the scope of the Second Amendment's guarantee. An exhaustive analysis of the term "arms" is also provided in the opinion distinguishing handguns from other firearms (like long guns). In line with that, the D.C. law's requirements for the way the guns should be kept (trigger-lock requirement) is criticized. The final paragraph of the opinion recognized the problem of handgun violence in the United States but it states that complete prohibition of such guns is not the right tool to combat the problem.

The Court was divided into five to four while taking the decision. Two dissenting opinions were submitted (one by Justice Stevens, one by Justice Breyer, other dissenting justices joined them) and both of them were as strongly argued as (and only a little shorter than) the majority opinion. In fact, the main opinion provides elements of the discussion with dissents so reading it sometimes feels like listening to the top quality legal discourse of the main arguer and two opposing voices. The biggest interpretative arguments on the prefatory and operative clauses of the Amendment were given by Justice Stevens. He concluded, referring to the absolute key judgment on judicial review in the American history in *Marbury v. Madison* case,

that "The preamble (...) both sets forth the object of the Amendment and informs the meaning of the reminder of its text. Such test should not be treated as mere surplusage, for '[i]t cannot be presumed that any clause in the constitution is intended to be without effect"'. Contrary to Scalia he also states that "The words 'the people' do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia". Finally, the dissent points that "The absence of any reference to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble".

Effects of the *District of Columbia v. Heller*

In the case of *District of Columbia v. Heller*, the Supreme Court, for the first time in its history, interpreted the Second Amendment as granting an individual right to each American citizen to keep and bear arms (Card, 2009:266).

As a result the gun laws of the District of Columbia (codified in the D.C. Official Code § 7) held unconstitutional became invalid and had to be liberalized through new regulation. Since District of Columbia is not a state, but an administrative unit created for the seat of the federal government, the effects of the Court's decision could not immediately be extended to the state laws. Another case, involving a state law on firearms had to be challenged. The reaction was of course very fast. Only two years later, in 2010, the Supreme Court heard a case and issued an opinion in the *McDonald v. Chicago*. Petitioner challenged inter alia the Chicago city ordinance banning the possession of handguns. Based on the precedent set in the *Heller* case, the decision confirmed the Second Amendment's protection of individual right to keep and carry guns. Once again the five to four majority occurred and this time another justice – Samuel Alito wrote the opinion holding that 'the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*". In other words, the Second Amendment right of individuals to keep and bear arms in self-defense applies against state and local governments as well as the federal government. This holding opened the door for change of the gun laws across the country.

Four dissenting opinions were submitted, strongly arguing against such direction of legal, historical and language reasoning. Some, like the one by Justice Breyer concluded that is not the modern understanding but the originalist interpretation of what was written back in the eighteen century

by the Founding Fathers: "In sum, the Framers did not write the Second Amendment in order to protect a private right of armed self defense. There has been, and is, no consensus that the right is, or was, 'fundamental'."

The decision in *McDonald* was a natural consequence of the line accepted in *Heller*. Originalism was the key for the *District of Columbia v. Heller* opinion. It has to be clearly emphasized that it was widely criticized, including some very strong opinions by those who accepted originalism as a key to the case and just think it should be better defended. Lund for example states that under specific circumstances, the case "should be seen as an embarrassment for those who joined majority opinion" and it may further be "widely (though not fairly) seen as an embarrassment for the interpretive approach that the Court purported to employ" (Lund, 2009:1345).

The criticism does not change the facts: Second Amendment has a new meaning and the new meaning was derived from the textual and historical analysis of the text. The analysis was conducted by the U.S. Supreme Court whose justices (binding majority) read the words, interpreted them and told all the Americans what they were. It may only be changed by a future judgment of the same court which may or may not happen, depending on the road the constitutional challenges will take.

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