

Scalia and the Lure of the Natural Law By Hadley Arkes

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Scenes from a dinner in Washington ten years ago:

Irving Kristol: "What was in the Second Amendment, again?"

Paul Cantor: "Irving, you don't remember? You wrote it."

There has often been a faint recollection of the Second Amendment, because it had rarely been before the courts. The rights in that Amendment were enforced politically: Voters punished politicians who would threaten the right of persons to own and use guns, either in hunting or in protecting themselves. But the wave of "gun control laws" produced in Washington, D.C., a law that barred people from carrying and registering handguns, or from keeping in their own homes guns that were assembled and ready to use in an emergency. The decision of the Supreme Court this June in *District of Columbia v. Heller* brought forth an opinion with historical sweep and linguistic acuity, focusing on that spare passage in the Constitution:

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.

After generations of misinstruction, it required an exertion of jural wit on the part of Justice Antonin Scalia to confirm that the right declared in the Second Amendment was a right on the part of ordinary persons to bear arms. A people practiced in the use of guns may be especially fit as citizens in a republic, ready to join a militia to defend their country. But their right to keep and use those arms to defend themselves did never depend on their membership in a militia. The remarkable thing, causing bewilderment widely in the land, was that the vote to recognize that right was only 5-4. To put it another way, Justice Kennedy, in his daily life of swinging back and forth, has been willing to confer on ordinary people a constitutional right to defend themselves with the use of guns. The reliable band of four liberal justices (Stevens, Souter, Ginsburg, Breyer) were willing to deploy their arts in an effort to make plausible and authoritative what was deeply implausible: that the Constitution had sought to protect only the rights of people to use guns when they were called into the service of their country, under terms laid down by the

legal authorities.

Justice Scalia's opinion has been celebrated by Prof. Randy Barnett and others as a preeminent example of "originalism" in jurisprudence. To which some of us say: It is only sensible, in construing the Constitution, to consider how the words of the text were understood by the men who set them down and then voted to ratify them as part of the fundamental law. To this task, Justice Scalia brought an account of the dictionaries of the eighteenth century (including Dr. Johnson's famous edition), along with some historical accounts curiously screened from the histories that most of us were given in schools. Most striking among them: an account of the movement, just after the Civil War, by armed militias in the South to strip newly freed black people of their freedom to keep arms they so evidently needed in defending themselves in their newly won freedom.

But in writing under the banner of "originalism," certain awkward truths remained unacknowledged: Scalia had to move beyond the text of the Constitution, because the plain words of the text were insistently denied. He had to deploy nothing less than the canons of reason in showing why certain readings, offered by the other side, were linguistically implausible. In that vein, he sought to show why it made little sense to let the phrase "keep and bear arms" be swallowed by the preamble and turned simply into the right of people to keep arms when they serve in a militia. In an earlier case dealing with a federal statute, Justice Ruth Ginsburg thought that the meaning of "carries a firearm" had to refer to a person bearing or carrying a firearm in an anticipation of danger. Scalia thought that she had caught here "the natural meaning" of "bear arms."

"Natural"? Pointing to some meaning so plain, so much in accord with the way in which ordinary people understand words, that it did not have to be spelled out in a statute? Scalia argued that the appeal, beyond the text, to the historical background rather confirmed a meaning that was there *before* the text. The Second Amendment, he said, "codified a pre-existing right": It "implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'"

Was he suggesting then a right so "natural" that it was not brought into being or created by the "positive law," the law that is merely posited or enacted in any place? Does that not begin to

suggest an appeal to something resembling—brace yourself—“natural law”? A close second look is in order because Justice Scalia has been famously dubious, if not scathing, about natural law over the years. He has expressed a sentimental openness to natural law, but his concern has been that judges, flown with high sentiments, have shaped the law to their own partisan views as they have invoked a sense of “natural justice” detached from the text of the Constitution.

But of course, as we have seen, even judges on the same political side have been torn apart by fierce disagreements over meanings contained in the text itself—terms such as “compelled . . . to be a witness against himself,” “equal protection of the laws,” or “to keep and bear arms.” And here, as elsewhere, the fact that any idea has been misused, or used wrongly, does not itself prove that the idea itself is untrue—that there is no such thing as “natural right.” The very notion of a misuse implies its own apt remedy, for it implies that one can understand, in the first place, the difference between a misuse, or a wrongful use, and a rightful use. The remedy lies then merely in sharpening our sense of how we’ve made those discriminations.

To what, then, was Scalia appealing? In his distrust of first principles, he seems to feel on firmer ground when he appeals to *tradition* in fixing the meaning of terms in the Constitution. And so, as he sought the origin of a right to bear arms “pre-existing” the text of the Constitution, his first move was to those rights that “had become fundamental for English subjects” by the time of the Founding. He appealed then to Blackstone in his commentaries on the laws of England. And yet what he latched on to in Blackstone was “the natural right of resistance and self-preservation.”

That right was indeed regarded as so “natural,” so ingrained in the motives of human beings, or so evident in the moral understanding, that it had to be presupposed in the positive law. It could not have been invented by the positive law. And yet that sense of a natural right could have been the version favored by Thomas Hobbes, and for Hobbes that meaning of a right was detached altogether from any move toward moral reasoning. In the world of Hobbes, even the man rightly condemned to capital punishment would have the impulse, never deadened, to flee for his life. And if he could break away only by killing his captors, Hobbes regarded him as killing in self-defense. If an assailant had attacked a victim, and the victim suddenly turned the tables, the putative victim could gain control of the knife or gun. If the assailant regained control of the weapon and struck at his intended victim, Hobbes would have regarded him as killing then in self-defense. For at that moment, the putative victim was as much a threat to the assailant as the

assailant had been to him. That is not, of course, the way the rest of us usually look on the situation. People affected with what we might call a moral sense would be more inclined to raise the question of whether the assailant had any right in the first place to put an innocent man in the position of struggling for his life.

My own hunch is that Scalia had in mind what he might call the “natural” meaning of self-defense, which is to say the meaning that will always be woven in with a judgment on the rights and wrongs of the matter. I assume that, for Scalia, self-defense meant the right of an innocent person to ward off an *unjustified* assault. But in that case we really would be back in the world of natural law, or what Blackstone called “the law of nature and reason.”

Two years ago, in the case of *Gonzales v. Oregon*, Scalia wrote a sharp, dissenting opinion when the Court upheld a policy of assisted suicide in Oregon. The Court had earlier confirmed that the federal government had a preeminent claim to govern the use of “controlled substances” in the United States. And in exercising that responsibility, the attorney general had held to the traditional understanding: that the purpose of medicine was to heal and restore, not to kill and dispatch patients. Scalia strongly supported that ancient understanding, which ran back to Hippocrates. Justice Kennedy was willing to allow that this venerable view was quite plausible and legitimate. But in a world of diversity and changing mores, he was more inclined to regard that doctrine of Hippocrates as but one of several plausible opinions on the matter.

Scalia was incredulous: One of several? Scalia insisted that the classic understanding was not merely one among a plethora of opinions, exotic and arguable. The attorney general had not merely recorded his *personal* preference: He had invoked a moral understanding long settled, and it was, Scalia insisted, “the most natural interpretation” of the statute. Again, “most natural”? Some lawyers and judges identify the natural with reflexes—e.g., wincing when feeling pain. But Scalia knew that Janet Reno, as attorney general, had shown reflexes quite different. She had supported the use of pharmaceuticals to hasten death in assisted suicide. My hunch, again, is that Scalia did not mean, by the “natural,” the reflexes of the nervous system. He must have meant, rather, the most natural in the sense of the most *reasonable*, the most defensible meaning. Now just how Scalia managed to make his case, or prove his point there, is another story, best left to another time.

It is enough for the moment to hold that our friend, that most engaging of jurists, has always been the most relentless in applying the laws of reason, often with a wit that induces his colleagues to wince. He has applied the same wit in reproving his friends for their innocence as they place an unwonted confidence in the claims of reason and when they are summoned again to the natural law. Antonin Scalia, as child and citizen, has found his home in the Church that provides, in our own day, the main sanctuary in sustaining a respect for reason as the ground of the natural law. As much as he has traveled and lectured in the world, he has never left his real home, and one day it will become as apparent to him, as to his friends, that he has never been detached from the natural law.

Hadley Arkes is the Ney Professor of Jurisprudence at Amherst College.

References

District of Columbia v. Heller