FUNDAMENTAL FRAMES: HOW CULTURAL FRAMES INFORM THE FOURTEENTH AMENDMENT

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INTRODUCTION

Few axioms are more familiar in constitutional law than the idea that some rights are so important they cannot be abridged without strict judicial scrutiny, even if they are not textually enumerated in the Constitution.[1] Such "fundamental" rights include the right to vote, the right to privacy, the right to procreate, the right to raise children, and the right to marry.[2] However, many of these rights boast a remarkably recent vintage, raising the perennial question why they came to be recognized when they did.[3]

The same could be said of certain rights that are referenced explicitly in the Constitution, including for example the right to bear arms, which remained dormant for much of American history, only to be declared an individual right by the Supreme Court in 2008,[4] and then incorporated to the states through the Fourteenth Amendment in 2010.[5]

Why certain rights are activated at certain times and not others tends to defy straightforward doctrinal analysis, often calling for additional lecture on the historical or political context of a particular opinion. From a teaching standpoint, however, such discussions can be vague and rambling, often lacking the doctrinal rigor that accompanies the various tests employed by the Court in other contexts. To compensate, this Essay proposes that a mode of analysis be imported from socio-legal studies to address the question of decisions that are determined primarily by context, or what socio-legal scholars call cultural frames.[6]

This Essay proceeds in two parts. Part I will discuss the emergence of

theory in the context of the right to bear arms, showing how cultural frame alignment provides a more precise analytic for understanding the emergence of the right than either doctrinal analysis or simple mention of historical and political context.

I. CULTURAL FRAME ANALYSIS

Beginning in the 1970s, sociologists and political scientists inspired by the civil rights movement began to take an interest in the various ways that movement organizers articulated reform agendas in terms that average people could understand.[6] This led to the articulation of a concept called "frames," or "schemata of interpretation" that average folks used to "locate, perceive, identify," and in short, explain, events.[7] To be successful, activists needed to construct their own frames, or schematic interpretations, that diagnosed social

"encompass interests or points of view that are incidental to their own goals, but popular among their target audience."[13] Finally, movement actors who take on a subject that has very little support at all, say same-sex marriage in the 1980s, might have to completely transform popular opinion in what is called "frame transformation".[14]

While the various strategies of frame alignment can help effect social change, they by no means guarantee that activists will be able to overcome, or for that matter transform the collective stock of meanings, beliefs, ideologies, practices, values, and "myths," shared by average people, or what sociological scholars call culture.[15] Interest in the cultural boundaries of reform has led some scholars to conclude that reform is ultimately contingent on either appealing to or changing prevailing cultural norms, or what Mayer Zald has called "cultural stock."[16] While movement campaigns that reject cultural stock fail, argues Zald, movement efforts that draw from existing stock, or reveal "contradictions" in that stock, i.e., between prevailing prejudice and popular ideals, tend to succeed.[17] So do movements that successfully transform cultural stock, either by altering popular opinions, beliefs, or practices (frame transformation), for example, or by linking movement claims to larger majority values (frame bridging), both processes that fall under the larger theoretical umbrella of "cultural framing".[18]

To show how cultural framing might be applied to better understanding, and teaching, constitutional law, it is helpful to look at a case study in which activists worked diligently to align their reform agendas with cultural frames. This was the case with the Second Amendment, a constitutional right that did not get incorporated to the states until 2010, after a period of active frame alignment by gun rights lobbies and lawyers. Telling the Second Amendment story provides an example of how the language of cultural frames can help show students why

13. Id. at 472.
14. Id. at 473.
15. This definition of culture is taken from

"original intent," a skillful way of "

governmental machinery in the United States."[41] More raids followed, of Nazis, the Ku Klux Klan, the Black Panthers, and other groups, none of whom enjoyed majority support.[42]

In July 1969, the Commission on the Causes and Prevention of Violence recommended "[f]ederal minimum standards under which the states would restrict ownership of handguns."[43] Among these standards were requirements that handgun owners license their guns, or self-help back to the federal government.[44] "[S]elf-defense", argued the Commission, was not a sufficient reason to limit regulation, and was actually more likely to result in gun owners shooting "family or friends", than burglars.[45]

As the government moved to limit the rights of average individuals to defend themselves, gun proponents began to push back, laying the foundations for a more robust, individual-focused interpretation of the right to bear arms. According to Republican Senator

handguns in "areas where violent crime is 20 per cent or more above the national average".[50] Though local urban populations tended to favor such bans, national majorities proved skeptical.[51]

Opponents of gun bans gained allies among sportsmen. In October 1969, Massachusetts Senator Edward M. Kennedy failed to block an exception to the GCA exempting certain types of shotgun shells popular among hunters from licensing requirements.[52] Taking this as a sign that sportsmen should be exempted, Indiana Senator Birch Bayh attempted to push through a more restrictive federal gun control law, making sure to exempt weapons used for "sporting purposes," but failed.[53] Such political trends sent clear signals to the NRA. Regardless of the Second Amendment's text and the Supreme Court's ruling in United States v. Miller, a frame alignment placed the greatest chance of success on hunting weapons and handguns—not military style weapons.[54]

By the 1990s, arguments in favor of an individual right to bear arms in self defense surged. Specifically, NRA advocates fleshed out the dual position that not only was the right to bear arms an individual constitutional right, but the right to bear arms in self defense was an even greater, absolute right worthy of constitutional protection independent of the Second Amendment.[55] For example, NRA official Wayne LaPierre argued in 1994 that the "use of arms for self-defense" was a right that derived from natural law itself, predating the founding.[56] One year later, Tanya Metaksa, executive director for the NRA

50. Nancy Hicks, Javits and Percy Ask Handgun Curb, N.Y. TIMES, July 22, 1975, at 37.

51. William E. Farrell, Majority at Hearing in Chicago Urges Congress to Ban Pistols, N.Y. TIMES, Apr. 16, 1975, at 24; Wayne King, Efforts to Curb Cheap Pistols Called Failure, N.Y. TIMES, June 20, 1975, at 32; Robert Pear, Crime Bill Challenged by Conservative Republicans, N.Y. TIMES, Sept. 15, 1980, at A17 (describing opposition to federal criminal code restricting firearms by the conservative Senate Steering Committee). National opposition to gun control led to a more localized approach, focusing on municipal bans. See, e.g., Joanna Dember, Trying a New Tactic in Handgun Control, N.Y. TIMES, Dec. 2, 1979, at 32.

52. Kennedy Plea Fails to Retain Gun Curb, N.Y. TIMES, Oct. 10, 1969, at 13.

53. Gun Controls Too Hot for Most Politicians, supra note 48, at 4.

54. John Hinckley's attempted assassination of Ronald Reagan created a surge of popular support for gun regulation, culminating in the Brady Handgun Violence Prevention Act. Pub. L. No. 103-159, 107 Stat. 1596 (1993) (codified at 18 U.S.C. §§ 921-922 (2012)). A provision of the law, U.S.C. § 922(s)(2), was invalidated by the Supreme Court in 1997. Printz v. United States, 521 U.S. 898, 936 (1997). The Public Safety and Recreational Firearms Use Protection Act, a ten-year ban of assault weapons, was enacted by Congress in Sept. 1994 and signed into law by President Clinton. Pub. L. No. 103-322, 108 Stat. 1996 (1994) (codified as amended at 18 U.S.C. § 922 (2012)). The Act banning assault weapons was a subtitle of the Violent Crime Control and Law Enforcement Act of 1994. For a discussion of the attempted assassination of President Reagan

McKissick joined Stokely Carmichael, a coordinator for the Student Non-Violent Coordinating Committee ("SNCC"), in calling for armed self-defense and "black power."[65] By the time of CORE's 1966 convention in Baltimore, McKissick had begun to publicly declare nonviolence a "dying philosophy."[66]

Convinced that nonviolence had become ineffectual and that black equality hinged on gun ownership and armed self-defense, CORE focused its brief in the D.C. case, styled District of Columbia v. Heller, on the Fourteenth Amendment, arguing that many of the Amendment's framers intended that the Due Process and Privileges and Immunities Clauses be used to protect the rights of freed slaves to own guns.[67] Though the NRA resisted such an argument, Second Amendment expert Alan Gura, the Institute for Justice, and a majority of United States senators and congressmen agreed, marking a significant effort to align the legal frame of private gun ownership with the cultural frame of black rights.[68]

The Supreme Court, perhaps surprisingly, sanctioned this reasoning, adopting the originalist claim that the Fourteenth Amendment was designed to protect black gun ownership, even though the Amendment itself did not technically apply to the District of Columbia.[69] Why the Court cited such evidence was not clear as a matter of law.[70] However, the Court's decision to cite the Fourteenth Amendment argument may ultimately have had less to do with legal doctrine than frame alignment. Precisely because CORE had linked gun ownership to black rights, the citation of black history might have appealed to the Court as a progressive way of framing gun rights, particularly at a moment when an African American was positioning himself for the presidency. Whether Obama's bid for the White House was on the minds of the Supreme Court or not, his frame aligned with the effort to pitch self-defense as a civil right, a convergence that became clear when Obama himself publicly endorsed the Supreme Court's opinion in Heller not long after it was decided.[71]

Immediately following the Supreme Court's ruling in Heller, Second Amendment activist Alan Gura filed a complaint in the Northern District of Illinois, arguing that Chicago's handgun ban, in place since 1982, violated the Second Amendment. Parallel suits followed, including two suits by the NRA,

65. AUGUST MEIER & ELLIOT M. RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 1942–1968, at 412 (Univ. of Ill. Press 1975) (1973).

66. Id. at 414.

67. Walker, supra note 31, at 515–27.

68. Id.

69. Id.

70. See Siegel, supra note 33, at 232.

71. Robert Barnes, Justices Reject D.C. Ban on Handgun Ownership, WASH. POST, June 27, 2008, at A1.

that "the right to keep and bear arms was highly valued for purposes of self defense".[78]

CONCLUSION

The Court's emphasis on self-defense in McDonald was revealing, an indication that the gun lobby's frame alignment strategies had worked. Despite differences in litigation strategy, in other words, both the NRA and Alan Gura had agreed on one thing