Putting the Second Amendment Second

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When people disagree on the meaning of the Second Amendment, they often divide into two camps. Those who support strong gun control measures read the amendment to say that the federal government cannot prevent states from arming their own militias, but the right to arm does not extend to individuals. In contrast, those who support gun rights read the amendment to say that individuals, not just collective militias, have the right to own firearms. In broader legal terms, the question the courts have grappled with as they have considered Second Amendment cases is this: Does the Second Amendment apply to the states or just to the national government? In other words, can states ban handguns and other firearms or does the Constitution require that states allow gun ownership? Two recent cases have begun to clarify the Supreme Court's position on this question. One, District of Columbia v. Heller *(2008), challenged the longstanding ban on handguns in the District of Columbia with the case of an armed security guard who was not allowed to bring a gun into his home for self-protection. The other,* McDonald v. Chicago *(2010), similarly challenged Chicago's handgun ban. Law professor Akhil Reed Amar considers the constitutional issues in these cases.*

The language of the Second Amendment has been the obsessive focus of just about everyone interested in *District of Columbia v. Heller,* the D.C. gun-ownership case. . . That amendment is indeed important and much misunderstood. But Heller's facts, which involve the possession of a gun inside the home for self-defense, lie rather far from the Second Amendment's core concerns, as originally understood by the Founding Fathers. To think straight about gun control and the Constitution, we need to move past the Second Amendment and pay more heed to the Ninth and 14th Amendments.

Let's begin here: Suppose, for argument's sake, that we concede that everything gun-control advocates say about the Second Amendment is right. Suppose that the amendment focused solely on arms-bearing in military contexts, and that it said absolutely nothing about an individual's right to have a gun while sleeping in his own home or hunting in his own private Idaho. Would this concession mean that no individual constitutional right exists today?

Hardly. According to the Ninth Amendment: "The enumeration[1] in the Constitution of certain rights shall not be construed to deny or disparage other rights retained by the people." In other words, there may well be constitutional rights that are not explicitly set forth in the Second Amendment (or in any other amendment or constitutional clause, for that matter). In identifying these unenumerated "rights retained by the people," the key is that a judge should not decide what he or she personally thinks would be a proper set of rights. Instead, the judge should ask which rights have been recognized by the American people themselves—for example, in state constitutions and state bills of rights and civil rights laws. Americans have also established, merely by living

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our lives freely across the country and over the centuries, certain customary rights that governments have generally respected. Many of our most basic rights are simply facts of life, the residue of a virtually unchallenged pattern and practice on the ground in domains where citizens act freely and governments lie low.

Consider, for example, the famous 1965 privacy case *Griswold v. Connecticut*.[2] The state of Connecticut purported[3] to criminalize the use of contraception, even by married couples, prompting the Supreme Court to strike down this extraordinarily intrusive[4] state law as unconstitutional. Writing for the majority, Justice William Douglas claimed that a general right of privacy could be found in between the lines of the Bill of Rights. But Douglas did a poor job of proving his case. . . . Writing separately in *Griswold,* the second Justice John Harlan, widely admired for his judicial care and craftsmanship, offered a more modest and less strained rationale: "Conclusive, in my view, is the utter novelty of [Connecticut's] enactment. Although the Federal Government and many States have at one time or another had on their books statutes forbidding the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime." Thus, the basic practice of the American people rendered Connecticut's oddball law presumptively[5] unconstitutional. It is also highly noteworthy that today around a dozen state constitutions and countless statutes speak explicitly of a right to privacy—a right nowhere explicitly mentioned in the federal Constitution.

Now take Harlan's sensible approach to the unenumerated right of privacy and apply it to Dick Anthony Heller's claim that he has a right to have a gun in his D.C. home for self-defense. When we look at the actual pattern of lived rights in America—what the people have, in fact, done—we find lots of regulations of guns, but few outright prohibitions of guns in homes as sweeping as the D.C. ordinance. We also find a right to keep guns affirmed in a great many modern state constitutions, several of which use the phrase "bear arms" in ways that clearly go beyond the military context. Unlike founding-era documents, modern state constitutions routinely affirm a constitutional right to "bear arms" for hunting, recreation, and/or self-defense.

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2 See pages 62–65 for more on *Griswold* v. *Connecticut*.

3 **purported:** claimed

4 **intrustive:** unwelcome and disruptive

5 **presumptively:** on the basis of a reasonable assumption

In addition to the Ninth Amendment, we should also view the right to bear arms through the lens of the 14th Amendment's command that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Though this particular sentence applies only to the states, other language in the 14th Amendment affirms that the federal government, too, has a parallel obligation to respect the fundamental rights of citizens.

But the 14th Amendment did not specifically enumerate these sacred privileges and immunities. Instead, like the Ninth, the 14th invited interpreters to pay close attention to fundamental rights that Americans had affirmed through their lived experience—in state bills of rights and in other canonical[6] texts such as the Declaration of Independence and landmark civil rights legislation. And when it came to guns, a companion statute to the 14th Amendment, enacted by Congress in 1866, declared that "laws . . . concerning personal liberty [and] personal security . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens." Here, in sharp contrast to founding-era legal texts, the "bear arms" phrase was decisively severed[7] from the military context. Women as well as men could claim a "personal" right to protect their "personal liberty" and "personal security" in their homes. The Reconstruction-era Congress clearly understood that Southern blacks might need guns in their homes to protect themselves from private violence in places where they could not rely on local constables to keep their neighborhoods safe. When guns were outlawed, only outlaw Klansmen would have guns, to paraphrase a modern NRA slogan.[8] In this critical chapter in the history of American liberty, we find additional evidence of an individual right to have a gun in one's home, regardless of the original meaning of the Second Amendment.

There are at least three advantages in shifting 21st-century gun-control discourse in this direction. First, a Ninth-and-14th Amendment framework is more modest. Unusually draconian[9] gun laws can be struck down simply because they lie outside the lived pattern of the American experience, while more mainstream gun laws can be upheld precisely because they have proved acceptable to the people in many places. If our

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6 canonical: accepted as authoritative and essential

7 severed: broken off

8 NRA slogan: "If you outlaw guns, only outlaws will have guns."

9 draconian: harsh and unforgiving, named after Draco, who established [illegible] in ancient Athens

nation's capital wants to argue that specially strict gun rules should apply there because the city faces unique risks, no rigid textual language prevents judges from considering such pragmatic[10] claims in the course of interpreting the boundaries of actual American practice. By contrast, if the Second Amendment's language really did guarantee a right to guns in homes, by what authority could judges allow for a different approach in D.C.? And then, if one has a Second Amendment right to a pistol or shotgun at home, why not a machine gun? Given that the Second Amendment's core right is military, it would seem odd that military arms would be easier to ban than other weapons.

Second, the Ninth and 14th Amendments are more modern and democratically responsive. The Ninth invites us to consider not only rights that have long been part of the American tradition but also rights that have emerged in actual modern practice and in state constitutional clauses of relatively recent vintage that are relatively easy to amend. The 14th directs our attention to the still-relevant problems of race and police protection or the absence thereof. By contrast, the Second Amendment harkens back to a lost 18th-century America, where citizens regularly mustered[11] for militia service on the town square and where the federal army was rightly suspect. This is not our world.

Finally, a focus on the Ninth and 14th Amendments is simply more honest. The open-ended language of the Ninth and 14th Amendments really did aim to invite Americans to ponder state constitutional provisions that declare rights, and these provisions really do focus on individual self-defense. The framers of the 14th Amendment really did focus intently on self-defense in the home. The framers of the Second did not.