

Issue: Guns

Guns: The Legal Landscape

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.

After more than 200 years of relative inattention by the Supreme Court as to the meaning of the above-quoted text of the Second Amendment to the U.S. Constitution, the breadth of an individual right to bear arms has become the source of frequent and heated litigation in the last 15 years. A conservative majority on the Supreme Court decided in 2008 in *District of Columbia v. Heller*,¹ that the District of Columbia law banning handguns violated an individual right to bear arms created by the Second Amendment. The fleshing out of the extent of that right in the context of increasing mass shootings and gun violence in the country has courts struggling to resolve strongly-held competing interests.

A Little History

Like most of the laws in this country, the right addressed in the Second Amendment has its origin in English common law, in particular the English Bill of Rights of 1689. The tumultuous history of 17th century England, including the English Civil Wars (1642-51) and the Glorious Revolution (1688-89), makes it difficult to interpret some of the terms used in the common law and reflected in the Second Amendment. Did “Militia” refer to local organized fighters able to resist the Crown or to local organized fighters organized by the Crown to protect itself? That period in English history involved struggles between the Crown and Parliament and between Catholics and Protestants, with each party needing a Militia to defend itself.^{2,3}

To add to the confusion, the grammar and punctuation of the Second Amendment leave much to be desired. The first and third commas should be deleted, and some versions of the amendment do delete them. The “prefatory” clause before the middle comma, suggesting that the right relates to a collective effort, does not easily link to the “operative” clause following the middle comma, which appears to refer to an individual right of the people. The Supreme Court finally addressed this issue in 1939 in *United States v. Miller*, and determined that the amendment referred to a collective right rather than an individual right. That was the state of jurisprudence on the Second Amendment until *Heller* in 2008.⁴

Heller and McDonald

In 2008 the Supreme Court addressed in the *Heller* case the constitutionality of a District of Columbia law that provided for a nearly complete ban on individuals owning or carrying a handgun. In an opinion by Justice Scalia that exhaustively tracked through the history and varying interpretations of the Second Amendment, a 5-4 majority of the Court distinguished *Miller* and other prior precedents, struck down the D.C. handgun ban, and held that the Second Amendment protects an individual right to possess a firearm for use in traditionally lawful purposes. No militia involvement was necessary. Scalia noted that the right was not unlimited but subject to longstanding reasonable and customary restrictions.⁵

The ruling in *Heller* limited only congressional action under the Second Amendment since the District of Columbia is a federally-governed municipality. In *McDonald v. Chicago* the Supreme Court held in 2010 that the individual right to keep and bear arms under the Second Amendment also applied to the 50 states under the Fourteenth Amendment to the U.S. Constitution. In another 5-4 decision, Justice Alito said that the rights protected by the Second Amendment are fundamental to liberty and deeply rooted in history and tradition and should be applied to the states through the Fourteenth Amendment.⁶ Thus, in two rulings two years apart the Supreme Court provided for an individual right to bear arms that cannot be infringed by the U.S. Congress or by any state.

***Bruen* and the Search for Limitations**

Following the *Heller* and *McDonald* cases, the principal question facing the lower federal courts was the proper scrutiny to be applied to a gun regulation challenged as unconstitutional under the Second Amendment. In the last 12 years, federal district and appellate courts have found a variety of regulations involving government buildings, juvenile delinquents, concealed carry of weapons and other gun regulations to be enforceable under *Heller*.⁷

In a 2022 case entitled *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court in a 6-3 decision struck down as unconstitutional a New York State Law dating back to 1905 requiring a license for parties to carry a handgun outside of home and providing that the licensing authorities may deny such a license unless the party shows proper cause. The opinion by Justice Thomas explicitly rejected analyses by lower courts involving public interests and public safety and asserted that the only proper basis to uphold a gun regulation was whether the regulation is consistent with America's historical tradition of firearm regulation.⁸ Apparently, a 115 year tradition of gun licensing in New York did not meet that standard.

Under *Bruen* the federal district and appellate courts are left to ponder whether a modern regulation (or even one that has been on the books for 50 or 100 years) has an appropriate antecedent in the 18th or 19th century rather than whether a particular limitation on gun ownership or use addresses a serious problem in an appropriate manner. Notably, the 5th Circuit Court of Appeals in New Orleans has struck down a longstanding federal law prohibiting a person subject to a domestic violence restraining order from possessing a gun because it could find no antecedent from early American history.⁹ The Supreme Court has accepted that case for review in its next term.

Again, voters interested in eventually diluting the extreme right-wing bias of the judiciary and seeing sensible gun regulations enacted have only one choice: elect Democrats.

¹ <https://tile.loc.gov/storage-services/service/ll/usrep/usrep554/usrep554570/usrep554570.pdf>

² https://en.wikipedia.org/wiki/Second_Amendment_to_the_United_States_Constitution

³ <https://www.britannica.com/topic/Second-Amendment>

⁴ https://www.law.cornell.edu/wex/second_amendment

⁵ <https://www.law.cornell.edu/supct/html/07-290.ZS.html>

⁶ <https://www.oyez.org/cases/2009/08-1521>

⁷ https://www.law.cornell.edu/wex/second_amendment

⁸ <https://www.law.cornell.edu/supremecourt/text/20-843>

⁹ <https://www.pbs.org/newshour/nation/supreme-court-ruling-creates-turmoil-over-gun-laws-in-lower-courts>