Paper 205: Government and Politics of the U.S.A. ·
Lecture 12

Federal Courts and Judicial Behaviour

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District of Columbia v. *Heller*

- Firearms Control Regulations Act of 1975

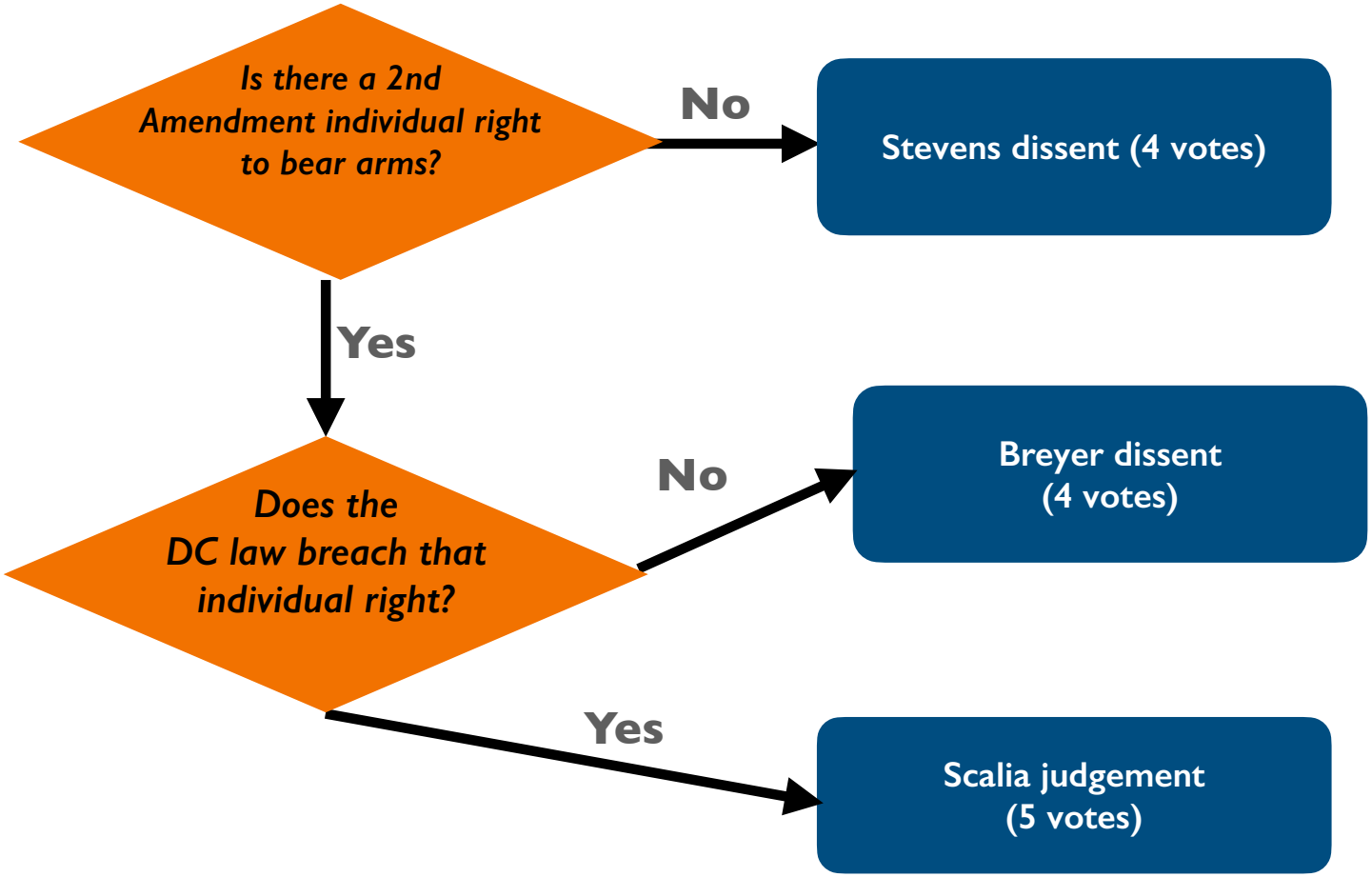
  *"bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device" (*Heller Syllabus)

- Second Amendment:

  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

- Link to Heller slip opinions

Opinions in *Heller*: A flow chart



Second amendment text: 1

- from Scalia opinion at p. 11

> *From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state."*

Second amendment text: 2

- from Stevens dissent at p. 12

  Had the Framers wished to expand the meaning of the phrase "bear arms" to encompass civilian possession and use, they could have done so by the addition of phrases such as "for the defense of themselves," as was done in the Pennsylvania and Vermont Declarations of Rights. The unmodified use of "bear arms," by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts.

Second amendment text: 3

- from Scalia opinion at p. 11

> *The phrase "bear Arms" also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: "to serve as a soldier, do military service, fight" or "to wage war." … But it unequivocally bore that idiomatic meaning only when followed by the preposition "against," which was in turn followed by the target of the hostilities. See 2 Oxford 21.*

Second amendment text: 4

- from Stevens dissent at p. 13 (footnote 9)

> *The Court allows that the phrase "bear Arms" did have as an idiomatic meaning, " 'to serve as a soldier, do military service, fight,' " ante, at 12, but asserts that it "unequivocally bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities," ante, at 12–13. But contemporary sources make clear that the phrase "bear arms" was often used to convey a military meaning without those additional words. See, e.g., To The Printer, Providence Gazette, (May 27, 1775).*

Second amendment intent: I

- from Stevens dissent at p. 25

  With all of these sources upon which to draw, it is strikingly significant that Madison's first draft omitted any mention of nonmilitary use or possession of weapons. Rather, his original draft […] read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Cogan 169.

  Madison's decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms.

Second amendment intent: 2

- from Scalia opinion at p. 25

> *JUSTICE STEVENS thinks it significant that the Virginia, New York, and North Carolina Second Amendment proposals were "embedded . . . within a group of principles that are distinctly military in meaning," such as statements about the danger of standing armies. Post, at 22. But so was the highly influential minority proposal in Pennsylvania, yet that proposal, with its reference to hunting, plainly referred to an individual right.*

Second amendment precedent: I

- from Stevens dissent at p. 2

> *The view of the Amendment we took in* Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.*
>
> *Since our decision in* Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there; we ourselves affirmed it in 1980.*

Second amendment precedent: 2

- from Scalia opinion at p. 49

  Nothing so clearly demonstrates the weakness of JUSTICE STEVENS' case. Miller *did not hold that and cannot possibly be read to have held that.*

Second amendment policy, balancing: I

- from Breyer dissent at p. 32

> *In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive alternatives. Are there other potential measures that might similarly promote the same goals while imposing lesser restrictions? […] Here I see none.*
>
> *The reason there is no clearly superior, less restrictive alternative to the District's handgun ban is that the ban's very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that any handgun he sees is an illegal handgun. And there is no plausible way to achieve that objective other than to ban the guns.*

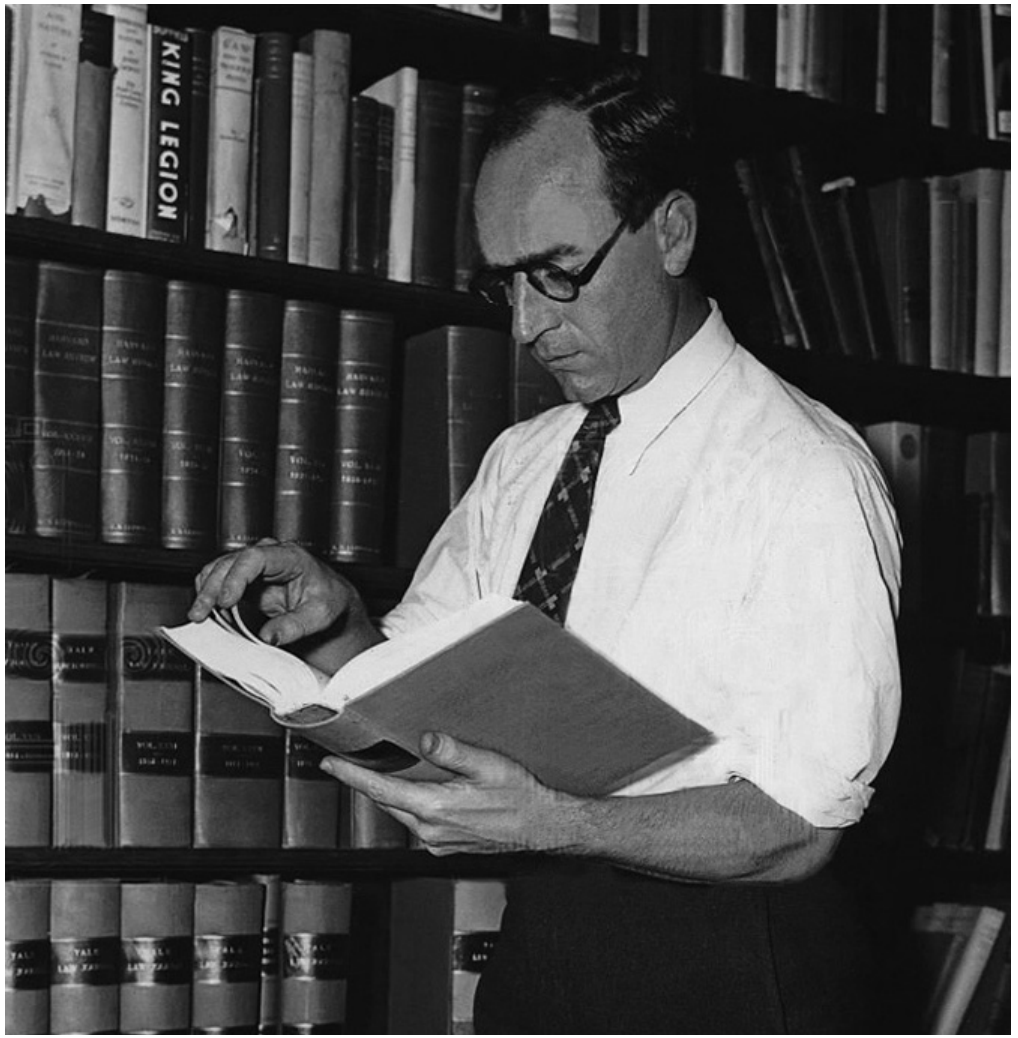
Second amendment policy, balancing: 2

- from Scalia opinion at pp. 62-3

  We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.

Legal Realism

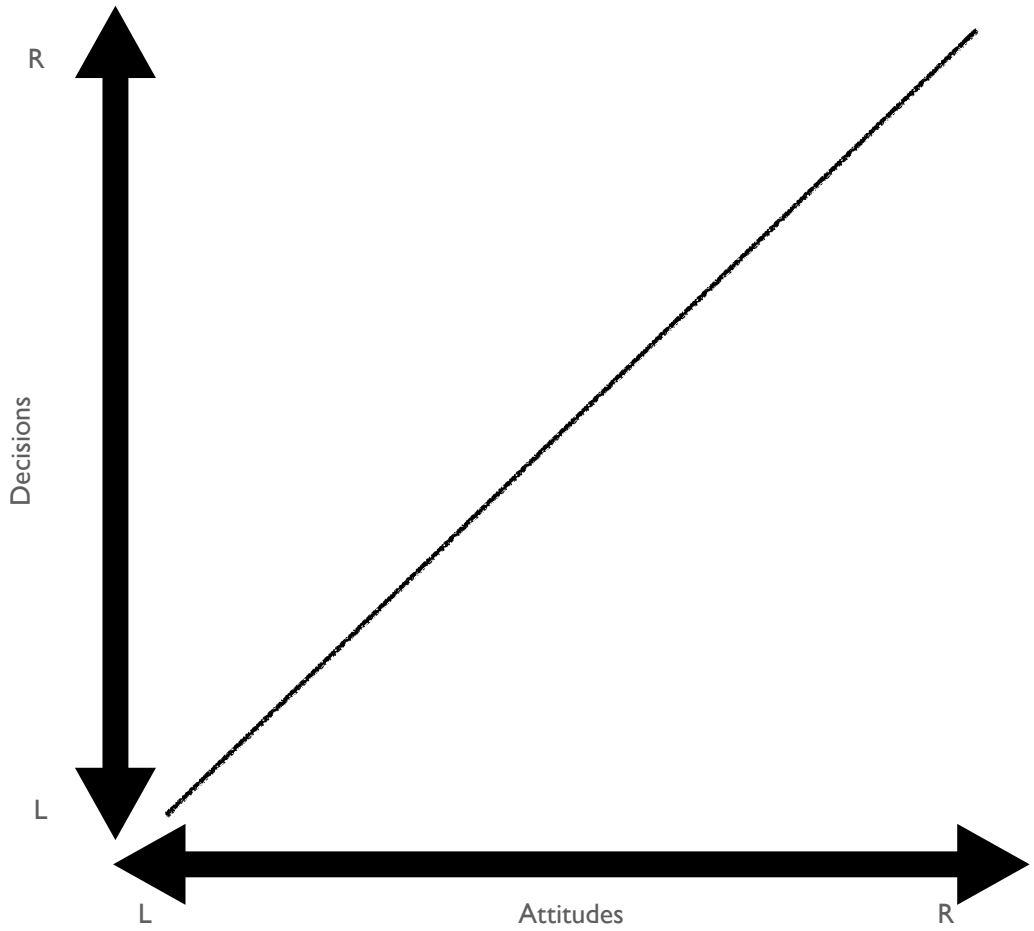
- what if judges use law as a tool to *justify* their decisions? (rather than as a *mechanism* to reach decisions)
- eg Karl Llewellyn (1893-1962), Jerome Frank (1889-1957)
- attributed to Frank: law is *"only a matter of what the Judge had for breakfast"*
- normative responses… (Frankfurter, Ely, Dworkin, Bork)



A legal model of decision making

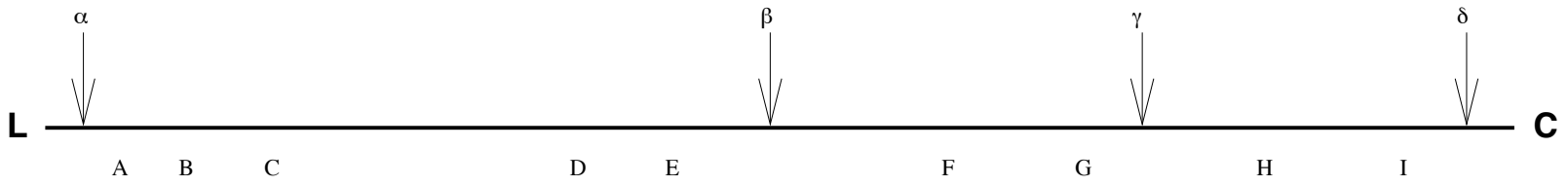
FACTS
+
ARGUMENT(S)
=
RESULT
?

Attitudinalism



Decisions in cases

- liberal - conservative attitudinal continuum
- nine justices A-I
- four cases:α (0:9); β (5:4); γ (7:2); δ (9:0)

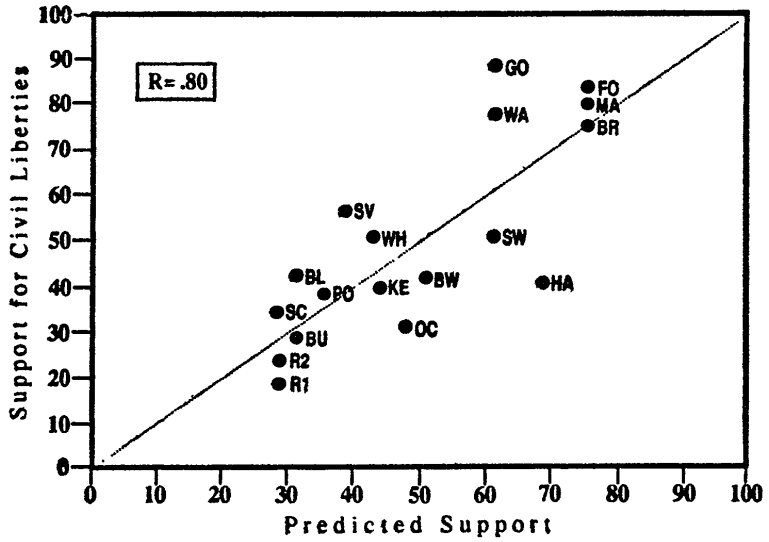


Evidence for attitudinalism

- from Segal & Cover (APSR 1989)

(votes)

Figure 1. Civil Liberty Support by Ideology



(attitudes)

Strategic Justices

- Justices are trying to get as close as possible to their ideologically preferred outcome
- But they face obstacles
  - e.g. opinions must be crafted to get a majority
  - e.g. danger of veto players (congress relegislates, const amendment, etc)
  - Justices are policy driven but do not just vote policy into law

Constrained Court

- Bailey and Maltzman (2011)
- two kinds of constraint
  - legal values
  - political constraints
- a more complex understanding of Court behaviour

Conclusion

finally a colour photo

Suggestions for further reading

On "legalism" see Waldron's *The Law*, and on Ely and Bork see respectively their *Democracy and Distrust* and *The Tempting of America*. On Dworkin see R. Dworkin, *Law's Empire* (London: Fontana, 1986) and *Life's Dominion* (London: HarperCollins, 1993). On Frankfurter's reasoning about political questions, read his contrasting opinions in *Colegrove* v. *Green* (1946) and *Gomillion* v. *Lightfoot* (1960).

"Attitudinal" accounts of Supreme Court behaviour are summarized in J. A. Segal and H. J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2nd Edition, Cambridge: CUP, 2002); strategic accounts are suggested by L. Epstein and J. Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998); and F. Maltzman, J. F. Spriggs, and P. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge: CUP, 2000).

Two more recent books that employ a more nuanced approach are M. Bailey and F. Maltzman, *The Constrained Court* (Princeton, NJ: Princeton University Press, 2011), and L. Epstein, W. M. Landes, and R. A. Posner, *The Behavior of Federal Judges* (Cambridge, MA: Harvard University Press, 2013).