

**SECOND AMENDMENT
RIGHT TO BEAR ARMS**

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SECOND AMENDMENT—RIGHT TO BEAR ARMS

Amdt2.1 Overview of Second Amendment, Right to Bear Arms

For much of its early history, the Second Amendment went largely unscrutinized by the Supreme Court. The few nineteenth century cases implicating the Second Amendment established for a time that the Amendment was a bar to federal, but not state, government action,¹ and the Court’s only significant Second Amendment decision in the twentieth century seemed to suggest that the right protected under the Amendment was tied only to state militia use of certain types of firearms.² In this relative vacuum, the lower federal courts and legal scholars disputed the meaning of the Second Amendment and how it applied, if at all, to an expanding universe of federal, state, and local laws governing the private possession and sale of firearms.³

By the beginning of the twenty-first century, many of the U.S. Courts of Appeals that considered the matter concluded that the Second Amendment protected a collective right tied to militia or military use of firearms,⁴ while some courts and commentators maintained that the Amendment enshrined an individual right to possess firearms outside the context of militia or military activity.⁵ In the 2008 case *District of Columbia v. Heller*,⁶ the Supreme Court held, after a lengthy historical analysis, that the Second Amendment protects an individual right to possess firearms for historically lawful purposes, including self-defense in the home.⁷ The *Heller* majority also provided some guidance on the scope of the right, explaining that it “is not unlimited” and that “nothing in [the] opinion should be taken to cast doubt” on “longstanding prohibitions” like “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,” among other “presumptively lawful” regulations.⁸

Two years after *Heller*, the Court revisited the question of whether the Second Amendment applies to the states, concluding in *McDonald v. City of Chicago*⁹ that the right to keep and bear arms is a “fundamental” right that is incorporated through the Fourteenth Amendment against the states.¹⁰ In a subsequent decision in *Caetano v. Massachusetts*,¹¹ the Court issued a brief, per curiam opinion vacating a Massachusetts Supreme Court decision that had upheld

¹ *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894). The Fourteenth Amendment, through which the Second Amendment was later held to be applicable to the states, was ratified following the Civil War, in 1868. See *infra* Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens.

² *United States v. Miller*, 307 U.S. 174, 178 (1939) (explaining that the Second Amendment was enacted “[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces” and “must be interpreted and applied with that end in view”).

³ See, e.g., Richard A. Allen, *What Arms? A Textualist View of the Second Amendment*, 18 GEO. MASON U. C.R. L.J. 191, 191–93 (2008) (explaining the views taken by courts and scholars following *Miller*); Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & LIBERTY 48, 49 & n.4 (2008) (collecting cases on both sides of the debate).

⁴ E.g., *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988) (stating that cases after *Cruikshank* had “analyzed the second amendment purely in terms of protecting state militias, rather than individual rights,” and the defendant had “made no arguments that the [challenged statute] would impair any state militia”); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (“[T]he Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia.”); *United States v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000) (recognizing that as of the date of decision, the lower federal courts had uniformly held that the Second Amendment protects a collective, rather than an individual, right).

⁵ See, e.g., *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

⁶ 554 U.S. 570 (2008).

⁷ *Id.* at 595.

⁸ *Id.* at 626–27 & n.26.

⁹ 561 U.S. 742 (2010).

¹⁰ *Id.* at 778, 791 (plurality op.); *id.* at 806 (Thomas, J., concurring in part and concurring in judgment).

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Amdt2.1

Overview of Second Amendment, Right to Bear Arms

a law prohibiting the possession of stun guns. The Court in *Caetano* reiterated that the Second Amendment applies to the states and extends to “bearable arms” that “were not in existence at the time of the founding.”¹²

In the 2022 case *New York State Rifle & Pistol Association v. Bruen*,¹³ the Court considered the constitutionality under the Second Amendment of a portion of New York’s firearms licensing scheme that restricts the carrying of certain licensed firearms outside the home. In a 6-3 decision, the Court struck down New York’s requirement that an applicant for an unrestricted license to carry a handgun outside the home for self-defense must establish “proper cause,” ruling that the requirement is at odds with the Second Amendment.¹⁴ In doing so, the Court recognized that the Second Amendment protects a right that extends beyond the home¹⁵ and also clarified that the proper test for evaluating Second Amendment challenges to firearms laws is an approach rooted in text and the “historical tradition” of firearms regulation, rejecting a “two-step” methodology employed by many of the lower courts.¹⁶

Amdt2.2 Historical Background on Second Amendment

Second Amendment:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Historical surveys of the Second Amendment often trace its roots, at least in part, through the English Bill of Rights of 1689,¹ which declared that “subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law.”² That provision grew out of friction over the English Crown’s efforts to use loyal militias to control and disarm dissidents and enhance the Crown’s standing army, among other things, prior to the Glorious Revolution that supplanted King James II in favor of William and Mary.³

The early American experience with militias and military authority would inform what would become the Second Amendment as well. In Founding-era America, citizen militias drawn from the local community existed to provide for the common defense, and standing armies of professional soldiers were viewed by some with suspicion.⁴ The Declaration of Independence listed as grievances against King George III that he had “affected to render the Military independent of and superior to the Civil power” and had “kept among us, in times of peace, Standing Armies without the Consent of our legislatures.”⁵ Following the Revolutionary War, several states codified constitutional arms-bearing rights in contexts that echoed these concerns—for instance, Article XIII of the Pennsylvania Declaration of Rights of 1776 read:

¹¹ 577 U.S. 411 (2016).

¹² *Id.* at 412.

¹³ No. 20-843 (U.S. June 23, 2022).

¹⁴ *Id.* at 62–63.

¹⁵ *Id.* at 23–24.

¹⁶ *Id.* at 8–15.

¹ See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (1829) (“In England, a country which boasts so much of its freedom, the right was secured to protestant subjects only, on the revolution of 1688; and it is cautiously described to be that of bearing arms for their defence, ‘suitable to their conditions, and as allowed by law.’”).

² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1891 (1833).

³ JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 115–16 (1994).

⁴ See THE FEDERALIST No. 29 (Alexander Hamilton) (referencing proposition that “standing armies are dangerous to liberty” and militias are “the most natural defense of a free country”).

⁵ THE DECLARATION OF INDEPENDENCE paras. 13–14 (U.S. 1776).

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Amdt2.2
Historical Background on Second Amendment

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.⁶

Similarly, as another example, Massachusetts’s Declaration of Rights from 1780 provided:

The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.⁷

Mistrust of standing armies, like the one employed by the English Crown to control the colonies, and anti-Federalist concerns with centralized military power colored the debate surrounding ratification of the federal Constitution and the need for a Bill of Rights.⁸ Provisions in the Constitution gave Congress power to establish and fund an Army,⁹ as well as authority to organize, arm, discipline, and call forth the militia in certain circumstances (while reserving to the states authority over appointment of militia officers and training).¹⁰ The motivation for these provisions appears to have been “recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.”¹¹ However, despite structural limitations such as a two-year limit on Army appropriations and certain militia reservations to the states, fears remained during the ratification debates that these provisions of the Constitution gave too much power to the federal government and were dangerous to liberty.¹²

In the *Federalist*, James Madison argued that “the State governments, with the people on their side,” would be more than adequate to counterbalance a federally controlled “regular army,” even one “fully equal to the resources of the country.”¹³ In Madison’s view, “the advantage of being armed,” together with “the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.”¹⁴ Nevertheless, several states considered or proposed to the First Congress constitutional amendments that would explicitly protect arms-bearing rights, in various formulations.¹⁵

⁶ PA. DECLARATION OF RIGHTS § XIII (1776), in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3083 (Francis N. Thorpe ed., 1909).

⁷ MA. DECLARATION OF RIGHTS § XVII (1780), in 3 *id.* at 1892.

⁸ See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 401 (Jonathan Elliot ed., 1836) (statement of Gov. Edmund Randolph) (“With respect to a standing army, I believe there was not a member in the federal Convention, who did not feel indignation at such an institution.”).

⁹ U.S. CONST. art. II, § 8, cl. 12.

¹⁰ *Id.* art. II, § 8, cl. 15–16.

¹¹ *Perpich v. Dep’t of Def.*, 496 U.S. 334, 340 (1990).

¹² See Steven J. Heyman, *Natural Rights and the Second Amendment*, in THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS 200–01 (Carl T. Bogus ed., 2000) (collecting anti-federalist objections regarding power over militia and “to raise a standing army that could be used to destroy public liberty and erect a military despotism”).

¹³ THE FEDERALIST No. 46 (James Madison).

¹⁴ *Id.*

¹⁵ E.g., AMENDMENTS PROPOSED BY THE VIRGINIA CONVENTION JUNE 27, 1788, in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 19 (Helen E. Veit et al. eds., 1991) (proposing among other things, “[t]hat the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people

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Historical Background on Second Amendment

Tasked with “digesting the many proposals for amendments made by the various state ratification conventions and stewarding them through the First Federal Congress,”¹⁶ James Madison produced an initial draft of the Second Amendment 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.¹⁷

The committee of the House of Representatives that considered Madison’s formulation altered the order of the clauses such that the militia clause now came first, with a new specification of the militia as “composed of the body of the people,” and made several other wording and punctuation changes.¹⁸

Debate in the House largely centered on the proposed Amendment’s religious-objector clause, with Elbridge Gerry, for instance, arguing that the clause would give “the people in power” the ability to “declare who are those religiously scrupulous, and prevent them from bearing arms.”¹⁹ Gerry proposed that the provision “be confined to persons belonging to a religious sect scrupulous of bearing arms,” but his proposed addition was not accepted.²⁰ Other proposals not accepted included striking out the entire clause, making it subject to “paying an equivalent,” which Roger Sherman found problematic given religious objectors would be “equally scrupulous of getting substitutes or paying an equivalent,”²¹ and adding after “a well regulated militia” the phrase “trained to arms,” which Elbridge Gerry believed would make clear that it was “the duty of the Government” to provide the referenced security of a free State.²²

As resolved by the House of Representatives on August 24, 1789, the version of the Second Amendment sent to the Senate remained similar to the version initially drafted by James Madison, with one of the largest changes being the re-ordering of the first two clauses.²³ The provision at that time read:

A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.²⁴

trained to arms is the proper, natural and safe defence of a free State[,]” and “[t]hat any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead”); AMENDMENTS PROPOSED BY THE NEW YORK CONVENTION JULY 26, 1788, *in id.* at 22 (proposing similar language but omitting religious-objector provision); AMENDMENTS PROPOSED BY THE NEW HAMPSHIRE CONVENTION JUNE 21, 1788, *in id.* at 17 (proposing that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion”).

¹⁶ SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 59 (2006).

¹⁷ 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

¹⁸ THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 264 (Neil H. Cogan ed., 2015) (House Committee of Eleven Report, July 28, 1789) [hereinafter, COMPLETE BILL OF RIGHTS].

¹⁹ 1 ANNALS OF CONG. 778 (1789) (Joseph Gales ed., 1834).

²⁰ *Id.* at 779.

²¹ *Id.*

²² *Id.* at 780.

²³ COMPLETE BILL OF RIGHTS, *supra* note 18, at 267 (House Resolution, August 24, 1789).

²⁴ COMPLETE BILL OF RIGHTS, *supra* note 18, at 267 (House Resolution, August 24, 1789).

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The Amendment would take what would become its final form in the Senate, where the religious-objector clause was finally removed and several other phrases were modified.²⁵ For instance, the phrase referencing the militia as “composed of the body of the People” was struck, and the descriptor of the militia as “the best security of a free State” was modified to “necessary to the security of a free State.”²⁶ Several other changes were proposed and rejected, including adding limitations on a standing army “in time of peace” and adding next to the words “bear arms” the phrase “for the common defence.”²⁷ The final language of the Second Amendment was agreed to and transmitted to the states in late September of 1789.²⁸

Amdt2.3 Early Second Amendment Jurisprudence

Second Amendment:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

For most of its history, the Second Amendment was not substantively addressed by the Supreme Court. Few nineteenth and early twentieth century cases implicated the Second Amendment directly, and thus the small number of references in early cases were glancing and largely unilluminating as to the nature and scope of the right protected by the Amendment.

In the 1820 case *Houston v. Moore*,¹ the Court addressed the constitutionality of a state statute providing for state court-martial punishment of militia members called into the service of the United States who refused deployment.² The case turned not on the Second Amendment but rather on the nature of federal and state authority over the militia, with the Court concluding that the state retained concurrent jurisdiction, at least where not withdrawn by Congress, to punish militia members in such circumstances.³ In a dissenting opinion, Justice Joseph Story agreed that “a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress.” Justice Story explained that “[the Second Amendment] may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested.”⁴ Although Justice Story did not provide further elaboration of how the Second Amendment might “confirm[] and illustrate[]” the proposition that a state retains concurrent, subordinate authority over the militia, it seems he may have been suggesting that the Amendment’s reference to the importance of a “well regulated militia” supported such authority.

Another passing reference to the Second Amendment in a pre-Civil War case came in the infamous and now-superseded *Dred Scott v. Sandford*⁵ decision. In holding that Black Americans were not citizens of the United States, the majority opinion in *Dred Scott* listed among the implications of an alternative conclusion that citizenship “would give them the full

²⁵ Any Senate debate of what would become the Second Amendment does not survive in recorded form. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 36 (1986) (“The documentary record of debates on the Bill of Rights consists . . . of deliberations in the House of Representatives.”).

²⁶ COMPLETE BILL OF RIGHTS, *supra* note 18, at 270.

²⁷ COMPLETE BILL OF RIGHTS, *supra* note 18, at 268–69.

²⁸ COMPLETE BILL OF RIGHTS, *supra* note 18, at 274.

¹ 18 U.S. 1 (1820).

² *Id.* at 12.

³ *Id.* at 14.

⁴ *Id.* at 21 (Story, J., dissenting).

⁵ 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

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liberty of speech in public and in private . . . ; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”⁶

Following the Civil War, the Court issued several opinions that more squarely implicated the Second Amendment and established for a time that the Amendment was a bar only to federal government action.⁷ In *United States v. Cruikshank*,⁸ the Court vacated the convictions of a group of men under a federal statute proscribing conspiracies to deprive citizens of rights “granted or secured . . . by the constitution or laws of the United States,” among other things.⁹ The indictment averred, in relevant part, that the defendants intended to prevent two Black men from exercising their right “of bearing arms for a lawful purpose.”¹⁰ The Court rejected the proposition that this could be a valid basis for a violation of the statute, as “[t]his is not a right granted by the Constitution.”¹¹ Rather, according to the Court, the Second Amendment “means no more than that it shall not be infringed by Congress,” i.e., it “has no other effect than to restrict the powers of the national government,” and thus the actions of private “fellow-citizens” could not deprive the victims of a right covered by the Second Amendment.¹² In the 1886 case *Presser v. Illinois*,¹³ the Supreme Court addressed a Second Amendment challenge to Illinois laws prohibiting “bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.”¹⁴ The Court held that these provisions did not infringe the right of the people to keep and bear arms, as the Second Amendment “is a limitation only upon the power of congress and the national government, and not upon that of the state.”¹⁵

Given scant guidance from the Supreme Court, there was no definitive resolution in the twentieth century of what the right protected by the Second Amendment encompasses, and what role, if any, the textual reference to a “well regulated Militia” plays in addressing that question. The Second Amendment is divided into a first clause (“A well regulated Militia, being necessary to the security of a free State”) and a second clause (“the right of the people to keep and bear Arms shall not be infringed”). Courts, commentators, and Congress debated, over the course of decades, the meaning of, and relationship between, these two clauses, primarily with respect to whether (1) in light of the first clause, the Amendment protects a collective right tied

⁶ *Id.* at 417; *see also id.* at 450 (stating, in reference to the applicability of the Bill of Rights to the territories, that Congress could not “deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.”). In a later case, the Court in dicta suggested that “the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons.” *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897). As described *infra*, the Court has since squarely addressed a Second Amendment challenge to state laws restricting public carry, in *New York State Rifle & Pistol Association v. Bruen*, No. 20-843 (U.S. June 23, 2022).

⁷ This view of the Second Amendment has been invalidated by subsequent Supreme Court precedent. *See* Amdt2.5 Post-Heller Issues and Application of Second Amendment to States; *see also* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

⁸ 92 U.S. 542 (1875).

⁹ *Id.* at 548.

¹⁰ *Id.* at 553.

¹¹ *Id.*

¹² *Id.*

¹³ 116 U.S. 252 (1886).

¹⁴ *Id.* at 264–65.

¹⁵ *Id.* at 265; *see also* *Miller v. Texas*, 153 U.S. 535, 538 (1894) (stating that it was “well settled” that the Second Amendment “operate[s] only upon the federal power, and [has] no reference whatever to proceedings in state courts”).

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Amdt2.3
Early Second Amendment Jurisprudence

to maintaining formal, organized militia units; or (2) in light of the second clause, the Amendment protects an individual right to possess a firearm unconnected with service in a militia.¹⁶

The Supreme Court's most thorough consideration of the Second Amendment in the twentieth century came in *United States v. Miller*,¹⁷ a 1939 decision that seemed to tie the Second Amendment right "to keep and bear arms" to militia use. *Miller* involved a federal statute, the National Firearms Act, which required registration of short-barreled shotguns, among other things.¹⁸ After reciting the original provisions of the Constitution dealing with the militia, the *Miller* Court observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view."¹⁹ The significance of the militia, the Court continued, was that it was composed of "civilians primarily, soldiers on occasion."²⁰ It was upon this force that the states could rely for defense and securing of the laws, on a force that "comprised all males physically capable of acting in concert for the common defense," who, "when called for service . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."²¹

The *Miller* Court accordingly rejected the proposition that the federal restriction on short-barreled shotguns violated the Second Amendment, holding that absent evidence "tending to show that possession or use of" a short-barreled shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, [the Court] cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."²² According to the Court, there was no indication that such weapons were "any part of the ordinary military equipment or that [their] use could contribute to the common defense."²³ Years after *Miller*, the Court, in upholding a federal firearms statute prohibiting a convicted felon from possessing a firearm, characterized in a footnote *Miller's* holding as being that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"²⁴

The lack of clarity regarding the fundamental nature and scope of the Second Amendment following *Miller* fueled disagreement in the latter part of the twentieth century as to its application to an expanding set of federal, state, and local laws governing the private possession and sale of firearms. Writing in dissent in *Adams v. Williams*,²⁵ a 1972 Fourth

¹⁶ A sampling of the diverse literature in which the same historical, linguistic, and case law background shows the basis for strikingly different conclusions includes: STAFF OF SUBCOMM. ON THE CONSTITUTION, S. 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); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 *TENN. L. REV.* 461 (1995); William Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 *DUKE L.J.* 1236 (1994); Symposium, *Symposium on the Second Amendment: Fresh Looks*, 76 *CHI.-KENT L. REV.* 3 (2000).

¹⁷ 307 U.S. 174 (1939).

¹⁸ *Id.* at 175.

¹⁹ *Id.* at 178.

²⁰ *Id.* at 179.

²¹ *Id.*

²² *Id.* at 178.

²³ *Id.*

²⁴ *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

²⁵ 407 U.S. 143 (1972).

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Amdt2.3

Early Second Amendment Jurisprudence

Amendment case involving an arrest for unlawful possession of a handgun without a permit, Justice William O. Douglas, joined by Justice Thurgood Marshall, underscored his view that the Second Amendment “was designed to keep alive the militia” and thus would not pose an obstacle even to a ban on the possession of pistols by “everyone except the police.”²⁶ In a concurring opinion in the later case *Printz v. United States*,²⁷ involving the background check process for certain firearm purchases under the Brady Handgun Violence Prevention Act, Justice Clarence Thomas acknowledged that the Second Amendment was “somewhat overlooked” in the Court’s jurisprudence but had “engendered considerable academic, as well as public, debate.”²⁸ On the latter point, Justice Thomas alluded to “an impressive array of historical evidence” in scholarly commentary indicating that the Second Amendment protects a “personal right” to keep and bear arms and suggested that such an understanding supported an argument that the federal government’s regulation of at least the “purely intrastate sale or possession of firearms” would be unconstitutional.²⁹

Lower courts and at least one congressional subcommittee weighed in as well. In the ninety-seventh Congress, the Senate Judiciary Committee’s Subcommittee on the Constitution issued a report concluding, among other things, that the Second Amendment protects “a right of the individual citizen to privately possess and carry in a peaceful manner firearms and similar arms.”³⁰ By the turn of the century, most U.S. Courts of Appeals to have considered the matter interpreted the Second Amendment as speaking of a collective right tied to military or militia use of firearms,³¹ though a divided panel of the U.S. Court of Appeals for the Fifth Circuit in 2001 reached a contrary conclusion.³² Then, in 2007, a split panel of the D.C. Circuit struck down District of Columbia restrictions on the private possession of handguns as inconsistent with the Second Amendment,³³ and the Supreme Court granted review,³⁴ leading to the Court’s first significant pronouncements on the Second Amendment in almost seventy years.

²⁶ *Id.* at 150–51 (Douglas, J., dissenting).

²⁷ 521 U.S. 898 (1997).

²⁸ *Id.* at 938 n.2 (Thomas, J., concurring).

²⁹ *Id.* at 939.

³⁰ STAFF OF SUBCOMM. ON THE CONSTITUTION, S. COMM. ON THE JUDICIARY, 97TH CONGRESS, 2D SESS., *THE RIGHT TO KEEP AND BEAR ARMS* 11 (Comm. Print 1982).

³¹ *E.g.*, *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988) (stating that cases after *Cruikshank* had “analyzed the [S]econd [A]mendment purely in terms of protecting state militias, rather than individual rights,” and the defendant had “made no arguments that the [challenged statute] would impair any state militia”); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (“[T]he Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia.”); *United States v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000) (recognizing that, as of the date of decision, the lower federal courts had uniformly held that the Second Amendment protects a collective, rather than an individual, right).

³² *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). One judge on the panel wrote a special concurrence refusing to join in the section of the opinion concluding that the Second Amendment protected an individual right, characterizing it as dicta and unnecessary to resolve the case. *Id.* at 272 (Parker, J., specially concurring).

³³ *Parker v. District of Columbia*, 478 F.3d 370, 400–01 (D.C. Cir. 2007).

³⁴ *District of Columbia v. Heller*, 552 U.S. 1035 (2007) (mem.) (order granting petition for writ of certiorari, as limited).

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Amdt2.4
Heller and Individual Right to Firearms

Amdt2.4 Heller and Individual Right to Firearms

Second Amendment:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Before the Supreme Court’s decision in *District of Columbia v. Heller*,¹ the District of Columbia had a web of regulations governing the ownership and use of firearms that, taken together, amounted to a near-total ban on operative handguns in the District. One law generally barred the registration of most handguns.² Another law required persons with registered firearms to keep them “unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device.”³ A third law prohibited persons within the District of Columbia from carrying (openly or concealed, in the home or elsewhere) an unlicensed firearm.⁴ In 2003, six D.C. residents challenged these measures as unconstitutional under the Second Amendment, arguing that the Constitution provides an individual right to keep and bear arms.⁵ In particular, the residents contended that the Second Amendment provides individuals a right to possess “functional firearms” that are “readily accessible to be used . . . for self-defense in the home.”⁶

The challenge made its way to the Supreme Court, which, in a 5-4 decision authored by Justice Antonin Scalia, concluded that the Second Amendment provides an individual right to keep and bear arms for lawful purposes.⁷ The majority arrived at this conclusion after undertaking an extensive analysis of the founding-era meaning of the words in the Second Amendment’s “prefatory clause” (“A well regulated Militia, being necessary to the security of a free State”) and “operative clause” (“the right of the people to keep and bear Arms shall not be infringed”).⁸ Applying that interpretation to the challenged D.C. firearm laws, the Court concluded that the District’s functional ban on handgun possession in the home and the requirement that lawful firearms in the home be rendered inoperable were unconstitutional.⁹

The majority analyzed the Second Amendment’s two clauses and concluded that the prefatory clause announces the Amendment’s purpose.¹⁰ Furthermore, although there must be some link between the stated purpose in the prefatory clause and the command in the operative clause, the Court concluded that “the prefatory clause does not limit . . . the scope of the operative clause.”¹¹ Accordingly, the Court assessed the meaning of the Second Amendment’s two clauses.

Beginning with the operative clause, the Supreme Court first concluded that the phrase the “right of the people,” as used in the Bill of Rights, universally communicates an individual right, and thus the Second Amendment protects a right that is “exercised individually and

¹ 554 U.S. 570 (2008).

² *Parker v. District of Columbia*, 478 F.3d 370, 373 (D.C. Cir. 2007).

³ *See id.*

⁴ *See id.*

⁵ *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 103–04 (D.D.C. 2004).

⁶ *Parker*, 478 F.3d at 374.

⁷ *District of Columbia v. Heller*, 554 U.S. 570, 595, 626–27 (2008).

⁸ *Id.* at 577.

⁹ The Court did not evaluate the challenged licensing law on that ground that the District had asserted that, “if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified,” which the Court interpreted to mean that “he is not a felon and is not insane.” *See id.* at 630–31.

¹⁰ *Id.* at 577.

¹¹ *Id.* at 577–78.

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belongs to all Americans.”¹² Next, the Court turned to the meaning of “to keep and bear arms.”¹³ “Arms,” the Court asserted, has the same meaning now as it did during the eighteenth century: “any thing that a man wears for his defence, or takes into his hands, or use[s] in wrath to cast at or strike another,” including weapons not specifically designed for military use.¹⁴ The Court then turned to the full phrase “keep and bear arms.” To “keep arms,” as understood during the founding period, the Court maintained, was a “common way of referring to possessing arms, for militiamen *and everyone else*.”¹⁵ The Court further explained that “bearing arms,” during the founding period as well as currently, means to carry weapons for the purpose of confrontation; but even so, the Court added, the phrase does not “connote[] participation in a structured military organization.”¹⁶ Taken together, the Court concluded that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”¹⁷ The Court added that its textual analysis was supported by the Amendment’s historical background, which was relevant to its analysis because, the Court reasoned, the Second Amendment was “widely understood” to have codified a pre-existing individual right to keep and bear arms.¹⁸

Turning back to the prefatory clause, the Supreme Court majority concluded that the term “well-regulated militia” does not refer to state or congressionally regulated military forces as described in the Constitution’s Militia Clause;¹⁹ rather, the Second Amendment’s usage refers to all “able-bodied men” who are “capable of acting in concert for the common defense.”²⁰ The Court opined that the security of a free “state,” does not refer to the security of each of the several states, but rather the security of the country as a whole.²¹

Coming back to the Court’s initial declaration that the two clauses must “fit” together, the majority concluded that the two clauses fit “perfectly” in light of the historical context showing that “tyrants had eliminated a militia consisting of all the able-bodied men . . . by taking away the people’s arms.”²² Thus, the Court announced the reason for the Second Amendment’s codification was “to prevent elimination of the militia,” which “might be necessary to oppose an oppressive military force if the constitutional order broke down.”²³ The Court clarified that the reason for codification does not define the entire scope of the right the Second Amendment guarantees.²⁴ This is so because, the Court explained, the Second Amendment codified a pre-existing right that included using firearms for self-defense and hunting, and thus the pre-existing right also informs the meaning of the Second Amendment.²⁵

The Supreme Court majority added that its conclusion was not foreclosed by its earlier ruling in *Miller*, which seemed to tie the Second Amendment right to militia use. The Supreme Court in *Heller* concluded that *Miller* addressed only the type of weapons eligible for Second

¹² *Id.* at 579–81.

¹³ *Id.* at 581–91.

¹⁴ *Id.* at 581.

¹⁵ *Id.* at 582–83.

¹⁶ *Id.* at 584.

¹⁷ *Id.* at 592.

¹⁸ *Id.* at 592–95.

¹⁹ U.S. CONST. art I, § 8, cl. 15 (“The Congress shall have Power . . . to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”).

²⁰ *Heller*, 554 U.S. at 595–96.

²¹ *Id.* at 597.

²² *Id.* at 598.

²³ *Id.* at 599.

²⁴ *Id.*

²⁵ *Id.* at 599–600.

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Amendment protection.²⁶ Furthermore, in the Court’s view, the fact that *Miller* assessed a type of unlawfully possessed weapon supported its conclusion that the Second Amendment protects an individual right, with the Court noting that “it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen.”²⁷ Nor, the Court added, did *Miller* “purport to be a thorough examination of the Second Amendment,” and thus, the Court reasoned, it could not be read to mean more than “say[ing] only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”²⁸

After announcing that the Second Amendment protects an individual’s right to possess firearms, the Supreme Court explained that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”²⁹ Nevertheless, the Court left for another day an analysis of the full scope of the Second Amendment.³⁰ The Court did clarify, however, that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms,” among other “presumptively lawful” regulations.³¹ As for the kind of weapons that may obtain Second Amendment protection, the Court explained that *Miller* limits Second Amendment coverage to weapons “in common use at the time” that the reviewing court is examining a particular firearm, which, the Court added, “is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.”³²

Finally, the Supreme Court applied the Second Amendment, as newly interpreted, to the contested D.C. firearm regulations and concluded that they were unconstitutional.³³ First, the Court declared that possessing weapons for self-defense is “central to the Second Amendment right,” yet D.C.’s handgun ban prohibited “an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”³⁴ Moreover, the handgun prohibition extended into the home, where, the Court added, “the need for defense of self, family, and property is most acute.”³⁵ Additionally, the requirement that firearms in the home be kept inoperable is unconstitutional because, the Court concluded, that requirement “makes it impossible for citizens to use them for the core lawful purpose of self-defense.”³⁶ Thus, the Court ruled that D.C.’s handgun ban could not survive under any level of scrutiny that a court typically would apply to a constitutional challenge of an enumerated right.³⁷

²⁶ *Id.* at 621–22.

²⁷ *Id.* at 622.

²⁸ *Id.* at 623–25.

²⁹ *Id.* at 626.

³⁰ *Id.*

³¹ *Id.* at 626–27 & n.26.

³² *Id.* at 627 (internal citations and quotation marks omitted); *id.* at 582 (“Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communication . . . and the Fourth Amendment applies to modern forms of search . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”).

³³ *Id.* at 628–36.

³⁴ *Id.* at 628.

³⁵ *Id.* at 628–29.

³⁶ *Id.* at 630.

³⁷ *Id.* at 628–29.

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Justice John Paul Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented.³⁸ Justice Stevens did not directly quarrel with the majority’s conclusion that the Second Amendment provides an individual right, asserting that it “protects a right that can be enforced by individuals.”³⁹ But he disagreed with the majority’s interpretation of the scope of the right, contending that neither the text nor history of the Amendment supports “limiting any legislature’s authority to regulate private civilian uses of firearms” or “that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.”⁴⁰ Additionally, he characterized the majority’s interpretation of *Miller* as a “dramatic upheaval in the law.”⁴¹ In his view, *Miller* interpreted the Second Amendment as “protect[ing] the right to keep and bear arms for certain military purposes” and not “curtail[ing] the Legislature’s power to regulate the nonmilitary use and ownership of weapons.” This interpretation, Justice Stevens added, “is both the most natural reading of the Amendment’s text and the interpretation most faithful to the history of its adaptation.”⁴²

Justice Stephen Breyer, joined by Justices Stevens, David Souter, and Ruth Bader Ginsburg, authored another dissent.⁴³ Although agreeing with Justice Stevens that the Second Amendment protects only militia-related firearm uses, in his dissent he argued that the District’s laws were constitutional even under the majority’s conclusion that the Second Amendment protects firearm possession in the home for self-defense.⁴⁴ He began by assessing the appropriate level of scrutiny under which Second Amendment challenges should be analyzed.⁴⁵ Justice Breyer suggested an interest-balancing inquiry in which a court would evaluate “the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.”⁴⁶ In making that evaluation, Justice Breyer would have asked “how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests.”⁴⁷ Applying those questions to the challenged D.C. laws, Justice Breyer concluded that (1) the laws sought to further compelling public-safety interests; (2) the D.C. restrictions minimally burdened the Second Amendment’s purpose to preserve a “well regulated Militia” and burdened “to some degree” an interest in self-defense; and (3) there were no reasonable but less restrictive alternatives to reducing the number of handguns in the District.⁴⁸ Thus, in Justice Breyer’s view, the District’s gun laws were constitutional. He also anticipated that the majority’s decision would “encourage legal challenges to gun regulation throughout the Nation.”⁴⁹ The majority did not seem to voice disagreement with this

³⁸ *Id.* at 636–80 (Stevens, J., dissenting).

³⁹ *Id.* at 636.

⁴⁰ *Id.* at 636–37.

⁴¹ *Id.* at 639.

⁴² *Id.* at 637–38.

⁴³ *Id.* at 681–723 (Breyer, J., dissenting).

⁴⁴ *Id.* at 681–82.

⁴⁵ *Id.* at 687–91.

⁴⁶ *Id.* at 689–90. The majority explicitly rejected Justice Breyer’s suggested approach. *Id.* at 634 (majority op.) (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.”).

⁴⁷ *Id.* at 693 (Breyer, J., dissenting).

⁴⁸ *Id.* at 691–719.

⁴⁹ *Id.* at 718.

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prediction, but noted that “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.”⁵⁰

Amdt2.5 Post-Heller Issues and Application of Second Amendment to States

Second Amendment:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Supreme Court’s decision in *Heller* left several questions regarding the scope and application of the Second Amendment unanswered, including what methodology or level of scrutiny should ordinarily apply to laws implicating the Second Amendment right to keep and bear arms and how far Second Amendment protections extend, if at all, beyond keeping firearms for self defense in the home. Additionally, because *Heller* involved a challenge to a D.C. law, which is generally not treated as a state for purposes of constitutional law,¹ a question beyond the scope of *Heller* was whether the Second Amendment applies to the states. Several Supreme Court cases near the end of the nineteenth century established the Second Amendment as a constraint only on federal government action.² However, as the Supreme Court noted in *Heller*, those decisions “did not engage in the sort of Fourteenth Amendment inquiry required by” later Supreme Court cases³—specifically, cases establishing the doctrine of “selective incorporation” through which particular provisions in the Bill of Rights that are “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition” are considered to be incorporated in the Due Process Clause of the Fourteenth Amendment such that they apply to the states.⁴

The Supreme Court revisited the issue of whether the Second Amendment applies to the states in the 2010 case *McDonald v. City of Chicago*,⁵ concluding that it does. *McDonald* involved Second Amendment challenges to ordinances banning handgun possession in the City of Chicago and its neighboring suburb of Oak Park, Illinois.⁶ The lower courts held that they were bound by the Supreme Court precedent establishing that the Second Amendment does not apply to the states, but the Supreme Court reversed in a 4-1-4 ruling.⁷ The Court, in an opinion authored by Justice Alito, concluded that “the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”⁸ Thus, a plurality of the Court held that the Second Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.⁹ The plurality first noted that *Heller* makes “unmistakabl[e]” that the basic right to self-defense is a “central component” of the Second Amendment and “deeply rooted in this

⁵⁰ *Id.* at 635 (majority op.).

¹ See *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805).

² See *supra* Amdt2.3 Early Second Amendment Jurisprudence.

³ *District of Columbia v. Heller*, 554 U.S. 570, 620 n.23 (2008).

⁴ See *infra* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

⁵ 561 U.S. 742 (2010).

⁶ *Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009).

⁷ *McDonald*, 561 U.S. at 749.

⁸ *Id.* at 778.

⁹ *Id.* at 791. Although Justice Thomas was part of the five-Justice majority of the *McDonald* Court who agreed that the Second Amendment was applicable to the states via the Fourteenth Amendment, he disagreed with his colleagues’ view that the Due Process Clause served as the proper basis for this incorporation. *Id.* at 805–58 (Thomas, J., concurring). In Justice Thomas’s view, the Fourteenth Amendment’s Privileges or Immunities Clause provided the source for incorporation. *Id.* at 805–06, 855.

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Nation’s history and tradition.”¹⁰ The Court reiterated much of the information recited in *Heller* about the founders’ relationship to arms, including the fear many held—based on King George III’s attempts to disarm the colonists—that the newly created federal government, too, would disarm the people to impose its will.¹¹ The Court explained that, even though the initial perceived threat of disarmament had dissipated by the 1850s, “the right to keep and bear arms was highly valued for purposes of self-defense.”¹² The Court also pointed to congressional debate in 1868 of the Fourteenth Amendment, during which Senators had referred to the right to keep and bear arms as a “fundamental right deserving of protection.”¹³

In his concurring opinion, Justice Thomas said that he would have construed the Second Amendment to be applicable to the states via the Privileges or Immunities Clause of the Fourteenth Amendment because, in his view, “the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship.”¹⁴ Justice Thomas’s opinion nevertheless provided the crucial fifth vote to hold that the Second Amendment applies to the states.

Justice Breyer dissented (joined by Justices Ginsburg and Sotomayor), contending that “nothing in the Second Amendment’s text, history, or underlying rationale . . . warrant[s] characterizing it as ‘fundamental’ insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes.”¹⁵ Additionally, he asserted that the Constitution provides no authority for “transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislators to courts or from the States to the Federal Government.”¹⁶

Justice Stevens authored another dissenting opinion, arguing that the question before the Court was not whether the Second Amendment, as a whole, applies to the states, but rather whether the Fourteenth Amendment requires that the liberty interest asserted—“the right to possess a functional, personal firearm, including a handgun, within the home”—be enforceable against the states.¹⁷ In his view, the Second Amendment is not enforceable against the states, particularly because the Amendment is a “federalism provision” that is “directed at preserving the autonomy of the sovereign States, and its logic therefore resists incorporation by a federal court against the states.”¹⁸

Between *McDonald* in 2010 and *New York State Rifle & Pistol Association v. Bruen* in 2022, the Supreme Court issued only one other decision substantively addressing the Second Amendment.¹⁹ In *Caetano v. Massachusetts*,²⁰ the Court issued a brief, per curiam opinion vacating a Massachusetts Supreme Court decision that upheld a law prohibiting the

¹⁰ *Id.* at 767–68 (internal emphasis, citations, and quotation marks omitted) (plurality op.).

¹¹ *Id.* at 768.

¹² *Id.* at 770.

¹³ *Id.* at 775–76 (internal citations and quotation marks omitted).

¹⁴ *Id.* at 778 (Thomas, J., concurring).

¹⁵ *Id.* at 913 (Breyer, J., dissenting).

¹⁶ *Id.*

¹⁷ *Id.* at 858, 884, 890 (Stevens, J., dissenting).

¹⁸ *Id.* at 897 (internal citations and quotation marks omitted).

¹⁹ In 2019, the Court granted review in a case challenging portions of New York City’s handgun licensing regime that limited the transportation of firearms to shooting ranges and second homes outside the city, but changes to the laws at issue prompted the Court to effectively dismiss the case as moot in April 2020 without ruling on the merits. *See* *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1526 (2020). Several Justices wrote or joined separate opinions in the case signaling concern that the Second Amendment was not being properly applied by some courts. *E.g., id.* at 1527 (Kavanaugh, J., concurring) (“[I] share Justice Alito’s concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.”).

²⁰ 577 U.S. 411 (2016).

SECOND AMENDMENT—RIGHT TO BEAR ARMS

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Post-Heller Issues and Application of Second Amendment to States

possession of stun guns. The Supreme Court reiterated in *Caetano* that the Second Amendment applies to the states and extends to “bearable arms” that “were not in existence at the time of the founding.”²¹

The plethora of Second Amendment challenges to federal, state, and local gun laws in the years following *Heller* and *McDonald*, coupled with the lack of guidance from the Supreme Court on questions such as what standard of review governs and whether the Second Amendment applies outside the home, led the lower federal courts to develop their own rules and frameworks for analyzing Second Amendment cases. With respect to the question of how to evaluate the constitutionality of gun laws under the Second Amendment, the lower federal courts in post-*Heller* cases generally applied a two-step framework.²² At step one, a court would ask whether the law at issue burdened conduct protected by the Second Amendment, which typically involved an inquiry into the historical meaning of the right.²³ If the law did not burden protected conduct, it was upheld.²⁴ If the challenged law did burden protected conduct, a court would next apply either strict scrutiny—an exacting form of constitutional review requiring the government to show that the law is narrowly tailored to achieve a compelling government interest²⁵—or a somewhat lower standard of “intermediate scrutiny” to determine whether the law was nevertheless constitutional.²⁶ Whether a court applied intermediate or strict scrutiny would ordinarily depend on whether the law severely burdened the “core” protection of the Second Amendment.²⁷ What precisely constituted the “core” of the Second Amendment, however, produced some disagreement among the U.S. Courts of Appeals, particularly with respect to whether it extended beyond the home.²⁸ Nonetheless, using the two-step framework, the U.S. Courts of Appeals after *Heller* upheld many firearms regulations,

²¹ *Id.* at 412.

²² *See, e.g.*, *Powell v. Tompkins*, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (collecting cases).

²³ *E.g.*, *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016); *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011). Courts at step one sometimes recognized a safe harbor for the kinds of “longstanding” and “presumptively lawful” regulations that the Supreme Court in *Heller* appeared to insulate from doubt. *E.g.*, *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) (“It seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second Amendment right.”). In a variation, some courts treated such regulations not as *per se* constitutional but merely as being entitled to a presumption of constitutionality. *See, e.g.*, *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 686 (6th Cir. 2016) (“*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis.”)

²⁴ *E.g.*, *Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019) (concluding that, based on historical evidence, “a felony conviction removes one from the scope of the Second Amendment”).

²⁵ *E.g.*, *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (describing strict scrutiny standard in the context of the First Amendment).

²⁶ Courts sometimes would go on to step two in an “abundance of caution” even if it was doubtful that a challenged law burdened conduct protected by the Second Amendment. *Nat’l Rifle Ass’n of Am., Inc. v. ATF*, 700 F.3d 185, 204 (5th Cir. 2012); *see Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013) (“[W]e and other courts of appeals have sometimes deemed it prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step[.]”).

²⁷ *E.g.*, *Nat’l Rifle Ass’n*, 700 F.3d at 195.

²⁸ *Compare Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012) (“The state’s ability to regulate firearms . . . is qualitatively different in public than in the home.”); *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018) (stating that the right “is at its zenith inside the home” and “is plainly more circumscribed outside the home”); *and Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (“If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny.”), *with Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017) (recognizing that the right of law-abiding citizens to carry a concealed firearm is a core component of the Second Amendment); *and Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (“The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”).

SECOND AMENDMENT—RIGHT TO BEAR ARMS

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Post-Heller Issues and Application of Second Amendment to States

often after concluding that the “core” of the Second Amendment was not severely burdened and thus intermediate scrutiny should be applied.²⁹

Amdt2.6 Bruen and Concealed-Carry Licenses

Second Amendment:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Supreme Court in the 2022 case *New York State Rifle & Pistol Association v. Bruen*¹ considered the constitutionality of a portion of New York’s handgun licensing regime relating to concealed-carry licenses for self-defense. The laws at issue in the case generally required a New York resident wishing to possess a firearm in public to get a “carry” license authorizing concealed carry, which typically required the license applicant to show “proper cause”—for carry unrelated to specific purposes like hunting or target practice, a “special need for self-protection distinguishable from that of the general community.”²

The lower court in *Bruen* upheld the challenged laws based on the two-step inquiry described above,³ but in a 6-3 decision, the Supreme Court reversed.⁴ The majority opinion, authored by Justice Clarence Thomas, began by addressing the proper standard for evaluating Second Amendment challenges to firearm regulations and rejected the two-step framework that “combines history with means-end scrutiny.”⁵ In the majority’s view, the two-step approach was inconsistent with *Heller*, which focused on text and history and “did not invoke any means-end test such as strict or intermediate scrutiny.”⁶ As such, the Court concluded that the standard for applying the Second Amendment is rooted solely in text and history, stating the test as follows:

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”⁷

Turning, then, to the first question in the analysis—whether the Second Amendment’s text covers the conduct at issue—the majority opinion concluded that it did, as the word “bear” in

²⁹ *E.g.*, *Gould*, 907 F.3d at 676–77; *Bonidy*, 790 F.3d at 1128–29; *Kanter v. Barr*, 919 F.3d 437, 450–51 (7th Cir. 2019). Not all firearms regulations were upheld, however. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015) (concluding that a law limiting the number of rounds that could be loaded into a firearm did not survive intermediate scrutiny on the record before the court); *Wrenn*, 864 F.3d at 667 (holding that restrictions on obtaining concealed carry license effectively banned exercise of core Second Amendment right and were thus unconstitutional); *but see Kachalsky*, 701 F.3d at 94 (applying intermediate scrutiny and upholding similar restrictions after concluding that possession of firearms outside the home is outside core of Second Amendment).

¹ No. 20-843 (U.S. June 23, 2022).

² *Id.* at 3 (quoting *In re Klenosky*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)).

³ *N.Y. State Rifle & Pistol Ass’n v. Beach*, 818 F. App’x 99, 100 (2d Cir. 2020) (summary order) (citing *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 83, 100–01 (2d Cir. 2012)).

⁴ *Bruen*, slip op. at 63.

⁵ *Id.* at 8.

⁶ *Id.* at 13.

⁷ *Id.* at 15 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

SECOND AMENDMENT—RIGHT TO BEAR ARMS

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the text “naturally encompasses public carry.”⁸ As such, according to the majority, the Second Amendment “presumptively guarantees . . . a right to ‘bear’ arms in public for self-defense.”⁹

On the next question of consistency with the country’s “historical tradition of firearm regulation,” the majority opinion provided some further guidance as to how to conduct the analysis, acknowledging that the “regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868.”¹⁰ For this reason, the majority explained that historical analysis of modern-day gun laws may call for reasoning by analogy to determine whether historical and modern firearm regulations are “relevantly similar.”¹¹

With respect to how to determine what qualifies as relevantly similar, the majority opinion identified “at least two metrics: how and why the regulations burden a law-abiding citizen’s right to armed self-defense.”¹² As an example of modern laws that could pass muster by means of historical analogy, the majority opinion pointed to laws prohibiting firearms in “sensitive places” such as schools or government buildings, though the majority rejected the proposition that the “sensitive place” category could apply so broadly as to cover “all places of public congregation that are not isolated from law enforcement.”¹³

Throughout the majority opinion, the Court provided further guideposts as to what sort of historical evidence would be most valuable, cautioning, among other things, against reading too much into early English law that did not necessarily “survive[] to become our Founders’ law” or ascribing too much significance to post-enactment history, at least where that history was inconsistent with the original meaning of the constitutional text.¹⁴ The majority declined to weigh in on whether the prevailing historical understanding for analytical purposes should be pegged to when the Second Amendment was adopted in 1791 or when the Fourteenth Amendment was ratified in 1868, as the majority opinion concluded that the public understanding was the same at both points for relevant purposes with respect to public carry.¹⁵

With framework and guidance in place, the majority opinion turned to its historical analysis, assessing whether a variety of laws from England and the United States proffered by the respondents met the burden of establishing that New York’s laws were consistent with the country’s historical tradition of firearms regulation.¹⁶ Ultimately, the majority concluded that the respondents did not meet the burden “to identify an American tradition justifying the State’s proper-cause requirement.”¹⁷ While acknowledging that history reflected restrictions on public carry, which limited “the intent for which one could carry arms, the manner by which one carried arms,” or the particular circumstances “under which one could not carry arms,” the majority opinion concluded that “American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense” or made public carry

⁸ *Id.* at 23.

⁹ *Id.* at 24.

¹⁰ *Id.* at 18.

¹¹ *Id.* at 20.

¹² *Id.*

¹³ *Id.* at 21–22.

¹⁴ *Id.* at 26–28.

¹⁵ *Id.* at 29.

¹⁶ *Id.* at 29–62.

¹⁷ *Id.* at 30.

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contingent on a showing of a special need.¹⁸ The few historical laws that the majority viewed as extending that far were, according to the opinion, “late-in-time outliers.”¹⁹

Justice Samuel Alito joined the Court’s majority opinion in full but wrote separately to respond primarily to points made by the dissent. Justice Alito emphasized in his concurrence that the majority opinion did not disturb *Heller* or *McDonald* and said nothing about who may be prohibited from possessing a firearm, what kinds of weapons may be possessed, or the requirements for purchasing a firearm.²⁰ Justice Brett Kavanaugh, joined by Chief Justice John Roberts, agreed that the New York’s licensing regime violated the Second Amendment but wrote separately to underscore that the Court’s decision would not prohibit states from imposing licensing requirements for public carry based on objective criteria so long as the requirements “do not grant open-ended discretion to licensing officials and do not require a showing of some special need apart from self-defense.”²¹ Justice Kavanaugh, quoting from *Heller*, reiterated that the Second Amendment right is not unlimited and may allow for many kinds of gun regulations.²² Justice Amy Coney Barrett wrote a solo concurrence to highlight two open methodological questions regarding the role of post-ratification practice in historical inquiry and whether 1791 or 1868 should be the relevant benchmark year.²³ She underscored that both questions were unnecessary to resolve in the present case but might have a bearing on a future case.²⁴

Justice Stephen Breyer authored a dissent, joined by Justices Elena Kagan and Sonia Sotomayor. The dissent objected to deciding the case on the pleadings without an evidentiary record as to how New York’s standard was actually being applied.²⁵ More fundamentally, Justice Breyer disagreed with the majority’s “rigid history-only approach,” which he argued unnecessarily disrupted consensus in the U.S. Courts of Appeals, misread *Heller*, and put the Second Amendment on a different footing than other constitutional rights.²⁶ The dissent also viewed the history-focused approach as “deeply impractical” because it imposed on judges without historical expertise—and courts without needed resources—the task of parsing history, raised numerous intractable questions about what history to consider and how to weigh it, and would “often fail to provide clear answers to difficult questions” while giving judges “ample tools to pick their friends out of history’s crowd.”²⁷ The dissent viewed the majority’s historical analysis regarding public carry as an embodiment of these impracticalities, as the majority found reasons to discount the persuasive force of numerous historical regulations similar to New York’s that appeared to meet the Court’s “analogical reasoning” test.²⁸

¹⁸ *Id.* at 62.

¹⁹ *Id.*

²⁰ *Id.* at 2 (Alito, J., concurring).

²¹ *Id.* at 1–2 (Kavanaugh, J., concurring).

²² *Id.* at 3.

²³ *Id.* at 1–2 (Barrett, J., concurring).

²⁴ *Id.* at 2.

²⁵ *Id.* at 14 (Breyer, J., dissenting).

²⁶ *Id.* at 21–25.

²⁷ *Id.* at 25–34.

²⁸ *Id.* at 34–50.