Is Judicial Review Obsolete?

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BY STUART TAYLOR

July 5, 2008 The big decision on June 26 that the Second Amendment protects an individual right to keep a loaded handgun for self-defense at home is the high-water mark of the "original meaning" approach to constitutional interpretation championed by Justice Antonin Scalia and many other conservatives. At the same time, the decision may show "originalism" to be a false promise.

Scalia's 64-page opinion for the five-justice majority was a tour de force of originalist analysis. Without pausing to ask whether gun rights is good policy, Scalia parsed the Second Amendment's 27 words one by one while consulting 18th-century dictionaries, early American history, the 1689 English Bill of Rights, 19th-century treatises, and other historical material.

And even the lead dissent for the Court's four liberals—who are accustomed to deep-sixing original meaning on issues ranging from the death penalty to abortion, gay rights, and many others—all but conceded that this case should turn mainly on the original meaning of the 217-year-old Second Amendment. They had little choice, given the unusual absence of binding precedent.

But in another sense, District of Columbia v. Heller belies the two great advantages that originalism has been touted as having over the liberals' "living Constitution" approach. Originalism is supposed to supply first principles that will prevent justices from merely voting their policy preferences and to foster what Judge Robert Bork once called "deference to democratic choice." But the gun case suggests that originalism does neither.

First, even though all nine justices claimed to be following original meaning, they split angrily along liberal-conservative lines perfectly matching their apparent policy preferences, with the four conservatives (plus swing-voting Anthony Kennedy) voting for gun rights and the four liberals against.

These eight justices cleaved in exactly the same way—with Kennedy tipping the balance from case to case—in the decision the same day striking down a campaign finance provision designed to handicap
rich, self-funded political candidates; the June 25 decision barring the death penalty for raping a child; the June 12 decision striking down the elected branches' restrictions on judicial review of Guantanamo detainees' petitions for release; and past decisions on abortion, affirmative action, gay rights, religion, and more.

This pattern does not mean that the justices are insincerely using legal doctrines as a cover for politically driven votes. Rather, it shows that ascertaining the original meaning of provisions drafted more than 200 years ago, in a very different society, is often a subjective process on which reasonable people disagree—and often reach conclusions driven consciously or subconsciously by their policy preferences. And some of us have trouble coming to confident conclusions either way.

I wrote approvingly of the federal Appeals Court opinion striking down the District of Colombia's strict handgun ban 15 months ago, and found Scalia's argument for the same result equally persuasive. But then I studied the dissents by liberal Justices John Paul Stevens and Stephen Breyer, and found them pretty persuasive too. Scalia and the two dissenters all made cogent arguments while papering over weaknesses in their positions. I think that Scalia may have won on points. But more study might tip me the other way.

The reason is that the justices' exhaustive analyses of the text and relevant history do not definitively resolve the ambiguity inherent in the amendment's curious wording: "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."

And even if there is a clear right answer evident to people more discerning than I, the voting pattern suggests that conservative and liberal justices will never agree on what it is. More broadly, even when there is no dispute as to original meaning, it is often intolerable to liberals and conservatives alike. For example, no constitutional provision or amendment was ever designed to prohibit the federal government from discriminating based on race (or sex). This has not stopped conservatives from voting to strike down federal racial preferences for minorities (by seeking to extend liberal precedents) any more than it stopped liberals from striking down the federal laws that once discriminated against women.

Second, the notion that originalists would defer more to democratic choices than would the loosey-goosey liberals has come to ring a bit hollow. The originalists began with a compelling critique of the liberals' invention of new constitutional rights to strike down all state abortion and death-penalty laws, among others. But the current conservative justices have hardly been models of judicial restraint.
They have used highly debatable interpretations of original meaning to sweep aside a raft of democratically adopted laws. These include federal laws regulating campaign money and imposing monetary liability on states. And in last year's 5-4 decision striking down two local school-integration laws, the conservative majority came close to imposing a "colorblind Constitution" vision of equal protection that may be good policy but which is hard to find in the 14th Amendment's original meaning.

In the gun case, as Justice Breyer argued, "the majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems." (Of course, Breyer's solicitude for elected officials disappears when the issue is whether they should be able to execute rapists of children or ban an especially grisly abortion method.)

If originalism does not deliver on its promises to channel judicial discretion and constrain judicial usurpations of elected officials' power, what good is it?

Indeed, it seems almost perverse to be assessing what gun controls to allow based not on examining how best to save lives but on seeking to read the minds of the men who ratified the Bill of Rights well over 200 years ago.

The originalist approach seems especially odd when it comes down to arguing over such matters as whether 18th-century lawyers agreed (as Scalia contends) that "a prefatory clause does not limit or expand the scope of the operative clause" and whether (as Stevens contends) the phrase "'bear arms' most naturally conveys a military meaning" and "the Second Amendment does not protect a 'right to keep and to bear arms,' but rather 'a right to keep and bear arms' " (emphasis in original). The justices may as well have tried reading the entrails of dead hamsters.

Is the answer to embrace liberals' "living Constitution" jurisprudence, which roughly translates to reading into the 18th-century document whichever meaning and values the justices consider most fundamental?

By no means. Rather, in the many cases in which nothing close to consensus about the meaning of the Constitution is attainable, the justices should leave the lawmaking to elected officials. To borrow from an article I wrote in 1986: "Those who work so hard to prove that the Constitution cannot supply the values for governance of modern society seem to think that judges must do it, with a little help from their friends in academia. But the argument rebounds against the legitimacy of judicial review itself. Bork poses a question for which they have no good answer: 'If the Constitution is not law [that] tells judges what to do and what not to do--... what authorizes judges to set at naught the majority judgment of the American people?" " 
Now it seems that the originalist view of the Constitution is indeed incapable of telling today's judges what to do—not, at least, with any consistency from one judge to the next. So is judicial review itself obsolete?

Not quite. Judicial review remains valuable, perhaps indispensable, because it helps provide the stability and protection for liberty inherent in our tripartite separation of powers, with the legislative, executive, and judicial branches serving as the three legs of a stool and with each potent enough to check abuses and excesses by the others.

The June 12 decision rebuffing President Bush's (and Congress's) denial of fair hearings to Guantanamo detainees proclaiming their innocence is a case in point. But the broad wording of Kennedy's majority opinion, joined by the four liberals, went too far by flirting with a hubristic vision of unprecedented judicial power to intrude deeply into the conduct of foreign wars. (See my column, 6/21/08, p. 15.)

Indeed, not one of the nine justices seems to have a modest understanding of his or her powers to set national policy in the name of enforcing the Constitution. But the other branches, and most voters, seem content with raw judicial policy-making—except when they don't like the policies. For better or worse, what Scalia has called "the imperial judiciary"—sometimes liberal, sometimes conservative—seems here to stay.

Given this, the best way to restrain judicial imperialism may be for the president and the Senate to worry less about whether prospective justices are liberal or conservative and more about whether they have a healthy sense of their own fallibility.

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1. Do the intentions of the Constitution's framers still matter in considering issues like gun control? When they're ambiguous, how would you attempt to deduce what those intentions were?
2. Do you think the constitution is a "living document" or are you an "originalist"?
3. Should the 2nd Amendment be read to mean that every individual has a right to a firearm? Where should that protection begin and end?