Bratislava International School of Liberal Arts

Oh *Heller*. Did Justice Scalia Make the Right Decision?: An Argument for Constitutional Moral Reasoning Based on the Preamble

BACHELOR THESIS

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Oh *Heller*. Did Justice Scalia Make the Right Decision?: An Argument for Constitutional Moral Reasoning Based on the Preamble

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Declaration of Originality

I hereby declare that this bachelor thesis is the work of my own and has not been published in part or in whole elsewhere. All used literature is attributed and cited in references.

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Abstract

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This work aims to highlight the inadequate way the United States Supreme Court approached the Second Amendment in the 2008 *District of Columbia v. Heller* case. By first answering questions of what gives the Second Amendment legitimacy and why can it not be amended or repealed, the focus then turns to modes of interpretation. Since the *District of Columbia v. Heller* case fixated on textualism and originalism as the only modes of interpreting the Second Amendment, this thesis provides a new mode of constitutional interpretation: moral reasoning. This position is built by examining the shortcomings of these two modes of interpretation seen in *District of Columbia v. Heller.* Additionally, the importance of the United States Constitution's Preamble is brought into focus in terms of how it may aid this proposed mode of interpretation. While it is too late to alter the decision made in 2008, the fact that there exists a neglected link between the Second Amendment and the Preamble still stands.

Abstrakt

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Kľúčové slová: **Druhý dodatok, *distrikt Kolumbia v. Heller,* Spojené štáty, interpretácia, preambula**

Cieľom tejto práce je poukázať na neadekvátny prístup Najvyššieho súdu Spojených štátov k druhému dodatku ústavy v prípade *Dištrikt Kolumbia v. Heller* z roku 2008. Najskôr bude zodpovedaná otázka, čo robí druhý dodatok ústavy legitímnym a prečo nemôže byť pozmenený alebo zrušený, potom bude pozornosť venovaná spôsobom jeho interpretácie. Pretože prípad *Dištrikt Kolumbia v. Heller* sa sústredil na textualizmus a originalizmus ako jediné spôsoby interpretácie druhého dodatku, predložená práca poskytuje nový prístup k výkladu ústavy, a tým je morálne uvažovanie. Táto pozícia bude budovaná postupne skúmaním nedostatkov oboch interpretačných prístupov uplatnených v prípade *Dištrikt Kolumbia v. Heller*. Okrem toho sa zdôrazní význam preambuly Ústavy Spojených štátov a ukážeme, ako môže podporiť nový navrhovaný spôsob interpretácie. Aj keď je príliš neskoro na zmenu rozhodnutia prijatého v roku 2008, skutočnosť, že medzi druhým dodatkom a preambulou existuje zanedbaná súvislosť, stále pretrváva.

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Introduction

Guns were and remain an important aspect of the American identity. Whether one is for or against ownership of firearms, there is no denying the harms that come along with these weapons. Compared to other developed countries, the United States stands as a considerable outlier when it comes to the number of guns owned as well as the number of gun-related deaths within the nation (Lopez, 2018). While there is much debate surrounding the root of this problem, the freedom to bear arms ultimately begins with the Second Amendment to the Constitution of the United States of America.

This Amendment 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." (*The Constitution of the United States,* Amendment 2). Even though most Amendments of the United States' Constitution all have a general, public understanding, that is not the case for the Second. It reads differently depending on who is interpreting it. Further, a person's reading or understanding almost always conforms to their broader stance on guns. For instance, someone with an interest in more general public availability of firearms will read the Amendment to guarantee individual rights. Those who oppose public availability will read it to *only* guarantee the right to bear arms for militias.

Although controversies and disagreements can be found in almost any context, the one revolving around the Second Amendment is rather pressing. In 2016 alone, there was a total of 38,658 gun deaths in the United States, inclusive of suicides, homicides, and accidents (America's gun culture in charts, 2019). Additionally, mass shootings, or active-shooter incidents, have become and are still common in recent years (Active shooter incident have become more common in U.S. in recent years, 2019). Considering that this issue has not been resolved or at least decreased yet, a good place to start may be with the Second Amendment since it allows for the bearing of arms.

While there exists an abundance of scholarly literature on the Second Amendment, the best sources to which to refer are United States Supreme Court cases since they deal with Constitutional issues and directly impact the lives of people in America. The 2008 *District of Columbia v. Heller* is the perfect reference because it is situated around the interpretation of the Second Amendment. The problem presented there had to do with whether the District of Columbia's handgun ban, as well

as other restrictions, violated citizens' Second Amendment right. The final decision of five to four ruled that the handgun ban did in fact violate the Second Amendment.

What is more, the majority argued that the Amendment ensures an individual the right to bear arms even if they have no connections to militias. The minority, however, believed it only covered militia use. The question that remains is, where did these differing readings of the Second Amendment come from, and was Justice Antonin Scalia's majority decision the right one?

Again, much literature exists on the Second Amendment, especially its interpretation. The same goes for reviews or critiques of Scalia's decision in *District of Columbia v. Heller.* However, the focus tends to fall into one of two categories. These two categories are textualism and originalism, two modes of Constitutional interpretation. Though there are eight modes of interpretation in total, only textualism and originalism seem to be used when approaching the Second Amendment. Through this thesis, the aim is to uncover which mode is better for understanding the Second Amendment. Moreover, if neither seems to be appropriate, should another mode be introduced?

In order to uncover the answers to such questions, the thesis will proceed as follows. The first chapter shall address the Constitution's parts, including the Preamble as well as the Bill of Rights. It will also provide a condensed overview of how the United States functioned before sharing a common Constitution and what problems the Founding Fathers faced when drafting the existing Constitution. Finally, the first chapter breaks down the Second Amendment.

Chapter 2 begins by defining Constitutional interpretation and its purpose. However, only two modes of interpretation, textualism and originalism, are analyzed in detail for they are the most relevant. Next, examples of both these modes are provided to help differentiate between them. Next, the so-called "dead hand problem" is introduced in order to understand why the Second Amendment should still hold the legitimacy that it does. Last, this chapter acknowledges the shortcomings of the two modes, which are mentioned in great detail in this chapter, and argues for another mode: moral reasoning.

In chapter 3, the thesis finally addresses *District of Columbia v. Heller* beginning with a summary of Justice Scalia's decision. Next, summaries of Justice Stevens' and Justice Breyer's dissenting opinions are provided. The concluding paragraphs provide critiques of the decision as well as both dissenting opinions. Last but not least, the argument for using moral reasoning as another mode of interpretation in *Heller* is presented.

The Second Amendment as Part of the Constitution

To understand the Second Amendment its imperative to first understand the United States Constitution as a whole. Beginning with the Preamble, one is able to grasp the leading values which inspired the Constitution as well as the amendments that followed. However, the Constitution is far from perfect, as seen through early debates which will be highlighted in later sections. The Constitution is not set in stone, and there is always room for modification where needed. Finally, since the Second Amendment is part of the Bill of Rights, the significance these first ten amendments hold over later amendments will be addressed.

The Importance of the Preamble

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. (U.S. Const. pmbl.)

These words ring immensely familiar, especially to those of the American citizen body. Not only are they well recognized, but they also hold great significance, for it is the Preamble of the United States Constitution. While it highlights neither individual rights nor separation of governmental powers, it puts forth another message and serves a different purpose. The Preamble was written by America's Founding Fathers: George Washington, Alexander Hamilton, Benjamin Franklin, and so on. With this brief but essential message, it puts forth their purpose in drafting the Constitution itself, as is stated in the closing clause. Therefore, the Constitution ensures American citizens' domestic tranquility, common defense, and liberty. The same applies to their descendants, including, of course, the current American citizen body.

However, one could argue that, with the increase of mass shootings occurring in the United States, this domestic tranquility and or general welfare is lacking. Moreover, one could even go as far as to argue that the Second Amendment facilitates these acts. How could this be? With the Second Amendment guaranteeing the right of the people to keep and bear arms, it is possible for any law-abiding, of age citizen to get hold of these lethal weapons: guns. Even if they do not fall under those two categories and so cannot lawfully purchase firearms, they might still have access to them through family members, friends, or illegal means. A 2017 survey estimates that about

393,300,000 firearms, legal and illicit, exist in the United States alone (Karp, 2018). This number shows how accessible guns are in America, valid or not.

When the Second Amendment is taken for discussion on a Constitutional basis, the focus is on either the militia clause, the justification, or the arms-bearing clause, the operative (explained in the *What Next?* section of this chapter). However, it seems the promises ensured in the Preamble are rarely confronted in relation to the Second Amendment. Why this might be is unclear. While the Preamble does not acknowledge any rights or powers, this does not mean it is fully excluded from Constitutional discourse. There have been many landmark cases in which the Preamble has been used as a witness such as *Chisholm v. Georgia, Martin v. Hunter's Lessee,* and *McCulloch v. Maryland,* just to name a few (*Purpose and Effect of the Preamble*). If the current interpretation of the Second Amendment does in fact enable frequently occurring mass shootings and is in turn impeding the values that the Preamble ensures to America's people, there is a serious Constitutional issue at hand.

Articles of Confederation

Following the United States' independence from Britain came the establishment of the Articles of Confederation. This document did not act so much as a Constitution but more as a "mutual defense treaty establishing a 'firm league of friendship' among newly-formed co-equal states" (Maggs, 2017, p. 403). The reason it was not considered a real Constitution but rather a treaty was because individual States acted on their own accord under their own interests. While the Articles of Confederation ceased to exist due to unresolvable issues, it had some successes. The most crucial problem was that Congress "had very little legislative, executive, and judicial power" (Maggs, 2017, p. 416). All states chose their own laws and decided which rights to implement under their individual Constitutions. However, despite these issues, the Confederation overall was able to perform many functions as a government under a proper constitution. Even during times of potential secession, the Confederation successfully kept the thirteen states together in the face of their opposing interests. Nonetheless, its failure led to the creation of the current United States Constitution, which could be considered the biggest success from an overall failure. This was all made possible by Congress's prudence in recognizing the existing problems and "its willingness to promote and accept reform" (Maggs, 2017, p. 417).

In 1787, the Founding Fathers met in Philadelphia, originally planning to reform the Articles of Confederation. However, they did more than just that. They ditched the Articles altogether and drafted the United States Constitution to take its place. During the Convention in

which this all took place, "the focus was not on principles of government, and the relation of individual to society… but on the needs and uses of union" (Hankin, 1979, p. 406). While the Fathers did not tweak or replace the individual state constitutions and governments during the Convention, they did transform "the *links between* states" (Hankin, 1979, p. 406). What this ultimately did was create a framework of government whose position was over and above the state governments. States that had been acting on their own wills were now able to come together and work under a single government. In other words, it established "a more perfect Union" (Hankin, 1979, p. 406).

Early Constitutional Debates

Since its creation, the Constitution has gone through little modification. Therefore, arguably, it still holds the same significance today that it did then. It acts as the supreme law within the United States. More than that, it highlights citizens' individual rights and guarantees them protection from an oppressive government. After years of being oppressed by Great Britain, the former colonists fought hard to gain their independence, which they succeeded in doing. Witnessing how the original government had failed paved a way to appreciate a strong, working central government with a written foundational document. For these reasons, it is not taken lightly.

However, much debate arose during its creation. Disagreement stemmed from all aspects of the document, but much of it concerned the inclusion of a Bill of Rights. There were ultimately two sides to this debate: Federalists, who pushed for an existing Constitution and no Bill of Rights, and Anti-Federalists who opposed a Constitution and advocated for a Bill of Rights. They expressed their opinions and arguments through a series of then-anonymous essays which were often published in newspapers, now referred to as the *Federalist* and *Anti-Federalist Papers*. What is more, disputes even emerged at the core of today's controversial Second Amendment. One side argued for keeping the militia tradition alive while the other opted for a central, standing army.

Despite the fact that Federalists pushed for an existing constitution, they were against the idea of including a Bill of Rights. Article 84 of the *Federalist Papers*, written by Alexander Hamilton, focused solely on the exclusion of a Bill of Rights. He began by defining such a Bill as "stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince" (Hamilton, 2009, p. 46). Hamilton then argued that a Bill of Rights would not only be unnecessary since all rights are already alluded to in the constitution itself, but would also be dangerous because "They would contain various exceptions to powers not granted." (Hamilton, 2009, p. 47). In other words, a Bill of Rights would attempt to

limit governmental powers which were not even granted to the government in the first place. Hamilton believed that the Constitution already ensured a separation between governmental powers and individual rights even if it was not explicitly stated. In addition, he believed that the Preamble of the constitution did a better job of recognizing individual rights than the Bill of Rights could. According to him, the Constitution was concerned more with general political interest and rights than with specific ones.

Anti-federalists on the other hand believed that the lack of a Bill of Rights was a threat to citizens' liberties. Someone under the pseudonym of John DeWitt expressed in his second essay that he was worried about the permanence of the decision about to be made in establishing the Constitution. He described the pre-existing constitution as a "compleat System for the future government of the United States" (DeWitt, 2009, p. 38) rather than perceiving it as a revision of the first Confederation. DeWitt explained that the seemingly simple procedure to adjust amendments is not so and believed amendments would not come easily. With this complex procedure, he feared the government both would be able to and in fact would increase its power over the people. However, with a Bill of Rights included in the Constitution, certain rights would be fixed and the government would have no means to infringe upon them. He stated that these rights must be explicitly specified, for, if not, "The people … to express those rights so granted might convey more than they originally intended, they chose at the same moment to express in different language those rights which the agreement did not include..." (DeWitt, 2009, p. 40). In the end, the Federalists gave way to the Anti-Federalists' demands in order to appease a majority of the people. The Constitution, with the inclusion of a Bill of Rights, was ratified on June 21, 1788.

While there was no specific debate on the Second Amendment, much disagreement stemmed from having militias rather than a standing army. On the one side, the Federalists, especially James Madison, believed the militia system would be ineffective. Predicting that many would not be so eager to undergo unpaid military training, he argued for a standing army. He also believed the government would always call for a more professional and efficient army (Madison, 2009).

On the other hand, the Anti-Federalists, scarred by Great Britain's army, rejected the idea of standing armies. Afraid that the federal power would end up controlling the standing army, they argued for militias. This is because militias ultimately ensured security if the standing army controlled by the federal power were to rise against them (Brutus, 2009).

In order to appease the Anti-Federalists, the Second Amendment was created. While not all of their concerns were addressed, such as an outright ban of standing armies, the statement "shall

not be infringed" was added to the Amendment. With the inclusion of these few words, the government would have no means to strip the citizenry of their freedom to form militias in times of need.

The Bill of Rights

The fact that much dispute surrounded the Bill of Rights is quite surprising, for now these ten amendments are commonly regarded as the most sacred rights (Schwarts, 2002). This could explain why the arguably problematic Second Amendment has not been considered being amended or repealed. Its being part of the Bill of Rights plays part in its being 'untouchable'. Nowhere have I seen this reason explicitly stated. However, I am led to believe it to be true because, while the amendments have rarely been repealed, there is still one case of this: the Eighteenth Amendment, which is not part of the Bill of Rights.

While it is constitutionally possible, as seen with the Eighteenth Amendment, repealing amendments is not an easy process. The process is highlighted in Article V of the Constitution, and it consists of three steps. First, repealing an amendment does not mean simply deleting it or removing it from the Constitution. Another amendment must take its place. For that to happen, there must be a request from two-thirds of the states. Then, that proposed amendment must be ratified by three-fourths of the states. This was the case with the Eighteenth Amendment, which prohibited alcohol within the United States. This Amendment came into effect in 1919 and lived a very short life, only fourteen years, proving to be only problematic during its time. It was difficult to enforce, and with it came much corruption and bribery. Many gangsters profited from the illegal sale of beer and liquor while the Great Depression was only worsening within the United States. Due to these problems, President Franklin Roosevelt realized something had to be done. While the original intent was only to modify the Amendment, the need for money resulted in its being fully repealed (Munger & Schaller, 1997).

The Great Depression was one of the hardest times in United States history. Everyone's general welfare was without a doubt negatively affected, and there was little hope for providing children with a better future. During this time, life expectancy was not steady whatsoever. While there was a general increase in life expectancy, times of increased unemployment showed life expectancy to be much lower, dropping to an average of 59 years. On the other hand, the mortality rate for infants, children, and young adults was overall decreasing, with ages 5-19 keeping at a steady decrease. What is more, suicide was on a general increase, peaking during times of unemployment (Grandos & Roux, 2009). Congress and the President recognized those troubles and

decided to make a decision that appealed to Constitutional values. Why is that not the case for the Second Amendment? Everyday in America, at least 310 people are shot. Out of those 310, 164 people are killed either by intention, suicide, or accident. The rest bear severe injuries. Not to mention, everyday, 21 children ranging from ages one to seventeen are shot. At least eleven of them die (Key Gun Violence Statistics). Are these incidents providing Americans and their posterity the values that were promised such as domestic tranquility and general welfare?

What Next?

The United States Constitution as a whole as well as its parts were subject to much debate over the course of its drafting. However, that debate has been followed by little change. While the Constitution does not have as many weaknesses as the Articles of Confederation, it is still not always very clear and consists of many ambiguities, especially in the Second Amendment.

Both such lack of clarity and ambiguity in the Amendment can be seen in its two clauses: a justification clause and an operative clause (Volokh, 1998). The justification clause is the statement of purpose, which refers to "A well regulated militia," which seems straightforward and clear. The operative clause on the other hand refers to the "right to keep and bear arms," which is rather broad. The result is questions such as: Does the right to bear arms exist only in relation to promoting a well regulated militia? Are the clauses independent of one another and, if so, which clause has the upper hand? Also, what is a "militia" in modern America, the National Guard or Army? Further, what determines it as "well regulated"?

Since there are so many ambiguities, not only in the Second Amendment but in the bulk of the Constitution as well, people are often at a loss as to what some of the amendments are trying to convey and which rights are and are not guaranteed. Because there are so many uncertainties, eight modes of Constitutional interpretation have developed. However, I will discuss only textualism and originalism in the next chapter, not because I find the others unappealing or unconvincing, but rather because they seem to be the only modes in practice in regards to the Second Amendment. Considering there are only two modes when approaching this Amendment, could there be potential problems with the implications of this Amendment? If so, how could these problems be sorted out? If there are solutions, could they be found in other parts of the Constitution?

Interpreting the Second Amendment

The United States Constitution does not always speak clearly to us. The fact is, it is broadly worded, leaving gaps and ambiguities and causing intents and messages to get lost along the way. This is no surprise, however, granted it was drafted some 230 years back by men living in different conditions. Unfortunately, this circumstance poses two serious issues. First, considering that the Constitution acts as the United States' supreme, overruling law, ambiguities can be rather harmful since it can create disagreement on significant issues. Second, regarding the matter that it was drafted by people who differed greatly from today's American citizenry, the legitimacy of the Constitution is at stake since people today might not feel obliged to comply with decisions made by a mismatched representative body. This chapter will explore how these two concerns are addressed and resolved.

Modes of Interpretation

Since there are many ambiguities within the whole Constitution, people are often at a loss when determining what the Amendments are trying to convey. Because there are many uncertainties, courts are given the task of interpretation. As legislative attorney Brandon J. Murrill explains, "interpretation is necessary to determine the meaning of ambiguous provisions of the Constitution or to answer fundamental questions left unaddressed by the drafters" (Murrill, 2018, p. 1). The Second Amendment is no stranger to this task. Although there exist eight modes of constitutional interpretation in total, only two will be discussed because they seem to be the only modes in practice when approaching the Second Amendment amongst scholars as well as judges.

One of these two modes is known as textualism. In this mode, interpreters focus on what the terms in the Constitution could have meant when it was ratified. In other words, it "focuses on the plain meaning of the text" (Murrill, 2018, p. 5). Murrill explains that "Textualists usually believe there is an objective meaning of the text" (Murrill, 2018, p. 5) and they do not advocate for courts to be flexible with the meaning. All of their focus is aimed at the sole meaning of the language and text chosen and they do not take into account any political or ideological views. The main argument for this mode of interpretation is that it promotes more predictability in judges' decisions because "textualism prevents judges from deciding cases in accordance with their personal policy views" (Murrill, 2018, p. 6). Another argument is that it "promotes democratic values" because justices must adhere to the words chosen by the "people" of that time.

On the other side, it is believed that textualism is a relatively unreliable form of interpretation. The meanings of certain texts can differ from one judge to another mainly because parts of the Constitution are broadly worded and fairly ambiguous—the Second Amendment, for example. This is rather obvious, for not everyone comes from the same background or holds the same beliefs. Finally, opponents of textualism will also argue that textualism itself is not sufficient when answering fundamental constitutional questions and that other aspects should be taken into consideration, such as moral reasoning and practical consequences. Although textualism seems to be a comparatively straightforward mode of interpretation, it is quite the opposite (Murrill, 2018, p. 7).

While taking the intentions of the drafters into consideration is excluded in textualism, it is put to good use in the second mode that is being presented, originalism. For the most part, originalists recognize there was an "'objective identifiable' or public meaning" (Murrill, 2018, p. 7) in the text of the Constitution that was understood then and is still understood in the same way today. By recognizing this public meaning, interpreters have a better understanding of what the founders meant in their times or what rights they considered to be sacred. Proponents of originalism "point as well to the basic logic that a law, in order to function as law, has to have a fixed or settled meaning until it is formally amended or discarded" (Murrill, 2018, p. 8). There needs to be an existing consensus on what a law ensures in order to eliminate the possibility of people acting in ways they please. Without a settled understanding, people will interpret laws in the way they deem best. When people can approach laws in this manner, they are no longer laws, or rules set in a community to regulate the actions of members, but become something along the lines of suggestions. Just as in the textualist mode, originalism limits a judge's ability to take into consideration their political views and beliefs, which ensures more predictability in decision making. This virtue is highly respected because, when dealing with constitutional issues, judges must comply with the values established by the Constitution and not what they themselves regard as essential or necessary.

However, there does not seem to be consensus on how to practice originalism. Disagreement ultimately begins over which historical sources should be examined when adopting this approach. Some such options are *The Federalist* and *Anti-Federalist Papers*, the Constitutional Convention, and dictionaries. Arguments for originalism usually center around the historical aspect and the democratic values this mode holds. With regard to changing the meaning of Amendments, some originalists argue matters should be taken into the hands of Congress and adhere to Article V of the Constitution. Those who argue against it, on the other hand, point to the problem originalists face amongst themselves: not being able to agree on original meaning. Moreover, this

could also lead to the fact that perhaps the people of the Founding could not agree on a particular meaning either. Consequently, originalists might construe meanings that are nowhere near what the people at the time of the Founding were aiming for. Problems may also arise from a variety of historical sources that rebut one another and possible gaps or misleading information. Although proponents argue this mode limits a judge's political views to influence his decision, opponents argue the opposite. With a variety of sources arguing for both sides, it is quite easy for a judge to pick the sources that conform to their views and base their decision on that. To prevent this from happening, originalists need to come to a consensus on an original meaning of the Constitution. Last but not least, just because someone is an originalist does not necessarily mean they are an adept historian. Making judgments with reference to historical texts would presumably be better suited for historians than decisionmakers. Ideally, being an originalist as well as an adept historian should go hand in hand (Murrill, 2018, pp. 9-10).

Finally, for clarification, it is crucial to state the main difference between these two modes once again. Only in originalism do interpreters break down what the drafters could have meant by referring to historical documents during the time that the Amendment was ratified. In textualism, interpreters focus solely on word choice and what those words or clauses mean at the *present* time. Textualism does not put weight on how certain words were understood in the past.

Examples of Originalism and Textualism

Now let us look at both originalism and textualism put into practice with the Second Amendment. Nathan Kozuskanich worked with originalism and used a keyword search through three historical newspapers and pamphlets to find the answers he was looking to uncover. The first was the *Early American Imprints* series, which contain "over 15,500 documents from 1763 to 1791" (Kozuskanich, 2008, p. 416). Through his word search, 273 of those documents contained the keyword "bear arms." When reprints of the Bill of Rights and quotes from the Second Amendment are discarded, "111 hits remain[ed], of which only two do not use the phrase to connote a military meaning" (Kozuskanich, 2008, p. 416). Next, Kozuskanich searched through *Early American Newspapers,* which resulted in 115 hits, with only five not using "bear arms" with a military construct. Finally, on the Library of Congress database, "which includes *Letters of Delegates to Congress, Journals of the Continental Congress, Elliot's Debates,* and the *House and Senate Journals of the First Congress*" (Kozuskanich, 2008, p. 416), returned only 41 hits with four instances in which "bear arms" was not explicitly tied to some military context. Based on these results, Kozuskanich argues "that Americans consistently employed 'bear arms' in a military

sense… showing that the overwhelming use of 'bear arms' had a military meaning" (Kozuskanich, 2008, p. 416). Common defense and militia are shown to be the primary concerns rather than "the individual right to self-defense" (Kozuskanich, 2008, p. 417) when referring to firearms. Regarding those hits that did not show a relation to the military, the word use surrounding "bear arms" aimed to denote the meaning "carry guns." This research proves something that was already well known: Americans owned guns. What is more, this research shows how well guns were regulated through militia organization as well as militia-service laws. At the time, there is no doubt that self-defense was considered a natural right, as it is today. However, there is no link from one's personal safety to a constitutional right to bear arms. On the other hand, most relied on the militia to ensure their safety, for it was their job. Unlike police, who fought crimes occurring on a smaller scale such as in communities, militias were established to fight a potential oppressive government for the nation. Through this, one can see that the right to bear arms is not an individual or personal right but rather a civic right (Kozuskanich, 2008). The difference between these two rights is that one benefits the society as a whole while the other benefits only oneself.

Eugene Volokh, on the other hand, approaches the Second Amendment with a textualist mode of interpretation. After introducing the odd format of the Second Amendment—the operative and justification clause—which causes courts to interpret it somewhat differently from other amendments, he puts forth his findings: "many contemporaneous state constitutional provisions are structured similarly" (Volokh, 1998, p. 794). Rhode Island's 1842 constitution, New Hampshire's 1784 Constitution, and Massachusetts' 1780 Constitution are just a few texts that can be compared to the Second Amendment. This "modest discovery" as Volokh puts it, suggests some new arguments. The first addresses the argument that once the militia clause, i.e., the justification clause, ceases to exist, the right to bear arms, i.e., the operative clause, goes with it. Or, more simply put, "the justification clause provides a built-in expiration date for the right" (Volokh, 1998, p. 797). Volokh claims that this argument can easily be rebutted because of what the Amendment does not say: "'so long as a militia is necessary'" (Volokh, 1998, p. 797). Instead, it says "being necessary," which hints at the fact that the speaker is not putting a limit on the right, but justifying it. Moreover, as Volokh argues, although militias are not used in contemporary America, it is not up to judges to decide to do away with the Second Amendment. As long as a right remains in the Constitution, people have the freedom to exercise it, and the Court cannot abolish it just because they deem the right not valuable.

The second argument he poses is that, while the Second Amendment is commonly read as "The right to keep and bear arms is protected *only when* it contributes to a well-regulated militia, or *only when* the well-regulated militia is necessary to the security of a free State" (Volokh, 1998,

p. 801), its commonness does not make it correct. Volokh states that it is inconsistent with the rest of the text because it does not contain an "only when" clause. Just because the operative clause is broader than the justification clause does not mean the operative clause should be excluded. As long as the government does not take away the right to keep and bear arms from the people, they are allowed to act against the justification clause. Furthermore, he states that "Congress has no obligation… to properly train the militia, or to demand that it be armed" (Volokh, 1998, p. 802). Instead, by creating a standing army, as the United States well has, legislation has the right to "undercut the value of a well-regulated militia" (Volokh, 1998, p. 802). Volokh makes this point to emphasize the fact that the government can constitutionally act against the justification clause *as long as* they do not interfere with the operative clause, which refers to the right of *the people*. Since the text guarantees the right to keep and bear arms for "the people," it applies to all people generally and not just those who serve in the militia. While at the time of the Founding only men from ages 18 to 45 served in the militia, those who did not still had the right to bear arms through the operative clause. Again Volokh states that those of the Founding enacted these rights so they could "constrain courts, not to leave them with complete discretion to do justice any way they think best" (Volokh, 1998, p. 805). Therefore, the government cannot take away the right to bear arms from the people even if they do not coordinate with the rest of the Amendment: adding value to a standing militia. All in all, the justification clause can aid the operative clause, but the operative clause is ultimately independent of the justification clause (Volokh, 1998).

The results of these two examples matter not here, although they do provide opposing outcomes. What matters is how each scholar approached the Second Amendment. Kozuskanich relied on other historical texts to derive the meaning of "bear arms" during the time of the Founding and, instead of translating it through a present-day understanding, kept it consistent. In other words, "to keep and bear arms" was only for militia purposes back then, and it remains the same now. Volokh, on the other hand, while referring to other state Constitutions during ratification, used them as an aid to further his argument rather than as a backbone. From a textualist perspective, he focused solely on what "the people" means, which today translates to every of age, law-abiding citizen.

The Dead Hand Problem

While Kozuskanich and Volokh provide thorough examples of how to interpret the Second Amendment, they fail to answer a crucial question: What gives the Second Amendment legitimacy?

Referring to the fact that the Constitution was drafted some two hundred years ago by people different from us, a new problem arises. Why should we abide by the decisions made by them? Primarily since "the people" back then consisted of only white, property-owning men and not the women and blacks, among others, of today, for example? Furthermore, these decisionmakers are long dead. So, as Michael McConnell puts it, "Why should their decisions prevent the people of today from governing ourselves as we see fit?" (McConnell, 1997, p. 1127). In other words, are their decisions still valid, and why or how do people today take them to be legitimate in a representative democracy?

This issue is known as the "dead hand problem." It is commonly believed that the "dead hand problem" is aimed at originalism. Nevertheless, McConnell argues that, if accepted, it may eventually hurt all and any governments that work under a constitution. Nonetheless, despite the mode of constitutional interpretation, there is no denying that "we are governed by the dead hand of the past" (McConnell, 1997, p. 1127). It affects all of our present-day decisions and actions. Indeed, this is a problem even the Founders addressed. Thomas Jefferson, for example, said, "'The earth belongs in usufruct to the living… the dead have neither powers nor rights over it'" (McConnell, 1997, p. 1127). Additionally, he argued that any Constitution or even law for that matter "should expire at the end of a generation" (McConnell, 1997, p.1127). Hannah Arendt, in *On Revolution*, acknowledged Jefferson's ability to discern the dangers of regarding a Constitution to be something sacred and untouchable. Jefferson viewed this as especially dangerous because he was aware of the fact that it was nowhere near perfected by the Founders (Arendt, 1990, p. 233). However, this is no longer a question of interpretation. Instead, the answer can be found by asking "why we should consult the decisions of persons long dead" (McConnell, 1997, p. 1128). McConnell then proceeds to provide five of what he regards as the most plausible answers to the "dead hand problem."

The first solution is known as the "living constitution," and it argues for enforcing only those parts of the Constitution that we currently deem valid or valuable and to ignore or modify those we do not. He explicitly uses the Second Amendment as an example, stating, "if the idea of widespread gun ownership is scary in modern urban America, then the Second Amendment should be treated as a dead letter" (McConnell, 1997, p. 1128). Unfortunately, ignoring what is deemed invalid leads to further problems because we may well end up "disregarding the Constitution whenever we disagree with it" (McConnell, 1997, p. 1129). Through this, the Constitution ultimately becomes "a makeweight" and strips it of its authority, making this solution only a "capitulation."

The next solution aims for the goal that people should not view the Constitution as restraining, but rather as enabling. McConnell compares it to grammar, the rules of which "do not merely constrain the speaker or writer, but make communication possible" (McConnell, 1997, p. 1130). By having a Constitution, governments can establish common rules and grant protections so that citizens are able to live in a functioning society. Through this, it can be argued that the dead hands make it easier for us to govern ourselves rather than take it as the dead still directly governing us.

The third response is not really an answer, but more of a defense for "the legitimacy of the dead hand" (McConnell, 1997, p. 1130). This defense more or less ties itself to originalism. We should believe that the Founding Fathers had the best intentions for us when they constructed the Constitution in the way they did. That is, they included the rights and protections that they considered the most sacred not only to themselves but to the nation as a whole. Being citizens of that nation, we should carry those rights through and through. If we really want to change parts of the Constitution, we have every right to do so through Article V, which is why they included it in the Constitution in the first place.

The use of Article V then leads to the next solution, number four. However, this has not been used so often. McConnell explains, "If there were persistent demands for a significant constitutional amendment, backed by a majority of people but blocked by the two-level supermajority requirement of Article V, we would have a genuine crisis of legitimacy" (McConnell, 1997, p. 1132). The United States is a *representative* democracy. Disregarding the interest of the majority just because it does not get passed through the two-third majority vote by House and or three-fourths majority by the States is no longer representation; it becomes rule by the few.

The last solution is again less of an answer and more of a response where McConnell takes from American lawyer Jed Rubenfeld's claim that "the dead hand problem…is a misguided way to think about constitutional legitimacy" (McConnell, 1997, p. 1133). Rubenfeld and Edmund Burke, who also adopted this response, refer to constitutional legitimacy as something that depends on "the will and choice of present-day majorities" (McConnell, 1997, p. 1133). If the majority were to decide to cut themselves off from this legitimacy, "the whole chain and continuity of the commonwealth would be broken" (McConnell, 1997, p. 1134). The links between generations would be non-existent, and each new generation would have to start from scratch. Despite our differences with the people during the Founding, we are still "part of a historically continuous community" (McConnell, 1997, p. 1134). We are able to reject what they put forth for us but not without legitimate reasoning and moral backing (McConnell, 1997, p.1134).

Another Mode?

Due to the shortcomings that textualism and originalism bring, relying exclusively on them can never make clear what the Second Amendment is strictly ensuring. Because of this, it will always be possible for people to read the Second Amendment in ways that conform to their pre-established values and opinions about it. Indeed, I will argue that Justice Antonin Scalia let his beliefs and values lead him when he ruled that the Second Amendment protects an individual's right to bear arms separate from a militia in the *District of Columbia v. Heller* case. Scalia used both textualism and originalism to interpret the Second Amendment during this case, as did Justice John Paul Stevens in his dissent. However, Scalia's interpretation of the Second Amendment differed significantly from Stevens'. From the *District of Columbia v. Heller* case, I have come to notice there is no one straightforward answer when using textualism and or originalism. On this note, I do not wish to yield to one of these two modes of interpretation since they may not be satisfactory. Instead, I intend to argue for a third mode of interpretation, that being moral reasoning.

District of Columbia v. Heller

In 2008, the United States Supreme Court heard one of the most landmark cases regarding the Second Amendment, that being *District of Columbia v. Heller*. The District of Columbia had outlawed handguns and required all persons interested in keeping them within their home to apply for a one-year license to do so. What is more, it required that all legally registered handguns within a home to be bound by a trigger lock, disassembled, or unloaded. The reason for this was the District was known to have a high rate of gun deaths, particularly by handguns. Dick Anthony Heller, a member of the District's police force, attempted to register for such license. However, he was denied by the police chief. Claiming that this denial for a license infringed upon his Second Amendment rights, he took this issue to court and demanded that the bar on handgun registration be unenforced. The constitutional issue presented had to do with the fact that Heller's right to self-defense was being violated, namely because, first, he was denied such a privilege and, second, the trigger lock prohibited its usefulness in a needed situation. With a five-to-four decision, the majority pronounced three main holdings: First, "The Second Amendment protects an individual right to posses a firearm unconnected with service in a militia." Second, "the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever." Last, "The handgun ban and the trigger lock requirement violate the Second Amendment" (*District of Columbia v. Heller,* 2008).

Scalia's Decision

This section summarizes Justice Antonin Scalia's reasoning for his decision in *District of Columbia v. Heller*. Scalia begins his interpretation with textualism and finishes with originalism by analyzing other sources to enhance his understanding of the Second Amendment.

Textualism

Justice Scalia begins his decision by breaking up the amendment and focusing on its clauses. However, Scalia breaks it into four parts: two main sections and then two subsections for each main section. The two main sections are parallel to that of Volokh's operative and justification clauses. He even adopts Volokh's arguments that the operative clause is independent of the justification clause. While the right to bear arms may aid a well regulated militia, it still stands as its own right. Additionally, Scalia reads "to keep" and "to bear" separately, rather than "to keep and bear" together. With this, he stipulates that the portion of "to keep" covers that individual right to own

guns while "to bear" refers to the one connected to the militia. When "to bear arms" is read independent of keeping them, "the term has a meaning that refers to carrying for a particular purpose—confrontation" (Scalia, 2008, p. 10). This phrase recognizes that, while "to bear arms" is for confrontational purposes, it fails to suggest anything having to do with service to a militia.

Originalism

Scalia then moves on to originalism by referring to how State Constitutions explicitly state that guns protect individual rights. According to Scalia, Madison and the other drafters did not do this for the Second Amendment because it was at that time already understood to cover individual rights for ownership. On top of that, hinting back to his definition of "to bear arms," the Second Amendment already expressed that, and so why make the Amendment wordy and lengthy? The dissenting opinions believe this to be an idiomatic way of speech but Scalia disagrees and declares the Amendment to be very clear in its wording and purpose.

In keeping with the originalist mode, Scalia turns his attention to legal and other sources to determine the understanding of the Second Amendment during its ratification period. He first mentions legal scholar St. George Tucker's[1] commentary on the Second Amendment, in which he stated "'This may be considered as the true palladium of liberty…. The right to self-defence is the first law of nature'" (Scalia, 2008, p. 33). Later, Tucker groups the Second Amendment with other rights mentioned in the First Amendment and says that, if Congress were to pass any laws prohibiting those rights, it is up to the judiciary to announce it Constitutional or not. If it does not find it Constitutional, then it has every right to "'acquit the accused'" (Scalia, 2008, p. 33). For Scalia, "It is unlikely that Tucker was referring to a person's being 'accused' of violating a law making it a crime to bear arms in a state militia" (Scalia, 2008, p. 33). By this, he refers to the idea that it would be ridiculous to convict someone for bearing arms if the Second Amendment only held the right for militia related services. One could not breach the Second Amendment for carrying arms if it were *only* for supporting the militia because one could not be guilty for performing their duty. Therefore, the Second Amendment also implicitly includes a right for individual self-defense.

William Rawle,[2] the second scholar Scalia brings up, makes a clear distinction "between the people's right to bear arms and their service in a militia" (Scalia, 2008, p. 34). He argues, however, that people should not abuse the right by grouping together for unlawful purposes during

[1] Tucker was an American lawyer and militia officer during the Revolutionary War, and editor of American edition of Blackstone's *Commentaries on the Laws of England*.
[2] An American lawyer from the late eighteenth and early nineteenth centuries.

times of peace. According to Scalia, Rawle would have no need to state this if the Amendment did not cover individual rights.

Finally Scalia turns to Joseph Story, who "published his famous *Commentaries on the Constitution of the United States* in 1833" (Scalia, 2008, p. 35). Story explains that a right to bear arms without a connection to militia services was included in the English Bill of Rights. He then makes a comparison to the right included in the Bill of Rights to the Second Amendment. This is revealing for Scalia because the comparison would have not made sense if the Second Amendment was only for militia purposes.

With the use of textualism and originalism, Scalia comes to his decision. Reading the Second Amendment as having operative and justification clauses that are independent of one another, he concludes that the right to bear arms exists even without existing militias. Further, Scalia reads the "keep and bear arms" part of the Amendment as "to keep" and "to bear," one connotating a military sense and the other an individual one. Through this process, Scalia concludes that the Second Amendment does in fact guarantee an individual the right to bear arms even if unconnected to militia service.

Dissenting Opinions

Justice Stevens was just one of the four Justices of the Supreme Court to disagree with Scalia's interpretation of the Second Amendment. Stevens simply argued that nowhere in the Second Amendment did it ensure individuals the right to bear arms for self-defense. For him, the right only covered that to aid militias. Justice Stephen Breyer, in another dissenting opinion, also found Scalia's decision to be insufficient but for reasons other than interpretation. Beginning with Stevens's dissent, we will see how his interpretation differs from that of Scalia's. Then, Breyer's dissent will reveal problems with Scalia's decision regardless of the interpretation.

Stevens

Similar to Scalia, Stevens begins his interpretation of the Second Amendment with textualism followed by originalism. The following sections summarize Stevens's process of interpretation using these two modes.

Textualism

First, Stevens directs his attention the text of the Amendment itself, breaking it into three parts: "*A well regulated Militia, being necessary to the security of a free State*," "*The right of the people*,"

and "*To keep and bear arms.*" Starting with the justification clause, he states that it "makes three important points" (Stevens, 2008, p. 5). The first point is that "it identifies the preservation of the militia as the Amendment's purpose," the second that "it explains that the militia is necessary to the security of a free States," and last that "it recognizes that the militia must be 'well regulated'" (Stevens, 2008, p. 5). While he points out that militias are not such a great concern today as they were at the time of the Founding, we must still refer to previous State Constitutions for clarification. While many of these Constitutions included a right similar to that of the Second Amendment, only two states, Pennsylvania and Vermont, explicitly stated that the right also covers individual self-defense. Stevens argues that this "confirms that the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear arms' was on military uses of firearms," which at the time was considered the militia (Stevens, 2008, p. 8). If they aimed for the Second Amendment to cover individuals bearing arms, they would have explicitly stated so, as was done in the Constitutions of Vermont and Pennsylvania.

Further, he says that the majority merely tries to read the Amendment as an operative clause that aids the justification clause and find some "'logical connection'" (Stevens, 2008, p. 8). However, while the majority does agree that the justification clause can resolve ambiguity in the operative clause, the Court fails to "identify any language in the text that even mentions civilian use of firearms" (Stevens, 2008, p. 8-9). By concluding that the operative clause does not depend on the justification clause, they are able to find their preferred reading of the Second Amendment.

Moving on to "The right of the people," Stevens explains that the Court reads "the people" throughout the Constitution as referring "to all members of the political community, not an unspecified subset'" (Stevens, 2008, p. 9). But, when it comes to the Second Amendment, the Court does in fact read "the people" to protect a subset, that being law-abiding, responsible citizens. What is more, the Second Amendment refers to a "collective action of individuals having a duty to serve in the militia" rather than an individual one, i.e., bearing arms for self-defense.

Finally, Stevens argues that the portion of "to keep and bear arms" should be read together rather than individually, as the Court does. The phrase "bear arms" most naturally refers to a military context, as seen in contemporary texts. If the Framers wanted the right to encompass rights for individual purposes, they would have stipulated that. However, they, once again, did not. As for "keep," Stevens argues that it "in no way contradicts the military meaning conveyed by the phrase 'bear arms'" (Stevens, 2008, p. 15). Instead, "keep" describes "the requirement that militia members store their arms at their homes, ready to be used for service when necessary'" (Stevens,

2008, p. 15). This was stated in many state militia laws during the time the Second Amendment was drafted. In conclusion, the Amendment is read as protecting one's right "to keep and bear arms" rather than to "to keep" and to "bear arms."

Originalism

Then Stevens's focus turns to originalism and he presents Madison's first draft of the Second Amendment, which went as follows:

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person. (Stevens, 2008, p. 21)

In this draft, the Amendment refers *only* to the right connected to militias and not individual uses. Nonetheless, the Amendment underwent much debate which led to modification. Those who participated in the drafting process were "fully aware of the other formulations that would have protected civilian use and possession of weapons" (Stevens, 2008, p. 25). However, they did not do this, thus rejecting "those alternative formulations" (Stevens, 2008, p. 25). Through this, it is obvious that the Second Amendment refers only to a right that aids militias and not individual self defense.

Stevens also argues that the texts used by the Court as a basis of reference for an originalist interpretation is insufficient. He claims that *The English Bill of Rights*, *Blackstone's Commentaries*, the *Postenactment Commentary*, and the *Post-Civil War Legislative History* either separately or all together provide "little support for the Court's conclusion" and "shed only indirect light on the question before us" (Stevens, 2008, p. 28). *The English Bill of Rights* was not a proper source because its second Article was established for different reasons and concerns than the Founding Fathers had for the Second Amendment. Also, neither in its preamble nor in any provision of Article II was there a militia specified purpose for bearing arms. *Blackstone's Commentaries* does propose the same issue, "differently worded, and differently historically situated" (Stevens, 2008, p. 30). On the other hand, Blackstone provides advice on how to read such articles properly with respect to the intentions of those who created it, counseling that "'[t]he fairest and most rational mode to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable'" (Stevens, 2008, p. 31). As for the *Postenactment Commentary* done by many scholars, including those who were near the time of the

framing as well as those who came after, they bring forth limited relevance. First, “Their views are not altogether clear” (Stevens, 2008, p. 31), tending to group the Second Amendment with Article II of the faulty English Bill of Rights which and their knowledge of the drafting history of the amendment seems to be lacking. Therefore, all and any of these sources presented by the Court Stevens believes to be problematic.

Finally, Stevens brings to light the decision made in *United States v. Miller*, a 1939 Supreme Court case involving the Second Amendment and previously the most prominent Court case to deal with it. Debate revolved around whether the Amendment protected Miller's right to keep and bear a double sawed-off shotgun. The majority voted against Miller since such a gun does not help provide for a well regulated militia. In this case, the Court explicitly states that Miller's gun does not fall under the protection of the Second Amendment because it does not contribute to the greater good of a militia. Nowhere do they claim the Second Amendment protects individual rights. Furthermore, he explains that, until *Heller*, the Second Amendment had always been understood within legislation as having direct ties to militias, not to individual use. He questions when and where this changed. Since it has not, the Court's interpretation of the Second Amendment in this instance is for him clearly fabricated.

Just as Scalia, Stevens uses a combination of textualism and originalism to examine the Second Amendment. During his breakdown of the Amendment, he refers to other State Constitutions from the ratification period to discover some similarities. To his findings, Vermont and Pennsylvania included Amendments within their Constitutions that covered the individual use of firearms. The fact that Madison did not include such a term in the final draft of the Second Amendment is for him telling. In other words, the Second Amendment was not used to guarantee individual firearm ownership. Stevens also critiques the sources chosen by Scalia when in his originalist mode, claiming that they are insufficient. Last, Stevens questions how the general understanding of the Second Amendment has changed from the 1939 *Miller* case to the 2008 *Heller* case. He claims that it has not and the Court fabricated a new meaning of the Second Amendment.

Breyer

While Justice Breyer, another member of the dissenting opinions, agrees with Justice Stevens, he added another reason for why he disagrees with Justice Scalia's decision. Breyer puts forth an instance that, even if the Court's interpretation of the Second Amendment was correct, i.e., it does

protect individual bearing, the District's law is still "consistent with the Second Amendment" (Breyer, 2008, p. 2). He illustrates that the District of Columbia, being an urban area with a high crime rate, was attempting to combat "a serious, indeed life-threatening, problem" (Breyer, 2008, p. 2) by establishing a handgun ban and requiring trigger locks when kept inside the home. Breyer then acknowledges the District's decision-making process for when they adopted such laws. They took a look at overall statistics within the United States and discovered that "guns were 'responsible for 69 deaths in [the United States] each day.'" Out of 25,000 gun deaths, 3,000 were accidental according to reports (Breyer, 2008, p. 15). They also provided data specifically for the District, stating that 155 murders out of the 285 that occurred in 1974 occurred from handguns. With additional information, the committee "found [handguns] to have a particularly strong link to undesirable activities in the District's exclusively urban environment" (Breyer, 2008, p.16). All in all, the committee decided "that '[t]he easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 years'" (Breyer, 2008, p. 14).

However, the Court presents counter-data illustrating that, after the handgun ban, crimes actually increased rather than decreased. So banning handguns within the District did not solve their overall problem whatsoever. To this, Breyer responded that labeling the handgun ban as the cause of the increase in crime within the District is an elementary mistake. No one could pinpoint whether that was the sole factor. Breyer then goes on to explain that analyzing data and creating regulations is not a job suited for judges. Rather, it is something that was and should still be left in the hands of the District's committee.

Breyer comes forth with a different reason than Stevens. Leaving the question of interpretation, Breyer relies on the problems handguns pose within the District of Columbia. He claims, whether or not the Second Amendment ensures individual possession, there is a bigger issue at hand, the safety of the community, and that it should be resolved by policy makers, not the Court.

Both Stevens and Breyer pose worthy arguments as to why Scalia's decision was faulty. Stevens presented exactly how his path of interpretation using originalism and textualism directly clashed with that of Scalia's. It differed namely in the breakdown of the Amendment's parts as well as the sources used to understand its meaning during the ratification period. Stevens also presents an intriguing question as to why the general understanding of the Amendment all of a sudden changed

during the *District of Columbia v. Heller* case. While Breyer agrees with Stevens' interpretation, he also mentions the overall existing problem with handguns within the District area. Whether Heller's Second Amendment right was being violated, the safety of the people should also be taken into question. If handguns are in fact a safety hazard, then their ban should stand for the overall good and safety of the people. However, in the end, a majority of five-to-four voted that the handgun ban was a violation of the Second Amendment.

Conclusion

While both Justices Scalia and Stevens approach the Second Amendment in an originalist and textualist way, their outcomes differ greatly. It is difficult to pinpoint who has the upper hand in this dispute. However, Stevens makes an exceptional argument in revealing how Madison and the other Founders had the option to include a statement that covers individual rights, as seen with previous State Constitutions. It is quite telling that they did not do so, for that is not what they wished the Second Amendment to cover. From an originalist perspective, it is crucial to refer to other sources during ratification period in order to grasp the general understanding of the Amendment of that time. The general understanding for the right to bear firearms went in one of two ways: individual use and or militia use. Madison and the other Founders settled on exclusive militia use.

Additionally, it seems as though the sources used by the Court were chosen in order to conform to their desired interpretation of the Amendment. One can easily back up one's chosen understanding of the Second Amendment by choosing sources that conform to one's pre-formed understanding. This kind of faulty interpretation is similar to choosing particular data to accommodate one's hypothesis in research that lead to false conclusions. While the Court could have referred to previous State Constitutions, which would have been the best fit since the United States Constitution was modeled on them, it chose not to. Instead, it found sources like St. Tucker, Rawle, and Story that matched their preferred understanding of the Second Amendment.

However, through this we are able to see the problems with originalist interpretation, as mentioned in the previous chapter. Scalia and Stevens clearly did not agree on which sources were reliable to turn to in order to discover the original meaning of the Second Amendment. Moreover, the variety of historical sources each presented almost always rebutted the other's understanding. Finally, with the wide selection of historical sources arguing for both sides, Scalia or Stevens are easily able to find sources that conform to their desired understanding.

I must also bring to light the compelling data and statistics Justice Breyer brought forth. He could have taken the point he wanted to convey much further, that the law was aimed at reducing gun-related crimes and deaths within the District, which was more than just a question of interpretation. Knowing that handguns were a safety issue within the District and knowing that the District's committee recognized that issue, Breyer could have alluded to the Preamble of the Constitution for more support. This would not have been the first time the Preamble was brought into court case. Whether accidental or purposeful, handguns were the result of many deaths within that urban environment. To allow such guns to be brought back into that region can potentially breach the promises ensured within the Preamble. The crimes and killings do in fact harm domestic tranquility within the District. What is more, a quarter of the victims of accidents were children under the age of fourteen (Breyer, 2008, p. 15), which in turn harms the blessings of liberty not only of the citizens of the District, but also their posterity. The question now stands if Justice Scalia would have been willing to consider this an issue worthy of constitutional debate.

Conclusion

The Second Amendment has been a quite controversial topic in recent years. Acting as a midway point between Federalist and Anti-Federalist demands for security during the ratification period, it has left Americans with uncertainties. Pondering questions like, "What does it really ensure?" "To what extent is it relevant in today's world?" and "Is it really infrangible?" creates many disagreements between the two sides. However, having no single general understanding of the Second Amendment creates more than just disputes; it creates problems in constitutional Court decisions. Luckily, constitutional interpretation exists to tackle these issues. Thanks to originalism and textualism—two very popular methods of interpretation for the Second Amendment, as seen in *District of Columbia v. Heller*—ambiguities within the Amendment are able to be addressed. On the other hand, both of these modes contain flaws of their own and usually provide differing outcomes. This again is highlighted in *Heller* between Scalia's court opinion and the dissenting opinion of Stevens. Therefore, I present the idea of invoking another method of interpretation: moral reasoning, using the Preamble as backing.

Moral reasoning, simply speaking, is an individual's ability to distinguish between right and wrong and to make decisions based on that. When it comes to interpreting the Second Amendment, those who interpret it must take into account what their desired understanding can entail. If the understanding were to entail harmful events, they must take into consideration what the Founding Fathers envisioned when drafting the Constitution. Conveniently, their aims and hopes are highlighted in the Preamble. Thus, if one's desired understanding of the Second Amendment wrongs the values promised in the Preamble, there is a significant Constitutional issue is at hand.

The District of Columbia's handgun ban was able to do just that. Considering the District is an urban area, legislators found quite shocking the amount of violence handguns brought. What is more, legislators recognized that, in order to diminish such violent acts, they had to place restrictions on handguns. By implementing strict regulations and requiring trigger locks on handguns kept at home, legislators only strove to decrease the amount of deaths, accidental or purposeful, caused by these guns. All in all, these regulations deemed "unconstitutional" aimed to bring about the general welfare, domestic tranquility, and secure the blessings of the posterity within the District.

While some may argue the District's handgun ban and other regulations undermined the Second Amendment, making it unconstitutional, the opposite is true. Even if the legislators did not

explicitly imply that their decisions conformed to the Preamble, their end goal remained to ensure the overall safety of the people. And, since their goal did accommodate the values of the Preamble, which lays out the moral framework for the Constitution, their bans were fully constitutional. Finally, Cicero's line, "Salus populi suprema lex esto [The safety of the people is the supreme law]" (Cicero, *De legibus* 3.3.8), serves as support for the claim that the Preamble's moral values, which the Amendments aim to ensure, trump any desired or original understanding.

Before I analyzed Scalia's decision, I had to answer a handful of questions. The first was why so many understandings of the Second Amendment exist. The fact is, it is worded rather broadly and its formatting does not match other Amendments. Consisting of two clauses, people tend to hold one clause as more meaningful than the other in order to conform to their desired stance on the Amendment. Withal, this eradicates a general understanding of a rather confusing and contentious Amendment. An issue like this leads me to my next question: Why has it not been amended or repealed? To this I was unable to uncover an explicit answer. Nonetheless, I believe it has something to do with the fact that it is part of the Bill of Rights and not just any other Amendment like the 18th, which was repealed. Yet a good portion of Americans seem either uninterested in keeping it or protest against having it, which leads to my last question: Why does the Second Amendment hold so much power? While this question was not necessarily answered, some replies to it were found through the "dead hand problem." All in all, we either accept those decisions made by the Founding Fathers or we do not. If not, and if there were intense demand to repeal the Second Amendment, it would have to be taken up through the process laid out in Article V of the Constitution.

District of Columbia v. Heller was a landmark case in the United States. Considering it was the first Supreme Court case to have dealt with the Second Amendment in sixty-nine years, it established some surprising conclusions which led to vigorous reactions. Some stood by Scalia's decision and others believed he made a grave misinterpretation which would affect future decisions regarding the Second Amendment. Through this thesis, I aimed to present my critical stance on Scalia's decision and show the flaw in his reasoning, in that it lacks moral reasoning. While Scalia concluded the Second Amendment to guarantee the individual use of firearms, he failed to recognize the problems that were associated with handguns within the District. The use of moral reasoning would have gone beyond searching for a general understanding of the Second Amendment and addressed the potential troubles that the Amendment could ensure.

The Preamble is more than just the United States Constitution's opening statement. It announces the Constitution's guiding principles and essential purposes. Moreover, the Founding Fathers believed it was crucial a part of the Constitution because it highlighted their intentions and aims in drafting it, i.e., the well-being of their descendants. Additionally, it has been a common point of reference in Constitutional law, whether as support or to find meaning for other, unclear parts of the Constitution. Despite its common usage, it did not make an appearance in *Heller*, though it absolutely could have. While Breyer hinted at the dangers handguns brought to the District, he did not allude to the Preamble whatsoever. Further, this was an aspect Scalia failed to acknowledge or take into consideration when making his decision. While it is too late for a change in the decision in *Heller*, the gravity of the Preamble in life-threatening situations may make an appearance in future cases.

Finally, we address the question of what would occur if Justice Scalia did take the Preamble into consideration when making his decision. If he were to hold his understanding of the Second Amendment higher than the safety of the District's people, he would be making a rather bold statement. That statement being: the rights highlighted in the Bill of Rights as well as the rest of the Amendment are superior to whatever the Preamble aims to ensure. Moreover, it would make the Preamble appear to be just empty words which serve no purpose for the rest of the Constitution.

If, on the other hand, Scalia did deem safety as a higher priority, then change would have to follow. While his understanding of the Amendment could remain the same, his decision on the District's handgun ban would have to conclude that it was constitutional, no matter how it may infringe upon Second Amendment rights. If handguns really do bring serious issues to the District, then the main concern is ensuring the safety of the people, as may be established by bans.

Resumé

Cieľom tejto práce je poskytnúť kritiku rozhodnutia sudcu Scalia v prípade *Dištrikt Kolumbia v. Heller*. Na lepšie porozumenie samotného druhého dodatku ústavy Spojených štátov však treba najskôr urobiť výskum týkajúci sa pozadia ústavy Spojených štátov.

Prvá kapitola najskôr predstaví preambulu ako dôležitú časť ústavy Spojených štátov. Potom pokračuje v stručnom zhrnutí toho, ako USA fungovali pred a počas tvorenia ústavy. Ďalej je položená otázka, prečo nebol dodatok ústavy doplnený alebo zrušený. Odpoveď na túto otázku možno dostať preskúmaním dôležitosti Listiny práv, ako aj skorších ústavných diskusií. Nakoniec uvediem dôležitú poznámku týkajúcu sa zvláštnej štruktúry druhého dodatku danej ústavy.

Druhá kapitola predstavuje prax ústavného výkladu. Aj keď existuje veľa spôsobov interpretácie, podrobne sú vysvetlené iba dva, textualizmus a originalizmus. Dôvodom je, že tieto dva prístupy sa javia ako jediné spôsoby praktického výkladu druhého pozmeňujúceho a doplňujúceho dodatku. Keďže sa zdá, že tieto prístupy sa od seba veľmi neodlišujú, uvedené sú príklady každého prístupu. Nakoniec na pochopenie ako a prečo má druhý dodatok ústavy toľko uplatnení, vysvetlíme problém mŕtvej ruky.

Tretia kapitola podrobne skúma prípad *Dištrikt Kolumbia v. Heller* a uvádza zhrnutia stanovísk Dvora audítorov a dvoch nesúhlasných stanovísk. Zatiaľ čo väčšina, piati proti štyrom, rozhodla, že druhý pozmeňujúci a doplňujúci dodatok v skutočnosti zaručuje, že jednotlivec je oprávnený nosiť zbrane na individuálne účely, nedospelo sa ku konsenzu o prevládajúcom porozumení. Aj keď sudca Scalia a sudca Stevens - ktorý predstavuje jeden z nesúhlasných názorov - použili na stanovenie významu druhého pozmeňujúceho a doplňujúceho dodatku textalizmus aj originalizmus, ich výsledky sa veľmi líšili.

Rozdielne chápanie druhého dodatku medzi týmito dvoma sudcami vedie k dvom záverom. Po prvé, druhý pozmeňujúci a doplňujúci dodatok je formulovaný všeobecne. A čo je viac textualizmus a originalizmus ako spôsoby interpretácie majú veľa vlastných nedostatkov. Preto je možnosť dosiahnuť dopredu požadované pochopenie druhého dodatku ústavy pomerne jednoduchá.

Po druhé, tieto dva spôsoby interpretácie nie sú dostatočné. Je potrebné vziať do úvahy iný spôsob. Táto práca presadzuje morálne uvažovanie ako iný, nový spôsob ústavnej interpretácie pre druhý

dodatok ústavy. Ďalej, na lepšiu podporu morálneho odôvodnenia treba objasniť význam preambuly a hodnoty, ktoré zabezpečuje.

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