

Newscast Media WASHINGTON, D.C.—The biggest debate going on is the debate on gun control that has escalated within the past few weeks. There is talk of Barack Obama using his executive powers to tackle the gun issue, while others wish to see restraint being exercised on this issue. Either way, the debate seems to be driven by emotion, rather than reason or critical thinking. Having waited for weeks without reviewing the ongoing debate, I will now present a judicial review on this subject that has already been settled in the United States Supreme Court.

It would be counterproductive for government to attempt to abrogate well-settled decisions and case law, and also to violate the Constitution's Second Amendment that public officials swear to protect. When Barack Obama took the oath of office four years ago, and when he does so again on January the 20th, the following are the utterances made:

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." Any Executive Order Obama issues that infringes upon the US Constitution's Second Amendment, would not only be a violation of the oath he took publicly, but also a blasphemy upon the Constitution he swore to preserve, protect and defend.

The Supreme Court presented a very intellectual argument and ruling in 2008 and deconstructed the Second Amendment in regard to the selective banning of firearms in the United States Supreme Court, 554 U. S. _____ (2008)) decision. I will present highlights of the ruling, in simple terms, using the words of the justices.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State (prefatory clause), the right of the people to keep and bear Arms, shall not be infringed (operative clause)."

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." See J. Tiffany, A Treatise on Government and Constitutional Law §585,p. 394 (1867)

Logic demands that there be a link between the stated purpose and the command.

Breakdown of the Operative Clause:

- (i) Right of the people —We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.
- (ii) To keep and bear Arms The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of defence." 1 Dictionary of the English Language 107 (4th ed.) (hereinafter Johnson). Timothy Cunningham's important 1771

legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.

Just as the First Amendment protects **modern forms of communications**, e.g., *Reno v. American Civil Liberties Union*, 521 U. S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo v. United States*, 533 U. S. 27, 35–36 (2001), the Second Amendment extends, prima facie, **to all instruments that constitute bearable arms**, **even those that were not in existence at the time of the founding**.

We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Johnson 1095. Webster defined it as "[t]o hold; to retain in one's power or possession." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons." "Keep arms" was simply a common way of referring to possessing arms, for militiamen *and everyone else*.

At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In *Muscarello v. United States*, 524 U. S.125 (1998).

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second

Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state." It is clear from those formulations that "bear arms" did not refer only to carrying a weapon in an organized military unit.

Meaning of the Operative Clause:

Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment.

We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.

*(What the Supreme Court is saying is, the pre-existing right, is the right to self defense).

The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States v. Cruikshank*, 92 U. S. 542, 553 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.

The Second amendment declares that it shall not be infringed . . . "

Breakdown of the Prefatory Clause:

The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State "

(i) "Well-Regulated Militia." In *United States v. Miller*, 307 U. S. 174, 179 (1939), we explained that "the Militia comprised all males physically capable of acting in concert for the common defense."

That definition comports with founding-era sources. See, e.g., Webster ("The militia of a country are the able bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations"); The Federalist No. 46, pp. 329, 334 (B. Wright ed. 1961) (J. Madison) ("near half a million of citizens with arms in their hands"); Letter to Destutt de Tracy (Jan. 26, 1811), in The Portable Thomas Jefferson 520, 524 (M. Peterson ed. 1975) ("[T]he militia of the State, that is to say, of every man in it able to bear arms").

Unlike armies and navies, which Congress is given the power to create ("to raise . . . Armies"; "to provide . . . a Navy," Art. I, §8, cls. 12–13), the militia is assumed by Article I already to be in existence. Congress is given the power to "provide for calling forth the militia," §8, cl. 15; and the power not to create, but to "organiz[e]" it—and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force.

Finally, the adjective "well-regulated" implies nothing more than the imposition of proper discipline and training. Declaration of Rights §13 (1776), in 7 Thorpe 3812, 3814 (referring to "a well-regulated militia, composed of the body of the people, trained to arms").

(ii) "Security of a Free State."

Joseph Story wrote in his treatise on the Constitution that "the word 'state' is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community." 1 Story §208; see also 3 id., §1890 (in reference to the

Second Amendment's prefatory clause: "The militia is the natural defense of a free country").

There are many reasons why the militia was thought to be "necessary to the security of a free state." **First,** of course, it is useful in repelling invasions and suppressing insurrections. **Second,** it renders large standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. The Federalist No. 29, pp. 226, 227 (B. Wright ed. 1961) (A. Hamilton). **Third,** when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

(iii) Relationship between Prefatory Clause and Operative Clause:

The U.S. Supreme Court then made this argument: We reach the question, then: *Does the preface fit with an operative clause that creates an individual right to keep and bear arms?* It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. See, e.g., Letters from The Federal Farmer III (Oct. 10, 1787), in 2 The Complete Anti-Federalist 234, 242 (H. Storing ed. 1981). John Smilie, for example, worried not only that Congress's "command of the militia" could be used to create a "select militia," or to have "no militia at all," but also, as a separate concern, that "[w]hen a select militia is formed; the people in general may be disarmed."

St. George Tucker's version of Blackstone's Commentaries, as we explained above, conceived of the Blackstonian arms right as necessary for self-defense. He equated that right, absent the religious and class-based restrictions, with the Second Amendment. See 2 Tucker's Blackstone 143. In Note D, entitled, "View of the Constitution of the United States," Tucker elaborated on the Second Amendment: "This may be considered as the true palladium of liberty The right to self-defense is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."

The U.S. Supreme Court in 2008 concluded: "Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." (Pp.64, United States Supreme Court, 554 U. S._____ (2008)).