Where Will the Second Amendment Revolution Lead?

The Constitution at a Crossroads

Introduction

Twenty-five years ago, it would have been outlandish to predict that the Supreme Court would recognize that the Second Amendment guarantees an individual right to bear arms. The Reagan Justice Department's version of *Crossroads*[1] did not mention the Second Amendment, and in 1991, no less of an authority than Warren E. Burger, the moderately conservative former Chief Justice of the United States, stated in an interview that the Second Amendment "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."[2] Burger's view, that the Second Amendment's right to bear arms could not be separated from militia service, was shared by other prominent conservatives, including failed Reagan Supreme Court nominee Robert Bork, who in 1989 argued that the Second Amendment works "to guarantee the right of states to form militias, not for individuals to bear arms."[3] But what Burger viewed to be a "fraud," and what Bork viewed as a mistaken view of the Constitution's original meaning, is now the law of the land, courtesy of the Supreme Court's controversial and deeply divided 5-4 decision in *District of Columbia v. Heller*.[4]

It is startling how much the ground has shifted. Twenty years ago, conservatives were debunking the idea that the Second Amendment protected an individual right. By February 2008, a month before *Heller* was argued, even progressive candidates such as Barack Obama were loudly and proudly stating the view that "there is an individual right to bear arms."[5] In *Heller*, the Supreme Court held for the first time that the more than two centuries old Second Amendment "conferred an individual

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[1] Office of Legal Policy, U.S. Dep't of Justice, *Report to the Attorney General, The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* 180 (1988).

[2] Warren E. Burger, *The Right To Bear Arms*, PARADE MAGAZINE, Jan. 14, 1990, at 4.

[3] Claudia Luther, *Bork Says State Gun Laws Constitutional*, L.A. TIMES, Mar. 15, 1989, at B5; see also Miriam Bensimhorn, *Advocates: Point and Counterpoint, Laurence Tribe and Robert Bork Debate the Framers' Spacious Terms*, LIFE, Fall 1991 (Special Issue), at 96, 98 ("[T]he National Rifle Association is always arguing that the Second Amendment determines the right to bear arms. But I think it really is people's right to bear arms in a militia. The NRA thinks that it protects their right to have Teflon-coated bullets. But that's not the original understanding." (quoting Robert Bork)).

[4] 554 U.S. 570 (2008).

[5] Nedra Pickler, *Obama Supports Individual Gun Rights*, ASSOCIATED PRESS, Feb. 15, 2008.

right to keep and bear arms."[6] In 2010, the Supreme Court recognized 5-4 in *McDonald v. City of Chicago* that this right was incorporated against the States through the Fourteenth Amendment.[7]

The question now is where this Second Amendment revolution leads. While President Obama, the National Rifle Association, and a majority of the Supreme Court may all agree there is an individual right to bear arms, there remains much debate about the contours of that right. So far, the Supreme Court has raised more questions than it has answered. It remains unclear exactly what the right protects or how the Court will balance the protection of Second Amendment rights against the government's interest in crime prevention and public safety through the regulation of firearms. The answer to these questions will determine whether hundreds of gun control laws at the federal, state, and local levels are preserved or struck down by the Court.

But there is another intriguing dynamic at play in the Second Amendment arena. In the wake of *Heller* and *McDonald,* it is clear that the recognition of an individual right to bear arms has expanded the constituency of Americans who take constitutional rights seriously, with both liberals and libertarian conservatives clamoring for robust protection of different parts of the Bill of Rights and disagreeing only about what parts deserve what level of protection. As a result, the Second Amendment revolution has at least some potential to lead to a more robust protection of constitutional rights across the board, in a "rising tide lifts all boats" kind of way. On the other hand, there is also the possibility that the Court may limit the application of Second Amendment rights in ways that could erode constitutional rights in other important areas or create special rules that apply only in the Second Amendment context. All that can be said at this point is that the Supreme Court has moved the Second Amendment to a crossroads, and that all Americans have an important interest in where the law in this area heads over the next twenty years.

Heller, *McDonald* and the Recognition of an Individual Right to Bear Arms

> "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."[8]

Among the provisions of the Bill of Rights, the Second Amendment stands out because of its explanatory preamble, which tells us why the Framers believed the right to keep and bear arms should not be infringed. The question this text has posed since the Amendment was ratified in 1791 is what bite the Amendment has outside of the state militia context. As Chief Justice Burger's comments indicate, for 216 years, the Supreme Court's answer to that question was "very little."

The Court's ruling in *District of Columbia v. Heller* changed this landscape dramatically. Justice Antonin Scalia led a five-Justice conservative majority to hold that "the District's ban on handgun possession in the home violates the Second Amendment," recognizing for the first time that the Second

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[6] 554 U.S. at 595.
[7] 130 S. Ct. 3020, 3025 (2010).
[8] U.S. CONST. amend. II.

Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[9] Justice Scalia reached this conclusion by minimizing the importance of the Amendment's opening preamble that references militias, instead focusing his attention on what he called the Amendment's "operative clause." After engaging in a free-ranging historical inquiry that considered common law sources predating the Second Amendment, contemporaneous understandings, and post-ratification practice at both the federal and state level, Justice Scalia concluded that the Second Amendment guaranteed an individual right to "keep and bear Arms."[10]

Four Justices, led by Justice John Paul Stevens, dissented in *Heller*, arguing that the majority's decision was contrary to "[t]he text of the Amendment, its history, and our [precedent]."[11] Justice Stevens emphasized the militia-focused purpose of the Second Amendment, as revealed by the text of its opening clause and the Amendment's drafting history.[12] And he was unpersuaded that the majority's historical examination was sufficient to justify stepping away from the Court's prior precedent to place new-found limitations on democratically enacted gun laws.[13]

Two years after *Heller*, in *McDonald v. City of Chicago*, a similarly divided Court concluded that "the Second Amendment right is fully applicable to the States."[14] Led by Justice Samuel Alito, a five-Justice majority in *McDonald* held that the Second Amendment was incorporated against the States by the Fourteenth Amendment, finding it "clear 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."[15] Leading the dissenters in *McDonald*, Justice Stevens countered that "[t]he so-called incorporation question was squarely and, in my view, correctly resolved in the late 19th century."[16] The majority in *McDonald* brushed aside the authority relied upon by Justice Stevens as being of little relevance since it "preceded the era in which the Court began the process of 'selective incorporation' under the Due Process Clause."[17]

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[9] 554 U.S. at 570, 635.
[10] *Id.* at 579-619.
[11] *Id.* at 637 (Stevens, J., dissenting).
[12] *Id.* at 640-662 (Stevens, J., dissenting).
[13] *Id.* at 662-680 (Stevens, J., dissenting).
[14] 130 S. Ct. at 3025.
[15] *Id.* at 3042. A plurality of the Court concluded that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment," *id*. at 3050, with Justice Clarence Thomas arguing in his concurring opinion that incorporation through the Fourteenth Amendment's Privileges or Immunities Clause "is a more straightforward path . . . that is more faithful to the Fourteenth Amendment's text and history." *Id.* at 3058-59 (Thomas, J., concurring).
[16] *Id.* at 3088 (Stevens, J., dissenting). In 1876, the Supreme Court stated in *United States v. Cruikshank* that the Second Amendment was "one of the amendments that has no other effect than to restrict the powers of the national government." 92 U.S. 542, 553 (1875). A decade later, in *Presser v. Illinois*, the Court again reiterated that the Second Amendment is "a limitation only upon the power of Congress and the National government, and not upon that of the States." 116 U.S. 252, 264-65 (1886). And the Court's 1894 decision in *Miller v. Texas* declared it "well settled that the restrictions of [the Second Amendment] operate only upon the federal power, and have no reference whatever to proceedings in state courts." 153 U.S. 535, 538 (1894).
[17] *Id.* at 3031.

Heller and *McDonald* Leave Unresolved the Substance of an Individual Right to Bear Arms

In two years, *Heller* and *McDonald* changed Second Amendment law faster and more significantly than had any cases in the previous 216 years combined, but these two cases created more questions than they answered. *Heller's* specific holding—that the Second Amendment protects a responsible, law-abiding citizen's right to possess an operable handgun in the home for self-defense—is relatively narrow. In many ways the true test will be determining the nature and scope of the right to bear arms and how judges should decide when a burden on that right exceeds constitutional limits.

In fact, the Court in *Heller* expressly acknowledged that its decision left "many applications of the right to keep and bear arms in doubt," since, as the "first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."[18] Until the Supreme Court provides further guidance, lower courts must navigate *Heller*'s *dicta* and use their own judgment to determine, first, whether a particular law falls within the ambit of the Second Amendment at all, and, second, how to scrutinize laws that do burden Second Amendment rights.

Will the Scope of the Right to Bear Arms Be Viewed Restrictively or Expansively?

The *Heller* opinion addressed the question of what the right to bear arms encompasses in a somewhat scattershot fashion. As a starting point, Justice Scalia explained that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," but he emphasized that the Second Amendment does not "protect the right of citizens to carry arms for *any sort* of confrontation."[19] According to Justice Scalia, "the right secured by the Second Amendment is not unlimited," that is, it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[20]

Drilling down on what the Second Amendment protects, Justice Scalia concluded that "self defense . . . was the *central component* of the right itself,"[21] leaving the right's importance for "[a] well regulated Militia" as a secondary consideration at best. Through this lens, Justice Scalia viewed the Court's prior decision in *United States v. Miller*—the precedent relied most heavily upon by the dissenters[22]—as standing only for the narrow proposition "that the Second Amendment does not

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[18] 554 U.S. at 635.
[19] *Id.* at 592, 595 (emphasis in original).
[20] *Id.* at 626.
[21] *Id.* at 599 (emphasis in original).
[22] *Id.* at 637-39 (Stevens, J., dissenting). As Justice Stevens highlighted, *Miller* held that "possession or use of a [weapon]" must have "some reasonable relationship to the preservation or efficiency of a well regulated militia," in order to implicate the rights guaranteed by the Second Amendment. *Id.* at 637 (quoting *Miller*, 307 U.S. 174, 178 (1939)). As Justice Stevens also pointed out, the Supreme Court reaffirmed *Miller* in 1980, stating in *Lewis v. United States* that a federal firearm statute prohibiting felons from possessing a firearm did not "trench upon any constitutionally protected liberties" under the Second Amendment. *Id.* at 638 n.3 (quoting *Lewis*, 445 U.S. 55, 73

protect those weapons not typically possessed by law-abiding citizens for lawful purposes."[23] That is, only certain types of "Arms" receive any protection at all under the Second Amendment. Understanding "the inherent right of self-defense" as "central to the Second Amendment right," Justice Scalia concluded that because "handguns are the most popular weapon chosen by Americans for self-defense in the home, . . . a complete prohibition of their use is invalid."[24]

What other boundaries exist on the Second Amendment right? As one example, the Court noted that prohibitions on carrying concealed weapons had repeatedly been held lawful under state Supreme Court decisions applying state analogues to the Second Amendment.[25] In addition, the Court observed that its opinion should not "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 arms."[26] The Court also highlighted the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" to suggest the Second Amendment may only protect "the sorts of lawful weapons . . . possessed at home" by ordinary people.[27] Finally, the Court noted that "these presumptively lawful regulatory measures" are identified "only as examples" and should not be viewed "to be exhaustive."[28]

Thus, *Heller* suggested that a number of common gun regulations were consistent with the right to bear arms, but did not explain why or provide the lower courts much in the way of an analytic framework for assessing the constitutionality of gun regulations. Indeed, the Court in *Heller* and *McDonald* almost seemed to go out of its way to avoid addressing how lower courts should analyze challenges to gun regulations, something that has left the lower courts divided in disarray.[29] The

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(1980)). Prior to *Heller*, as Justice Stevens explained, nine federal Courts of Appeals, relying on *Miller*, dismissed the notion that the Second Amendment guaranteed an individual right to bear arms disconnected from militia service. *See id.* at 638 n.2 (listing cases). Only the D.C. Circuit, in the case leading to *Heller*, and the Fifth Circuit had reached contrary conclusions, with the law challenged in the Fifth Circuit ultimately being upheld as a "reasonable" restriction on the individual right to bear arms. *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (upholding law limiting firearm possession to persons subject to a domestic violence order).

[23] *Id.* at 624-25.

[24] *Id.* at 629.

[25] *Id.* at 626.

[26] *Id.* at 626-27.

[27] *Id.* at 627.

[28] *Id.*at 627 n. 26.

[29] For example, since *Heller*, ten Circuit Courts of Appeal have considered the constitutionality of 18 U.S.C. § 922(g), which restricts firearm possession by felons, undocumented aliens, and other specific classes of persons. Although uniform in upholding the constitutionality of these laws, these courts have been deeply divided over why laws that make it unlawful for certain classes of people to possess firearms should be upheld. The Third, Fifth, and Ninth Circuits have upheld such laws based on the conclusion that the persons regulated by these laws fall outside the scope of the Second Amendment altogether. *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011) (concluding that felons fall outside the scope of the Second Amendment); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (same for undocumented aliens); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 294 (U.S. 2010) (same for felons).

standard of review applicable in Second Amendment challenges is one of the most important questions now being confronted in the lower courts.

How Will Courts Scrutinize Laws that Burden Second Amendment Rights?

As noted above, determining whether the "right of the people to keep and bear Arms" has been "infringed" is only the first step of a court's analysis. Equally if not more important is the second step: determining whether a law that burdens Second Amendment rights is nonetheless constitutionally permissible because of the importance of the government interests at stake. Courts have traditionally used differing levels of scrutiny, from rational basis to strict scrutiny, to determine whether a law burdening a constitutionally protected interest can be justified by the government's interest in adopting the law. In *Heller*, the Court expressly left for another day the question of what level of scrutiny should be applied to burdens on the right to bear arms.[30] And although the Court in *McDonald* recognized the right to bear arms as a fundamental right for purposes of incorporation, *McDonald,* like *Heller*, did not specify the precise level of scrutiny to be given laws that burden this right.[31]

In *Heller*, after determining that a ban on handguns kept and used for the protection of one's home burdens Second Amendment rights, Justice Scalia's opinion for the Court concluded that "[u]nder any of the standards of scrutiny that [the Court] ha[s] applied to enumerated constitutional rights," such a "prohibition on an entire class of 'arms' . . . would fail constitutional muster."[32] In a footnote, Justice Scalia explained that the challenged law "would pass rational-basis scrutiny," but clarified that he believed rational basis scrutiny inappropriate "to evaluate the extent to which a legislature may regulate a specific, enumerated right."[33] Justice Scalia also seemed to reject the "interest-balancing" approach that Justice Stephen Breyer proposed in a separate dissent, which "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[34] In doing so, Justice Scalia noted that "[c]onstitutional rights

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The First, Fourth, Seventh, and Tenth Circuits have recognized that such laws burden Second Amendment interests, but have nonetheless upheld them based on the importance of the government's interest in preventing these persons from possessing firearms. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (concluding that domestic violence misdemeanants are within scope of Second Amendment); *United States v. Chester*, 628 F.3d 673, 681, 683 (4th Cir. 2010) (same); *United States v. Skoien*, 614 F.3d 638, 642-44 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1674 (U.S. 2011) (same); *United States v. Reese*, 627 F.3d 792, 803 (10th Cir. 2010) *cert. denied*, 131 S. Ct. 2476 (2011) (same for persons subject to a domestic violence restraining order).

And the Sixth, Eighth, and Eleventh Circuits have upheld such laws without any significant analysis by interpreting *Heller* as having established certain categorical safe harbor exceptions to the Second Amendment. *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 322 (2010) (finding safe harbor exception for felon gun ban); *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1027 (2011) (same for habitual drug users gun ban); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (same for domestic violence misdemeanants gun ban).

[30] 554 U.S. at 628-29.

[31] 130 S.Ct. at 3036-38.

[32] 554 U.S. at 628-29.

[33] *Id.* at 628 n. 27.

[34] *Id.* at 634 (quoting *id.* at 689-90 (Breyer, J., dissenting)).

are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad,"[35] suggesting the possibility of a disjuncture between the historic right to bear arms and modern gun regulations. Justice Scalia's majority opinion also expressed doubts that an infringement of the right to bear arms could be cured by providing adequate and reasonable alternatives.[36]

McDonald did little to clear up confusion as to the appropriate standard of review. While the Court recognized that the right to bear arms was "fundamental" for purposes of incorporation, it, too, did not opine about the proper standard of review in Second Amendment cases. Instead, the Court went out of its way to provide "assurances" to the States that the Second Amendment "does not imperil every law regulating firearms," reiterating the list of possible exceptions it had earlier emphasized in *Heller*.[37] In the same breath, though, the Court nonetheless acknowledged that incorporation of the Second Amendment "will to some extent limit the legislative freedom of the States."[38]

If the Supreme Court left a roadmap for lower courts to follow, it is not clear at all what the starting point should be, where the courts should go, what route they should take to get there, or what rules they should follow along the way. This is problematic because, as well-known conservative Judge J. Harvie Wilkinson III cautioned in a recent Fourth Circuit opinion, "[t]his is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights."[39]

Post-*Heller*, lower federal courts have generally applied some form of "intermediate" scrutiny that gives weight to the important public safety considerations associated with firearms.[40] For example, the D.C. Circuit has applied intermediate scrutiny to the District of Columbia's updated registration requirements and prohibition on semi-automatic rifles and large-capacity magazines,[41] although in dissent Judge Brett Kavanaugh expressed his view that, if anything, strict scrutiny should apply.[42] A few district courts have reviewed Second Amendment challenges under strict scrutiny,[43] while others have

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[35] *Id.* at 634-35.

[36] *Id.* at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.,* long guns) is allowed.").

[37] 130 S.Ct. at 3047.

[38] *Id.* at 3047, 3050.

[39] *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (upholding against a Second Amendment challenge the application of a regulation prohibiting possession of a loaded handgun in a motor vehicle within a national park area).

[40] *See*, *e.g.*, *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010).

[41] *Heller v. District of Columbia*, 670 F.3d 1244, 1256-57, 1261-62 (D.C. Cir. 2011).

[42] *Id.* at 1284 (Kavanaugh, J., dissenting). Judge Kavanaugh's preferred approach though would be to "assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Id.* at 1271.

[43] *See*, *e.g.*, *United States v. Bay*, 2:09-CR-83 TS, 2009 WL 3818382 (D. Utah Nov. 13, 2009) (applying strict scrutiny but nonetheless concluding "that keeping guns out of the hands of convicted felons in order to protect society as a whole is a compelling government interest.")

expressed doubts that "intermediate scrutiny seems excessive."[44] And at least two Circuits have suggested an association between level of scrutiny and the degree of burden on the Second Amendment interest.[45]

Also potentially relevant to the emerging standard of review is the experience of state courts, given that 43 States recognize an individual right to bear arms under their own state constitutions,[46] and many state constitutions contain language remarkably similar to the Second Amendment.[47] State courts have been uniform in their conclusions that state laws burdening the right to bear arms should be subject to a "reasonable regulation test" that "should not be mistaken for a rational basis test,"[48] but is clearly less demanding than strict scrutiny.[49] While the a "reasonable regulation" test is not a common one in federal constitutional doctrine, the lower courts as well as the Supreme Court may find the longstanding practices of the states in interpreting language similar to the Second Amendment to be highly significant.

All of this leaves the future constitutionality of laws regulating ownership and possession of firearms in a state of uncertainty and flux. If the Supreme Court ultimately decides that it should follow the lead of state courts interpreting state Second Amendment analogues,[50] it is possible that the newly recognized federal individual right to bear arms may have little effect on most state and federal firearm regulations currently on the books. If the Court instead establishes a higher standard, akin to strict scrutiny, the Court's Second Amendment jurisprudence could ultimately call into question a broad range of gun laws in states across the nation.

The Second Amendment Revolution and Our Broader Constitutional Order

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[44] *United States v. Laurent*, 11-CR-322, 2011 WL 6004606 (E.D.N.Y. Dec. 2, 2011).

[45] *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (concluding that "the rigor of . . . judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right," while striking down Chicago firing-range training ordinance); *Nordyke v. King*, 644 F.3d 776, 784 (9th Cir. 2011) (suggesting a "substantial burden framework"), *reh'r en banc granted* 664 F.3d 774 (9th Cir. 2011).

[46] *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 205 (2006). Since Professor Volokh's article in 2006, Kansas has amended its Constitution to recognize an individual right to bear arms. Kan. Const. Bill of Rights § 4. Virginia has interpreted its state constitutional right to bear arms as coextensive with developments to the federal right recognized in *Heller*. *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 369 (Va. 2011). Hawaii has yet to expressly characterize whether its right to bear arms is individual, although its constitutional language is essentially identical to the Second Amendment. *State v. Mendoza*, 920 P.2d 357, 367 (Haw. 1996). Only Massachusetts has expressly stated that its right to bear arms does not guarantee an individual right. *Com. v. Davis*, 343 N.E.2d 847 (Mass. 1976). The constitutions of six States -- California, Iowa, Maryland, Minnesota, New Jersey, and New York, --have no provision concerning the right to bear arms.

[46] Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 n.12, 715-25 (2007).

[47] *See*, *e.g.*, R.I. CONST. art. I, § 22 ("The right of the people to keep and bear arms shall not be infringed.").

[48] *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003).

[49] *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 n.12 (2007).

[50] *See* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 380-84 (2011).

While both *Heller* and *McDonald* divided the Supreme Court 5-4 along ideological lines, the reactions and fault lines on the opinions outside the Court have been far less homogeneous. The Second Amendment revolution got critical academic support from liberal law professors including Sanford Levinson[51] and critical public support in 2008 from then-candidate Barack Obama. In *McDonald*, Constitutional Accountability Center filed a brief on behalf of preeminent law professors across the political spectrum arguing for incorporation of the Second Amendment right recognized in *Heller*. Meanwhile, prominent conservatives including Robert Bork and, more recently, Judge Wilkinson, have expressed serious reservations about where the revolution would lead.[52]

This ideological juxtaposition reflects the reality that the fight in *Heller* and *McDonald,* is, at bottom, a fight about rights. While the Supreme Court's decisions in *Heller* and *McDonald* leave an uncertain future for the regulation of firearms, they have, at the same time, helped create a broader and more ideologically diverse constituency for the Constitution's protection of individual substantive rights.[53] *McDonald* is a perfect illustration of this point, with the conservatives abandoning their usual hostility to substantive due process to hold that the right to bear arms is a substantive liberty protected from state abridgement by the Due Process Clause. In the future, one could imagine that the Court's conservative majority would be more responsive to the rights of criminal defendants when those criminal defendants happen to be gun owners, which is often the case given the many federal criminal laws pertaining to gun ownership and trafficking.[54] So, for example, it is at least conceivable that the Court would look more favorably on a Fourth Amendment search and seizure claim when it is brought by a "mom and pop gun shop,"[55] rather than by a drug dealer.

On the other hand, there is a risk that as the Court determines the contours of the Second Amendment it might reach conclusions that have negative consequences for the scope of other

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[51] *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

[52] Judge Wilkinson has admonished that *Heller* "represents a failure . . . to adhere to a conservative judicial methodology in reaching its decision," that "encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009). Judge Wilkinson identifies "four major shortcomings" in *Heller*: "an absence of a commitment to textualism; a willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation; a failure to respect legislative judgments; and a rejection of the principles of federalism." *Id.* Calling *Heller* an "act of judicial aggrandizement," he argues it "discarded the tenets of judicial restraint," violating the principle that "when the channels of democracy are functioning properly, judges should be modest in their ambitions and overrule the results of the democratic process only where the constitution unambiguously commands it." *Id.* at 254-56.

[53] To be sure, as a number of *Crossroads* chapters bear out, the right to bear arms is not the only area where conservatives are actively moving the law by expanding the scope of constitutional rights. See, e.g. *Citizens United v. FEC*, 130 S.Ct. 876 (2010); *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653 (2011); *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701(2007). For more on this, see *Crossroads* Chapters 4, 5, and 6. *Heller* and *McDonald*, nevertheless, remain distinctive since these cases turn not merely on the permissibility of some species of state regulation, but on the more fundamental question of whether the Constitution protects an individual right to bear arms at all.

[54] This is one of the areas where ideological lines are already scrambled on the Court, with an unlikely combination of Justices, including Justices Antonin Scalia and Clarence Thomas, promoting an expansive, right-protecting view of the Sixth Amendment. *See*, *e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004).

[55] *Szajer v. City of Los Angeles*, 632 F.3d 607, 608 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 98 (U.S. 2011).

constitutional protections. In other words, it is possible that questions concerning the scope of the Second Amendment right will bleed into and dilute the protection afforded by other constitutional protections. For example, both the Second Amendment and the Fourth Amendment's guarantee against unreasonable searches and seizures protect the right of "the people." If the Court interprets the phrase "the people" as restricting the scope of the Second Amendment's protection to a subset of persons within the United States, this restrictive view may be read into rights protected under the Fourth Amendment, and perhaps into other areas of the Constitution as well.[56]

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The Supreme Court in *Heller* and *McDonald* opened the door for federal courts to review whether firearm regulations unconstitutionally infringe on the newly recognized federal individual right to bear arms. But whether the opening is a crack or a chasm is far from certain. It also remains to be seen whether the Second Amendment revival will lead to a more expansive, or more restrictive, approach by the Court to other parts of the Bill of Rights. The only things that are clear at this point are that the Court's recent Second Amendment rulings have unsettled constitutional law and changed the nature of the debate over the Bill of Rights.

[56] A restrictive definition of "the people" is perhaps implied by the *Heller* majority. 554 U.S. at 580-1. But a restrictive reading of "the people" seems to stand in opposition to Justice Anthony Kennedy's concurring opinion in *Verdugo-Urquidez*, which provided the fifth vote for the conclusion that the Fourth Amendment did not apply extra-territorially in Mexico. According to Justice Kennedy, the phrase "the right of the people" "may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it." 494 U.S. 259, 276 (1990) (Kennedy, J., concurring). In Justice Kennedy's view, "reference to 'the people' in the Fourth Amendment" cannot be viewed as "a source of restricting its protections." *Id.* Where Justice Kennedy stands today is uncertain, since he signed onto the majority opinion in *Heller* in full without providing a concurrence clarifying his views.