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The Supreme Court Is Too Gun-Shy on the Second Amendment

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Sometimes whether the Supreme Court decides a case is as important as what it decides. A case in point is the right to keep and bear arms. The justices decided that the Second Amendment protects an individual right in *District of Columbia v. Heller* (2008) and that states as well as the federal government may not infringe it in *McDonald v. Chicago* (2010). But it hasn't agreed to hear a single case since to define the scope of the right.

The court is supposed to give priority to "circuit splits" among the lower courts, along with the emergence of unresolved constitutional questions, when deciding whether to hear cases. Yet the complete judicial disaccord on gun rights in the decade since *Heller* has met with a deafening silence from the justices. The federal circuits can't even agree on how to evaluate Second Amendment challenges, let alone what the result should be.

The Fourth U.S. Circuit Court of Appeals found AR-15s—one of the most popular rifles in America—to be wholly without constitutional protection. The Ninth Circuit held that the Second Amendment "does not include, in any degree, the right . . . to carry concealed firearms," even when a state also bans open carry. Earlier, the Seventh Circuit had held that "a right to keep and bear arms for personal self-defense . . . could not rationally have been limited to the home," compelling Illinois to establish a concealed-carry permit system.

It's high time for the court to begin making sense of Second Amendment law. That doesn't mean making a sweeping judgment on "assault weapons," concealed carry, or anything else, but equipping the lower courts with the tools they need to decide cases consistently. The high court said in *Heller* that laws implicating the Second Amendment must be subject to heightened judicial scrutiny—as opposed to the "rational basis" standard under which the government usually wins. But some circuits have disregarded even that simple directive. The Second Circuit has determined that "marginal, incremental, or even appreciable restraints on the right to keep and bear arms" necessitate no heightened scrutiny.

Some circuits have been asking for the high court's intervention. The First and Fourth circuits have both indicated that they are waiting on the justices to decide whether the Second Amendment applies outside the home.

It's understandable for the Supreme Court to be wary of disrupting longstanding state laws, but the court has refused opportunities to clarify the way these laws are to be interpreted even in the narrowest situations. Last year the court refused to hear *Silvester v. Becerra,* concerning the application of an arbitrary wait time to a firearm owner's subsequent gun purchases, and *Teixeira v. Alameda County,* concerning the Second Amendment's protection of the right to sell arms. Justice Clarence Thomas derided the court's continued resistance to clarifying the Second Amendment in his dissent from the denial in *Silvester*—Justice Neil Gorsuch joined him on a similar dissent in 2017—pointing out that second-class treatment of the Second Amendment has encouraged the lower courts to codify their policy preferences.

The latest opportunity for the court to step in is *Mance v. Whitaker,* in which the Fifth Circuit upheld a pre-*Heller* federal law prohibiting licensed dealers from selling handguns across state lines. With *Mance,* the court could provide a meaningful framework for evaluating Second Amendment cases without directly affecting any state law.

Mance is the first Second Amendment appeal to arrive at the Supreme Court since Brett Kavanaugh joined the court. Justice Kavanaugh has a strong record of grappling with these issues; as a D.C. Circuit judge, he rejected an "interest balancing" approach that amounts to a policy analysis, instead focusing on the original meaning of the Second Amendment. To the extent that the court's decade-long reticence can be explained by justices being unsure of Anthony Kennedy's swing vote, that excuse has expired—and only four votes are needed to hear a case. Even if Chief Justice John Roberts wants the court to stay out of this gun fight, his colleagues could force his hand.

Regardless of how the court ultimately decides these cases, it should start deciding them. With its silence, the court gives license to judges around the country to rule that constitutional rights mean different things in different places.

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