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Ninth Circuit Guns Ruling a Surprising Win for Scalia's Logic

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America loves its guns. Big guns, little guns, black guns, silver guns, revolvers, pistols, rifles, semiautomatics, machine; guns that spin and click; guns that pow and pop and ratatat. More than 300 million guns float between sea and shining sea, enough to give one to every man, woman and child in the United States. And lately, constitutional questions involving guns have begun springing up in federal courts—including, recently, the Ninth Circuit's en banc ruling in Peruta v. County of San Diego .

That's because the Supreme Court in 2008 recognized a constitutionally protected Second Amendment right to keep a working pistol in the home. The court's decision in District of Columbia v. Heller, written by the late Justice Antonin Scalia, served in some ways as Scalia's greatest intellectual success. Not because its reasoning was unimpeachable—as the two lengthy dissents make clear, there are numerous aspects of the majority's reasoning to criticize. Rather, the decision was a triumph for Scalia because his majority opinion and at least one of the dissents spilled the bulk of their ink on historical facts concerning the original meaning of the Second Amendment as it was understood in 1787.

The idea that judges engaging in constitutional interpretation should endeavor to uncover the Constitution's original meaning is the centerpiece of the doctrine of "originalism" that broadly permeated Scalia's jurisprudence. Wider acceptance of originalism is, perhaps, Scalia's most long-lasting legacy and one reason his death in February of this year marked a deep ideological loss for the conservative legal movement. Whereas some more progressive scholars and judges view the Constitution as "living" and approach the text asking what the words mean today, Scalia asserted in no uncertain terms that the Constitution is "dead, dead, dead"—its meaning locked in when it was ratified. Anything else, he found profoundly undemocratic.

Thus, the judicial task when interpreting the Constitution was, for Scalia, primarily a historical one. Heller exemplifies this methodology, with Scalia citing primarily antique sources, including a dictionary from 1773, chronicles of the English Reformation and Blackstone. The dissent by Justice John Paul Stevens adopted a similar approach, relying on dictionaries from 1755 and 1794, along with minutes from the ratification debates and other historical ephemera. Only Justice Stephen Breyer's shorter dissent took a pointedly non-originalist, "living Constitution" approach, primarily discussing social science data and findings of Congress and state legislatures about the role guns play in society.

Eight years later, Scalia has passed away, and courts are only beginning to wrestle with some of the vexing legal questions Heller created. One significant question is the physical scope of the Heller rule: The case recognized a constitutional right to own a pistol in the home for self-defense but left open whether that right extends to taking pistols outside the home for the same purpose.

Last month, the Ninth Circuit, sitting en banc, addressed that issue in dramatic fashion. In Peruta , the court upheld a San Diego County statute requiring a license, obtained in part on a showing of "good cause," to carry a concealed gun. Although a significant opinion on its merits in the nascent field of Second Amendment law, what stands out most from Peruta is that the court's 7-4 majority opinion, authored by Clinton-appointed and generally left-leaning Judge William Fletcher, employed the same kind of originalist methodology as Scalia championed.

Peruta, a San Diego County resident, had applied for a license to carry a concealed gun in 2009 but failed to provide "good cause" to support his application. After the county denied his request, Peruta brought an action challenging the requirement on the ground that it violated his Second Amendment rights. The district court granted summary judgment for the county, but a three-judge panel of the Ninth Circuit reversed, with conservative, Reagan-appointed Judge Diarmuid O'Scannlain finding that San Diego County's application of the "good cause" requirement for a concealed gun license so impeded the rights identified in Heller that it violated the Constitution.

But O'Scannlain's views lost out two years later, when the en banc panel reached the opposite conclusion. Fletcher, a former law professor, turned to his academic roots and traced the history of English regulation of weapons as far back as the 13th century. He found restrictions on concealed weapons dating to before the Elizabethan era and remaining part of English law

ever since. The American colonies imported those regulations almost as soon as they were founded, Fletcher recounted, and limitations on concealed guns continued unquestioned at and after the Constitution's adoption as well as the 14th Amendment's.

Based on this historical investigation, Fletcher concluded that, when the states ratified both the Second and Fourteenth Amendments, those amendments were never understood to include concealed arms at all. Thus, Fletcher determined that San Diego's requirement is not subject to any kind of heightened constitutional review, because it does not implicate a constitutionally protected right. Examined for a mere rational basis, Fletcher found the law passes with ease.

It's likely that Scalia, himself a gun lover with an expansive view of the Second Amendment, would have disapproved of San Diego's limitation on carrying concealed guns. But he would probably have appreciated Fletcher's judicial approach. While Heller's originalist methodology (and the limited body of extant Second Amendment law) surely invited originalist reasoning, Fletcher could just as easily instead have conducted a "living" constitutional analysis focused on modern meanings and legislative findings, as Breyer's Heller dissent did. Instead, Fletcher embraced Scalia's originalism, applied it to reach a progressive outcome—and presumably did so because he found it to be the most effective way to ground his analysis of the law.

And so, at least for now, Scalia's own preferred methodology means most Americans who love their guns in the Ninth Circuit, at least in those states that restrict the public variety, will have to love them in private.

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