THE SECOND AMENDMENT

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George Mason University
Legal Studies Research Paper Series
LS 15-23

This paper is available on the Social Science Research Network at ssrn.com/abstract=2662700
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National Constitution Center
Interactive Constitution

http://constitutioncenter.org/interactive-constitution/amendments/amendment-ii

Common Interpretation

By Nelson Lund and Adam Winkler

Modern debates about the Second Amendment have focused on whether it protects a private right of individuals to keep and bear arms, or a right that can be exercised only through militia organizations like the National Guard. This question, however, was not even raised until long after the Bill of Rights was adopted.

Many in the Founding generation believed that governments are prone to use soldiers to oppress the people. English history suggested that this risk could be controlled by permitting the government to raise armies (consisting of full-time paid troops) only when needed to fight foreign adversaries. For other purposes, such as responding to sudden invasions or other emergencies, the government could rely on a militia that consisted of ordinary civilians who supplied their own weapons and received some part-time, unpaid military training.

The onset of war does not always allow time to raise and train an army, and the Revolutionary War showed that militia forces could not be relied on for national defense. The Constitutional Convention therefore decided that the federal government should have almost unfettered authority to establish peacetime standing armies and to regulate the militia.

This massive shift of power from the states to the federal government generated one of the chief objections to the proposed Constitution. Anti-Federalists argued that the proposed Constitution would take from the states their principal means of defense against federal usurpation. The Federalists responded that fears of federal oppression were overblown, in part because the American people were armed and would be almost impossible to subdue through
military force.

Implicit in the debate between Federalists and Anti-Federalists were two shared assumptions. First, that the proposed new Constitution gave the federal government almost total legal authority over the army and militia. Second, that the federal government should not have any authority at all to disarm the citizenry. They disagreed only about whether an armed populace could adequately deter federal oppression.

The Second Amendment conceded nothing to the Anti-Federalists’ desire to sharply curtail the military power of the federal government, which would have required substantial changes in the original Constitution. Yet the Amendment was easily accepted because of widespread agreement that the federal government should not have the power to infringe the right of the people to keep and bear arms, any more than it should have the power to abridge the freedom of speech or prohibit the free exercise of religion.

Much has changed since 1791. The traditional militia fell into desuetude, and state-based militia organizations were eventually incorporated into the federal military structure. The nation’s military establishment has become enormously more powerful than eighteenth century armies. We still hear political rhetoric about federal tyranny, but most Americans do not fear the nation’s armed forces and virtually no one thinks that an armed populace could defeat those forces in battle. Furthermore, eighteenth century civilians routinely kept at home the very same weapons they would need if called to serve in the militia, while modern soldiers are equipped with weapons that differ significantly from those generally thought appropriate for civilian uses. Civilians no longer expect to use their household weapons for militia duty, although they still keep and bear arms to defend against common criminals (as well as for hunting and other forms of recreation).

The law has also changed. While states in the Founding era regulated guns—blacks were often prohibited from possessing firearms and militia weapons were frequently registered on government rolls—gun laws today are more extensive and controversial. Another important legal development was the adoption of the Fourteenth Amendment. The Second Amendment originally applied only to the federal government, leaving the states to regulate weapons as they saw fit. Although there is substantial evidence that the Privileges or Immunities Clause of the Fourteenth Amendment was meant to protect the right of individuals to keep and bear arms from infringement by the states, the Supreme Court rejected this interpretation in United States v. Cruikshank (1876).

Until recently, the judiciary treated the Second Amendment almost as a dead letter. In District of Columbia v. Heller (2008), however, the Supreme Court invalidated a federal law that forbade nearly all civilians from possessing handguns in the nation’s capital. A 5–4 majority ruled that the language and history of the Second Amendment showed that it protects a private right of individuals to have arms for their own defense, not a right of the states to maintain a militia.
The dissenters disagreed. They concluded that the Second Amendment protects a nominally individual right, though one that protects only “the right of the people of each of the several States to maintain a well-regulated militia.” They also argued that even if the Second Amendment did protect an individual right to have arms for self-defense, it should be interpreted to allow the government to ban handguns in high-crime urban areas.

Two years later, in McDonald v. City of Chicago (2010), the Court struck down a similar handgun ban at the state level, again by a 5–4 vote. Four Justices relied on judicial precedents under the Fourteenth Amendment’s Due Process Clause. Justice Thomas rejected those precedents in favor of reliance on the Privileges or Immunities Clause, but all five members of the majority concluded that the Fourteenth Amendment protects against state infringement the same individual right that is protected from federal infringement by the Second Amendment.

Notwithstanding the lengthy opinions in Heller and McDonald, they technically ruled only that government may not ban the possession of handguns by civilians in their homes. Heller tentatively suggested a list of “presumptively lawful” regulations, including bans on the possession of firearms by felons and the mentally ill, bans on carrying firearms in “sensitive places” such as schools and government buildings, laws restricting the commercial sale of arms, bans on the concealed carry of firearms, and bans on weapons “not typically possessed by law-abiding citizens for lawful purposes.” Many issues remain open, and the lower courts have disagreed with one another about some of them, including important questions involving restrictions on carrying weapons in public.

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Not a Second Class Right: The Second Amendment Today

By Nelson Lund

The right to keep and bear arms is a lot like the right to freedom of speech. In each case, the Constitution expressly protects a liberty that needs to be insulated from the ordinary political process. Neither right, however, is absolute. The First Amendment, for example, has never protected perjury, fraud, or countless other crimes that are committed through the use of speech. Similarly, no reasonable person could believe that violent criminals should have unrestricted access to guns, or that any individual should possess a nuclear weapon.

Inevitably, courts must draw lines, allowing government to carry out its duty to preserve an orderly society, without unduly infringing the legitimate interests of individuals in expressing their thoughts and protecting themselves from criminal violence. This is not a precise science or one that will ever be free from controversy.

One judicial approach, however, should be unequivocally rejected. During the nineteenth century, courts routinely refused to invalidate restrictions on free speech that struck the judges as reasonable. This meant that speech got virtually no judicial protection. Government suppression of speech can usually be thought to serve some reasonable purpose, such as reducing social discord or promoting healthy morals. Similarly, most gun control laws can be viewed as efforts to save lives and prevent crime, which are perfectly reasonable goals. If that’s enough to justify infringements on individual liberty, neither constitutional guarantee means much of anything.

During the twentieth century, the Supreme Court finally started taking the First Amendment seriously. Today, individual freedom is generally protected unless the government can make a strong case that it has a real need to suppress speech or expressive conduct, and that its regulations are tailored to that need. The legal doctrines have become quite complex, and there is room for disagreement about many of the Court’s specific decisions. Taken as a whole, however, this body of case law shows what the Court can do when it appreciates the value of an individual right enshrined in the Constitution.

The Second Amendment also raises issues about which reasonable people can disagree. But if the Supreme Court takes this provision of the Constitution as seriously as it now takes the First Amendment, which it should do, there will be some easy issues as well.
*District of Columbia v. Heller* (2008) is one example. The “right of the people” protected by the Second Amendment is an individual right, just like the “right[s] of the people” protected by the First and Fourth Amendments. The Constitution does not say that the Second Amendment protects a right of the states or a right of the militia, and nobody offered such an interpretation during the Founding era. Abundant historical evidence indicates that the Second Amendment was meant to leave citizens with the ability to defend themselves against unlawful violence. Such threats might come from usurpers of governmental power, but they might also come from criminals whom the government is unwilling or unable to control.

*McDonald v. City of Chicago* (2010) was also an easy case under the Court’s precedents. Most other provisions of the Bill of Rights had already been applied to the states because they are “deeply rooted in this Nation’s history and tradition.” The right to keep and bear arms clearly meets this test.

The text of the Constitution expressly guarantees the right to bear arms, not just the right to keep them. The courts should invalidate regulations that prevent law-abiding citizens from carrying weapons in public, where the vast majority of violent crimes occur. First Amendment rights are not confined to the home, and neither are those protected by the Second Amendment.

Nor should the government be allowed to create burdensome bureaucratic obstacles designed to frustrate the exercise of Second Amendment rights. The courts are vigilant in preventing government from evading the First Amendment through regulations that indirectly abridge free speech rights by making them difficult to exercise. Courts should exercise the same vigilance in protecting Second Amendment rights.

Some other regulations that may appear innocuous should be struck down because they are little more than political stunts. Popular bans on so-called “assault rifles,” for example, define this class of guns in terms of cosmetic features, leaving functionally identical semi-automatic rifles to circulate freely. This is unconstitutional for the same reason that it would violate the First Amendment to ban words that have a French etymology, or to require that French fries be called “freedom fries.”

In most American states, including many with large urban population centers, responsible adults have easy access to ordinary firearms, and they are permitted to carry them in public. Experience has shown that these policies do not lead to increased levels of violence. Criminals pay no more attention to gun control regulations than they do to laws against murder, rape, and robbery. Armed citizens, however, prevent countless crimes and have saved many lives. What’s more, the most vulnerable people—including women, the elderly, and those who live in high crime neighborhoods—are among the greatest beneficiaries of the Second Amendment. If the courts require the remaining jurisdictions to stop infringing on the constitutional right to keep and bear arms, their citizens will be more free and probably safer as well.
The Reasonable Right to Bear Arms

By Adam Winkler

Gun control is as much a part of the Second Amendment as the right to keep and bear arms. The text of the amendment, which refers to a “well regulated Militia,” suggests as much. As the Supreme Court correctly noted in District of Columbia v. Heller (2008), the militia of the founding era was the body of ordinary citizens capable of taking up arms to defend the nation. While the Founders sought to protect the citizenry from being disarmed entirely, they did not wish to prevent government from adopting reasonable regulations of guns and gun owners.

Although Americans today often think that gun control is a modern invention, the Founding era had laws regulating the armed citizenry. There were laws designed to ensure an effective militia, such as laws requiring armed citizens to appear at mandatory musters where their guns would be inspected. Governments also compiled registries of civilian-owned guns appropriate for militia service, sometimes conducting door-to-door surveys. The Founders had broad bans on gun possession by people deemed untrustworthy, including slaves and loyalists. The Founders even had laws requiring people to have guns appropriate for militia service.

The wide range of Founding-era laws suggests that the Founders understood gun rights quite differently from many people today. The right to keep and bear arms was not a libertarian license for anyone to have any kind of ordinary firearm, anywhere they wanted. Nor did the Second Amendment protect a right to revolt against a tyrannical government. The Second Amendment was about ensuring public safety, and nothing in its language was thought to prevent what would be seen today as quite burdensome forms of regulation.

The Founding-era laws indicate why the First Amendment is not a good analogy to the Second. While there have always been laws restricting perjury and fraud by the spoken word, such speech was not thought to be part of the freedom of speech. The Second Amendment, by contrast, unambiguously recognizes that the armed citizenry must be regulated—and regulated “well.” This language most closely aligns with the Fourth Amendment, which protects a right to privacy but also recognizes the authority of the government to conduct reasonable searches and seizures.

The principle that reasonable regulations are consistent with the Second Amendment has been affirmed throughout American history. Ever since the first cases challenging gun controls for violating the Second Amendment or similar provisions in state constitutions, courts have
repeatedly held that “reasonable” gun laws—those that don’t completely deny access to guns by law-abiding people—are constitutionally permissible. For 150 years, this was the settled law of the land—until *Heller*.

*Heller*, however, rejected the principle of reasonableness only in name, not in practice. The decision insisted that many types of gun control laws are presumptively lawful, including bans on possession of firearms by felons and the mentally ill, bans on concealed carry, bans on dangerous and unusual weapons, restrictions on guns in sensitive places like schools and government buildings, and commercial sale restrictions. Nearly all gun control laws today fit within these exceptions. Importantly, these exceptions for modern-day gun laws unheard of in the Founding era also show that lawmakers are not limited to the types of gun control in place at the time of the Second Amendment’s ratification.

In the years since *Heller*, the federal courts have upheld the overwhelming majority of gun control laws challenged under the Second Amendment. Bans on assault weapons have been consistently upheld, as have restrictions on gun magazines that hold more than a minimum number of rounds of ammunition. Bans on guns in national parks, post offices, bars, and college campuses also survived. These decisions make clear that lawmakers have wide leeway to restrict guns to promote public safety so long as the basic right of law-abiding people to have a gun for self-defense is preserved.

Perhaps the biggest open question after *Heller* is whether the Second Amendment protects a right to carry guns in public. While every state allows public carry, some states restrict that right to people who can show a special reason to have a gun on the street. To the extent these laws give local law enforcement unfettered discretion over who can carry, they are problematic. At the same time, however, many constitutional rights are far more limited in public than in the home. Parades can be required to have a permit, the police have broader powers to search pedestrians and motorists than private homes, and sexual intimacy in public places can be completely prohibited.

The Supreme Court may yet decide that more stringent limits on gun control are required under the Second Amendment. Such a decision, however, would be contrary to the text, history, and tradition of the right to keep and bear arms.