

An Open Letter On The Second Amendment

An Individual Right To Arms?

(This letter is from many publications and was issued as a statement on our Constitutional Liberties by the Academicians in the column to the left)

The view that the Second Amendment¹ to the Constitution of the United States guarantees only the states' right to maintain formal militias has attained a surprising respectability. That may be more explicable as an expression of the hostility many academicians feel towards guns and their owners than as an unbiased constitutional interpretation. The Second Amendment does not guarantee merely a "right of the states" but rather a "right of the people," a term which, as used throughout the Bill of Rights (e.g., the First and Fourth Amendments), is widely understood to encompass a personal right of citizens.

Moreover, the Amendment refers to the "militia," a term which in the 18th century meant not a formal military unit like the National Guard, but a system under which every household and every man of military age was required to own a gun in order to defend the community against tyranny, foreign invasion, and crime. The leading interpretations before Congress when it enacted the Bill of Rights affirmed that by the Second Amendment "the people are confirmed in their right to keep and bear their private arms" — "their own arms."²

Furthermore, the "individual right" component of Second-Amendment thought became even more prominent in constitutional theory due to the transformation wrought by and through the debates in the Reconstruction Congress concerning the privileges and immunities of national citizenship. Many Congressmen pointed out that blacks in the South needed to be constitutionally protected in the citizen's individual, personal right to bear arms in self-defense.³

Of course, the right to bear arms is no more "absolute" than is the right to speak, to publish, or to assemble. Hence, there is room for disagreement over the scope of Second-Amendment rights, just as there currently exists legitimate disagreement over the scope of the First-Amendment rights of assembly and free speech.⁴ Nothing in this statement, therefore, is intended to deny either the constitutionality of, or the need for, sensible gun laws.

1. 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. 1 Stat 21 (1848)
2. Kates, 'Handgun Prohibition and the Original Meaning of the Second Amendment,' 82 *Mich. L Rev* 204, 214, 223-224 (1983). See generally Amar, 'The Bill of Rights as a Constitution,' 100 *Yale L.J.* 1131, 1162 ff. (1991), Levinson, "The Embarrassing Second Amendment," 99 *Yale L.J.* 637 (1989), L. Levy, *Original Intent and the Framers' Constitution* 341 (1988). 5. Holbrook, *A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees* (1989).
3. Cottrol and Diamond, 'The Second Amendment: Toward an Afro-Americanist Reconsideration,' 80 *Georgetown L.J.* 309 (1991).
4. See, e.g., Kates, 'The Second Amendment: A Dialogue,' 49 *Law & Contemp. Probs.* :45 (1986).

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