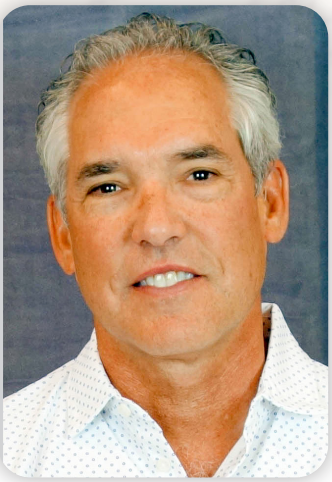
PRESIDENT'S MESSAGE



The History of Gun Legislation Starts with the Second Amendment

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Before my time ends as president of the State Bar of Nevada, I wanted to write about something that is dear to me as a native Nevadan and Westerner. I grew up in military family in Henderson and learned to shoot a weapon by the time I was 8 years old, and I've hunted all over this beautiful state. I learned that guns can be a useful tool, but you must respect them, for they can do great harm as well.

Since the1981 assassination attempt of President Ronald Reagan and the shooting of James Brady that eventually led to his death, we have watched our country come together to support gun regulation, followed by a proliferation of the purchase of weapons to such an extent that we have more weapons in civilian hands than any other nation. As of 2017, Americans own more than 400 million firearms, which works out to an estimate of 120 firearms for every 100 persons—a ratio of more than twice the amount of the next country.

While I appreciate the right to own firearms, there must be a balance to protect all citizens' rights to live without the fear of intentionally or accidently becoming a victim of violence. The history of firearms law starts with the Second Amendment to the Constitution of the United States, which was adopted in 1791 as part of the Bill of Rights. The Second Amendment provided a constitutional check on congressional power under Article I, Section 8 to organize, arm and discipline the federal militia. The Second Amendment reads, "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." In modern times, Americans refer to this right as an individual's right to carry and use arms for self-defense. In addition to checking federal power, the Second Amendment also provided state governments with what Luther Martin described as the "last coup de grace" that would enable states "to thwart and oppose the general government."

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The first major case I could find on the subject was *United States v. Cruikshank*, 92 U.S. 542 (1876). The court held that the Bill of Rights did not apply to private actors or to state governments despite the adoption of the 14th Amendment. The decision reversed criminal convictions for civil rights violations committed in aid of anti-reconstruction murders. Decided during the Reconstruction Era, the case represented a major blow to federal efforts to protect the civil rights of African Americans. The case arose from the hotly disputed 1872 Louisiana gubernatorial election and the subsequent Colfax massacre, in which dozens of Black people and three white people were killed. Federal charges were brought against several white insurgents under the Enforcement Act of 1870, which prohibited two or more people from conspiring to deprive anyone of their constitutional rights. In his majority opinion, Justice Morrison Waite overturned the defendants' convictions, holding that the plaintiffs had to rely on state courts for protection. *Cruikshank* was the first case to come before the Supreme Court that involved a possible violation of the Second Amendment.

After *Cruikshank* came *Presser v. Illinois*, 116 U.S. 252 (1886). In this landmark decision, the Supreme Court held, "Unless restrained by their own constitutions, state legislatures may enact statutes to control and regulate all organizations, drilling, and parading of military bodies and associations except those which are authorized by the militia laws of the United States."

In *United States v. Miller*, 307 U.S. 174 (1939), the court addressed the 1934 National Firearms Act (NFA), which was passed in response to public outcry over the St. Valentine's Day Massacre. The NFA required fully automatic firearms and short-barreled rifles and shotguns to be registered with the government department that would eventually be known as the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The Supreme Court held that "sawed-off" weapons were not part of any ordinary military equipment, or that their use could contribute to the common defense.

The case that appears to be the most cited with respect to this issue is *District of Columbia v. Heller*, 554 U.S. 570 (2008), which is the landmark decision ruling that the Second Amendment protects an individual's right to keep and bear arms, unconnected with service in a militia, for traditionally lawful purposes, such as self-defense within the home. The decision also determined that the District of Columbia's handgun ban

and requirement that lawfully owned rifles and shotguns be kept "unloaded and disassembled or bound by a trigger lock" violated this guarantee. It also stated that the right to bear arms is not unlimited, and that guns and gun ownership would continue to be regulated. It was the first Supreme Court case to decide whether the Second Amendment protects an individual right to keep and bear arms for self-defense or if the right was intended solely for state militias. In regard to the scope of the right, the court wrote:

> "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken 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 and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

The court also added the private ownership of machine guns is something that can also be regulated, and the court stated that while the amendment protected arms like handguns that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"), the amendment may not by itself protect machine guns. The decision stated:

> "It may be objected that if weapons that are most useful in military service – M16 rifles and the like – may be banned, then the Second Amendment right is completely detached from the prefatory clause."

In a dissenting opinion, Justice John Paul Stevens stated that the court's judgment was "a strained and unpersuasive reading" which overturned longstanding precedent, and that the court had "bestowed a dramatic upheaval in the law." Stevens also stated that the amendment was notable for the "omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense," which was present in the Declarations of Rights of Pennsylvania and Vermont.

Two years later in *McDonald v. Chicago*, 561 U.S. 742 (2010), the court found that an individual's right to "keep and bear arms," as protected under the Second Amendment, is incorporated by either the Due Process Clause or Privileges or Immunities Clause of the 14th Amendment and is thereby enforceable against the states. The decision cleared up the uncertainty left in the wake of *Heller* as to the scope of gun rights in regard to the states.

In a 5-4 decision, the majority agreed that the 14th Amendment incorporates the Second Amendment right recognized in *Heller* but was split on the rationale. Justice Stephen Breyer wrote, "In sum, the Framers did not write the Second Amendment in order to protect a private right of armed self-defense. There has been, and is, no consensus that the right is, or was, 'fundamental.'"

With these Supreme Court rulings and the politicization of gun ownership, we will see the debate continue for an indefinite future.