Operation Protect & Defend – 2021-2022 Program

The Second Amendment

The topic for this year's Dialogue is the Second Amendment. One of the primary goals of Operation Protect and Defend has always been to encourage robust, civil dialogue about important issues of civic education and the Constitution. Respectful discussion of civic issues makes us stronger as a society. Representative government works best when it has the participation of informed citizens.

The Second Amendment to the United States Constitution was enacted as part of the Bill of Rights and adopted by the states in 1789. It reads:

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.

The Second Amendment was, in part, a response to King George III's attempts to disarm the American colonists prior to the Revolutionary War.

For the next 200 plus years following its adoption, there were few court decisions interpreting the meaning of the Second Amendment. In 2008, the United States Supreme Court decided *District of Columbia v. Heller*, 553 U.S. 570 (2008), overturning Washington D.C's handgun ban and declaring an individual's constitutional right to possess firearms in the home for self-defense. *Heller* is considered a resounding victory for proponents of an expanded right to bear arms.

Heller was followed shortly by *McDonald v. City of Chicago*, 561 U.S. 742 (2010) where the Supreme Court held that under the 14th Amendment's Due Process Clause, individuals possess the rights outlined in *Heller*, not just against the federal government but against the states.

Many expect the Supreme Court to hear more Second Amendment cases. *New York State Rifle & Pistol Association Inc. v. Bruen*, argued November 3, 2021, is shaping up to be another significant case in Second Amendment jurisprudence.

SECOND AMENDMENT: Notable Quotes

"The constitution shall never be construed . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms."

— Alexander Hamilton

"The Constitution [preserves] the advantage of being armed which Americans possess over the people of almost every other nation (where) the governments are afraid to trust the people with arms."

— James Madison

"Like most rights, the Second Amendment right is not unlimited. . . . It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

— Antonin Scalia, U.S. Supreme Court Justice

"The question presented [in Heller] is not whether the Second Amendment protects a 'collective right' or an 'individual right.' Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right."

— John Paul Stevens, U.S. Supreme Court Justice

"[T]here simply is no untouchable constitutional right to keep loaded handguns in the house in crime-ridden urban areas."

— Steven Breyer, U.S. Supreme Court Justice

Background on *Common Interpretation* - National Constitution Center

The *Common Interpretation* essay on the Second Amendment (copied below) was written by Nelson Lund (Professor, Antonin Scalia School of Law, George Mason University) and Adam Winkler (Professor, UCLA School of Law)—leading conservative and liberal scholars on the Second Amendment. It includes information and interpretations, on which the two scholars agree. The essay provides a foundation of common ground before students consider opposing viewpoints about how we should interpret the Second Amendment in the future.

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***The Second Amendment: Common Interpretation* (2015)**

- By Nelson Lund, University Professor, George Mason University, Antonin Scalia School of Law & Adam Winkler, Professor of Law, UCLA Law

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 of 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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<u>Critical Thinking Question</u>: What do these two professors *agree* on as it relates to the 2nd Amendment? Where is the common ground?

SECOND AMENDMENT: Essential Vocabulary

Enjoin

Majority

Dissent

Summary judgment

Textualism

Strict construction

Liberal construction

Stare decisis

Affirmed

Living Constitution

Landmark

Precedent

Jurisprudence

Petitioner

Incorporation

Ordered liberty

Federalist

Anti-Federalist

Prefatory clause

Codified

Holding

Privileges and immunities clause

Writ of certiorari

District of Columbia v. Heller, 553 U.S. 570 (2008)

Decided June 26, 2008, 5-4

Facts of the Case and Procedural History

Prior to this decision, in the District of Columbia (D.C.), it was illegal to carry a firearm unless it was registered with D.C. law enforcement. D.C. did not allow for registration of handguns. And no person could carry a handgun without a license issued by the chief of police. The chief of police could issue licenses for one-year periods. D.C. required residents to keep lawfully owned firearms, such as registered long guns, "unloaded and disassembled or bound by a trigger lock or similar device" unless located in a business or used for lawful recreational activities.

Dick Heller was a D.C. special police officer authorized to carry a handgun while on duty at the Thurgood Marshall Judiciary Building. He applied for a registration certificate with the chief of police for a handgun to keep at home for self-defense, but was refused.

He then filed suit in federal District Court for the District of Columbia on Second Amendment grounds, seeking to enjoin the city from enforcing: the ban on registration of handguns; the licensing requirement to the extent it prohibits the carrying of a firearm in the home without a license; and the trigger-lock requirement to the extent it prohibits the use of functional firearms within the home.

The federal District Court dismissed his complaint, but the Court of Appeals for the District of Columbia Circuit reversed. The Court of Appeals held that the Second Amendment protects an individual right to possess firearms and that the city's ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. The Court of Appeals ordered the District Court to enter summary judgment, (judgment without trial), for Heller. The decision of the Court of Appeals was appealed to the Supreme Court.

Majority opinion by Justice Antonin Scalia

Justice Scalia, writing for the majority of justices, pointed out that the two sides to the case had very different interpretations of the Second Amendment. The dissent reasoned that the Second Amendment protects only the right to possess and carry a firearm in connection with militia service. The majority held that the Second Amendment protects "an individual right to possess a firearm unconnected with service in a militia, and to use that [firearm] for traditionally lawful purposes, such as self-defense within the home."

Justice Scalia broke down the Amendment into its prefatory clause ("[a] well regulated Militia, being necessary to the security of a free State") and its operative clause ("the right of the people to keep and bear Arms shall not be infringed").

Justice Scalia and the majority held that in this case, the prefatory clause announced the purpose of the Amendment but did not otherwise limit the operative clause. The Court stated that "the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right" to keep and bear arms. This preexisting right to bear arms was derived from the English Bill of

Rights, the predecessor to the Second Amendment. The Second Amendment merely enshrined that the right "shall not be infringed."

Justice Scalia, adhering to his past expression that the plain text of the law is most important in determining its meaning, examined the plain text of the Amendment. In doing so, he reviewed the historical meanings of the operative clause and the prefatory clause to conclude that the Second Amendment "protected an individual right to use arms for self-defense." He focused on the historical meaning of the term "bear arms" and concluded that it included the carrying of weapons outside of an organized militia. The majority recognized that the right to keep and bear arms was not unlimited and that the government was free to ban possession by certain classes of people, ban possession in certain places and ban possession of certain categories of weapons. The Court pointed to prior laws that prohibit possession of firearms by felons and the mentally ill; forbid the carrying of firearms in sensitive places such as schools and government buildings; and prohibit the carrying of dangerous and unusual weapons not connected to service in a militia.

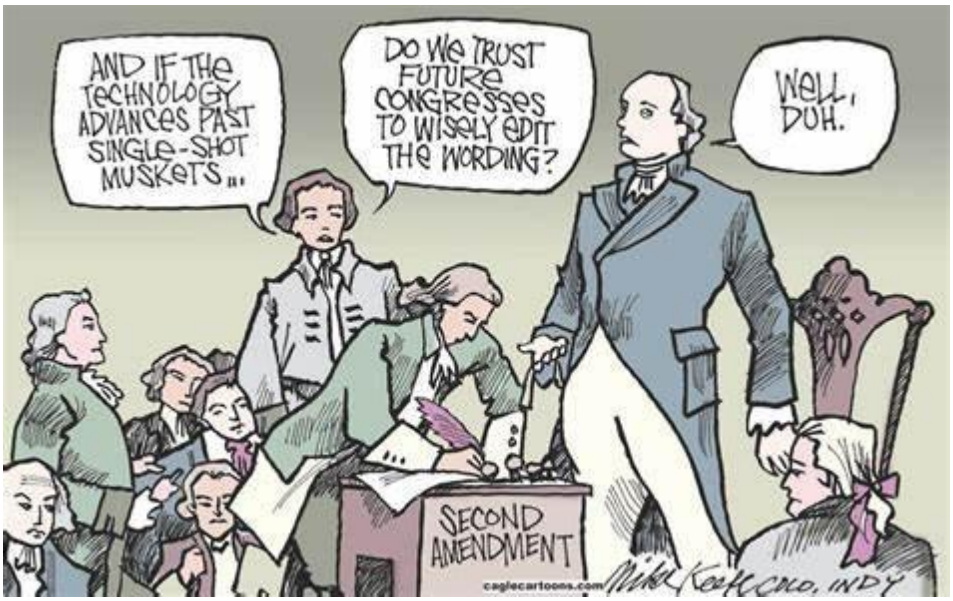
Dissent by Justice John Paul Stevens & Justice Stephen Breyer

The dissent, in an opinion by Justice Stevens, pointed to the Court's prior holding in *United States v. Miller*, 307 U.S 174 (1939), which upheld a conviction for possession of a short-barreled shotgun. Stevens argued that the *Miller* Court found that the short-barreled shotgun was not being possessed for militia purposes and was thus illegal under the National Firearms Act. Justice Stevens argued that the majority's decision in *Heller* was impermissible if the Court was going to follow the doctrine of stare decisis (Latin for "to stand by a decision") with regard to the prior ruling in the *Miller* case.

Justice Stevens reasoned that the primary purpose of the Second Amendment was to protect the government from overthrow by a standing army by counterbalancing it with "a well regulated militia." He pointed out that at the time of the Second Amendment's adoption, two states, Pennsylvania and Vermont, had Declarations of Rights that stated "the people have a right to bear arms for the defence of themselves and the state," a purpose notably absent in the Second Amendment. Moreover, Justice Stevens reasoned that the constitutional history behind the drafting of the Second Amendment, primarily by James Madison, showed that it was intended to apply to possession of firearms for military purposes.

Justice Breyer also filed a separate dissent expressing two views. First, he agreed with Justice Stevens that the Second Amendment "protects militia-related, not self-defense-related, interests." Second, even if the Second Amendment protected an interest in self-defense, that protection is not absolute and D.C.'s regulations were a permissible legislative response to the serious problem of gun violence. Justice Breyer criticized the majority for not providing guidelines for how to determine if a regulation ran afoul of the Second Amendment.

<u>Critical Thinking Question</u>: The text of the Second Amendment has inspired much debate. How would you write it to be more clear and more applicable to modern society? Write a new 2nd Amendment.



Political Cartoon Analysis

1. What prior knowledge do you need to have to understand the cartoon?

2. What is the topic of the cartoon?

3. What is the cartoonist's message about this topic?

McDonald v. City of Chicago, 561 U.S. 742 (2010)

Decided June 28, 2010, 5-4

Facts of the Case and Procedural History

Otis McDonald, a 76-year-old Chicago resident and retired engineer, was an experienced hunter and legally owned several hunting rifles, but he wanted to own a handgun due to his growing concerns about safety in his neighborhood. However, owning a handgun was illegal under Chicago's local law. McDonald sued the city to overturn the handgun ban, arguing the ban violated the Second and Fourteenth Amendments.

The District Court rejected McDonald's arguments. The court concluded that *Heller* did not decide whether the Second Amendment applies to the states; *Heller* only applied the Second Amendment to handgun bans issues by federal jurisdictions, such as the District of Columbia. McDonald appealed and the Seventh Circuit Court of Appeals affirmed, upholding the District Court ruling. McDonald then appealed to the U.S. Supreme Court.

Majority opinion by Justice Samuel Alito

Relying heavily on the history of the Second Amendment outlined in the *Heller* decision, the Court held that the Second Amendment right to keep and bear arms is incorporated in the concept of due process because the right is fundamental to our scheme of ordered liberty. When a constitutional right is "incorporated," it is enforceable against the States through the Due Process Clause of the 14th Amendment. The Court again reiterated that the right to keep and bear arms was not unlimited, repeating the same limits mentioned in *Heller*.

Concurrence by Justice Clarence Thomas

Justice Thomas agreed with the majority but also reasoned that the Second Amendment applies to the states through the Privileges and Immunities Clause of the Fourteenth Amendment. However, Justice Thomas acknowledged that such a holding was contrary to the Court's ruling in *United States v. Cruikshank*, 92 U.S. 542 (1876). Justice Thomas did not feel compelled by stare decisis because he believed that *Cruikshank* was wrongly decided.

Dissent by Justice Stevens

Faithful to his dissent in *Heller*, Justice Stevens again reasoned that the Second Amendment, given its connection to the militia, does not create a right to private self-defense. Justice Stevens stated that whether the Court found the Second Amendment incorporated by the Fourteenth Amendment or found the right to apply through the Privileges and Immunities Clause, neither provision placed restrictions on the states' ability to regulate firearms. Justice Stevens would have allowed states to experiment with different solutions to the problem of gun violence.

New York State Rifle & Pistol Association v. Bruen (formerly Beach), 354 F. Supp. 3d 143 (N.D.N.Y. Dec. 17, 2018)

Facts of the Case and Procedural History

Robert Nash and Brandon Koch, each applied for a New York state license to carry a firearm outside their home for self-defense. They were both denied their license because they could not show "a special need for self-protection, distinguishable from that of the general community," which is required under New York law. Nash and Koch, along with the New York chapter of the National Rifle Association, the New York State Rifle & Pistol Association, filed a lawsuit to overturn the New York licensing law. They argued the law violated their Second Amendment rights, as defined by *District of Columbia v. Heller*.

Opinion by Judge Brenda Sannes

The district court held that a prior case, *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), required that the court conclude that the licensing law did not violate the Second Amendment.

The facts in the *Kachalsky* case were "substantially identical to the facts" in the current case. The *Kachalsky* district court held that New York licensing law "does not burden recognized protected rights under the Second Amendment" and that even if it did, the law was permissible under the United States Supreme Court's "intermediate scrutiny test." In *Kachalsky*, the Second Circuit Court of Appeals affirmed the district court's decision. The Court of Appeals concluded that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention," and therefore the New York licensing law is constitutional.

Nash and Koch asked the court to ignore *Kachalsky* and instead to follow *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). In *Wrenn*, the court concluded that the "law-abiding citizen's right to bear common arms must enable the typical citizen to carry a gun."

The district court ruled that Nash and Koch's case was "virtually identical" to that in *Kachalsky* and that the district court was required to follow *Kachalsky*.

Subsequent History

On appeal, the Second Circuit Court of Appeals, in a one-page summary order, affirmed the District Court, citing *Kachalsky*. (*New York State Rifle & Pistol Association v. Beach*, 818 Fed. Appx. 99, 2020).

On November 3, 2021, the U.S. Supreme Court heard oral arguments in this case with a decision expected in the spring of 2022.

***Peruta v. City of San Diego*,** 824 F.3d 919 (9th Cir. 2016) (en banc)

In a California case—very similar to *New York State Rifle & Pistol Association*—an en banc panel of the United States Court of Appeals for the Ninth Circuit upheld California Penal Code section 25400. This law bans the carrying of loaded or unloaded concealed firearms unless the bearer has been issued a license by the sheriff of the county.

The sheriff may issue a concealed carry license to a person upon proof of: 1) the applicant is of good moral character; 2) good cause exists for issuance of the license; 3) the applicant is a resident of the county of a city within the county, or the applicant spends a substantial period of time at their principal place of employment in the county or a city in the county; and, 4) the applicant has completed a course of training in firearm safety and use.

On June 26, 2017, the United States Supreme Court denied certiorari in this case.

***Miller v. Bonta*,** 2021 U.S. Dist. LEXIS 105640 (S. Dist. Cal., June 4, 2021)

Facts of the Case and Procedural History

Plaintiffs challenged California's 1989 assault weapons ban, the Assault Weapons Control Act, as a violation of the Second Amendment.

Opinion by Judge Roger Benitez

The district court, focusing largely on the popular AR-15 rifle, held that California's ban was unconstitutional relying on the Supreme Court's ruling in *Heller*.

In the opening line of the court's opinion, the court stated: "Like the Swiss Army knife, the popular AR-15 rifle is a perfect combination of home defense weapon and homeland defense equipment."

The court concluded that at least some assault weapons, such as the AR-15, were well suited to self-defense in the home, as protected by *Heller*, and well suited for use in the militia, as stated in the Second Amendment itself.

In defending the Assault Weapons Control Act, the California Attorney General argued that assault weapons are more lethal than standard firearms and are disproportionately used in crimes and mass shootings.

The court cited data presented at trial that there were more modern rifles in the U.S. than Ford F-150 pickup trucks and that the vast majority were owned by law-abiding citizens. He pointed out that "mass shootings with assault weapons continue to occur at the same average rate as before the ban" despite the California Legislature's prediction that Assault Weapons Control Act would reduce them significantly. He pointed to expert testimony that assault weapons were at the most, equally lethal to other firearms and that the majority of crimes are committed with handguns which are protected under the Supreme Court's rulings in *Heller* and *McDonald*. Finally, the court concluded that the AR-15 was an ideal weapon for use by a militia as specifically contemplated by the Second Amendment.

The court held that California had not even considered the burden on the right to self-defense in the home or militia use, and thus could not justify the ban under *Heller*.

The Attorney General appealed the court's decision to the Ninth Circuit Court of Appeals.

Subsequent History

On June 21, 2021, the Court of Appeals issued a stay of the district court's decision pending appeal, putting the ruling on hold until further review by the Court.

Critical Thinking Question: How do you balance the fact that many law abiding gun owners own AR-15's and the fact that AR-15's are used in many mass shootings when determining whether banning AR-15's is constitutional?

Political Cartoon Analysis

1) What prior knowledge do you need to have to understand the cartoon?

2) What is the topic of the cartoon?

3) What is the cartoonist's message about this topic?

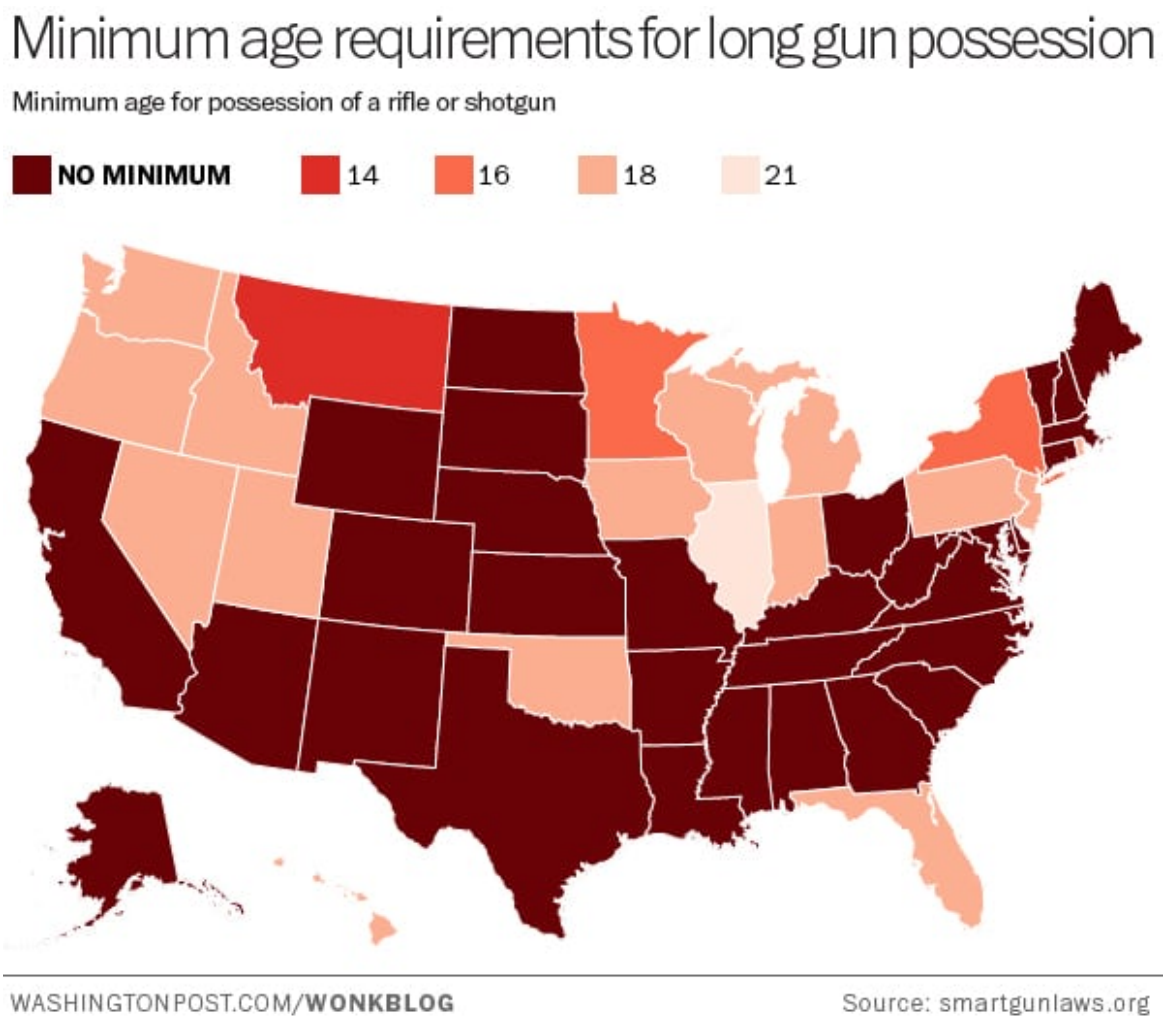
Excerpt from Brittanica ProCon article: History of Gun Control

Federal and State Gun Laws in the 2000s

Protection of Lawful Commerce in Arms Act and Child Safety Lock Act of 2005 was enacted on Oct. 26 by President George W. Bush and gives broad civil liability immunity to firearms manufacturers so they cannot be sued by a gun death victim's family. The *Child Safety Lock Act* requires that all handguns be sold with a "secure gun storage or safety device."

The *National Instant Criminal Background Check System (NICS) Improvement Amendments Act of 2007* was enacted as a condition of the *Brady Act* and provides incentives to states (including grants from the Attorney General) for them to provide information to NICS including information on people who are prohibited from purchasing firearms. The NICS was implemented on Nov. 30, 1998 and later amended on Jan. 8, 2008 in response to the Apr. 16, 2007 Virginia Tech University shooting so that the Attorney General could more easily acquire information pertinent to background checks such as disqualifying mental conditions.

On Jan. 5, 2016, President Obama announced new executive actions on gun control. His measures take effect immediately and include: an update and expansion of background checks (closing the "gun show loophole"); the addition of 200 ATF agents; increased mental health care funding; $4 million and personnel to enhance the National Integrated Ballistics Information Network (used to link crimes in one jurisdiction to ballistics evidence in another); creating an Internet Investigations Center to track illegal online gun trafficking; a new Department of Health and Human Services rule saying that it is not a HIPAA violation to report mental health information to the background check system; a new requirement to report gun thefts; new research funding for gun safety technologies; and more funding to train law enforcement officers on preventing gun casualties in domestic violence cases.



In addition to federal gun laws, each state has its own set of gun laws ranging from California with the most restrictive gun laws in the country to Arizona with the most lenient, according to the Law Center to Prevent Gun Violence and the Brady Campaign's "2013 State Scorecard." 43 of 50 states have a "right to bear arms" clause in their state constitutions.

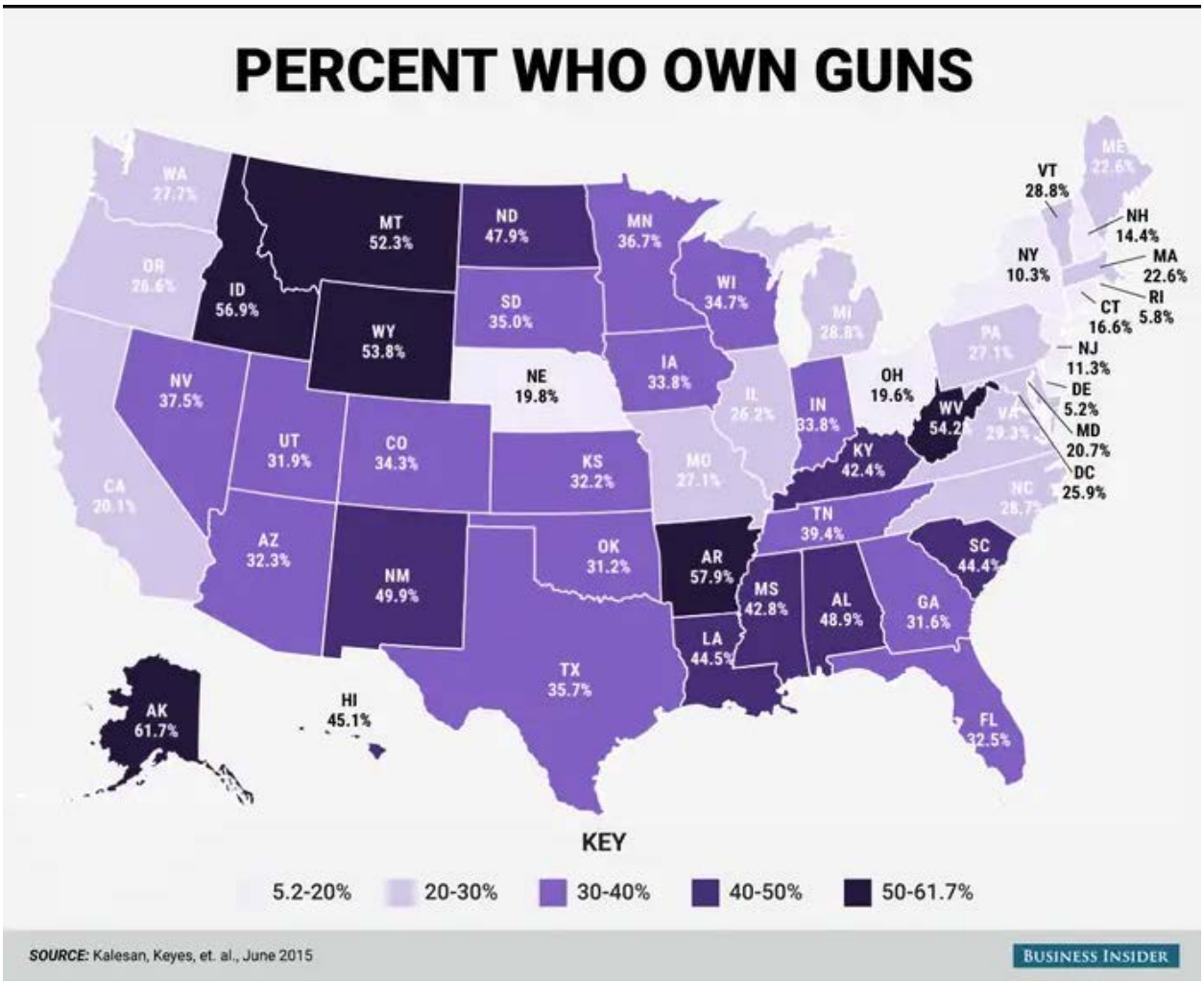
The most common state gun control laws include background checks, waiting periods, and registration requirements to purchase or sell guns. Most states prevent carrying guns, including people with a concealed carry permit, on K-12 school grounds and many states prevent carrying on college campuses. Some states ban assault weapons.

Gun rights laws include concealed and open carry permits, as well as allowing gun carry in usually restricted areas (such as bars, K-12 schools, state parks, and parking areas). Many states have "shoot first" (also called "stand your ground") laws. Open carry of handguns is generally allowed in most states (though a permit may be required).

Collective v. Individual Right: Guns and the Supreme Court

Until 2008, the Supreme Court repeatedly upheld a collective right (that the right to own guns is for the purpose of maintaining a militia) view of the Second Amendment, concluding that the states may form militias and regulate guns.

The first time the Court upheld an individual rights interpretation (that individuals have a Constitutional right to own a gun regardless of militia service) of the Second Amendment was the June 26, 2008 US Supreme Court ruling in *DC v. Heller*. The Court stated that the right could be limited: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited. . . . Thus we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose."



The U.S. Supreme Court ruled on June 28, 2010 in *McDonald v. Chicago* that the Fourteenth Amendment, specifically the Due Process Clause, includes the Second Amendment right to keep and bear arms and, thus, the Second Amendment applies to the states as well as the federal government, effectively extending the individual rights interpretation of the Second Amendment to the states.

On June 27, 2016, in *Voisine v. United States*, the Supreme Court ruled (6-2) that someone convicted of "recklessly" committing a violent domestic assault can be disqualified from owning a gun under the 1996 Lautenberg Amendment to the 1968 *Gun Control Act*. Associate Justice Elena Kagan, JD, writing the majority opinion, stated: "Congress enacted § 922(g)(9) [the Lautenberg Amendment] in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors–just like those convicted of felonies–from owning guns."

On Feb. 20, 2018, the U.S. Supreme Court indicated it would not hear an appeal to California's 10-day waiting period for gun buyers, thus leaving the waiting period in place. Justice Clarence Thomas said the Court should have heard the challenge, stating "The right to keep and bear arms is apparently this Court's constitutional orphan," in reference to the Court not hearing a major Second Amendment case since 2010.

On Apr. 27, 2020, the U.S. Supreme Court indicated it would not rule on *New York State Rifle & Pistol Association Inc. et al., v. City of New York*. The case revolved around a New York City regulation that prevented residents with "premises licenses" to take their guns to second homes and shooting ranges outside of New York City. The city repealed the regulation when the U.S. Supreme Court agreed to hear the case. The ruling would have been the first on the scope of the Second Amendment in almost a decade.

On June 15, 2020, the Supreme Court declined to hear almost a dozen cases appealing gun control laws, leaving the laws in place. In question were laws in Illinois, Maryland, Massachusetts, and New Jersey that require residents to meet specific criteria to obtain a permit to carry outside of their homes. Also in question was a Massachusetts law banning certain semiautomatic guns and high-capacity magazines and a California law requiring microstamping technology and design features. Justices Thomas and Kavanaugh dissented, arguing that some of the cases should have been heard by the Supreme Court.

The National Rifle Association (NRA)

The National Rifle Association calls itself "America's longest-standing civil rights organization." Granted charter on Nov. 17, 1871 in New York, Civil War Union veterans Colonel William C. Church and General George Wingate founded the NRA to "promote and encourage rifle shooting on a scientific basis" to improve the marksmanship of Union troops. General Ambrose Burnside, governor of Rhode Island (1866 to 1869) and US Senator (Mar. 4, 1875 to Sep. 13, 1881), was the first president.

Over 100 years later, in 1977, in what is known as the "Revolt at Cincinnati," new leadership changed the bylaws to make the protection of the Second Amendment right to bear arms the primary focus (ousting the focus on sportsmanship). The group lobbied to disassemble the *Gun*

Control Act of 1968 (the NRA alleged the Act gave power to the ATF that was abused), which they accomplished in 1986 with the *Firearms Owners Protection Act*.

In 1993 the Centers for Disease Control (CDC) funded a study completed by Arthur Kellerman and colleagues, published in the *New England Journal of Medicine,* titled "Gun Ownership as a Risk Factor in the Home," which found that keeping a gun at home increased the risk of homicide. The NRA accused the CDC of "promoting the idea that gun ownership was a disease that needed to be eradicated," and argued that government funding should not be available to politically motivated studies. The NRA notched a victory when Congress passed the Dickey Amendment, which deducted $2.6 billion from the CDC's budget, the exact amount of its gun research program, and restricted CDC (and, later, [the National Institutes of Health (NIH)]) gun research. The amendment stated that "none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control." The admonition effectively stopped all federal gun research because, as Kellerman stated, "[p]recisely what was or was not permitted under the clause was unclear. But no federal employee was willing to risk his or her career or the agency's funding to find out." Jay Dickey (R-AR), now retired from Congress, was the author of the Dickey Amendment and has since stated that he no longer supports the amendment: "I wish we had started the proper research and kept it going all this time… I have regrets."

As of Jan. 2013, the NRA had approximately 3 million members, though estimates have varied from 2.6 million to 5 million members. In 2013 the NRA spending budget was $290.6 million. The NRA-ILA actively lobbies against universal checks and registration, "large" magazine and "assault weapons" bans, requiring smart gun features, ballistic fingerprinting, firearm traces, and prohibiting people on the terrorist watchlist from owning guns; and in favor of self-defense (stand your ground) laws. In 2014 the NRA and NRA-ILA spent $3.36 million on lobbying activity aimed primarily at Congress but also the US Fish and Wildlife Service, Naitonal Park Service, Bureau of Land Management, Army Corps of Engineers, and the Forest Service.

On Aug. 6, 2020, New York Attorney General Letitia James, JD, MPA, filed a lawsuit arguing for the dissolution of the NRA and the removal of CEO Wayne LaPierre. James has jurisdiction over the NRA because the organization has been registered as a non-profit in New York for 148 years. The lawsuit argues that the NRA has displayed corruption, including ill-gotten funds, and misspending, including inflated salaries that diverted $64 million from the NRA's charitable mission to fund extravagant lifestyles. James also requested that LaPierre and three top executives repay NRA members. The lawsuit accuses LaPierre of arranging contracts for himself with the NRA worth $17 million without NRA board approval and of not reporting hundreds of thousands in income to the IRS.

Also on Aug. 6, 2020, D.C. District Attorney General Karl A. Racine, JD, filed a separate lawsuit against the NRA Foundation, alleging that it is not operating independently of the NRA as required by law, but instead the NRA Foundation regularly loaned money to the NRA to address deficits. The NRA stated it would countersue New York Attorney General James for "an unconstitutional, premeditated attack aiming to dismantle and destroy the NRA."

On Jan. 15, 2021, the NRA filed for bankruptcy, and announced plans to leave New York and move to Texas where the organization will reincorporate. New York Attorney General Letitia James called the move a "tactic to evade accountability and my office's oversight." NRA CEO Wayne Lapierre stated, "The NRA is pursuing reincorporating in a state that values the contributions of the NRA, celebrates our law-abiding members, and will join us as a partner in upholding constitutional freedom." On May 11, 2021, a federal judge dismissed the bankruptcy filing, allowing legal proceedings against the NRA to proceed in New York.

The Gun Control Lobby

The start of the modern gun control movement is largely attributed to Mark Borinsky, PhD, who founded the National Center to Control Handguns (NCCH) in 1974. After being the victim of an armed robbery, Borinsky looked for a gun control group to join but found none, founded NCCH, and worked to grow the organization with Edward O. Welles, a retired CIA officer, and N.T. "Pete" Shields, a Du Pont executive whose son was shot and killed in 1975.

Gun control activists, including Mayor Vincent Gray, march in Washington, DC
Source: Bijon Stanard, "Let's Talk: Obama Speaks; Dr. King's March on Washington 50th Anniversary!," letstalkbluntly.com, Aug. 8, 2013

In 2001, after a few name changes, the National Center to Control Handguns (NCCH) was renamed the Brady Campaign to Prevent Gun Violence and its sister organization, the Center to Prevent Handgun Violence, was renamed the Brady Center to Prevent Handgun Violence, though they are often referred to collectively as the Brady Campaign. The groups were named for Jim Brady, a press secretary to President Ronald Reagan who was shot and permanently disabled on Mar. 30, 1981 during an assassination attempt on the President.

The 2014 gun control lobby was composed of Everytown for Gun Safety, Brady Campaign to Prevent Gun Violence, Coalition to Stop Gun Violence, Sandy Hook Promise, Americans for

Responsible Solutions, and Violence Policy Center. Collectively, these groups spent $1.94 million in 2014, primarily aimed at Congress but also the Executive Office of the President, the Vice President, the White House, Department of Justice, and the Bureau of Alcohol, Tobacco, and Firearms.

The most-recently available total annual spending budgets for gun control groups were $13.7 million collectively (4.7% of the NRA's 2013 budget): including Everytown for Gun Safety ($4.7 million in 2012); the Brady Campaign ($2.7 million in 2012); the Brady Center ($3.1 million in 2010); Coalition to Stop Gun Violence ($308,761 in 2011); Sandy Hook Promise ($2.2 million in 2013); and the Violence Policy Center ($750,311 in 2012).

The Current Gun Control Debate

Largely, the current public gun control debate in the United States occurs after a major mass shooting. There were at least 126 mass shootings between Jan. 2000 and July 2014. Proponents of more gun control often want more laws to try to prevent the mass shootings and call for smart gun laws, background checks, and more protections against the mentally ill buying guns. Opponents of more gun laws accuse proponents of using a tragedy to further a lost cause, stating that more laws would not have prevented the shootings. A Dec. 10, 2014 Pew Research Center survey found 52% of Americans believe the right to own guns should be protected while 46% believe gun ownership should be controlled, a switch from 1993 when 34% wanted gun rights protected and 57% wanted gun ownership controlled. According to a Feb. 20, 2018 Quinnipiac Poll taken shortly after the Feb. 14 mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, 66% of American voters support stricter gun control laws.

On Dec. 18, 2018, the U.S. Justice Department announced a new rule banning bump stocks, a gun attachment that allows a semi-automatic gun to fire rapidly like an automatic weapon. As of Mar. 26, 2019, the new rule classifies bump stocks as machine guns, which bans them nationwide under existing gun control laws.

A May 2019 Quinnipiac poll found that, while 61% of Americans are in favor of stricter gun laws, there were differences in support between political parties: 91% of Democrats, 59% of Independents, and 32% of Republicans supported more gun laws.

On Apr. 8, 2021, Attorney General Merrick Garland outlined five actions to be taken by the Biden Administration to curb gun violence:

1. Measure the problem of criminal gun trafficking in a data-driven way
2. Close a regulatory loophole that has contributed to the proliferation of so-called 'ghost guns'
3. Make clear that statutory restrictions on short-barreled rifles apply when certain stabilizing braces are added to high-powered pistols
4. Publish model 'red flag' legislation for states
5. Empower communities to combat and prevent gun violence, making more than $1 billion in funding available through over a dozen grant programs.

On Aug. 4, 2021, the Mexican government sued U.S. gun manufacturers in U.S. federal court. The Mexican government accused the manufacturers, including Smith & Wesson Brands, Inc.; Barrett Firearms Manufacturing, Inc.; Beretta U.S.A. Corp.; Colt's Manufacturing Company LLC, and Glock Inc, of "actively facilitating the unlawful trafficking of their guns to drug cartels and other criminals in Mexico." The Foreign Affairs Ministry estimates 70% of guns trafficked in Mexico came from the United States, contributing to17,000 homicides in 2019 alone.

2020 COVID-19 Pandemic

The 2020 COVID-19 (coronavirus) pandemic caused gun sales to rise, and resulted in a conflict between the NRA and several states when gun and ammo shops were not included as essential businesses during stay-at-home orders. A significant portion of schools in the U.S. were temporarily closed in Mar. 2020 to prevent the spread of COVID-19 (coronavirus). That month was the first March to pass without a school shooting since 2002, the year most 2020 high school seniors were born.

The FBI conducted over 3.7 million gun background checks in Mar. 2020 for the sale of 1.9 million guns in the US, the second highest number of gun sales in one month after Jan. 2013, which saw gun sales reach 2 million following President Obama's reelection and the Dec. 14, 2012 Sandy Hook Elementary School shooting. The FBI conducted over 2.9 million background checks in Apr. 2020, over 3.1 million in May 2020, over 3.9 million in June 2020 (an all-time high), and over 3.6 million in July 2020 as the COVID-19 (coronavirus) pandemic continued.

The FBI conducted more background checks in 2020 than in any other year since 1998 when the agency began collecting data. The FBI reported 39,695,315 background checks completed in 2020, up from 2019 in which 28,369,750 million checks were performed.

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Supplemental material for teachers

Below is an article for optional use by OPD teachers.

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What the Second Amendment really meant to the Founders: Their arguments had far less to do with today's debate than partisans think.

- By Noah Shusterman, *The Washington Post* (February 22, 2018)

Love it or hate it, the Second Amendment provides the constitutional framework for American gun laws. As with all things constitutional, Americans are adapting 18th-century laws to fit 21st-century lives. But in reality, the concerns of the Founding Fathers had little to do with either side's position in the modern gun-control debate. None of the issues animating that debate — from "stand your ground" laws to assault weapons bans — entered into the Founders' thinking.

Yet because both sides in debates about the Second Amendment invoke what the Founders would have thought, it's important to look at what they actually intended.

1. The Founding Fathers were devoted to the militia.

Read the debates about the Constitution and the Bill of Rights, and the militia's importance leaps off the page. Alexander Hamilton, writing in the Federalist Papers, called a well regulated militia "the most natural defense of a free country." His anti-Federalist critics agreed with the need for a citizens' militia, writing that "a well regulated militia, composed of the Yeomanry of the country, have ever been considered as the bulwark of a free people."

Their disagreement was over how best to ensure that the militia was maintained, as well as how to divide up the roles of the national government vs. state governments. But both sides were devoted to the idea that all citizens should be part-time soldiers, because both sides believed a standing army was an existential threat to the ideas of the revolution.

2. The amendment's primary justification was to prevent the United States from needing a standing army.

Preventing the United States from starting a professional army, in fact, was the single most important goal of the Second Amendment. It is hard to recapture this fear today, but during the 18th century few boogeymen were as scary as the standing army — an army made up of professional, full-time soldiers.

By the logic of the 18th century, any society with a professional army could never be truly free. The men in charge of that army could order it to attack the citizens themselves, who, unarmed and unorganized, would be unable to fight back. This was

why a well-regulated militia was necessary to the security of a free state: To be secure, a society needed to be able to defend itself; to be free, it could not exist merely at the whim of a standing army and its generals. The only way to be both free and secure was for citizens to be armed, organized and ready to defend their society. The choice was a stark one: a standing army or a free nation.

3. The authors of the Bill of Rights were not concerned with an "individual" or "personal" right to bear arms.

Before the landmark 2008 Supreme Court case *District of Columbia v. Heller*, courts had ruled that the right of individual citizens to bear arms existed only within the context of participation in the militia. In *Heller*, the Supreme Court overturned that precedent, delivering gun rights advocates their biggest legal victory.

This was not, however, a return to an "original understanding" of the Second Amendment, as Justice Antonin Scalia claimed for the majority. It's not that the Founding Fathers were against the idea of an individual right to bear arms. It just was not an issue that concerned them.

Again, the militia was all important: The men writing the Bill of Rights wanted every citizen to be in the militia, and they wanted everyone in the militia to be armed. If someone was prohibited from participating in the militia, the leaders of the Founders' generation would *not* have wanted them to have access to weapons. In fact, the 18th-century regulations that required citizens to participate in the militia also prohibited blacks and Indians from participating as arms-bearing members.

4. The Founding Fathers were very concerned about who should, or should not, be armed.

These restrictions on militia membership are critically important to understand. Because despite the words of the Second Amendment, 18th-century laws did infringe on Americans' right to bear arms.

Laws rarely allowed free blacks to have weapons. It was even rarer for African Americans living in slavery to be allowed them. In slave states, militias inspected slave quarters and confiscated weapons they found. (There were also laws against selling firearms to Native Americans, although these were more ambiguous.)

These restrictions were no mere footnote to the gun politics of 18th-century America. White Americans were armed so that they could maintain control over nonwhites. Nonwhites were disarmed so that they would not pose a threat to white control of American society.

The restrictions underscore a key point about militias: They were more effective as domestic police forces than they were on the battlefield against enemy nations; and they were most effective when they were policing the African American population.

5. Eighteenth-century Americans tolerated a certain amount of violence and instability, as long as it came from other white Americans.

During the 18th century, insurrectionary groups such as the Carolina Regulators and vigilante groups such as Pennsylvania's Paxton Boys showed that Colonial governments could not simply issue laws and count on the people to obey them. (As did, one might add, the American Revolution.) Shay's Rebellion in 1787 and the Whiskey Rebellion in 1791 showed that those problems would not go away with the arrival of the new republic. Including all citizens in the militia and relying on that militia to enforce the laws meant that issues which divided the citizenry also divided the militia. When disagreements over political issues turned violent, the government would not necessarily enjoy the balance of power over citizens who, as militia members, were trained and armed.

Those events also showed a pattern that emerged during the 18th century: Americans were willing to tolerate a significant degree of instability and violence on the part of white Americans. The Paxton Boys, for instance, murdered 20 Conestoga Indians who had been living peacefully with their Pennsylvanian neighbors for some time. Though the governor issued warrants for their arrest, and Benjamin Franklin called the killers a "disgrace of their country and their colour," no Paxton Boys were ever prosecuted.

The Whiskey Rebellion was an armed uprising against the national government. In its aftermath, only two rebels were convicted of treason, and President George Washington pardoned them both. Indians who attacked whites, and enslaved peoples who resisted, however, received no such indulgence.

Today's Second Amendment

Anyone wishing for a return to an original meaning of the Second Amendment — where no one was a professional soldier, but everyone would be required to participate in the militia — would find themselves far from the political mainstream.

America's standing army is now the most powerful fighting force in world history. The National Guard still exists as a citizens' militia, but participation is a far cry from the Founders' vision of participation by all citizens. Meanwhile, the Army and the militia have diversified in ways which no one in the 18th century could have imagined.

What remains, though, is the pattern of what Americans will and will not tolerate. In the centuries since the Bill of Rights became law, the strictest gun-control laws have been aimed — sometimes explicitly, sometimes not — at keeping African Americans from arming themselves. Americans have been eager to disarm blacks, but hesitant to disarm whites.

California's gun-control laws, for instance, began as a reaction to the Black Panthers' armed patrols and open carry. Yet, when self-proclaimed militiamen engaged in armed resistance to law enforcement at the Bundy ranch in 2014, there was no similar call for new gun laws, and a significant portion of the American political establishment initially expressed support for their actions.

Meanwhile, the nation continues to tolerate a level of gun violence from its citizens unparalleled in other wealthy nations. Eighteenth-century militias were unstable and unpredictable; American gun violence in the 21st century has been every bit as unstable and unpredictable and, given the improvements in weaponry, far more fatal. In three of the most recent mass shootings — the high school in Parkland, Fla., the church in Sutherland Springs, Tex., and Las Vegas — three men killed a total of 101 people and injured hundreds more, a level of carnage that would have been impossible with the weapons available during the 18th century.

Despite these body counts, and despite the seeming inevitability of future tragedies like these, there have been no new national laws to limit citizens' access to high-powered weapons. Some states have enacted such restrictions, but other states have moved in the opposite direction, loosening limits on citizens' access to firearms.

The United States still seems willing to tolerate a significant degree of instability and violence on the part of white American men, the demographic group responsible for the majority of mass shootings. The United States also seems willing to tolerate daily rates of gun violence that surpass all but the worst mass shootings, in large part because most homicide victims are people of color.

Again, this level of carnage could not have been foreseen by the men who wrote the Constitution and the Bill of Rights. As Americans, though, we still live our lives and write our laws within the framework that those men left us, including the Second Amendment. At its best, the Second Amendment was a commitment to citizen participation in public life and a way to keep military power under civil control. At its worst, it was a way for whites to maintain their social domination.

In today's America, the echoes of 18th-century racial politics still weigh down our society, while the new republic's commitment to citizen participation is nowhere to be found.

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