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COMMENTARY

Graglia: Have more faith in democracy

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In striking down the District of Columbia's gun control law, the U.S. Supreme Court raised the question whether constitutional rights are necessarily good ideas. The court, in a 5-4 vote, invalidated the Washington, D.C., law because it violates the Second Amendment right to "keep and bear arms." Whatever else that may be said about the case, it illustrates Thomas Jefferson's observation that by trumping policy choices, constitutional rights amount to rule of the living by the dead.

Whatever the merits of gun control today, researching the history of the Second Amendment in a bid to determine the view of the people who adopted it in 1791, hardly seems a sensible way of deciding the issue. It is arguable — as the 5-4 split on the Supreme Court indicates — that the Second Amendment does not guarantee an individual right to possess guns; "bear arms" has a military ring.

If democracy is the norm, only policy choices clearly precluded by the Constitution should be struck down by the courts. The view of elected legislators should prevail in cases of doubt. The court might well, therefore, have refrained from taking the gun control issue out of the political process.

Problems raised by constitutional restrictions are illustrated by the claim, currently being litigated, that John McCain is not a "natural born" citizen of the United States as required by the Constitution to be eligible to be president. The presumptive Republican presidential nominee was born of American parents in the Panama Canal Zone.

In 2000, the claim was made and litigated that Dick Cheney was not eligible to be vice president because he was an "inhabitant" of Texas. He lived in Texas and worked here. So did then-Gov. George W. Bush. The Constitution provides that the president and vice president may not both be inhabitants of the same state. There is no question, of course, that Govs. Arnold Schwarzenegger of California, born in Austria, and Jennifer Granholm of Michigan, born in Canada, are ineligible to be president regardless of popular demand for their political leadership. Though the Constitution wisely precludes very few policy choices, even those few can create serious and unneeded problems, pointlessly frustrating democracy.

A more serious problem with constitutional restrictions is the invitation they present for judicial activism, which may be defined as judges holding unconstitutional policy choices that the Constitution does not clearly forbid.

If constitutionalism is the rule by the dead, judicial activism is rule by judges who are very much alive. An

example is the court's 5-4 decision last term invalidating Louisiana's law making child rape a capital offense.

The law (and similar laws of five other states) was not invalidated because the justices in the majority "interpreted" the Constitution differently than the justices in the minority, discovering a prohibition the dissenters couldn't find.

Like most rulings of unconstitutionality, no question of interpretation was involved. That ruling was based entirely on the policy preference of the majority and their willingness and ability to substitute that preference for the policy choice made by the elected representatives of the people of Louisiana and other states that made child rape a capital offense. The decision illustrates the central truth of American constitutional law that it has little to do with the Constitution.

That rulings of unconstitutionality are made on the basis of ideology, not the Constitution, should be clear enough simply from the consistent ideological division of the Supreme Court over a myriad of policy issues. Four justices — John Paul Stevens, David Souter, Ruth Bader Ginsberg and Stephen Breyer — vote almost as a unit on the left and four other justices, Chief Justice John G. Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito, vote almost as reliably on the right.

So the policy choice that prevails in most controversial constitutional cases depends on the position of the ninth justice, Anthony Kennedy. He is the only justice almost always on the winning side in controversial 5-4 decisions, because it is his vote that makes it the winning side.

In a nation of more than 300 million people with elected national and state legislatures and executives, the final decision on such fundamental policy issues as gun control, punishment for child rape, consideration of race to increase school integration and the legal rights of alien enemy combatants held overseas rests on the views of a single unelected official.

A nation willing to go to war to spread democracy elsewhere should have more faith, it would seem, in democracy at home.

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