


 A portrait of Justice John Paul Stevens, an elderly man with white hair and glasses, wearing a dark suit and a patterned bow tie. He is looking slightly to the right of the camera. The background is a blurred bookshelf filled with books. A blue brushstroke graphic is overlaid across the bottom of the image, behind the title text.

Stevens, J., Dissenting: The Legacy of *Heller*

Second Amendment scholars discuss the late Justice John Paul Stevens's contributions to one of the nation's thorniest debates

BY JOSEPH BLOCHER &
DARRELL A.H. MILLER

During his 34 years on the Supreme Court, Justice John Paul Stevens participated in thousands of decisions that addressed nearly every aspect of American law. But he had no doubt which one of those decisions was the worst: *District of Columbia v. Heller*.¹ He dissented from the opinion at length, called it “unquestionably the most clearly incorrect decision . . . announced during my tenure on the bench,”² and continued to criticize it up until his death in July of this year. Others, closer to the Justice, have written and will write about his remarkable tenure on the bench. But we want to

focus on his Second Amendment opinions and commentary, which we think provide insight not only on the right to keep and bear arms, but more generally on the late Justice's approach to law and judging.

**“A well regulated Militia”:
The Law Before *Heller***

In *Heller*, the Supreme Court held for the first time that the Second Amendment guarantees a personal right to keep and bear firearms for purposes unrelated to an organized militia. That 2008 holding was the culmination of decades of effort by gun rights advocates to transform the personal purposes interpretation of the Second Amendment from a “fraud” — in the words of (then retired) Chief Justice Warren Burger — into the law of the land.³

The Second Amendment, which reads “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,”⁴ is a linguistic mess. Not even the place-

ment of the commas is certain.⁵ What is certain, though, is that for 200 years the vast majority of judges interpreted it to protect only those arms, people, and activities having some connection to an organized militia.

During that time, the Supreme Court directly addressed the meaning of the Second Amendment only once, and that came in an odd decision involving the prosecution of a gangster, Jack Miller, for transporting a short-barreled shotgun in violation of the National Firearms Act of 1934 (NFA). The NFA was Congress's response to the gun-fueled gangland violence of the 1920s and '30s that had besieged the nation — including Stevens's own home of Chicago. It strictly regulated short-barreled shotguns and other weapons, like the Thompson submachine gun, that had become popular among mobsters and bootleggers. In *United States v. Miller*,⁶ the Court held that because a short-barreled shotgun was not suitable for use in a militia, its possession was not protected by ►

the Second Amendment, and *Miller's* indictment was lawful.

The NFA, which is still in force, was the first federal attempt to significantly regulate firearms, and it has enjoyed some success (for example, fully automatic weapons are rarely used by criminals today). The NFA, though, was unique only in that it was a nationwide law. State and local governments had been regulating arms since the Founding era, with laws that ran the gamut from permit requirements to prohibitions on particular classes of weapons to bans on possession by particular classes of people. Indeed, a search of the Repository of Historical Gun Laws, a free online resource hosted by the Center for Firearms Law at Duke,⁷ shows that more than 1,000 state and federal laws had been enacted by the time Justice Stevens was born in 1920.

Despite all this regulation, the Second Amendment did not play a significant role in firearm policy, because it was not generally understood to encompass private uses of weapons. It certainly did not feature prominently in litigation, because few regulations interfered directly with state militias. Indeed, for more than two centuries, no federal case struck down a law on Second Amendment grounds.

Although the Amendment remained legally inert until 2008, it was politically galvanizing. Beginning around the 1960s, gun rights advocates tried to use the 27 words of the Amendment to anchor a right to keep and bear arms for private purposes like self-defense. They found allies in advocacy organizations like the National Rifle Association and in certain (and sometimes unexpected) quarters of the academy. But they never had the right vehicle to advance the issue to the high court.

Justice Stevens dissented, and did so on Justice Scalia's turf. He looked at the same historical record, the same linguistic facts, and came to the opposite conclusion.

“Original Public Meaning Originalism”: *Heller, McDonald, and Stevens in Dissent*

Eventually Dick Heller, a special officer at the Federal Judicial Center, of all places, emerged as an unlikely champion. Heller wanted to keep a firearm in his home for self-defense, but the District of Columbia's regulations made that impossible in practice. After he lost in the trial court and succeeded in the court of appeals, the Supreme Court granted certiorari. The briefing was voluminous. Even Vice President Dick Cheney joined an amicus brief supporting *Heller*.

At the same time gun rights advocates promoted their vision of the Second Amendment to think tanks, thought leaders, and the public, “original public meaning originalism” emerged as a prominent interpretive theory among academics and the judiciary. This kind of originalism rejected both “the living constitution” (the idea that the Constitution should be read as an evolving document) and “original intent” (the notion that it should be read in accord with the intentions of the drafters at the Philadelphia Convention). Instead, original public meaning originalism claimed to be rooted in historical fact: The words mean today what a speaker of English in the ratifying generation would have understood then.

Justice Antonin Scalia, the most visible advocate for this interpretive method, wrote for the five-justice majority in *Heller*. In keeping with his methodological commitments, he crafted a thoroughly originalist opinion, relying heavily on scholarship and historical sources. According to Scalia, the central question in *Heller* was simple and simply stated: How were the words of the Second Amendment typically understood in 1791?

Scalia held that the two portions of the Second Amendment were distinct. The “operative” portion was the part about the right to keep and bear arms; the “prefatory” part was about the militia. Resort to the “prefatory” part was only necessary if the “operative” section was ambiguous. But the operative portion was absolutely clear to the majority: The right was to keep and bear firearms for personal purposes unrelated to the organized militia. In support, Justice Scalia cited evidence from the English Declaration of Right, Blackstone's Commentaries, and several 19th-century cases and materials that post-dated the ratifying generation. He dismissed *Miller* as “an uncontested and virtually unreasoned case.”⁸

Justice Stevens dissented, and did so on Justice Scalia's turf.⁹ He looked at the same historical record, the same linguistic facts, and came to the opposite conclusion: A native speaker of English, reading the words of the Second Amendment in 1791, would have understood them to convey a military meaning. Although Justice Scalia pointed to a few contrary examples, Justice Stevens quoted his own words back to him: “The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily* is used.”¹⁰ Most linguists and historians agreed with Stevens's interpretation,

emphasizing that the phrase “bear arms” in 1791 was used most often in a collective, military sense.

What’s especially notable about Stevens’s dissent in *Heller* is its good faith. He was not an originalist, but he addressed originalists on their terms, using their tools. He could have written past the majority opinion and applied an evolving constitutional standard to resolve the case. But he was convinced of the soundness of his argument and the receptiveness of his fellow justices. Stevens was apparently so convinced of the merits of his opinion that he thought he could persuade the arch-originalist Justice Clarence Thomas to join it.¹¹

He didn’t, and *Heller* is now the law. Two years later, in *McDonald v. City of Chicago*¹² — a case involving gun regulations in Stevens’s beloved hometown — the Court had to decide whether *Heller*’s right should be incorporated against state and local governments. Again, Justice Stevens found himself dissenting — this time not only about the constitutionality of gun regulation, but about how incorporation doctrine should be understood. And again, Justice Scalia took the other side, writing a concurring opinion specifically to take issue with Justice Stevens’s approach.

In both *Heller* and *McDonald*, Justice Stevens authored powerful dissents rooted in history. Those opinions are often excerpted in constitutional law casebooks, and rightly so. But it would be a mistake to read Stevens’s opinions as nothing more than a historical mano-a-mano with Justice Scalia. In terms of Second Amendment law and theory, they are much more than that. With characteristic clarity, the first three sentences of his opinion in *Heller* dissolved a decades-old false dichotomy:

The question presented by this case is not whether the Second Amendment protects a “collec-

tive right” or an “individual right.” Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.¹³

This is profoundly correct, and deftly sidesteps an unhelpful debate in which Second Amendment scholarship had been mired for decades.

Similarly, in *McDonald*, the Justice demolished the misunderstanding that the gun debate is simply about constitutional rights on one side of the equation and regulatory priorities on the other. Too often, that frame leads to the conclusion that only gun owners have constitutionally relevant interests. But as Justice Stevens noted, “Your interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence.”¹⁴ Increasingly, the hard questions of firearms law are about conflicting rights.

A “Self-Inflicted Wound”: Stevens Reflects on *Heller*

John Paul Stevens lived a very long life, and among the familiar stories he told was that, as a 12-year-old growing up in Chicago, he’d watched Babe Ruth “call his shot” against the Cubs in 1932. Stevens had a similar skill at knowing where constitutional law would fall during his long tenure on the bench. His dissent over the constitutionality of anti-sodomy laws in *Bowers v. Hardwick* (1986) was vindicated 17 years later by *Lawrence v. Texas* (2003).

As it happens, the final dissent he ever issued, on the last decision day of his tenure, was *McDonald*. It is possible that someday that decision will go down as Justice Stevens’s called shot on the right to keep and bear arms, and the Supreme Court will revisit its

decision in *Heller*. He was not alone in wishing as much. Many scholars, commentators, advocates, and even some of his fellow justices have called for its reconsideration.¹⁵

We have our doubts about whether this will happen. As we wrote in our recent book, *The Positive Second Amendment: Rights, Regulation, and the Future of *Heller** (2018), the basic holding of *Heller* — that the Second Amendment protects a right to keep and bear arms for certain private purposes, including self-defense — seems legally and politically secure.

But we agree with Justice Stevens that the Second Amendment, properly understood, is not a legal impediment to the kinds of reasonable gun regulations that form the mainstream of the U.S. gun debate — things like expanded background checks, prohibitions on unreasonably powerful weapons, and limits on possession by especially dangerous persons. In keeping with *Heller*’s admonition (echoed in *McDonald*) that gun rights are not absolute, the number and percentage of successful legal challenges claiming a violation of the Second Amendment remains quite low. That low rate of success makes even more sense when one considers that stringent gun regulations are rare, leaving only the most reasonable and popular regulations open to challenge. This is not a target-rich environment for gun rights litigators.

Of course, all of that could change. Even as we write this, the Supreme Court is due to hear oral argument in *New York State Rifle and Pistol Association v. City of New York*, a potentially major Second Amendment case. Some voices both on and off the Court have called for an entirely new structure for evaluating Second Amendment claims — one that would apply strict scrutiny across the board, ►

or would evaluate gun laws based solely on a rigid test of text, history, and tradition. (We have filed an amicus brief in support of neither side, arguing that the Court should not impose such a radical change in the law.)

But at least for now, even after *Heller*, the primary obstacles to further gun regulation in the United States are political, not constitutional. The relevant debates are in legislatures, not courts. And, to the extent the Second Amendment keeps being invoked for propositions that it doesn't support, clarifying the law can help improve the conversation.

Perhaps the Justice recognized this. After all, he published his post-retirement commentary on the Second Amendment in the popular press and addressed it to the public, not to legal elites. In fact, *Heller* became something of a preoccupation for Stevens. It was the opinion that kept him up at night,¹⁶ the one that he kept wanting to talk to people about.

First came his book *Six Amendments: How and Why We Should Change the Constitution* (2014), in which he proposed to amend the Second Amendment to read: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms when serving in the Militia shall not be infringed."¹⁷ Then, in the wake of the Parkland shooting, where 17 people were killed by a recently expelled student on Valentine's Day 2018, Stevens openly called for repeal of the Second Amendment in a *New York Times* op-ed. *Heller*, he said, "has provided the N.R.A. with a propaganda weapon of immense power. Overturning that decision via a constitutional amendment to get rid of the Second Amendment would be simple and would do more to weaken

Most recently, linguistic research using vast databases of 18th-century materials and "big data" techniques unavailable in 2008 have tended to vindicate Justice Stevens. . . . The phrase "bear arms" was overwhelmingly used in a collective, military sense in 1791, just as Justice Stevens had written.

the N.R.A.'s ability to stymie legislative debate and block constructive gun control legislation than any other available option."¹⁸

Near the end of his life, as the pace of mass shootings increased — in schools, churches, concert arenas, and clubs — and as it became apparent the political branches were incapable of addressing the violence, Stevens's agitation grew, as did his certainty that *Heller* was wrong. "These mass shootings are peculiar to America and are peculiar to a country that has the Second Amendment," he lamented in one of his last interviews.¹⁹ "So I think that interpreting the Second Amendment to protect the individual right to own firearms is really just absurd, and it's also terribly important. It happens over and over and over again. I think I should have been more forceful in making that point in my *Heller* dissent."²⁰ His autobiography, published just weeks before his death, called *Heller* "the worst self-inflicted wound in the Court's history."²¹

Others agree. In addition to expressing concern about the social costs,

legal scholars, linguists, and historians have cast serious doubt on *Heller*'s basic premises. Most recently, linguistic research using vast databases of 18th-century materials and "big data" techniques unavailable in 2008 have tended to vindicate Justice Stevens. Linguists like Dennis Baron²² and Neal Goldfarb²³ and historians like Alison LaCroix²⁴ have looked at the material and have come to a similar conclusion: The phrase "bear arms" was overwhelmingly used in a collective, military sense in 1791, just as Justice Stevens had written.

Whatever its historical or linguistic defects, *Heller* remains the law of the land. We wrote the *Positive Second Amendment* with that assumption at the book's core. And, at least for the foreseeable future, *Heller* is not going anywhere. But, as we argue in the book, that's not necessarily bad news for the large majority of Americans who believe that gun rights and gun regulation can co-exist²⁵ — history and constitutional law are on their side. Our hope was and is that a proper understanding of the Second Amendment can tone down the rhetoric and professionalize the gun debate. We remain optimistic.

Buoyed by that optimism and encouraged by friends and colleagues, we sent a copy of the book to Justice Stevens, hoping for a thank-you note at best. What we got back instead was some of the verve that must have been all too familiar to those who clerked for the late justice:

Thank you for the copy of your thoughtful book which I have read with interest and admiration. I remain somewhat puzzled by why you characterize your views as "positive" and confess that I regard your explanation of reasons why the NRA need not fear overrul-

ing *Heller* as equally explaining why the Second Amendment is not needed to protect gun manufacturers from arbitrary regulation. In my opinion the main purpose of the amendment is to enhance the appeal of NRA arguments against additional regulations. No other civilized country has such an amendment or a comparable number of gun-related tragedies. I am convinced that the country would be better off if the Second Amendment were repealed.²⁶

The Justice's letter, written with characteristic force and tact, makes it clear that we failed to convince him of our "positive" vision for the Second Amendment. But, perhaps more importantly, we take it as evidence of his undiminished optimism that peo-

ple are reasonable and persuasive, and that the soundest arguments will carry the day in the end. On that, we're in complete agreement.



JOSEPH BLOCHER is the Lanty L. Smith '67 Professor of Law at Duke Law School.



DARRELL MILLER is the Melvin G. Shimm Professor of Law at Duke Law School. Blocher and Miller co-direct the Center for Firearms Law at Duke Law School and are co-authors of *The Positive*

Second Amendment: Rights, Regulation, and the Future of Heller (Cambridge 2018).

¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

² John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, *THE ATLANTIC* (May 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/>.

³ *Id.*

⁴ U.S. Const. amend. II.

⁵ Ross E. Davies, *Which Is the Constitution?*, 11 *GREEN BAG 2D* 209 (2008).

⁶ *United States v. Miller*, 307 U.S. 174 (1939).

⁷ DUKE CENTER FOR FIREARMS LAW, REPOSITORY OF HISTORICAL GUN LAWS, <https://law.duke.edu/gunlaws/>.

⁸ *Heller*, 554 U.S. at 624 n.24.

⁹ Justice Stephen Breyer wrote a separate dissent, arguing that D.C.'s law was constitutional even if the right to keep and bear arms includes private purposes. *Heller*, 554 U.S. at 681 (Breyer, J., dissenting).

¹⁰ *Heller*, 554 U.S. at 649 n.11 (Stevens, J., dissenting) (quoting *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting)).

¹¹ *Remembering Justice John Paul Stevens*, NAT'L CONST. CTR. (July 19, 2019), <https://constitution-center.org/debate/podcasts/remembering-justice-john-paul-stevens>.

¹² *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

¹³ *Heller*, 554 U.S. at 636 (Stevens, J., dissenting).

¹⁴ *McDonald*, 561 U.S. at 891 (Stevens, J., dissenting).

¹⁵ See, e.g., *id.* at 916 (Breyer, J., dissenting); Richard Aborn & Marlene Koury, *Toward a Future, Wiser Court: A Blueprint for Overturning District of Columbia v. Heller*, 39 *FORDHAM URB. L.J.* 1353, 1354 (2012) (citing Chris W. Cox, *Justice Ginsburg Reminds Us What Is at Stake in November*, NAT'L RIFLE ASS'N-INST. FOR LEGISLATIVE ACTION (Feb.

13, 2012), <http://www.nraila.org/news-issues/articles/2012/justice-ginsburg-reminds-us-what-is-at-stake-in-november.aspx>).

¹⁶ See Kate Shaw, *Ask the Author: Interview with Justice John Paul Stevens*, *SCOTUSBLOG* (June 12, 2009, 10:26 AM), <https://www.scotusblog.com/2019/06/ask-the-author-interview-with-justice-john-paul-stevens/>.

¹⁷ JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 132 (2014).

¹⁸ John Paul Stevens, *Repeal the Second Amendment*, *N.Y. TIMES*, Mar. 27, 2018.

¹⁹ See Shaw, *supra* note 16.

²⁰ *Id.*

²¹ JOHN PAUL STEVENS, *THE MAKING OF A JUSTICE* 485 (2019).

²² Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 *HASTINGS CONST. L.Q.* 509 (2019).

²³ Brief of Neal Goldfarb as Amicus Curiae in Support of Respondents, *New York State Pistol & Rifle Ass'n v. City of New York* (No. 18-280), available at https://www.supremecourt.gov/DocketPDF/18/1-280/112037/20190812160955077_18-280%20Amicus%20Brief%20of%20Neal%20Goldfarb.pdf.

²⁴ Alison LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, *THE PANORAMA* (Aug. 3, 2018), <http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/>.

²⁵ JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 4-5 (2018).

²⁶ Letter from Justice John Paul Stevens to Joseph Blocher (Mar. 14, 2019) (on file with the authors).



Proud Sponsor
of **Judicature.**

Western Alliance Bank specializes in banking for law firms and settlement administrators. We have been providing nationwide settlement, escrow and distribution services for 15 years.

Specializing in:

Class Action Settlements

Bankruptcy

Mass Torts

Simple to Complex Attorney-Focused
Fiduciary Banking Solutions

Connect with your team of settlement services bankers.

Settlement Services Group

Western Alliance Bank

(838) 854-2705

settlementservices@westernalliancebank.com



westernalliancebank.com/settlementservices



**Western Alliance
Bank**

Member FDIC