AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Individual Rights/Guns

**Friedman v. City of Highland Park, Illinois, \_\_ U.S. \_\_** (2016)

*Arie Friedman, a resident of Highland Park, Illinois, owned a semi-automatic weapon and several large-capacity magazines that could accept more than ten rounds of ammunition. On June 24, 2013, Highland Park past a ban on the possession, sale and manufacture of that and related weapons. Friedman and members of the Illinois Rifle Association immediately filed a lawsuit, asking for an injunction against that measure on the ground that the ban on semi-automatic weapons violated the Second Amendment as incorporated by the due process clause of the Fourteenth Amendment. That claim was rejected by the local district court and by the Court of Appeals for the Seventh Circuit. Friedman appealed to the Supreme Court of the United States.*

 *The Supreme Court denied certiorari. This means that the ruling of the court of appeals is good law (although only a precedent for the Seventh Circuit). Justice Thomas and Justice Scalia dissented from the denial of certiorari. They claimed that the Constitution protected the right to own a semi-automatic weapon. What standard do they use when making that judgment? Is their standard correct? Why is the Supreme Court not adjudicating conflicts over the meaning of the Second Amendment? Might recent terrorist uses of semi-automatic weapons influence the court?*

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I1a50e81a368811e5a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [SCALIA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I1a50e81a368811e5a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, dissenting from the denial of certiorari.

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The Second Amendment provides: “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.” We explained in *Heller* and *McDonald* that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” We excluded from protection only “those weapons not typically possessed by law-abiding citizens for lawful purposes.” . . .

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Based on its crabbed reading of *Heller*, the Seventh Circuit felt free to adopt a test for assessing firearm bans that eviscerates many of the protections recognized in *Heller* and McDonald. The court asked in the first instance whether the banned firearms “were common at the time of ratification” in 1791.  But we said in *Heller* that “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”

The Seventh Circuit alternatively asked whether the banned firearms relate “to the preservation or efficiency of a well regulated militia.”  But that ignores *Heller*'s fundamental premise: The right to keep and bear arms is an independent, individual right. Its scope is defined not by what the militia needs, but by what private citizens commonly possess. . . . Because the Second Amendment confers rights upon individual citizens—not state governments—it was doubly wrong for the Seventh Circuit to delegate to States and localities the power to decide which firearms people may possess.

Lastly, the Seventh Circuit considered “whether law-abiding citizens retain adequate means of self-defense,” and reasoned that the City's ban was permissible because “[i]f criminals can find substitutes for banned assault weapons, then so can law-abiding homeowners.”  That analysis misreads *Heller*. The question under *Heller* is not whether citizens have adequate alternatives available for self-defense. Rather, *Heller* asks whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist.  And *Heller* draws a distinction between such firearms and weapons specially adapted to unlawful uses and not in common use, such as sawed-off shotguns.  The City's ban is thus highly suspect because it broadly prohibits common semiautomatic firearms used for lawful purposes. Roughly five million Americans own AR-style semiautomatic rifles. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. Under our precedents, that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons.

The Seventh Circuit ultimately upheld a ban on many common semiautomatic firearms based on speculation about the law's potential policy benefits. The court conceded that handguns—not “assault weapons”—“are responsible for the vast majority of gun violence in the United States.”  Still, the court concluded, the ordinance “may increase the public's sense of safety,” which alone is “a substantial benefit.”  *Heller*, however, forbids subjecting the Second Amendment's “core protection ... to a freestanding ‘interest-balancing’ approach.”  This case illustrates why. If a broad ban on firearms can be upheld based on conjecture that the public might feel safer (while being no safer at all), then the Second Amendment guarantees nothing.