

BEARING ARMS

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.

IN GENERAL

Test For over 200 years, despite extensive debate and much legislative action with respect to regulation of the purchase, possession, and transportation of firearms, as well as proposals to substantially curtail ownership of firearms, there was no definitive resolution by the courts of just what right the Second Amendment protects. The Second Amendment is naturally divided into two parts: its prefatory clause (“A well regulated Militia, being necessary to the security of a free State”) and its operative clause (“the right of the people to keep and bear Arms shall not be infringed”). To perhaps oversimplify the opposing arguments, the “states’ rights” thesis emphasized the importance of the prefatory clause, arguing that the purpose of the clause was to protect the states in their authority to maintain formal, organized militia units. The “individual rights” thesis emphasized the operative clause, so that individuals would be protected in the ownership, possession, and transportation of firearms.¹ Whatever the Amendment meant, it was seen as a bar only to federal action, not state² or private³ restraints.

¹ 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, SENATE COMMITTEE 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).

² *Presser v. Illinois*, 116 U.S. 252, 265 (1886). See also *Miller v. Texas*, 153 U.S. 535 (1894); *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897). The non-application of the Second Amendment to the states was reaffirmed in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983).

³ *United States v. Cruikshank*, 92 U.S. 542 (1876).