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Second Amendment - Bearing Arms

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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.

2nd Amendment Annotations

Prior to the Supreme Court's 2008 decision in *District of Columbia v. Heller*,¹ the courts had yet to definitively state what right the Second Amendment protected. The opposing theories, perhaps oversimplified, were (1) an "individual rights" approach, whereby the Amendment protected individuals' rights to firearm ownership, possession, and transportation; and (2) a "states' rights" approach, under which the Amendment only protected the right to keep and bear arms in connection with organized state militia units.² Moreover, it was generally believed that the Amendment was only a bar to federal action, not to state or municipal restraints.³

However, the Supreme Court has now definitively held that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use that weapon for traditionally lawful purposes, such as self-defense within the home. Moreover, this right applies not just to the federal government, but to states and municipalities as well.

In *Heller*, the Court held that (1) the District of Columbia's total ban on handgun possession in the home amounted to a prohibition on an entire class of "arms" that Americans overwhelmingly chose for the lawful purpose of self-defense, and thus violated the Second Amendment; and (2) the District's requirement that any lawful firearm in the home be disassembled or bound by a trigger lock also violated the Second Amendment, because the law made it impossible for citizens to use arms for the core lawful purpose of self-defense.

The Court reasoned that the Amendment's prefatory clause, i.e., "[a] well regulated

Militia, being necessary to the security of a free State," announced the Amendment's purpose, but did not limit or expand the scope of the operative clause, i.e., "the

right of the people to keep and bear Arms, shall not be infringed." Moreover, the prefatory clause's history comported with the Court's interpretation, because the prefatory clause stemmed from the Anti-Federalists' concern that the federal government would disarm the people in order to disable the citizens' militia, enabling a politicized standing army or a select militia to rule.

Further, the Court distinguished *United States v. Miller*,⁴ in which the Court upheld a statute requiring registration under the National Firearms Act of sawed-off shotguns, on the ground that Miller limited the type of weapon to which the Second Amendment right applied to those in common use for lawful purposes.

In *McDonald v. Chicago*,⁵ the Court struck down laws enacted by Chicago and the village of Oak Park effectively banning handgun possession by almost all private citizens, holding that the [Fourteenth Amendment](#) incorporated the Second Amendment right, recognized in *Heller*, to keep and bear arms for the purpose of self-defense.

The Court reasoned that this right is fundamental to the nation's scheme of ordered liberty, given that self-defense was a basic right recognized by many legal systems from ancient times to the present, and *Heller* held that individual self-defense was "the central component" of the Second Amendment right. Moreover, a survey of the contemporaneous history also demonstrated clearly that the Fourteenth Amendment's Framers and ratifiers counted the right to keep and bear arms among those fundamental rights necessary to the Nation's system of ordered liberty.

Footnotes

[554 U.S. ____](#) (2008).

A sampling of the diverse literature in which the same historical, linguistic, and case law background is the basis for strikingly different conclusions includes: Staff of Subcomm. on the Constitution, Senate Comm. on the Judiciary, 97th Congress, 2d Sess., *The Right to Keep and Bear Arms* (Comm. Print 1982); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment* (1984); *Gun Control and the Constitution: Sources and Explorations on the Second Amendment* (Robert J. Cottrol, ed. 1993); Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984); Symposium, *Gun Control*, 49 *Law & Contemp. Probs.* 1 (1986); Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637 (1989).

See *Presser v. Illinois*, [116 U.S. 252, 265](#) (1886); see also *Miller v. Texas*, [153 U.S. 535](#) (1894); *Robertson v. Baldwin*, [165 U.S. 275, 281-282](#) (1897).

[307 U.S. 174](#) (1939).

No. [08-1521](#) (June 28, 2010).

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