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Congressional Briefing

History of Gun Rights and Gun Regulations

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History stands at the heart of the debate about the right to bear arms. So how have Americans used the regulatory powers of government to reduce gun violence in the past? This briefing will review the many ways local, state, and federal authorities have managed the use of guns throughout our history. Perhaps the past can offer us a way to break out of our present impasse.

Saul Cornell is Paul and Diane Guenther Chair in American History at Fordham University. Professor Cornell is a leading authority on early American constitutional history and has written extensively on the Second Amendment and the history of gun regulation. His articles have appeared in: *The Journal of American History*, *The William and Mary Quarterly*, *The Yale Law Journal*, and *The Yale Journal of Law and the Humanities*. He authored the chapter on the “Right to Bear Arms” in the *Oxford Handbook of the U.S. Constitution* and contributed to the *Cambridge History of Law in America*.

Darrell A. H. Miller is Melvin G. Shimm Professor of Law at Duke Law School. He writes and teaches in the areas of civil rights, constitutional law, civil procedure, state and local government law, and legal history. His scholarship has been published in leading law reviews such as the *Yale Law Journal* and the *University of Chicago Law Review* and has been cited by the Supreme Court of the United States, the United States Courts of Appeals, the United States District Courts, and in congressional testimony and legal briefs. With Joseph Blocher, he is the author of [*The Positive Second Amendment: Rights, Regulation, and the Future of Heller*](#) (Cambridge University Press, 2018).

Karin Wulf is Professor of History and Director of the Omohundro Institute at William & Mary. She has co-edited *Milcah Martha Moore's Book: A Commonplace Book from Revolutionary America* (1997) and *The Diary of Hannah Callender, 1758-1788* (2010). Her book, *Not All Wives: Women of Colonial Philadelphia* was published by Cornell University Press in 2000, and issued in paper by the University of Pennsylvania Press in 2005.

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Although gun rights and gun control are often cast as opposing ideals in modern public debate, for most of American history the two were seen as not simply complimentary, but inseparable. The Founding Generation that framed and adopted the Second Amendment feared tyranny, but were also wary of anarchy. Their ideal was well-regulated liberty; what modern jurists call ordered liberty. This brief typology of some of the most relevant categories of gun regulations enacted over the course of American history is illustrative of the broad scope of firearms regulation under Anglo-American Law.

Common Law

- Limits based on place, such as courts and markets
- Bans on weapons deemed dangerous or unusual
- Limits on discharge of weapons
- Regulations on storage of weapons

State and Local Police Power

- In addition to the above, militia regulations and militia inspections
- Taxes on weapons and gunpowder
- Bans of dangerous groups or individuals

Federal Regulations Under Militia Clause and Commerce Clause

- Militia regulations defining who was in the militia, the types of weapons required
- Inspection of militia weapons and fines for failing to muster properly armed
- Regulations on the manufacture, sale, and transportation of firearms

The 2008 case, *District of Columbia v. Heller*, resolved whether the Second Amendment protects a right to keep a gun for personal self-defense or whether it is limited to participation in an organized militia. *Heller* ruled the right extends to personal use, but is not unlimited. What are the limits? Lower courts have established a two-part test:

First, does the Second Amendment even cover the regulation in question? Frequently, this determination involves the history of the regulation. For example, *Heller* suggests that machine guns can be prohibited because they fall within historical prohibitions on “dangerous and unusual weapons.”

Second, does the regulation impermissibly burden the right to keep and bear arms. This is a protection question. Typically, judges examine the purpose of the legislation and determine how well the regulation fits its stated purpose. If the regulation burdens too much core Second Amendment activity, it’s unconstitutional; but if its burdens are minor—prohibitions on firearms with obliterated serial numbers is an example-- it survives the challenge.

Justice Brett Kavanaugh and some other judges consider the second test impermissible and argue for an approach based solely on text, history, and tradition. Far from further limiting regulation, Kavanaugh suggests that “governments appear to have more flexibility” with a historical test. It is clear, then, is that an understanding of the history of firearm regulation in America is likely to continue to be relevant to Second Amendment litigation.