

WHAT'S BETWEEN AND A D

When gun-banners refer to a “Living Constitution,” what they really mean is a Constitution that can be interpreted any way they like ... which is not much different from having no Constitution at all.

by DAVE KOPEL



AMENDMENT:

THE DIFFERENCE IN A "LIVING CONSTITUTION" DEAD DOCUMENT?



The Supreme Court's decision last year in *District of Columbia v. Heller* was the epitome of "original meaning" jurisprudence. The majority opinion and the dissents argued at length about what the citizens of the Founding Era thought that the Second Amendment meant. >>

Yet today, for many Americans, original meaning seems irrelevant. They believe in a so-called "living Constitution," by which the Constitution is interpreted according to evolving social standards.

Fortunately for the Second Amendment, the case for a strong *individual* right is at least as strong under the living Constitution theory as it is under originalism.

There are some gun prohibitionists, and other people, who purport to believe in a living Constitution; but what they really want is a dead Constitution. They want the Constitution to allow whatever they like, and forbid whatever they don't like. With this approach, the Constitution might as well never have been written, since "the Constitution" would mean nothing more than "whatever the judge happens to feel today."

In contrast, an intellectually serious advocate of living constitutionalism looks to a variety of external, objective sources in order to ascertain evolving constitutional meaning.

Almost everyone subscribes, at least to some extent, to living constitutionalism. Today, we all agree that the First Amendment protects the right of a journalist to write, "The president is an idiot." Yet as the great legal historian Leonard Levy detailed in his book, *Origins of the Bill of Rights*, when the First Amendment was ratified, the original understanding of the guarantee of "the

freedom of the press” was mainly that it prevented prior restraints. That is, the government could not censor speech before publication, nor could the government forbid someone to publish a newspaper without a government license.

Yet post-publication punishment for

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speech could be constitutional. Levy demonstrates that when Congress passed the Sedition Act of 1798 during the administration of John Adams, the criminalization of “seditious libel” was consistent with original understanding of the First Amendment. Indeed, the Sedition Act was much more speech-protective than were its British antecedents. For example, if you wrote, “President John Adams is an imbecile who lacks any understanding of how to perform the functions of the presidency,” you could be prosecuted under the Sedition Act. But if you could prove that Adams really was an imbecile, then you would be entitled to an acquittal.

However, as Levy explains, many Americans considered the Sedition

Act to be an outrage. And they took out their anger in the election of 1800, in which Thomas Jefferson defeated John Adams, even though Adams had handily beaten Jefferson in 1796. From then onward, Levy writes, the First Amendment was understood to prohibit even post-publication punishment for writings that criticized the government.

Similarly, whatever the Second Amendment might originally have meant, the historical record from 1800 onward shows that it was unambiguously understood as protecting a personal right to own guns for self-defense. Starting with St. George Tucker’s 1803 American edition of William Blackstone’s *Commentaries*, up through the 1897 second edition of Henry Campbell Black’s *Handbook of American Constitutional Law*, the legal scholars of the 19th century taught that the Second Amendment belonged to all Americans, not merely to a militia that Congress could define out of existence.

Supporters of the living Constitution theory use the term “constitutional moments” to describe times when the people, acting through the political system, alter or expand the Constitution without going through the formal process of constitutional amendment. The key examples cited are usually the Civil War and Reconstruction, plus the Franklin Roosevelt administration. During those momentous times, the Second Amendment was plainly applied in its modern sense, as a right not limited to the militia.

During the troubles of “Bleeding Kansas,” anti-slavery congressmen such as Charles Sumner reacted furiously to what Sumner denounced as “the crime against Kansas”—namely, the disarming of anti-slavery Kansans by an illegitimate pro-slavery territorial government. During the Civil War, Democrats were similarly enraged that the Lincoln administration and General John C. Fremont violated Second Amendment rights by confiscating the personal arms of citizens in Missouri who were suspected of sympathizing with the Confederacy.

After the war, white racist governments of the former Confederate states enacted

“black codes,” which prohibited former slaves from possessing firearms. The purpose was to leave the freedmen in *de facto* subjugation, and defenseless against the Ku Klux Klan’s terrorism. Congress responded by passing the Freedmen’s Bureau Act of 1866, which explicitly protected the freedmen’s “constitutional right to arms.” Two years later, Congress passed the 14th Amendment, and the debates in Congress leave no doubt that the amendment’s proponents intended to make sure that state and local governments did not infringe the Second Amendment right of freedmen to own and use guns for home defense against violent criminals, particularly the Klan.

In 1941, Congress looked with horror at what gun confiscation had led to in Nazi Germany and the Soviet Union. When Congress passed the Property Requisition Act to allow the federal government to take property needed for national defense against tyranny, Congress made sure that the American people would retain their own ability to resist tyranny. The act forbade the federal government “to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),” or “to impair or infringe in any manner the right of any individual to keep and bear arms . . .”

Later, the Firearms Owners’ Protection Act of 1986 and the Protection of Lawful Commerce in Arms Act of 2005 affirmed the individual Second Amendment right and enacted strong laws to stop various abuses of that right by federal, state or local officials.

Like the First Amendment in 1800, the Second Amendment was put to the test in elections.

In the 2000 case *United States v. Emerson*, where the 5th Circuit Court of Appeals was considering whether the Second Amendment guaranteed an *individual* right, the Clinton administration told the judges that

the Second Amendment allowed for unlimited gun confiscation—even from National Guardsmen on active duty. Solicitor General Seth Waxman answered a citizen's letter by declaring, as the citizen had asked, that the Clinton administration really did believe that it could “take guns away from the public” and “restrict ownership of rifles, pistols and shotguns from all people.”

The NRA put those words on billboards where voters could see them, and in the 2000 election the Second Amendment issue cost Al Gore five swing states—West Virginia, Missouri, Florida, Clinton's home state of Arkansas and Gore's own Tennessee. Shortly before Bill Clinton left office, he publicly acknowledged that Gore had lost the election because of gun owners.

Back in 1994, Democrats who had supported Clinton's gun-ban program suffered a landslide defeat and the Republicans took control of Congress. Yet in that terrible year for anti-gun Democrats, not a single incumbent Democratic U.S. representative who was endorsed by the NRA lost his seat. Clinton later admitted, “The NRA is the reason the Republicans control the House.”

Then in 2004, John Kerry came closer to defeating an incumbent president in wartime than had any candidate since 1812. As with Gore, Kerry's Second Amendment record cost him the presidency. Finally, in 2006 and 2008, the Democrats took back control of Congress, thanks in part to the dozens of pro-Second Amendment candidates they put forward.

These days, even candidates who have a very long record of supporting gun bans and of denying the Second Amendment go around proclaiming how important they think the Second Amendment is, and talking about their joys of owning or using guns—as did Hillary Clinton in 2008, months before the *Heller* case was decided. So, too, Joe Biden on the campaign trail a few months later tried to sound like Charlton Heston—warning that if Obama “tries to fool with my Beretta, he's got a problem.”

You could call Clinton and Biden

extremely cynical and you would be right. But they are also canny career politicians and they have recognized that a candidate who wants to win national office better not tell Americans that they don't have a Second Amendment right to self defense guns.

At the state and local level, as well, the American people have repeatedly affirmed the right to arms as a vibrant part of our modern law. The 1975 handgun ban enacted by the District of Columbia City Council was supposed to start the dominoes falling towards a national handgun ban. But every time voters were given a chance to ban handguns, they voted “no”—in Massachusetts in 1976, California in 1982 and in three Wisconsin towns (Milwaukee, Kenosha, and very left-leaning Madison) in 1993-94.

City councils in Chicago and Morton Grove, Ill., did ban handguns; in response, legislatures in almost every other state enacted pre-emption laws to forbid local handgun bans.

When considering the meaning of the United States Constitution, the Supreme Court has often examined how parallel provisions in state constitutions have been interpreted and implemented. Here, too, the American people have relentlessly shown that in modern times they cherish the right to arms. Since 1963, the people of 20 states have chosen, either through their legislatures or through a direct vote, to add a right to arms to their state constitution, to re-adopt the right to arms or to strengthen an existing right.

In every state where the people have had the opportunity to vote directly, they have endorsed the right to arms by overwhelming margins. For example, in 1998, liberal Wisconsin adopted an arms right guarantee by a vote of 1,205,873 to 425,052.

Thus, the American people continue to reject the notion that the right to arms is obsolete and should be ignored. Even before the *Heller* decision was announced, a Gallup Poll found that 73 percent of Americans believe that the Constitution guarantees an individual, non-militia right to arms. A Gallup Poll

Continued on page 54

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Living Constitution

from page 27

released this year found that support for banning handguns has dropped to only 29 percent—the lowest level since Gallup began polling the issue half a century ago.

The Founding Father of living constitutionalism was Oliver Wendell Holmes Jr., who served on the U.S. Supreme Court from 1902 until 1932, and was one of the most influential jurists in all of American history.

In the 1914 case of *Gompers v. United States*, Holmes wrote, “the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.”

Likewise, in *Missouri v. Holland* in 1920, Holmes declared that the words of the Constitution “have called into life a

being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”

Holmes’ words are the living Constitution’s answer to those who would claim that the Second Amendment is for the militia only. The militia-only interpretation is a “mathematical” and “formal” theory that says, in effect: “Bear arms” is exclusively a military term of art. “Keep” gets turned into a military-only word by being used in the phrase “keep and bear arms.” The only form of arms bearing that is explicitly mentioned in the Second Amendment is militia. Therefore, the Second Amendment right protects only the militia.

Each of the above formulaic steps can be convincingly refuted by looking at the historical evidence of original meaning in the Founding Era. But even if the militia-only formal argument were correct, Justice Holmes and the living Constitution would tell us to consider how those words have been used *after* the Founding, and over the course of 220 years of our nation’s development.

As our nation has grown and evolved, through periods of crisis and periods of calm, the people and their elected officials have affirmed and defended that right. The constitutional history of the 21st century is just beginning. Regardless of whether one considers originalism or living constitutionalism to be the best constitutional theory, the practical reality is that We the People have the present duty of defending our constitutional rights from their enemies, foreign and domestic, and of safeguarding and nurturing for future generations the rights that every previous generation of Americans has bequeathed to us. ☞

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