



It's Time for Democrats to Stop Agreeing That the Second Amendment Protects an Individual's Right to Bear Arms

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Former Supreme Court Justice John Paul Stevens (appointed by a Republican President) **wrote** in 2019, "*District of Columbia v. Heller*, which recognized an individual right to possess a firearm under the Constitution, is unquestionably the most clearly incorrect decision that the Supreme Court announced during my tenure on the bench."

Never in the 217 years since the Bill of Rights had been ratified In 1791 had the Supreme Court found an individual Constitutional right to own a gun separate from a militia (which today we call the National Guard) and during that time, local, state and the Federal government enacted numerous gun control laws.

Even former Republican Chief Justice Warren Burger (appointed to the Court by Richard Nixon) called the NRA support of this interpretation "One of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have even seen in my lifetime."

But Democratic politicians are afraid to agree with Stevens or even Burger.

When it comes to gun violence, Democrats generally start by saying "Of course we don't want to infringe people's Second Amendment right to own a gun. We just want 'common sense' gun laws like background checks and red flag laws" (which everyone knows will do little except at the margins.)

Republicans didn't say "Of course we don't want to infringe women's Constitutional right to decide whether to bear a child. We just want common sense laws to protect their health." No. They spent decades declaring abortion is murder, that as Alito said in his draft opinion, Roe was "egregiously wrong from the start," and packing the courts with judges who agree with Alito.

It's time for Democrats to summon some courage and say loud and clear that the *Heller* decision adopted by a 5-4 Republican majority on the Court was one of a string of politicized 5-4 decisions by Republican Justices to advance the Republican agenda.

What's Wrong With *Heller*?

The 2008 *Heller* decision flew in the face of long-standing Supreme Court precedent. Never in the 217 years since the Bill of Rights had been ratified in 1791 had the Supreme Court found an individual Constitutional right to own a gun separate from a militia (which today we call the National Guard) and during that time, local, state and the Federal government enacted numerous gun control laws.

Heller (like Alito's draft opinion overturning *Roe* smashed the Supreme Court's own precedent, effectively reversing the Supreme Court's 1939 decision in *United States v. Miller* upholding provisions of 1934 National Firearms Act, passed by Congress in response to the St. Valentine's Day Massacre which required the registration of certain types of firearms, such as machine guns and sawed-off shot guns.

In *Miller*, a unanimous Supreme Court had held that "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees to the citizen the right to keep and bear such a weapon."

Antonin Scalia's 5-4 opinion in *Heller* demonstrated the utter hypocrisy of Scalia's textualist/originalist doctrine of Constitutional interpretation—now adopted by at least 5 other Supreme Court Justices--that the Constitution should be interpreted according to the meaning of the text as understood at the time it was written.

Here's the actual text of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms."

Excuse me. What about the text regarding "a well regulated Militia" and the "security of a free State [i.e. a State of the Union]"? Scalia's majority opinion treats these as a nullity, or, as he calls them mere "prefatory clause(s)" that do not limit the "operative clause" that "connotes an individual right to keep and bear arms." What? Scalia and his 4 right-wing colleagues really think the Framers put the text "a well-regulated militia" and a "free State" in the Constitution for their entertainment value and not for any operative meaning?

A Politicized Extreme Right-Wing Court

And indeed, Scalia and his 4 right-wing colleagues were doing little more than carrying out the political bidding of right-wing interest groups. The *Heller* case was constructed by the right-wing think tank, the Cato Institute and specifically designed to give 5 right-wing Justices a road map to overturning long-standing precedent to find an individual right to gun ownership unconnected to state militias, despite the plain language of the Second Amendment. An amicus brief signed

by then-Texas Attorney General Greg Abbott and authored by then-Texas Solicitor General Ted Cruz was filed by 31 Republican state Attorney Generals. It was, to quote former Chief Justice Burger again a "fraud on the American public by special interest groups."

And why can't Democratic politicians (except perhaps Beto O'Rourke) dare to say this? Do they think that pretending to support an individual's Constitutional right to own guns will win the votes of Trump loyalists? In his June 2 speech after the Uvalde massacre, supporting many "common sense" gun laws, President Biden even quoted from Scalia's *Heller* decision.

Biden did so, knowing full well that sometime this month, the Supreme Court is almost certain to expand the reach of *Heller* by finding unconstitutional a New York gun law which has been in effect since 1913 and requires someone carrying concealed weapon in public to have a permit.

Get ready to ride the New York subway, knowing that the person standing next to you may be legally packing heat.

Why can't Democratic politicians say openly, as best-selling author and prominent Chicago attorney Scott Turow recently wrote in *Vanity Fair* that, like Alito's draft abortion opinion, this is "originalist bunk."

Originalism/textualism was a political/judicial philosophy reverse engineered to reach reactionary results by claiming that generalized principles in the Constitution like "free speech" and liberty always and forever have the meaning they had in 1791 when black people were slaves, or in 1868 when the 14th Amendment was passed and most schools were segregated and women had no rights.

It has now been turned into the rationale for a Republican Supreme Court majority to enact an extreme right-wing political agenda, often opposed by a majority of the American people.

As corporations legally buy politicians, state legislatures suppress the vote and gerrymander districts, the Supreme Court allows states to force women to carry fetuses, and madmen to carry weapons of mass destruction, the president and congressional Democrats should at least have the courage to tell the truth.

Democrats need a Senate majority to confirm new Justices who will affirm human rights like a woman's right to choose and voting rights and reject turning America into an armed camp where 5-year-old school children need to be taught in prison-like schools how to avoid mass murderers. But first Democrats need to stand for something meaningful.