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The Second Amendment Is Not Absolute

We impose restrictions on all sorts of constitutional rights. The right to bear arms is no different.

By [Sonja West](#)

You've likely heard it from any number of sources. Perhaps it was from a presidential candidate, a lawmaker, your libertarian brother-in-law, or your Facebook frenemy. Whatever the source, you likely have been told that regulating guns in virtually any way violates the Second Amendment.

I therefore offer today this quick constitutional refresher course: It does not.

Constitutional rights are not absolute. They never have been and, practically, never can be. In our constitutional democracy, we have always recognized that we can, and must, have our constitutional cake and regulate it too.

Take, for example, our freedom of speech. It is one of the most clearly stated and robustly protected rights in the Constitution, yet it is also subject to numerous restrictions. Our speech might not be protected if it falsely damages someone's reputation, aids and abets a crime, contains a threat of violence, reveals a trade or military secret, harasses, plagiarizes, inflicts severe emotional distress, is deemed to be obscene, incites violence, or leaks classified information, to name a few. The United States Supreme Court further allows restrictions on **when**, **where**, and **how** we can express ourselves even when the message itself is protected. In some cases we control *who* may speak, such as limitations we may constitutionally impose on the speech of **students**, **prisoners**, and **government employees**.

When determining what regulations on speech are acceptable, the Supreme Court carefully weighs the significant value of protecting the freedom of expression against the countervailing public interests. Thus you certainly have a right to protest, but not in a public park without a permit. You have a right to exclaim your beliefs, but not with a sound truck at night in a residential neighborhood. You have a right to express yourself through art, but not with a can of spray paint on someone else's car. Child pornography is indisputably a type of speech, yet the Supreme Court gives it no constitutional protection, zero, because the court believes that the harm it inflicts on the abused children far outweighs any expressive value.

The same is true of our freedom to exercise our religions. The court has held (in [an opinion authored by Justice Antonin Scalia](#)) that as long as a government regulation applies to everyone equally and does not target a particular religious group, many general laws that infringe on religious practices are nonetheless constitutional. Thus, if your religion involves the use of a banned hallucinogen like peyote, as was the situation in the Supreme Court case involving members of the Native American Church, your constitutionally protected right to freely exercise your religious beliefs takes a back seat to the state's interest in uniform drug laws.

America has always recognized that we can, and must, have our constitutional cake and regulate it too.

I could go on. So I will. We have the constitutionally protected right to peaceably assemble, but not to block traffic. We are protected from unreasonable and unwarranted searches, unless there is probable cause, exigent circumstances, or a hot pursuit. If charged with a crime, we have the right to a speedy trial (but not if the prosecution is hunting down witnesses) and also a public one (but not if you want your trial televised). We also have the right to a trial by jury (unless the crime carries a sentences of six months or less).

The Second Amendment, of course, is no exception. In the 2008 case of [District of Columbia v. Heller](#), the Supreme Court told us that we have a constitutional right to possess firearms for self-defense, at least within our homes. But the opinion never suggested that this right was unconditional or immune from all regulation. In fact, Justice Scalia, writing for the majority, said just the opposite. In *Heller*, he specifically said that “the right secured by the Second Amendment is not unlimited.”

Protecting the right to keep and bear arms is not the same as forbidding all regulations on that right. We can protect that right and still require background checks, permits, and training. We can still regulate when, where, and what kinds of guns are allowed. In some cases, we can regulate who can obtain guns, imposing restrictions on, for instance, felons, the mentally ill, and known terrorists. We can ban firearms such as military-style assault weapons that (like child pornography) plainly cause far more harm than they add in value. We can require those who are negligent with their weapons (as we do those who are negligent with their words in defamation cases) to be held liable for the harm they inflict on others. We can do all of these things; we just don't. There might be policy reasons to debate the pros and cons of specific regulations, but there's no reason to assume that there is a constitutional problem.

And you don't need to take my word for it. Let's take another listen to Justice Scalia in *Heller*, shall we? The Second Amendment, he stated, does not protect “the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.” He further noted that nothing in the court's decision “should be taken to cast doubt on 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.”

“But, but, but ...,” your Facebook friend might counter, “the text of the Second Amendment says that the right to keep and bear arms ‘shall not be infringed.’ Shall Not. Be. Infringed.” Said friend may even say it in all capital letters.

Funny story. The framers used the word “shall” a lot. But it turns out that many of the constitutional rights they wrote about in unqualified terms are, in fact, qualified. Some amendments, for example, tell us that the government “shall make no law ... abridging” or “shall [not] deprive any person of” or “shall not make or enforce any law which shall abridge” certain rights. Others declare that a right “shall not be violated” or “shall be preserved.” And yet many of those rights have been subject to restrictions over the years. Considering that the framers prefaced the Second Amendment with the observation that a “well regulated militia being necessary to the security of a free State,” its language—“shall not be infringed” notwithstanding—is arguably less absolutist than many other constitutional provisions that did not come with a qualifier.

Our constitutional rights are not an all-or-nothing deal. We can uphold the Second Amendment and still pass reasonable regulations that further the public’s interest in safety. So don’t feel you need to choose between protecting our Second Amendment rights and supporting sensible gun regulations. Why should you? The Constitution doesn’t.

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