

# GUN LAW IN OHIO

## Firearms Law

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### I. Constitutional Components of Firearms Law\*

(\*perhaps we might want to go to part B for our post-law school refresher on this)

#### A. The Second Amendment:

“A well-regulated militia, being necessary to the security of a free State, the right to keep and bear arms shall not be infringed”.

Sounds pretty clear, doesn't it? Not so fast.

##### 1. Problems with this:

a. Thanks to various interpretations of this seemingly brief and clear amendment, the determination that firearms are “inherently dangerous” items, AND government regulation of same, the right to bear arms is under more scrutiny (and under more fire) than ever. (Let the discussion and argument ensue as to what all the qualifiers in this Amendment mean, and whether any of this is a good thing or not!).

##### b. Let's break this sentence down:

Part 1: “A well-regulated Militia, being necessary to the security of a free State

Part 2: the right of the people to keep and bear arms shall not be infringed”.

If Part 2 were just in there by itself, there would be not argument, and no room for interpretation, would there? Nice job, guys !

Militia? What does this mean? Why are certain words capitalized.

A “Militia in 1787?

A “Militia” today?

## 2. Case Law on the Subject:

**U.S. v. Cruikshank** , 92 U.S. 542 (1876) There is a natural (or even divine) law of the right of resistance and self-preservation (a la self-defense). As such an individual may use firearms for this purpose when the intervention of society may be too late. As such, the Second Amendment of the United States Constitution does not grant this ancient right, but exists to prevent its infringement. This is, and always has been a very controversial case. While cited as recently as 2000, it remains subject to criticism for its ultimate holding. Beware.

**District of Columbia v. Heller** 554 U.S. 570 (2008) The 2<sup>nd</sup> Amendment applies to federal districts and protects an individual’s right to possess a firearm for traditionally lawful purposes (like self-defense within the home). It addressed whether the Second Amendment extends beyond the federal enclaves into the states. The Supreme Court ruled that “the [textual elements] guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has been widely understood that the Second Amendment, like the First and the Fourth Amendment, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes that pre-existence of the right and declares only that it shall not be infringed” **Id.**

(One of my favorite quotes of the case):

“We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra*, at 54–55, and

n. 26. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.” ***Id.***

***Heller*** ruled that the 2<sup>nd</sup> Amendment is an individual right rather than a collective right. What’s the difference? Plenty !

-Collective Rights vs. Individual Rights

Strangely enough, one could argue that ***Heller*** was the first real Supreme Court case to specifically decide whether the Second Amendment protects an individual right to keep and bear arms for self-defense (not until 2008). Again, note it dealt with only the Federal Government, not state government.

3. Does the 2<sup>nd</sup> Amendment apply to states? Yes, of course it does ! How? The 14<sup>th</sup> Amendment. Anywhere else?

***McDonald v. Chicago*** 561 U.S. 742 (2010): This case held that the right to keep and bear arms applies to state governments via the due process clause of the 14<sup>th</sup> Amendment and is therefore an individual incorporated right.

“The right to keep and bear arms is enforceable against the States because it is a privilege of American Citizenship recognized by Section 1 of the Fourteenth Amendment, which provides, *inter alia*, ‘No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.’ In interpreting this language it is important to recall that constitutional provisions are ‘written to be understood by the voters’. *Heller*. The objective of this inquiry is to discern what ‘ordinary citizens’ at the time of the Fourteenth Amendment’s ratification would have understood that Amendment’s Privileges and Immunities Clause to Mean.

*Ibid.* A survey of contemporary legal authorities plainly shows that, at that time, the ratifying public understood the Clause to protect the constitutionally enumerated rights, including the right to keep and bear arms.” *Id.*

Some commentary about *Heller* and *McDonald*:

From the Law Center to Prevent Gun Violence:

“In 2008, the U.S. Supreme Court singlehandedly inserted the judicial system into the ongoing national debate over gun laws in America. In a 5-4 decision in *District of Columbia v. Heller*, the Court invalidated the District of Columbia’s handgun ban and firearm storage law, stating for the first time that the Second Amendment protects a responsible, law-abiding citizen’s right to possess an operable handgun in the home for self-defense. *Heller* was unquestionably a radical decision, overturning the Court’s previous ruling that the Second Amendment was tied to state militia service. For almost seventy years, lower federal and state courts nationwide had relied on that pronouncement to reject hundreds of Second Amendment challenges.

The *Heller* decision immediately drew strong criticism from a wide array of legal scholars, historians, advocates and legislators, including a particularly scathing rebuke from respected conservative judge Richard Posner, who noted that, “The only certain effect of the *Heller* decision will be to increase litigation over gun ownership.”

In fact, new litigation started almost immediately. The day that *Heller* was announced, plaintiffs filed a lawsuit challenging the City of Chicago’s handgun ban, with a second suit filed the next day. Other suits emerged soon after, escalating once the Supreme Court confirmed that the Second Amendment also applied to state and local laws in 2010’s *McDonald v. City of Chicago* decision. After that case, the number of lawsuits challenging gun laws nationwide skyrocketed.

Thankfully, despite the explosion of litigation, courts across the country have rejected the overwhelming majority of Second Amendment challenges initiated since *Heller*. Gun rights advocates and criminal defendants across the country have sought to expand the Second Amendment to invalidate almost every gun law on the books today. In siding with us and the majority of Americans who support sensible gun laws, courts are finding that smart laws aren’t just constitutional—they’re also critical to keeping our communities safe from gun violence.

End quote !

Note that *Heller* has a long and tortured procedural history both before and after the actual issuance of the opinion noted above. Many aspects of the *Heller* decision are actually still up in the air.

Also note that as recently as the 2016 Presidential election the *Heller* case was discussed. See YouTube

B. \*Other Amendments to the U.S. Constitution that Pertain to Firearms Law (perhaps this should be 1<sup>st</sup>)

1. Privileges and Immunities/Due Process of Law (5<sup>th</sup> and 14<sup>th</sup> Amendments):

Remember your Con-Law in law school? 5<sup>th</sup> Amendment privileges and immunities vs. 14<sup>th</sup> Amendment Privileges and immunities.

You've got 5<sup>th</sup> Amendment Due Process and 14<sup>th</sup> Amendment Due Process. Or perhaps you learned it as 5<sup>th</sup> Amendment P & I, versus 14<sup>th</sup> Amendment P & I. Which applies to what?

a. 5<sup>th</sup> Amendment Due Process: “. . . No person shall be deprived of life, liberty or property without due process of law . . .” The FEDERAL GOVERNMENT

b. 14<sup>th</sup> Amendment Due Process: “. . . No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States, nor shall any State Deprive any person of life, liberty or property without due process of law. . .” The STATE GOVERNMENT

These concepts set the stage for a constitutional inter-play between states, the Federal Government, and even local governments so that we have a patchwork of local, state, and federal laws concerning firearms where perhaps there should be none. Or perhaps there should ONLY be Federal Law. And what about the potential for conflict. You're seeing that play out in this area of the law, just like in other areas, such as immigration, gay marriage, and abortion. THIS IS FEDERALISM IN ITS PUREST FORM .

WHAT ABOUT LOCAL GOVERNMENTS, WHERE DO THEY FIT IN? Remember your state/local law in college?

2. First Amendment (see below), Fourth Amendment (see below); After over 200 years of jurisprudence, the law is still rather unclear and conflicting on many issues involving firearms. Keeping up with the case law and regulations of the Federal Government, and all 50 states should be of prime priority for anyone wanting to practice Gun Law.

3. The 5<sup>th</sup> Amendment revisited. There is a second part to the 5<sup>th</sup> Amendment that will be invoked very soon with regard to the Presidential election, and new gun control laws. Can you tell what it is ? See below.

C. Gun Shows and the First Amendment (and the Second !)

1. What is a gun show anyway? A collection of vendors (and buyers) where a variety of firearms and firearms-related accessories are for sale or trade in one large location. Similar to a flea market, or swap-meet, it allows both buyers and sellers more space, more selections and more choices than in single gun or sporting goods store.

2. A great deal of information about guns and related products is disseminated and exchanged at a Gun Show, so any limitation on these events can be in violation of the free speech principles of the First Amendment of the Constitution. They may also violate lawful assembly provisions as well.

According to the NRA, Recent legislation that would end gun shows as we know them would gravely impact the lawful transfer of firearms themselves, and would also end the transfer of information and political dialogue that is crucial to our grassroots efforts in communicating with our members and lawful firearm owners," he told me. "This kind of legislation is not only an affront to the Second Amendment, but would also have dire consequences for the First Amendment rights of gun owners. – Glen Caroline, NRI-LIA grassroots Director

3. What about this so-called “Gun Show Loophole” ?

Anti-gun activists, including the previous (Obama) administration, decry as a ”loophole” the ability for individuals to buy or sell firearms without a license and without a background check. Is there a really a gun-show loop-hole? It depends on who you talk to.

Despite what some media commentators have claimed, existing gun laws apply just as much to gun shows as they do to any other place where guns are sold. Since 1938, persons selling firearms have been required to obtain a federal firearms license. If a dealer sells a gun from a storefront, from a room in his home or from a table at a gun

show, the rules are exactly the same: he can get authorization from the FBI for the sale only after the FBI runs its “instant” background check (which often takes days to complete). As a result, firearms are the most severely regulated consumer product in the United States — the only product for which FBI permission is required for every single sale.

-Legislation: Gun Show Loophole Closing Act of 2009 (H.R. 2324)

Gun Show Background Check Act of 2009 (S.843)

-Contributing events: Need we discuss again ??

-Columbine High School

-Aurora Shooting in Colorado

-Sandy Hook Elementary/Day Care

-The Lautenberg Amendment

-The Virginia Tech Shooting

-The San Bernadino Shooting

-The “Pulse” Shooting in Florida

-The GOP Congressional Shooter (Steve Scalese)

-The Charleston S.C. Church Shooting (Dylan Roof)

-Las Vegas

-Parkland High School

-San Anotonio Wal-Mart

-Dayton, Ohio Oregon District

(sources: Mass Shooting Tracker, Gun Violence Archive, Huffpost)

D. Search and Seizure Issues and the Fourth Amendment

(Does the 4<sup>th</sup> Amendment apply to gun owners? )

4<sup>th</sup> Amendment of the United States Constitution: “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”

Of course, the big question here is “what is reasonable”. Is the mere noticing of a firearm on someone’s person, or in their car (as in a duly provided Concealed-Carry Permit) sufficient probable cause such that a search of that person is “reasonable”? What about gun ownership, and that’s all? Is gun ownership (in itself) probable cause, and will a warrantless search of one’s home for this reason (possession of firearms) be deemed “reasonable”.

Warrantless searches, or “No-knock searches” (dare we said “a raid” ? ) can undermine both the Second and Fourth Amendments. Across the country, citizens have shot at police because armed homeowners believed they were being burglarized when police enter without notice. In *Quinn v. Texas* (2006) Case Number 13-765, a gun-owner was shot in his own home after the police obtained a no-knock warrant to search his home. The search was based solely on the suspicion of the presence of his “firearms”. The firearms were legally owned and obtained, and were used only for the purpose of self-defense. When the police smashed open Quinn’s door in the middle of the night without warning (not even knocking !), Quinn grabbed his gun thinking he was the victim of a home invasion. He was shot and later prosecuted, and penalized. The Supreme Court has since refused to hear the case. Attorneys for Quinn argued in the case that legal gun ownership (as protected by the Second Amendment) is not grounds for law enforcement officers to evade the protections of the Fourth Amendment. So the mere possession of a gun can be enough for police to raid your home for just about any reason.

Stop and Frisk (for lack of a better term): *U.S. v. Robinson* Decided 1/23/17; This appeal presents the question of whether a law enforcement officer is justified in

frisking a person whom the officer has lawfully stopped and whom the officer reasonably believes to be armed, regardless of whether the person may legally be entitled to carry the firearm. Stated otherwise, the question is whether the risk of danger to a law enforcement officer created by the forced stop of a person who is armed is eliminated by the fact that state law authorizes persons to obtain a permit to carry a concealed firearm.

Gun confiscation: Be it in the form of a buy-“back”, discussed later, or simple confiscation, this seems to be the rage socially and politically.

Red-Flag Laws: Do these provisions violate your 4<sup>th</sup> and 5<sup>th</sup> Amendment rights? You bet they do. Why hasn't this part of the issue been raised? It has.

#### E. The Taxing and Commerce Clauses

1. The Commerce Clause: Article 1, Section 8 of the United States Constitution (the old one-two punch):

“Congress shall have the Power to lay and collect taxes, duties, Imposts, and excises, to pay debts and provide for the common Defense and general welfare of the United States. . . .”

“ . .to regulate Commerce with foreign Nations, and among the several states . . . “

a. Nearly unlimited power here. (Ask Justice Roberts in his ObamaCare decision). And remember Chief Justice John Marshall who said “the power to tax is the power to destroy” ! *McCulloch v. Maryland* 17 U.S. 327 (1819)

b. Bottom-line, NEVER (EVER) underestimate the power of Congress under this Clause of the United States Constitution. Go back to your Bar Exam review, where they told you any answer to a Commerce Clause question indicating that congress exceeded its power is always wrong. Still the same today.

2. Firearms Freedom Act (FFA) Declares that any firearms made and retained in a state are not subject to federal commerce clause authority. It is a 10<sup>th</sup> Amendment

challenge to the powers of Congress under the Commerce Clause with firearms as the subject. But can a state opt-out like this? Courts striking it down?

3. More current proposals: Tax bullets, or related equipment to make it cost-prohibitive?

4. What about an Executive Order emasculating the whole 2<sup>nd</sup> Amendment thing?

-Be careful what you wish for . . .

#### F. State Constitutional Amendments & Related Issues

1. a. Ohio State Constitution:

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. Art. I, § 4 (enacted 1851).

b. Open Carry/Concealed Carry Ohio Revised Code Sections 2923.125 and 2923.12(B)

2. The 2<sup>nd</sup> Amendment of the U.S. Constitution is a federal provision<sup>3</sup>. 44 States have chosen to explicitly embody a right to bear arms in their state constitution.

4. Each of the state constitutions address the state-based right to bear arms within their respective jurisdictions.

5. The degree and nature of the protection prohibition and regulations varies from state to state with some being more intrusive than others.

6. The Conceal Carry Permit process varies as well from state to state and good knowledge of reciprocity issues is a must for any gun owner, CCP carrier, or gun lawyer. Stay informed!

a. Reciprocity (1 state honors another state's CCW)

b. Uniform/Universal Conceal Carry

7. Local Ordinances: Can a Town Council regulate one's Second Amendment right like the states/feds? How?

G. Things to look out for:

1. The political campaigns: We are not going to have a single campaign that does not touch upon gun control, gun violence, or gun legislation from this point forward
2. The Presidential elections: Good heavens, are you ready?
  - a. How it will impact the campaign
  - b. What the outcome of the election will mean?
3. Other elections
  - a. Federal Level
  - b. State level
  - c. Local Level
4. Legislation:
  - a. Registration
    - Don't we do this already ? What changes are needed?
    - Like immigration law, perhaps if we simply enforced the laws that are already on the books, we wouldn't have a problem
  - b. Purchases
  - c. "Gun Buy-Backs"
    - First of all, how can it be a buy-BACK when the government never owned it in the first place? You didn't buy that gun from the government, how can they buy it BACK from you? Semantics? Probably, but a legal enough of a distinction nonetheless.
    - Second of all, what if you DON'T want to sell you guns to someone (like the government)? What if you just want to keep your gun, are you now automatically a felon for doing nothing?
    - Third, isn't the government prohibited from forcing the citizens to buy something? Does not the reverse apply too (the "corollary" for your law school days). Isn't the government precluded from compelling you to sell something?
      - \*See ObamaCare debate (yeah, that worked out well, didn't it?)
      - \*Eminent Domain? (Taking of one's property?) See last sentence of the 5th Amendment to the U.S. Constitution.

\*Valuation? (“Just compensation” ? )

-Fourth, who is going to enforce it? The local cops? Ask the BLM folks about this. The ATF ? As everyone else about them. The Army? Who’s down with this one? There is an actual constitutional reason for this one to be a problem. Anybody know why? Or Why not

- d. The so-called “Red-Flag Laws” being proposed  
Boy, talk about a stamping over your 5<sup>th</sup> Amendment rights!
- e. The NRA’s Role (the role of all interest groups)
- f.

## II. Practical applications/odds & Ends

### 1. Constitutional Carry

- a. Seeks to have Ohio join the growing number of states which allow "constitutional" carry, or lawful carry of a concealed firearm without a license.
- b. The Full Faith and Credit Clause of the U.S. Constitution comes to mind here. Analogy: Gay Marriage (Discuss!)
- c. Federalism at its best !
- d. One perspective: (From the Buckeye Firearms Association Position on Constitutional Carry:

“We don't need permission from the government to go to church or exercise our First Amendment right. Nor do we need a license to exercise our right for a speedy trial (Sixth Amendment.) It makes no sense that a person would need permission from the government to remain silent (Fifth Amendment) or be secure with our belongings that a Government can't just take or search at their whim (Fourth Amendment).

The whole idea in the "Bill of Rights" is that they are, well, rights. They are rights of the people, and our Founding Fathers codified them because government tends to overstep its bounds.

If we have the "right" to "keep" (own) and bear (carry) arms, then why do we need permission?

-Do you agree with this?

2. “Stand Your Ground (DOA these days??)

a. How does this “Stand your ground actually operate?

b. When a self-defense defense is raised, it is an affirmative defense raised by the Defendant. He admits to shooting the person, but was justified in the use of deadly force. Since it is an affirmative defense the Defendant must prove (burden of proof is now on Defendant, not Prosecution) the following elements:

-The attacker must have the means of causing death or serious bodily injury

-The attacker must show that they intend to cause death or serious injury

-Under the circumstances as they exist, the Defendant reasonably believes that their life is in immediate danger.

-Under the circumstances you have no acceptable alternative but to use deadly force to save your life. (You can’t get away).

c. You have to prove all of these things in a self-defense argument, YOU.

Under “stand your ground” you do not have to prove the last element (“you can’t get away”). You still have to prove all the other elements. It is not the wild west, it’s not people roaming around shooting everyone.

- - Lots of mis-information out there - -

d. Deleted (Vetoed) from last round of legislation by then-governor Kasich (it was H.B. 228 back then)

e. Re-Introduced every year (including 2019 & 2020)

f. But with the political climate out there, Stand Your Ground might not be on the forefront either. Don’t hold your breath.

3. The “Castle Doctrine” Presumption that a person properly acts in self-defense if they use deadly force against anyone who unlawfully enters their home, or vehicle. You DON’T have a duty to retreat in your home.

4. Universal Background Checks

a. prohibits the transfer of firearms from one person to another unless there is a background check. That background check can be accomplished by an FFL or law enforcement. There is no time limit on how long it may take to conduct such a check

5. The Extreme Risk Protection Order Act

a. allow family members, household members, and law enforcement officers to obtain a court order that temporarily restricts a person's access to firearms if that person poses a danger to themselves or others.

b. One of the so-called Red-Flag laws.

6. The Concept of Deadly Force

a. What is Deadly force?

1. Any kind of force which can cause death or serious bodily injury

2. Danger: “...Grave danger . . .?” “Is there any other kind . . .?”

3. Examples:

-Choking

-Hitting in the head with blunt object

-cutting/stabbing

-firearms

-sexual assault

b. Self-Defense & Use of Deadly Force

1. Elements: I.D.O.L (**I**mmEDIATE **D**efense **O**f **L**ife)

2. NEVER TO DEFEND PROPERTY !!!!!

c. Elements of a Deadly Force Situation

1. Ability

2. Intent

3. Imminent Jeopardy

4. Preclusion
- d. The Duty to “flee”

**III. So what do we take away from this?**

- A. It’s more than just the Second Amendment
- B. It’s more than just Federal Law
- C. The Second Amendment is under serious “evaluation” be law makers and judges all across the country and at all levels of government.
  1. What does this mean?
    - a. You Gun folks out there can say evaluation means it is under attack.
    - b. You Anti-Gun Folks out there can say this is long overdue
    - c. Shall we have a policy discussion on the merits of the 2<sup>nd</sup> Amendment, and/or its’ repeal?  
... perhaps for another day.

THANK YOU !!!

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**\*Celebrating 25 years (1994-2019)\***

Joseph Gibson is an attorney with a private practice focusing on Workers' Compensation law (representing both employers and injured workers) litigation, and firearms law. He is the owner of Gibson Law Offices, a solo-practitioner law firm with locations in Vandalia, Fairborn and Middletown. In 1987 he graduated from the University of Dayton with Bachelor of Arts in Political Science. He went on to attend the University of Dayton School of Law, and where he earned his Juris Doctor degree in 1990. In the late 1980's and early 1990's, he worked for the Department of Defense at Wright-Patterson Air Force Base Air Force Logistics Command. His time there was mainly in the Air Force Contract Law Center where he reviewed Contracting Officer's Decisions for legal sufficiency. He was then appointed by the Ohio Bureau of Workers Compensation to be the local district attorney for Dayton and Springfield service offices where he represented the BWC at all levels of administrative hearing. He advised claim and risk staff on claim questions, premium issues, and agency policy. He has instructed at Sinclair Community College and Edison State Community College in the Political Science and Business Law Fields. In 2009 he was elected to County Council in his hometown of Tipp City, Ohio earning the highest number of votes a candidate has ever won up to that time. He was re-elected 4 years later and again in 2017. In 2014 he was selected to be Council President. Currently he serves as the Mayor. He also serves on the Tipp City-Monroe Township Cable Access Commission and the Miami County Council. He has advised gun shop owners and private citizens on firearms law issues for several years, and has spoken on the subject to trade groups, recreational organizations and local civic groups. He is a Lifetime/Benefactor Member of the National Rifle Association of America.