

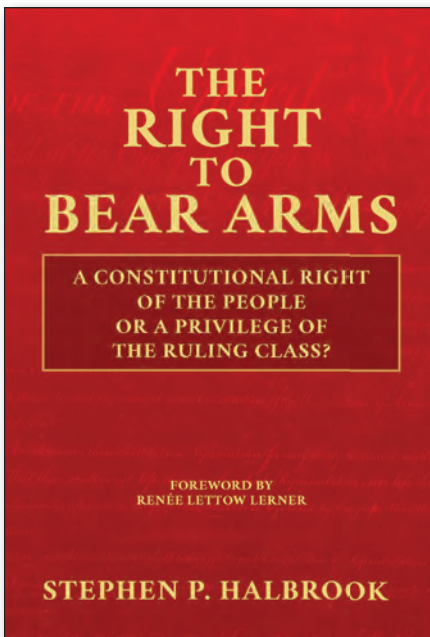
The Right to Bear Arms

A Constitutional Right of the People or a Privilege of the Ruling Class?

BY STEPHEN P. HALBROOK

Book Highlights

- **In the United States today, most states recognize the right to bear arms by law-abiding citizens, but several states—some of the largest—restrict permits to carry handguns to a tiny elite of influential people.** Is this a violation of the Second Amendment, based on its text, history, and tradition? The question answers itself.
- **Opponents of the Second Amendment argue that the right to bear arms is somehow fictitious, mistakenly claiming this right was never recognized by English law.** They cite English King Edward III's Statute of Northampton of 1328, which prohibited going armed in affray of the peace, as proof. But English courts would hold that this law only applied to persons who carry arms with evil intent in a manner to terrorize others. The English Declaration of Rights of 1689 recognized the right of Protestants to have arms for their defense and security. Englishmen could freely and peaceably carry firearms until restrictions were imposed as late as 1920.
- **The American colonists always had the right, and sometimes the duty, to bear arms, which allowed them to protect themselves from criminals, hostile Native Americans, and wild animals.** In the 1760s, the British began imposing severe restrictions on the Americans, who increasingly armed themselves for resistance. The attempt of the Redcoats to confiscate colonist arms at Lexington and Concord sparked the American Revolution, and American arms would eventually win the war.
- **When the Constitution was proposed in 1787 without a Bill of Rights, the anti-Federalists demanded one that recognized the right to bear arms for defense of self and state.** The demand was initially strongest in the Northern states, which had abolished or were in the process of abolishing slavery. Finally, several state conventions demanded a declaration of rights, and it came to fruition with the proposal and ratification of the Second Amendment.
- **Anti-gun advocates unjustifiably tout a Massachusetts's law enacted in 1836 against going armed unless one had cause to fear an assault as precedent for today's gun bans.** But the law only applied on complaint of a person having reasonable cause to fear an injury from the person going armed, which would not exist if the person went armed peaceably.
- **New York has replaced Mississippi as one of the most egregious states denying the right to bear arms.** The difference is that instead of denying the right only to persons of color, it denies the right to everyone except a privileged class. The Supreme Court is expected to pass judgment on the New York law in 2022.



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Synopsis

What could be confusing about the Second Amendment’s prohibition on the infringement of “the right,” not the privilege, of “the people,” not a tiny elite, to “bear arms”? Plenty, if one muddies the water enough.

Once again, the constitutional right to bear arms is under assault. While most states issue permits to carry handguns to law-abiding persons in general or don’t even require permits, a handful of states deny the right to all but a few privileged persons. And once again, the U.S. Supreme Court will pass judgement that will affect the lives of all Americans for better or worse—the case, *New York State Rifle & Pistol Association v. Bruen* is the first significant gun-rights dispute to reach the bench in more than a decade. A decision is expected in 2022.

Fortunately, author and Independent Institute Senior Fellow **Stephen P. Halbrook**—the winner of three cases before the U.S. Supreme Court (*Printz v. United States*, *United States v. Thompson/Center Arms Company*, and *Castillo v. United States*)—brings clarity to this misunderstood right in his book, *The Right to Bear Arms: A Constitutional Right of the People or a Privilege of the Ruling Class?*

The Origin of the Right to Bear Arms

Halbrook presents a comprehensive review of the right to bear arms, tracing its development to its English origins. The Statute of Northampton of 1328, cited by some today as somehow overriding America’s Second Amendment, was actually construed as prohibiting one from going armed in a manner to terrify one’s fellow subjects. The leading precedent interpreting this medieval statute is the 1686 case of *Rex v. Knight*, a prosecution against a Protestant activist who carried arms for self-defense against attacks by Catholic partisans. The Catholic King James II disarmed his Protestant

political opponents, prompting his removal in the Glorious Revolution of 1688. The Declaration of Rights of 1689 recognized the right of English Protestants to “have Arms for their Defence” as allowed by law.

The right to bear arms continued to be recognized in England, even in tumultuous times. What was seen as a universal right in England was reversed in oppressed Ireland. It was not until 1870 that a license to carry a gun was required in England; even then, anyone could buy the license at a post office. Only beginning in 1920 was an Englishman required to show a “need” to the authorities for a gun license, representing the loss of the right to bear arms for the English citizenry.

The American settlers would insist on, and expand, their already existing rights as Englishmen. In the colonies, carrying arms was generally an unchallenged right, a practical necessity, and sometimes a legal duty. When the Stamp Act and other oppressive measures were imposed in 1765, the Sons of Liberty protested. They often carried arms openly or concealed at will. In the 1770 homicide trials arising out of the Boston Massacre, both the prosecution and the defense agreed that individuals in the colonies had a right to carry weapons for self-defense.

While the British began to cut off the supply of arms and ammunition to the colonies, the royal administration in the colonies recognized that it had no legal power to seize arms from the colonists. But once armed conflict erupted at Lexington and Concord, British commander Thomas Gage demanded that Bostonians surrender their firearms in exchange for safe passage to leave the city. He then confiscated the firearms and reneged on his promise. The Revolution was on, and the independent states began adopting constitutions and bills of rights, including recognition of the preexisting right to bear arms.

The Trials and Tribulations of the Second Amendment

When the Constitution was proposed, the alarm went out that it had no bill of rights. Recognition of the right to bear arms was demanded along with freedom of speech. James Madison proposed what became the Second Amendment, and the Bill of Rights was ratified by the states in 1791. The right to bear arms for self-defense was taken for granted. The federal Militia Act of 1792 required able-bodied males to arm themselves. The Founders personally carried arms and defended the right to do so.

At the beginning of the early Republic, citizens were at liberty peaceably to carry arms outside the home in public, openly or concealed, without any restrictions. Legal commentators acclaimed the constitutional right to bear arms as the palladium of liberty of a free state.

By statute or judicial decisions, some states prohibited going armed in a manner that would terrorize others, and required violators to find sureties to keep the peace. In 1813, two states banned the carrying of concealed weapons; a handful of other states followed. Courts upheld these restrictions because one could bear arms openly.

The slave codes provided the dishonorable exception to the right to bear arms, as well as to other rights. Slaves were virtually prohibited from firearms possession, while free blacks were required to obtain a license to carry a firearm. Like today, in America's "may issue" carry states, licenses were subject to the discretion of the government's issuing authority.

When slavery was abolished, the Southern states enacted the Black Codes, which required African Americans to obtain a license, subject to official discretion, to possess and carry firearms. Congress sought to prohibit the confiscation of unlicensed firearms from the newly-freed slaves through passage of the Civil Rights and Freedmen's Bureau Acts of 1866. The

Fourteenth Amendment was proposed and ratified intending, in part, to protect the right to bear arms from state violation, and the Civil Rights Act of 1871 provided for enforcement of that and other rights. The courts responded with mixed results to the carry restrictions that were enacted in a handful of states during Reconstruction.

The Supreme Court's Impact on the Right to Bear Arms

The U.S. Supreme Court weighed in with two decisions in the last quarter of the nineteenth century. *United States v. Cruikshank* held that the rights to assemble peaceably and to bear arms for a lawful purpose preexisted the Constitution, but no basis existed for the federal prosecution of private individuals for violation of the exercise of those rights by African Americans. And in *Presser v. Illinois*, the Court held that the requirement of a license to parade with arms in cities, which was passed during a period of labor unrest, did not infringe on the right to bear arms. Both of these decisions predated the Supreme Court's adoption of the "incorporation doctrine" of the Fourteenth Amendment.

Before and after the turn of the century, restrictions were sporadically enacted against the bearing of arms in unique contexts not shared by most of America. Far from being predominant or longstanding, these laws were needles in a haystack. Some "Wild West" cattle towns disallowed the carrying of firearms, although statehood and court rulings invalidated some of the bans. Jim-Crow-inspired licensing requirements and fees essentially prohibited blacks from exercising the right to bear arms in some states. And New York's Sullivan Law of 1911, named after a politician with ties to organized crime, sought to ensure that Italians and other immigrants went to prison if they dared to carry a gun for self-defense.

In the twentieth century and beyond, the state courts upheld the right to bear

arms under state constitutional guarantees. The U.S. Supreme Court upheld the common law right to be armed in self-defense, opined in dictum that restrictions on concealed carry did not violate the right to bear arms, and in *United States v. Miller*, held that militia arms are protected by the Second Amendment.

In *District of Columbia v. Heller* (2008), the Court held that the District's handgun ban violated the individual right to keep and bear arms. The opinion clarified that to "bear arms" means to carry arms and has no exclusive militia context. And it rejected the view that the right could be dismissed by judge-made interest-balancing tests. That was followed by the Supreme Court's *McDonald v. Chicago* decision in 2010, which held the right to arms to be fundamental and protected from state violation by the Fourteenth Amendment.

Since *Heller* and *McDonald* were decided, state carry bans have been litigated in the lower federal courts. Some federal circuits have found discretionary issuance laws to violate the right of the public at large to bear arms. Other circuits have upheld the denial of the right to ordinary citizens, typically under a watered-down version of intermediate scrutiny that allows judges to balance away the right.

The Future of the Right to Bear Arms

The Supreme Court granted review of New York's discretionary-licensing law in a case called *New York State Rifle and Pistol Association v. Bruen*. A decision is expected in 2022. Will the Supreme Court uphold the universality of the right to bear arms as enshrined in the Second Amendment? Or will the outcome further erode this constitutional right, such that the term loses its meaning? Only time will tell.

The way and extent to which the right to bear arms is exercised may vary with societal changes, uncertainties, and disasters. The year 2020 exemplified that, with

record gun sales being prompted by political transformations resulting in greater restrictions in certain states, fewer restrictions in other states, the arrival of the coronavirus and its devastating impact, and

the sparking of rioting and pullback of law enforcement nationwide.

Whatever the future holds, the Second Amendment and the ongoing love affair of Americans with private firearms ownership

have endured for well over two centuries. If some politicians and judges are mystified by the meaning of the words “the right of the people to...bear arms,” most Americans are not.

Praise for *The Right to Bear Arms*

“In *The Right to Bear Arms*, Halbrook has provided a comprehensive, up-to-date review of the New York case pending before the U.S. Supreme Court, while elaborating on the historical and principled meaning of the Second Amendment. This book could not appear at a more auspicious moment. The reality is that the decision in the prior Heller and similar cases that the Second Amendment is a personal right and not a privilege afforded by governmental units is perhaps in greater danger now than it was before Heller. The evident temptations to rescind from the broadest implications of Heller have courts and judges seeking ways to water down that fundamental principle, and there is more than a little reason to fear some of that tendency emerging at the Supreme Court in the guise identifying historical developments as qualifying the plain language of the Second Amendment. Halbrook greatly diminishes the prospect of a satisfactory completion of that misguided task.”

—**WILLIAM B. ALLEN JR.**, Emeritus Dean and Professor of Political Philosophy, James Madison College, Michigan State University; former Chairman, U.S. Commission on Civil Rights

“Stephen Halbrook’s *The Right to Bear Arms* is particularly timely now, when critics allege tainted origins of so many American institutions. The right to own and carry guns, as Halbrook shows, grew from a long, honorable tradition in Anglo-American law of trusting the common man to defend himself. It was, as this book shows, the attempt to deny historic gun rights that grew out of racial animus in the Jim Crow South and anti-immigrant prejudice in Northern cities.”

—**JEREMY A. RABKIN**, Professor of Law, Antonin Scalia Law School, George Mason University; Member, Board of Directors, U.S. Institute of Peace

“With his comprehensive book, *The Right to Bear Arms*, Stephen Halbrook gives us an important history of a right often disparaged by elites but frequently cherished by ordinary citizens—the right to bear arms for self-defense. This timely book is must reading for those concerned with the civil right of self-preservation.”

—**ROBERT J. COTTROL**, Harold Paul Green Research Professor of Law and Professor of History and Sociology, George Washington University; author, *The Long, Lingering Shadow: Slavery, Race, and Law in the American Hemisphere*

About the Author



STEPHEN P. HALBROOK is a Senior Fellow at the Independent Institute. He received his J.D. from Georgetown University Law Center and Ph.D. in social philosophy from Florida State University. The winner of three cases before the U.S. Supreme Court, he is a contributor to numerous journals and his many books include *Gun Control in Nazi-Occupied France: Tyranny and Resistance*; *Gun Control in the Third Reich: Disarming the Jews* and “*Enemies of the State*”; *The Founders’ Second Amendment: Origins of the Right to Bear Arms*; *That Every Man Be Armed: Evolution of a Constitutional Right*; *Firearms Law Deskbook: Federal and State Criminal Practice*; *Securing Civil Rights: Freedmen, the Fourteenth Amendment, and the Right to Bear Arms*; *State and Federal Bills of Rights and Constitutional Guarantees*; and *Target Switzerland: Swiss Armed Neutrality in World War II*.



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