Question about the 2nd Amendment

You are subscribed. Unsubscribe

2ndAmendment × + Add Tag

Sort replies by: Oldest first Newest first Most popular

 Jameson Martinez · a month ago

"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."

I am sure we will get to this part of the Bill of Rights as we go through the Constitution, but I am a little confused and I hope to get some good responses.

The wording, "A well regulated Militia", what and exactly who is that. I know that many states have an active militia, however are ordinary citizens considered part of of this "well regulated" militia or do each state choose its own definition?

Thanks for the responses,
J.

5 · flag

Thomas Marshall · a month ago

Great post, Jameson.

I had never thought about the phrase `well-regulated' and it certainly changes my perception of things. When I think of a militia, I always think a loosely-knit group of people who take up `arms' to fend off an attacker (in this case foreign enemy), but perhaps that is too narrow of an interpretation.

I take it that the phrase `well-regulated' means something like structured or organized, perhaps in that militias are linked with one another and that there is a definite chain of command.

Great question to ponder.

3 · flag

 Jameson Martinez · a month ago

Thanks for reponding Thomas,

That is basically what I thought as well, but then that would mean that the right of the people to keep and bear Arms would only be true for those who are part of a structured or organized militia. And that would exclude many or most citizens.

I am going to have to look on the different laws on each state that regulate the militias.

↑ 0 ↓ · flag

Anonymous · a month ago

The answer to your questions are here https://en.wikipedia.org/wiki/District_of_Columbia_v._Heller and here https://en.wikipedia.org/wiki/McDonald_v._Chicago in which the court, in two 5-4 decisions, affirmed that the right to bear arms is individual and that neither the federal government not the states can restrict it without due process and a set of strict tests in the same way the first amendment right to free speech is not absolute.

Now, because "originalism" was the reason 5 justices voted that way vs the "living constitution" view of those who voted against, a course that promotes "living constitution" understanding of the US Constitution is sparing the students from the way half the SCOTUS justices understand the constitution.

↑ 3 ↓ · flag

 Jameson Martinez · a month ago

Interesting, thanks for sharing.

↑ 1 ↓ · flag

Anonymous · a month ago

The two cases, known among pundits as the Heller (2008) and Chicago (2010) cases have settled the meaning of the second amendment likely for decades to come because the SCOTUS usually, and hypocritically I must say, respects precedent for just as long.

The first case said that the second amendment is an individual right with respect to the federal government (DC is a peculiar place which is managed by the feds unlike other states). The second established that something that is known as the https://en.wikipedia.org/wiki/Incorporation_of_the_Bill_of_Rights applied to the second amendment as well, so states were bound by the finding of Heller. So the matter is now settled.

What is frustrating with this staff is that they keep promoting what is known as "the living

constitution" doctrine, which is one of the two views of the constitution. The other, originalism, is the one that was used in the above two cases.

↑ 0 ↓ · flag

 John Walton · a month ago

If the Supreme Court applied orginalism and precedent to the recent 2nd amendment cases the would not have decided in the way they did. They have created a decidedly unregulated mess rather than a well regulated militia.

An orginalist would not have changed the meaning of the 2nd amendment from a right to keep and bear arms to allow for a well regulated militia to an individual right to have anything.

↑ 1 ↓ · flag

Anonymous · a month ago

Actually, and I am not doing the google search for you, what "militia" meant in 1791, which is when the bill of rights was adopted, supports the idea of the second amendment as upheld by the Heller case . Scalia has explained it several times (I remember in particular an interview he did promoting the book above with Piers Morgan). Then the Chicago case was just the incorporation of that right to the states as it had been done with others in the past.

You are falling into an "orginalism straw man", which is something typical of defenders of the "living constitution" point of view. A better example of an originalist who betrayed it to save a law is Roberts affirming that the Obamacare penalty is a tax.

↑ 1 ↓ · flag

michael schnautzer · a month ago

Michael Schnautzer with the second amendment concerning with people carrying weapons such as concealed weapons, assault weapons., you have to look at the many situations that has happened during this last year and now. how do you know what that person is going to do when he or she buys the weapon. A number of people that started situations had no arrests in the past. I believe that mandatory background checks which includes medical and mental health Lastly NRA should all most every one should be armed to fight back from the bad people ? what do you people think?,

↑ 0 ↓ · flag

Anonymous · 5 days ago

As I recall, Professor Amar favors a reading of the second amendment allowing for individual ownership, not just for militias, particularly because it has been how we have lved as a society

over the last few centuries, at the very least bringing into play the ninth amendment, as well. Also, Amar does not consider himself a "living" constitutionalist, but speaks of *faithful* readings. As mentioned, I recall such considerations lead Amar to support private gun ownership.

On this wider question of interpretation, Amar's point is that being faithful necessarily involves unwritten considerations. For instance, as he mentions, who is to preside over the VP's impeachment? From an originalist or textualist point of view, that would mean the VP presides over the VP's impeachment?

http://www.democracyjournal.org/27/originalist-sin.php

0 · flag

Anonymous · 5 days ago

When the 2 leftists on the SCOTUS voted so we got 7-2 for Bush over Gore we saw the rare time leftists depart from their bias of how they deal with the law. Sotomayor is all about reading the law from a Latina point of view and should be impeached from the court.

Technology can render what anyone thinks irrelevant. The founders could not have anticipated 3D printing. 3D printing means unregistered guns can be made by and the government has no means to stop it. Which is the point of the constitution. The central government is only supposed to have powers delegated to it and agreed to. So now it is powerless to control guns this is exactly where we are supposed to be as the deal was created. We can do anything we want because we told the government to butt out of this area of the law.

Congress has the power to take any area of law away from the courts. Terry Schiavo might still be alive and not starved to death except the media made her husband a victim and everyone deserves the life insurance when a spouse becomes an annoyance and can't pull their load ... if you aren't of value to the state then you lose your life. Just like it says in our Declaration of Independence, we are endowed by the state with certain INALIENABLE RIGHTS among these is life, only so long as the government considers you of value and you subscribe to progressive values ...

0 · flag

+ Comment

Anonymous · a month ago

At the time of the adoption of the Bill of Rights there was no standing federal army. By the time of the Civil War there was only a limited standing army. Not enough to fight a serious land war. If you remember, a significant part of the Union army in the Civil War was made up of groups of men from individual states who volunteered into numbered regiments from their home state. There was no federal stockpile of weapons at the ready for the state volunteers. So, in order the have an "army" for the United States, these state militias were required. And in order for any state to have a militia ready to "stand up"

on very short notice the people who would be brought together into the state militias would need to have their own weapons. If didn't have there own rifles at home then there would be no ability to have an official state militia. For most of constitutional history, right up to the "hard right turn" of the Heller case, the Supreme Court held that the opening clause of this amendment, "A well regulated Militia, being necessary to the security of a free State" held sway. There was no absolute, unfettered right for anyone to have a gun. That "right" has only changed because of this specific Roberts Court and its willingness to overturn decades of precedent to meet its own view of the Constitution. See Citizens United as an excellent example

↑ 3 ↓ · flag

 Michael J Esposito Signature Track · a month ago

Sir anonymous, you are constantly bringing up SCOTUS and Scalia to defend your point. It is a reality that SCOTUS and 5 of the justices are right wing in their thinking? Are we going to continue to give 9 justices all that power? It's politics that breeds contempt. just sayin!

↑ 1 ↓ · flag

Anonymous · 7 days ago

Where Justice Kennedy decide to limit the size of a magazine ... 3D printers allow the size of the magazine to be as big as people want.

↑ 0 ↓ · flag

+ Comment

 Jameson Martinez · a month ago

Are States in charge of defining what a militia is today in their state? Or is there a standard for all states?

↑ 0 ↓ · flag

+ Comment

 Anthony Gary Brown Signature Track · a month ago

Heller and *McDonald* have settled (for the time being!) that the right is *individual* and consequently the *keeping* of arms can only be subject to the lightest necessary control by Federal or State governments. However, the Justices as whole were more coy on what they thought the undoubted, individual right to *bear* arms might effectively mean. And there are presently a couple of cases exactly on that *bear* point working their way up to the SC, though perhaps not quite in time for this term.

As to *well-regulated*, there are a range of meanings encapsulated in that short compound adjective.

Could certainly mean *under tight control* ; could mean *well-trained*; could mean *ready to fight at a moment's notice*. Or all of the above, and more.

But, in any case, the SC has unambiguously held that the need for a well-regulated militia is a *sufficient*, but not a *necessary* condition for the Constitutional preservation of the right of individuals to have weapons.

Gary B.

4 · flag

+ Comment

Ron Moore · a month ago

Gary,

Where has the SC held that "the need for a well-regulated militia is a *sufficient*, but not a *necessary* condition for the Constitutional preservation of the right of individuals to have weapons.?" I have read both *Heller* and *McDonald* and am fairly certain that the language was not used in either, at least by the majority. I might be wrong. I have seen the exact phrase argued by a few legal scholars, but never in a SC court decision.

It seems to me that the majority decisions in both Heller and McDonald were fairly straight-forward, not coy at all.

I enjoyed your ideas surrounding the meaning of a well-regulated militia. In *US v. Miller* the SC stated that at the time of ratification the militia would have been believed to include all capable male citizens and that they would generally have been required to provide their own weapons.

Ron M.

0 · flag

+ Comment

 Anthony Gary Brown Signature Track · a month ago

Ron, I doubt that the "necessary and/or" sufficient wording is used in the cases, but it is, imho, the underpinning logic of the decisions: that the first clause of amendment gives *a*, but not *the*, reason why the right of the people may not be infringed.

As to *bear*, the facts argued in *Heller* and *McDonald* both concerned an effective ban - Federal in the

first, State in the second - on an individual having a handgun at home, for defending the home. The justices were clear in each case that they were not required to decide the wider *factual* issue of *bearing* arms *outside* the home (just as in Heller the majority justices reserved opinion on whether the right extended beyond Federal jurisdiction; which they then dealt with separately in McDonald).

Carefully chosen cases on what the word *bear* properly means and does not mean are shortly due at the SC level. The careful slicing of these 2nd Amendment cases into relatively narrow and distinct fact-sets is no accident!

Gary B.

↑ 0 ↓ · flag

Ron Moore · a month ago

Gary,

Thanks for the response. I agree with your statement that the clause gives *a,* but not *the*, reason. I'm just not sure that we can determine that to be the unambiguous position of the court. We are in agreement concerning the basic question raised in Heller and McDonald. As far as the justices not deciding the wider issues regarding bearing arms in either decision, that was, in my opinion, consistent with the nature of the court. The SC typically looks at narrow questions and attempts to provide narrow answers. This dynamic allows many of their opinions to appear to be extremely ambiguous to those who look for shades of gray.

Ron

↑ 0 ↓ · flag

 Anthony Gary Brown Signature Track · 24 days ago

And, just to follow up - the Supreme Court has today declined to take the 3 cases on the issue of the meaning of the word "bear" in the 2nd Amendment. The SC decision in effect leaves in place current State and Federal case law that supports a rather restrictive meaning of the term.

http://news.yahoo.com/supreme-court-declines-challenges-gun-laws-143850213.html

↑ 0 ↓ · flag

+ Comment

 Anthony Gary Brown Signature Track · a month ago

Ron: maybe I chose my word badly. By *unambiguous* I meant the whole of the majority (with no dilution of the core point in separate opinions). I didn't mean to suggest that there wasn't strongly dissenting minority, which there was in each case. But I regard Heller and McDonald as settled law, so far as they go; and correctly decided too.

And indeed: the SC usually rules as narrowly as it can. Furthermore, the lawyers for each side often present as narrowly as possible, not wanting to put all their eggs in one basket / case..... Pro-gun advocates' tactics, recently, have been: decide the Federal ownership issue; then decide the State ownership issue; then decide the carrying issue; etc etc

AGB

0 · flag

Ron Moore · a month ago

Gary,

Thanks for the conversation and for helping me better understand your position. Like you, I see *Heller* and *McDonald* as settled law. However when it comes to Constitutional law, interpretation is all that matters. What is settled today is likely to change in the future.

Ron M.

0 · flag

 Miruna Maura Trocan · 25 days ago

Thanks for sharing this, I gained a deeper understanding of this topic just by reading your conversation.

0 · flag

+ Comment

James Ritchie · a month ago

When the founding fathers wrote the Bill of Rights, it was a different time and place. The first quarter of the 17th century was a period of experimentation and improvisation as the settlers struggled to gain a foothold in the New World. During the succeeding decades, the colony's evolving militia system was refined, reorganized, and continually tested in combat. Forced to defend themselves with little or no outside help, the colonists had developed an effective and well organized militia system that by the 1670s encompassed nearly all able-bodied, adult males. Ref http://historyisfun.org/militia-in-the-

Revolutionary-war.htm

These people who were the militia, would meet for church on Sunday mornings and practice afterwords. The women would prepare lunch and take care of the kids and the men would practice. Much like sportsman today who head to the range to practice their marksmanship.

0 · flag

 Michael J Esposito Signature Track · a month ago

There are what states call
the State Defense Force. They are not under federal jurisdiction like the state national guard. I would think these kind of organizations would be closer to a Militia then a bunch of guys getting drunk and letting off of some manly steam..

0 · flag

+ Comment

Pedro Filipe Matos da Cruz · a month ago

Hi,

I am not american, therefore i never studied the american constitution and legal system, but i always understood the 2nd amendment as a protection against... the us army.
I suposse that interpertation followed from this quotes:

"A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defense against foreign danger historically have been always the instruments of tyranny at home" - James Madison

"There are instruments so dangerous to the rights of the nation and which place them so totally at the mercy of their governors that those governors, wether legislative or executive, should be restrained from keeping such instruments on foot but in well-defined cases. Such an instrument is a standing army" - Thomas Jefferson

Reading some of your comments i guess that this is not the reason for the existince of the 2nd amendment, is it?

0 · flag

Joel Kovarsky · a month ago

Pedro,

Your interpretation is one of several. Another is that the militia was intended to help defend the nation in case of foreign invasion. You can find nearly any opinion--all sincerely defended--you want in published discussions. The couple of quotes you use will never settle anything, and I am not sure what will:

http://www.newyorker.com/online/blogs/newsdesk/2012/04/the-second-amendment.html

http://www.constitution.org/2ll/2ndschol/89vand.pdf (this one vigorously defends the idea that the second amendment was intended to protect us from our own standing army)

http://www.npr.org/2013/01/07/168834462/the-2nd-amendment-27-words-endless-interpretations (I happen to like the closing remark from this one:

"Because in the end, trying to find a meaningful metaphor to help explain the Second Amendment is like, well, it's like trying to find a meaningful metaphor to help explain the Second Amendment."

0 · flag

Anthony Watkins · a month ago

looks like someone beat me to the punch:)

Pedro, The 2nd amendment came at a time when the young country hasd recently freed itself from a govt many considered tyrannical. it had done so, largely with the help of irregulars, miltias, if you will, allowing thse folks to keep arms would allow for the defense against England, if it decided to reclaim its colonies. There was also the consideration that the new revolution might give way to a tyranny of its own, and if that happened, the good people needed to be able to rise up and restroe a democratic republic. Of course, such a revolutuion would only fail to be treason if it succeeded. In fact, prior to the civil war, there were several minor and not so minor rebellions, all were put down and the perpertrators were not treated as heroic defenders

you can read about some of them here:

http://en.wikipedia.org/wiki/List_of_incidents_of_civil_unrest_in_the_United_States

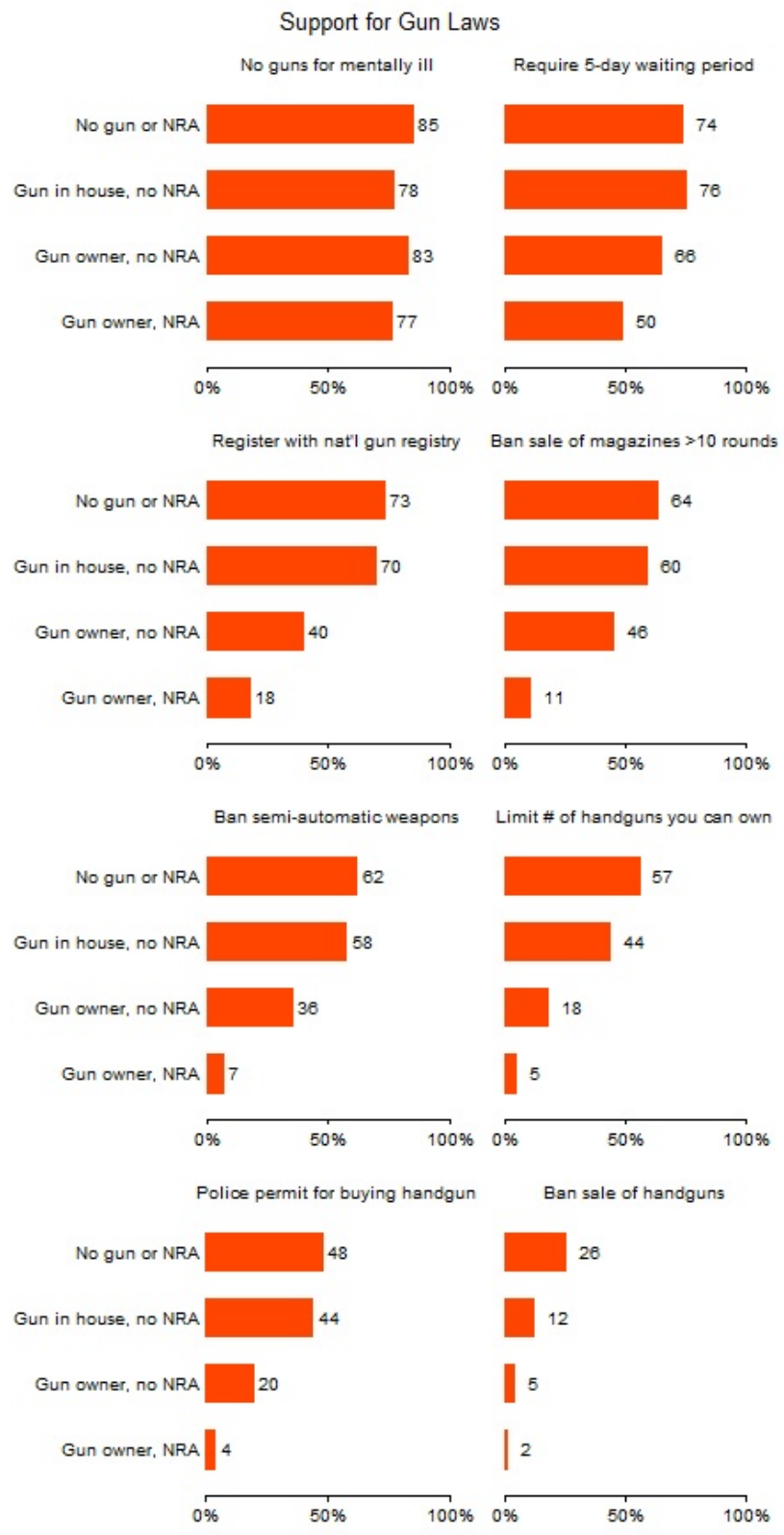
Somehow, the right for irregulars to keep their arms for the purpose of defending a country that had no standing army, has morphed, thanks to an "activist" court into the right of individuals to keep certain types of weapons in their home and sometimes on their persons, even though we now not only have a standing army, and not only is it larger and more powerful than any other amry in the world, it is several times over so. what we have today

does not really have a clear lineage to the original 2nd amendment.

↑ 3 ↓ · flag

Joel Kovarsky · a month ago

As a follow-up to my own remarks, I served two years in the US Army (easy job, end of Viet Nam era in Army Medical Corps running a specialty clinic). I have known many responsible gun owners, and have no trouble with the second amendment as a right to bear arms, in part to defend your home. That said, I also view them--given their outsized presence in the USA--as a public health menace: http://www.press.umich.edu/158723 (that book just scratches the surface of available medical literature) and http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-researc... . There are many responsible gun owners who would have no trouble with some regulation, but that does not mean we can get past the politics, particularly on a national level. Looking at other threads in these fora, there is expectedly the focus on the amendment itself. For some of us, the intractable constitutional argument does not help fix other problems. Also see: http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/23/gun-owners-vs-the-nra-what-the-polling-sh...



Source: NRA membership and gun ownership questions were from a December 2011 YouGov poll. Respondents were reinterviewed and asked gun control items in either the July 21-23 or Aug. 25-27 poll. Approximate sample size=1,850. Graph by John Sides.

↑ 2 ↓ · flag

michael schnautzer · a month ago

Michael Schnautzer hello joey I got trained for six months at Letterman hospital in 1975 every time I see mash I think of this place. What my basic problem is that kids in the parents house have easy access to firearms, they need to be locked so the kids cannot get to these items. a lot of kids would not die for nothing.

0 · flag

 Anthony Watkins · a month ago

Michael, seems to me a reasonable person could see that firearms ought to be regulated but not banned along the lines as follows.

to purchase a fire arm, one must show proof, at their own expense of sufficient training, and a medical evaluation as to the mental stability of oneself, proof of a large (1 million dollars seems typical for most high risk occasions) liability policy and sign a statement and be subject to surprise checks to make their weapon is always secured in a safe place, away from ammunition (also in a secure place), if gun is used in commission of a crime, the gunowner's policy pays the victim or victim's family. I would allow the free market to determine what factors would allow a private company to underwrite a million dollars on the behavior of the gun owner. obviously, if the gun owner cannot secure liability coverage, he/she would lose the right to possess a weapon. i do not see that as a violation of the 2nd amendment, and i think it would make for a safer america.

just my take

3 · flag

michael schnautzer · a month ago

Michael Schnautzer I totally agree with what you wrote, what I think the problem is there is aot of weapons on the street that were stolen or taken from family homes with no police reports being done. A true gun owner needs to lock up their weapons where they themselves have access to these weapons. My favorite government people ATF need to get out and find these stolen weapons .I think some of the crime would go down

0 · flag

 Michael J Esposito Signature Track · a month ago

All good points, I would like to see the parents of a minor who finds one of their guns and harms or kills another be held responsible. If we want to see safe controls how about a nation wide register and as with auto's insure them too.

0 · flag

James Ritchie · a month ago

@Anthony, long guns (rifles and shot guns) normally do not have any license. Long guns are not normally used by criminal activity. All 50 states have some requirements on handguns, some more restrictive than others. Many who own handguns do so for personal protection. CT you must take a 8 hour course that includes lecture on legal issues, proper handling, and practical which requires actual target shooting and a certain score before you can get a permit to carry (either open or concealed). BTW you must be finger printed FBI back ground check, State Police back ground check before your permit is granted. We also have a law that when minors are in the house, the guns must be secured in a safe or in your physical possession.

The problem is more about gang members, felons, or the mentally ill who do not care about laws. According to the latest stats by the government, 1 out 4 houses have a gun. 314 million guns in this country as of 2012. That is more than the entire population of the USA.

@Michael, CT once you detect your guns have been stolen (remember they must be secured), you have 24 hours to report it. That does not stop the issue either.

John Lott Jr is a social economic researcher that has looked into this debat for years and published many books on the subject. He has been called for testimony before the Congress and many State legislators in the USA. should check out his website.
http://johnrlott.blogspot.com/

-2 · flag

Joel Kovarsky · a month ago

James,

I would acknowledge Lott's knowledge of the subject, but not his conclusions. He is extreme in his views, i.e. that we need more guns, not less. We have lost more people to guns here in the USA since the assassinations of Martin Luther King Jr. and Robert Kennedy than in all our wars since the revolution (see final paragraph in NEJM article by Hemenway linked below). It is not just gangs and seriously mentally ill, when you consider teen suicide and other issues: http://www.americanbar.org/groups/committees/gun_violence/resources/the_u_s_compared_to_other_nation... . As I said early in this conversation, I have no difficulty with most gun owners, but the guns themselves are a public health menace and deserve to be treated as such. A major portion of the issue is public safety, including the safety of our children. It is impossible for me to see how more guns is the answer to these issues (even if Mr. Lott found a way to parse the subject).

With respect to auto safety, we improved not because drivers got better (think drinking and texting), but because vehicles were made safer. We can use that sort of logic in approaching our gun health issues. I would strongly recommend looking at the 12 April 2013 *New England Journal of Medicine* "Sounding Board" by Hemenway and Miller: http://www.bmc.org/Documents/David_Hemenway_NEJM.pdf .

↑ 2 ↓ · flag

James Ritchie · a month ago

So by your logic, any inanimate object can become a public health menace. Yes with cars there cars there are many ways to perform engineering items to improve safety. But the primary purpose of a car is transportation. None of the improvements will reduce hitting bystanders, but will reduce injuries of the occupants of the vehicle. But this is comparing apples to oranges. A firearm is a weapon. Its only designed to send a projectile down the barrel to hit the target that it is aimed at. That is it sole function of a weapon. The article also mentioned micro-stamping of the firing pin. In both cases, DC & California, this is only required on semi-automatics. There is some questions about its effectiveness. On any semi-automatic weapon, the shell cases are ejected after each shot. The firing pins after about 1,000 rounds wear to a point the micro-stamping is no longer readable. Additionally replacement firing pins do not have to be micro-stamped. Accord the FBI 2012 unified crime report (http://www.fbi.gov/news/stories/2013/september/latest-crime-stats-released/latest-crime-stats-releas...), the # 1 weapon used for homicides is a revolver. Revolvers keep the shell casings in the cylinder until a manual process to remove them and then to reload. The reason that this is the primary gun used is that the shell casings are not left at the scene of the crime. So how effective is the micro-stamping?

The data for 2012 still shows that car deaths are greater then gun deaths (95 to 83 per day respectfully). So by your logic cars should be defined as a public health menace as well.

This leads back to the inanimate object. No inanimate object can function on its own. Again back to the FBI 2012 UCR, over 30% of the homicides are performed by knifes, baseball bats, screw drivers, and kitchen frying pans are the top 4 in that category. the FBI breaks out that information to homicides and justifiable homicides. Justifiable homicides are larger in percentage that homicides (38% to 31% respectfully). Under your logic, then we must address baseball bats, knifes, and kitchen frying pans the same way.

This all goes back to one issue, who is ultimately responsible for an inanimate object? Since you can not try an inanimate object for criminal intent, go after the person, not the object, for the criminal misdeed.

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

That is not my logic: it is yours. By your logic we should not bother with auto safety? And we need more guns? And who said anything about blaming the object and not the person? It has to be one or the other? It sounds like you just want more guns. I suspect that vast majority of the public would disagree with your conclusion, although it is almost impossible to get through

any national regulations. There is action at some local levels.

↑ 2 ↓ · flag

Anonymous · a month ago

Gun grabbers take on the individual rights of an ice skater's right to choose his own costume:

↑ 0 ↓ · flag

+ Comment

Anthony Watkins · a month ago

MJE, I think if we let the private insurance markets pay out for the claims of victims, they would be harsher than any govt regulation on who could and could not have a gun. All we have to do is make it a felony to be in possession of a weapon that is not covered by liability insurance, making the owner forfeit the weapon and spend at least a year and a day in prison. i doubt we would have near the problem of unsecured weapons, in the home or on the street.

↑ 2 ↓ · flag

 Michael J Esposito Signature Track · a month ago

Anthony, I was a paramedic here in NYC for over 25 yrs and saw more suicides by parents guns then almost any other suicides by. I still say what would help from minors getting the parents guns would be to hold them responsible if someone gets hurt with their gun. I believe in some state if not all if a minor throw a party over his parents house and the kids get drunk then drive an harm or kill, I believe the parents are held responsible?

↑ 1 ↓ · flag

 Mark Heyne · a month ago

Seems like a brilliantly simple idea, Anthony!

↑ 1 ↓ · flag

+ Comment

 Michael Bean · a month ago

I would be very interested to hear from others who may have read the Carl Bogus material about the Second Amendment? Essentially, his claim is that James Madison drafted the Second Amendment to assure constituents of Virginia (and other southern states) that Congress could not use its newly-acquired powers to indirectly undermine the slave system by disarming the militia, on which the South relied, to control its slaves. His arguments are very interesting and compelling. That the "militia" is a slave controlling entity and not the popular "minute-man" image we sometimes imagine. Any comments?

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

I am aware of Bogus's work, but think it is but one interpretation of the language of this contentious amendment. Also, there are other interpretations of Madison's intent (but I'll admit to not knowing the whole landscape). The history of "a well-regulated militia" (some think this is now represented by our National Guard) is complicated and arguably not best confined to interpretations of the presumed intents of the Founders: http://www.h-net.org/reviews/showrev.php?id=12864 . That discussion pertains to a review of:

Saul Cornell. *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control*

in America. New York: Oxford University Press, 2006. xvi + 270 pp. ISBN 978-0-19-514786-5.

0 · flag

 Michael Bean · a month ago

Joel
Certainly Madison had complex intents. However, an important one was to get the Constitution ratified. After all, the rest is immaterial if the states won't accept the document. Bogus sees the slave states as particularly resistant to any thought of weakening their militias because they would otherwise be unable to keep slaves under control. Southern states were also fearful of efforts to compel their Militias to cross state lines to serve in other states...citing various rebellions. If this could happen, the slave states would have weaker slave control. So the motivation of Madison to get the Virginia vote was particularly important.

0 · flag

Joel Kovarsky · a month ago

Michael,

Thanks for this explanation. Because of your remarks I was able to track down a bit more discussion of that perspective: http://www.thehypertexts.com/Slavery%20and%20the%20Second%20Amendment%20Slave%20Patrol%20Militias.ht... and http://www.minnpost.com/eric-black-ink/2013/01/was-second-amendment-adopted-slaveholders . That latter piece discusses an article by Bogus, "The Hidden History of the Second Amendment", and there is a YouTube video (what a shock) delivered by Bogus on the subject, for those who might want to watch: http://www.youtube.com/watch?v=aK_XfU8Sju4 .

0 · flag

+ Comment

Peter A. Zitko Signature Track · a month ago

Hi Jameson,

The following analysis of the Second Amendment and the “Militia” are excerpts from my own original work (*The Second Amendment: Historical and Contemporary Relevance*, 2012) except where citations and resources are indicated. This may help to shed some light on a rather complex and somewhat ambiguous topic. I have highlighted and/or underlined some of the sections that pertain to your question, although answering your query may require substantive analysis and background material, some of which I have included.

***

The Second Amendment is vested in a rich history of civil liberties that not only includes the American founding era and its integration in the Bill of Rights, but predates this period by nearly one hundred years as the English Bill of Rights gave certain "subjects" the right to have arms for their "defence."[1] This amendment evokes a wide range of sentiment and volatile opinion, yet its historic development and relevance to both the founding generation and contemporary society is seldom understood from an impartial perspective. The Second Amendment in its contemporary characterization focuses on an individual right to bear arms which is significantly different from the Founding Fathers' original concept of not only an individual entitlement to self defense, but a public right to maintain a citizen militia as a potential check on the national government or other general forces which may tyrannize and oppress the very citizens who give legitimacy to the American government.

A wide variety of opinions abound and rhetoric from gun rights advocates and antagonists flourishes; nonetheless, the historical context leading up to this amendment is rarely understood or discussed, nor is this somewhat nebulous liberty well defined in modern culture—at least not until the Supreme Court recently ruled in two landmark cases.[2] Yet, even with the 2008 case of *District of Columbia et al. v. Heller* and the subsequent 2010 ruling in *McDonald et al. v. City of Chicago, Illinois,* the debate over the true meaning and relevance of the 2nd Amendment continues.[3] The rationale of this brief forum response is to investigate the pre-Constitutional history leading to the eventual inclusion of the Second Amendment in the Bill of Rights; frame the amendment in its 18th century perspective as intended by Madison, the Anti-Federalists and Founding Fathers; and track its progression and evolution from 1791 via judicial interpretations through the most recent Supreme Court rulings in *D.C. v. Heller* (2008) and *McDonald v. City of Chicago* (2010).

In a 1983 essay regarding the common law tradition of bearing arms, Professor Joyce Lee Malcolm sums up the Second Amendment dilemma. She writes, "Few would disagree that the crux of this controversy is the construction of the Second Amendment, but, as those writing on the subject have demonstrated, that single sentence is capable of an extraordinary number of interpretations."[4] **Does the Second Amendment truly give the individual American citizen a right to possess firearms as Professor Malcolm, and more recently, the Supreme Court imply? Or perhaps Professor Lois G. Schwoerer is correct when she suggests, "The Americans, like the English, favored the militia, and wrote an awkwardly worded amendment that would assure that the militia would be appropriately armed by the individuals who served in it."**[5] **Constitutional scholar Linda R. Monk offers support for this premise, writing, "Some legal scholars interpret the first clause of the Second Amendment as giving the people the right to bear arms only as part of a 'well regulated militia.' To these scholars, such a militia would be today's National Guard, which is the modern-day successor to the minutemen of the colonial period."**[6]

But the spirit of the Second Amendment could also embody a much deeper meaning as Professor Akhil Amar believes, "The amendment's root idea was not so much guns per se, nor hunting, nor target shooting. Rather the core idea concerned the necessary link between democracy and the military."[7] **Amar continues by suggesting the Second Amendment means, "We, the People, must rule and must assure ourselves that our military will do our bidding rather than its own."**[8] **It is quite conceivable that not only is Amar correct in his analysis, elements of all these Second Amendment interpretations are valid hypotheses.**

Historical Development

In overly simplistic terms, the Second Amendment's "right to bear arms" from an historical perspective was, as Professor Malcolm illustrates, "secured by Englishmen and bequeathed to their American colonists."[9] The English Bill of Rights suggested this liberty was one of several "ancient and indubitable rights and liberties of the people of this kingdom."[10] This claim of historic and unquestionable rights in which common people were allowed to possess weapons was somewhat grandiose and overstated; although, it is important to understand the circumstances that lead to this 1689 proclamation.[11]

English Bill of Rights (1689)

That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law (English Bill of Rights, Article VII).

Contrary to the linguistic hyperbole of the English Bill of Rights, prior to 1689, seldom had any governing body, let alone English Parliament, allowed citizens the right to possess weapons for their own defense. On the surface, this individual liberty giving Protestants the right to "have arms for their defence" might seem righteous and pragmatic, but it may have evolved out of less than virtuous intentions. In 1689 there was tension and animosity between the Crown and the governing class. According to historian and Professor of Law Joyce Lee Malcolm, the reason lawmakers were so open to the idea of personal ownership and possession of weapons was "to place the sword in the hands of Protestant Englishmen and the power over it in the hands of Parliament."[12]

The English Bill of Rights proclaimed that the right of certain subjects, "Protestants," to have weapons for their defense was an "ancient and indubitable" liberty; however, this assessment deserves some clarification.[13] It is true that prior to the English Bill of Rights, it was the duty of English subjects to have weapons. But this obligation was far from an individual liberty—it was a civic duty. Professor Lois G.Schwoerer notes that "early [English] governments had imposed a responsibility on subjects, according to their income, to be prepared to use arms against crime and in defense of community and nation."[14]

Schwoerer, who coincidentally disputes much of Malcolm's historical analysis, does agree with Malcon on at least one point when she writes, "There was no ancient political or legal precedent for the right to bear arms" prior to the English Declaration of Rights.[15] The notion of a historical right to bear arms that precedes the English Bill of Rights is vested in a long history that "condemned war and professional soldiers and favored a system of citizen defense."[16] This preference for citizen militias can be traced back to such social and political philosophers as Desiderius Erasmus (1466-1536), Niccolò Machiavelli (1469-1527), Sir Thomas More (1478-1535), and James Harrington (1611-1677).[17] Nevertheless, a public duty to perform civic defense is quite different than an individual liberty to have weapons for personal defense. While the limitations inherent in the English Bill of Rights with respect to the particular subjects entitled to "have arms for their defence" is noted, it remains the starting point which would evolve into a more formidable civil liberty—the Second Amendment.

Game Laws

Prior to the English Bill of Rights, Game Laws were enacted as early as the 14th century to restrict weapon and eventually gun ownership. This generally limited the possession of firearms to the very wealthy. Schwoerer points out that "Game Laws helped to protect the monarch and upper classes against insurrection while at the same time defending their sport and game."[18] Malcolm similarly concludes that, game acts were "aimed to confine the ordinary Englishman's use of firearms to

legitimate peacekeeping" and "were also intended to eliminate hunting as a pretext for the 'meaner sort' to wander about with weapons."[19] William Blackstone was less munificent by stating that, among other things, the game laws were meant "for prevention of popular insurrections and resistance to the government, by disarming the bulk of the people...which last is a reason oftener meant than avowed by the makers of forest or game laws."[20] Malcolm further clarifies that "Because the English legal and military system required the general public to assume a variety of police and military functions, no game act until that of 1671 actually removed from the common people the privilege of owning arms. Rather, these acts simply prohibited the use of weapons for hunting."[21]

Schwoerer interestingly surmises that while there was opposition to the Game Laws, there was not "a demand for the *right* to possess arms."[22] This may be due in part to the obligation which Englishmen had to be armed as part of their civic duty. Professor Malcolm points out, "Like most duties [serving in the militia] was often resented and... commonly regarded as onerous, if not dangerous."[23] She further suggests that "Englishmen did not consider themselves privileged to serve in a militia. In fact, they resented the military demands made upon them by their government."[24]

Sir William Blackstone (1723-1780)

Perhaps the best way to understand the English Bill of Rights and the prevailing sentiment regarding firearm ownership is through the words of the great 18th century legal scholar Sir William Blackstone. Blackstone's *Commentaries on the Laws of England* was not only studied in Britain but also in the colonies and by the Founding Fathers as they deliberated the U.S. Constitution.[25] Research by Professor Donald S. Lutz of the University of Houston suggests that Blackstone was more commonly read and cited by the Founders than any other influential English or European political philosopher with the exception of Montesquieu.[26] As observed in the preceding section, Blackstone noted Game Laws and their ulterior purpose, but it is also important to understand his interpretation of Article VII of the English Bill of Rights.

Blackstone wrote that the British constitution secured certain "absolute rights which appertain to every Englishman." [27] In order to protect these "absolute rights," other "auxiliary subordinate rights of the subject" are necessary to protect the "three great and primary rights, of personal security, personal liberty, and private property." [28] The fifth and final "auxiliary right of the subject...is that having arms for their defence, suitable to their condition and degree, and such as are allowed by law."[29] Blackstone was essentially quoting the English Bill of Rights, but he goes on to further clarify its intent. He suggests that "it is indeed a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[30]

In Blackstone's view, this was not a right solely to be had by Protestants; rather, it was a liberty to be enjoyed by all "Englishmen." He indicates the right carries with it certain obligations; although, it is a "natural right" of self-defense when other means are not available. In contemporary American society this might be likened to a home invasion in which local law enforcement is not readily available—lacking other recourse, the homeowner has the right to defend herself. It is rather apparent that Blackstone recognizes an individual right to self-defense. But as Schwoerer declares, "Blackstone was not advocating an unrestricted right of the individual to have arms."[31] Yet, as Malcolm illustrates, Blackstone viewed this right "for self preservation" as a "natural," rather than historical, and vital component to "public safety."[32] It is quite likely that the Founding Fathers, who studied and admired Blackstone's legal prowess, had a similar opinion towards a citizen's right to self-defense—which may

be an underlying principle of the Second Amendment and civil liberty in general.

A Well Regulated Militia and Opposition to Standing Armies

George Mason wrote in the 1776 Virginia Declaration of Rights "That a well-regulated militia, or composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."[33] Just a year prior to the Virginia Declaration of Rights, while serving on Fairfax County's Committee of Safety, Mason spoke of the militia as being "formed upon the liberal sentiments of public good, for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors...to infuse a martial spirit of emulation, and to provide a fund of officers; that in case of absolute necessity, the people might be the better enabled to act in defence of their invaded liberty."[34] Mason was in fact conveying the popular sentiment of preferring citizen militias over standing armies, although he was also affirming a very Lockean idea of liberty and social contract. He continues with "All men are by nature born equally free and independent. To protect the weaker from the injuries and insults of the stronger were societies first formed; when men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of the thing required."

Mason's thoughtful and enlightened words give credence to Professor Amar's belief that the Second Amendment has a much deeper meaning than many modern enthusiasts conceptualize. There is little doubt the popular idea of citizen militias "would later figure prominently in the Second Amendment." [35] The colonists, as their British predecessors before them, did not trust the standing armies of a central authority. Blackstone wrote in *Commentaries* that "In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms."[36] He goes on to profess, "In [democracies] no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier."[37] **Militias which were comprised of citizens with a vested interest in the region and their local ethos would maintain civic loyalties. Professor Amar writes, "If central authorities tried to use a national standing army to suspend the Constitution and subjugate the people, state militias could spring into action, much as colonial governments had mobilized military resistance to George III in the mid-1770s**."[38] Hence, there is a linkage between democracy and military, albeit this relationship is quite different in contemporary America than it was during the 18th century.

During ratification debates, this penchant for citizen militias was embraced by both Federalists and Anti-Federalists alike, although there remained different attitudes towards maintaining a standing army and the efficacy of militia forces. In *Federalist No. 28*, Hamilton, taking a characteristically nationalistic view, writes that in the event that "the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government."[39] He goes on to state, "if the persons intrusted [sic] with supreme power become usurpers...The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair."[40]

James Madison in *Federalist No. 46* suggests "the State governments, with the people on their side, would be able to repel the danger" of an oppressive national standing army.[41] He reasons that a national army could only comprise itself of a fraction of the number of men a militia could and these

"citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence" would prevail out of sheer numbers and motivation.[42] There is little doubt that both Madison and Hamilton had a certain national agenda when writing in support of the Constitution. Still, they acknowledge the fears which Anti-Federalists had over standing armies and their general preference for citizen militias.

The Anti-Federalists held fervent feelings which abhorred standing armies. At the New York Ratification Convention in 1788, Melancton Smith voiced this concern in opposition of the U.S. Constitution. He feared, as many Anti-Federalists did, that a well financed national standing army would be used to usurp state authority. He advised the convention members to consider the national armies "extensive, exclusive revenues, the vast sums of money they command, and the means they thereby possess of supporting a powerful standing force. The states, on the contrary, will not have the command of a shilling or a soldier."[43] Robert Yates wrote to the people of New York in 1787 voicing a similar concern, "A free republic will never keep a standing army to execute its laws. It must depend upon the support of its citizens."[44] **This dependence on the citizens was in the form of state militias, hence the Second Amendment was a necessary inclusion in the Bill of Rights as a means to secure liberty against a potentially tyrannical national regime.**

Founding Fathers

While there is a fair amount of historical data which relates to the Second Amendment, it is important to understand the perception and attitudes the Founding Fathers had with regard to the Militia and an individual's right to bear arms. It was, after all, by demand of the Anti-Federalists that the Bill of Rights, which included the Second Amendment, was later incorporated in the first Ten Amendments to the Constitution. While this section is somewhat lengthy, it is by no means exhaustive; rather, it is designed to purvey an understanding of the Founding Fathers who were instrumental in facilitating the Bill of Rights and Second Amendment.

James Madison (Federalist/Democratic Republican)[45]

In 1789, James Madison presented to Congress what would become the Second Amendment. While it was originally worded somewhat differently, it conveyed the two recognizable key points that people had the right to "keep and bear arms" and "a well regulated militia [is the] best security of a free country."[46] For Madison, these two intrinsic elements formulated a formidable civil liberty. He wrote in *Federalist No. 46* that "Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of."[47] Interestingly, and important to modern Second Amendment interpretation, Madison establishes one significant fact known to all Americans of his era—the American government(s), unlike most others, was not "afraid to trust the people with arms."[48] Thus, there is an implication that the individual right to bear arms was a widely understood civil liberty during the ratification period. In fact, Madison used this common knowledge in support of ratification prior to the inclusion of the Bill of Rights.

Samuel Adams (Anti-Federalist)

On February 27, 1769, Samuel Adams wrote in the Boston Gazette, often quoting or paraphrasing "Mr. Blackstone," that "the subjects of England are entitled...to the right of having and using arms for

self-preservation and defence."[49] In writing this article, Adams was responding to criticism from a recent Boston vote which called "upon the inhabitants to provide themselves with arms for their defence."[50] It was Adams' opinion, like Blackstone, that people had an individual right to bear arms for "the means of self preservation against the violence of oppression."[51] He was also of the opinion, like Blackstone, that "the exercise of the military power is forever dangerous to civil rights."[52] Interestingly, this article does imply that some people during the founding era, like contemporary America, objected to citizens bearing arms. Yet, it is also clear that Adams believes individuals did have a right to bear arms and use them to avert military oppression.

Thomas Jefferson (Neutral/Democratic Republican)[53]

In three separate drafts of the 1776 Virginia Constitution, Thomas Jefferson would write, "No freeman shall ever be debarred the use of arms."[54] The second and third draft added the verbiage, "within his own lands or tenements." [55] Constitutional lawyer Stephen P. Halbrook writes, "The proposition expressed by Jefferson...that 'no freeman shall ever be debarred the use of arms' was fundamental to the world view of the American patriots."[56]

The Declaration of Independence would affirm Jefferson's opposition to standing armies and support an alliance in principle with later Anti-Federalist concerns. Among the many objections to the tyranny imposed by George III on the colonists, Jefferson asserts that "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil power."[57] Writing to Major John Cartwright many years later Jefferson advised, "The constitutions of most of our States assert, that all power is inherent in the people; that they may exercise it by themselves, in all cases to which they think themselves competent,...that it is their right and duty to be at all times armed."[58] **In essence, Jefferson is affirming Professor Amar's proposition that the right to keep and bear arms from a founding perspective is steeped in a linkage of liberty between "democracy and the military**."[59]

John Adams (Federalist)

Prior to the Revolution, John Adams was the defense attorney for 8 British Army soldiers who had killed several civilians in the infamous Boston Massacre. While this event is relevant to the Second Amendment from the aspect of Britain having a standing army in Massachusetts, Adams' oral defense arguments are particularly interesting because it sheds light on social norms and citizens' rights to be armed in 1870. Adams argued, "Here every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence, not for offence."[60] Even while it may have been advantageous to debate a citizen's right to bear arms, Adams recognized this right for defensive purposes. This builds upon Blackstone's premise, as well as that of others, that the right to bear arms was not strictly associated with service in a militia but also included the personal right to self-defense.

Patrick Henry (Anti-Federalist)

At the Virginia Ratifying Convention, the former Virginia Governor voiced his concerns over a nationalized standing army. He declared, "Are we at last brought to such an humiliating and debasing degradation, that we cannot be trusted with arms for our own defence?" His concern was that Congress would take control of all arms and the states would be left defenseless against the national government. He continues by stating, "If our defence be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?"[61] **Patrick Henry**

believed that localized citizens and state militias who had a vested interest in the community would be better prepared to protect state interests, whereas a national army controlled by Congress would not have similar motivations. He was also of the opinion that Article I, Section 8, Clause 16 of the U.S. Constitution "seemed to put the states in the power of Congress."[62] Speaking at the convention one week later, Henry affirmed, "The great object is, that every man be armed," and that "Every one Who is able may have a gun."[63]

George Mason (Anti-Federalist)

At the same Virginia Ratification Convention that Patrick Henry declared, "the great object is, that every man be armed," George Mason framed this sentiment in terms that were near and dear to many of the Founding Fathers and former colonists. Mason famously stated, "Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man, who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them."[64] He continues by articulating that the governor of Pennsylvania believed people should not be disarmed "openly," rather the government should "weaken them, and let them sink gradually, by totally disusing and neglecting the militia."[65] **Mason is voicing the common theme among Anti-Federalists that liberty and freedom was at risk if the people did not have a means to protect themselves from a potentially oppressive national government via a strong militia.**

Noah Webster (Federalist)

In October 1787, Noah Webster wrote a famous pamphlet addressed to "His Excellency Benjamin Franklin, Esq." which is called *An Examination Into the Leading Principles of the Federal Constitution*.[66] Webster wrote that a government's military must be of greater force than what the people can assemble or command.[67] If it is not so, the government's force could be repelled "on the first exercise of acts of oppression."[68] He went on to write, "Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States."[69]

Webster was a Federalist and described tyranny as "the exercise of some power over a man, which is not warranted by law, or necessary for the public safety."[70] He also suggested in the United States, military force could not be used against its citizens because "Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the power, and jealousy will instantly inspire the *inclination*, to resist the execution of a law which appears to them unjust and oppressive."[71] Webster essentially suggests that congressional powers are "nominal" and the real authority is with the people who will not allow a standing army to be utilized to tyrannize the nation's citizenry. Webster's views do not necessarily indicate that he believed in an individual's right to bear arms for self-defense although he does understand that Americans are well armed and because of this fact Congress or any other central authority "cannot enforce unjust laws by the sword."[72] This was a staunchly Federalist perspective and the Anti-Federalists were not easily swayed to rely on this rather idealistic premise without subsequent Constitutional amendments.

From Founding to Contemporary Development

It is evident that 18th century America and the 21st century United States are far different environments and many aspects of the Constitution have necessarily evolved to reflect the needs of a society which

was inconceivable to the Founding Fathers. Nevertheless, the civil liberties guaranteed in the Bill of Rights are as valuable in modern society as they were to the founding generation in December of 1791 when the first ten amendments were ratified. In *United States v. Chadwick* (1977), The Supreme Court has suggested that the "fundamental values [of the Framers] would far outlast the specific abuses which gave" an amendment birth. In this instance, the Court was referring to the Fourth Amendment, yet this principle can be applied to the complete Bill of Rights. In *Tashjian v. Republican Party of Connecticut* (1986) the court wrote "in setting up an enduring framework of government, [the Framers] undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." As Constitutional lawyer Stephen Halbrook points out, "constitutional protections...are not frozen into colonial technologies."[73]

Contemporary purposes and societal norms with regard to the Second Amendment have evolved in such ways that this liberty is now somewhat more equitable along social class and race structures. While it is true that poor people may not have the financial means to purchase arms for their defense, and this often includes certain less fortunate ethnic groups, the legal use of arms is no longer designed to dominate race or culture. Professor Robert J. Cottrol writes, that during colonial times, “Settlers of British North America, an armed and universally deputized white population was necessary not only to ward off dangers from the armies of other European powers, but also to ward off attacks from the indigenous Indian population that opposed the encroachment of English settlers on their lands.”[74] He goes on to proclaim that “An armed white population was also essential to maintain social control over blacks and Indians who toiled unwillingly as slaves and servants in English settlements.”[75] The idea presented here that modern Second Amendment rights are more inclusive and less abusive compared to the colonial period is intended as a general statement regarding the legal use of firearms. There is certainly room to debate whether this truly is the case in application, although this argument is beyond the scope of this paper.

Militia vs. National Guard

At this point in this essay, it is rather apparent that one of the original objectives of the Second Amendment was to maintain citizen militias as a means to protect society from a potentially oppressive and ubiquitous national military. Whether Federalist or Anti-Federalist, the Founders understood what "A well regulated Militia, being necessary to the security of a free State" actually meant.[76] But there is simply no comparable militia in contemporary society and maintaining a large standing army, even during times of peace, is a well established and accepted practice—it is legitimized by many years of cumulative precedence.

The National Guard is often cited as the modern day version of the 18th century militia, but this is not an accurate comparison. **Professor Amar writes, "Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but two hundred years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called 'a select corps' or 'select militia'—and viewed in many quarters as little better than a standing army**."[77] During the process of ratification, many people feared that Article 1, Section 8, Clauses 15 and 16 of the U.S. Constitution, commonly referred to as the Militia Clauses, would be used by Congress to disarm the people. Professor Robert J. Cottrol writes, "Some expressed fear that Congress would use its power to establish a select militia, a body of men chosen from the population at large who would receive special military training and would perform almost all militia duties somewhat similar to the modern National Guard."[78] In support of Amar's premise, Cottrol goes on to suggest that "Many viewed this

select militia with as much apprehension as they did a standing army."[79]

Unlike the modern day National Guard, during the late 18th century, any person who was capable of bearing arms would be considered a part of the militia. On June 16, 1788 during the Virginia Ratifying Convention, George Mason questioned, "I ask, Who are the militia? They consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day."[80] Tenche Coxe, a Pennsylvania delegate to the Continental Congress, wrote a similar opinion earlier that same year. He stated, "Who are the militia? Are they not ourselves?[81] Using these presumptions as a basis for appraisal between the National Guard and the militia as understood by the founding generation is to compare two diametrically contrasting martial entities.

If the purpose of the Second Amendment is to secure a state militia for protection against a standing army, which as previously detailed was a popular sentiment among the Anti-Federalists; this rationale has little applicability in modern society.[82] Not only has contemporary society changed its views of a standing army, any modern day militia of armed citizens, even if it were to exist as it did in the 18th century, is simply not a feasible match against the awesome power of the national military complex. Journalist Brian Doherty makes a cogent assessment of this dilemma when he writes, "The concept and practice of the militia as the founders understood it ... has been driven from American life and law, with the National Guard a desiccated remnant of what was once the core of civic republicanism in America. This is why so many Americans see the Second Amendment as confusing, archaic, and unworthy of consideration today."[83]

Conclusion

It is evident that the right to bear arms in the English Bill of Rights is a substantially different concept than what the Founding Fathers perceived the right to entail in the late 1700s. Although, it was the initial catalyst which would eventually evolve into a more equitable right of individual and collective self defense. The English Bill of Rights was wrought with ulterior religious and political purposes, whereas the American permutation was certainly a truer liberty for those who qualified for Constitutional protection. Professor Malcolm and Sir William Blackstone seem to agree the English Bill of Rights was in fact an individual right of self-defense, albeit as Professor Schwoerer contends "that English-men did not secure to 'ordinary citizens' the right to possess weapons."[84] In a broad sense both views are correct, the original English Bill of Rights did secure an individual right to bear arms; however, it was restricted by class and religion.[85]

While Malcolm definitively separates a duty from a right, the nature of civil militias was part of the socio-political fabric in 1689 and this aversion to standing militaries during times of peace was a prevalent sentiment during the founding era. **It would be negligent to dismiss the strong evidence which suggests the roots and original intention of the Second Amendment was steeped in the Founding Fathers' preference for citizen militias and their disdain for standing armies. Professor Amar concludes, "Founding history confirms a republican reading of the Second Amendment, whose framers generally envisioned Minutemen bearing guns, not Daniel Boon gunning bears**."[86]

Professor Robert J. Cottrol of George Washington University stated in his book *Gun Control and the Constitution*, “For much of American history, [the right to keep and bear arms] was extolled as fundamental, a bedrock constitutional principle that could not be denied free people.”[87] With this said, the Constitution has substantially evolved since its inception. While the original intention of the

Second Amendment may have been more aptly understood to be supportive of militias rather than an individual's right to bear arms, Supreme Court decisions, public attitudes, cumulative precedent and modernization has refined the meaning of the Second Amendment. There is quite simply no citizen militia in modern society which can compare to those of the late 18th century. The National Guard is often touted as the modern day equivalent, but this is not a fair comparison.[88] The contemporary National Guard is a quasi-professional armed force which is easily nationalized and unlikely to fight or have the means to protect local ideals if the overpowering national armed force collective were to rise up and tyrannize the American population. There is purely no fair comparison between the armaments of the 18th century and modernity's "high tech" and well-armed modern military forces.

As stated in the opening paragraph, the modern characterization of the Second Amendment focuses on an individual right to bear arms, in part due to the facts just stated—there is no contemporary equivalent to the 18th century militia. **Without an individual right to bear arms, the Second Amendment would be likened to the Third Amendment—an antiquated liberty with little contemporary purpose.** The Second Amendment has evolved quite dramatically since inception; though, the often dismissed "private" aspect of this amendment which is now clarified through *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010) continues to support the founding principle of freedom and liberty. The attitude behind the Founders' preference for militias over standing armies is relevant in principle, although modern society through lengthy cumulative preference and evolving social norms has decided to embrace the modern standing armed forces as a legitimate protection of civil liberties.

[1] "English Bill of Rights 1689," *Yale Law School*, 1689/2008, accessed June 10, 2012, http://avalon.law.yale.edu/17th_century/england.asp. Note: The English Bill of Rights was an anti-Catholic document and gave "the subjects which are Protestants" the right to "have arms for their defence..."

[2] Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective," *Chicago-Kent Law Review* 76, no. 27 (2000), accessed July 7, 2012, http://www.saf.org/LawReviews/SchwoererChicago.htm. Note: Prior to the two recent Supreme Court cases, Schwoerer writes, "As incidents of gun violence have multiplied, and the public has become polarized into groups that favor gun control versus those who believe in a constitutional right of the individual to own guns, academics have enlarged their efforts to discover exactly what the intentions of our forefathers were in writing the Second Amendment and precisely what that awkwardly worded amendment meant."

[3] *District of Columbia v. Heller,* 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 3025 (2010).

[4] Joyce Lee Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," *Hastings Constitutional Law Quarterly* 10 (1983).

[5] Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective."

[6] Linda R. Monk, *The Words We Live By: Your Annotated Guide to the Constitution* (New York: Hyperion, 2003), 151.

[7] Akhil R. Amar, *America's Constitution: A Biography* (New York: Random House, 2006), Kindle.

[8] Ibid.

[9] Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, MA: Harvard University Press, 1994), ix.

[10] "English Bill of Rights 1689," *Yale Law School*.

[11] Joyce Lee Malcolm, "The Creation of a 'True Antient and Indubitable' Right: The English Bill of Rights and the Right to Be Armed," *Journal of British Studies* 32, no. 3 (July 1993): 226, accessed July 5, 2012, doi:10.1086/386031. Note: Malcolm suggests that the "rights proclaimed in the English Declaration of Rights was neither ancient nor indubitable."

[12] Ibid.

[13] "English Bill of Rights 1689," *Yale Law School*, Note: The English Bill of Rights lists thirteen liberties which it considers to be "ancient and indubitable." The right for Protestant subjects to "have arms for their defence" is listed seventh.

[14] Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective."

[15]Ibid. Note: Schwoerer dismisses much of Malcolm's historical thesis; however, it should be pointed out that after thoroughly reading both scholars, Schwoerer seems highly adversarial and far more subjective when it comes to interpreting historical events. There is one point in Schwoerer's essay where she seemingly ignores the final draft of the English Bill of Rights which implies an individual liberty. Instead she prefers to cite an earlier draft by Whigs which declared Article VII to be a collective right.

[16] Ibid. See also: Robert J. Cottrol, *Gun Control and the Constitution*, xii.

[17] Ibid.

[18] Ibid.

[19] Joyce Lee Malcolm, "The Creation of a 'True Antient and Indubitable' Right," 231-232.

[20] William Blackstone, *Commentaries on the Laws of England*, vol. I (New York: E. Duyckinck, 1765/1827), Google Books, 311.

[21] Joyce Lee Malcolm, *To Keep and Bear Arms*,13.

[22] Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective."

[23] Joyce Lee Malcolm, *To Keep and Bear Arms*, 1.

[24] Ibid., 9.

[25] Robert J. Cottrol, *Gun Control and the Constitution: Sources and Explorations on the Second Amendment* (New York: Garland Pub., 1994), xii. Note: Cottrol writes “Sir William Blackstone, whose *Commentaries on the Laws of England* greatly influenced American legal thought both before the American Revolution and well into the nineteenth century… His importance with respect to the question of the right to keep and bear arms, and indeed a number of other issues, should not be underestimated.”

[26] Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American

Political Thought," *The American Political Science Review* 78, no. 1 (March 1984): 194. Note: Interestingly, John Locke was a distant third to Blackstone.

[27] William Blackstone, *Commentaries on the Laws of England*, 102.

[28] Ibid.

[29] Ibid., 104.

[30] Ibid., 102.

[31] Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective."

[32] Joyce Lee Malcolm, "The Creation of a 'True Antient and Indubitable' Right, 248.

[33] George Mason, "Virginia Declaration of Rights, 1776," Constitution.org, accessed July 7, 2012, http://www.constitution.org/bcp/virg_dor.htm.

[34] George Mason, "Remarks on Annual Elections for the Fairfax Independent Company," Gunston Hall: Home of George Mason, April 17-26, 1775, accessed June 10, 2012, http://www.gunstonhall.org.

[35] Akhil R. Amar, *America's Constitution*.

[36] William Blackstone, *Commentaries on the Laws of England*, vol. I (New York: E. Duyckinck, 1765/1827), Google Books, 310.

[37] Ibid.

[38] Akhil R. Amar, *America's Constitution*.

[39] Alexander Hamilton, "The Federalist No. 28: Idea of Restraining the Legislative Authority in Regard to the Common Defense Considered (continued)," *Independent Journal* (New York), December 26, 1787.

[40] Ibid.

[41] James Madison, "The Federalist No. 46: The Influence of the State and Federal Governments Compared," *New York Packet*, January 29, 1788.

[42] Ibid.

[43] Melancton Smith, "Melancton Smith, Speech in the New York Ratification Convention, June27, 1788," University of North Carolina at Chapel Hill, accessed June 4, 2012, http://www.unc.edu.

[44] Robert Yates, "Brutus I," *New York Journal*, October 18, 1787, accessed June 2, 2012, Constitution.org.

[45] Note: Madison was a federalist during the ratification debates although he would later join forces with Thomas Jefferson as a Democratic Republican, or what is sometimes called a Jeffersonian Republican, to oppose John Adams and the Federalist party.

[46] James Madison and Jack N. Rakove, *Writings* (New York, NY: Literary Classics of the United States, 1999), 442. Note: Madison's original words were, "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military

service in person."

[47] James Madison, "The Federalist No. 46: The Influence of the State and Federal Governments Compared," *New York Packet*, January 29, 1788.

[48] Ibid.

[49] Samuel Adams and Harry A. Cushing, *The Writings of Samuel Adams* (New York: Octagon Books, 1968), accessed July 22, 2012, http://press-pubs.uchicago.edu/founders/documents/v1ch3s4.html.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Note: Thomas Jefferson would claim neutrality during the ratification debates; however, he would later team up with James Madison and others to form the Democratic Republican party, a precursor to the modern day Democrat Party.

[54] Thomas Jefferson, "No Freeman Shall Be Debarred the Use of Arms (Quotation)," Thomas Jefferson's Monticello, 1776/2012, accessed August 14, 2012, http://www.monticello.org/site/jefferson/no-freeman-shall-be-debarred-use-arms-quotation.

[55] Ibid. Note: Stephen Halbrook surmises this additional phrase "may have been a rebuke to English game laws which prohibited commoners from hunting on their own land" (Halbrook, 1989, p. 53).

[56] Stephen P. Halbrook, *A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees* (New York: Greenwood Press, 1989), 53.

[57] Thomas Jefferson, *Declaration of Independence*, 1776.

[58] Thomas Jefferson and Merrill D. Peterson, *Writings* (New York, NY: Literary Classics of the U.S., 1984), 1491.

[59] Akhil R. Amar, *America's Constitution: A Biography* (New York: Random House, 2006), Kindle.

[60] Mayo W. Hazeltine, *Masterpieces of Eloquence: Famous Orations of Great World Leaders from Early Greece to the Present Time*, vol. 6 (New York: P.F. Collier & Son, 1905), Google Books, 2578.

[61] Patrick Henry, "Virginia Ratifying Convention: June 9, 1788," Constitution Society, 1788/2012, accessed August 15, 2012, http://www.constitution.org/rc/rat_va_07.htm.

[62] Ibid. Note: This section of the Constitution reads, "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

[63] Patrick Henry et al., "Virginia Ratifying Convention: June 14, 1788," Constitution Society, 1788/2012, accessed August 15, 2012, http://www.constitution.org/rc/rat_va_12.htm.

[64] George Mason et al., "Virginia Ratifying Convention: June 14, 1788," Constitution Society, 1788/2012, accessed August 15, 2012, http://www.constitution.org/rc/rat_va_12.htm.

[65] Ibid.

[66] Paul L. Ford et al., *Pamphlets on the Constitution of the United States: Published during Its Discussion by the People, 1787-1788* (Brooklyn, NY: [S.l.], 1888), accessed August 15, 2012, http://archive.org/details/cu31924020874099.

[67] Ibid.

[68] Ibid.

[69] Ibid.

[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] Stephen P. Halbrook, "Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment," *University of Dayton Law Review*, 1989, accessed July 22, 2012, http://www.constitution.org.

[74] Robert J. Cottrol, *Gun Control and the Constitution: Sources and Explorations on the Second Amendment* (New York: Garland Pub., 1994), xv.

[75]Ibid., xii. Note: Cottrol interestingly writes, "The need for white men to act not only in the traditional militia and posse capacities but also to keep order over the slave population helped lessen class, religious and ethnic distinctions among whites in colonial America. That need also helped extend the right to bear arms to classes traditionally viewed with suspicion in England, including indentured servants."

[76] U.S. Constitution, Amendment II.

[77] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), Kindle.

[78] Robert J. Cottrol, *Gun Control and the Constitution*, xvi. Note: Cottrol goes on to write, "The English experience of the seventeenth century had shown that [a select militia] could be used to disarm the population at large. Richard Henry Lee of Virginia expressed the fear that it might be so used in the American colonies."

[79] Ibid., xvi.

[80] George Mason, "Virginia Ratifying Convention: June 16, 1788," Constitution Society, 1788/2012, accessed August 16, 2012, http://constitution.org/rc/rat_va_13.htm.

[81] Tenche Coxe as cited in Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*.

[82] Akhil R. Amar, "The Bill of Rights and the Fourteenth Amendment," *The Yale Law Journal: Faculty Scholarship Series*, 1193rd ser., 101 (1992): 1261, accessed June 10, 2012, http://digitalcommons.law.yale.edu/fss_papers/1040. Note: Amar writes, "The 1789 instantiation of [the Second Amendment] was intimately connected with federalism concerns about a federally controlled standing army that might seek to overawe state-organized militias." See also Robert J. Cottrol, *Gun*

Control and the Constitution, xvi. Cottrol writes, "critics of the new Constitution reflected the fear that without an armed population and a broad-based militia, the newly empowered federal government could turn despotic."

[83] Brian Doherty, *Gun Control on Trial: Inside the Supreme Court Battle Over the Second Amendment* (Washington, D.C.: Cato Institute, 2008), Kindle. Note: It is understood that Doherty may have biases regarding the Second Amendment and is not a scholarly source; however, his opinion does support the views held by other scholarly sources utilized in this paper.

[84] Lois G. Schwoerer, "To Hold and Bear

↑ 1 ↓ · flag

Anonymous · a month ago

lengthy post but well worth the read.

To me this is the core argument:
"Blackstone viewed this right "for self preservation" as a "natural," rather than historical, and vital component to "public safety."[32] It is quite likely that the Founding Fathers, who studied and admired Blackstone's legal prowess, had a similar opinion towards a citizen's right to self-defense—which may be an underlying principle of the Second Amendment and civil liberty in general."

Check out how many times Joe Biden attacks Clarence Thomas and natural rights. and the term natural rights was used. Natural rights was supposed to defeat Thomas when the Anita Hill story fell apart. Biden claiming good natural law is subservient to the constitution which is invoked when the left runs the court so natural rights do not exist at all. According to Biden good natural law is something outside government or static set of "timeless truths". Instead according to Bideen natural law is defined by man and thus is an evolving body of ideals that alters to adjust to popular ideas of to government (when liberals run it) so natural law is like Ann Margaret in the Cincinnatti Kid using scissors to adjust puzzle pieces to fit new social challenges and new economic circumstances du jour. Biden's good natural law doesn't prevent anyone from doing anything any time they really want to do something. Hillary no doubt shares similar views on the rights of the individual protected by natural rights vs the power of the government to totally ignore those rights..

http://www.loc.gov/law/find/nominations/thomas/hearing-pt1.pdf

↑ 1 ↓ · flag

clinton mathews · a month ago

Great Post by Peter A. Zitko! Thanks Peter, you give us great information to consider as we struggle with the 2nd Amendment and the thinking of the times that brought it into being. A truly scholarly work.

↑ 1 ↓ · flag

Anonymous · a month ago

Thanks Clinton, I greatly appreciate your kind comments!

0 · flag

+ Comment

 Jameson Martinez · a month ago

Great post Peter.

0 · flag

Anonymous · a month ago

Thanks Jameson!

1 · flag

+ Comment

 Jameson Martinez · a month ago

Thank you all for such great responses. This has been my favorite class so far on Coursera, mostly because of the great feed back and discussions in the forums.

0 · flag

 Robert Prince III · 25 days ago

Concerned on the writing assignments. Can't find the options for writing requirements. I am asking for direction of where the link is that I need to direct myself. if you can help, I'd greatly appreciate it. Thank you

0 · flag

+ Comment

brianew · 25 days ago

I believe SCOTUS got it wrong in Heller and McDonald. The individual right to bear arms seems more a modern day interpretation of the 2nd Amendment than an interpretation from original intent. If you take the 2nd Amendment and 10th Amendment, both of which are in the Bill of Rights and where considered at the same time, there is a connecting and overarching principle that states have the power to regulate militias and by consequence arms as powers not given to the federal government rest with the state and respectively the people. Keeping in mind the Bill of Rights was not primarily written to protect individual

citizens but to first and foremost appease states' fears of a tyrannical federal government imposing its will on states. Certainly the 9th Amendment can be properly thought to posses the right of the people to bear arms yet that right still doesn't deny the power of the State to establish a "well-regulated militia" meaning organized and disciplined for the purpose of public defense as Alexander Hamilton says in Federalist #29. Notice he doesn't say individual defense but the public defense. He goes on to say "It is, therefore, with the most evident propriety, that the plan of the convention proposes to empower the Union 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, *reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress*.'" He doesn't mention an individual right to arms largely because self-defense would have seemed like common sense to any man. Would Hamilton have supported collecting guns and indiscriminately shooting people of course not. He would have supported that individual being held accountable for committing an act that violated another persons right to live peacefully. Yet it seems the "individual right" component the Supreme Court put forth wasn't the point of the 2nd Amendment at all because self-defense was already a natural right. The 2nd Amendment is for establishing a militia, a well-regulated militia, for the purpose of a public defense of a state or the nation with responsibility shared between the states and the federal government in its regulation. You can read Federalist #29 here: http://www.constitution.org/fed/federa29.htm

↑ 0 ↓ · flag

Anonymous · 24 days ago

a founder's view for the need for the 2nd Amendment.

The strongest reason for the people to retain the right to keep and bear arms is, as a last resort, to protect themselves against tyranny in government.

Consider someone today can argue (The individual right to bear arms seems more a modern day interpretation of the 2nd Amendment than an interpretation from original intent.) with Jefferson and claim superior insight into original intent.

In today's politics that puts Jefferson in the Tea Party along with Sarah Palin and Ted Cruz - favorites of the left.

↑ 0 ↓ · flag

+ Comment

Mahathir Chang · 24 days ago

In the spirit of the Second Amendment, people should be able to own nuclear, biological or other non-conventional weapons. The US military has them and the people has the right to be able to safeguard agains tyranny. The purpose of the Second Amendment is to prevent opression by some over another.

↑ -2 ↓ · flag

Anonymous · 5 days ago

Certainly anything doable from a 3D printer is illegal and also not detectable by the NSA.

Some say that if you aren't doing something that offends the state then you have nothing to worry about. I would rather that they worry about me than me worrying about them.

Of course we might all disarm and let Putin run the world. Progressives have always wanted the USA to disarm. This traces back to the history of how the progressive movement has been run out of Moscow when it was called the USSR.

0 · flag

+ Comment

Anonymous · 24 days ago

>In the spirit of the Second Amendment, people should be able to own nuclear, biological or other non-conventional weapons.

Secretary of State Kerry agrees with you and the American left in assuring WMDs return to Afghanistan and wants to see Iran go nuclear.

>The purpose of the Second Amendment is to prevent opression by some over another.

Actually it is to prevent the government of the USA from having excess power over its people. However, president has decided to get rid of our military in order that all other countries can do whatever they want and we can no longer do anything about it in. If Putin revives the USSR, so what we won't be able to stop the new Soviet Union with the new tiny military he is giving us. This in order than everyone gets a free Obamaphone or unlimited unemployment if they work for a couple of weeks.

0 · flag

clinton mathews · 24 days ago

In the spirit of Mahathir and Anon, I firmly believe this thread has exhausted its usefulness!

0 · flag

+ Comment

SherrieLeShell · 23 days ago

This post is most likely going to be a bit off the mark as to what is being discussed in this forum. First, I would like to say, I have a understanding to what the 2nd Amendment is saying as it relates to individuals having the right to bear arms. However, what I do not understand is the "Stand your ground law" in states such as Texas and Florida and possibly others as well. The Federal government

desperately needs to get involved in these state laws. Over that last few months many people have loss their lives for ridiculous reasons based on these state laws. If anyone has any opinions regarding this, please share your thoughts I'm interested in hearing them.

↑ 0 ↓ · flag

clinton mathews · 23 days ago

Please review Constitutional Amendment X. What standing do you think the federal government has in this matter?

↑ 0 ↓ · flag

+ Comment

⬇ scroll down for more ⬇