"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."
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We hope this issue of *Insights* helps to build understanding of the history of the Second Amendment and the intent, scope, and impact of federal gun policy.

Aurora, Colorado; Sandy Hook, Connecticut; and Chicago, Illinois, have experienced, in common, recent and horrific dates with gun violence. Each incident has sparked a renewed interest in the rights and limits of the Second Amendment.

This interest has resulted in spirited national policy debates, executive orders by the United States president, and passionate conversations across the political spectrum and throughout the country. But how did we get here? We hope this issue of *Insights* helps to build understanding of the history of the Second Amendment and the intent, scope, and impact of federal gun policy.

The issue opens with an article from Saul Cornell (Fordham University), introducing readers to the English Common Law history of the Second Amendment, and its influence on colonial charters and our U.S. Constitution. In “Interviews,” Juliet Leftwich (Law Center to Prevent Gun Violence) and Jonathan Lowy (Brady Center to Prevent Gun Violence) reflect on the scope of federal gun policy, including past and present proposals to regulate guns in the United States. In “Teaching the Second Amendment,” Corey Ciocchetti (University of Denver) explains how a study of the politics that shaped the construction of the Second Amendment can serve to illustrate greater lessons and insights about our Constitution for students. To help connect this rich content to your classroom, check out our Learning Gateways features for useful instructional strategies.

**Teaching Legal Docs** takes a close look at the Federal Firearms License. The Law Review written by Rachel Friedman (2L at Ohio State University Moritz College of Law), our 2013 summer intern, profiles significant Second Amendment cases that have reached the courts since the *Heller* ruling in 2008. Closing out the issue is a personal reflection by South Dakota State Representative Betty Olson on arming classroom teachers.

Remember that the magazine doesn’t stop with these pages. Check out the rich roundup of resources online at [www.insightsmagazine.org](http://www.insightsmagazine.org). The website offers teachers additional instructional supports, including ready-to-use handouts, articles, and opportunities for continued discussion. And be sure to take note of our call for applications for the 2014 Federal Trials Summer Institute for Teachers on page 13.

We continue to benefit from your feedback and ideas for the magazine, so keep them coming to our editor or me. Let us know about topics that you would like to see us tackle in future issues, and innovative classroom strategies that you have initiated to bring content alive for your students.

Enjoy,

Mabel McKinney-Browning
Mabel.MckinneyBrowning@americanbar.org

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Early modern English political theorists and jurists often described the right to defend oneself as the first law of nature. Philosophers such as Thomas Hobbes and John Locke described a world without government or law as a state of nature, a primitive and dangerous world in which each person could use deadly force whenever they judged it necessary. In such a world each person was judge, jury, and executioner. Society and government were designed to provide the security and certainty unavailable in the state of nature. In exchange for the benefits of living in a world governed by the rule of law, individuals, with a few well-defined exceptions, gave up the right to use deadly force. English common law, the collected body of legal decisions, which interpreted the meaning of England’s unwritten constitution, spelled out these exceptions in considerable detail. Individuals were legally obliged to retreat from attack and were not allowed to stand and fight, unless retreat was physically impossible. The only exception to the legal requirement that one flee was in one’s home. Deadly force was justified in repelling violence in one’s home, but even in this case, one had to demonstrate that one had no other alternative to repel or subdue one’s attacker.

In 1688, Englishmen ousted the Catholic King James II, and established the Protestant monarch, William of Orange, as king. Parliament finally achieved its longtime goal of asserting its legal superiority over the monarchy. One aspect of this assertion of power involved adopting a declaration of rights, listing such basic liberties as the right to petition and banning practices such as cruel and unusual punishments. The English Declaration of Rights also asserted: “That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.” The right was limited to Protestants and the type of armament further restricted by social class. Finally, the right was limited in scope: Parliament retained the power to regulate or restrict the right as it saw fit to promote public safety and the general welfare of the nation. Yet, keeping in mind these larger constraints, the assertion of such a right was a significant milestone in Anglo-American views about the relationship among citizenship, arms, and liberty.

Civic Obligation and a Well-Regulated Militia

Many English legal ideas were transformed by the realities of American colonial life. The idea of the right to have arms was no exception. In the American context the right to have arms became closely enmeshed with the idea of a well-regulated militia. In an era before police forces, colonial militias served many vital roles. The militias put down rebellions, particularly slave insurrections, protected the colonists from Indian neighbors who were not keen to cede additional land to Englishmen, and guarded against incursions from Spanish settlers to the South and French settlers to the North.

During the rising tensions that led up to the American Revolution, the militia and the right to have arms protected by the English Declaration of Rights became a controversial issue.
Bostonians put their own distinctive gloss on this English ideal when they stated that militias were “well adapted for the necessary Defense of the Community.” British officials reacted negatively to the fiery rhetoric used by groups such as the Sons of Liberty, and were particularly alarmed by the most radical colonists’ invocation of the right of armed self-defense against political oppressors. When attacked for his incendiary remarks, radicals such as Samuel Adams reminded Bostonians and royal officials that Massachusetts had long ago enacted a “wholesome law of the Province” that required each householder to provide himself with a musket to meet their obligation to participate in the militia. Far from

Saul Cornell is a professor of history at Fordham University. He is one of the nation’s leading authorities on early American constitutional thought, and the author of A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America.
being radicals, Adams asserted that the colonists were simply defending their ancient rights.

The Right to Bear Arms in the First State Constitutions

The Virginia Declaration of Rights, drafted a month before American Independence, did not mention the right to bear arms, but it did assert:

That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence 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.

The first state to protect a right to bear arms was Pennsylvania, which drafted its own constitution and declaration of rights in the same year. Pennsylvanians framed the right in the following terms:

XIII. That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

Pennsylvania followed Virginia’s model and included an express statement that the military should be subordinate to civilian control and that a standing army composed of professional soldiers posed a threat to liberty. In a separate provision, Pennsylvania stated a close corollary of these principles, affirming a right not to be forced to bear arms for individuals who were religious pacifists.

That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal
service when necessary, or an equivalent thereto: But no part of a man’s property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.

Quakers and Mennonites were among those who opposed bearing arms and were exempted from this obligation. Quakers generally felt that their religious creed not only barred them from bearing arms, but from providing any support to the military, including paying for replacements to serve in their place. Thus, the constitutional protection afforded by the Pennsylvania Declaration of Rights for conscientious objectors failed to satisfy most Quakers.

Massachusetts was the first state to protect a right to “keep and bear arms.” In Massachusetts the right was linked to “common defense.” In contrast to Virginia and Pennsylvania, Massachusetts submitted a draft of its constitution to individual towns for comment. Although many towns commented on various aspects of the new state constitution, particularly those dealing with freedom of religion, the right to bear arms prompted little commentary. Two towns did express some concern that the formulation of this right was too narrow. The response of the western town of Williamsburg faulted the constitution’s exclusive focus on common defense and proposed the following alternative: “1st that we esteem it an
essential privilege to keep Arms in Our houses for Our Own Defence and while we Continue honest and Lawfull Subjects of Government we Ought Never to be deprived of them.” No action was taken on this suggestion.

Only four of the original state constitutions singled out the right to bear arms for explicit protection: Pennsylvania, North Carolina, Vermont, and Massachusetts. In the case of North Carolina and Massachusetts, the right to bear arms was linked expressly to defense of the state or common defense. Pennsylvania’s language, emulated by Vermont, is more ambiguous. Some modern commentators have interpreted the phrase “defense of themselves and the state” as protecting a private individual right and others see the language as more collective, an effort to protect the people acting together to protect community, not individuals, acting in isolation for private purposes.

The absence of an explicit affirmation of an individual right of self-defense in the early state constitutions does not mean Americans did not venerate this ancient right. Not every right protected under common law was enshrined in the new constitutions. Most Americans did not see any threat to this right and believed that there was no need to single out this right for special protection.

The Origins of the Second Amendment

Although there were hundreds of essays published both for and against the Constitution, the subject of hunting and the right of individual self-defense produced little commentary. Indeed, there is pretty strong evidence that Federalists and Anti-Federalists each saw these issues as matters best left to the state legislatures to regulate as part of their traditional police power (the power to pass laws to promote the public welfare.) Although Federalist Tench Coxe and the Anti-Federalist author with the Roman-inspired pen name Brutus agreed on few things, they were in complete agreement on this issue. Brutus made this point expressly when he wrote, “[I]t ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other . . . .” Federalist Tench
**Second Amendment Milestones in American History**

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1968</td>
<td>Gun Control Act is enacted “for the purpose of keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetence.” It regulates imported guns, ownership and licensing requirements, and limits sales.</td>
</tr>
<tr>
<td>1972</td>
<td>U.S. Bureau of Alcohol, Tobacco, and Firearms (ATF) is established as the agency recognized today. (It had existed in a variety of configurations under a variety of names since 1789.) Among its duties: control the use and sale of firearms, and enforce federal firearms laws.</td>
</tr>
<tr>
<td>1986</td>
<td>Firearms Owners Protection Act relaxes restrictions of gun and ammunition sales and establishes mandatory penalties for use persons committing crimes with a firearm.</td>
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<tr>
<td>1994</td>
<td>Brady Handgun Violence Prevention Act, named for Assistant to the President and White House Press Secretary James Brady, imposes a 5-day waiting period for the purchase of handguns. In addition, the Violent Crime Control and Law Enforcement Act banned all sale, manufacture, importation, or possession of specific assault weapons.</td>
</tr>
<tr>
<td>1999</td>
<td>U.S. President Clinton announces a $15 million federal gun buyback plan. The plan was eliminated by President Bush in 2001.</td>
</tr>
<tr>
<td>2008</td>
<td>District of Columbia v. Heller becomes the first case to sue gun makers, firearms trade associations, and gun dealers for costs associated with gun-related violence. The Court rules that the Second Amendment grants individuals the right to bear arms.</td>
</tr>
<tr>
<td>2010</td>
<td>The Supreme Court extends the individual right to bear arms to the states in McDonald v. City of Chicago.</td>
</tr>
<tr>
<td>2013</td>
<td>President Obama announces a plan for changes to gun laws, including banning the sale of certain semiautomatic rifles and high-capacity ammunition magazines and requiring background checks for all gun buyers. U.S. Senate later rejects a bipartisan proposal to expand background checks.</td>
</tr>
</tbody>
</table>

Coxe echoed this understanding, writing that “[t]he states will regulate and administer the criminal law, exclusively of Congress.” The police power of the states would not be diminished under the new Constitution and the individual states would continue to legislate on all matters “such as unlicensed public houses, nuisances, and many other things of the like nature.”

The issue of the right to bear arms did not even emerge until the end of the Pennsylvania ratification convention. Backcountry Anti-Federalists from Pennsylvania proposed a series of amendments, including several on the militia and the right to bear arms. The most interesting aspect of this proposal was that it fused together two rights treated separately in the 1776 Pennsylvania Constitution, the right to bear arms and the right to hunt. The list of these amendments was published as a pamphlet, The Dissent of the Pennsylvania Minority. It was also reprinted in newspapers in virtually every state. Although widely reprinted, the Dissent’s odd formulation of the right to arms was not emulated by any other state convention or copied by any other writer at the time. Although this provision did not garner much interest at the time it was written, modern commentators, particularly those associated with gun rights, have made this text central to their interpretation of the Second Amendment. Indeed, this Anti-Federalist text played a key role in the 2008 Supreme Court decision on the meaning of the Second Amendment, District of Columbia v. Heller. In his opinion, Justice Scalia echoed the gun rights view that this Pennsylvania text was the key to unlocking the meaning of the Second Amendment. Justice Stevens, by contrast, questioned the constitutional value of using a text that was a minority voice of a single state as the lodestar for reinterpreting the Second Amendment.

While Federalists had achieved an impressive victory over their Anti-Federalist opponents during ratification, the absence of a bill of rights, one of the Anti-Federalists’ most common criticisms, struck a resonant chord in many. Ratification of the Constitution was premised on an implicit understanding that the First Congress would take up the question of amendments to the Constitution, which would include a...
The Right to Bear Arms in Your State

At least 45 states have provisions in their constitutions discussing the right to bear arms. As you discuss with students the Second Amendment to the U.S. Constitution, or the Bill of Rights broadly, it may be useful to explore how your state constitution relates to the federal framework. State constitutions can afford rights beyond those protected by the federal Constitution, but state constitutions cannot take away rights guaranteed by the U.S. Constitution. Resources for locating provisions in your state constitution may be found at www.insightsmagazine.org.

Materials:
- Copy, or access to, text of Second Amendment of U.S. Constitution
- Copy, or access to, text of your state constitution

1. Assuming students are already familiar with the Second Amendment to the U.S. Constitution, remind them of the text:

   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.

   Discuss the amendment with students, and make notes of responses for comparison:
   - Do you recognize this provision from the U.S. Constitution? What is it?
   - Where in the U.S. Constitution is this located?
   - In what year was this amendment written or ratified?

2. Explain that you want to investigate your state constitution, especially to compare any provisions for the right to bear arms. Distribute copies of your state constitution. Ask students to study the document and to identify any mention of a right to bear arms. Depending on the size of the group of students, and the length of your state’s constitution, you might organize students into small groups, or excerpt portions of your state constitution.

3. Discuss your state constitution with students:
   - Does your state constitution include a provision about bearing arms? If so, where is it located?
   - Many state constitutional provisions are located within the first articles of the constitution. Six state constitutions—California, Iowa, Maryland, Minnesota, New Jersey, New York—do not include any provisions.
   - What does your state constitution say about the right to bear arms? Does your state constitution include language about “individual rights,” a “standing army,” or “self-defense?” Does your state constitutional provision include language about “hunting,” “family,” or “home?”
   - Many state constitutions use similar language. Maine’s constitutional provision, for example, “Every citizen has a right to keep and bear arms..."
and this right shall never be questioned," is very similar to Pennsylvania’s provision, “The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.” Both Nevada and Wisconsin, for example, mention the right to bear arms for hunting.

• In what year was your state constitution written? If your state constitution specifies a right to bear arms, when was that provision written, added, or modified? Was it written before or after the Second Amendment (1791)?

4. Ask students to compare the language in their state constitution with the language of the Second Amendment.

• How does the provision in your state constitution compare to the Second Amendment? Are there shared words or phrases? Are there different words or phrases?

• Why do you think this provision was included in your state constitution in addition to the Second Amendment? Do you think your state constitution expands U.S. constitutional rights? How?

5. Conclude discussion by asking students to compare the right to bear arms provision in their state constitution to two other state constitutions. How are the provisions similar or different?

6. Consider assigning these research activities: Who originally wrote your state constitution, including its writing and ratification process; when and how your state constitution has been revised or amended; gun rights advocacy groups active in your state; or gun licensing policies in your state.

declaration of rights. Several state conventions, including Virginia, Massachusetts, New York, and New Hampshire had made recommendations for amendments. The most common recommendation was a prohibition on standing armies in peacetime. Several conventions demanded some type of explicit protection for the right to bear arms. Two other proposals affirmed state control of the militia and limited the federal government ability to mobilize the militia. The job of digesting the many proposals for amendments, including those pertaining to the right to bear arms and the militia, fell to James Madison, who had been an outspoken opponent of amendments during ratification. A pragmatist by temperament, Madison recognized that a properly framed list of amendments would do little harm, but might win over some moderate Anti-Federalists. In the course of the debates in the House and Senate, Madison’s original provision was edited and rearranged. A clause dealing with those religiously scrupulous of bearing arms was dropped when an Anti-Federalist congressman expressed alarm that the new federal government might use this clause as pretext for declaring who was scrupulous and use this power to disarm the state militias. Congress also dropped references to the militia as composed of the body of the people and efforts to limit the role of the militia to common defense. Congress was given the power to define the composition of the militia any way it saw fit, and its actions were not limited to common defense, a change that would have struck Southerners as particularly ominous given their dependence on the militia for controlling their slave populations.

The Senate edited the House list of seventeen amendments, paring it down to twelve provisions, which were then submitted to the states for ratification. When the states failed to ratify the first two amendments, which dealt with apportionment of representatives and congressional salaries, the Fourth Article became the Second Amendment. The final text read: “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.”

**A Well-Regulated Right**

Firearm regulations have existed since the colonial era. Laws regulated the storage of firearms and gunpowder, restricted the discharge of weapons at certain times and in certain places, and limited possession to citizens judged virtuous and loyal. The state retained the right to inspect homes to make sure gunpowder was properly stored and,
when necessary, conducted gun censuses to determine the levels of private gun ownership.

Compared to England, America was a well-armed society, but the guns owned by citizens tended to be those of greatest utility in a rural agricultural society. Pistols were generally a luxury good and only a small percentage of the population opted to acquire them. Heavy, large-bore military style muskets with bayonets, the type of weapons most essential to a well-regulated militia, were not what most citizens wanted for private use. One of the main goals of government firearms policy in the Founding era was to encourage ownership of these military-style weapons.

Levels of interpersonal violence among those of European descent were relatively low in the era of the Second Amendment. Gun violence was, therefore, not a significant problem. Consumer behavior reflected this fact and most Americans sought guns useful for daily life, not pistols or military muskets. State regulations also reflected this reality.

The most common type of gun regulations from the era of the Second Amendment dealt with the militia. These laws specified the types of weapons men needed to bring to muster (muskets for soldiers, horsemen’s pistols for dragoons and other mounted units). Militia weapons were subject to inspection by the government, and failure to maintain one’s weapon or report to muster resulted in fines. States also exempted militia weapons from seizure during debt proceedings, but treated other arms as ordinary property, which could be seized for debts or failure to pay taxes. Although one might travel with a musket to muster, some states prohibited traveling with a loaded weapon or discharging a weapon on a muster day without permission. Guns, including militia weapons, were not exempt from the states’ police powers.

Rather than close the book on historical argument about the meaning of the Second Amendment, Heller has elevated the importance of history to future gun litigation. “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment,” Justice Scalia wrote in Heller, “nothing in our opinion should be taken to cast doubt on long-standing prohibitions.” Justice Scalia’s formulation of the scope of the right to bear arms seemed to suggest that if a regulation had deep historical roots, it would be considered “presumptively lawful.” Understanding the history of firearms regulation seems likely to be crucial to the resolution of future litigation on gun rights and gun control.

It seems unlikely that any significant piece of gun regulation able to survive the political process would ever be struck down on Second Amendment grounds. Handgun bans clearly are out of bounds according to Heller, but hardly any other gun laws have been struck down in the wake of the decision. Over seven hundred cases have been tried, and few regulations have failed to pass constitutional muster.

The politics of gun control and gun rights remains divisive. Federal gun regulation seems stalled. There has been considerable activity at the state level, but two opposite trends have emerged. Pro-gun states have expanded gun rights and pro-gun regulation states have passed new, more stringent laws. Although the subject of the Second Amendment and gun regulation continue to inspire vigorous public debate, the actual legal impact of Heller thus far has been quite modest. Although no challenges to recent state gun laws have been mounted, these seem unlikely to prevail. If history is any guide, states will continue to have considerable latitude to legislate in this area as long as laws do not interfere with the right to use a handgun in the home for purposes of lawful self-defense. Courts have not rushed to strike down gun regulations after Heller and there is no indication that things will be much different in the future.
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Q: What does the Legal Action Project of the Brady Center to Prevent Gun Violence do? We use the courts to effect change. We seek justice for victims of gun violence, bringing civil liability cases against irresponsible gun manufacturers, sellers, and owners. We also defend gun laws, and often work with government officials at the local, state, and federal level who are defending gun laws. We also challenge certain policies at all levels of government that hinder gun violence prevention efforts. We also file amicus curiae (“friends of the court” in Latin) briefs in many cases.

Q: How can the courts help prevent gun violence? There is a long history of using litigation, particularly torts, to change dangerous industries, or industries where there is economic incentive to make negligent decisions. If we can decrease the economic incentive, then it begins to make a difference. Ninety percent of America’s gun dealers sell no guns that are used in violent crimes. Instead, 1% of dealers sell 57% of the guns that are used in crimes. In other words, there are a few bad apples that know, or should know, that the guns they are selling will be used in crimes.

Litigation is important because the industry is vastly unregulated. Guns are the only consumer product not regulated by the federal government with regard to safety features. In other industries, manufacturers are compelled to issue recalls when their products are not safe. Beyond manufacturing, there are no limits on the numbers of guns that sellers can sell. There are no limits on the number of guns that buyers can buy. We represented a young man who was shot by a gun bought from an Ohio gun show that ended up being sold by an illegal trafficker. It was one of 87 handguns made in one purchase, paid for in cash. Sellers are not required to ask buyers certain questions. They are not even required to ask the buyer to demonstrate that they know how to handle a gun. This alone would help...
identify “straw purchasers,” or individuals buying guns for someone else.

**Q: How could gun manufacturers be accountable in some of these cases?**

Gun manufacturers are negligent in two ways. They neglect to employ the use of feasible, often more expensive, safety features. We represented the family of a 15-year-old boy who was shot by his 14-year-old friend. The friend did not realize that the gun was loaded. There are safety devices that could have alerted a teenage boy to the fact that there were bullets in the chamber, as well as safety devices that prevent guns from being fired by unauthorized users.

Manufacturers also know, or should know, which of their customers, gun dealers, are the “bad apples” that I mentioned earlier. Gun manufacturers could require their customers, gun dealers, to employ practical and reasonable business practices. This violates the “reasonable care” standard of civil law.

**Q: What made you get involved in this work?**

I’ve been doing this for 16 years. Prior to this, I spent 9 years in private practice, involved with litigation as a trial lawyer. I was looking for a change, and this was a cause that I believed very strongly in, so this was a good fit.

**Q: How do you find clients? Could you tell me about your typical cases in a year?**

We find our clients in a couple of ways: victims or their families will contact us; or they will contact their local lawyer, who contacts us. Sometimes we are contacted by lawyers working cases on appeal, and we get involved during the appeal process.

Most of the cases that we handle are liability cases. They involve victims of gun violence, or the gun industry. After that, we also assist in cases by
helping governments or lawyers, or filing _amicus_ briefs with the court.

Our smallest, but growing, group includes cases where we challenge policies that hinder the prevention of gun violence. For example, we challenged a law in Florida that attempted to revoke a doctor’s medical license for discussing with patients the risks of guns. The American Academy of Pediatrics advises doctors to discuss the risks of guns with patients and their parents. We won an injunction against this law on the grounds that it violated doctors’ First Amendment rights. We also successfully challenged an ordinance in a community in Georgia that mandated that all “heads of households” keep a gun in their home. The Second Amendment protects the rights of individuals to own guns, but it also protects the rights of individuals not to own guns or keep them in their homes.

**Q: We hear so much about background checks. Could you explain when they are required?**

You are required to have a federal firearms license to “engage in the business” of selling firearms. Licensed sellers are required to do background checks on buying customers. Private sellers, however, are not. They appear at gun shows, next to the licensed sellers, and do not require background checks. There are some private sellers who go from gun show to gun show, called “gun show cowboys.” It’s somewhat subjective if they are “selling” or “engaged in the business” of selling firearms, so they tell authorities, for example, that they are selling their late grandfather’s gun collection. It’s extremely difficult to catch them doing anything illegal.

**Q: What can everyday people do to get involved with this national conversation?**

The majority of Americans favor sensible gun laws. They just need to speak up more. They can get involved in organizations like the Brady Campaign, and just make their voice heard.

**Q: Do you think that the deregulated system you described earlier will change?**

Yes. We are seeing changes already. Courts are recognizing the need for change. In addition, after [the 2012 shooting at] Sandy Hook [Elementary School, in Newtown, Connecticut], we saw numerous A-rated by the National Rifle Association senators push for expanded background checks. I do think we will see changes to our current system in the future.

### Civilian Gun Ownership and Gun Deaths Around the World

<table>
<thead>
<tr>
<th>Country</th>
<th>Guns per 100</th>
<th>Gun-Related Deaths per 100,000</th>
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</thead>
<tbody>
<tr>
<td>United States</td>
<td>89</td>
<td>10.3</td>
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<tr>
<td>Switzerland</td>
<td>46</td>
<td>3.84</td>
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*Sources: Small Arms Survey, 2013; University of Sydney School of Public Health, www.gunpolicy.org, 2013*
Juliet Leftwich is the legal director of the Law Center to Prevent Gun Violence in San Francisco, California. She has worked extensively on the development and drafting of state and local gun laws throughout the United States, and has testified at numerous public hearings in support of such laws. Juliet is a special advisor to the American Bar Association’s Standing Committee on Gun Violence.

Q: How did you become interested in gun violence? Why is it a pressing issue?
The Law Center to Prevent Gun Violence was formed in the wake of an assault weapons massacre at a law firm in the 101 California Street building in downtown San Francisco in 1993. Eight people were killed, and six others were wounded. I personally got involved because my former law firm was located in the building and I was there the day of the shooting. The tragedy affected me profoundly, making me realize that gun violence can happen any place, any time. I began volunteering with the Law Center soon after it was created and joined the legal staff two years later.

Gun violence is a pressing social issue because of the needless devastation it causes in communities nationwide every day. Guns kill more than 30,000 Americans each year—an average of 80 people each day—and injure more than 70,000 others. Gun violence also has an enormous economic impact on our society, with medical costs alone estimated at $2.3 billion annually.

Q: What can we do about gun violence?
There is a lot that we can do to reduce our nation’s epidemic of gun violence. The United States has the weakest gun laws of all industrialized nations in the world and, as a result, the highest rates of gun-related deaths and injuries. Federal law does require a federal firearms license for individuals to “engage in the business” of selling firearms, and background checks for customers purchasing from those licensed sellers. Because of the “private sale” loophole, however, unlicensed sellers are not required to conduct background checks on prospective purchasers. As a result, convicted felons and others are easily able to buy guns from private sellers nationwide. Our nation’s gun laws are filled with many other dangerous loopholes. Federal law does not ban the sale of assault weapons or large capacity ammunition magazines and does not require gun buyers to obtain a license or register their weapons. In addition, federal law provides almost complete legal immunity to gun manufacturers and sellers for their negligent behavior and exempts guns from the Consumer Product Safety Act. Virtually all other consumer products are subject to the Act or regulated by other governmental agencies, allowing for the monitoring and recall of products that present substantial risks of injury to consumers.

Fortunately, our laws can be changed and we know that strong gun laws work. California, for example, has adopted over 30 significant gun laws...
in the last 20 years and its gun death rate has dropped by 56%, a decline that is 27% higher than in the rest of the nation. In addition, the Brady Act, which requires gun dealers to conduct background checks on prospective firearm purchasers, has, despite its “private sale” loophole, blocked more than two million gun sales to convicted felons and other prohibited buyers.

Q: What specific policies have been proposed since the 2012 shooting in Newtown, Connecticut? What has happened with them?

The slaughter of innocent school children and staff in Newtown in December 2012 provided a tipping point and triggered a cultural shift in the way our nation views guns and gun violence. Public opinion polls consistently show that Americans are sick of the bloodshed and overwhelmingly support common sense gun laws, like those requiring background checks on all gun buyers.

Although we were very disappointed that the Senate failed to pass a modest background checks bill last spring, we were gratified to see that many states have stepped up to fill the void. We at the Law Center track all state firearms legislation, and 2013 was a record year for smart gun laws. Eight states made very significant changes to their laws, enacting legislation, for example, to require universal background checks and ban assault weapons and large capacity ammunition magazines. Thirteen other states also adopted important laws to help reduce gun violence. Overall, it’s been a year of incredible progress.

Q: What is the role of the Second Amendment? How does it guarantee rights?

Permit regulation of guns?

In 2008, in a landmark case called District of Columbia v. Heller, the Supreme Court held for the first time that the Second Amendment protects an individual right to bear arms. In a narrow 5-4 ruling, the Court struck down Washington, D.C.’s handgun ban, holding that the Second Amendment guarantees the right of responsible, law-abiding individuals to possess an operable handgun in the home for self-defense.

The Supreme Court made very clear, however, that the Second Amendment isn’t absolute and that it allows a wide variety of common sense gun laws, including those prohibiting firearm possession by felons and the mentally ill, imposing conditions on the commercial sale of guns, and banning particularly dangerous types of weapons. Nonetheless, the Heller decision opened the floodgates to lawsuits by the National Rifle Association and others claiming that existing federal, state, and local gun laws violate the Second Amendment. The good news is that the courts have overwhelmingly rejected those suits, making clear that the Second Amendment is not an obstacle to the laws America so desperately needs to address our epidemic of gun violence.

Q: How can ordinary citizens contribute to the national conversation on gun violence? Do you think this is happening? Why or why not?

Ordinary citizens can do a lot to contribute to the national conversation on gun violence. First and foremost, they need to speak out and let their elected officials know that they care strongly about this issue and will vote accordingly. They should stay informed about current events, educate themselves about the laws in their state, and support organizations dedicated to reducing gun violence.

Americans are realizing that gun violence doesn’t have to be an inevitable fact of life in the United States. They are also realizing that in order to counteract the incredible political power of the gun lobby, they need to become involved. I am so pleased to see that is exactly what is happening.

For more information

- Brady Campaign to Prevent Gun Violence
  http://www.bradycampaign.org/
- Law Center to Prevent Gun Violence
  http://smartgunlaws.org/
The right to vote is the very foundation of government by the people. As we approach the 50th anniversaries of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the 2014 Law Day theme, American Democracy and the Rule of Law: Why Every Vote Matters, calls on every American to reflect on the importance of a citizen’s right to vote and the challenges we still face in ensuring that all Americans have the opportunity to participate in our democracy.

May 1, 2014

www.LawDay.org
Federal Firearms Licensing: An Overview

This overview is meant to provide a quick explanation of the federal system and highlight elements of the legal document at hand: the Federal Firearms License.

Federal Firearms License

The Federal Firearms License (FFL) allows individuals to engage in business related to the manufacture of ammunition or firearms or the interstate or intrastate sale of firearms. Holding an FFL to pursue these activities has been a legal requirement in the United States since 1968, with the passage of the Gun Control Act. Prior to the 1968 Gun Control Act, the Federal Firearms Act of 1938 required manufacturers and sellers of firearms or ammunition engaged in selling or buying ammunition or firearms as part of interstate or foreign commerce to have a license. So, the federal system originated in 1938, but our current system has been in place since 1968. It is administered by the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which is housed within the U.S. Department of Justice.

There are eight different types of Federal Firearms Licenses, though their actual numbers extend from 1–11. All types allow individuals to pursue a range of ammunition and firearms-related manufacturing and selling activities, and deal with a range of specific products. For example, a Type 1 FFL is for gun dealers or gunsmiths “not dealing in destructive devices.” The federal government has grouped certain products, such as firearms that require explosives, including cannons and artillery equipment, as well as armor-piercing bullets into a class requiring particular types of FFLs—Types 9–11 to be exact. The types in between are for pawnbrokers, curio and relic dealers, and manufacturers, dealers, and importers.

The Application

The application for the FFL is extensive. There are three documents that must be completed—the Application for Federal Firearms License, a Certification of Compliance, and a Fingerprint Card.

The Application for Federal Firearms License is 18 pages long, but is split into four separate copies, including two for the ATF, one for the Chief Law Enforcement Officer (CLEO) in your community, and one to be retained by the applicant. (The ATF does notify state and local law authorities of FFL applicants within their jurisdiction through the application document.) All four copies must be completed by the applicant. The forms ask for contact information, business details, answers to a variety of questions, and signatures to verify certain information. Each form also requires applicants to attach a headshot photograph (2” x 2”). If an applicant is seeking licensing for a business, the application must list all owners, co-owners, partners, and other “responsible persons” involved with the business.

The last two documents are shorter, but still complex. The Certification of Compliance is one page, and asks applicants to verify U.S. citizenship status, and certify that their application is accurate to the best of their knowledge. The Fingerprint Card is two pages, and was developed by the FBI. It asks for fingerprints of all ten fingers, along with height, weight, eye and hair color, sex, race, and place of birth.

Once the application is submitted and received by the ATF, the ATF is mandated under the Gun Control Act of 1968 to act upon it within 60 days. Officials at the ATF’s Federal Firearms Licensing Center (FFLC), in Martinsburg, West Virginia, will review all three documents included in the application, and conduct electronic background checks on all of the individuals listed on the main application. The written application may be followed by a phone call from an ATF agent to the applicant. In all cases, the written application is forwarded to the applicant’s closest ATF office, and an in-person interview is scheduled by an Industry Operations Investigator (IOI). The IOI will conduct all federal and state licensing requirements with the applicant. Following the interview, the IOI will prepare a report recommending the ATF issue a license or deny the application. If the application is approved, the FFLC will complete processing of the application and issue the applicant a license. All of this happens within 60 days of the ATF’s receipt of the initial application.

Applicants for FFLs must be at least 21 years of age and otherwise not prohibited from owning or handling ammunition or firearms. Application fees range from $30 to $3,000, depending on the type of license sought, and all licenses are valid for three years. The Brady Handgun Violence Prevention Act of 1993 effectively changed the licensing system in that it raised application fees and extended the license period. For example, the Brady legislation raised the cost of a dealer license.
from $10 per year to $200 for every three years.

Everyone who holds an FFL is also required to follow all firearms licensing laws in their resident states. In addition, all FFL holders are required to keep meticulous inventory and sales records, including using ATF-approved inventory software. Holders are required to maintain records for at least 20 years from the date of generation. If a licensed manufacturer or dealer goes out of business or closes shop, their records are to be shipped to the ATF's Out-of-Business Records Center for filing. Finally, licensed holders may be asked to supply transaction records to law enforcement officers as requested for investigations.

The License

The FFL is one page, often watermarked with the ATF official seal. The most prominent pieces of information on the page include the license number, expiration date, and type of license. Less prominent are other elements on the document, including licensee contact information and ATF contact information. There are also details about what the license, based on the type, allows the licensee to do. Finally, the license is signed by the licensee.

Applications, Licenses, and the Freedom of Information Act

Because these licenses are federal documents, their applications may be publicly requested under the Freedom of Information Act (FOIA). To do this, the requester makes an FOIA Request. That is simply a written request in which the requester describes the information wanted, and the format he or she wants it in, in as much detail as possible.

Additionally, the ATF maintains a state-by-state listing on its Web site of all FFL holders. As of August 2013, there were 138,186 FFL holders across all states. Within the state-by-state listings, one can see license holders, contact information, and what type of federal license they hold.

International Commerce

The federal system outlined here generally applies to domestic commerce and manufacturers and sellers of ammunition and firearms. International matters of the same kind are governed by the International Traffic in Arms Regulation (ITAR). These rules are administered by the U.S. Department of State's Directorate of Defense Trade Controls. Anyone wishing to pursue international commerce must first obtain an FFL, then submit a separate application to the Directorate, and pay an additional application fee ($2,250 in 2013).

Gun Control Act of 1968

The Gun Control Act of 1968 (GCA) was passed by Congress following the assassinations of President John F. Kennedy, Senator Robert Kennedy, and Dr. Martin Luther King, Jr. It was known by this time that the rifle used to assassinate President Kennedy had been a surplus Italian military rifle imported into the United States. As a result, one of the goals of the GCA was to regulate the importation of ammunition and firearms into the United States, in addition to regulating domestic sale and distribution.

The GCA, as amended over the years, continues to be the primary vehicle for the federal regulation of firearms. The GCA's stated goals are to “keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background or incompetency, and to assist law enforcement authorities in the states and their subdivisions in combating the increasing prevalence of crime in the United States.”
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. Though few teachers would accept such garbled prose from students, early Americans 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 of the gun debate, and significant for teaching. The truth of which position best represents the amendment’s true purpose may well rest somewhere in the middle.

**The Text and 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 defence, 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.*

It more often results in nebulous statements such as the Second Amendment filled with cryptic language palatable to both sides but frustrating to citizens, lawmakers, and judges alike. All is not lost, 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 18th-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 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 v. 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 v. 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 bans. The law generally prohibited unregistered or 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 machine guns). 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 struck 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 to carry his handgun in his home if qualified.

Two lengthy dissents were filed—each garnering four votes. 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 of 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 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 v. City of Chicago, was decided in 2010 by...
Learning Gateways

Guns in America
Political Cartoon Analysis

Political cartoons are engaging and accessible, primary sources for discussing controversial issues, such as Second Amendment or gun rights in America. The following three political cartoons address the topic of guns in the United States, but from different perspectives. They do this quite literally—they are all from countries other than the United States. Handout-ready versions of all three cartoons, along with a cartoon analysis worksheet from the National Archives, are available at www.insightsmagazine.org.

Materials:
Copies of the following political cartoons:
- Cartoon 2: “Guns of America,” Jianping Fan, China, 2013
NARA Cartoon Analysis Worksheet (optional)

1. Distribute the three political cartoons, either to all students or in small groups. Depending on students’ familiarity with analyzing political cartoons, you might also distribute the Cartoon Analysis Worksheet from the National Archives.
2. Ask students to discuss the cartoons, either as a class or in small groups, considering the following questions for each:
   - What do you see in the cartoon? What is happening? Is there any text?
   - Can you identify any specific objects or symbols used in the cartoon? What role do they play?
   - Symbols in the three cartoons include: Statue of Liberty, guns, camouflage bulletproof vest, New York City skyline, prison bars.
   - How is the Statue of Liberty portrayed?
   - In which country was this cartoon produced? How do you think the cartoonist perceives the United States and guns in America?
   - What overall message do you think the cartoonist is trying to convey? What is the tone of the cartoon? Is it meant to be realistic? Intentionally exaggerated?

3. Ask students to next compare the cartoons:
   - Can you identify common symbols or objects in these cartoons? Which are only depicted in one cartoon?
   - How is the Statue of Liberty portrayed in each cartoon? How do they compare? How is Liberty’s face depicted? What does the artist use to illustrate differences?
   - Why do you think the artists chose to use the Statue of Liberty?
   - Consider the overall messages of the three cartoons. Are they more alike or different? Why?
   - Do you think the cartoons are insightful? Why?

4. Wrap up discussion by considering:
   - Each cartoon comes from a different country: Bulgaria, China, and the Philippines. What do these images tell us about the perception of those outside the United States about guns in America?
   - 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 Court 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 the 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 reached the high court. The Court incorporated the Second Amendment to the states in 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 and 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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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).


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.


7. *Miller* at 177.

8. *Id*.


10. *Id.* at 682.

11. 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.

12. 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.
Second Amendment in the Courts Since *Heller*

By Rachel Friedman

In 2008 the Supreme Court of the United States held in *District of Columbia v. Heller*, 554 U.S. 570 (2008) that the Second Amendment protects an “individual’s right to possess a firearm unconnected with the militia, and to use that firearm for traditionally lawful purposes such as self-defense within the home.” In *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020 (2010), the Court extended the Second Amendment right to keep and bear arms to the states through the Fourteenth Amendment. Since *Heller* and *McDonald*, there has been a significant increase in litigation and legislation surrounding the meaning and boundaries of the Second Amendment and its protection. Questions surrounding litigation have included who is guaranteed the protection of the Second Amendment and to what extent, safe storage laws, ammunition regulation, concealed carry and its limitations, and the emergency processes by which government leaders pass gun laws to eliminate and prevent tragic mass shootings.

In an effort to shed light on the wide range of issues politicians are faced with surrounding the Second Amendment, a review of cases from New York, Massachusetts, Illinois, Connecticut, and Colorado is most effective in highlighting the range of changes and disputes among the states.

**New York**

In *People v. Hughes* the New York Supreme Court, Appellate Division, in 2009, held that a statute criminalizing the possession of a weapon by a person previously convicted of a crime did not violate the Second Amendment. The challengers in *Hughes* used *Heller* to challenge these statutes claiming that the provisions violate their Second Amendment rights. This is an example of a state court articulating the limitations of the Second Amendment and interpreting the Supreme Court’s decision in *Heller* when the Supreme Court stated that Second Amendment restrictions “prohibit . . . the possession of firearms by felons or the mentally-ill.” *District of Columbia v. Heller*, 554 U.S. 570, 629-627 (2008).

**Massachusetts**

In 2013, in *Commonwealth v. McGowan*, the Supreme Judicial Court of Massachusetts held that a statute pertaining to firearm storage falls outside the scope defined in *Heller* as being protected by the Second Amendment. A Massachusetts law mandated storage of a firearm in a secured, or locked, container, or with a safety device that renders it inoperable by anyone other than the authorized user. The court held that the safe storage statute was not unconstitutional because it does not interfere with the right to keep or carry a loaded gun in the home. Reasonable storage requirements fall outside the scope of the right to bear arms protected by the Second Amendment because such laws allow an owner of a firearm to carry or keep a firearm under the owner’s immediate control within the home while preventing persons who are not licensed to possess or carry a firearm.

**Illinois**

On July 9, 2013, Illinois became the last state to allow concealed carry of firearms. The provisions of Illinois House Bill 183, Firearm Concealed Carry Act, which became effective immediately, included allowing a license that will be valid statewide for five years from the date of issuance and no later than 90 days after an application is deemed complete. The Firearm Concealed Carry Act defined “concealed firearm” as “a loaded or unloaded handgun carried on or about a person completely or mostly concealed from view of the public or on or about a person within a vehicle.” In addition, the bill contains a set of restrictions that includes prohibited places, storage requirements, and applicant disqualification. A few of the prohibited places include schools, parks, bars or restaurants where more than half of business is alcohol sales, libraries, and public transportation. Further restrictions include disqualification of anyone who has been convicted or found guilty in any state of “two or more violations related to driving while under the influence of alcohol, other drug or drugs, intoxicating compound or compounds, or any combination thereof, within the last five years” and “a misdemeanor involving the use or threat of physical force or violence to any person within the last five years.” (Firearm Concealed Carry Act). Illinois
Governor Pat Quinn attempted to pass a “trailer bill” that would add restrictions to concealed carry law but it was rejected. Attempts to add restrictions will likely continue to occur. Whether there will be additional court challenges remains to be seen, but Illinois struggles to find a comfortable post-*Heller* middle ground that makes both gun enthusiasts and gun-control advocates comfortable.

**Connecticut**

The National Shooting Sports Foundation (NSSF) filed suit in the Federal District Court for the District of Connecticut alleging that on April 13, 2013, Connecticut Senate Bill Number 1160 (SB 1160) was improperly introduced via “emergency certification.” The complaint states that SB 1160 is invalid because it “bypassed basic safeguards of the normal legislative process, including the bill printing requirements and both the public hearing and committee processes, and was passed by both the Senate and House of Representatives the same day it was introduced.” The National Industry Group wants a judge to strike down the law as invalid. The law, passed in response to the mass shooting at Sandy Hook Elementary in Newtown, expanded Connecticut’s assault weapons ban and background check requirements. This litigation is interesting because it does not focus on the constitutionality of the law but the process of how the law came to be. Connecticut politicians enacted this legislation as a direct response to the tragic Sandy Hook massacre; however, Lawrence G. Keane of NSSF explains, “All of this is in violation of guarantees citizens are supposed to have under Connecticut State Statutes and protections in our State and U.S. Constitutions for which our forefathers fought.” Keane, senior vice president and general counsel of NSSF, also states “Our suit focuses on this abuse of process that has resulted in enacted law that does nothing to improve public safety, while resulting in adverse effects on law-abiding citizens, manufacturers, retailers and sportsmen’s organizations.”

**Colorado**

On July 1, 2013, new gun laws took effect in Colorado requiring that “before any person who is not a licensed gun dealer transfers or attempts to transfer possession of a firearm, he or she shall: require that a background check be conducted of the prospective transferee; and obtain approval of the transfer from the Colorado Bureau of Investigation after a background check has been requested by a licensed gun dealer.” In addition, House Bill 1229 “prohibits the sale, transfer, or possession of an ammunition feeding device that is capable of accepting, or that can be readily converted to accept, more than 10 rounds of ammunition or more than 5 shotgun shells (large-capacity magazine).” The new law was met with opposition and a request for an injunction was sought to prohibit enforcement aspects of the magazine limit law until the entire suit is resolved because of poorly worded technicalities that allegedly violate Second Amendment rights. The two phrases within the magazine law that are in question are: one that bans all magazines that can be “readily converted to hold more rounds,” and another that requires that a person be in “continuous possession” of any large-capacity magazines that were purchased before the law took effect. The laws were passed in response to the 2012 mass shooting that took place in Aurora, Colorado.

The wide range of litigation in legislation has made the Second Amendment an important and challenging topic for government officials. The conversation surrounding the Second Amendment is far from over and it is interesting to see what judges and lawmakers will decide in the future.

Rachel Friedman was a 2013 summer intern in the American Bar Association Division for Public Education. She is a second-year law student at The Ohio State University Moritz College of Law.
Arming Teachers, Protecting Students

Betty Olson is a Republican member of the South Dakota House of Representatives, representing District 28B, which includes Butte, Harding, and Perkins Counties within the state. She was first elected to the chamber in 2006. She was one of the sponsors of HB-1087, which provides for the establishment of a school sentinel program in South Dakota and training for school sentinels. Betty is a former rancher, writer, and substitute teacher.

After many discussions with local school board members, teachers, law enforcement officers, and fellow legislators following the slaughter of children in schools that were “Gun Free Zones,” I and several other South Dakota legislators brought a bill that would allow school employees and volunteers to carry concealed weapons to protect students on school grounds.

One of the characteristics of mass shootings is that they generally occur in places where firearms are banned: malls, schools, etc. That was the finding of a famous 1999 study by John Lott of the University of Maryland and William Landes of the University of Chicago, and it appears to have been borne out by experience since then as well.

John Lott, the economist who authored the book More Guns, Less Crime, explained that: “With just one single exception, the attack on congresswoman Gabrielle Giffords in Tucson in 2011, every public shooting since at least 1950 in the United States in which more than three people have been killed has taken place where citizens are not allowed to carry guns.”

Rep. Scott Craig and Sen. Craig Tieszen, a former Rapid City, South Dakota, Chief of Police, are the prime sponsors of the school sentinel bill, and the cosponsors include teachers, attorneys, law enforcement, first responders, and military veterans. Most of the sponsors have children and grandchildren attending public schools. The safety of our children was, and is, our only concern.

South Dakota is a very rural state with many schools that are located in isolated areas miles and hours from law enforcement. Most of the school districts can’t afford to hire armed guards for each building and research shows that uniformed armed guards are the first target of the shooter before moving on to murder students and teachers in the classrooms without having to worry about anyone returning fire.

It is important to note that no teacher or any other employee will be required to carry a firearm; this law is strictly voluntary on all levels. Anyone who volunteers to help protect our children must be approved by the school board and either the county sheriff or local chief of police, and all the volunteers will be given the same firearms training that law enforcement officers receive.

Contrary to what some fear mongers told the press, no guns will be left on the teachers’ desks where children can find them and accidently shoot someone.

Contrary to what some fear mongers told the press, no guns will be left where children can find them and accidently shoot someone. All volunteers will carry concealed weapons that are kept out of sight of the children where they will be readily accessible should the need to use them arise. According to the law that passed, every volunteer will have been approved by either the sheriff or the police chief and will have had the same firearm training as law enforcement.

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