A Sampling of Sources Pertaining to the 2nd Amendment

The following is the evolution of the language that eventually became the Second Amendment to the US Constitution. As you read, consider not just the sentiment, but realize also that capitalization and punctuation are revealing as to the Founder's intent.

The original text of what was to become the Second Amendment, as brought to the floor to the first session of the first congress of the U.S. House of Representatives, was:

> *"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 Bill of Rights that Madison introduced on June 8 1789 was not composed of numbered amendments intended to be added at the end of the Constitution. The Rights instead were to be inserted into the existing Constitution. The right to keep and bear arms was not to be inserted in Article One, Section Eight that specifies Congress's power over the militia. The sentence that later became the Second Amendment was to be inserted in the First Article, Section Nine, between clauses Three and Four, following the prohibition on suspension of habeas corpus, bills of attainder, and ex post facto laws, all individual civil rights asserted by individuals as a defense against government action. (Additionally, these provisions can all be interpreted as limits on congressional power, a view that has been advanced by supporters of the individual rights view of the Amendment.) Debate in the House on the remainder of June 8 focused again on whether a Bill of Rights was appropriate, and the matter was held for a later time. On July 21, however, Madison raised the issue of his Bill and proposed a select committee be created to report on it. The House voted in favor of Madison's motion, and the Bill of Rights entered committee for review. No official records were kept of the proceedings of the committee, but on July 28, the committee returned to the House a reworded version of the Second Amendment. On August 17, that version was read into the Journal:

> *"A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."*

The Second Amendment was debated and modified during sessions of the House on August 17 and August 20. These debates revolved primarily around risk of "mal-administration of the government" using the "religiously scrupulous" clause to destroy the militia as Great Britain had attempted to destroy the militia at the commencement of the American Revolution. These concerns were addressed by modifying the final clause, and on August 24, the House sent the following version to the United States Senate:

> *"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no one religiously scrupulous of bearing arms shall be compelled to render military service in person."*

The next day, August 25, the Senate received the Amendment from the House and entered it into the Senate Journal. When the Amendment was transcribed, the semicolon in the religious exemption portion was changed to a comma by the Senate scribe:

> *"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms shall be compelled to render military service in person."*

On September 4, the Senate voted to change the language of the Second Amendment by removing the definition of militia, and striking the conscientious objector clause:

> *"A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed."*

The Senate returned to this Amendment for a final time on September 9. A proposal to insert the words "For the common defense" next to the words "Bear Arms" was defeated. The Senate then slightly modified the language and voted to return the Bill of Rights to the House. The final version passed by the Senate was:

> *"A well regulated militia being the security of a free state, the right of the people to keep and bear arms shall not be infringed."*

The House voted on September 21, 1789 to accept the changes made by the Senate, but the Amendment as finally entered into the House journal contained the additional words "necessary to":

> *"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 proposed amendment was approved by both the House and Senate as :

> *"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 original and copies distributed to the states, and then ratified by them, had different capitalization and punctuation:

> *"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."*

Both versions are commonly used in official government publications.

A Sampling of Sources Pertaining to the 2nd Amendment

What follows are a sampling of documents pertaining to the intention of the 2nd Amendment of the US Constitution. They are (mostly) presented in historical order. Please do the following.

- ✓ Consider who the author is…How important is this source?
- ✓ As you read, put a box around any words you do not understand and can not derive the meaning of from the sentence context. (I tried to modernize much of the spelling)
- ✓ As you read, underline/highlight any main lines of thought or arguments.
- ✓ As you read, consider the historical context of the quote, and how that may have influenced the quote.
- ✓ In the box to the right, briefly summarize in your own words, where this author stands on the proper place of interaction between Church and State. (Feel free to jot down any other thoughts or commentary here too.)
- ✓ Proceed to the last pages and complete those.

A. "A well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense 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."
Virginia Declaration of Rights, 12 June 1776

B. "No free man shall ever be debarred the use of arms [within his own lands or tenements]."
Thomas Jefferson, 1776, Draft of a proposed Virginia Constitution (it was not passed by those assembled)

C. "It is true, the yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended-and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions. It is easily perceived, that if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength: This may be done in great measure by congress, if disposed to do it, by modelling the militia. Should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenseless."
Letter from the Federal Farmer to the Republican, 10 October 1787

D. "Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in 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 pretense, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the power, and jealousy will instantly inspire the inclination, to resist the execution of a law which appears to them unjust and oppressive."
Noah Webster, An Examination of the Leading Principles of the Federal Constitution, 1787

E. “To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defense, or by partial orders of towns, countries or districts of a state, is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man; it is a dissolution of the government. The fundamental law of the militia is, that it be created, directed and commanded by the laws, and ever for the support of the laws.”
John Adams, A Defense of the Constitution of the United States, 1787-1788

F. “If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers may be exerted with infinitely better prospect of success than against those of the rulers of an individual State. In a single State, if the persons entrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which it consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair.”
Alexander Hamilton, Federalist Paper nr.28, 26 December 1787

G. “I ask, who are the militia? They consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor…”
George Mason, US Constitution ratification convention, 16 June 1788

H. “Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.”
James Madison, Federalist Papers nr.46, 29 January 1788

I. “Among the interesting objects, which will engage your attention, that of providing for the common defense will merit particular regard. To be prepared for War is one of the most effectual means of preserving peace.
A free people ought not only to be armed but disciplined; to which end a uniform and well digested plan is requisite. And their safety and interest require, that they should promote such manufactories, as tend to render them independent on others for essential, particularly for military supplies.
The proper establishment of the Troops, which may be deemed indispensable, will be entitled to mature deliberation.”
George Washington, First State of the Union Address, 8 January 1790

J. “The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, thought this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How is it practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national Bill of Rights.”
US Supreme Court Justice Joseph Story, in his Commentaries on the Constitution of the United States, 1833

K. “That the words "a well regulated militia being necessary for the security of a free State", and the words "common defense" clearly show the true intent and meaning of these Constitutions [Arkansas and US] and prove that it is a political and not an individual right, and, of course, that the State, in her legislative capacity, has the right to regulate and control it: this being the case, then the people, neither individually nor collectively, have the right to keep and bear arms.”
State v. Buzzard (1842), Arkansas Supreme Court ruling.
- This quote is written in the dissenting opinion by Justice Lacy, in which he offers the above as his paraphrase of the majority’s reasoning for the opinion.
  As part of their opinion, the majority also stated that the intent of the 2nd Amendment was for States to have a militia to protect themselves against a national army that could infiltrate and overthrow them. Consequentially, due to this view of the original intent, they felt the 2nd Amendment was never meant to apply as a right granted to individuals.

L. "We think it clear that there are no sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms."
Presser v. Illinois (1886), United States Supreme Court ruling
- This post-Civil War era case interprets the meaning of the 2nd Amendment rights relating to militias and individuals. The court ruled the 2nd Amendment was a right of individuals, not militias, and was not a right to form or belong to a militia, but related to an individual right to bear arms for the good of the United States, who could serve as members of a militia upon being called up by the Government in time of collective need. In essence, it declared, although individuals have the right to keep and bear arms, a state law prohibiting common citizens from forming personal military organizations, and drilling or parading, is still constitutional because prohibiting such personal military formations and parades does not limit a personal right to keep and bear arms.

Name: _____
Period: _____ Date: _____

2nd Amendment

1-4. What evidence is there in the primary source quotes/documents to support the following statements?

A. "The Founders intended for gun ownership to be an absolutely right, without restrictions"

B. "The Founders intended for people to own guns in order to protect themselves from the potential of a tyrannical government."

C. "The Founders intended for gun ownership to exist within the context of a state-sponsored militia, which would operate in support of the state or nation."

D. "The Founders intended for people to retain arms for daily affairs (like hunting), but that they should defer to militias in the event of national defense."

5. Look at the changing evolution of the proposal which would become the 2nd Amendment. Consider the changing sentences, which words are capitalized when (and which lose capitalization, and when), and how the punctuation changes… what do all these factors suggest as how the Congress viewed the purpose/intend of this Amendment?

6-8. Of the Documents/quotes, which are the most IMPORTANT in revealing intent? Identify three, and explain <u>why</u>

Document _____ Why? _____

_____

_____

Document _____ Why? _____

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_____

Document _____ Why? _____

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Federal Court Case Law and Policy Relevant to the 2nd Amendment

Judicial opinions relating to the Second Amendment have not been Nationalized. The following are laws currently enforceable nationally. (Presidential Executive Orders are not included, since a current president can – at a whim and without due process – overturn one of their predecessors' executive orders)

Caetano v. Massachusetts (2016, Supreme Court)
The Court ruled that the Second Amendment extends to all bearable arms, in stating "The Court held that the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding, and that this Second Amendment right is fully applicable to the States."

District of Columbia v. Heller (2008, Supreme Court)
The Court held that the 2nd Amendment protects an individual's right to possess a firearm unconnected with service in a militia for traditionally lawful purposes, such as self-defense within the home.

United States v. Rybar (1996, 3rd Circuit, later reaffirmed by the Supreme Court)
The Court held that Congress does have the authority to regular possession of homemade machine guns under the Commerce Clause

Federal Assault Weapons Ban (1994, Congressional Law; expired 2004)
A prohibition on the manufacture for civilian use of certain semi-automatic firearms, as well as large capacity ammunition magazines. (All court challenges to the ban were rejected.)

Brady Handgun Violence Prevention Act (1993, Congressional Law)
Required a five-day waiting period before a firearm purchase and mandatory criminal background check

Gun-Free School Zones Act (1990, Congressional Law)
Prohibits any unauthorized individual from knowingly possessing a firearm at a place the individual knows to be a school.

Undetectable Firearms Act (1988, Congressional Law)
makes it illegal to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm that is not as detectable by walk-through metal detection as a security exemplar containing 3.7 oz (105 g) of steel, or any firearm with major components that do not generate an accurate image before standard airport imaging technology

Firearms Owner's Protection Act (1986, Congressional Law)
A lw which offered revisions to the Firearm Owner's Protection Act of 1986 to offer increased protections to owners of firearms. This includes abolishing pursuit of a national directory of firearms, among other things.

Lewis v. United States (1980, Supreme Court)
The Court rules that Congress may prohibit felons from possessing firearms.

Omnibus Crime Control and Safe Streets Act (1968, Congressional Law)
Prohibited interstate trade in handguns and increased the minimum age to 21 for buying handguns

United States v. Miller (1939, Supreme Court)
The Court states The Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia."

- Gun control advocates argue that, for over six decades, the United States Circuit Courts, with very few exceptions, have cited *Miller* in rejecting challenges to federal firearms regulations.
- Gun rights advocates claim this case as a victory because they interpret it to state that ownership of weapons for efficiency or preservation of a well-regulated militia unit of the present day is specifically protected

Presser v. Illinois (1886, Supreme Court)
The Court held that States may forbid private armies. The Congress can set policy regarding regulations of firearms, but the states can affect peoples right to peaceably assemble.

The Second Amendment has not been Nationalized by the Supreme Court.
The Court has held that Congress and local jurisdictions may -to a point – make gun laws which can be restrictive.
For instance…

Current judicial precedents
At present, with certain exceptions and disputes, the courts generally find it acceptable under the Second Amendment for federal, state, and local jurisdictions to:

- Regulate or not regulate militias
- Enact, or not enact, child-safety lock legislation
- Ban or permit handgun possession
- Regulate or not regulate handgun possession
- Prohibit or allow the carrying of concealed firearms and/or weapons
- Regulate or not regulate the carrying of concealed firearms and/or weapons
- Ban or permit assault weapons
- Prohibit and regulate firearms on commercial aircraft.
- Prohibit possession of firearms by persons who have been:
  - Involuntarily committed to a mental institution
  - Convicted of a felony
  - Convicted of a misdemeanor crime of domestic violence or not, since in one jurisdiction the Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence law was ruled a violation of the 2nd and 5th Amendments and was ruled unconstitutional for two years though that decision was reversed on appeal and the Supreme Court has not granted certiorari.
  - Convicted of a misdemeanor crime of domestic violence and in the military, and being unable as a soldier in uniform to handle any weapons, although per Department of Defense policy, crew-served weapons such as tanks, missiles, and aircraft are exempt from the Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence law and may be handled or used by a soldier previously convicted of a crime of domestic violence despite the same individual not being allowed to handle or use a pistol.
  - Dishonorably discharged from the military
- Require the licensing of firearms dealers
- Ban or regulate bombs, artillery, and explosives
- Require or not require the registration of firearms
- Ban or permit the possession of firearms and ammunition on county-owned property
- Ban or not ban the possession of weapons of any kind on Federal property (Although weapons are generally banned on most Federal property, National Parks in some parts of Alaska encourage hikers to carry firearms for protection against wild animal.)
- Prohibit firearm possession anywhere in licensed liquor establishments, or to prohibit firearm possessions only in the bar areas of some businesses, or to permit the carry of concealed weapons in any facility other than Federal facilities
- Require or not require handgun owner identification cards
- Require or not require the presentation of identification prior to buying ammunition
- Ban or permit ballistic fingerprinting databases

These rules vary between jurisdictions and are subject to court decisions rendered according to local law. The Federal District courts have not ruled uniformly either for or against several of these provisions, and the Supreme Court has not yet ruled uniformly.

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How the NRA Rewrote the Second Amendment

The Founders never intended to create an unregulated individual right to a gun. Today, millions believe they did. Here's how it happened.

by Michael Waldman

. . . . . .

"A fraud on the American public." That's how former Chief Justice Warren Burger described the idea that the Second Amendment gives an unfettered individual right to a gun. When he spoke these words to PBS in 1990, the rock-ribbed conservative appointed by Richard Nixon was expressing the longtime consensus of historians and judges across the political spectrum.

Twenty-five years later, Burger's view seems as quaint as a powdered wig. Not only is an individual right to a firearm widely accepted, but increasingly states are also passing laws to legalize carrying weapons on streets, in parks, in bars—even in churches.

Many are startled to learn that the U.S. Supreme Court didn't rule that the Second Amendment guarantees an individual's right to own a gun until 2008, when *District of Columbia v. Heller* struck down the capital's law effectively banning handguns in the home. In fact, every other time the court had ruled previously, it had ruled otherwise. Why such a head-snapping turnaround? Don't look for answers in dusty law books or the arcane reaches of theory.

So how does legal change happen in America? We've seen some remarkably successful drives in recent years—think of the push for marriage equality, or to undo campaign finance laws. Law students might be taught that the court is moved by powerhouse legal arguments or subtle shifts in doctrine. The National Rifle Association's long crusade to bring its interpretation of the Constitution into the mainstream teaches a different lesson: Constitutional change is the product of public argument and political maneuvering. The pro-gun movement may have started with scholarship, but then it targeted public opinion and shifted the organs of government. By the time the issue reached the Supreme Court, the desired new doctrine fell like a ripe apple from a tree.

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The Second Amendment consists of just one sentence: "A well regulated militia, being necessary for the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Today, scholars debate its bizarre comma placement, trying to make sense of the various clauses, and politicians routinely declare themselves to be its "strong supporters." But in the grand sweep of American history, this sentence has never been among the most prominent constitutional provisions. In fact, for two centuries it was largely ignored.

The amendment grew out of the political tumult surrounding the drafting of the Constitution, which was done in secret by a group of mostly young men, many of whom had served together in the Continental Army. Having seen the chaos and mob violence that followed the Revolution, these "Federalists" feared the consequences of a weak central authority. They produced a charter that shifted power—at the time in the hands of the states—to a new national government.

"Anti-Federalists" opposed this new Constitution. The foes worried, among other things, that the new government would establish a "standing army" of professional soldiers and would disarm the 13 state militias, made up of part-time citizen-soldiers and revered as bulwarks against tyranny. These militias were the product of a world of civic duty and governmental compulsion utterly alien to us today. Every white man age 16 to 60 was enrolled. He was actually required to own—and bring—a musket or other military weapon.

On June 8, 1789, James Madison—an ardent Federalist who had won election to Congress only after agreeing to push for changes to the newly ratified Constitution—proposed 17 amendments on topics ranging from the size of congressional districts to legislative pay to the right to religious freedom. One addressed the "well regulated militia" and the right "to keep and bear arms." We don't really know what he meant by it. At the time, Americans expected to be able to own guns, a legacy of English common law and rights. But the overwhelming use of the phrase "bear arms" in those days referred to military activities.

There is not a single word about an individual's right to a gun for self-defense or recreation in Madison's notes from the Constitutional Convention. Nor was it mentioned, with a few scattered exceptions, in the records of the ratification debates in the states. Nor did the U.S. House of Representatives discuss the topic as it marked up the Bill of Rights. In fact, the original version passed by the House included a conscientious objector provision. "A well regulated militia," it explained, "composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person."

Though state militias eventually dissolved, for two centuries we had guns (plenty!) and we had gun laws in towns and states, governing everything from where gunpowder could be stored to who could carry a weapon—and courts overwhelmingly upheld these restrictions. Gun rights and gun control were seen as going hand in hand. Four times between 1876 and 1939, the U.S. Supreme Court declined to rule that the Second Amendment protected individual gun ownership outside the context of a militia. As the Tennessee Supreme Court put it in 1840, "A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms; much less could it be said that a private citizen bears arms because he has a dirk or pistol concealed under his clothes, or a spear in a cane."

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Cue the National Rifle Association. We all know of the organization's considerable power over the ballot box and legislation. Bill Clinton groused in 1994 after the Democrats lost their congressional majority, "The NRA is the reason the Republicans control the House." Just last year, it managed to foster a successful filibuster of even a modest background-check proposal in the U.S. Senate, despite 90 percent public approval of the measure.

What is less known—and perhaps more significant—is its rising sway over constitutional law.

The NRA was founded by a group of Union officers after the Civil War who, perturbed by their troops' poor marksmanship, wanted a way to sponsor shooting training and competitions. The group testified in *support* of the first federal gun law in 1934, which cracked down on the machine guns beloved by Bonnie and Clyde and other bank robbers. When a lawmaker asked whether the proposal violated the Constitution, the NRA witness responded, "I have not given it any study from that point of view." The group lobbied quietly against the most stringent regulations, but its principal focus was hunting and sportsmanship: bagging deer, not blocking laws. In the late 1950s, it opened a new headquarters to house its hundreds of employees. Metal letters on the facade spelled out its purpose: firearms safety education, marksmanship training, shooting for recreation.

Cut to 1977. Gun-group veterans still call the NRA's annual meeting that year the "Revolt at Cincinnati." After the organization's leadership had decided to move its headquarters to Colorado, signaling a retreat from politics, more than a thousand angry rebels showed up at the annual convention. By four in the morning, the dissenters had voted out the organization's leadership. Activists from the Second Amendment Foundation and the Citizens Committee for the Right to Keep and Bear Arms pushed their way into power.

The NRA's new leadership was dramatic, dogmatic and overtly ideological. For the first time, the organization formally embraced the idea that the sacred Second Amendment was at the heart of its concerns.

The gun lobby's lurch rightward was part of a larger conservative backlash that took place across the Republican coalition in the 1970s. One after another, once-sleepy traditional organizations galvanized as conservative activists wrested control.

Conservatives tossed around the language of insurrection with the ardor of a Berkeley Weatherman. The "Revolt at Cincinnati" was followed by the "tax revolt," which began in California in 1979, and the "sagebrush rebellion" against Interior Department land policies. All these groups shared a deep distrust of the federal government and spoke in the language of libertarianism. They formed a potent new partisan coalition.

Politicians adjusted in turn. The 1972 Republican platform had supported gun control, with a focus on restricting the sale of "cheap handguns." Just three years later in 1975, preparing to challenge Gerald R. Ford for the Republican nomination, Reagan wrote in *Guns & Ammo* magazine, "The Second Amendment is clear, or ought to be. It appears to leave little if any leeway for the gun control advocate." By 1980 the GOP platform proclaimed, "We believe the right of citizens to keep and bear arms must be preserved. Accordingly, we oppose federal registration of firearms." That year the NRA gave Reagan its first-ever presidential endorsement.

Today at the NRA's headquarters in Fairfax, Virginia, oversized letters on the facade no longer refer to "marksmanship" and "safety." Instead, the Second Amendment is emblazoned on a wall of the building's lobby. Visitors might not notice that the text is incomplete. It reads:

".. the right of the people to keep and bear arms, shall not be infringed."

The first half—the part about the well regulated militia—has been edited out.

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From 1888, when law review articles first were indexed, through 1959, every single one on the Second Amendment concluded it did not guarantee an individual right to a gun. The first to argue otherwise, written by a William and Mary law student named Stuart R. Hays, appeared in 1960. He began by citing an article in the NRA's *American Rifleman* magazine and argued that the amendment enforced a "right of revolution," of which the Southern states availed themselves during what the author called "The War Between the States."

At first, only a few articles echoed that view. Then, starting in the late 1970s, a squad of attorneys and professors began to churn out law review submissions, dozens of them, at a prodigious rate. Funds—much of them from the NRA—flowed freely. An essay contest, grants to write book reviews, the creation of "Academics for the Second Amendment," all followed. In 2003, the NRA Foundation provided $1 million to endow the Patrick Henry professorship in constitutional law and the Second Amendment at George Mason University Law School.

This fusillade of scholarship and pseudo-scholarship insisted that the traditional view—shared by courts and historians—was wrong. There had been a colossal constitutional mistake. Two centuries of legal consensus, they argued, must be overturned.

If one delves into the claims these scholars were making, a startling number of them crumble. Historian Jack Rakove, whose Pulitzer-Prize winning book *Original Meanings* explored the founders' myriad views, notes, "It is one thing to ransack the sources for a set of useful quotations, another to weigh their interpretive authority. … There are, in fact, only a handful of sources from the period of constitutional formation that bear directly on the questions that lie at the heart of our current controversies about the regulation of privately owned firearms. If Americans has indeed been concerned with the impact of the Constitution on this right … the proponents of individual right theory would not have to recycle the same handful of references … or to rip promising snippets of quotations from the texts and speeches in which they are embedded."

And there were plenty of promising snippets to rip. There was the ringing declaration from Patrick Henry: "The great object is, that every man be armed." The eloquent patriot's declaration provided the title for the ur-text for the gun rights movement, Stephen Halbrook's 1984 book, *That Every Man Be Armed.* It is cited reverentially in law review articles and scholarly texts. The Second Amendment professorship at George Mason University is named after Henry. A $10,000 gift to the NRA makes you a "Patrick Henry Member."

The quote has been plucked from Henry's speech at Virginia's ratifying convention for the Constitution in 1788. But if you look at the full text, he was complaining about the cost of both the federal government and the state arming the militia. ("The great object is, that every man be armed," he said. "At a very great cost, we shall be doubly armed.") In other words: Sure, let every man be armed, but only once! Far from a ringing statement of individual gun-toting freedom, it was an early American example of a local politician complaining about government waste.

Thomas Jefferson offers numerous opportunities for pro-gun advocates. "Historical research demonstrates the Founders out-'NRAing' even the NRA," proclaimed one prolific scholar. "'One loves to possess arms' wrote Thomas Jefferson, the premier intellectual of his day, to George Washington on June 19, 1796." What a find! Oops: Jefferson was not talking about guns. He was writing to Washington asking for copies of some old letters, to have handy so he could issue a rebuttal in case he got attacked for a decision he made as secretary of state. The NRA website still includes the quote. You can go online to buy a T-shirt emblazoned with Jefferson's mangled words.

Some of the assumptions were simply funny. In his book on judicial philosophy, Supreme Court Justice Antonin Scalia, for example, lauded Professor Joyce Lee Malcolm's "excellent study" of English gun rights, noting sarcastically, "she is not a member of the Michigan Militia, but an Englishwoman." But a historian fact-checked the justice: "Malcolm's name may sound British, and Bentley College, where Malcolm teaches history, may sound like a college at Oxford, but in fact Malcolm was born and raised in Utica, New York, and Bentley is a business college in Massachusetts."

Still, all this focus on historical research began to have an impact. And eventually these law professors, many toiling at the fringes of respectability, were joined by a few of academia's leading lights. Sanford Levinson is a prominent liberal constitutional law professor at the University of Texas at Austin. In 1989, he published an article tweaking other progressives for ignoring "The Embarrassing Second Amendment." "For too long," he wrote, "most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members. That will no longer do." Levinson was soon joined by Akhil Reed Amar of Yale and Harvard's Laurence Tribe. These prominent progressives had differing opinions on the amendment and its scope. But what mattered was their political provenance—they were liberals! (One is reminded of Robert Frost's definition of a liberal: someone so open-minded he will not take his own side in an argument.)

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As the revisionist perspective took hold, government agencies also began to shift. In 1981, Republicans took control of the U.S. Senate for the first time in 24 years. Utah Sen. Orrin Hatch became chair of a key Judiciary Committee panel, where he commissioned a study on "The Right to Keep and Bear Arms." In a breathless tone it announced, "What the Subcommittee on the Constitution uncovered was clear—and long lost—proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms." The cryptologist discovering invisible writing on the back of the Declaration of Independence in the Disney movie *National Treasure* could not have said it better.

Despite Hatch's dramatic "discovery," a constitutional right to gun ownership was still a stretch, even for the conservatives in Reagan's Justice Department, who were reluctant to undo the work not only of judges, but also of democratically elected legislators. When Ed Meese, Reagan's attorney general, commissioned a comprehensive strategy for jurisprudential change in 15 areas ranging from the "exclusionary rule" under the Fourth Amendment to public initiatives to private religious education, it did not include a plan for the Second Amendment.

But in time, the NRA's power to elect presidents began to shift executive branch policies, too. In 2000, gun activists strongly backed Governor George W. Bush of Texas. After the election, Bush's new attorney general, John Ashcroft, reversed the Justice Department's stance. The NRA's head lobbyist read the new policy aloud at its 2001 convention in Kansas City: "The text and original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms."

In the meantime, the "individual right" argument was starting to win in another forum: public opinion. In 1959, according to a Gallup poll, 60 percent of Americans favored banning handguns; that dropped to 41 percent by 1975 and 24 percent in 2012. By early 2008, according to Gallup, 73 percent of Americans believed the Second Amendment "guaranteed the rights of Americans to own guns" outside the militia.

Over the past decade, the idea of a Second Amendment right has become synonymous with conservatism, even with support for the Republican Party. In 1993, for example, the *New York Times* mentioned "gun control" 388 times, and the Second Amendment only 16. By 2008, overall mentions of the issue dropped to 160 but the Second Amendment was mentioned 59 times.

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In the end, it was neither the NRA nor the Bush administration that pressed the Supreme Court to reverse its centuries-old approach, but a small group of libertarian lawyers who believed other gun advocates were too timid. They targeted a gun law passed by the local government in Washington, D.C., in 1976—perhaps the nation's strictest—that barred individuals from keeping a loaded handgun at home without a trigger lock. They recruited an appealing plaintiff: Dick Heller, a security guard at the Thurgood Marshall Federal Judiciary Building, who wanted to bring his work revolver home to his high-crime neighborhood. The NRA worried it lacked the five votes necessary to win. The organization tried to sideswipe the effort, filing what Heller's lawyers called "sham litigation" to give courts an excuse to avoid a constitutional ruling. But the momentum that the NRA itself had set in motion proved unstoppable, and the big case made its way to the Supreme Court.

The argument presented in *District of Columbia v. Heller* showed just how far the gun rights crusade had come. Nearly all the questions focused on arcane matters of colonial history. Few dealt with preventing gun violence, social science findings or the effectiveness of today's gun laws—the kinds of things judges might once have considered. On June 26, 2008, the Supreme Court ruled 5-4 that the Second Amendment guarantees a right to own a weapon "in common use" to protect "hearth and home." Scalia wrote the opinion, which he later called the "vindication" of his judicial philosophy.

After the decision was announced, Heller stood on the steps of the court for a triumphant press conference. Held aloft behind him was a poster bearing that quote from Patrick Henry, unearthed by the scholars who had proven so important for the successful drive: “Let every man be armed.”
* * *

In January 2014, liberal activists jammed a conference room at the Open Society Foundations in New York City. They were there to hear former NRA president David Keene. “Of course, we really just invited David to coax him into giving us the secret of the NRA’s success,” joked the moderator.

Improbably, the gun movement’s triumph has become a template for progressives, many of whom are appalled by the substance of the victories. Keene was joined by Evan Wolfson, the organizer of Freedom to Marry, whose movement has begun to win startling victories for marriage equality in courts. Once, conservatives fumed about activist courts enforcing newly articulated rights—a woman’s right to reproductive choice, equal protection for all races. But just as they learned from the left’s legal victories in those fields, today progressives are trying to re-learn from their conservative counterparts.

One lesson: patience. The fight for gun rights took decades. Another lesson, perhaps obvious: There is no substitute for political organizing. A century ago the satirical character Mr. Dooley famously said in an Irish brogue, “No matter whether th' Constitution follows th' flag or not, the Supreme Coort follows th' iliction returns.” Before social movements can win at the court they must win at the ballot box. The five justices in the *Heller* majority were all nominated by presidents who themselves were NRA members.

But even more important is this: Activists turned their fight over gun control into a constitutional crusade. Modern political consultants may tell clients that constitutional law and the role of the Supreme Court is too arcane for discussion at the proverbial “kitchen table.” Nonsense. Americans always have been engaged, and at times enraged, by constitutional doctrine. Deep notions of freedom and rights have retained totemic power. Today’s “Second Amendment supporters” recognize that claiming the constitutional high ground goes far toward winning an argument.

Liberal lawyers might once have rushed to court at the slightest provocation. Now, they are starting to realize that a long, full jurisprudential campaign is needed to achieve major goals. Since 2011, activists have waged a widespread public education campaign to persuade citizens that new state laws were illegitimate attempts to curb voting rights, all as a precursor to winning court victories. Now many democracy activists, mortified by recent Supreme Court rulings in campaign finance cases (all with *Heller*’s same 5-4 split), have begun to map out a path to overturn *Citizens United* and other recent cases. Years of scholarship, theorizing, *amicus* briefs, test cases and minority dissents await before a new majority can refashion recent constitutional doctrine.

Molding public opinion is the most important factor. Abraham Lincoln, debating slavery, said in 1858, “Public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed. Consequently he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed.” The triumph of gun rights reminds us today: If you want to win in the court of law, first win in the court of public opinion.

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http://www.truth-out.org/news/item/13890-the-second-amendment-was-ratified-to-preserve-slavery

The Second Amendment Was Ratified to Preserve Slavery

by Thom Hartmann

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“The real reason the Second Amendment was ratified, and why it says "State" instead of "Country" (the framers knew the difference – see the 10th Amendment), was to preserve the slave patrol militias in the southern states, which was necessary to get Virginia's vote. Founders Patrick Henry, George Mason and James Madison were totally clear on that... and we all should be too.

In the beginning, there were the militias. In the South, they were also called the "slave patrols," and they were regulated by the states.

In Georgia, for example, a generation before the American Revolution, laws were passed in 1755 and 1757 that required all plantation owners or their male white employees to be members of the Georgia Militia, and for those armed militia members to make monthly inspections of the quarters of all slaves in the state. The law defined which counties had which armed militias and even required armed militia members to keep a keen eye out for slaves who may be planning uprisings.

As Dr. Carl T. Bogus wrote for the University of California Law Review in 1998, "The Georgia statutes required patrols, under the direction of commissioned militia officers, to examine every plantation each month and authorized them to search 'all Negro Houses for offensive Weapons and Ammunition' and to apprehend and give twenty lashes to any slave found outside plantation grounds."

It's the answer to the question raised by the character played by Leonardo DiCaprio in *Django Unchained* when he asks, "Why don't they just rise up and kill the whites?" If the movie were real, it would have been a purely rhetorical question, because every southerner of the era knew the simple answer: Well regulated militias kept the slaves in chains.

Sally E. Haden, in her book *Slave Patrols: Law and Violence in Virginia and the Carolinas*, notes that, "Although eligibility for the Militia seemed all-encompassing, not every middle-aged white male Virginian or Carolinian became a slave patroller." There were exemptions so "men in critical professions" like judges, legislators and students could stay at their work. Generally, though, she documents how most southern men between ages 18 and 45 -- including physicians and ministers -- had to serve on slave patrol in the militia at one time or another in their lives.

And slave rebellions were keeping the slave patrols busy.

By the time the US Constitution was ratified, hundreds of substantial slave uprisings had occurred across the South. Blacks outnumbered whites in large areas, and the state militias were used to both prevent and to put down slave uprisings. As Dr. Bogus points out, slavery can only exist in the context of a police state, and the enforcement of that police state was the explicit job of the militias.

If the anti-slavery folks in the North had figured out a way to disband -- or even move out of the state -- those southern militias, the police state of the South would collapse. And, similarly, if the North were to invite into military service the slaves of the South, then they could be emancipated, which would collapse the institution of slavery, and the southern economic and social systems, altogether.

These two possibilities worried southerners like James Monroe, George Mason (who owned more than 300 slaves) and the southern Christian evangelical, Patrick Henry (who opposed slavery on principle, but also opposed freeing slaves).

Their main concern was that Article 1, Section 8 of the newly-proposed US Constitution, which gave the federal government the power to raise and supervise a militia, could also allow that federal militia to subsume their state militias and change them from slavery-enforcing institutions into something that could even, one day, free the slaves.

This was not an imagined threat. Famously, 12 years earlier, during the lead-up to the Revolutionary War, Lord Dunsmore offered freedom to slaves who could escape and join his forces. "Liberty to Slaves" was stitched onto their

jacket pocket flaps. During the war, British General Henry Clinton extended the practice in 1779. Numerous freed slaves served in General Washington's army.

Thus, southern legislators and plantation owners lived not just in fear of their own slaves rebelling, but also in fear that their slaves could be emancipated through military service.

At the ratifying convention in Virginia in 1788, Henry laid it out:

> "Let me here call your attention to that part [Article 1, Section 8 of the proposed Constitution] which gives the Congress 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....
>
> "By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither ... this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is ridiculous; so that this pretended little remains of power left to the states may, at the pleasure of Congress, be rendered nugatory."

George Mason expressed a similar fear:

> "The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless, by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them [under this proposed Constitution].... "

Henry then bluntly laid it out:

> "If the country be invaded, a state may go to war, but cannot suppress [slave] insurrections [under this new Constitution]. If there should happen an insurrection of slaves, the country cannot be said to be invaded. They cannot, therefore, suppress it without the interposition of Congress.... Congress, and Congress only [under this new Constitution], can call forth the militia."

And why was that such a concern for Patrick Henry?

> "In this state," he said, "there are two hundred and thirty-six thousand blacks, and there are many in several other states. But there are few or none in the Northern States.... May Congress not say, that every black man must fight? Did we not see a little of this last war? We were not so hard pushed as to make emancipation general; but acts of Assembly passed that every slave who would go to the army should be free."

Patrick Henry was also convinced that the power over the various state militias given the federal government in the new Constitution could be used to strip the slave states of their slave-patrol militias. He knew the majority attitude in the North opposed slavery, and he worried they'd use the Constitution to free the South's slaves (a process then called "Manumission").

The abolitionists would, he was certain, use that power (and, ironically, this is pretty much what Abraham Lincoln ended up doing):

> "[T]hey will search that paper [the Constitution], and see if they have power of manumission," said Henry. "And have they not, sir? Have they not power to provide for the general defence and welfare? May they not think that these call for the abolition of slavery? May they not pronounce all slaves free, and will they not be warranted by that power?
>
> "This is no ambiguous implication or logical deduction. The paper speaks to the point: they have the power in clear, unequivocal terms, and will clearly and certainly exercise it."
>
> He added: "This is a local matter, and I can see no propriety in subjecting it to Congress."

James Madison, the "Father of the Constitution" and a slaveholder himself, basically called Patrick Henry paranoid.

> "I was struck with surprise," Madison said, "when I heard him express himself alarmed with respect to the emancipation of slaves.... There is no power to warrant it, in that paper [the Constitution]. If there be, I know it not."

But the southern fears wouldn't go away.

Patrick Henry even argued that southerner's "property" (slaves) would be lost under the new US Constitution, and the resulting slave uprising would be less than peaceful or tranquil:

> "In this situation," Henry said to Madison, "I see a great deal of the property of the people of Virginia in jeopardy, and their peace and tranquility gone."

So Madison, who had (at Jefferson's insistence) already begun to prepare proposed amendments to the US Constitution, changed his first draft of one that addressed the militia issue to make sure it was unambiguous that the southern states could maintain their slave patrol militias.

His first draft for what became the Second Amendment had said: "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** *[emphasis mine]*: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."

But Henry, Mason and others wanted southern states to preserve their slave-patrol militias independent of the federal government. So Madison changed the word "country" to the word "state," and redrafted the Second Amendment into today's form:

> "A well regulated Militia, being necessary to the security of a free **State** *[emphasis mine]*, the right of the people to keep and bear Arms, shall not be infringed."