

Constitution Class Handout
Instructor: Douglas V. Gibbs
douglasvgibbs@reagan.com

www.politicalpistachio.com
www.douglasvgibbs.com
www.constitutionassociation.com

Lesson 14

Militias and Standing Armies

2nd Amendment: Keep and Bear Arms

The 2nd Amendment does not give you the right to keep and bear arms. The 2nd Amendment does not protect you against the government from taking away your guns. Your rights are given to you by God, and protecting your rights is your responsibility. Like anything else you own, if you give away your rights, or allow someone to take them, they may still belong to you as an unalienable, God-given right, but you have given up all access to them, and can no longer exercise those rights.

In the *Washington, D.C. v. Heller* case in 2008 the Supreme Court of the United States determined that the right to bear arms is an **individual right**, as opposed to a **collective right** which would only allow the bearing of arms for the purpose of participating in government approved groups, such as law enforcement agencies.

During the early years of the United States under the United States Constitution, the Anti-Federalists feared the creation of a central government because they feared the federal government would become tyrannical, and take away people's rights. Therefore, even though the Constitution in the first seven articles did not grant to the federal government any authority over gun rights, along with the rest of the rights enumerated in the Bill of Rights, those skeptical over the creation of a central government wanted an amendment that clarified the federal government had no authority to infringe on the right to keep and bear arms.

The States have **Original Authority**, meaning that all powers belonged to the States prior to the writing of the Constitution. The first seven articles of the document did not give to the federal government the authority to regulate firearms, therefore, any legislative power over gun rights is a State power. The 2nd Amendment simply confirms that. The argument then becomes about the potential tyranny of the States. If the 2nd Amendment does not apply to the States, what keeps the States from infringing on gun rights? The State constitutions, and the people, hold the responsibility of restraining the States from infringing on the right to keep and bear arms. The Founding Fathers were not concerned with a tyranny of the States because the State governments are closer to the people, and therefore the people have fewer legal and political obstacles when acting to ensure the State governments do not infringe on individual rights.

Complacency, then, becomes our greatest enemy.

With freedom comes responsibility.

Understanding that the Framers expected their posterity to be informed problem-solvers, while recognizing that basic human nature would invite complacency and the rise of a tyrannical government, it becomes clear why the Founding Fathers put so much importance on gun rights.

In early American society the need to be armed was necessary for a number of reasons, including, but not limited to, protecting one's property, facilitating a natural right of self-defense, participating in law enforcement, enabling people to participate in an **organized militia** system, deterring a tyrannical government, repelling invasion, suppressing insurrection, and hunting.

The right to keep and bear arms is not merely about protecting your home, or hunting, though those are important, too. The whole point of the 2nd Amendment is to protect us against all enemies, foreign and domestic, which could include a potentially oppressive central government.

Noah Webster in his "An Examination of the Leading Principles of the Federal Constitution," in 1787 articulated the necessity for keeping and bearing **arms** clearly: "*Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.*"

Some will argue the 2nd Amendment does not apply to our current society because the militia is a thing of the past.

The National Guard now serves as the organized militia envisioned by the Founding Fathers, but an unorganized militia also exists.

Title 10 of the United States Code provides for both "organized" and "unorganized" civilian militias. While the **organized militia** is made up of members of the National Guard and Naval Militia, the **unorganized militia** is composed entirely of private individuals.

*United States Code: Title 10 – Armed Forces, Subtitle A – General Military Law
Chapter 13 – The Militia:*

Sec. 311. Militia: composition and classes

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b) The classes of the militia are -

*(1) the organized militia, which consists of the National Guard and the Naval Militia; and
(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.*

Other than age, health, gender, or citizenship, there are no additional provisions for exemption from membership in the unorganized militia. While it is doubtful that it will ever be called to duty, the United States civilian militia does legally exist. The Founding Fathers would have likely included in the definition of unorganized militia, "All able-bodied citizens capable of fighting."

McDonald v. City of Chicago (2010) challenged the City of Chicago's ban on hand guns, bringing to the surface the debate over whether or not the 2nd Amendment only applies to the federal government.

The 5-4 Decision of the *McDonald v. City of Chicago* case by the U.S. Supreme Court holds the 2nd Amendment protects the right to keep and bear arms in all cities and States. The U.S. Supreme Court concluded that originally the 2nd Amendment applied only to the federal government, but it is in the opinion of the court that the 14th Amendment incorporates the Bill of Rights, therefore applying those amendments, and more specifically the 2nd Amendment, to the States.

The decision by the Supreme Court, in this case, makes all State laws on fire arms null and void. Applying the 2nd Amendment to the States means the 2nd Amendment is supreme over any and all State laws on firearms, and according to the 2nd Amendment, “the right to keep and bear arms shall not be infringed.” If “shall not be infringed” applies to both the federal government and the States governments, then all persons are allowed to possess a firearm. The words, “shall not be infringed” carries no exceptions.

The reason the 2nd Amendment is absolute in its language is because it was intended to only apply to the federal government. The federal government shall not infringe on the right to keep and bear arms in any way, but the States retain the authority to regulate guns as necessary based on the needs and allowances of the local electorate.

The U.S. Constitution applies to the federal government except where specifically noted otherwise.

In reference to *McDonald v. Chicago*, I am uneasy anytime the federal government tells a city or state what they have to do, even if on the surface it is for a good cause.

If we give the federal government the right to tell cities they have to allow gun ownership, what stops them from doing the opposite later? This case created a precedent of allowing the federal government to dictate to the States and cities what they have to do, and that kind of federal intrusion constitutes great danger to **State Sovereignty**.

Breaking down the language used in the 2nd Amendment assists in clarifying what the original intent was.

The 2nd Amendment begins, “*A well regulated Militia*.” The immediate understanding of that phrase by the average American in today’s culture recognizes it as meaning, “A militia under the control of the government,” or “regulated by government agencies,” or “managed by federal law.”

All of the above definitions are wrong.

As discussed regarding the Commerce Clause in Article I, Section 8, the word “regulated” does not mean “controlled or restricted by government.” The definition used by the Framers, and the one that fits best with the context of the period, and the principles of the Constitution, can be found in the 1828 Webster Dictionary. Webster defined **regulated** as: “To put in good order.” Some historians state that the word “regulate” in the 18th Century meant “To make regular.” The word “restrict” was not used in the 1828 definition until the third and final definition of “regulated,” revealing that today’s most common definition was the “least used” definition during the time of the writing of the United States Constitution.

Since “regulate” did not mean “to control and restrict,” but instead meant “to put in good order,” that means a well regulated militia is one that is in good order.

The need to have a militia in good order makes sense when one considers that during the Revolutionary War the militia was not in good order. The muskets were all different sizes, often the clothing of some members of the militia was tattered, and many didn’t even have shoes.

To put the militia in good order, Congress was required to create standards for the militia to follow. The authority to Congress regarding this power is revealed in Article I, Section 8, Clause 16, where the Constitution says, “*The Congress shall have Power. . . To provide for organizing, arming, and*

disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”

The next part of the 2nd Amendment reveals that a well regulated militia is “*necessary to the security of a free State.*”

The word *State*, in that instance, means “individual, autonomous, sovereign State.” In other words, a well regulated militia is necessary to the security of a free Massachusetts, a free Pennsylvania, a free Virginia, a free New York, a free Ohio, a free California, and so on.

“*Necessary to the security of a free State.*” A militia is necessary, not just recommended, *to the security of a free State*. Security against whom? A foreign invader? Isn't that what the standing army was supposed to be for? Why would States need militias, capable of being called up by the governor of the State, for their “security,” and to ensure that security is for them to remain a “*free State?*”

Foreign enemies were a concern, but not as much of a concern as a tyrannical central government. Thomas Jefferson so distrusted a central government that he suggested there would be a bloody revolution every twenty years.

“... can history produce an instance of a rebellion so honourably conducted? I say nothing of it's motives. They were founded in ignorance, not wickedness. God forbid we should ever be 20 years without such a rebellion. The people can not be all, and always, well informed. The part which is wrong will be discontented in proportion to the importance of the facts they misconceive. If they remain quiet under such misconceptions it is a lethargy, the forerunner of death to the public liberty. We have had 13 states independant 11 years. There has been one rebellion. That comes to one rebellion in a century and a half for each state. What country ever existed a century and a half without a rebellion? And what country can preserve it's liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it's natural manure.” -- Thomas Jefferson to William Stephens Smith, Paris, 13 Nov. 1787

The **Declaration of Independence** also states that the people have the right to stand up against their government should it become tyrannical. In the second paragraph of the Declaration of Independence it reads:

“*That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*”

The right to alter or abolish a tyrannical government walks hand in hand with the right to keep and bear arms. How could it ever be logical that the right to keep and bear arms could ever be influenced or restricted by the very government that that right exists to protect the people against in the first place?

Terms:

Arms - Weapons, firearms; a gun that may be used for protection of property or as part of a militia.

Collective Right - Rights held by a group, rather than its members separately.

Declaration of Independence - The unanimous formal Declaration of the thirteen united States of America declaring their freedom from Great Britain, dated July 4, 1776.

Individual Right - Rights held by individuals within a particular group.

Organized Militia - A well trained militia that is in good order that operates under the authority of Congress, able to be called into actual service by the executive authority of a State, or by the Congress of the United States; National Guard, Naval Militia, State Militias.

Original Authority - Principal agent holding legal authority; initial power to make or enforce laws; the root authority in government.

Regulated - To make regular; to put in good order.

State Sovereignty - The individual autonomy of the several states; strong local government was considered the key to freedom; a limited government is the essence of liberty.

Unorganized Militia - Able-bodied citizens of the United States, or those who have made a declaration of intention to become citizens of the United States, who are members of the militia who are not members of the National Guard or the Naval Militia.

Questions for Discussion:

1. In your opinion, what are the most important reasons for the right to bear arms?
2. If the courts, or the federal government, were to redefine gun rights as being a collective right, how would that affect our individual right to keep and bear arms?
3. Is a militia necessary in today's society? Why?
4. Why did the Founding Fathers see it as necessary to prohibit the federal government from any authority to prohibit the right to keep and bear arms, but felt it necessary to allow the States full authority over gun regulations?
5. In *McDonald v. Chicago* the Supreme Court ruled that the 2nd Amendment applies to cities and States. How does that open up the opportunity for the federal government to further regulate firearms?

Resources:

10 USC § 311 - Militia: Composition and Classes, Cornell University
Law School: <http://www.law.cornell.edu/uscode/text/10/311>

McDonald v. City of Chicago, United States Supreme Court:
<http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>

Noah Webster, *An Examination of the Leading Principles of the Federal Constitution* (Philadelphia 1787), *The Federalist Papers*: <http://www.thefederalistpapers.org/founders/noah-webster/noah-webster-an-examination-of-the-leading-principles-of-the-federal-constitution-philadelphia-1787>

The Tree of Liberty Quotation, Monticello - TH: Jefferson Encyclopedia:
http://wiki.monticello.org/mediawiki/index.php/The_tree_of_liberty...(Quotation)

Washington, D.C. v. Heller, Supreme Court of the United States Blog:
<http://www.scotusblog.com/case-files/cases/dc-v-heller/>

3rd Amendment: Quartering

The Founding Fathers feared a centralized government with a powerful military. One of the final straws that began the road to the American Revolution was the **Quartering Act of 1765** where the colonists became required to house and feed the British troops they despised. The Quartering Act enabled the British Empire to exercise greater control over the populace. It was also known as one of the **Intolerable Acts**.

The Quartering Act served as a major reason for the writing of the 3rd Amendment, which reads: *“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”*

Tyrannical governmental systems use unwarranted influence through military means. To guard against the potential for the disastrous rise of misplaced power, the Framers’ concerns about **standing armies** became evident in the 3rd Amendment.

To help the populace protect themselves, and be able to enforce the 3rd Amendment, in case the federal government violated the clause, the Founding Fathers also gave us the 2nd Amendment: *“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.”*

The concept of a Militia that is not a federal army is the realization that the United States will not be one where there is a **standing army** that can be used against its citizens. Article I, Section 8, Clause 12 gives the Congress the power to raise and support armies, but limits them to no more than two years funding.

When a military arm of a tyrannical government can compel the citizenry to house the military machinery of defense, a **police state** is present and liberty is at risk. Such was the reasoning behind the 3rd Amendment.

Until the Revolutionary War, the American States had no military, and the militias were populated by the colonists. The Constitution gave the U.S. Government the authority to build a military for the defense of

the union. A military establishment, in the minds of the Founders, was a potentially dangerous thing. The Founding Fathers desired to protect the union, but did not desire that the American military become an authoritarian tool of a potentially tyrannical federal government.

Terms:

Intolerable Acts - A series of laws passed by the British Parliament against the American Colonies in March of 1774. The British Parliament referred to these laws as the Coercive Acts. The acts were primarily designed to punish the colony of Massachusetts for defying British policies, and more specifically, for the Boston Tea Party. The Intolerable Acts caused outrage among the Americans, which led to the calling of the First Continental Congress in September of 1774. Among the actions taken by this united Congress was a boycott of British goods. The Intolerable Acts were called “impolitic, unjust, and cruel,” and included the Boston Port Act, the Massachusetts Government Act, the Quartering Act, the Quebec Act, and the Administration of Justice Act.

Police State - A system where the government exercises rigid and repressive controls through strong law enforcement or military control.

Quartering Act of 1765 - Act passed by the British Parliament in 1765 that stated that British troops in America would be housed in barracks and in public houses unless and until the number of troops overwhelmed the facilities, at which time, the troops could be housed in private commercial property, such as inns and stable, and in uninhabited homes and barns. The quartering would be without compensation and, in fact, owners would be required to provide soldiers with certain necessities such as food, liquor, salt, and bedding, also without compensation.

Standing Army - A professional permanent army composed of full-time career soldiers who are not disbanded during times of peace.

Questions for Discussion:

1. Why did the British pass the Quartering Act of 1765?
2. How did the Americans respond to the Intolerable Acts?
3. Why did the Founding Fathers have concerns regarding standing armies?
4. How does militias protect against the formation of a police state?

Resources:

Joseph Andrews, *A Guide for Learning and Teaching The Declaration of Independence and The U.S. Constitution - Learning from the Original Texts Using Classical Learning Methods of the Founders*; San Marcos: The Center for Teaching the Constitution (2010).

Madison’s Notes Constitutional Convention, Avalon Project, Yale University: http://avalon.law.yale.edu/subject_menus/debcont.asp

Philip B. Kurland and Ralph Lerner, *The Founder’s Constitution – Volume Five - Amendments I-XII*; Indianapolis: Liberty Fund (1987).

Quartering Act, U.S. Constitution Online:

<http://www.usconstitution.net/quarteringact.html>

The Declaration of Rights and Grievances, U.S. Constitution Online:

<http://www.usconstitution.net/intol.html>

Copyright 2015 Douglas V. Gibbs