

# Widener University Delaware Law School

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## Gun Rights are Not Unlimited

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**Your Turn**  
Alan Garfield  
Guest columnist

# Gun rights are not unlimited

Is this country insane?

Since 2014, there have been 1,927 mass shootings in which four or more people were killed or injured, according to the Gun Violence Archive. That averages to almost one incident per day.

How much more carnage will it take before we outlaw the private possession of weapons of war?

But wait! Won't that violate our Second Amendment rights?

No. That's a myth propagated by the NRA.

It's true that the Second Amendment says "the right of the people to keep and bear Arms, shall not be infringed." But it's also true that that clause is preceded by "A well regulated Militia, being necessary to the security of a free State."

As you likely know, there is a longstanding debate over whether the Second Amendment provides only a collective right to bear arms in connection with military service or also provides a private right to own weapons.

What you may not know, is that the collective right interpretation was the prevailing interpretation for the first 217 years after the Second Amendment was ratified. It was only 11 years ago, in 2008, that the Supreme Court for the first time interpreted the Second Amendment to include a private right to bear arms.

Just 17 years before this opinion was issued, the conservative Chief Justice Warren Burger was telling the American public that the NRA's private rights argument was "one of the greatest pieces of fraud, I repeat the word fraud, on the American people by any special interest group that I have ever seen in my lifetime."

But fine. Let's give the Court its due and accept that there is a private right to bear arms.

That leads to the more relevant question: What is the scope of this right?

Constitutional rights are not absolute. Just because you have a right to free speech doesn't mean you can falsely yell "fire" in a crowded theatre. Nor does your right to religious freedom entitle you to engage in human sacrifice.

So, what, exactly, is the extent of the private right to bear arms? Thus far, the Supreme Court has said only that people have a right to have a handgun at home. That's it. Full stop.

The Supreme Court has not said that private individuals have a right to assault weapons, high-capacity magazines, bump stocks, or F-15 fighter jets. It has not said that individuals have a right to take handguns outside their homes.

Indeed, in his landmark opinion finding a private right to bear arms, conservative Justice Antonin Scalia was quick to point out that Second Amendment rights are "not unlimited," and that nothing in the Court's opinion "should be taken to cast doubt" on longstanding gun regulations.

Still, by finding a private right to bear arms, the Supreme Court did invite future legal challenges to gun regulations, and numerous lawsuits are working their way through the lower courts. But the Supreme Court justices have shown little appetite for expanding gun rights.

It's certainly possible that the Supreme Court might interpret the Second Amendment more aggressively now that the conservative Brett Kavanaugh has replaced the moderate Anthony Kennedy. But, if the justices are wise, they will use their power cautiously and sparingly.

Striking the appropriate balance between an individual's right to bear arms and society's interest in reducing gun violence is a complicated endeavor. It is best left to the people's elected representatives, not five unelected justices – that's all you need for a majority – with no expertise on weapons or gun violence.

*Alan Garfield is a distinguished professor at Widener University Delaware Law School.*