Understanding the Second Amendment

Corey A Ciocchetti, University of Denver
UNDERSTANDING THE SECOND AMENDMENT: A FIVE PAGE SYNOPSIS

By: Corey Ciocchetti | University of Denver

“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.” These might be the most awkwardly assembled twenty-seven words in American political history. Much like reading James Joyce’s FINNEGANS WAKE or William Faulkner’s THE SOUND AND THE FURY, the Second Amendment takes repeated review to grasp even basic understanding.¹ Though few teachers would accept such garbled prose from students, early Americas accepted this so-called sentence as part of our Bill of Rights -- the most important protections granted to states and individuals from federal government intrusion. Interpreting the meaning of these words has stirred fierce debate from which two primary positions evolved. The Individual Right Position holds that the Second Amendment protects the right of individuals to possess and use firearms (with some legislative oversight) for militia service as well as traditionally lawful reasons unrelated to militia service such as confrontation and self-defense. The Militia-Focused Position holds that the Second Amendment focuses on its opening clause and thereby prevents the federal government from disarming state militias in an attempt to wield power via a standing army. Under this position, individuals are allowed to possess and carry arms only in connection with militia service, which is subject to strong legislative limitations. This essay evaluates the text, history and judicial precedent surrounding the Second Amendment -- evidence generally accepted by both sides. The truth of which position best represents the amendment’s true purpose may well rest somewhere in the middle.

THE TEXT & HISTORY OF THE SECOND AMENDMENT

Drafting and ratification of constitutional text and amendments, like legislation, is akin to sausage making -- one may relish the results but ought to avoid glimpsing the process. Diverse interests stake out distant positions and compromise rules the day. This can result in clear proclamations of lasting national pride such as:

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.²

It more often results in nebulous statements like the Second Amendment filled with cryptic language palatable to both sides but frustrating to citizens, lawmakers and judges alike. All is not lost,

¹ Faulkner writes, cryptically, in THE SOUND AND THE FURY: “Caddy held me and I could hear us all, and the darkness, and something I could smell. And then I could see the windows, where the trees were buzzing. Then the dark began to go in smooth, bright shapes, like it always does, even when Caddy says that I have been asleep.” Vintage Books, First Vintage International Edition, 75 (1990).
² Preamble to the United States Constitution.
however, as the Second Amendment may be parsed to seek a more specific meaning. This section evaluates the meaning of the words according to the Individual Right and Militia-Focused Positions.

“A well regulated Militia, being necessary to the security of a free state . . .”

This language clearly revolves around the concept of the militia. In late Eighteenth Century America, all able-bodied males at least seventeen years of age and physically capable of bearing arms to defend the state were eligible to join the militia. This group of citizen-soldiers was trained, if called into service, to leave their day-to-day jobs, gather their arms from their homes and stand ready to repel invasions (mostly from Indian tribes) and resist tyranny (eventually in the form of King George III). It was this militia, comprised of members from towns in Massachusetts and the surrounding colonies, who fought the British during the battles of Lexington and Concord beginning the Revolutionary War. The contemporary version of the American militia - the National Guard - is much different from the revolutionary militia. In 1791, a National Guard would have been considered a standing army viewed suspiciously by a founding generation who had just overcome the strongest standing army in the world. So . . . this sounds fairly straightforward. What’s all the fuss?

In one sense, ALL able-bodied males residing in a state were potential militia members. They were to be called forth in emergencies and/or if governmental order broke down. The Individual Right adherents favor this formulation of militia. They hold that tyrants throughout history eliminated opposition, not by disbanding militias, but by taking away their arms and creating a standing army to rule the land in the militia’s absence. The most prominent example comes from England where Kings Charles II and James II disarmed militias and created standing armies. This led to the Glorious Revolution of 1688 and the enshrinement of the right of Protestants to bear arms in the English Bill of Rights: “That the subjects which are Protestants, may have arms for their defence suitable to their conditions and as allowed by law.” This camp believes that the best bulwark against such disarmament occurs when individuals have an independent right to possess and use the types of firearms they would have traditionally brought with them if called into militia service or traditionally used to defend themselves (translated into the modern day equivalent – the flintlock pistol translates into today’s handgun). They argue that an armed populace restrains a central government from abusing its people akin to the Stuart kings of England and restricts the federal government (in charge of the militia in Article I of the Constitution) from disarming the states and the people by disarming the militia.

In another sense, the militia can describe only the able-bodied men ACTUALLY CALLED into militia service by the government. This Militia-Focused Position holds the more restrictive view that the amendment codifies no individual right to possess and use arms outside of official militia service. They argue that the framers expressed little concern for the individual right to possess and use a firearm when debating and drafting the amendment. Evidence supporting this position comes from James Madison (the drafter of the Second Amendment). Madison’s first draft drew from proposed

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3 The term “the state” is generally thought to have referred to the polity (all the people) of a sovereign jurisdiction such as a colony, state or nation as opposed to any particular state such as North Carolina.

4 THE BILL OF RIGHTS, 1689, 1 W. & M., ch. 2, sess. 2.
language offered by many of the existing states, some of which contained a self-defense right, and still declined to clearly enumerate the Individual Right position. Madison’s draft read: “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.” The argument is that a military meaning is found throughout the draft, especially in the “religiously scrupulous” language -- a concept that exempts people today from military drafts. That phrase/concept would make no sense in an individual right to bear arms context.

“The right of the people to keep and bear Arms, shall not be infringed.”

The Individual Right adherents claim that this language forms the operative clause -- the meat of the amendment that rules the day. The militia-focused preface, they argue, merely introduces a purpose (that all able-bodied males might be called on to resist tyranny with arms) but cannot limit or expand the operative clause. The Militia-Focused camp, on the other hand, rebuts that it “cannot be presumed that any clause in the constitution is intended to be without effect.” This means that the militia language must do more than announce a purpose -- it must have legal significance. Perhaps the United States Supreme Court would add clarity to the matter via a clear interpretation of the Second Amendment . . .

**Supreme Court Precedent**

There are three major United States Supreme Court cases interpreting the Second Amendment. The Court’s first substantial pronouncement came in United States against Miller in 1939 (nearly 150 years after the ratification of the Second Amendment). Two men were convicted of transporting an unregistered short-barreled, 12 gauge shotgun in interstate commerce (from Oklahoma to Arkansas) in violation of the National Firearms Act. The defendants argued that the Firearms Act violated their Second Amendment rights. The Supreme Court upheld the convictions arguing that the possession of a short-barreled shotgun had no “reasonable relationship to the preservation or efficiency of a well regulated militia” as required by the Second Amendment. The Court held that it could not take judicial notice of the fact that this type of weapon formed “any part of the ordinary military equipment, or that its use could contribute to the common defense.” The case quoted at length from “debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators (including Blackstone and Adam Smith)” but did not elaborate on the contours of the Second Amendment and any individual right to possess a firearm unrelated to militia service.

Nearly 70 years later, District of Columbia against Heller, became the country’s landmark Second Amendment case. In 1976, the District of Columbia (D.C.) passed one of the nation’s strictest gun

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5 Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 174, 2 L. Ed. 60 (1803).
6 307 U.S. 174 (1939) (unanimous opinion of the Court).
7 Miller at 177.
8 Id.
9 D.C. v. Heller, 554 U.S. 570 (2008) (the majority was comprised of the Chief Justice and Justices Scalia, Kennedy, Thomas and Alito. Justices Souter, Ginsburg and Breyer joined Justice Stevens’ dissent. Justices Stevens, Souter and
The law generally prohibited unregistered / unlicensed handgun possession (while, at the same time, prohibiting handgun registration severely limiting licensing) and required district residents to keep their lawfully owned guns “unloaded and disassembled or bound by a trigger lock or similar device.” In a 5-4 decision, the Supreme Court took the Individual Use & Possession Position and held that the Second Amendment enumerates an individual right to possess and use a firearm “in case of confrontation” and particularly for self-defense in the home. Justice Scalia’s opinion broke down the clause into two parts -- the preface comprised of the Militia clause and the operative clause enumerating the individual right. The Court found that the two work together to allow the types of weapons that people traditionally keep in their homes for self-defense (which includes handguns but likely excludes more dangerous weapons such as machineguns). In so finding, the opinion evaluated the amendment’s text, state constitutional arms-bearing provisions adopted near in time to the Second Amendment, the legislative history surrounding the amendment’s proposal, the amendment’s interpretation from adoption through the end of the 19th century and relevant Supreme Court precedent. The majority qualified the right by stating that: “Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” In the end, the Court stuck down the D.C. laws banning handgun possession in the home and mandating that firearms in the home remain inoperable. The Court did not strike down the licensing restrictions but did require that Mr. Heller be granted a registration and license for to carry his handgun in his home if qualified.

Two lengthy dissents were filed -- each garnering four votes. Former Justice Stevens’ dissent described the Second Amendment right as pertaining only to militia service. He argued that strong Supreme Court precedent as well as the text and history of the Second Amendment allows legislatures to regulate “the civilian use and misuse if firearms so long as they do not interfere with the preservation of a well-regulated militia.” This, of course, is the Militia Focused Position in full bloom. He predicted (correctly) that the decision would open up further litigation on whether the amendment guaranteed the right to possess and use firearms outside of the home for self-defense or other purposes. Justice Breyer’s dissent agreed with Justice Stevens’ analysis and wrote separately to advocate for a proportionality test in Second Amendment cases. Justice Breyer argued that the District’s gun laws were a proportionate response to the compelling concerns of handgun violence in

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Ginsburg joined Justice Breyer’s dissent). It is interesting that seven decades passed before the Court considered a major Second Amendment issue. This fact is less unique after considering that the Supreme Court first held that a law violated the First Amendment freedom of speech guarantee in 1931 in Near v. Minnesota ex rel. Olson (nearly 150 years after the First amendment was ratified).

10 The D.C. City Council voted for the gun regulations 12-1. The licensing regulations were promulgated later. A good timeline of D.C.’s gun law is here: http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071700689.html (last visited Oct. 1, 2013).

11 D.C. Code §§ 7-2501.01(12) (definitions), 7-2502.01(a) (registration requirements), 7-2502(a)(4) (registration prohibitions) §§ 22-4504(a), 22-4506 (provisions prohibiting carrying handguns without a license and grating the D.C. Chief of Police permission to issue one-year licenses) and § 7-2507.02 (disassembly/trigger lock provisions with exceptions for firearms located in businesses or being used for lawful recreational purposes).

12 The majority added that this was not an exhaustive list. See Heller at 626.
densely populated urban areas facing serious crime problems. This regulation was within the “zone that the Second Amendment leaves open to regulation by legislatures.”

The third and final major Second Amendment case, *McDonald against the City of Chicago*, was decided in 2010 by another 5-4 vote. The city of Chicago banned handgun possession by all private citizens (with limited exceptions). Illinois citizens (including Mr. McDonald who was in his late seventies) and the National Rifle Association sued the City of Chicago and the Village of Oak Park arguing that gun restrictions violated the Second Amendment as interpreted by *Heller*. The Chicago residents argued that they had been threatened with violence in their high-crime neighborhoods and needed firearms for self-defense. The City responded that the Second Amendment only prohibits the federal government from violating an individual’s right to possess and use a firearm for self-defense. The Court disagreed and held that the Second Amendment is also applicable to the states via the Fourteenth Amendment.

The process of “incorporating” the Bill of Rights to the states is rather complicated theoretically. In brief, the idea is that the Bill of Rights originally restricted only the federal government from interfering with rights of individuals and states. The Fourteenth Amendment, in contrast, requires state governments to treat individuals in certain ways (for example, providing that a state may not deprive “any person of life, liberty, or property, without due process of law”). This dichotomy created an interesting anomaly. The protections in the Bill of Rights (freedom of speech, religion, press, etc.) could be ignored by the states unless another amendment that directly applied to the states prohibited such action. The Incorporation doctrine uses the concept of due process clause from the Fourteenth Amendment to copy and paste many of the protections from the Bill of Rights into the Fourteenth Amendment. The justices have incorporated many rights from the first ten amendments as cases involving such rights slowly reach the high court. The Court incorporated the Second Amendment to the states *McDonald* expanding the Individual Right position developed in *Heller*. Justices Stevens and Breyer dissented in this case as well.

**The Beauty of the Second Amendment & The Constitution**

Constitutional law is fascinating to teach because there is rarely one “correct” answer. This is especially true when it comes to the Second Amendment. Brilliant minds have parsed its words, commas and clauses, the thoughts of the founding generation and every generation since and the debate still rages. The beauty of the Constitution and America in general is that students may form their own conclusions based on the text, history and precedent surrounding the Second Amendment, criticize their opponents’ views and perhaps passionately urge their leaders to adopt a different position.

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13 *Id.* at 682.
14 130 S. Ct. 3020 (2010). Part of the decision was a plurality because Justice Thomas disagreed about the manner in which the Second Amendment was to be incorporated.
15 See Chicago, Ill., Municipal Code § 8-20-040(a) (2009) (requiring firearm registration) and § 8-20-050(c) (prohibiting the registration of most handguns). The Chicago suburb of Oak Park, Illinois enacted similar handgun restrictions, which were also challenged in the lawsuit.
16 Other plaintiffs included the Illinois State Rifle Association and the Second Amendment Foundation, Inc.
17 The Court has declined to incorporate in some cases.