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No Right to Keep and Bear Arms

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The National Rifle Association is the only lobbying organization in America with half of a constitutional amendment emblazoned across the front of its headquarters. When citing the Second Amendment, the NRA systematically deletes the phrase "A well regulated militia, being necessary to the security of a free state," from the oft-quoted second half of the amendment, "the right of the people to keep and bear arms, shall not be infringed."

Primarily as the result of the NRA's efforts, the Second Amendment is the most misunderstood provision contained in the Bill of Rights. The purpose of the Second Amendment is to guarantee the states' ability to maintain independent militias composed of state residents available to be called upon to defend the country should its security be threatened. The Founding Fathers' reliance on state militias to perform this military task stemmed from their deep distrust of a standing federal army. The NRA and other members of America's gun lobby neatly ignore the legal history surrounding the amendment, choosing instead to propagate the myth that it guarantees an individual right to keep and bear arms.

The U.S. Supreme Court, the ultimate arbiter of the amendment's intent, has addressed its meaning in several cases. In 1886, the Court ruled in *Presser v. Illinois* that the Second Amendment functions only as a check on the power of the federal government—preventing it from interfering with a state's ability to maintain a militia—and in no way limits the states' powers to regulate firearms.

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States, therefore, are not prohibited by the Second Amendment from controlling private ownership of handguns and other categories of firearms in virtually any way they see fit. The question then becomes to what extent may the federal government regulate the ownership of firearms by citizens?

The U.S. Supreme Court dealt directly with this question in a 1939 decision, *United States v. Miller*. In *Miller* the Court upheld a federal law making it a crime to ship a sawed-off shotgun in interstate commerce. Refusing to strike down the law on Second Amendment grounds absent any evidence that a sawed-off shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia," the Court held that the Second Amendment "must be interpreted and applied" only in the context of safeguarding the continuation and effectiveness of the state militias.

Yet perhaps the most significant case is the 1980 decision in *Lewis v. United States*. The majority opinion, joined by then Chief Justice Warren Burger and current Chief Justice William Rehnquist, ruled that restrictions contained in the Gun Control Act of 1968 prohibiting felons from owning firearms were constitutional. In its analysis, the Court applied a "rational basis" standard, which requires that the remedy need merely be "rationally related to a legitimate purpose." The application of this standard is revealing. When determining whether a statute meets equal protection requirements, statutes that impinge on fundamental, individual rights—such as freedom of speech or the right to counsel—are judged by the more rigorous "strict scrutiny" standard. In *Lewis*, the Court stated, "These legislative restrictions on the use of firearms do not trench upon any constitutionally protected liberties." The opinion listed voting, the practice of medicine, and even holding office in labor organizations as "activities far more fundamental than the possession of a firearm."

In 1972 Justice William O. Douglas warned that one aspect of the damage wrought by the popular misinterpretation of the Second Amendment is a diminution of Fourth Amendment protections against search and seizure. In a powerful dissent to a decision extending the ability of police to stop

and frisk suspects, Douglas argued, "The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment. . . . There is no reason why all pistols should not be barred to everyone except the police."

And in January 1991 the U.S. Supreme Court refused to hear a challenge to the 1986 congressional ban on the manufacture of new machine guns. The Court let stand a ruling by the Eleventh Circuit Court of Appeals in *Farmer v. Higgins* that denying the plaintiff a license to manufacture a new machine gun was not unconstitutional.

The Eleventh Circuit's ruling was not surprising. The federal courts, in accordance with Supreme Court precedents, have consistently held that there is no individual right to own a gun.

In *United States v. Warin*, the Sixth Circuit Court of Appeals in 1976 expressed exasperation with the misguided arguments made by the defendant in attempting to persuade the court that the federal law prohibiting possession of an unregistered machine gun violated his Second Amendment rights. Upholding the defendant's conviction, the court stated, "It would unduly extend this opinion to attempt to deal with every argument made by defendant . . . all of which are based on the erroneous supposition that the Second Amendment is concerned with the rights of individuals rather than those of the states."

In a decision upholding a 1981 ban on the possession and sale of handguns in Morton Grove, Illinois, the Seventh Circuit Court of Appeals stated flatly that "possession of handguns by individuals is not part of the right to keep and bear arms." The U.S. Supreme Court refused to review the decision.

In 1984 the same court upheld a two-year-old ordinance that froze the number of handguns in Chicago. In allowing the law to stand, the court noted that it did "not impinge upon the exercise of a fundamental personal right."

In short, the federal courts have consistently given the Second Amendment a collective, militia interpretation. Moreover, no gun control measure has ever been struck down as unconstitutional under the Second Amendment. The federal government is clearly free to regulate the possession and transfer of specific categories of firearms in order to promote public safety.

Yet despite the volume of evidence to the contrary, many Americans believe the Second Amendment protects individual rights. A Hearst poll conducted in the mid-1980s found that half of those surveyed believed that the Constitution guarantees their right to own a handgun.

The primary reason for this confusion is the National Rifle Association. In its advertising, direct-mail and public appearances the NRA plays upon the public's fear of big government and crime, offering private firearm—specifically handgun—ownership as the last bulwark against criminal and governmental takeover. The NRA has successfully transformed the public's perception of firearms ownership from a privilege to an inalienable constitutional right.

Contrary to the rhetoric, however, the issue has long been settled. The Second Amendment in no way guarantees an individual right to keep and bear arms.