"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." (U.S. Const.)

THE TRUE PALLADIUM OF LIBERTY

By: James Baehr

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The Second Amendment remains among the most hotly contested of rights laid out in the Bill of Rights, with widespread divergence in elite and popular opinion concerning its fundamental meaning. Some legal scholars have traditionally "marginalize[d] the Amendment," describing it as a protection of a collective right to "bear arms" only in connection with service in a militia and having little application today (Levinson, 1989). Meanwhile, a recent poll shows that 73.4 percent of Americans believe the Second Amendment protects the rights of "law-abiding citizens . . . to legally own firearms for things like hunting, sport and personal protection" (McLaughlin, 2021). The tension between these two views, the collective and the individual rights model, came to a head in the *District of Columbia v. Heller*, 554 U.S. 570 (2008), where a divided Supreme Court reviewed the text, history, and precedent of the Amendment and held in favor of individual rights.

Proponents of the collective rights view argue that the prefatory clause of the Amendment — focusing on a "well regulated Militia" and the maintenance "of a free State" — limits its application to a collective purpose (Levinson, 1989). The Founders certainly expressed concern over the potential tyranny of a national government and believed the states and the people would provide a counterweight to such power. In Federalist 46, Madison wrote that even when facing a powerful federal government equipped with a "regular army . . . the State governments with the people on their side would be able to repel the danger" (Madison, 1788). The majority in *Heller* did not discount the preface but maintained that it also supported an individual right to hold arms. Madison later states in Federalist 46 that the Americans "possess" an advantage "over the people of almost every other nation" in that they are "armed" (Madison, 1788). The *Heller* decision focused on the Founders knowledge 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 by simply taking away the people's arms, enabling . . . a standing army to suppress political opponents" (*Heller*, 554 U.S. at 5980). The Second Amendment was a hedge against tyranny by prohibiting the disarmament of the people.

The *Heller* decision also turned on the drafters' focus on the inherent nature of the right. The wording "shall not be infringed" meant that the Amendment implicitly "codified a *pre-*

existing right" rather than creating a new one (*Heller*, 554 U.S. at 592) (emphasis in original). Founding-era scholar St. George Tucker called the Amendment "the true palladium of liberty . . . The right of self defence is the first law of nature . . . [w]herever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction" (*Heller*, 554 U.S. at 605) (quoting Tucker). Tucker explicitly contrasted this inalienable right with the "English game laws" that restricted gun ownership in England for hunting. Such a view that the Amendment protected inherent, individual rights to gun ownership for more than just militia membership — but defense and hunting — held the day in *Heller*. Blackstone likewise described gun ownership as "fundamental" and "the natural right of resistance and self-preservation" — broader than mere militia service (*Heller*, 554 U.S. at 594) (quoting Blackstone). In light of recent polling, such a view still holds with the American people (McLaughlin, 2021).

The Court has not fully clarified which specific "arms" Americans can bear — and where. The holdings of *Heller* and the follow-on case of *McDonald v. City of Chicago*, 561 U.S. 742 (2010) that incorporated the Second Amendment to the states have been described as "narrowly confined to invalidating bans on the possession of handguns by civilians in their own homes" (Spalding et al., 2013). The *Heller* Court declined 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 or government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" (*Heller*, 554 U.S. at 626-27). The Court also noted approvingly the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" despite the martial nature of the preface (*Heller*, 554 U.S. at 627). *Heller*, however, approvingly cited several opinions that struck down prohibitions on the open carrying of firearms (*Heller*, 554 U.S. at 629). The Supreme Court recently agreed to hear a challenge to a New York state law that significantly restricts the carrying of firearms outside the home, suggesting that the Court is prepared to expand its interpretations of the Second Amendment's protections (Williams, 2021).

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WORKS CITED

U.S. Const. amend. II.

District of Columbia v. Heller, 554 U.S. 570 (2008)

Levinson, S. (1989). The embarrassing Second Amendment. *Yale Law Journal*, 99, 637. https://digitalcommons.law.yale.edu/ylj/vol99/iss3/6

Madison, J. (1788). Federalist No. 46. *The Federalist*. https://founders.archives.gov/documents/Madison/01-10-02-0261

McLaughlin & Associates. (2021). National Second Amendment Foundation topline. https://www.saf.org/wp-content/uploads/2021/04/National-SAF-Topline-4-13-21.pdf

Spalding, M. & Forte, D. (Eds.). (2014). *The Heritage Guide to the Constitution*. Regnery Publishing.

Williams, P. (2021) Supreme Court to take up major Second Amendment concealed handgun case. *NBC News*. https://www.nbcnews.com/politics/supreme-court/supreme-court-consider-right-carry-gun-outside-home-n1265357