

The field of firearms law has grown dramatically since the first edition of this text was published in 2012. Second Amendment case law has proliferated in the last decade, and so have new laws regarding the right to keep and bear arms.

The book is intended to serve as both a treatise and a textbook. It has become a reference source in litigation and has been cited in judicial opinions and briefs, including by then-Judge Brett Kavanaugh. To provide starting points for research by professors, judges, students, and other scholars, we cite many primary sources as well as the most important modern scholarship. The book covers the leading controversies about arms laws, past and present, from the ancient and medieval worlds through modern 3D gun printing. Besides firearms, this book examines law and policy for other Second Amendment arms, like knives, martial arts weapons, electroshock weapons, and others.

Although this book is all about arms, the true subject is something else. *The Lord of the Rings*—notwithstanding the title and the plot—wasn't really about rings, and this book, title notwithstanding, isn't really about firearms.

The study of arms rights, duties, and controls raises fundamental legal questions: Who is sovereign, and who has the right to be? Questions of sovereignty encompass broad questions about a nation's self-government, individual ones relating to personal defense of bodily integrity, and everything in between.

From ninth-century England to the twenty-first-century United States, the same questions recur: How do arms in the hands of individuals enhance—or endanger—community security, personal security, order, and liberty?

This book always considers arms laws in their broader social context. Cases, statutes, and other legal materials are presented in conjunction with the culture, technology, and politics of their times.

Chapter 1 provides data and summarizes research on arms possession, use, and misuse in the modern United States. Chapter 2 and succeeding chapters proceed mostly chronologically—from England to the American colonies, the Revolution, and through the twentieth century. Chapters 8 and 9 cover the two major federal statutes governing firearms. Then come the foundational Supreme Court cases of the early twenty-first century, *District of Columbia v. Heller* and *McDonald v. Chicago*. Finally, five chapters discuss how modern lower courts have applied and created Second Amendment law after *Heller* and *McDonald*.

The chronological organization has proven a natural format for classes. But users can choose their own paths. For example, one can start with *Heller* (Ch. 11.A) and then proceed immediately to the post-*Heller* cases in the lower courts (Chs. 12-16). Or one can start at the beginning, with English legal history, follow the developing story of the right to arms over the next 1,100 years, and then read *Heller* and its dissents to see how they synthesize that history. A practice-oriented approach would

closely study the National Firearms Act, the 1968 Gun Control Act (Chs. 8 and 9), and state arms laws (Ch. 10).

Throughout the book, the Notes and Questions include bolded Connection Questions (“CQ”) to signal items that relate to other topics in other chapters.

Mindful that more pages mean a costlier textbook, we have endeavored not to increase the printed page count, even as we cover substantial new material. Thus, some cases that were excerpted in the second edition are now summarized in narrative text. Many of the excerpted cases have been further edited for brevity and clarity.

For some citations we use footnotes, rather than in-line cites. The decisions about what cites go into a footnote were made primarily with an eye on the page count. Because a footnote consumes an entire line of text, we have kept most short cites in-line. We have eliminated all citation use of *supra*, *infra*, and reduced the use of “at.” Cross-references to other chapters are in the form of “Ch. 7.D.4.” Cross references within a chapter are in the form of “Part E” or “Section “E.5.”

The field has grown so dramatically that over a third of this work’s material is provided online, at no cost. It can be found at <https://www.AspenPublishing.com/Johnson-SecondAmendment3> and at the book’s website, firearmsregulation.org. As described below, Chapters 1-16 comprise the printed and ebook editions, and Chapters 17-23 are online only.

One scholar, noting the importance of tradition in the Supreme Court’s analysis of the right to arms, points out that traditions change over time. He asks, “Whose traditions? English, American, African American, city, county, South, North? Since the thirteenth century? Since the sixteenth? The eighteenth? . . . [I]n 1791, in 1868, in 1930, or 2016?” Darrell A. H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 *Geo. J.L. & Pub. Pol’y* 223, 225 (2016). In this book, the answer is “all of the above.” The printed book proceeds chronologically beginning in ninth-century England and continues through 2021. Online Chapter 21, on Antecedents of the Second Amendment, goes as far back as ancient China and Greece. For the United States, slavery and a racial caste system are central to the history of arms rights and arms control, and we address them in detail. We also cover Native Americans in more breadth and depth than one will find in any other law school textbook other than books devoted to Indian Law. Issues involving Blacks and Indians are further treated in online Chapter 17. Other people from all over the world—including Tibetans, Chinese, Jews, Armenians, Darfuri, Czechs, Slovaks, Canadians, Venezuelans, and many others—are discussed in online Chapters 18, 19, and 21. You can decide whose traditions and history should be considered in policy making or legal interpretation. We believe that all are instructive.

Chapter 1 provides a detailed treatment of the empirical social science and commentary surrounding gun ownership, gun use, and gun crime. We have found that starting with a basic grounding in this material is helpful to students, letting them engage in an informed way with the rest of the material in the course.

Chapter 2 covers historical arms rights and duties in the United Kingdom—a topic that was not only important to the American Founders but remains a part of modern judicial analysis of American rights. Due to space considerations, this Chapter is shorter than its second edition predecessor. A fuller version is available in online Chapter 22, which provides additional social, political, and religious context.

Chapter 3 (the American colonies) and Chapter 4 (the American Revolution) were a single Chapter 3 in the second edition. The theme of Chapter 3 is how new conditions in America created a novel and distinctive American arms culture that influenced arms law and philosophy. The new Chapter 3 includes an improved and more detailed presentation of colonial laws mandating arms possession and arms carrying. It also includes more material on Native Americans, who played an important role in shaping what would become American gun culture. We include all perspectives on Native Americans—of the European colonial powers, of the American colonists, and, most importantly, of the Native Americans themselves. Coverage of Native Americans issues continues with new material in Chapters 6 and 7.

Chapter 4 examines the role of arms in the American Revolution, the role of arms control in precipitating the Revolution, and the arms laws of the Articles of Confederation and the new State governments. Having initially adopted a policy of decentralized defense by necessity, Americans came to regard dispersed arms ownership as so central to their identity that they started a war when the British government tried to confiscate arms.

Chapter 5 covers the history of the adoption of the Constitution, the controversies about the Constitution's new federal militia powers, and the adoption of the Second Amendment.

Chapter 6 covers the period from the Early Republic to the eve of the Civil War. It includes an explanation of how technological changes in arms manufacturing—such as the invention of machine tools that could produce interchangeable parts—affected the exercise of the right to arms and eventually arms laws.

In this third edition, the technology discussions in the printed book and ebook have been condensed; the full story is available in online Chapter 23.

Chapter 7 covers the Civil War through the end of the nineteenth century. It includes a summary of self-defense law and related topics, such as Stand Your Ground laws.

Chapter 8 covers the early twentieth century through the end of World War II. It includes a detailed examination of the first major federal gun control law, the National Firearms Act of 1934 (NFA). The NFA material is organized to help students become practice-ready. Although the NFA covers only a fairly small subset of arms, lawyers who practice firearms law find that the NFA generates many cases.

Chapter 9 begins with social, racial, and political history of firearms policy from the mid-twentieth century to the early twenty-first. The Chapter then proceeds to a very detailed treatment of the main federal gun control law, the Gun Control Act of 1968 (GCA), as amended. The improved structure in this third edition will help the reader become practice-ready for GCA cases—a necessity for anyone engaged in the general practice of criminal law in federal courts.

Because the NFA and the GCA have many analogues in state law, the study of the federal statutes also helps prepare students for the practice of state law. Unique issues in state law are the subject of Chapter 10. Forty-four states have their own constitutional rights to arms, with their own particular interpretations. The Chapter also covers state preemption laws (which limit or prohibit local controls)—and many other state law topics.

Chapter 11 covers modern Supreme Court Second Amendment cases. The two most important are *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010). One way to read or teach from this book is to begin with *Heller*, in

which Justice Antonin Scalia's majority opinion and Justice John Paul Stevens's dissent raise many pro/con arguments on legal history. When students then turn to the history chapters, they can read the historical materials in light of how the *Heller* Justices deployed them. Similarly, *McDonald*, which holds that the Fourteenth Amendment makes the right to arms enforceable against state and local governments, can be read immediately before reading Chapter 7, which covers the rise and decline of Reconstruction, including federal action to protect the arms rights of the freedmen. Chapter 11 also includes Supreme Court arms cases following *McDonald*. Decisions of the Court involving non-firearm arms—namely martial arts weapons and electric stun guns—are in 11.C. Controversies of the Supreme Court's denials of certiorari and reluctance to decide some important cases are in 11.D.

In April 2021, the Supreme Court granted certiorari in *New York State Rifle & Pistol Association v. Bruen*, to be argued in the Courts' 2021-22 term and presumably decided by June 2022. We are unable to include the Court's decision in this edition, which is to be published in September 2021. The book's website, however, will include an edited version of the opinion, plus commentary, that can be integrated into future classes.

In the first and second editions, post-*Heller* cases from lower courts were covered in a single massive chapter. That one chapter has now been split into five, for better clarity and readability. Each of the five chapters is suitable for one to three days of classes. For modern constitutional litigation, this is where the action is.

Chapter 12 begins by explaining standards of review in modern Second Amendment jurisprudence. It then presents three leading cases that illustrate different approaches to judicial review.

Chapter 13 covers the "Who?" of the Second Amendment. It examines laws forbidding certain types of persons from possessing arms.

Chapter 14 surveys cases and controversies over "Where?" the right to bear arms may be exercised. This includes carrying arms in public places in general and restrictions on particular locations.

Chapter 15 covers "What?" types of firearms and other arms are protected, or not protected, by the right to arms.

Finally, Chapter 16 addresses the "How and Why?" of other types of regulation. It studies laws such as bans on shooting ranges and the pandemic lockdowns of gun stores. It concludes with exercises for students to synthesize their analysis of what the Second Amendment should protect, and why.

THE ONLINE CHAPTERS

Online Chapters 12-16 from the second edition have become Chapters 17-23 since the printed edition now has 16 chapters.

Online Chapter 17 is titled "Firearms Policy and Status." It offers further coverage of modern issues involving Blacks and Indians, both discussed extensively in the printed historical chapters. The Chapter also covers arms rights in regard to physical or mental disabilities (the latter is also treated in Chapters 9 and 13), sexual orientation, marijuana use, and military service.

Chapter 18 addresses arms issues in international law. It begins with global and regional arms control treaties and human rights documents. Next, the Chapter surveys the classical founders of international law, such as Vitoria and Pufendorf, and how their views of the natural right of self-defense shaped international law. It then examines resistance to genocide and arguments for or against the right to resist. The Chapter closes by addressing the battle between efforts to create a global control system and the increasing popularity (in some places) of the idea of a right to arms.

Chapter 19 turns to comparative law—the study of particular nations. Part A studies all national constitutional provisions regarding arms rights, personal self-defense, and collective self-defense against tyranny. Part B presents social science studies comparing the effects of arms possession in different nations. The Part is structured for readers to engage in progressively more sophisticated analysis of quantitative social science. Part C presents a series of case studies of arms law and policy in eleven diverse nations: the modern United Kingdom (whose history is covered in Chapters 2 and 22), Switzerland, Canada, Mexico, Venezuela, Australia, Japan, China (a very detailed explanation of the current laws on guns and knives), Thailand, Kenya, and South Africa.

Part D of Chapter 19 looks in depth at tyranny and genocide. It includes studies of armed resistance against the Ottoman Empire genocide in World War I and against the Tibetan genocide perpetrated by the Chinese Communist Party. The worst mass murder in history—the 86 million killed by the communist regime of Mao Zedong—receives a hundred-page treatment showing how Mao's arms policies interacted with and supported his totalitarian program.

Chapter 20 offers an in-depth explanation of firearms and ammunition. It describes how firearms work, the different types of firearms, and so on. The Chapter assumes no prior knowledge. Readers unfamiliar with firearms may wish to read part of the Chapter immediately and then to refer to the Chapter as needed.

Chapter 21 treats the “Antecedents of the Second Amendment.” Most of the materials influenced the intellectual history that eventually led to the Second Amendment. Confucianism and Taoism did not, but the Chapter begins with them because much of what they say about arms, defense, and militias has interesting parallels to Western ideas. The Chapter then covers Greece, Rome, Jewish thought, early and medieval Christian thought, and early modern Italian and French political philosophy.

Chapter 22 is the full story of arms rights and duties in the United Kingdom. Compared to the shorter presentation in Chapter 2, this Chapter provides more political and religious context, deeper coverage of Scotland and Ireland, and other topics.

Chapter 23 is the history of the technological development of arms, from the longbows and harquebuses of Tudor England through modern 3D printed guns. Some of the material in this Chapter is presented in a more compressed form in Chapters 2-9.

As you will see, even the cutting-edge cases in Chapters 12-16 return again and again to the question of what the right to arms has been during the full sweep of Anglo-American history. As William Faulkner wrote, “The past is never dead. It's not even past.” *Requiem for a Nun* (1951). Understanding the good and the bad parts of our past is essential to making the decisions that will shape our future.

As the Anglo-American and the online international chapters describe, whether the power of armed physical force is widely shared or narrowly held is one of the most profound questions any society must answer.