

## THE SECOND AMENDMENT

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The Second Amendment of the United States Constitution 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.” Such language has created considerable debate regarding the Amendment’s intended scope. On the one hand, some believe that the Amendment’s phrase “the right of the people to keep and bear Arms” creates an individual constitutional right for citizens of the United States. Under this “individual right theory,” the United States Constitution restricts legislative bodies from prohibiting firearm possession, or at the very least, the Amendment renders prohibitory and restrictive regulation presumptively unconstitutional. On the other hand, some scholars point to the prefatory language “a well regulated Militia” to argue that the Framers intended only to restrict Congress from legislating away a state's right to self-defense. Scholars have come to call this theory “the collective rights theory.” A collective rights theory of the Second Amendment asserts that citizens do not have an individual right to possess guns and that local, state, and federal legislative bodies therefore possess the authority to regulate firearms without implicating a constitutional right.

Modern debates about the Second Amendment have focused on whether it protects a private right of individuals to keep and bear arms, or a right that can be exercised only through militia organizations like the National Guard. This question, however, was not even raised until long after the Bill of Rights was adopted.

Many in the Founding generation believed that governments are prone to use soldiers to oppress the people. English history suggested that this risk could be controlled by permitting the government to raise armies (consisting of full-time paid troops) only when needed to fight foreign adversaries. For other purposes, such as responding to sudden invasions or other emergencies, the government could rely on a militia that consisted of ordinary civilians who supplied their own weapons and received some part-time, unpaid military training.

The onset of war does not always allow time to raise and train an army, and the Revolutionary War showed that militia forces could not be relied on for national defense. The Constitutional Convention therefore decided that the federal government should have almost unfettered authority to establish peacetime standing armies and to regulate the militia.

This massive shift of power from the states to the federal government generated one of the chief objections to the proposed Constitution. Anti-Federalists argued that the proposed Constitution would take from the states their principal means of defense against federal usurpation. The Federalists responded that fears of federal oppression were overblown, in part because the American people were armed and would be almost impossible to subdue through military force.

Implicit in the debate between Federalists and Anti-Federalists were two shared assumptions. First, that the proposed new Constitution gave the federal government almost total legal authority over the army and militia. Second, that the federal government should not have any authority at all to disarm the citizenry. They disagreed only about whether an armed populace could adequately deter federal oppression.

The Second Amendment conceded nothing to the Anti-Federalists' desire to sharply curtail the military power of the federal government, which would have required substantial changes in the original Constitution. Yet the Amendment was easily accepted because of widespread agreement that the federal government should not have the power to infringe the right of the people to keep and bear arms, any more than it should have the power to abridge the freedom of speech or prohibit the free exercise of religion.

Much has changed since 1791. The traditional militia fell into desuetude, and state-based militia organizations were eventually incorporated into the federal military structure. The nation's military establishment has become enormously more powerful than eighteenth century armies. We still hear political rhetoric about federal tyranny, but most Americans do not fear the nation's armed forces and virtually no one thinks that an armed populace could defeat those forces in battle. Furthermore, eighteenth century civilians routinely kept at home the very same weapons they would need if called to serve in the militia, while modern soldiers are equipped with weapons that differ significantly from those generally thought appropriate for civilian uses. Civilians no longer expect to use their household weapons for militia duty, although they still keep and bear arms to defend against common criminals (as well as for hunting and other forms of recreation).

The law has also changed. While states in the Founding era regulated guns — blacks were often prohibited from possessing firearms and militia weapons were frequently registered on government rolls — gun laws today are more extensive and controversial. Another important legal development was the adoption of the Fourteenth Amendment. The Second Amendment originally applied only to the federal government, leaving the states to regulate weapons as they saw fit. Although there is substantial evidence that the Privileges or Immunities Clause of the Fourteenth Amendment was meant to protect the right of individuals to keep and bear arms from infringement by the states, the Supreme Court rejected this interpretation in *United States v. Cruikshank* (1876).

Until recently, the judiciary treated the Second Amendment almost as a dead letter. In 1939, in *United States v. Miller*, 307 U.S. 174, the Court adopted a collective rights approach, determining that Congress could regulate a sawed-off shotgun that had moved in interstate commerce under the National Firearms Act of 1934 because the evidence did not suggest that the shotgun "has some reasonable relationship to the preservation or efficiency of a well regulated militia . . . ." The Court then explained that the Framers included the Second Amendment to ensure the effectiveness of the military.

This precedent stood for nearly 70 years when in 2008 the U.S. Supreme Court revisited the issue in the case of *District of Columbia v. Heller* (07-290). The plaintiff in *Heller* challenged the constitutionality of the Washington D.C. handgun ban, a statute that had stood for 32 years. Many considered the statute the most stringent in the nation. In a 5-4 decision, the Court, meticulously detailing the history and tradition of the Second Amendment at the time of the Constitutional Convention, proclaimed that the Second Amendment established an individual right for U.S. citizens to possess firearms and struck down the D.C. handgun ban as violative of that right. The majority carved out *Miller* as an exception to the general rule that Americans may possess firearms, claiming that law-abiding citizens cannot use sawed-off shotguns for any law-abiding purpose. Similarly, the Court in its dicta found regulations of similar weaponry that cannot be used for law-abiding purposes as laws that would not implicate the Second Amendment. Further, the Court suggested that the United States Constitution would not disallow regulations prohibiting criminals and the mentally ill from firearm possession.

The dissenters in *Heller* disagreed. They concluded that the Second Amendment protects a nominally individual right, though one that protects only “the right of the people of each of the several States to maintain a well-regulated militia.” They also argued that even if the Second Amendment did protect an individual right to have arms for self-defense, it should be interpreted to allow the government to ban handguns in high-crime urban areas.

The Supreme Court’s ruling in *Heller* revitalized the Second Amendment. The Court continued to strengthen the Second Amendment through the 2010 decision in *McDonald v. City of Chicago* (08-1521). The plaintiff in *McDonald* challenged the constitutionality of the Chicago handgun ban, which prohibited handgun possession by almost all private citizens. In a 5-4 decision, the Court, citing the intentions of the framers and ratifiers of the Fourteenth Amendment, held that the Second Amendment applies to the states through the incorporation doctrine. Four Justices relied on judicial precedents under the Fourteenth Amendment’s Due Process Clause. Justice Thomas rejected those precedents in favor of reliance on the Privileges or Immunities Clause, but all five members of the majority concluded that the Fourteenth Amendment protects against state infringement of the same individual right that is protected from federal infringement by the Second Amendment.

Several questions, however, remain unanswered, such as whether regulations less stringent than the D.C. statute implicate the Second Amendment, whether lower courts will apply their dicta regarding permissible restrictions, and what level of scrutiny the courts should apply when analyzing a statute that infringes on the Second Amendment. As a general note, when analyzing statutes and ordinances, courts use three levels of scrutiny, depending on the issue at hand:

1. strict scrutiny
2. intermediate scrutiny
3. rational basis

Recent lower-court case law since *Heller* suggests that courts are willing to uphold:

- regulations which ban weapons on government property. *US v Dorosan*, 350 Fed. Appx. 874 (5th Cir. 2009) (upholding defendant’s conviction for bringing a handgun onto post office property);

- regulations which ban the illegal possession of a handgun as a juvenile, convicted felon. *US v Rene*, 583 F.3d 8 (1st Cir. 2009) (holding that the Juvenile Delinquency Act ban of juvenile possession of handguns did not violate the Second Amendment);
- regulations which require a permit to carry concealed weapon. *Kachalsky v County of Westchester*, 701 F.3d 81 (2nd Cir. 2012) (holding that a New York law preventing individuals from obtaining a license to possess a concealed firearm in public for general purposes unless the individual showed proper cause did not violate the Second Amendment.)

More recently, the Supreme Court reinforced its *Heller* ruling in its *Caetano v. Massachusetts* (2016) decision. The Court found that the lower "Massachusetts Supreme Judicial Court was wrong in the three reasons it offered for why the state could ban personal possession or use of a "stun gun" without violating the Second Amendment." The Supreme Court, however, remanded the case without further instructions, so this per curiam ruling did not do much to further clarify the Supreme Court's stance on the Second Amendment.