

Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Guns

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**Interest Groups on Gun Control and the Second Amendment**

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*The constitutional politics of gun control is driven by the interest groups that lobby government and sponsor litigation. The National Rifle Association (NRA) is the leading contemporary proponent of gun rights. The Brady Center to Prevent Gun Violence is a leading proponent of gun control. Their positions are noted in the excerpts below.*

*As you read those excerpts, consider the following questions. First, to what extent do these positions mirror those of political parties and individual justices? Do Democrats and Republicans merely echo the words of affiliated interest groups or do important differences exist in the ways in which parties and interest groups approach gun rights? How might these differences influence constitutional politics in the United States? Note how the Brady Center responded to the adverse decision in *District of Columbia v. Heller* (2008). Are proponents of gun control sincere when they insist that nothing of real consequence was actually decided? Suppose Justice Stevens had garnered a majority for his position. Could the NRA have plausibly insisted that, from their perspective, nothing of real consequence had been decided? You might compare the Brady Center's reaction to *Heller* to pro-choice claims that *Planned Parenthood v. Casey* was a terrible defeat. Was *Casey* really a worse defeat for abortion rights than *Heller* was for gun control? On what basis do interest groups claim judicial decisions are victories or defeats?*

*National Rifle Association, "The Constitution, Bill of Rights, and Firearms Ownership in America"<sup>1</sup>*

1. Does the Second Amendment Describe An Individual Right? The Founding Fathers created the Bill of Rights to protect the rights of individuals. The freedoms of religion, speech, association, and the rest all refer to individual liberties. The Second Amendment right to keep and bear arms is no different. . . . In constructing the Bill of Rights, Madison followed the recommendations of the state ratifying conventions. Though they ratified the Constitution, several of those conventions had recommended adding provisions about specific rights. Five conventions recommended adding a right to arms; by comparison, only three conventions mentioned free speech. Members of Congress had no doubt as to the amendment's meaning. They and their contemporaries were firearm owners, hunters and in some cases gun collectors (George Washington and Thomas Jefferson exchanged letters about their collections). They had just finished winning their freedoms with gun in hand, and would, in their next session, pass legislation requiring most male citizens to buy and own at least one firearm and 30 rounds of ammunition. . . .

2. Isn't the "well regulated militia" the National Guard? Gun control supporters insist that "the right of the people" really means the "right of the state" to maintain the "militia," and that this "militia" is the National Guard. This is not only inconsistent with the statements of America's Founders and the concept of individual rights, it also wrongly defines the term "militia." Centuries before the Second Amendment was drafted, European political writers used the term "well regulated militia" to refer to all the people, armed with their own firearms or swords, bows or spears, led by officers they chose. America's Founders defined the militia the same way. Richard Henry Lee wrote,

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<sup>1</sup> <http://www.three-peaks.net/PDF/2APrimerfinal.pdf> (accessed December 1, 2012).

"A militia when properly formed are in fact the people themselves . . . and include all men capable of bearing arms. . . ." Making the same point, Tench Coxe wrote that the militia "are in fact the effective part of the people at large." George Mason asked, "[W]ho are the militia? They consist now of the whole people, except a few public officers." . . . Four times in American history, Congress has enacted legislation declaring its clear understanding of the Second Amendment's meaning. Congress has never given any support for the newly minted argument that the amendment fails to protect any right of the people, and instead ensures a "collective right" of states to maintain militias. In 1866, 1941, 1986, and 2005, Congress passed laws to reaffirm this guarantee of personal freedom and to adopt specific safeguards to enforce it. The Freedmen's Bureau Act of 1866 was enacted to protect the rights of freed slaves to keep and bear arms following the Civil War and at the outset of the chaotic Reconstruction period. The act declared protection for the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . . including the constitutional right to bear arms. . . ." And in 2005, as a result of lawsuits aiming to destroy America's firearms industry, Congress passed the Protection of Lawful Commerce in Arms Act to end this threat to the Second Amendment. The act begins with findings that go to the heart of the matter: "Congress finds the following: (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed. (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms."

4. What are "gun control" laws? "Gun control" is the popular name for laws that regulate, limit or prohibit the purchase and possession of firearms. "Gun control" laws are usually proposed on the grounds they will stop the criminal misuse of firearms, but they are almost never actually targeted at criminals. Supporters of "gun control" most commonly call for laws that restrict law-abiding people, the only ones who will obey them. Laws prohibiting the possession of a firearm are unlikely to stop a person willing to commit robbery, assault or murder. On the other hand, honest citizens who respect the law will submit to the gun control laws, even if the laws do not make them safer.

7. Does the Second Amendment apply to modern guns the same way it applied to flintlocks? Isn't the Second Amendment dated and obsolete? Just as the First Amendment applies to the modern printing press and the Internet, the Second Amendment applies to modern firearms. The most important aspect of the Second Amendment is the philosophy on which it is founded: that all free people have the right to defend themselves, their families, communities and nation. In 1789 it applied to the freedom to keep and bear arms just as it does today. The technological advances of the past two centuries do not make that principle obsolete, any more than computerized printing cancels the First Amendment.

8. Isn't the Second Amendment just about protecting guns for hunting? The Second Amendment is not about hunting at all. The Second Amendment is about protecting the right of a free people to defend that freedom and to protect their families and communities from threats. The Founders, who all considered themselves English citizens, had seen the British army disarm the public. They believed this was an improper use of government power. In writing the Constitution, they included the Second Amendment to prohibit the American government from doing what the British had done. Hunting is an important American tradition and is the most effective wildlife management tool available. Firearms ownership is critical if hunting is to continue. So the fight to protect Second Amendment rights has the benefit of protecting this American sporting tradition.

10. If there are more guns, won't we have more crime?

Many areas with high percentages of gun owners are some of the most crime-free areas in the nation. The simple presence of a gun, or many guns, does not lead to crime. Most of the states with higher per capita legal gun ownership have the lowest rates of violent crime, while states with lower per capita gun ownership have much higher violent crime rates. The real answer to reducing crime is not passing gun laws, but solving other problems that really do lead to high crime rates. Gun control diverts attention from the roots of the crime problem.

13. Shouldn't we at least ban handguns? The important truth is: criminals do not want to attack armed citizens. The only real impact of a handgun ban is to insure that law-abiding citizens are disarmed, leaving them more at the mercy of illegally armed criminals. Cities such as Washington, D.C., and Chicago have banned handguns, and violent crime has not been eliminated, or even reduced.

16. We license drivers, shouldn't we license gun owners? Driving a car is not a constitutional right. People drive on the public roads as a privilege provided by the community. The community sets standards for drivers that everyone has to meet to make the roads safe. Firearm ownership is a constitutional right, and that means government has very limited power to restrict it. Gun owner licensing has little, if any, real value in preventing crime, but has proven time and again to set the stage for infringement on the right to own a firearm. . . .

19. Why does anyone need an "assault weapon"? This question is often used to justify laws restricting firearms ownership. So-called "assault weapons" are just one example. Why does anyone need a handgun? Why does anyone need a semi-auto shotgun? The real question we ask is, "Why does government need to restrict this right for law-abiding citizens?" In a free society the government has to prove it needs to restrict the basic rights of the people. The government that can restrict a right based on "need" can restrict any right. That is not a free society. Banning guns because some criminals use them tells all honest citizens that their rights and liberties depend not on their own conduct but on the behavior of the lawless. It tells the law-abiding that they have only such rights and liberties as criminals will allow.

20. Isn't it clear that America needs a national gun policy? It has one: the federal Gun Control Act of 1968, a massive set of restrictions on who may sell, buy and own firearms, how sales may occur, and what kinds of firearms may be sold. There are severe penalties for violations of these laws, but they have to be enforced. And, of course, each state and the District of Columbia and many cities and towns have laws governing the purchase, possession, and use of firearms. All told, there are tens of thousands of federal, state and local gun laws on the books.

*Brady Center to Prevent Gun Violence, "Unintended Consequences: What the Supreme Court's Second Amendment Decision in D. C. v. Heller Means for the Future of Gun Laws"*<sup>2</sup>

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The Limited Direct Effect of the *Heller* Decision

A narrow 5-4 majority of the Supreme Court in *District of Columbia v. Heller* (2008) held that the Constitution provides private citizens with a right to arms, rejecting the view—held by virtually every previous court in our nation's history—that the Second Amendment's militia clause and history limit the right of arms to service in a "well-regulated militia." . . .

. . . [O]ther than the Washington, D.C., law struck down by the Court, only Chicago, and a handful of suburban Chicago jurisdictions, have a handgun ban. And even those bans may not be struck down under *Heller*. Because the District is a federal enclave, whether the Second Amendment is "incorporated" against the states was "a question not presented by this case," and the Court cited to its earlier decisions that are affirmed that the Second Amendment applies only to the Federal Government. . . .

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The Risks of *Heller*: A Legal Weapon In The Arsenal of Gun Criminals?

There are . . . potential unintended consequences of *Heller* that are not at all positive. There are important potential legal risks presented by the Court's recognition of a private right to arms unrestricted

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<sup>2</sup><http://www.bradycenter.org/xshare/pdf/reports/post-heller-white-paper.pdf> (accessed December 1, 2012)

to militia use. Criminal defendants (and their defense lawyers) can be expected to try to transform *Heller* into a “get out of jail free” card, to attempt to evade punishment for serious gun crimes. . . .

It is also likely that the gun lobby will seek to have courts invalidate sensible gun laws that protect our families from gun violence, and to prevent the implementation of future laws. . . .

. . . [W]e believe that the decision, properly read, should not restrict the ability of communities to enact strong laws to keep deadly weapons off our streets and out of the hands of dangerous persons. [T]he Court went out of its way to make clear that a wide variety of gun laws, short of a handgun ban, remain constitutional, even listing some laws that it stated are “presumptively lawful,” including:

Bans on possession by felons and the mentally ill;

Bans on guns in schools;

Laws setting conditions for firearms sales;  
Concealed carrying prohibitions;

Prohibitions on “dangerous and unusual” weapons;

Safe storage laws.

The Court then added that “our list does not purport to be exhaustive.” . . .

. . . Particularly given the Court’s rejection of strict scrutiny, it is likely that courts considering whether the post-*Heller* Second Amendment allows for reasonable gun laws will follow the approach taken by state courts construing comparable state constitutional right to bear arms provisions. In 42 of the 44 states whose constitutions include a right to bear arms provision, the states’ high courts have interpreted the clauses as conferring an individual, not collective or militia, right. . . . But among those individual-rights states, no state has found the right to be absolute, and state courts across the board have consistently held that gun control measures that reasonably regulate firearm ownership, without completely or arbitrarily abrogating it, do not infringe the right. . . . For example, state courts in Georgia, Nebraska, North Carolina, Texas and Florida have all upheld bans on short-barreled or sawed-off shotguns, finding such laws permissible under state constitutional provisions that recognized a private, non-militia-based right to arms. . . . The Supreme Courts of Wyoming and Idaho, construing similar constitutional protections, upheld bans on concealed weapons as reasonable restrictions. . . . Courts in Colorado, Connecticut, and Ohio have upheld bans on assault weapons as a reasonable restriction of the right to bear arms recognized in those states’ constitutions. . . .

As many of these courts have recognized, “the legislative power to regulate arms is an inherent part of the ‘police power’” or, as the Colorado Supreme Court characterized it, the “state’s right, indeed its duty under its inherent police power to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people.” . . . The Connecticut Supreme Court agreed that “[s]tate courts that have addressed the question under their respective constitutions overwhelmingly have recognized that the right [to bear arms] is not infringed by reasonable regulation by the state in the exercise of its police power to protect the health, safety, and morals of the citizenry.” . . .

Courts applying *Heller* to other gun laws should similarly recognize that strong laws that prevent criminals from obtaining guns are not inconsistent with a private right to arms. In upholding reasonable gun laws, state courts should continue to recognize “the compelling state interest in protecting the public from the hazards involved with certain types of weapons, such as guns.” . . .

*Heller* Provides No Impediment to Strong Reasonable Gun Laws



The Second Amendment, as interpreted by the *Heller* Court, should not pose an impediment to strong reasonable gun laws. The policy proposals favored by the Brady Campaign, and most Americans, are not among those policy options taken off the table by *Heller*. Rather, they are narrowly tailored to minimize gun violence and prevent criminal use of guns, while allowing for possession of conventional handguns and long guns for lawful purposes. For example, we support:

Universal criminal background checks for all gun sales that eliminate the loophole under which criminals can now buy guns from “private sellers” without a background check at gun shows and elsewhere, no questions asked;

One-handgun-a-month laws that prevent high volume handgun purchases by gun traffickers;

Repeal of various restrictions on federal enforcement power against corrupt gun dealers;

Restrictions on military-style assault weapons (with exceptions for law enforcement and the military), while not preventing lawful purchases of conventional handguns, rifles, and shotguns.

These reasonable proposals should be permitted under *Heller*. While the Justices were narrowly split over whether the Second Amendment was limited to a militia-based right, the Justices unanimously agreed that virtually all existing gun laws are constitutional, regardless of the Second Amendment’s meaning.

#### *Heller’s Shaky Precedent*

Despite the potentially positive effects of *Heller*, its shaky legal reasoning should not be ignored. Especially when the gun lobby and criminals attempt to extend the opinion far beyond its language, courts must be reminded that the right discovered by five Justices in *Heller* was not supported by the Second Amendment’s text or history. . . . Virtually every court in American history that had construed the Amendment had been swayed by the historical record that makes the militia-centric purpose of James Madison and the other framers undeniable, as well as by the inconvenient fact that the Amendment begins by expressly referencing its one purpose—“a well-regulated militia, being necessary to the security of a free State.” . . .

. . . Judicial scholars from across the political spectrum have roundly criticized Justice Scalia’s majority opinion. One of the most noted conservative legal scholars of our day, Judge Richard Posner, likened the opinion to a “snow job,” stating that “It is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology.” Judge J. Harvie Wilkinson III, a perennial on the short-lists of potential Republican Supreme Court nominees, railed against Scalia’s decision as driven by the Justices’ policy views, and as evidencing a “failure to adhere to a conservative judicial methodology.”