

# The Second Amendment



## Second Amendment Overview

We

THE People

E  
PLURIBUS  
UNUM

THE



NATIONAL  
CONSTITUTION  
CENTER



# Key Questions for Class

- Why did the Founding generation enshrine the Second Amendment in the Bill of Rights?
- What was the Founding-era vision of the Second Amendment, and how did America’s “Second Founding”—and the ratification of the Fourteenth Amendment after the Civil War—shape the Second Amendment’s meaning?
- How has the Supreme Court interpreted the Second Amendment over time?
- Today, when can the government limit the individual right to possess guns and other firearms—and when can’t it?
- What are areas of constitutional debate over the Second Amendment today?



## Second Amendment Overview

# The Second Amendment

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.



## Second Amendment Overview

# The Second Amendment – Prefatory Clause

**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.



**Second  
Amendment  
Overview**

## The Second Amendment – **Operative Clause**

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.**



**Second  
Amendment  
Overview**

# Core constitutional debates over the Second Amendment's meaning:

Does the Second Amendment protect a right to keep and bear arms only when reasonably connected with militia service?

Or

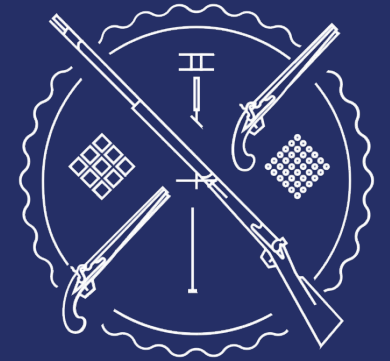
Does the Second Amendment also protect a freestanding right to keep and bear arms?



**Second  
Amendment  
Overview**

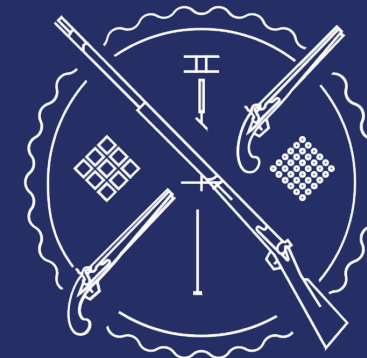
# Big Question

When can the government limit the individual right to possess guns and other firearms—and when can't it?



**Second  
Amendment  
Overview**

# THE BRITISH ARMY IN THE COLONIES



## Second Amendment Overview





## STANDING ARMY



## CITIZEN MILITIA



## Second Amendment Overview

# THE QUARTERING ACTS



## Second Amendment Overview

## The Third Amendment

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.



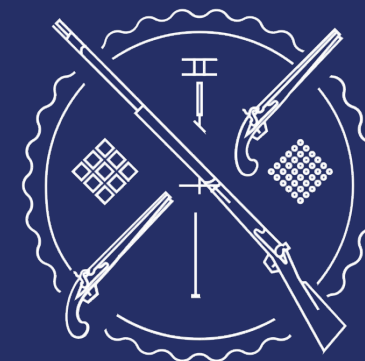
**Second  
Amendment  
Overview**

Excerpts from

## The Declaration of Independence

“kept among us, in times of Peace,  
Standing Armies without the Consent of  
our legislatures”

“affected to render the Military  
independent of and superior to the Civil  
power.”

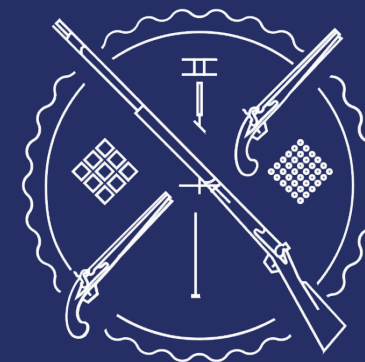


**Second  
Amendment  
Overview**

Excerpt from

## English Bill of Rights

“raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.”



### Second Amendment Overview



# Founding Vision

The Second Amendment grew out of the popular belief in Founding-era America that standing armies posed a danger to liberty, and that the better way to defend the nation while preserving freedom was the militia, composed of all able-bodied men of fighting age in the community.

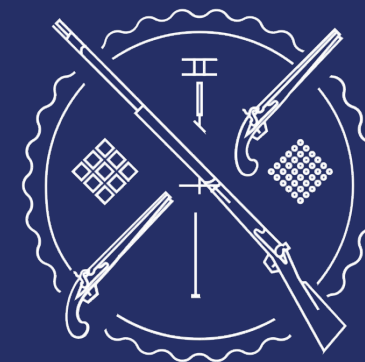


## Second Amendment Overview

Excerpt from

## English Bill of Rights

“subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law”



**Second  
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Overview**

# THE CONSTITUTIONAL CONVENTION



## Second Amendment Overview



# THE CONSTITUTION

## Article I, Section 8

Congress shall have power...

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;



**Second  
Amendment  
Overview**

# THE CONSTITUTION

## Article I, Section 8

Congress shall have 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, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;



### Second Amendment Overview

# THE CONSTITUTION

## Article I, Section 8

Congress shall have power...

**To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;**



**Second  
Amendment  
Overview**

# THE CONSTITUTION

## Article I, Section 8

Congress shall have power...  
**To provide and maintain a Navy;**



**Second  
Amendment  
Overview**

# DEBATES OVER STANDING ARMIES

In the debates over the Original Constitution, the Federalists (supporting the new Constitution) and the Anti-Federalists (opposing it) battled over the threat of standing armies and the scope of the national government's power over national security and citizen militias.

- With the new Constitution, the national government is given broad authority to establish a peacetime standing army and to regulate the militia.
- The Constitution's massive shift of power from the states to the national government in this context was a major objection to the new Constitution for the emerging Anti-Federalists.



## Second Amendment Overview

# RATIFICATION DEBATES

In the Press,  
and speedily will be published,  
**THE**  
**FEDERALIST,**  
A Collection of Essays written in fa-  
vor of the New Constitution.  
By a Citizen of New-York.  
Corrected by the Author, with Additions  
and Alterations.

*This work will be printed on a fine Paper  
and good Type, in one handsome Volume duo-  
decimo, and delivered to subscribers at the  
moderate price of one dollar. A few copies  
will be printed on superfine royal writing pa-  
per, price ten shillings.  
No money required till delivery.*

*To render this work more complete, will be  
added, without any additional expence,*

**PHILO-PUBLIUS,**  
AND THE  
*Articles of the Convention,*  
*As agreed upon at Philadelphia, Septem-  
ber 17th, 1787.*

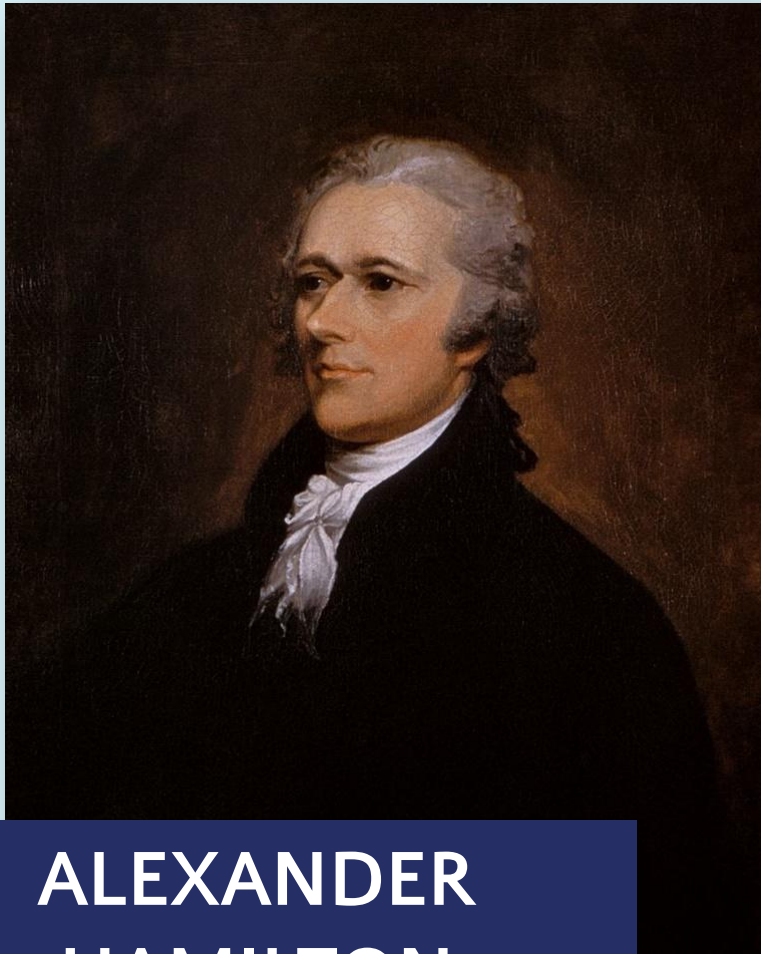
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In The Federalist Papers, both Hamilton and Madison addressed the issue of standing armies and the militia. The central idea behind Alexander Hamilton's arguments was that the Constitution was necessary for national security reasons and thus standing armies were sometimes needed to secure the liberties of the people.



## Second Amendment Overview

# RATIFICATION DEBATES



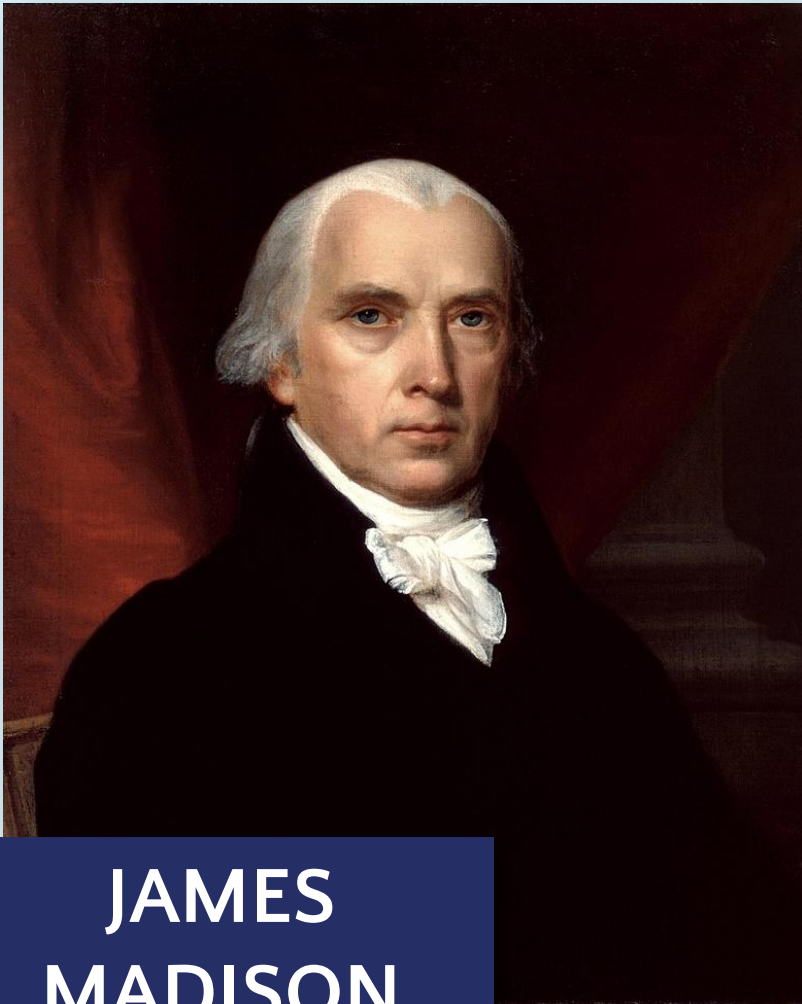
**ALEXANDER  
HAMILTON**

For Hamilton, the American Revolution showed that we shouldn't rely on state-organized militia for national defense.



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# RATIFICATION DEBATES



**JAMES  
MADISON**

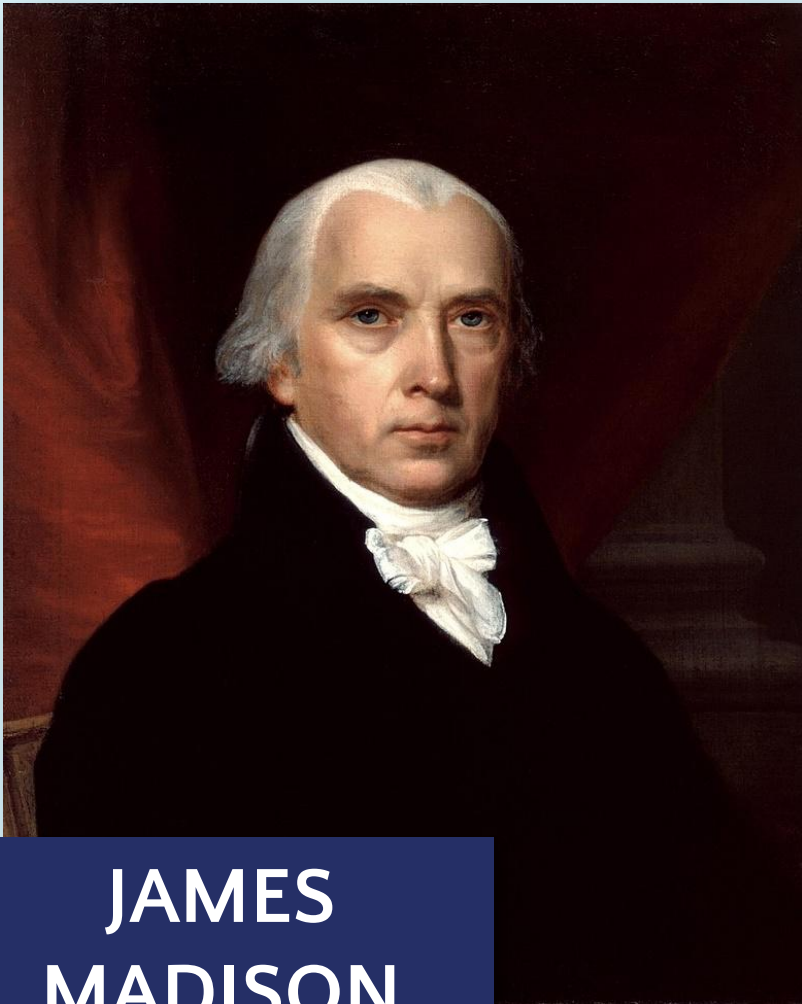
James Madison tried to chart a middle course between Hamilton and the Anti-Federalists. Madison agreed that standing armies were an essential part of modern states and necessary to security. However, he added that what afforded Americans protection against foreign threats was not only a standing army, but the militia as well. Both were necessary to protect a free republic.



## **Second Amendment Overview**



# RATIFICATION DEBATES



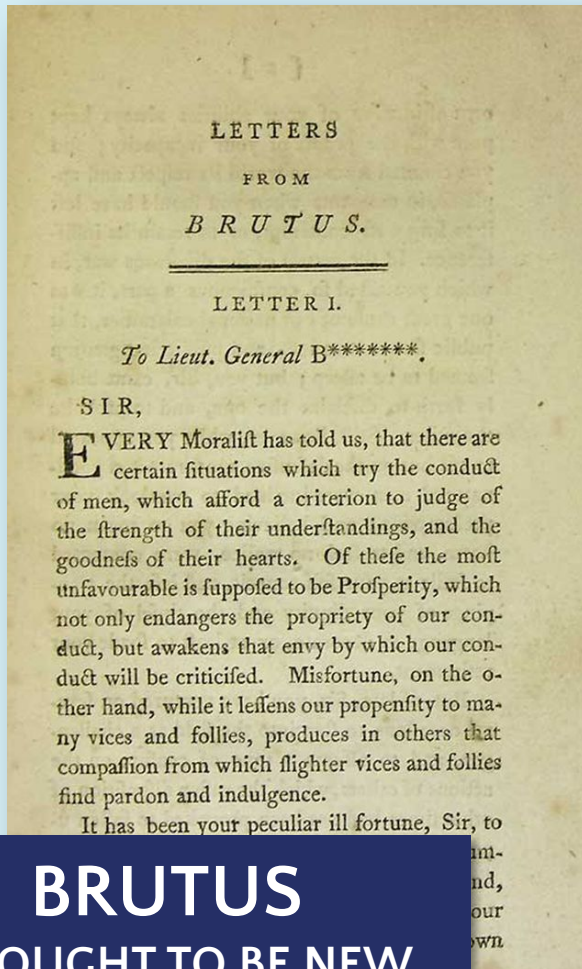
**JAMES  
MADISON**

**Madison's Main Point:**  
The Anti-Federalist concerns about a national army overpowering the American people are probably overblown. The American people are almost impossible to subdue. American militias were big, and the American people were armed.



**Second  
Amendment  
Overview**

# RATIFICATION DEBATES



At the same time, Anti-Federalist “Brutus” wrote many times about the anti-republican character of standing armies. For Brutus, the power of Congress to raise and support armies at its pleasure in times of peace and war and to control the militia evinced a tendency toward consolidation of government and **“destruction of liberty.”**

**BRUTUS**  
(THOUGHT TO BE NEW YORK'S ROBERT YATES)



**Second  
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Overview**



# RATIFICATION DEBATES

The Second Amendment responds to the Anti-Federalist fears that Congress might use its power to “organize, arm, and discipline” the militia as an excuse to disarm the American people.

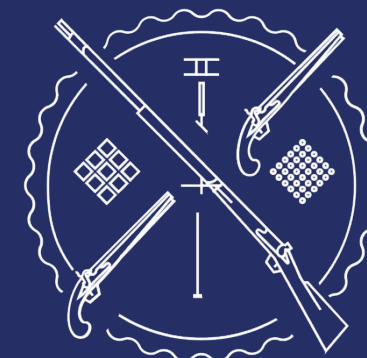
The Second Amendment prevents this.



**Second  
Amendment  
Overview**



# THE CIVIL WAR



## Second Amendment Overview

# THE CIVIL WAR AND RECONSTRUCTION

## Framing Question:

How did the Civil War, Reconstruction, and the Second Founding transform debates over the Second Amendment and the right to keep and bear arms? And specifically, why were gun rights so important to African Americans in the South following the Civil War?



## Second Amendment Overview

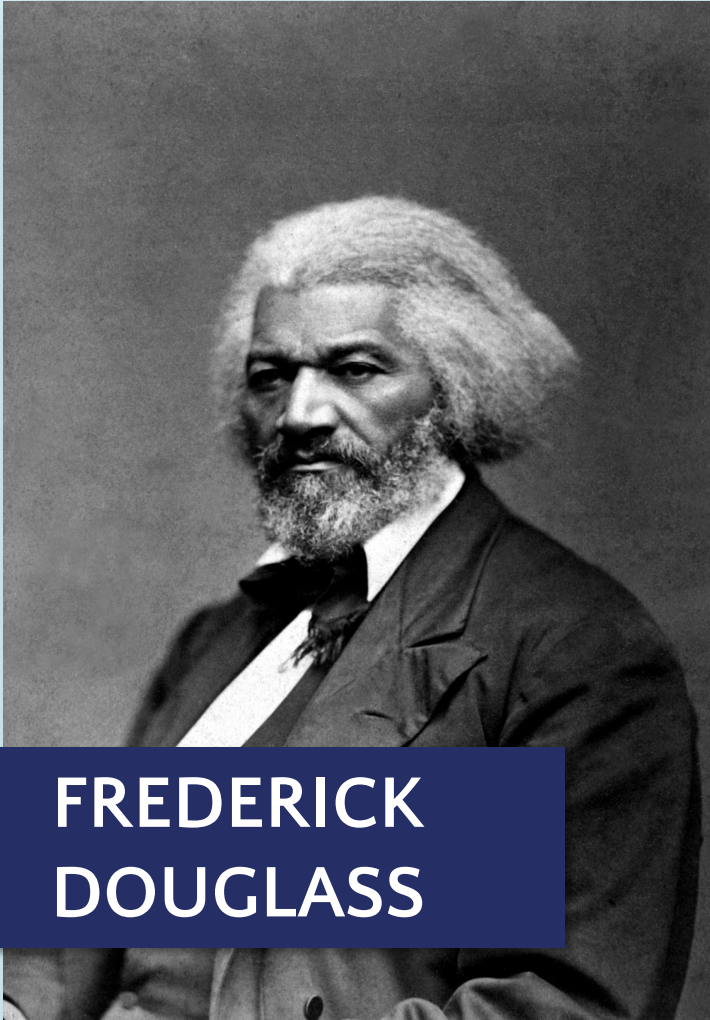
## THE BLACK CODES

After the Civil War, white Southerners passed new laws—the Black Codes—which discriminated against African Americans and tried to impose the conditions of slavery on them again. As part of this move, these Black Codes tried to take away their arms.



### Second Amendment Overview

## RESPONSE TO THE BLACK CODES



FREDERICK  
DOUGLASS

“The black man has never had the right either to keep or bear arms; and the legislatures of the states will still have the power to forbid it.”



Second  
Amendment  
Overview

## RESPONSE TO THE BLACK CODES

“We, the people of the State of South Carolina, in Convention assembled, . . . ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed . . . that the late efforts of the Legislature of this state to pass an act to deprive us of arms be forbidden, as a plain violation of the Constitution.”

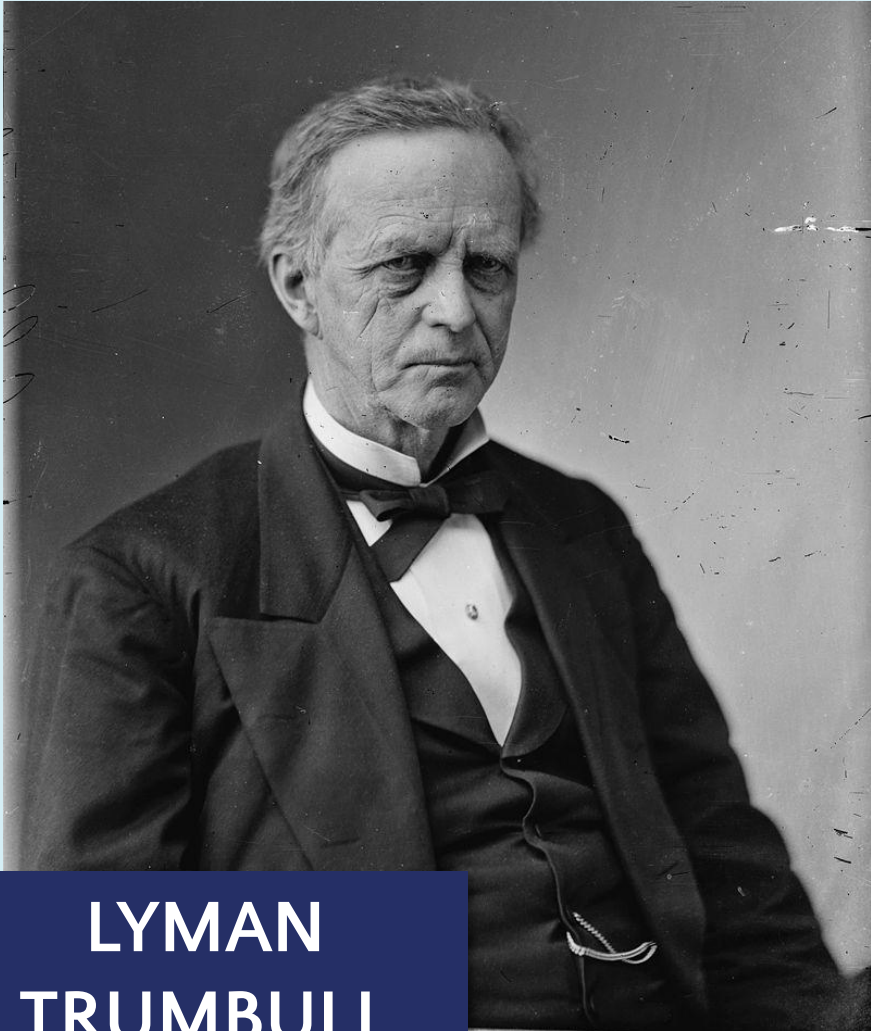
-Convention of African Americans in South Carolina



**Second  
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# CIVIL RIGHTS ACT OF 1866



**LYMAN  
TRUMBULL**

The Reconstruction Congress built new protections for African American gun rights into landmark laws like the Civil Rights Act of 1866.

Senator Lyman Trumbull specifically targeted a Mississippi law banning African Americans “from having fire-arms.”



## **Second Amendment Overview**

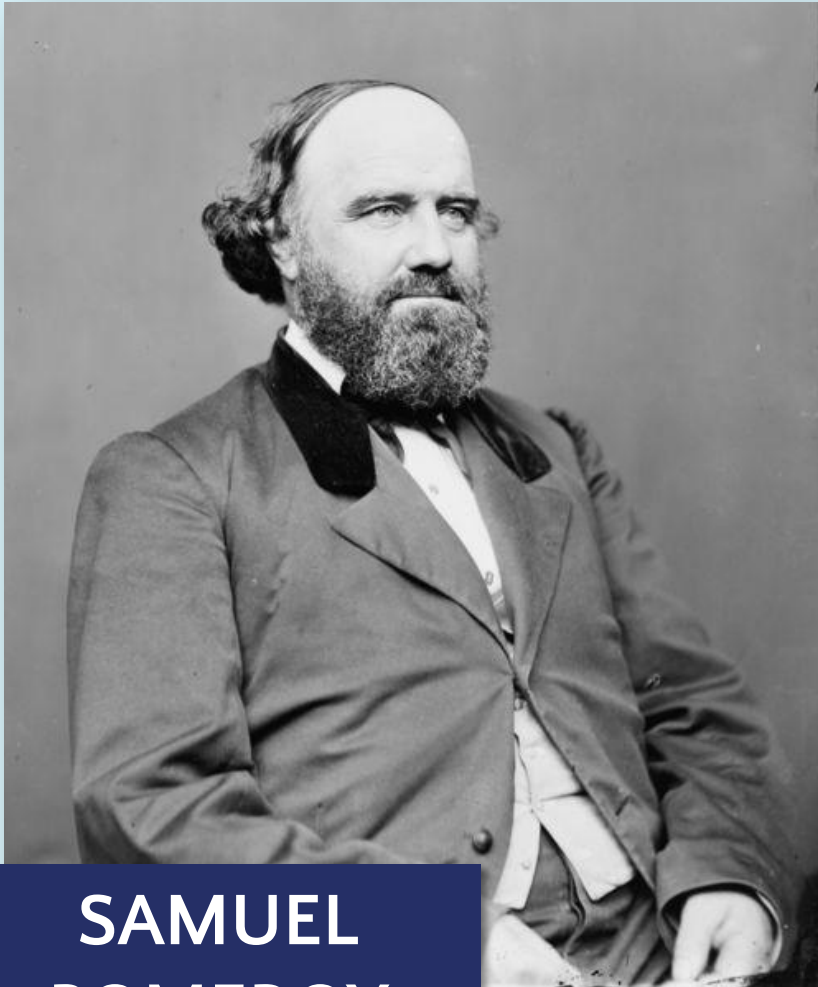
## FREEDMAN'S BUREAU ACT

“laws . . . concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all citizens.”;



### Second Amendment Overview

## FREEDMAN'S BUREAU ACT



**SAMUEL  
POMEROY**

“If the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-leaded musket be in the hand of the occupant. . . . Every man . . . should have the right to bear arms for the defense of himself and his family and his homestead.”

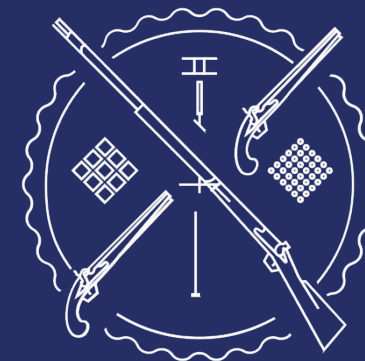


### **Second Amendment Overview**



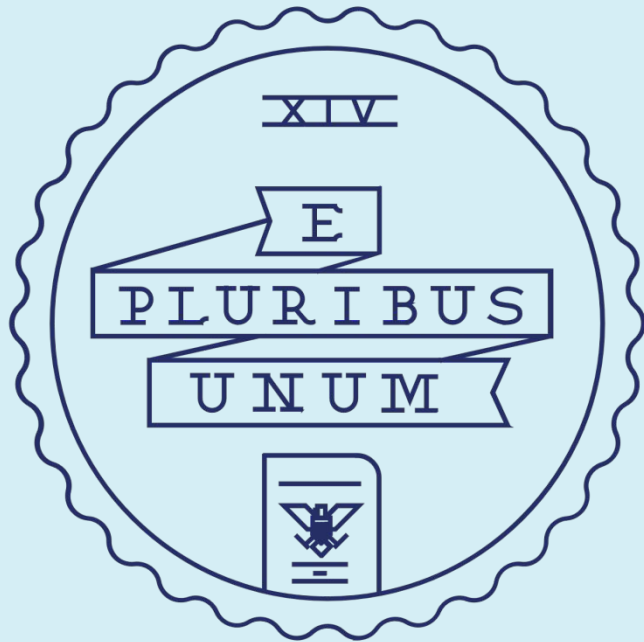
“[A] Winchester rifle should have a place of honor in every black home...When the white man...knows he runs as great a risk of biting the dust every time his African-American victim does, he will have a greater respect for African-American life.”

**IDA B. WELLS**



## **Second Amendment Overview**

# THE 14TH AMENDMENT (1868)



The 14th Amendment was ratified in 1868. In the ensuing decades, the Supreme Court would decide cases that limited its reach—including in the context of gun rights.

For instance, take *United States v. Cruikshank* (1876). This case arose out of one of the largest—if not the largest—incidents of white violence against African Americans during Reconstruction, the Colfax Massacre in April 1873. The incident takes place in Louisiana.

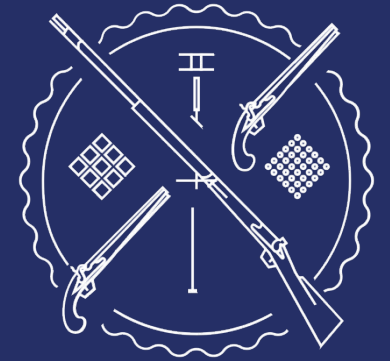


**Second  
Amendment  
Overview**

# *CRUIKSHANK V. UNITED STATES (1876)*

## **Facts of the Case:**

This case arose out of one of the largest—if not the largest—incidents of white violence against African Americans during Reconstruction, the Colfax Massacre in April 1873. The incident takes place in Louisiana. Both parties claimed victory after the election of 1872. Two Governors and two state legislatures claiming legitimacy. The two sides tried to take control of the Colfax Courthouse. The Republicans (including the local African American militia) succeeded in occupying it—reinforced by armed supporters. The militia began arming and drilling—with many African Americans armed with the rifles they had carried as Union soldiers.



## **Second Amendment Overview**

## CRUIKSHANK V. UNITED STATES (1876)



On April 13, 1873, a white mob—led by the Ku Klux Klan—stormed the courthouse. All told, a group of 150 white people attacked the courthouse and eventually drove African Americans out of the building by setting fire to it. More than 100 African Americans were shot and killed as they fled the fire.

**COLFAX MASSACRE**



**Second  
Amendment  
Overview**

## *CRUIKSHANK V. UNITED STATES (1876)*

### **The Outcome:**

William Cruikshank and others were prosecuted for these murders under the Enforcement Act of 1870. They were charged with infringing many constitutional rights, including Second Amendment rights, and some of them were convicted.

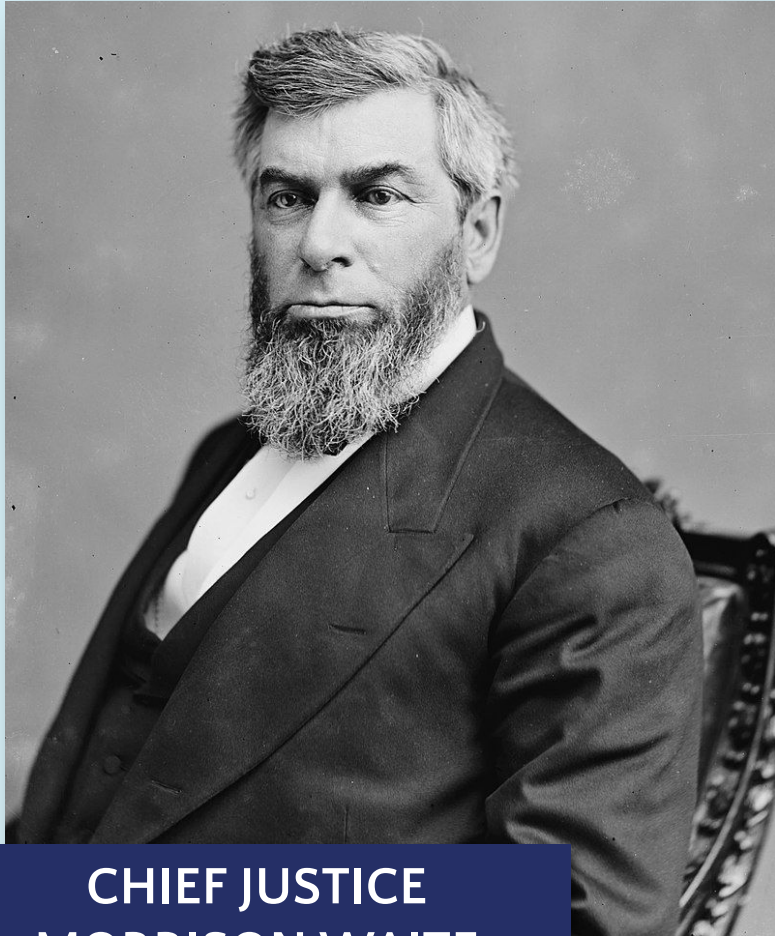
The Court unanimously rules that the suit was improper—throwing out the indictments against the alleged murderers.



### **Second Amendment Overview**



## CRUIKSHANK V. UNITED STATES (1876)



CHIEF JUSTICE  
MORRISON WAITE

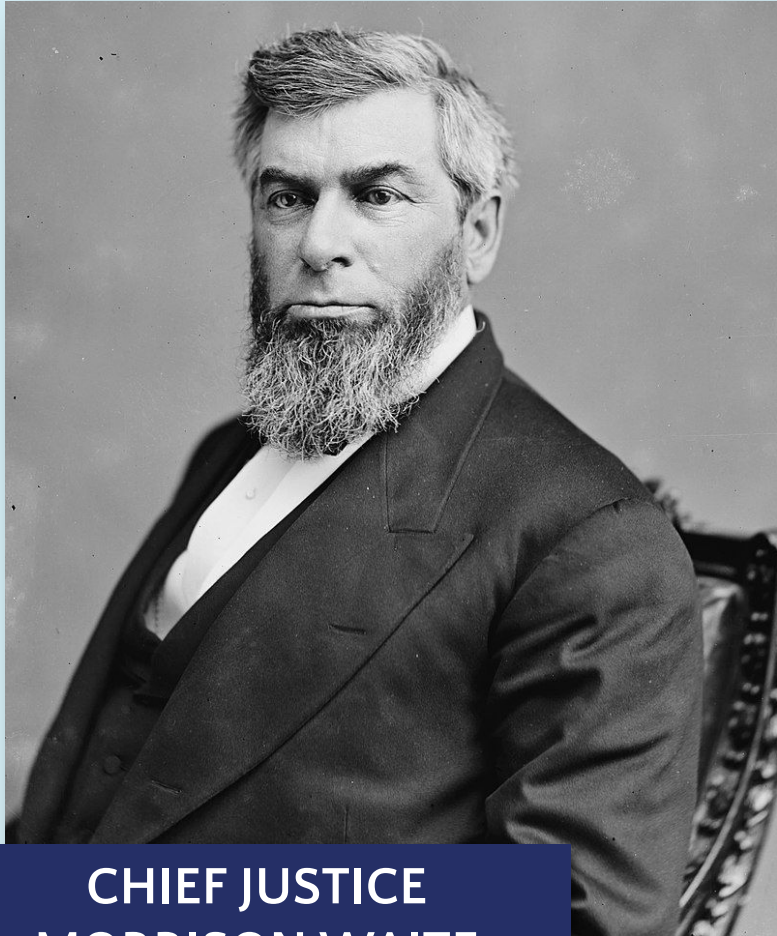
Chief Justice Waite says that the national government does not have power to protect against Bill of Rights violations by private—as opposed to government—actors.

After all, the Fourteenth Amendment says “No state shall...” not “No one shall...” (Lawyers call this the “state action” requirement.)



Second  
Amendment  
Overview

## CRUIKSHANK V. UNITED STATES (1876)



CHIEF JUSTICE  
MORRISON WAITE

“The right to bear arms is not a right granted by the Constitution nor does it depend on the constitution for its existence and the Second Amendment only restricts the powers of the national government.”



### Second Amendment Overview

# HYPOTHETICAL

## Can a city effectively ban handguns within city limits?

*District of Columbia v. Heller* (2008) and  
*McDonald v. City of Chicago* (2010)

**VOTE NOW!**



**Second  
Amendment  
Overview**

# DISTRICT OF COLUMBIA V. HELLER (2008)



DICK HELLER

## Facts of the Case:

The challengers argued that a District of Columbia law effectively banning handguns violated the Second Amendment. This case featured powerful originalist opinions—tackling the Second Amendment’s text and the Founding-era history—on both sides.



## Second Amendment Overview

## *DISTRICT OF COLUMBIA V. HELLER (2008)*

And the decision turned, in part, on the outcome of the debate over whether the Second Amendment protected a **collective right** (tied to militia service) or an **individual right** to keep and bear arms (that applied more generally).

If the **collective rights** side won, it would mean that governments had a great deal of discretion to regulate guns.

If the **individual rights** side won, it would mean that the Second Amendment might place limits on a range of gun regulations that limit the rights of individuals.



**Second  
Amendment  
Overview**

# *DISTRICT OF COLUMBIA V. HELLER* (2008)

## The Outcome:

The Supreme Court—in a 5-4 decision—endorsed the individual rights view. For the majority, the Second Amendment grants an individual right to keep and bear arms—including personal handguns in the home—subject to reasonable regulation outside of the home.

Justice Antonin Scalia authored the majority opinion. Scalia argued that it's clear from the Founding-era history that words like “arms” and “bear” referred to individual rights to own commonly held (so, widely owned and used) firearms.



## Second Amendment Overview

## *DISTRICT OF COLUMBIA V. HELLER (2008)*



**JUSTICE ANTONIN  
SCALIA**

“Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”

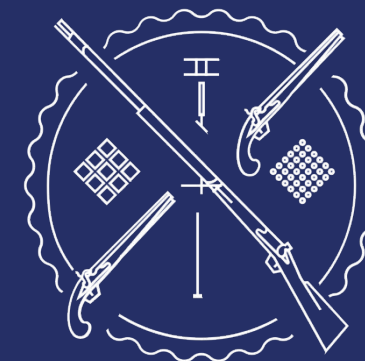


**Second  
Amendment  
Overview**

Excerpt from

## English Bill of Rights

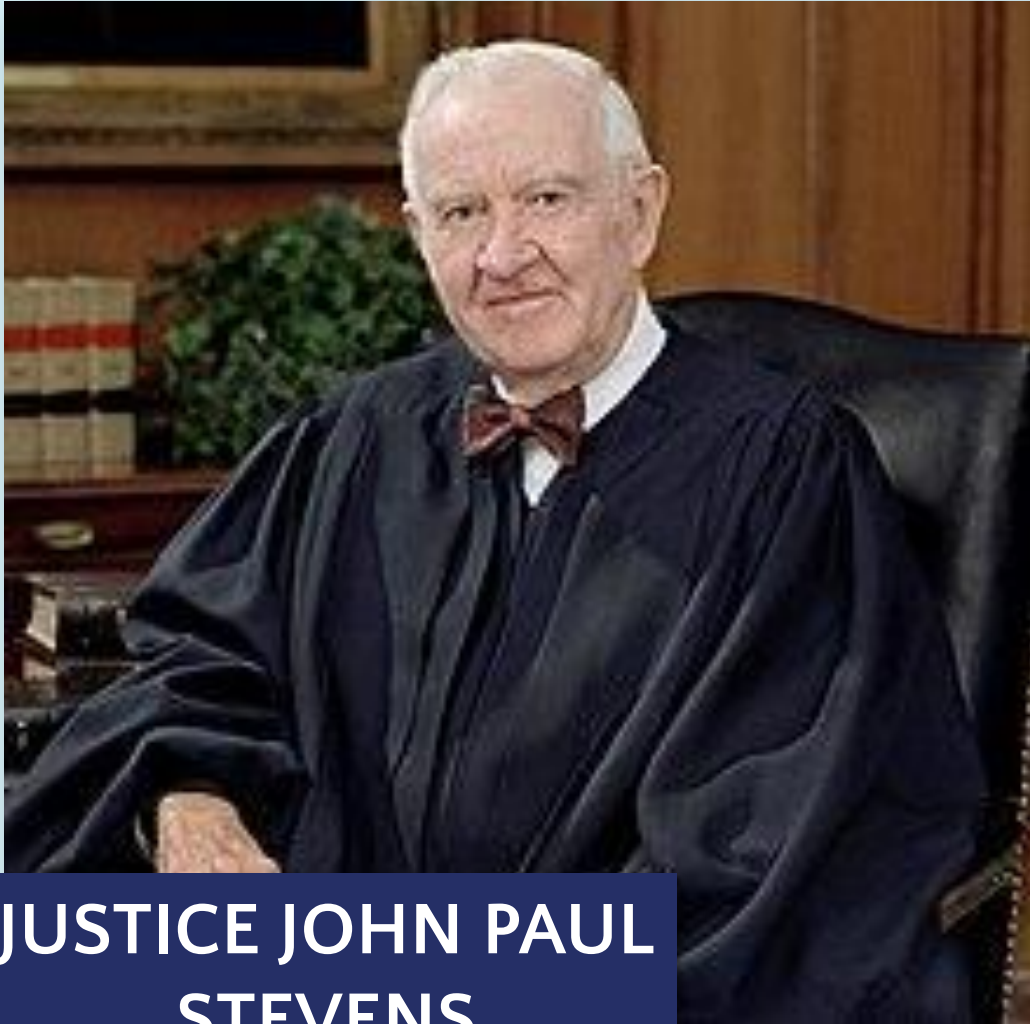
“subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law”



**Second  
Amendment  
Overview**



## *DISTRICT OF COLUMBIA V. HELLER (2008)*



**JUSTICE JOHN PAUL  
STEVENS**

### **Dissenting:**

The “distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms.”



### **Second Amendment Overview**

# MCDONALD V. CHICAGO (2010)

## Facts of the Case:

Since D.C. is not a state and is governed by federal law, the Supreme Court in *Heller* was simply asked to apply the Second Amendment directly. By challenging a similar handgun ban in Chicago, the *McDonald* case asked the key follow-up question: Does the 14th Amendment extend the Second Amendment's key protections to state abuses? This question goes to the issue of “incorporation.”



OTIS MCDONALD



## Second Amendment Overview

## *MCDONALD V. CHICAGO (2010)*

### **The Outcome:**

In a divided 5-4 decision, the Supreme Court concluded that the 14th Amendment did extend the Second Amendment's key protections to state abuses—and struck down the Chicago handgun ban.

The Court held that the right to keep and bear arms for the purpose of self-defense was “deeply rooted” in the nation’s history. And the Second Amendment was thus incorporated against the states through the 14th Amendment—meaning that the states could not infringe on that right.



### **Second Amendment Overview**

## SECOND AMENDMENT CASES

These cases establish a core principle—The Second Amendment protects an individual right to gun possession for purposes of protecting one’s home. However, these cases also emphasize that the Second Amendment right isn’t absolute.

Importantly, Justice Scalia’s *Heller* opinion acknowledged “**longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.**” It also limits Second Amendment rights to weapons in common use. So, the *Heller* Court affirmed the “**historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’**” In other words, the Second Amendment might protect ordinary handguns, but not bazookas.



### Second Amendment Overview