



Americans Against Gun Violence
P.O. Box 661252
Sacramento, CA 95866
(916) 668-4160 / (888) 286-8122
www.aagunv.org / info@aagunv.org

Does the Second Amendment guarantee an individual right to own a gun?

Until 2008, the answer to this question was a definite, “No.”

In fact, the late Supreme Court Chief Justice Warren Burger stated that the misrepresentation of the Second Amendment as guaranteeing an individual right to own guns “...has been the subject of one of the greatest pieces of fraud - I repeat the word 'fraud' - on the American public by special interest groups that I have ever seen in my lifetime.”¹

Since the 2008 Heller decision² and the related 2010 McDonald decision,³ though, the answer to the question of whether the Second Amendment guarantees an individual right to own a gun is a qualified “Yes,” with regard to a handgun kept in the home “for protection,” and “No” in most other circumstances.

The full text of the Second 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.

Opponents of gun control typically omit the first portion of the Second Amendment, which refers to “A well-regulated militia,” and cite only the last phrase referring to the “right to bear arms.” Prior to 2008, it had been repeatedly established in Supreme Court decisions,^{4,5} in decisions of lower courts, and in reviews by legal historians⁶ that the Second Amendment was intended to protect the rights of states to maintain armed militias, such as the current day National Guard, and that it did not imply a right of individual citizens to own firearms. In particular, the Supreme Court stated in the 1939 Miller case that there was no constitutional right to possess a gun unless possession of the gun had “some reasonable relationship to the preservation or efficiency of a well regulated militia.”⁴ The Supreme Court reiterated in the 1980 Lewis case, **“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.’”⁵**

In 2008, though, in a narrow five to four decision, the Supreme Court reversed decades of legal precedent, including prior Supreme Court decisions in 1939 and 1980, in what is known as the Heller decision, ruling that Washington D.C.’s freeze on new handgun acquisition violated the Second Amendment.⁷ The five member majority included justices Alito and Roberts, recently appointed to the court by President George W. Bush to replace the liberal justices Sandra Day O’Conner, who retired, and William Rehnquist, who died. In the 2000 and 2004 presidential elections, the NRA gave heavy support to the Republican candidate, George W. Bush, who was himself an NRA member. One NRA official boasted during the

presidential campaign that if Bush were elected, the NRA would be working out of the Oval office.⁸

The majority opinion in the Heller decision, written by the late Justice Antonin Scalia, depended heavily on articles published in law journals following the 1980 Lewis decision. Every single law review article published from 1888 to 1960 had affirmed that the “right of the people to keep and bear arms” conferred by the Second Amendment was a collective right of the people of the states to maintained armed state militias, not an individual right to own guns.⁹ Following the Lewis decision, though, articles began to appear in law journals in which authors argued that the Second Amendment was actually intended to confer an individual right to own guns. In an amicus brief filed in the case of *U.S. v. Lopez*, in 1995 concerning the Gun Free School Zone Act, an organization calling itself “Academics for the Second Amendment” claimed that 37 of 41 law review articles published since 1980 had endorsed the individual right interpretation of the Second Amendment.¹⁰ Both that brief and Scalia’s majority opinion in the Heller decision, though, failed to mention, that most of these articles were written by a small group of individuals who had either been employed at one time by the NRA or other pro-gun organizations or who had received other funding from the gun lobby.¹¹

Strictly speaking, the majority Heller decision does not go beyond guaranteeing an individual right to own handguns “used for self defense in the home.”¹² The majority opinion specifically states that the Second Amendment does not prohibit gun control laws including, but not limited to, bans on ownership of firearms by “felons and the mentally ill,”¹³ bans on carrying firearms in “sensitive places such as schools and government buildings,”¹⁴ or the carrying of “dangerous and unusual weapons.”¹⁵ Scalia’s majority opinion does not, however, address the fact that guns in the home are much more likely to be used to kill or injure a household member than to be used for self defense, or the fact that while handguns are not “unusual,” they are certainly “dangerous,” as they are the weapons used in most firearm related homicides¹⁶ and suicides¹⁷ in the USA. (See the answer to the question, *Should law abiding people own guns for protection?*)

Following the 2008 Heller decision and the related 2010 McDonald decision, in which the Supreme Court ruled that Heller applied not just to the District of Columbia, but to the states as well,¹⁸ hundreds of lawsuits have been filed by the gun lobby against all forms of gun controls laws. Most of these challenges have been rejected by the courts.¹⁹ In particular, the Supreme Court refused to hear challenges to assault weapons bans in the state of Maryland and the City of Highland Park, Ohio,²⁰ and the 9th Circuit Court of Appeals recently ruled that the Second Amendment does not confer a right to carry a concealed firearm.²¹ The full impact of the Heller and McDonald decisions, though, remains to be seen.

The gun lobby, most politicians, and even liberal media outlets and other gun violence prevention organizations²² often speak of the Second Amendment in a reverential manner, using terms such as “Second Amendment supporters,”²³ “gun rights advocates,”²⁴ and “protecting our Second Amendment rights.”²⁵ The Second Amendment, though, even in its original form, does not deserve such reverence.

According to the romanticized version of the history of the Second Amendment,

the Revolutionary War was won by volunteer militias composed of well-armed colonists who were expert marksmen as a result of the frequent use of firearms in their everyday life. Unfortunately, actual historical records don't support this romantic notion.²⁶ During the time of the Revolutionary War, there were no gun makers in the Colonies, and few records can be found of any gunsmiths, gun sales, or of guns being passed from generation to generation in probate records. Guns were so expensive, so cumbersome, so unreliable, and in such short supply at the beginning of the Revolutionary War that Benjamin Franklin recommended that the Continental Army be armed with bows and arrows instead. Most of the guns that were used by the Continental Army during the American Revolution were imported from France and The Netherlands after the war began.²⁷ Though the framers of the U.S. Constitution distrusted a standing army, knowing from the history of almost continuous war in Europe that governments with standing armies usually found excuses to put these armies to use,²⁸ they also knew by the time that the Second Amendment was ratified in 1791 that volunteer militias had been entirely ineffective during the Revolutionary War, which was won instead by the professional Continental Army.²⁹ George Washington himself dismissed the idea of protecting the country with a volunteer militia as being "chimerical," ridiculing the militia as being "incapacitated to defend themselves, much less to annoy the enemy."³⁰

Armed militias were effective, though, in maintaining the institution of slavery. At the time that the Second Amendment was written, armed white militias patrolled the slave states, preserving white control over an enormous but otherwise largely defenseless population of black slaves.³¹ Delegates from slave states to conventions at which the Constitution and the Second Amendment were written and ratified openly expressed their fears that the more populous northern states would abolish slavery by disarming the southern militias. Patrick Henry of Virginia, who is best known for his declaration, "Give me liberty or give me death," was a slave owner, as were fellow Virginians Thomas Jefferson and George Mason who, ironically, are credited with writing the words, "We hold these truths to be self evident, that all men are created equal," in the Declaration of Independence.³² At the convention held in Richmond, Virginia in 1788 to ratify the Constitution, Patrick Henry spoke in opposition, stating:

The majority of Congress is to the north, and the slaves are to the south³³They'll take your n_____s from you."³⁴

A less well known orator, Rawlin Lowndes, stated at South Carolina's ratification convention in 1788, "Negroes were our wealth, our only natural resource, yet behold how our kind friends in the north were determined soon to tie up our hands and drain us of what we had."³⁵

Contrary to the romanticized history of the Second Amendment that is promulgated by the gun industry, the associated gun lobby, and by most elected officials today, the main reason for the inclusion of the Second Amendment in the Bill of Rights was most almost certainly to reassure the southern colonies that if they ratified the Constitution, they would still be able to maintain armed militias to continue to subjugate the large black slave population.³⁶ While it may seem unthinkable in modern times that a tacit endorsement of the institution of slavery

would be included as an amendment to the U.S. Constitution, it should be recalled that the institution of slavery was also tacitly induced in three other parts of the constitution, including Article I, Section 2, which provided that each slave would be counted as three fifths of a person for the purpose of apportioning members of the House of Representatives; Article I, Section 9, which prohibited Congress from abolishing the slave trade until 1808 or of imposing an import tax of more than ten dollars per slave; and Article IV, Section 2, which provided that slaves who escaped across state lines into free states must be returned to their owners.

In summary, the genesis of the Second Amendment is linked much more closely to the preservation of the institution of slavery than to the preservation of the institution of democracy. There is scant evidence that the Second Amendment was ever intended to confer an individual right to own guns. In the 2008 Heller decision, which was heavily influenced by the seeding of the legal literature by authors with ties to the gun lobby and by the appointment of two new Supreme Court justices by a president who was himself a member of the NRA, the gun lobby essentially rewrote the Second Amendment, effectively deleting the introductory phrase, “A well regulated militia.”

The topic of how best to restore the Second Amendment to its pre-2008 interpretation will be the subject of another discussion on this website.

References

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⁴ U.S. v. Miller, 307 U.S. 174 (1939)

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¹³ Heller, p. 54

¹⁴ District of Columbia v. Heller, 54 (U.S. 2008).

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