

OTHER TAKES

Willett: In the Founders' own words

Justice Don R. Willett, TEXAS SUPREME COURT

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September 17 is Constitution Day, when Americans celebrate the birthday of our government and the 39 brave souls who signed the document that altered history.

As a Texas jurist, and a concealed handgun license-holder, I know that my fellow Texans love freedom ... and firearms. So no surprise when the Lone Star State combined the two and led a successful 31-state charge in the U.S. Supreme Court to overturn the District of Columbia's gun ban. The Court's landmark Heller decision last June agreed 5-4 with Texas that "the District of Columbia's categorical gun ban is markedly out of step with the judgment of the legislatures of the fifty States, all of which protect the right of private citizens to own handguns."

Heller settled a long-fought debate: the Second Amendment protects an individual right to keep and bear arms unconditioned on militia service. Wall-to-wall bans like DC's are unconstitutional; less-sweeping regulations (no guns for felons) are "presumptively lawful"; and future cases will clarify the wide legal middle ground.

Like many blockbuster decisions, Heller's bottom-line holding was razor-thin. The answer was 5-4, but the approach – and this is momentous – was 9-0. All nine justices waded through the Framers' debates to discern the drafters' understanding when they penned the Amendment's 27 words. For me, this focus on the purported original meaning carries both legal and personal significance. Not just because I'm a licensed-to-carry Texas Supreme Court justice, but because I also serve on the national advisory board of ConSource, the Constitutional Sources Project, a nonprofit with this singular goal: granting direct access to our Founders' words.

ConSource has created the first free, fully-indexed online library of constitutional source materials. Several of these digitized Founding-era documents posted on www.consource.org were widely mined by both Justice Scalia's majority and by Justice Stevens' dissent, and lawyers on both sides used the website to track down references, praising the project for providing a rich, unbiased resource. (In fact, several members of the Court have received training from ConSource.)

ConSource is fiercely apolitical. Indeed, when ConSource launched one year ago today at the National

Constitution Center, silhouetted by Independence Hall, the occasion was marked by notables of every partisan stripe and from every branch of government: Lynne Cheney, Justice Stephen Breyer, and Senator Harry Reid.

ConSource's online library boasts more than 11,000 historical documents, each one searchable and most paired with a nearby scanned version of the original. This collection brings together Founding materials that had been scattered in public and private archives around the world. For spelunkers in both classrooms and courtrooms, it features searchable text transcripts, high-resolution images of the original texts, and scholarly certification standards. Best of all, ConSource doesn't merely post, for example, James Madison's handwritten notes from the Constitutional Convention; it cross-references them to every significant clause of the Constitution. When the parties and jurists in *Heller* tapped ConSource to unearth how the Second Amendment and came to be, they found links to a trove of hard-to-find documents capturing its 1789-91 drafting and ratification history: prior amendment drafts, the *Federalist Papers*, congressional debates, state ratification debates, newspaper reports, and personal correspondence detailing behind-the-scenes maneuverings.

Heller is an epic case, perhaps the only case of constitutional first impression in our lifetime. It will launch a thousand (or more) law review articles, and future court decisions will delimit its reach. It afforded ConSource an auspicious judicial debut; a revolutionary tool for a revolutionary case.

This too is true: Growing use of ConSource's online library (which just welcomed its one millionth unique visitor) will spark necessary if nettlesome questions about the use of Founding-era documents generally. Methodology matters. How can judges consult these materials authoritatively and avert charges of cherry-picking, as arise today when judges cite selective snippets of a statute's legislative history to reinforce their preferred interpretation (and ignore snippets going the opposite way)? Who merits inclusion in the Founder pantheon, only those directly involved in the creation and ratification of the documents or a wider circle? Should there be a hierarchy of constitutional source material based on the person's proximity and substantive role? Vexing questions abound.

Weighty as these matters may be, ConSource is blissfully neutral. ConSource is focused on access, not agendas, and its mission is purely altruistic: to enrich "We the People" via increased knowledge about our Constitution. Viewing our Charters of Freedom in the National Archives is wondrous. But ConSource is putting these and thousands of other Founding-era treasures within a mouse-click of every American.

Knowledge of our constitutional architecture "is not handed down in the gene pool," as retired Justice (and current video-game designer) Sandra Day O'Connor recently stressed in urging more web-based civics education. At a time when more students can name the Three Stooges than the three branches of government, dusting off these historic documents – no Founder left behind! – is a noble endeavor that any Moe, or

Madison, should applaud.

Willett serves on the Supreme Court of Texas and on the national advisory board of ConSource, the Constitutional Sources Project (www.consource.org). The views expressed are his own and do not necessarily reflect those of ConSource.