*D.C. v Heller* and the Politicization of the Supreme Court

**Introduction**

In 2008, the Supreme Court decided to review a case that gave them the opportunity to define the meaning of the Second Amendment. The opinions issued by the three Justices have a problematic use of history and failed to adequately analyze the text of the Second Amendment. While it would be irresponsible to entirely reject original intentions in the creation of the Second Amendment, one must recognize it cannot directly apply to the present day which has different technological advancements from the Founding era. The Court’s decision in *District of Columbia v Heller* has outlined the Second Amendment to recognize an individual right to keep and bear arms for the purposes of self-defense[[1]](#footnote-1). This case reveals a larger issue that politics have been the leading mechanism in the Court and contrary to the conclusions drawn by the majority opinion, states should not be prevented from regulating the Second Amendment right. It is unreasonable to expect all jurists to remain perfectly unbiased, but, by using deficient arguments, the Justices are unable to perform in their highest capacity as jurists.

**Textual Analysis**

Justice Scalia and Justice Stevens use textual and historical analysis to determine whether the Second Amendment guarantees an individual or collective right to bear arms. The portion “A well regulated Militia, being necessary to the security of a free state” is considered the prefatory clause while “the right of the people to keep and bear Arms, shall not be infringed” is the operative clause. The primary disagreement the Justices have is over the weight of the prefatory clause and its importance to understanding the overall meaning of the Second Amendment.

Justice Scalia argues the prefatory clause delineates a purpose for the operative clause but in consistency with documents of the era, must only be consulted if it helps resolve uncertainty in the operative clause[[2]](#footnote-2). Additionally, Justice Scalia claims the prefatory clause serves to clarify, not provide boundaries for the meaning of the operative clause[[3]](#footnote-3). Under this standard, he concludes “the right of the people to keep and bear Arms, shall not be infringed” is the most critical part and that it serves to guarantee the rights of individual citizens to possess and carry firearms[[4]](#footnote-4). Since he finds that this right is a pre-existing one, Justice Scalia never needs to justify the meaning of the prefatory clause, as this allows him to completely avoid the issue of scope[[5]](#footnote-5). Lund argues this is one of Justice Scalia’s greatest mistakes. Despite incorrectly equating “a well regulated Militia” and “the militia” to draw conclusions about the prefatory clause and say the Second Amendment was codified to prevent the disbanding of “the militia” meaning able-bodied men, he never answers how the codification of the Second Amendment “preserved, promoted, or prevented the elimination of a *well-regulated militia[[6]](#footnote-6).*”

Taking a different stance, Justice Stevens followed the interpretation methods of William Blackstone, a scholar during the Founding era. He wrote, “[the] preamble is often called in to help the construction of an act of parliament,” indicating that legislators of this time period would have included the prefatory clause to specify the meaning of the operative clause[[7]](#footnote-7). Recognizing the way legislators of the Founding era regarded prefatory clauses, it makes it explicitly clear that the ratifiers did not intend the prefatory clause to be disregarded. He continues by rebuking Justice Scalia’s interpretation of the prefatory clause after the operative clause, alleging he did so to ensure he could give it a meaning which was consistent with his definition of the operative clause[[8]](#footnote-8). He equates this with Justice Scalia writing a narrative because the Court is supposed to interpret texts in the order they were written rather than in a pieced together form[[9]](#footnote-9).

**Historical Arguments and Originalist Claims**

In order to further their textual claims, both Justices attempt an originalist argument by studying documents of the time period and the original intent of the legislators who wrote the Second Amendment to determine its true meaning. Yet while both Justices make carefully crafted arguments, their inadequate use of history ultimately hinders their argument. As Malcolm explains, the documents Justice Scalia used to affirm the individual right to bear arms over a collective one was based in the English 1689 Declaration of Rights as it explained individuals did not need ties to a militia to own a firearm[[10]](#footnote-10). He affirms that this document provides important historical context as it was a precursor to the American documents and the Second Amendment[[11]](#footnote-11).

John Phillip Reid presents the concept of “law office history” when discussing lawyers and the manners in which they use history[[12]](#footnote-12). Lawyers are trained to include historical evidence to support their arguments however, they tend to sift through historical evidence to support their argument rather than use historical evidence to come to a conclusion[[13]](#footnote-13). Saul Cornell notes that Justice Scalia is practicing “law office history” by using the English declaration because it does not provide insight to the intentions of the Framers themselves[[14]](#footnote-14). Further, a true originalist argument would not only attempt to understand the mind of the legislators but use documents that demonstrate the beliefs held by the society that adopted these laws or practices and how they understood them[[15]](#footnote-15). Drawing from an English document is a poor source for making an originalist argument from the Founding era and appears to be present simply because it affirms Justice Scalia’s argument that individuals have a right to bear arms[[16]](#footnote-16). While Reid may argue this is a flaw in legal education as jurists are not trained as historians, but to support their arguments with evidence, it is a problematic aspect of Justice Scalia’s argument. Using sources that do not provide the correct historical context weakens his argument and demonstrates he did not adequately or accurately consider the intentions of the legislators themselves which is key to uncovering the meaning of the amendment. Cornell reacts harshly to this and equates analyzing the operative clause and establishing the meaning of the prefatory clause afterwards as equivalent to rewriting the meaning of the amendment[[17]](#footnote-17).

Comparatively, Justice Stevens defends his argument with much stronger sources of historical context. The Article I Militia clause indicated that members of the Founding era had a fear of standing armies and tyrannical governments and had an interest in protecting a militia that could defend citizens against those forces[[18]](#footnote-18). Therefore, when the ratifying conventions took place, many proposals were made to include an amendment that would protect militias because members of the convention felt the Constitution did not protect it explicitly enough[[19]](#footnote-19). Only one state, New Hampshire, proposed an amendment which would protect the individual right to keep and bear arms for the purpose of self-defense[[20]](#footnote-20). Considering that James Madison had all these proposals to draw from, his decision to omit a specific note about the right to keep and bear arms for self-defense was purposeful and indicates the members of the ratifying convention intended to protect a collective right via the Second Amendment[[21]](#footnote-21). This fact directly contradicts Justice Scalia’s argument that despite the textual language used, it indicated an individual right and that William Blackstone, a Founding era scholar’s words, further emphasized the “right to self-preservation” all Americans acknowledged[[22]](#footnote-22). However, Justice Stevens, despite using better historical context to construct an originalist argument, neglected to acknowledge the differences the Founders had. As Andrew Shankman expounds, the Founders had great disagreements. Far beyond having different political opinions, men who had written the Constitution and the Bill of Rights together disagreed on its very meaning years after it was written[[23]](#footnote-23). Thus, any originalist argument is rooted in ambiguity as it is impossible for twenty-first century jurists to understand the intentions of an amendment which the men who wrote it two hundred years ago could not agree on the meaning of.

Shankman emphasizes the potential flaws an originalist argument can have as it is both impossible and presumptuous to assume that by analyzing documents of the past, present day legal scholars can gain a full and accurate understanding of the Constitution and Bill of Rights[[24]](#footnote-24). Yet despite the challenges in understanding these texts, it would be irresponsible of jurists to neglect them. Jurists should instead turn towards a conscientious originalist approach to interpreting these texts[[25]](#footnote-25). As Nelson Lund explains, originalist arguments can prove to be challenging as not only are there difficulties in determining original meaning, but the legal questions posed in modern day cannot be answered by texts written when reality was quite different[[26]](#footnote-26). Even if one were to accept Justice Scalia’s interpretation of the Second Amendment and concede that there was a guaranteed, individual right to keep and bear arms, the Founders could have never imagined the way technology would develop firearms and communities living in densely populated, urban areas. Further, it would be irresponsible for jurists to assume Founding era documents were meant to encompass all potential and eventual technological and social developments. The uncertainty that rises out of those developments is part of the very reason jurists are needed. From this perspective, Justice Breyer focuses on an interesting angle in his dissent.

**A Modern Approach**

Justice Breyer affirms Justice Stevens’ assertions about the Second Amendment being intended to protect a collective right to bear arms rather than a singular one[[27]](#footnote-27). He argues this is the first question of this case but chooses to discuss a second factor, the limitations of the Second Amendment, in his dissenting opinion. Justice Breyer says, “Although I adopt for present purposes the majority’s position that the Second Amendment embodies a general concern about self-defense, I shall not assume that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars[[28]](#footnote-28).” Rather than solely focusing on an originalist argument as Justice Stevens makes, Justice Breyer approaches the issue as a living constitutionalist, accepting that in the United States, there is a prominent view of the Second Amendment providing an individual right to bear arms for the purpose of self-defense[[29]](#footnote-29). The living constitutionalist approach occurs when the Court focuses on the current meaning of the Constitution rather than the meaning when it was written[[30]](#footnote-30). He therefore chooses to focus on detailing why government restrictions are appropriate and constitutional despite the view many people and the majority have on the Second Amendment. While self-defense may be a justifiable reason for owning a firearm, he argues it is important to trust the judgement of legislators who have the ability to regulate such rights[[31]](#footnote-31).

Justice Breyer presents historical evidence from colonial America where gun right regulations were accepted[[32]](#footnote-32). He cites an example from Massachusetts where firearms were prohibited in Boston unless the carrier was not planning on entering any buildings in which case they would have to unload the firearm[[33]](#footnote-33). Despite the Massachusetts Constitution stating individuals had the right to “keep and to bear arms for the common defense,” it was a decision made by legislators to regulate firearms within the city to protect citizens[[34]](#footnote-34). After displaying several pieces of historical evidence supporting the right of states and local authorities to regulate firearms, Justice Breyer presents a test which he suggests the Court use to determine the constitutionality of the handgun ban in the District of Columbia. This “strict scrutiny test” would allow the Court to analyze gun regulations by weighing the interest of protecting the Second Amendment right and public safety interests prior to determining its constitutionality[[35]](#footnote-35). This would still provide local legislators with discretion to make regulations as they have the statistics and expertise to determine what is most beneficial for their jurisdiction[[36]](#footnote-36).

The perceptions Justice Scalia and Justice Breyer had on the constitutionality of the D.C. handgun ban and their arguments surrounding them were quite different. Justice Breyer used his dissent to discuss the importance of providing legislators with discretionary power to regulate firearms as they see fit for their constituents[[37]](#footnote-37). Justice Scalia comparatively denounced the handgun ban because, “The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute[[38]](#footnote-38).” While handguns may be popular among American gun owners, popularity is not nearly enough to consider a ban unconstitutional. Justice Scalia’s argument is based on the concept that Americans prefer this weapon today.

However, by Justice Scalia’s own standards, if this handgun ban had been enacted twenty or thirty years prior to *D.C. v Heller*, one could argue that in the District of Columbia, handguns would no longer be a popular firearm among law abiding American gun owners making the ban constitutional[[39]](#footnote-39). Therefore, the key to his argument lies in whether it is longstanding in nature or not and he disregards the need for facts and statistics to help apply a piece of text that was written in a different technological context to the present day. He reiterates that he does not intend to “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as school or government buildings” nor does he disagree with certain restrictions on dangerous or unusual weapons[[40]](#footnote-40). But in failing to discuss the factors which make a handgun safe or unsafe beyond their popularity as a weapon of self-defense, it has the potential to invalidate the complex reasons other prohibitions exist. Rather than discuss the preference of law abiding citizens, the Court is responsible for applying standards or amendments to technological developments by looking at the facts and judging what is safest and most constitutional. Justice Scalia’s claiming the validity of certain prohibitions because of their “longstanding” nature over the factual evidence that points towards them being beneficial for society, is highly dangerous as if one could argue something went against popularity or was not longstaning enough, it could theoretically be overturned[[41]](#footnote-41).

Conversely, a “strict scrutiny test” is highly factual in nature and relies greatly on the jurist conducting the test. While it is better suited at taking into account modern reality before a judge or the Court comes to a decision, it depends greatly on the values of the jurist themselves and their perceptions of which facts hold greater value. Justice Breyer’s dissenting opinion is important for the modern and living constitutionalist approach it takes to the Second Amendment because it has adapted to agree that while it was written to confront concerns about standing armies and protect militias, it has taken on an individualized meaning over time[[42]](#footnote-42). In this sense, Justice Breyer’s argument is more efficient than Justice Stevens' dissent because it addresses modern day regulations rather than the meaning the Second Amendment had two hundred years prior. Therefore, it is important for the Court to consider different methods of interpretation beyond Justice Scalia’s assertion that a ban is unconstitutional because modern Americans prefer handguns to other weapons for self-defense[[43]](#footnote-43). Yet while Justice Breyer is correct in analyzing the statistics surrounding gun violence in the District of Columbia to understand how the ban was instituted, limiting handgun ownership for purposes of self-defense is unlikely to reduce the number of handguns criminals have access to[[44]](#footnote-44). However, citizens are not prohibited from owning rifles or other firearms and thus their Second Amendment right is not entirely limited by a ban on handguns.

**Argumentative Flaws**

Clearly, each of the opinions issued by the Justices have their own flaws. Justice Scalia and Justice Stevens both utilize history in a questionable manner and focus too greatly on meanings and arguments that existed during a time period dissimilar from present day. As Justice Breyer emphasizes, though the Second Amendment was originally written to regulate a collective right, it was not meant to prevent states and localities from imposing their own restrictions on the use of firearms for personal defense[[45]](#footnote-45). Even if the Second Amendment were to assert a preexisting individual right, the Second Amendment is not boundless in its authority and it is important to defer to local legislators to apply regulations they find reasonable and for jurists to judge the constitutionality of those restrictions by applying a strict scrutiny test to weigh the benefits of a regulation with the limiting of a right[[46]](#footnote-46). Even so, Justice Breyer focuses so greatly on the statistics of the District of Columbia and firearm related violence in urban areas, and the concept of deferring to legislators that he does not confront the small benefits a handgun ban would provide in a strict scrutiny test[[47]](#footnote-47). This was still worded considerably more carefully than Justice Scalia’s claim that a ban was unconstitutional because it bans a “class” of arms that is commonly used by law abiding gun owners for the purpose of self-defense which insinuates the only reason it is unconstitutional is because it was not “longstanding” enough[[48]](#footnote-48). If factual evidence begins to lose traction over baseless arguments, the future of the Court and justice system appears grim.

**Politicization of the Court**

Politics in the twenty-first century are highly polarized, but this polarization has moved beyond Congress and the Presidency into the Supreme Court, the branch of government which is supposed to be the least politicized. And while mean approval for the Supreme Court appears to be consistently higher than that for Congress and the Presidency, the ideological gap among the Justices continues to grow wider due to each conservative or liberal appointee being a direct vote against different political ideals[[49]](#footnote-49). As Reid discusses, legal training teaches attorneys and judges to use history to justify their arguments[[50]](#footnote-50). Between their training and personal opinions, a slight degree of impartiality is bound to exist. The issue does not arise when their decisions align with their personal beliefs but when their personal beliefs are so strong their method of decision making changes to accommodate it. Segal identifies two dominant methods of decision making in the Court.

The legal model of decision making left little room for individual interpretation after taking into consideration all aspects of the case[[51]](#footnote-51). The attitudinal model strayed from this and includes Justices weighing their personal opinions alongside the facts of the case[[52]](#footnote-52). This shift in decision making methods reflects the high politicization in the Supreme Court and the overall lighter weight fact has in the courtroom. Though questions of ideology may arise in the Court, it is the responsibility of politicians primarily in Congress to debate policy while the Court remains focused on the legal model of decision making. When Justice Scalia and Justice Stevens construct arguments on originalist grounds without confronting the short falls of those methods, they serve to delegitimize the Court. When Justice Scalia makes living constitutionalist arguments based on the popularity of certain firearms and Justice Breyer focuses so heavily on present day statistics and largely neglects the text of the Second Amendment, it also serves to delegitimize the Court. Until the political battleground reverts to Congress and elections and the process of nominating Supreme Court Justices remains so volatile, the Court will not serve its intended purpose.

**Conclusion**

 The decision resulting from *District of Columbia v Heller* has been highly impactful because the Court was given the opportunity to ascribe meaning to the Second Amendment which was previously the subject of controversy and debate. Yet the decision issued and the arguments of Justices Scalia, Stevens and Breyer continue to inspire controversy. While Justice Scalia and Justice Stevens spent much of their opinions discussing textual and historical evidence through an originalist lens, they both fail to address where these can fall short. Justice Breyer took a different approach and made a living constitutionalist argument to why the District of Columbia handgun ban was indeed constitutional, even if the Second Amendment guarantees an individual right to keep and bear arms. This approach was beneficial as it is challenging for jurists to directly apply an amendment written two hundred years ago to the vast technological changes particularly in firearms.

Though his focus on statistics and a strict scrutiny test place too little value on original texts which are a critical part of the foundation of the legal system, it was more considerate and factually based than Justice Scalia’s argument which claimed the ban was unconstitutional essentially because it prohibited individuals from owning a popular type of firearm. *District of Columbia v Heller* is an excellent demonstration of the gradual politicization of the Supreme Court which has led to attitudinal decision making and the selection of evidence and arguments to support personal and party beliefs. As the Supreme Court continues to become increasingly polarized and serve as the new political battleground, it will lose legitimacy by becoming viewed as a place to make political arguments rather than a place for well crafted legal analysis derived from fact. Only when this change occurs will future cases have the ability to reverse the degree of power the Court placed in the Second Amendment which virtually considers regulations unconstitutional regardless of the evidence pointing towards its benefit.

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2. *District of Columbia v Heller,* 4*.* [↑](#footnote-ref-2)
3. Id. [↑](#footnote-ref-3)
4. Id, 19. [↑](#footnote-ref-4)
5. Lund, 1350. [↑](#footnote-ref-5)
6. Id, 1351-1352. [↑](#footnote-ref-6)
7. Stevens, 31. [↑](#footnote-ref-7)
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13. Id. [↑](#footnote-ref-13)
14. Cornell, 625. [↑](#footnote-ref-14)
15. Id, 629. [↑](#footnote-ref-15)
16. *District of Columbia v Heller,* 21. [↑](#footnote-ref-16)
17. Cornell, 636. [↑](#footnote-ref-17)
18. Stevens, 17. [↑](#footnote-ref-18)
19. Id, 20. [↑](#footnote-ref-19)
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22. *District of Columbia v Heller,* 21. [↑](#footnote-ref-22)
23. Shankman, A. (2018). *Original Intents: Hamilton, Jefferson, Madison, and the American Founding*. New York: Oxford University Press. 145. [↑](#footnote-ref-23)
24. Id. [↑](#footnote-ref-24)
25. Lund, 1372. [↑](#footnote-ref-25)
26. Id. [↑](#footnote-ref-26)
27. Breyer, 2. [↑](#footnote-ref-27)
28. Id, 3. [↑](#footnote-ref-28)
29. Id, 2. [↑](#footnote-ref-29)
30. Lund, 1369. [↑](#footnote-ref-30)
31. Breyer, 11. [↑](#footnote-ref-31)
32. Id, 5. [↑](#footnote-ref-32)
33. Id, 6. [↑](#footnote-ref-33)
34. Id. [↑](#footnote-ref-34)
35. Id, 9. [↑](#footnote-ref-35)
36. Id. [↑](#footnote-ref-36)
37. Id, 26. [↑](#footnote-ref-37)
38. *District of Columbia v Heller,* 56. [↑](#footnote-ref-38)
39. Lund, 1367. [↑](#footnote-ref-39)
40. *District of Columbia v Heller,* 2. [↑](#footnote-ref-40)
41. Id. [↑](#footnote-ref-41)
42. Breyer, 2. [↑](#footnote-ref-42)
43. *District of Columbia v Heller,* 56-57. [↑](#footnote-ref-43)
44. Lund, 1375. [↑](#footnote-ref-44)
45. Breyer, 1. [↑](#footnote-ref-45)
46. Id, 9. [↑](#footnote-ref-46)
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