

Internship Application – Supreme Court

Alexander Talbott

To: John Roberts, Chief Justice of the Supreme Court

5/10/2021

Abstract

Judicial review has been established as the core function of the United States Supreme Court since the early days of the Republic. It is the tool of the Court to check the power of the other branches of government. In this memo, I explore the history and power of judicial review, specifically regarding the 2nd Amendment and gun rights. I discuss two 2nd Amendment cases, *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010), and the impact of their decisions. Finally, I present an upcoming Supreme Court case as an example of effective gun control regulation and recommend the Supreme Court rule to uphold it.

Judicial Review

In 1803, shortly after the ratification of the Constitution and the United States government as we know it, the young Supreme Court heard a monumental case in *Marbury v. Madison* (1803). In the decision, Chief Justice John Marshall invalidated a section of a law passed by Congress for the first time.¹ The Judiciary Act of 1789 gave the Supreme Court the right to issue writs of mandamus, essentially court orders.² Marshall found this expansion of Court power unconstitutional and, in striking down the statute, established the precedent of judicial review.³

Judicial review immediately altered the balance of power in the early Republic. Detractors, such as Thomas Jefferson, declared judicial review to be unconstitutional stating “The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots.”⁴ Alexander Hamilton, on the other hand, supported judicial review as an important check on legislative power. He declared parliamentary governments, like the United Kingdom, to be “the constitutional judges of their own powers” and the courts were to keep the legislature “within the limits assigned to their authority.”⁵ There is no doubt judicial review can be used to expand the power of the court in ways that are unhealthy to democracy. The first use of judicial review to strike down a federal statute after *Marbury* was the *Dred Scott* decision.⁶ However, when used carefully and narrowly, as seen in two high-profile 2nd Amendment cases, judicial review serves as an essential check on the other branches of government.

The 2nd Amendment in the Supreme Court

District of Columbia v. Heller (2008)

In 1976, the District of Columbia passed the Firearms Control Regulations Act of 1975, banning residents from owning handguns, assault weapons, and unregistered firearms. It also mandated all firearms be “unloaded, disassembled, or bound by a trigger-lock or similar device.”⁷ This law stood intact until 2008 when a group of DC residents, gathered and financed by Robert A. Levy of the Cato Institute, filed suit alleging the law violated the 2nd Amendment.⁸

The Roberts Court agreed, overturning the handgun ban and disassembly requirement. Justice Antonin Scalia wrote the majority opinion citing an originalist argument that claimed the 2nd Amendment was intended to allow citizens to defend themselves from federal tyranny. Although he admitted handguns will not protect one from “bombers and tanks,” he held firm to preserve the 2nd Amendment with its original intent of self-defense.⁹

Harvard Law Professor Cass Sunstein described *Heller* as “the most explicitly and self-consciously originalist opinion in the history of the Supreme Court.”¹⁰ In the decision, the majority justices argue gun rights regulations must be understood under the context of 1791 law. If an arms regulation would have been considered unconstitutional then, it must be unconstitutional now. Chief Justice Roberts alluded to this during oral arguments for *Heller*, “[why isn’t it enough] to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time ... [and] determine how this restriction and the scope of this right looks in relation to those?”¹¹ Relying on 1791 law, however, made the precedent set by the *Heller* decision hard to interpret, as seen in future cases.

McDonald v. City of Chicago (2010)

Heller, the landmark case it was, opened the floodgates for difficult judicial interpretations in the lower courts. One judge remarked “*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations.”¹² Chiefly among the legal questions was the issue of incorporation under the 14th Amendment. Because the case was set in the District of Columbia, *Heller* affected only federal law, not addressing firearm regulations passed in the states or local municipalities.

This legal limbo was settled quickly, in the 2010 Supreme Court case *McDonald v. City of Chicago*. At the core of the case was a Chicago city ordinance banning handguns, similar to the law nullified by *Heller*. Just as in *Heller*, the court's conservative majority struck down the ordinance as unconstitutional in a 5-4 decision. Arguing in the majority opinion, Justice Samuel Alito stated the right to bear arms, enumerated in the 2nd Amendment, is incorporated under the Due Process Clause and thus applies to all states and municipalities. In doing so, the Court expanded the originalist interpretation of the 2nd Amendment as defined in *Heller* to the entire country.¹³

Impact of an Originalist Reading of the 2nd Amendment

Heller and *McDonald* gave the 2nd Amendment clarity in the eyes of the law. It can be argued *Heller* was the first Supreme Court case that addressed the 2nd Amendment definitively.¹⁴ The Justices of the majority struck down two of the most restrictive firearms laws in the country and in doing so, recognized the “right to bear Arms” as enshrined in the Constitution not to be infringed. The statutes in the District of Columbia and Chicago went too far, they argued, and the Court used its power of judicial review to correct them. Furthermore, the majority Justices were careful to define their opinions narrowly, holding an outright ban on firearms unconstitutional but leaving open the door to gun regulations.

In the *Heller* decision, Justice Scalia was very deliberate in limiting the scope of its impact. He noted the 2nd Amendment “is not unlimited” and only covers weapons “typically possessed by law-abiding citizens for lawful purposes.” Furthermore, he added the 2nd Amendment is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”¹⁵ As in the *Heller* decision, Justice Alito, in his majority opinion in *McDonald*, maintained certain limits on the extent of the 2nd Amendment as well claiming, “incorporation does not imperil every law regulating firearms.”¹⁶ The majorities in these cases recognized the 2nd Amendment as an unalienable right but also acknowledged the reality of the dangers of gun ownership without regulation.

There is no question America is a heavily armed nation. There are roughly 200-300 million guns in the United States owned by about a quarter of adults and present in more than a third of American households.¹⁷ Perhaps unsurprisingly, America is a hotbed for gun violence as well. On average, there are 12,000 homicides and 19,000 suicides involving guns each year.¹⁸ This is

in addition to the 338,000 nonfatal gunshot wounds yearly.¹⁹ As Harvard medical professor Dr. Matthew Miller put it, “Americans under age 40 are more likely to die from gunfire than from any specific disease.”²⁰

These alarming statistics underscore the necessity for gun regulations in America, much like the ones alluded to by Justices Scalia and Alito in their decisions. States with stricter gun laws have strong correlations with lower gun death rates.²¹ California, for example, has the strictest gun laws in the country with universal background checks, safe storage laws, and community violence intervention funding among many other regulations.²² Perhaps due to these regulations, California has the 8th lowest gun death rate in the US.²³ California, and other states such as New Jersey, and Hawaii, can serve as an example of safely regulating firearms without encroaching on 2nd Amendment rights.

One regulation that is currently under scrutiny is the restriction of concealed carry permits. In *New York State Rifle & Pistol Association v. Corlett*, a case the Supreme Court will hear this fall, the plaintiffs are suing the state of New York for its discretionary approval process regarding concealed carry permits.²⁴ Currently, in New York, one must apply for a concealed carry permit and the state will only grant them to applicants it deems “demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession”²⁵ The plaintiffs claim these regulations are unconstitutional under *Heller* and *McDonald* arguing the discretionary nature of the permit approval process violates their “fundamental right” to bear arms.²⁶

Recommendation

Heller and *McDonald* are two landmark Supreme Court cases that served as important checks on unconstitutional overreaches by local governments. However, in both majority opinions, both Justices were clear in elaborating the need for appropriate gun regulations. In the upcoming case, *New York State Rifle & Pistol Association v. Corlett*, it is evident that the regulations on concealed-carry permits fall under the scope of appropriate regulation.

I recommend the Chief Justice to vote to uphold the New York regulation. Restricting the ability to carry a concealed weapon does not infringe upon 2nd Amendment rights. The originalist interpretations of the 2nd Amendment laid out in *Heller* and *McDonald* do not apply to this case

as there is little to no 1791 precedent for concealed firearms. Incorporating the right to concealed carry to all states could be seen as an act of judicial activism, as it is infringing upon state's rights. This is directly contradictory to the originalist precedents set in *Heller* and *McDonald*. Furthermore, states with loose concealed-carry laws experience higher rates of violent crime.^{27, 28} It is important to approach this case cautiously and with a strict interpretation of 2nd Amendment rights as there are human lives that depend on it.

Conclusion

Judicial review is a fundamental power given to the Judicial branch of our government. Effective use of judicial review serves as a crucial check on the powers of the other branches of government. This can be seen in action with the cases of *Heller* and *McDonald*, two high-profile, and far-reaching 2nd Amendment decisions. The Supreme Court used *Heller* and *McDonald* to define the 2nd Amendment as a fundamental right to bear weapons "typically possessed by law-abiding citizens for lawful purposes" but deliberately left open the possibility for gun regulations. In the upcoming Supreme Court case *New York State Rifle & Pistol Association v. Corlett* the fate of a New York state law regulating concealed-carry permits will be determined. The Supreme Court should rule to uphold this law. Regulating concealed-carry permits is a state's right that does not infringe upon the 2nd Amendment and will make society safer as a whole.

Notes

- ¹ Encyclopedia Britannica. "Marbury v. Madison | Background, Summary, & Significance." Accessed May 4, 2021. <https://www.britannica.com/event/Marbury-v-Madison>.
- ² "Judiciary Act of 1789: Primary Documents of American History (Virtual Programs & Services, Library of Congress)." Accessed May 4, 2021. <https://www.loc.gov/rr/program/bib/ourdocs/judiciary.html>.
- ³ LII / Legal Information Institute. "WILLIAM MARBURY v. JAMES MADISON, Secretary of State of the United States." Accessed May 4, 2021. <https://www.law.cornell.edu/supremecourt/text/5/137>.
- ⁴ Jefferson, Thomas. *The Writings of Thomas Jefferson: Correspondence, Reports and Opinions While Secretary of State*. H. W. Derby, 1859.
- ⁵ "Founders Online: The Federalist No. 78, [28 May 1788]." University of Virginia Press. Accessed May 4, 2021. <http://founders.archives.gov/documents/Hamilton/01-04-02-0241>.
- ⁶ Menez, Joseph Francis, and John R. Vile. *Summaries of Leading Cases on the Constitution*. Rowman & Littlefield, 2004.
- ⁷ "D.C. Law Library - D.C. Law 5-19. Firearms Control Regulations Act of 1975 Amendments Act of 1983." Accessed May 4, 2021. <https://code.dccouncil.us/dc/council/laws/5-19.html>.
- ⁸ Liptak, Adam. "Carefully Plotted Course Propels Gun Case to Top." *The New York Times*, December 3, 2007, sec. U.S. <https://www.nytimes.com/2007/12/03/us/03bar.html>.
- ⁹ Justice Scalia. *District of Columbia v. Heller* (Justice Scalia, Opinion of the Court), U.S. (U.S. Supreme Court 2008).
- ¹⁰ Cass R. Sunstein, Comment, "Second Amendment Minimalism: Heller as Griswold," *Harvard Law Review* 122 (2008): 246. For arguments that Heller truly is an originalist decision, see Randy E. Barnett, "News Flash: The Constitution Means What It Says," *Wall Street Journal*, June 27, 2008, A13; and Lawrence B. Solum, "District of Columbia v. Heller and Originalism," *Northwestern University Law Review* 103 (2009): 923.
- ¹¹ "Argument Transcripts." Accessed May 7, 2021. https://www.supremecourt.gov/oral_arguments/argument_transcript/2007.
- ¹² *United States v. Chester*, 628 F.3d 673, 678–80 (4th Cir. 2010) (Davis, J., concurring in the judgment).
- ¹³ SCOTUSblog. "McDonald v. City of Chicago." Accessed May 7, 2021. <https://www.scotusblog.com/case-files/cases/mcdonald-v-city-of-chicago/>.
- ¹⁴ Tribe, Laurence H, and Joshua Matz. *Uncertain Justice: The Roberts Court and the Constitution*, 2015.
- ¹⁵ Justice Scalia. *District of Columbia v. Heller* (Justice Scalia, Opinion of the Court), U.S. (U.S. Supreme Court 2008).
- ¹⁶ Supreme Court of the United States. "McDonald v. City of Chicago Opinion of the Court." Accessed May 7, 2021. <https://www.law.cornell.edu/supct/pdf/08-1521P.ZO>.
- ¹⁷ Philip J. Cook et al., "Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective," *UCLA Law Review* 56 (2009): 1041, 1045; and Jill Lepore, "Battleground America: One Nation, Under the Gun," *New Yorker*, April 23, 2012.
- ¹⁸ Hemenway, Private Guns, Public Health, 4.
- ¹⁹ Marilyn Marchione, "Doctors Target Gun Violence as a Social Disease," *Associated Press*, August 12, 2012, <http://usatoday30.usatoday.com/news/health/story/2012-08-11/guns-public-health/56979706/1>.
- ²⁰ Matthew Miller et al., "Firearms and Violent Death in the United States," in *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis*, Daniel W. Webster and Jon S. Vernick, eds. (Baltimore: Johns Hopkins University Press, 2013), 3.
- ²¹ "Giffords Law Center's Annual Gun Law Scorecard." Accessed May 7, 2021. <https://giffords.org/scorecard>.
- ²² Giffords. "California." Accessed May 7, 2021. <https://giffords.org/lawcenter/gun-laws/states/california/>.
- ²³ "Giffords Law Center's Annual Gun Law Scorecard." Accessed May 7, 2021. <https://giffords.org/scorecard>.
- ²⁴ SCOTUSblog. "New York State Rifle & Pistol Association Inc. v. Corlett." Accessed May 4, 2021. <https://www.scotusblog.com/case-files/cases/new-york-state-rifle-pistol-association-inc-v-corlett/>.
- ²⁵ "Matter of Klenosky v. N.Y. City Police Dept, 75 A.D.2d 793 | Casetext Search + Citator." Accessed May 4, 2021. <https://casetext.com/case/matter-of-klenosky-v-ny-city-police-dept#p793>.
- ²⁶ Jansen, John Fritze and Bart. "Supreme Court Takes Case Seeking to Expand Concealed-Carry Rights in Public Places." *USA TODAY*. Accessed May 4, 2021. <https://www.usatoday.com/story/news/politics/2021/04/26/supreme-court-takes-gun-case-aimed-regulations-outside-home/7062821002/>.
- ²⁷ University, Stanford. "Violent Crime Increases in Right-to-Carry States." *Stanford News*, June 21, 2017. <https://news.stanford.edu/2017/06/21/violent-crime-increases-right-carry-states/>.
- ²⁸ "The Effects of Concealed-Carry Laws." Accessed May 7, 2021. <https://www.rand.org/research/gun-policy/analysis/concealed-carry.html>.