



Second Amendment

*Please Note: This summary of the Second Amendment to the U.S. Constitution was written prior to the U.S. Supreme Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 645, 169 L. Ed. 2d 417 (2007). While this summary mentions *Heller*, it does not discuss that opinion.*

The [Second Amendment to the U.S. Constitution states](#), “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.”

On March 18, 2008, the U.S. Supreme Court heard oral arguments in the case *District of Columbia v. Heller*, 128 S. Ct. 645, 169 L. Ed. 2d 417 (2007), an appeal of [Parker v. District of Columbia, 478 F.3d 370 \(D.C. Cir. 2007\)](#), in which the U.S. Court of Appeals for the District of Columbia Circuit held that the Second Amendment protects an individual right to keep and bear arms that is unrelated to service in a well-regulated militia. This ruling was in contrast to well over 200 federal and state court cases, and U.S. Supreme Court precedent, holding that the Second Amendment does not confer an individual right to own or possess firearms. The Supreme Court is expected to issue its ruling in the case in June 2008. Please see the [District of Columbia v. Heller Case](#) page for more detailed information.

In *United States v. Miller*, 307 U.S. 174 (1939), the last case in which the United States Supreme Court ruled directly on the meaning of the Second Amendment, the Court refused to divorce the goal set forth in the modifying clause of the Amendment, that is, a well-regulated state militia, from the activity described in the final clauses, that is, the keeping and bearing of arms. Stating that the “obvious purpose” of the Second Amendment was to “assure the continuation and render possible the effectiveness of the state militia,” the high court rejected the notion urged by the *Miller* defendants that their indictments for transporting an unregistered sawed-off shotgun across state lines violated their alleged constitutional “right to bear Arms.” *Id.* at 178. Because the defendants had made no showing that their possession or use of the gun had “some reasonable relationship to the preservation or efficiency of a well regulated militia,” the Court held that the Second Amendment afforded them no protection against the federal law under which they were charged. *Id.* Notably, the evidentiary issue considered by the Court was whether the defendants’ possession or use of the weapon bore any reasonable relation to participation in the organized state militia, and the Court rejected defendants’ proposition that the amendment protects an isolated, individual right to possess a firearm. *Id.*

This definitive holding by the highest court of the branch of government charged under our Constitution with interpreting that document is, under our system of jurisprudence, binding on all lower courts. Since *Miller*, no federal appellate or state appellate court has invalidated a firearms regulation on Second Amendment grounds.

In one recent case, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the U.S. Court of Appeals for the Fifth Circuit rejected a Second Amendment challenge to a federal law prohibiting firearms possession by persons subject to a domestic restraining order. The *Emerson* case received considerable publicity because the trial court had, in a clear departure from prior case law, struck the law down on Second Amendment grounds. Although all three judges on the Fifth Circuit panel agreed that the law was constitutional, two of the judges expressed their personal view that the Second Amendment protects an individual right to possess firearms. This view is *dictum* (i.e., unnecessary to the outcome of the case) and is not binding on other courts. For a summary of *Emerson* and other relevant appellate decisions, see LCAV’s [Summary of Second Amendment Case Law](#).

Although the *Miller* case is the only U.S. Supreme Court case directly ruling on the scope of the Second Amendment, the Supreme Court has not been silent on the issue since the holding. In *Lewis v. United States*, 445 U.S. 55 (1980), the Court was faced with a challenge to a federal law criminalizing possession of a firearm by a convicted felon, a challenge brought under the Equal Protection Clause. If the law had infringed a fundamental constitutional right, the Court would have been bound by its own prior rulings to apply what is called a “strict standard” of review of the challenged law. Where such a right is not impacted, the review standard is the lower, rational basis review. In *Lewis*, the Court used the rational basis standard of review to determine the constitutional issue, specifically noting that the challenged law did not “trench on any constitutionally protected liberties.” *Id.* at 65, n.8.

The high court’s actions have also been consistent with the *Miller* holding. In numerous cases in which the lower federal courts rejected individual “right to bear Arms” challenges to gun regulations and the losing plaintiffs have sought review by the U.S. Supreme Court, the Court has declined to review those cases. *See, e.g. Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000) (Second Amendment establishes no right to possess a firearm apart from the role possession of that gun might play in maintaining a state militia).

In addition, the Second Amendment constrains only the federal government. *U.S. v. Cruikshank*, 92 U.S. 542, 553 (1876) (the amendments that make up the Bill of Rights were enacted as constraints on congressional action, not state or local action). Under the incorporation doctrine, the Court has held that certain of the Bill of Rights amendments are “incorporated” by the Fourteenth Amendment as a constraint on state and local action. However, until the Court has held specifically that a given amendment is “incorporated,” it is only a constraint on Congress, not on state or local governments. The Second Amendment has never been “incorporated” and is therefore not a constraint to state or local regulation. *See Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (1982).

Unlike the federal constitution, some state constitutions do contain “right to bear arms” provisions which state specifically that the right protected is an individual right. In general, these provisions have been interpreted by the courts to be consistent with a wide range of firearms regulations, including, for example, bans on classes of firearms. *See, e.g., Quilici*, 695 F.2d at 267-268 (upholding Morton Grove’s ban on handguns against a challenge based on the Illinois Constitutional right to bear arms).

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