

## The Breakfast Club

### Constitutional Minute for 7 March 2023

#### Right #7: Freedom to Keep and Bear Arms

In 1859, the Texas Supreme Court, in *Cockrum v State*, 24Tex394 (1859), said: "*The right of a citizen to bear arms, in lawful defense of himself or the State, is absolute. He does not derive it from the State government. It is one of the "high powers" delegated directly to the citizen, and is excepted out of the general powers of government. A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the lawmaking power.*" (Emphasis added)

Why did this court opinion not settle the matter, after 1859 at least, of whether normal citizens (opposed to militia members) should be allowed to keep and bear firearms? Well, first, because it was the opinion of the Texas Supreme Court and not the U.S. Supreme Court and second, the "arms" involved in this case was a Bowie knife. But still, taken on its face, the verbiage is succinct and to the point, and "arms" can certainly be taken to mean all weapons which could be used to defend one's life.

Nevertheless, the issue of gun ownership vs gun control has been one of the key issues separating the political right from the political left, at least over the last 70 years or so. And then along came *D.C. v. Heller* in 2008 and *McDonald v. Chicago* two years later. Most conservatives hoped the combination of these two cases would settle the matter for all Americans; it certainly did not. Instead, what we've experienced since these two landmark cases is an even more virulent attempt by gun control fanatics to craft even craftier laws to infringe upon this fundamental right. In the first two years after *Heller*, federal courts considered the constitutionality of gun laws in more than two hundred cases. So much for setting precedent. Today, the hope turns to *NYSRPA v. Bruen*. We'll see.

Every American concerned about the gun issue should read the entirety of these three decisions, I mean that sincerely; and I've included links to them at the end of this essay. Particularly when you read *Heller*, you will find the reason the left remains steadfast in their attempts to restrict gun ownership, any way they can: Unfortunately, Justice Antonin Scalia left them an open door to do so.

We've talked about this in the past: the Supreme Court must respond to the question posed to them, they can't go off on a wild-goose chase as they settle a case. In *Heller*, the question was: are the District of Columbia laws which make it a crime to carry an unregistered firearm and making the legal registration of firearms so difficult as to comprise a ban on legal handgun ownership by private citizens, constitutional? Furthermore, is the D.C. code requiring all legal firearms kept in the home be disassembled or equipped with a trigger lock at all times also unconstitutional? With narrow questions, the Court usually rules narrowly. So, the Court's decision only applied to the right to "keep and bear" a "ready to use" firearm in the home for the purpose of defense of self and other occupants. But then Justice Scalia (who wrote the opinion) said: "*Like most rights, the right secured by the Second Amendment is not unlimited.*" That was the opening the Left was looking for. Where are the limits? What restrictions can be put in place without incurring a constitutional violation? That is now where the right to keep and bear arms is being contested in the courts.

The *Heller* decision unleashed a storm of criticism from the Left, particularly cries of "judicial activism." A very interesting series of "point-counterpoint" essays occurred between Robert Levy and David Kopel on one side, and Dennis Henigan and Erwin Chemerinsky on the other appeared on the [Cato Unbound](#) website. Read it. It will show you how the Left thinks.

Of course, for the Left, it was not judicial activism in 1965 when the Court invented a right to privacy nowhere mentioned in the Constitution, a right which eight years later was enlarged to include a “right” to abort a baby. That was somehow perfectly normal jurisprudence; but for Scalia to conclude an individual right to own guns was found in the Constitution, well, that was simply going too far.

One criticism I have of the Heller decision is Scalia did not rely on what is called by many writers the *first law of nature*: the right of self-preservation. Englishmen Thomas Hobbes,<sup>i</sup> John Locke,<sup>ii</sup> and Sir William Blackstone,<sup>iii</sup> along with many American founding era writers mentioned it. Scalia includes a few quotes mentioning the right of self-preservation in his opinion, but he makes no attempt to base the right to keep and bear arms on that more fundamental natural right, focusing instead on the wording of the 2<sup>nd</sup> Amendment. Here are some of my favorite founding era quotes on “the first law of nature:”

"Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature."<sup>iv</sup> (Samuel Adams)

“The supreme of all laws, in all cases, is that of *self-preservation*.”<sup>v</sup> (Thomas Paine)

"*Self-preservation is the first principle of our nature*. When our lives and properties are at stake, it would be foolish and unnatural to refrain from such measures as might preserve them because they would be detrimental to others."<sup>vi</sup> (Alexander Hamilton)

The current Virginia Assembly session shows us that the Left has no intention of giving up on their campaign to somehow, some way remove guns from American society (except in the hands of the military, the police, the Secret Service, the CIA, the FBI, the IRS, private security for celebrities and banks, and, well there are a few other people we’ll let have them, but that’s it, no more, nada, zip).

[Some writers](#) are predicting that the combination of the three cases cited here signal the death knell of gun control; that, over time, nearly all gun control measures will be found unconstitutional when the “text and history criteria” of the present Court is applied. I’m not that optimistic.

Keep informed and speak up if you want to retain this right!

For further reading:

[D. C. v. Heller](#)

[McDonald et al. v. City of Chicago, Illinois](#)

[NYSRPA v. Bruen](#)

[After Heller: The New American Debate About Guns.](#)

[That Every Man be Armed; The Evolution of a Constitutional Right, by Stephen P. Halbrook](#)

Next week: Right #8: Protection Against Quartering

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<sup>i</sup> <https://archive.org/details/hobbessleviathan00hobbuoft>

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<sup>ii</sup> <https://fee.org/articles/john-locke-natural-rights-to-life-liberty-and-property/>

<sup>iii</sup> <https://archive.org/details/BlackstoneVolume1>

<sup>iv</sup> Samuel Adams, The Rights of the Colonists, The Report of the Committee of Correspondence to the Boston Town Meeting, Nov. 20, 1772

<sup>v</sup> Thomas Paine, The Writings of Thomas Paine, Collected and Edited by Moncure Daniel Conway (New York: G.P. Putnam's Sons, 1894). Vol. 3.

<sup>vi</sup> Alexander Hamilton, A Full Vindication of the Measures of the Congress, &c., December 15, 1774.