

JOHNSON  
KOPEL  
MOCSARY  
O'SHEA

FIREARMS LAW AND  
THE SECOND AMENDMENT  
Regulation, Rights, and Policy



Wolters Kluwer  
Law & Business



# Firearms Law and the Second Amendment Regulation, Rights, and Policy

**Nicholas J. Johnson**

Professor of Law  
Fordham University

**David B. Kopel**

Adjunct Professor of Law  
University of Denver

**George A. Mocsary**

Visiting Assistant Professor of Law  
University of Connecticut

**Michael P. O'Shea**

Associate Professor of Law  
Oklahoma City University



**Wolters Kluwer**

Law & Business

Copyright © 2012 CCH Incorporated.

Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. ([www.wolterskluwerlb.com](http://www.wolterskluwerlb.com))

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at [www.wolterskluwerlb.com](http://www.wolterskluwerlb.com), or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail [customer.service@wolterskluwer.com](mailto:customer.service@wolterskluwer.com), call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Law & Business  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-0511-3

**Library of Congress Cataloging-in-Publication Data**

Firearms law and the Second Amendment regulation : rights, and  
policy / Nicholas J. Johnson . . . [et al].  
p. cm.

Includes index.

ISBN 978-1-4548-0511-3

1. Firearms — Law and legislation — United States — History. 2. United States. Constitution. 2nd Amendment. 3. Gun control — United States. I. Johnson, Nicholas J.

KF3941.F57 2011

344.7305'33—dc23

2011049656



SUSTAINABLE  
FORESTRY  
INITIATIVE

**Certified Sourcing**

[www.sfiprogram.org](http://www.sfiprogram.org)

SFI-01234

SFI label applies to the text stock



## **Firearms Law and the Second Amendment**

## **EDITORIAL ADVISORS**

### **Vicki Been**

Elihu Root Professor of Law  
New York University School of Law

### **Erwin Chemerinsky**

Dean and Distinguished Professor of Law  
University of California, Irvine, School of Law

### **Richard A. Epstein**

Laurence A. Tisch Professor of Law  
New York University School of Law  
Peter and Kirsten Bedford Senior Fellow  
The Hoover Institution  
Senior Lecturer in Law  
The University of Chicago

### **Ronald J. Gilson**

Charles J. Meyers Professor of Law and Business  
Stanford University  
Marc and Eva Stern Professor of Law and Business  
Columbia Law School

### **James E. Krier**

Earl Warren DeLano Professor of Law  
The University of Michigan Law School

### **Richard K. Neumann, Jr.**

Professor of Law  
Hofstra University School of Law

### **Robert H. Sitkoff**

John L. Gray Professor of Law  
Harvard Law School

### **David Alan Sklansky**

Professor of Law  
University of California at Berkeley School of Law

### **Kent D. Syverud**

Dean and Ethan A. H. Shepley University Professor  
Washington University School of Law

### **Elizabeth Warren**

Leo Gottlieb Professor of Law  
Harvard Law School

# About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, Best Case, ftwilliam.com and MediRegs family of products.

**CCH** products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

**Aspen Publishers** products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

**Kluwer Law International** products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleafs, books, and electronic products for comprehensive information in many areas of international legal practice.

**Loislaw** is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

**Best Case Solutions** is the leading bankruptcy software product to the bankruptcy industry. It provides software and workflow tools to flawlessly streamline petition preparation and the electronic filing process, while timely incorporating ever-changing court requirements.

**ftwilliam.com** offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

**MediRegs** products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

*To my family, near and far, here and gone*

— Nicholas J. Johnson

*To my father, Jerry Kopel, who devoted his career as a State Representative, an attorney,  
and a journalist to standing up for the rights of the underdog*

— David B. Kopel

*To Vicki, my family, and my loyal friends*

— George A. Mocsary

*To J.M.O. and to Honest John Martin (1812-1875)*

— Michael P. O'Shea

# Preface

While this book proceeds chronologically, we expect that many users will approach the material out of sequence. Indeed, we have done so in our own classes. For example, it can be very effective to launch right into contemporary gun-law issues by starting with the Supreme Court's major cases on the Second Amendment, *District of Columbia v. Heller*, and *McDonald v. Chicago* in Chapter 9, followed by Chapter 11 for post-*Heller* issues. It is also effective to assign the chapters covering the 17th and 18th century in conjunction with coverage of *Heller* and *McDonald*. This approach illuminates the originalist historical analysis in both cases. The most relevant original materials for *Heller* (from English origins to the first decades of American independence) appear in Chapters 2 through 5. The original materials relevant to the Fourteenth Amendment are in Chapter 6.

The book is sufficiently modular to accommodate instructors who wish to use particular chapters as part of more general courses, e.g., criminal law, constitutional law, or jurisprudence. For example, someone teaching criminal law might use Chapters 7 and 8 (covering the main federal gun control statutes) for a discrete segment on firearms violations. The treatments of *Heller* and *McDonald* in Chapter 9, and the material on standards of review in Chapter 11, are a nice vehicle for examining various general modes of constitutional decision-making. The material in Chapter 10 is a good choice for showing how the perspectives of divergent communities can affect the assessment of legal and constitutional issues. Online Chapter 13, on international law, could be used as a unit in a general course on international law, a seminar on arms control, or a class on the laws of warfare.

Instructors interested in particular policy topics, such as gun shows, import restrictions, handgun carry permits, or “assault weapons,” will find sections covering them. Of course, the index highlights discrete treatments of such topics.

The Notes & Questions in the book frequently raise forward-looking issues and core questions that relate to current controversies. Some of the Notes & Questions are designated “Connection Questions” (CQ) to indicate their relevance to cases or topics in other chapters.

While the U.S. debate on gun rights typically uses “the Second Amendment” as a shorthand for those rights, much of the legal history, and many of the contemporary legal battles, involves state constitutions. Today, 44 state constitutions have right-to-arms provisions. The book covers state right-to-arms



issues in depth, both for their intrinsic importance and because the state cases sometimes provide guidance or background for understanding the Second Amendment. Because state issues appear throughout the book, readers should use the Table of Statutes, Constitutions, and Regulations, and the Index, to find all the material on any particular state.

## **Overview of the Book**

Chapter 1 explains how firearms function and describes the major types of firearms. Chapter 1 also outlines the general scope of modern American gun laws, including variations among the states. The Chapter includes an Appendix of state constitutional provisions on the right to arms. The next nine chapters tell, in generally chronological order, the story of the development of gun regulation and gun rights in the United States.

The Second Amendment right to arms is widely viewed as a historical successor to the English right to arms, which was codified in the English Declaration of Right of 1689. Chapter 2 examines the historical and political background of the English right and English gun laws. It also explores the religious and philosophical background of the ideas of armed self-defense and a citizen militia. The chapter begins with early Chinese philosophy, then covers ancient Greece and Rome, Judeo-Christian perspectives, medieval thought, and the Renaissance.

Chapter 3 examines the American colonial experience and the American Revolution. Colonial militias were important military and political institutions, and the militia regulations provide insight into the early understanding of the public and private roles of arms possession. The chapter then describes the British efforts to confiscate American firearms and gunpowder that helped precipitate the American Revolution. Finally, the chapter covers the War of Independence, and the U.S. and state governments before 1789.

Chapter 4 discusses the framing of the U.S. Constitution and its Bill of Rights. Ratification of the U.S. Constitution in 1789 created a more active and powerful federal government; among its new powers were direct federal control over the militia. The Bill of Rights was added to the Constitution in 1791, including a Second Amendment that affirmed the necessity of a well regulated militia, and recognized the right of the people to keep and bear arms. Chapter 4 examines the debates over the Constitution's ratification, the drafting history of the Second Amendment, and the ways in which the American right to arms was viewed by the earliest constitutional commentators.

Chapter 5 surveys the first seven decades of the new republic. This period saw an evolution of the American understanding of both the role of militias and of the individual right to arms. The chapter starts with the political crisis of 1798-1800 that brought several states to the brink of armed resistance. The War of 1812 displayed the strengths and weaknesses of American militias. Chapter 5 also chronicles a significant transition in the direction of gun regulation in America. While colonial- and revolutionary-era gun control laws were mainly concerned with forcing people to own and carry guns, by the 1820s laws prohibiting people from carrying concealed guns and knives began to emerge, particularly in the South. These laws gave rise to the first judicial opinions addressing the scope of permitted regulation under the right to arms guarantees

in the federal and state constitutions. The predominant view of the courts of this period was that the constitutional right to arms included an individual right to carry common weapons for self-defense, and that legislatures could regulate the right. Many courts held that legislatures could prohibit the concealed carrying of weapons. The Southern states continued the colonial practice of enacting highly restrictive laws prohibiting the ownership or carrying of guns by slaves and, sometimes, by free Blacks, setting the precedent for broader restrictions after the Civil War. Abolitionists invoked the Second Amendment to complain about the disarmament of Free Soil settlers in Kansas in the 1850s, and to argue that slavery and the Second Amendment were incompatible.

Chapter 6 begins with the period following the Civil War, proceeds through Reconstruction, and ends at the turn of the 19th century. In this period, the Fourteenth Amendment was adopted to protect individual civil liberties against state interference—and especially to combat the violations of rights of newly freed slaves and their supporters. The chapter includes some of the many sources suggesting that the Amendment was intended to secure the individual liberties guaranteed in the federal bill of rights (including an individual right to arms for self-defense) against state infringement by state and local governments. The chapter also tracks the decline of Reconstruction, and the failure of the initial promise of the Fourteenth Amendment. Materials include decisions by the U.S. Supreme Court narrowly interpreting the Fourteenth Amendment, rendering it of little value as a guarantor of individual liberties; adoption by the Southern states of Jim Crow laws; and affirmation by Southern courts of increasingly restrictive (and often racially discriminatory) regulation of firearms—particularly the carrying and ownership of inexpensive handguns. As labor unrest grew in the North, some states prohibited mass armed parades, and the Supreme Court upheld such bans in *Presser v. Illinois*. The Court was, however, quite protective of armed self-defense by individuals, in “The Self-Defense Cases” which arose in federal territories.

Chapter 7 examines the early twentieth century. In this period, gun control for individuals expanded beyond the South, as Northern states, concerned about the labor movement and unassimilated immigrants, adopted a variety of handgun control laws. The chapter also marks the emergence of the first federal gun control laws. In the 1930s, the federal government imposed regulations on commercial gun sales. The most significant of these was National Firearms Act of 1934 (NFA), which severely restricted ownership of a few classes of firearms viewed as unusually dangerous, such as machine guns and short shotguns. Chapter 7 is anchored by the Supreme Court’s treatment of a Second Amendment challenge to the NFA in *United States v. Miller*. *Miller* is a short and ambiguous opinion that declared that exercises of the Second Amendment right had to have a “reasonable relationship” to the maintenance of a well regulated militia. For decades afterward, there was argument about whether *Miller* meant that the type of gun had to be suitable for a militia in order for it to be protected by the Second Amendment, or whether the individual had to be in a militia in order to have Second Amendment rights. After *Miller*, lower federal courts began to develop a state-government-focused conception of the Second Amendment that gave little or no credence to individual challenges to federal or state gun regulations.

Chapter 8 is the longest chapter in this book. It covers the balance of the 20th century. The scope of federal firearms regulation grew dramatically in this period, with the passage of several major statutes, including the federal Gun Control Act of 1968, the Firearms Owners Protection Act of 1986, and the federal “assault weapon” ban that was enacted in 1994 and which sunset in 2004. The chapter offers a detailed treatment of the various issues that arise under the modern statutes and accompanying regulations, the vast majority of which remain valid even after the Supreme Court’s 2008 affirmation of the individual right to keep and bear arms in *District of Columbia v. Heller*. During the late 20th century, lower federal courts rejected any version of a Second Amendment right that would impose meaningful limits on gun regulation. However, the tenor of judicial treatments of the issue began to change towards the end of the century, as scholarly and political debates bolstered the individual-rights theory. The chapter includes a section on social and political history that elucidates the most important bills, statutes, controversies, and political battles of the period. This history provides important context for the Supreme Court’s ultimate affirmation of the individual right to arms.

Chapter 9 is dedicated to the landmark decisions in *District of Columbia v. Heller* and *McDonald v. Chicago*. In these decisions, a five-Justice majority of the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for self-defense; that the Second Amendment right is a fundamental right made fully applicable against the states by the Fourteenth Amendment; and that handgun bans violate the Second Amendment.

Chapter 10 examines issues of gun rights and gun regulation from the special perspectives of race, gender, sexual orientation, and disability. The materials are mainly drawn from the amicus briefs filed in *Heller* by a variety of interest groups.

Chapter 11 addresses the aftermath of *Heller* and *McDonald*. This chapter covers several of the most important constitutional questions left unanswered by the two Supreme Court decisions, and how these topics are being addressed by state and federal courts. While, as Chapters 5 through 7 showed, state court case law on state right to arms provisions has been developing for almost two centuries, serious doctrinal development of the Second Amendment itself began only after *Heller*. Courts today are grappling with issue such as the standard of review, what types of arms are protected, and the right to “bear” arms in public places. Students and professors who want to explore gray areas in emerging legal doctrine will find Chapter 11 of particular interest.

## Online Chapters

The printed casebook ends with Chapter 11, but online chapters are available through a password protected website at [http://www.aspenlawschool.com/books/johnson\\_firearms/](http://www.aspenlawschool.com/books/johnson_firearms/) maintained by Aspen Publishers. Owners of the printed book have free access to these four additional online chapters:

*Chapter 12.* Social science about the benefits and harms of firearms possession and use.

*Chapter 13.* International gun control law, from sources such as the United Nations, the Organization of American States, and other treaties and international law documents. The chapter also covers the “Classical” period

of international law, in which philosophers such as Grotius, Puffendorf, Vattel, Victoria, and Suárez built the foundations of international law partly by extrapolating from general principles of the rights and the limits of personal self-defense.

*Chapter 14.* Comparative gun control laws. Examining the gun laws of several nations, including Canada, the United Kingdom, Japan, Nazi Germany, and Switzerland.

*Chapter 15.* While Chapter 1 provides an introduction to the different types of firearms and ammunition, and how they function, this chapter covers the same topic in greater depth and detail. It includes many illustrations and diagrams.

There is also a free website at <http://www.firearmsregulation.org>. This public website provides additional resources, including suggested topics for student research papers, a comprehensive list of published law review articles and ALR Annotations on arms-law topics, and links to numerous Internet resources on firearms law and policy.

### **Publishing Student Research**

Many students will use this book in upper-level classes in which they will write research papers. The public website offers some ideas for paper topics, as well as bibliographical and resource guides to help you get started.

Because Second Amendment doctrine is still in an early stage of development—especially in comparison to its closest analogue, the First Amendment, in which doctrinal development began in the 1930s—there are many opportunities for law student papers to make a genuine contribution to legal knowledge and analysis. If you write a good paper for your class, send it to us for consideration for publication on the public website.

*Nicholas J. Johnson*  
*David B. Kopel*  
*George A. Mocsary*  
*Michael P. O'Shea*

*January 2012*

# Acknowledgments

A great many people contributed to this book, but special mention must go to Nick Johnson's research assistants John Hunt and Tameem Zainulbhai; Dave Kopel's research interns Milena Boasherlieva, James Heinbaugh, Jonathan Shaw, and Margot Van Loon; and George Mocsary's research assistant Michael J. Kaczynski.

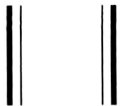
We are also grateful to copyright holders for permission to reprint excerpts from the following items:

Robert H. Churchill, *Popular Nullification, Fries's Rebellion, and the Waning of Radical Republicanism, 1798-1801*, 67 Penn. Hist. 105, 107 (Winter 2000). Permission granted by Pennsylvania History.

Robert J. Cottrol & Raymond T. Diamond, "Never Intended to Be Applied to the White Population": *Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 Chi.-Kent L. Rev. 1307, 1318-23 (1995). Reprinted with permission of Chicago-Kent Law Review.

"Sheffield Bowie" knife made in England for the American market. Permission to use photo granted by the Permanent Collection of the Historic Arkansas Museum, Little Rock, Arkansas.

J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253 (2009). Reprinted with permission of Virginia Law Review.



# Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xxiii</i>
<i>Acknowledgments</i>	<i>xxix</i>

<b>   PART ONE   </b>	
<b>THE ORIGINS OF THE RIGHT TO ARMS</b>	<b>1</b>
1. A Brief Introduction to Firearms and Their Regulation	3
2. Antecedents of the Second Amendment	37
3. The Colonies and the Revolution	101
4. The New Constitution	185
5. The Right to Arms, Militias, and Slavery in the Early Republic and Antebellum Periods	243
6. Reconstruction and Beyond	289
<b>   PART TWO   </b>	
<b>THE RIGHT TO ARMS IN THE MODERN WORLD</b>	<b>345</b>
7. A New and Dangerous Century	347
8. Between <i>Miller</i> and <i>Heller</i> : The Second Amendment in the Modern Era	381
9. The Supreme Court Affirms an Individual Right to Arms	577

10. Firearms Policy and Status: Race, Gender, Age, Disability, and Sexual Orientation	725
11. Applying the Affirmed Right to Arms	783

## || ONLINE ||

12. Social Science	
13. International Law	
14. Comparative Law	
15. In-Depth Explanation of Firearms and Ammunition	

<i>Table of Cases</i>	925
<i>Table of Authorities</i>	935
<i>Table of Statutes, Constitutions, and Regulations</i>	955
<i>Index</i>	967



# Contents

<i>Preface</i>	<i>xxiii</i>
<i>Acknowledgments</i>	<i>xxix</i>

<b>   PART ONE   </b>	
<b>THE ORIGINS OF THE RIGHT TO ARMS</b>	<b>1</b>

<b>   1   </b>	
<b>A Brief Introduction to Firearms and Their Regulation</b>	<b>3</b>
A. The Parts of a Firearm and Ammunition	3
B. Firearm Features	5
1. Firing Mechanism	5
2. Ammunition Feeding	5
3. Safety Devices	6
4. Firearm User Safety	6
C. The Major Types of Firearms	7
1. Handguns	8
a. Semi-Automatic Pistols	8
b. Revolvers	9
c. Legitimate Uses of Handguns	10
d. Criminal Uses of Handguns	10
2. Rifles	10
a. Bolt-Action	11
b. Semi-Automatic	11
c. Lever-Action	13
d. Single-Shot	13
e. Characteristics of Rifles	13
f. Legitimate Uses of Rifles	14
g. Crime with Rifles	14
3. Shotguns	14
a. Shotgun Shells	15
b. Types of Shotguns	15



c. Legitimate Uses of Shotguns	16
d. Crime with Shotguns	16
D. Modern Gun-Control Laws	17
1. Purchasing a Gun from a Commercial Dealer	17
2. Purchasing a Gun from Private Sellers	17
3. Purchases in Various Locations	18
4. Gun Registration	18
5. Keeping a Gun at Home	19
6. Target Shooting	19
7. Hunting with a Gun	19
8. Carrying a Gun for Protection	20
a. At Home or in Your Place of Business	20
b. In Your Automobile	20
c. In Public Places	20
9. Local Laws	21
10. Using a Gun for Self-Defense	22
E. Gun Control Controversies Today	22
Appendix: The Right to Arms in State Constitutions	26

## || 2 ||

<b>Antecedents of the Second Amendment</b>	<b>37</b>
A. The Early Far East	37
1. Confucianism	37
The Analects of Confucius	38
Mencius	38
2. Taoism	41
a. <i>Tao Te Ching</i>	41
b. <i>Wen-Tzu</i>	42
c. <i>The Master of the Hidden Storehouse</i>	43
d. <i>Huainanzi</i>	43
B. Ancient Greece and Rome	46
1. Greece	46
a. Greek Law	46
b. Plato vs. Aristotle	48
2. Rome	52
a. <i>Corpus Juris</i>	57
b. <i>Corpus Juris</i> Provisions on Self-Defense	58
C. Judeo-Christian Thought	61
1. Jewish Thought	61
2. Early Christian Thought	66
a. The Sermon on the Mount	66
b. The Final Instructions to the Apostles	66
c. The Arrest of Jesus	67