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The Right to Bear Arms

A Uniquely American Entitlement

Lawrence O. Gostin, JD

IN *DISTRICT OF COLUMBIA V HELLER*, THE US SUPREME Court held that individuals have a constitutional right to own firearms, notably to keep a loaded handgun at home for self-protection. The historic shift announced by *Heller* was the recognition of a personal right rather than a collective right tied to state militias.^{1,2} In *McDonald v Chicago*,³ the court, in its familiar 5 to 4 ideological split, held that the Second Amendment applies not only to the federal government but also to state and local gun control laws. In his dissent, Justice Stevens predicted that “the consequences could prove far more destructive to our nation’s communities and constitutional structure.”³

Is Gun Ownership a Fundamental Right?

The Bill of Rights, including the Second Amendment, originally applied only to the federal government, not to the states. However, the Supreme Court has interpreted the Fourteenth Amendment’s due process clause, ratified after the Civil War, as “incorporating” most of the Bill of Rights to the states. The governing standard for “incorporation” through substantive due process is whether a particular Bill of Rights guarantee is “fundamental” or “deeply rooted” in our nation’s history and tradition.

Justice Alito, writing for the Court, found that the Second Amendment is “fundamental to our [emphasis added] system of ordered liberty,” justifying its extension to the states. “The need for defense of self, family, and property is most acute in the home.” Justice Thomas would have relied on the Fourteenth Amendment’s Privileges or Immunities Clause, rather than due process, to provide “a more straightforward path” to incorporation.³

Why is the right to bear arms fundamental, when it appears that firearms—designed to cause injury or death—are antithetical to social order and public safety? In 2007 to 2008, the United States experienced 78 622 (25.87 per 100 000) nonfatal firearm injuries and 31 224 (10.36 per 100 000) fatalities, of which 40% were homicides, 55.6% suicides, and 2% unintentional deaths, with African American individuals having injury rates double those of white individuals.⁴

Justice Alito framed the right to bear arms as fundamental to a uniquely American conception of ordered liberty.

However, developed countries with strong firearms regulations have peaceful ordered lives with far fewer fatalities. In fact, the firearm death rate among US children younger than 15 years is almost 12 times higher than the rates in 25 other industrialized countries combined.⁵

The Supreme Court adopted a rigid historical methodology to declare gun ownership a fundamental right. In doing so, the Court relied on selective historical accounts of old English law, disarming freed slaves, postbellum federal law, and state constitutions. History, of course, is malleable, and many noted historians read these events as supporting purely a collective right to a state militia. Liberty, moreover, is not a static but a dynamic concept. Ordered liberty ought not be imagined as it would have been in the colonies or the post–Civil War period but what it is like in contemporary metropolises experiencing a firearms epidemic.

Firearms cannot be intrinsic to liberty because they have a unique potential to cause serious injury and death, posing a distinctive threat to social order. Unlike other liberties, carrying firearms directly puts the gun owner, family, and community at risk. “Your interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence,” wrote Stevens.³ Possessing a functioning handgun at home, moreover, does not enhance the right to self-defense. A homeowner’s gun is substantially more likely to kill the gun owner or a family member (through unintentional firing or suicide) than it is to harm an intruder.⁶ In addition, a gun purchased for the home may not remain in the home but rather find its way into the illegal market for use in criminal activity, threatening the wider community.

Perhaps most important, the Second Amendment is distinctly different from the rest of the Bill of Rights, which guarantees freedoms such as speech, press, religion, assembly, and petition. The Bill of Rights is critical to the fulfillment of personal autonomy, dignity, and political equality. The right to bear arms has no such intrinsic value but rather is a right to possess and use a consumer product—one that is inherently dangerous.

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The Plain Meaning of the Second Amendment

The plain text of the Second Amendment has little ambiguity: "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."⁷ *The people* can only refer to the collective populace, not each individual. The peculiar nature of the Second Amendment is that it affords a communal right that was meant to protect states from the federal government disarming their militias. Consequently, it is odd that the Supreme Court would now use an amendment designed to protect states to restrict their ability to pass gun control laws.

The Supreme Court and Federalism

Rejecting the claim that the right to bear arms is fundamental does not preclude states from permitting arms for hunting, self-defense, or any other legitimate purpose. There are many appropriate conceptions of an orderly social life that understandably vary across jurisdictions. What may be desirable in a rural community in Montana or Wyoming may be anathema to peaceful life in an urban area such as Los Angeles or New York. Densely populated cities face pressing challenges to combat violent crime and disarm street gangs, but most rural areas do not. Cities rarely offer hunting or other recreational uses of firearms. It is for that reason that firearm regulation is a quintessential area of US federalism where local solutions, supported by the electorate, should be permitted to flourish.

For other polarizing constitutional rights such as reproductive freedom or separation of church and state, conservative jurists assert "states' rights," recognizing the value of the "laboratory of the states." Rather than privileging one side of a contested social issue, if the Supreme Court were acting with due respect for the democratic process, it would exercise judicial restraint, allowing jurisdictions to find their own balance between gun ownership and public safety.

The Supreme Court's decision renders courts the ultimate arbiters of the reasonableness of gun control laws. Yet the judiciary holds no special advantage over the democratically elected branches of government in creating public safety policy. The judiciary, in fact, has weak institutional capacity for evaluating ongoing empirical evidence

concerning the effectiveness of particular interventions to stem the spread of firearm violence.

The Future of Gun Control

Justice Alito offered no clear standard on how courts should review the constitutionality of gun control going forward, but he did reiterate the *Heller* list of potentially allowable interventions: prohibiting felons and the mentally ill from gun ownership, forbidding firearms in sensitive places such as school and government buildings, and imposing conditions on commercial arms sales.¹

Legal scholars predict an avalanche of litigation, moving the political wars on firearms from the legislative chamber to the bench. In fact, following *Heller*¹ and *McDonald*,³ both Chicago and Washington, DC, enacted gun control ordinances that the National Rifle Association immediately challenged. The new laws are highly restrictive. Chicago's law, for example, limits homeowners to one handgun, with strict registration and permit requirements. Prospective gun owners must undergo firearm training, but ranges are illegal in the city.

Going forward, state and local legislatures must remain determined in the face of litigation threats as they craft laws that comply with *McDonald* while also safeguarding the populace against gun violence. If not, firearm injury and death statistics will show the cost US residents will have paid for *McDonald*.

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