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## **The Court Almost Gets It Right on Guns** **by Sheldon Richman**

Advocates of freedom barely dodged a bullet when the U.S. Supreme Court ruled 5-4 that the right to keep and bear arms, the subject of the Second Amendment, is an individual not a collective right. Opponents of gun ownership have long maintained that the Amendment's reference to the militia indicates that the right does not apply to private individuals.

Thankfully, all the justices apparently saw this for the nonsense it is. Even the dissenters did not deny that the right to own a gun is an individual right. The problem with their view is that they saw it as a highly restricted right.

Writing for the majority, Justice Antonin Scalia said the Amendment's preface — "A well regulated militia, being necessary to the security of a free state" — "announces the purpose for which the right was codified: to prevent elimination of the militia." It should not, Scalia went on, be seen as limiting the right specified in its main clause: "the right of the people to keep and bear arms, shall not be infringed."

Scalia's opinion goes to the heart of the matter. The Second Amendment *recognizes* an inherent right that precedes government. It does not purport to create one. Using historical analysis, Scalia shows that the opening clause, rather than limiting the stated right, merely explains why it was being codified in the Bill of Rights. He reminds us that when the Constitution was drafted, many people feared that the powerful central government would disarm the militias, which at the time comprised all able-bodied white men, in favor of a standing army, an object of great suspicion. Citing the importance of private gun ownership to a capable militia was meant to allay such fears. But according to both history and grammar, the militia reference did not impose a restriction on who has the right to keep and bear arms.

In his dissent Justice John Paul Stevens misses this point. He writes that since the explicit purpose of the Second Amendment does not include self-defense (and hunting), those uses of firearms couldn't have been intended by the Framers. The key word here is "purpose." As Scalia shows, the militia reference does not indicate the purpose of the *right*, but rather the purpose of

*codifying* the right, which everyone took for granted back then (Michael Bellesiles to the contrary notwithstanding).

The Framers apparently understood the principle of rights better than Stevens does. If one has a right, one may exercise it for any purpose consistent with the rights of others. Keeping and bearing arms for self-defense or hunting violates no one else's right. So it is entirely consistent with the Amendment. Stevens's conclusion implies that government creates rights and thus can create a right for one purpose (the militia) but not for others (self-defense). That would amount to a wholesale rejection of the Jeffersonian philosophy found in the Declaration of Independence and a repudiation of the American Revolution.

The misunderstanding of the nature of rights runs deep. After the decision, the *Chicago Tribune* called for repeal of the Second Amendment. But if rights are inherent in human nature, repeal would make no difference. A right would not disappear merely because a government document ceased to say it should not be infringed. That would not make it legitimately infringeable. Had the Bill of Rights never been added to the Constitution, do the *Tribune* editors seriously believe we would have had no inherent right to freedom of speech and the press?

Here, as much as I hate to do it, I must invoke Alexander Hamilton. While Hamilton was a nationalist and advocate of centralized power, he made an important argument against adding a bill of rights to the Constitution. (We may ignore the issue of his sincerity.) In Federalist 84 he wrote,

[Why] declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given [in the Constitution] by which restrictions may be imposed?

Mutatis mutandis, why should it be said that the right to keep and bear arms shall not be infringed, when no power is given by which restrictions may be imposed? Someone might argue that the government could forbid private ownership of guns in the name of the general welfare, but that would require him to demonstrate that the general welfare would be served if guns were banned.

### **The majority's faulty thinking**

Scalia's opinion is fine as far as it goes — though it contains some serious flaws at the level of basic principle. The case resulted from a challenge to a District of Columbia law that bans handguns from private homes. (The law also requires that shotguns and rifles be kept disassembled or trigger-locked.) In Scalia's words,

[The] enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.

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.

Unfortunately, because of a fundamental misunderstanding of rights, the majority opinion would permit gun regulations short of outright bans. Scalia writes,

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.... For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.

Well of course, no right is unlimited — if that means there is no right to violate rights. But Scalia means more than that. How else to explain his remark about carrying a concealed weapon, which in itself violates no rights whatever? Thus Scalia, as much as Stevens, has a crabbed notion of the right to keep and bear arms. He, for example, apparently would accept the prohibition on gun ownership by felons and “the mentally ill.” But if rights are inherent in our nature, why should a felon who is no longer imprisoned or someone branded mentally ill by the fundamentally corrupt system identified by Thomas Szasz be denied the right to self-defense? Individuals should be free to engage in any behavior that does not violate the rights of others. The doctrine of preventive-rights restrictions is the pathway to total government.

Existing regulations will now be tested in court. In the end, the ruling may have little effect on most gun laws, but the importance of the ruling cannot be denied. Think of what would have followed had the case gone the other way.

In a second dissenting opinion, Justice Stephen Breyer writes,

Far more important are the unfortunate consequences that today’s decision is likely to spawn. Not least of these, as I have said, is the fact that the decision threatens to throw into doubt the constitutionality of gun laws throughout the United States. I can find no sound legal basis for launching the courts on so formidable and potentially dangerous a mission.

Well, excuse me, Justice Breyer, if protection of our freedoms imposes a formidable and potentially dangerous mission on the Court. Talk about wagging the dog! It would be far more dangerous — to the people — if firearms were banned. Criminals would get them anyway. But the law-abiding among us would be left vulnerable.

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**This article was originally published in the October 2008 edition of *Freedom Daily*.**