

## IN LIBERTY'S TWO ARMS

All Second Amendment clauses protect gun rights.

BY DAVID KOPEL

To understand the Second Amendment, it helps to consult Justice Stephen Breyer's book *Active Liberty*.

This is not because the book reveals specifically how Breyer would vote in *District of Columbia v. Heller*, the upcoming Supreme Court case on the D.C. ban against owning handguns and using any firearm for self-defense in the home.

But Breyer's book, through its philosophical discussions of the meaning of liberty, does show a way to reconcile the subordinate clause of the Second Amendment (the importance of the militia to a free state) and the main clause (gun ownership as an individual right). And this reconciliation of the two clauses strongly suggests that the D.C. gun bans are unconstitutional.

### LEGAL LIBERTY

*Active Liberty* reminds us of the original meaning of "liberty" in the Greek city-states: the right of citizens to participate in their government. At the best periods in ancient Greece, as in New England town meetings, important public decisions were made democratically at assemblies of the people.

Active liberty, by itself, provides democracy, but it does nothing to protect minorities from the tyranny of the majority. Thus, Enlightenment philosophers articulated a principle of negative liberty: That a person has certain rights that even a majority cannot infringe.

Breyer explains that active liberty and negative liberty are both part of the Constitution. For example, in evaluating campaign finance restrictions, Breyer would balance the negative liberty aspect of the First Amendment (that government should not control political speech) with the active liberty aspect (the right of the people to a good system of elections).

As Breyer explains, active and negative liberty can conflict. In campaign finance regulation, negative liberty ("don't con-

trol political speech") conflicts with active liberty ("protect democratic elections"). For the Second Amendment, however, the active and negative liberty provisions reinforce each other.

### FOR THEMSELVES

The negative liberty aspect is in the Second Amendment's main clause: "the right of the people to keep and bear arms shall not be infringed." The clause derives from a long line of human rights philosophy about the right of individuals to defend themselves and their families. As Thomas Jefferson wrote in his model constitution for Virginia: "No freeman shall be debarred the use of arms in his own lands or tenements."

In forbidding the possession or use of any functional firearm in the home, the D.C. law violates the Second Amendment's main clause. Lawfully registered rifles and shotguns must be kept disassembled or locked up. There is no exception for self-defense.

Although the D.C. government's Supreme Court brief claims that local courts might find an implicit self-defense exception, the government took the opposite position in 1977. Then, in successfully defending the self-defense ban, the District argued, and the city's highest court agreed, that the statute deliberately banned self-defense in the home. The D.C. Court of Appeals ruled in *McIntosh v. Washington* that, even though owners of business premises were still allowed a limited degree of self-defense, the complete ban in the home was not an equal protection violation. The court found that there was a rational basis for the self-defense ban because of the great risk that people who had functional firearms in their home would kill in a domestic rage. (Extensive social science evidence disproves that court's dire view of people who pass a background check to own licensed, registered guns.)

### AND FOR OTHERS

The introductory clause of the Second Amendment ("A well-regulated militia being necessary to the security of a free state") comes not from the tradition of negative liberty, but from classical and Renaissance principles of republicanism, an active liberty tradition.

As David Hardy described in his 1986 law-review article “The Second Amendment and the Historiography of the Bill of Rights,” James Madison, in drafting the Second Amendment, blended the republican and human rights principles into a single amendment.

The active liberty clause is concerned with preserving citizens’ ability to contribute to the defense of their communities. For example, a threat might arise from a foreign attacker where the national army might not be able to respond in time. Likewise, the armed citizens of the founding era were often called upon by local officials to help search for escaped criminals or to protect frontier villages. More broadly, the republican philosophers worried that citizens who did not participate in the protection of their communities would become passive and dependent, and thereby lose virtues necessary to the survival of a free society.

Today, the government does not require citizens to serve in organized militias. Gun prohibition advocates claim that the Second Amendment therefore has no practical meaning.

Thomas Cooley, the greatest American legal scholar of the latter 19th century, anticipated this argument and explained why government neglect of the militia (the first clause) did not negate the second clause: If Second Amendment rights were limited to those enrolled in a militia, “the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.”

### TO SUPPRESS PREDATORS

Even if the Second Amendment nullificationists were correct that the introductory clause overrides the main clause, they err in their hyperliteral reading of this initial clause.

When we see the word “press” in the First Amendment, we understand that it protects more than just the freedom to use literal printing presses. It obviously includes sharing ideas using tools that have the same purpose as the press, such as fountain pens, typewriters, and Web sites. If a newspaper abandoned printing presses entirely and published its articles exclusively online, “freedom of the press” would still protect the writing.

Likewise, the active liberty principle of the Second Amendment’s opening clause teaches us about more than just formal militias. It looks to the role of citizens in helping to carry out the government functions of a free state—particularly the essential governmental function of suppressing predatory violence.

Research by the Centers for Disease Control and Prevention has found that legally armed homeowners (of whom there are none in the District) use firearms to drive burglars away from their homes hundreds of thousands of times a year.

Only about 13 percent of American burglaries are perpetrated against occupied homes (known as “hot burglary”), thanks to the burglars’ fear that residents might be armed. By contrast, the rate of hot burglaries is 45

percent to 50 percent in countries such as England and the Netherlands, where defensive gun ownership is forbidden or heavily discouraged.

Thwarting or deterring a home invasion obviously is beneficial for the individual family, but it also benefits the people as a whole. Drastically reducing the number of hot burglaries reduces the number of emergency calls to which police must respond, giving them more resources for other programs.

A militiaman in 1791 did much more than protect himself alone, and the Founders understood that collective benefit. By defending communities, militias protected people not in the militia, such as the elderly, women, and children.

Likewise, modern Americans who exercise Second Amendment rights confer benefits on the whole community. About half of all American homes contain a firearm. Burglars, however, do not know which half, so they must try to avoid all occupied homes.

One could say that the families without guns are free-riders on the benefits from families with guns. Or one could say that the Second Amendment’s opening clause envisioned that the security benefits of keeping arms would inure to the whole community.

### THROUGHOUT HISTORY

This view has strong historical roots. The leading constitutional commentators of the early Republic, St. George Tucker and William Rawle, described the Second Amendment as guaranteeing a right to own guns for individual defense and for community security.

Likewise, the Reconstruction Congress, when passing the Freedmen’s Bureau Act and, later, the 14th Amendment, explicitly affirmed the right of former slaves to own guns in their own homes for protection against the likes of the Ku Klux Klan. This was important for the freedmen personally and also for preventing the Klan from destroying the right of freedmen to participate in the political process.

Later, during the 1950s and 1960s, many civil rights activists in the South (including Eleanor Roosevelt, on a speaking tour in Tennessee) had guns to protect themselves while they campaigned against segregation laws and in favor of voting rights.

It is possible to imagine how the active liberty and negative liberty clauses of the Second Amendment might conflict. A law that required prospective gun owners to undergo training or take a test might advance the active liberty clause, while arguably infringing the negative liberty clause.

Yet in the D.C. case, the active liberty and negative liberty provisions are in perfect harmony. The D.C. bans on functional firearms are contrary to the purposes of both clauses of the Second Amendment. The D.C. statutes eliminate both the personal and community benefits from firearm ownership in the home. Under both the active and negative concepts of liberty discussed in Breyer’s book, these D.C. statutes should be struck down.

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