

# Statement of Professors of Constitutional Law: The Right to Keep and Bear Arms and the Constitutionality of Expanded Background Checks

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Congress is currently considering several bills designed to lessen the toll of gun violence, including a proposal to expand background checks. Some have argued that these measures might violate the right to keep and bear arms. As professors of constitutional law, we write to address those concerns and to confirm that respect for the fundamental right to keep and bear arms is fully consistent with reasonable gun regulation. That includes expanded background checks, which fall squarely within constitutional limits.

## I. Rights and Regulation Under the Second Amendment

The Second Amendment reads, “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.” In the 2008 case *District of Columbia v. Heller*, the Supreme Court held that the Amendment protects an individual right to own a handgun for private purposes like self-defense within one’s own home. Justice Scalia’s majority opinion also emphasized repeatedly that the right to keep and bear arms, like other constitutional rights, is “not unlimited,” and is subject to regulation. In the Court’s words:

[N]othing in our opinion 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.

The Court further noted that the Amendment protects only those weapons “in common use at the time,” and not those that are “dangerous and unusual.” Justice Scalia’s opinion observed that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” It also noted that nothing in the *Heller* decision suggested that laws regulating the storage of firearms to prevent accidents were invalid.

*Heller* did not purport to exhaust either the type or scope of regulations that are constitutional. As the majority noted: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” Even as the Court ordered the District of Columbia to give Dick Heller a handgun permit, the majority qualified its order by expressly “[a]ssuming that [he] is not disqualified from the exercise of Second Amendment rights.”

Thus, in the foundational case of modern Second Amendment law, the Supreme Court held that there is a private right to keep and bear arms *and* that it is subject to regulation. The Court implied that some gun laws raise no Second Amendment issues at all—they regulate conduct that simply falls outside the boundaries of the Second Amendment. And even laws that do implicate the right to keep and bear arms can nonetheless be constitutional. History, doctrine, legal practice, and popular opinion are all in agreement on this point. As Justice

Scalia’s opinion emphasized, the government retains “a variety of tools” to combat gun violence. The question for future cases would be which tools are permissible, and why.

Since *Heller*, the lower courts have decided more than 1,000 cases challenging various weapons regulations. They have struck down as unconstitutional some broad forms of regulation, like statewide prohibitions on public carrying. But in cases involving more limited forms of gun regulation—such as prohibitions on certain purchasers or on large-capacity magazines—courts have accommodated both the individual right and important regulatory interests like public safety. As then-D.C. Circuit Judge Brett Kavanaugh put it in an opinion, *Heller* “largely preserved the status quo of gun regulation in the United States.”

## II. The Constitutionality of Expanded Background Checks

Of relevance to H.R.8 and the establishment of expanded background checks, courts have been nearly uniform in rejecting challenges to bars on firearm possession by prohibited classes of persons, like those convicted of felonies or domestic violence misdemeanors, those who have been adjudicated mentally ill, minors, and persons subject to domestic violence restraining orders. Such groups mostly fall outside the scope of the Second Amendment, and—not coincidentally—are the very groups that background checks are meant to prevent from acquiring guns.

Background checks are a way to, in the words of H.R.8, “ensure individuals prohibited from gun purchase or possession are not able to obtain firearms.” Yet under current federal law, a prohibited purchaser—a person convicted of a felony, for example—can purchase a gun from an unlicensed dealer without any background check. The Second Amendment does not require this dangerous loophole. More than 20 states already require some form of expanded background checks, and those systems have withstood the rare constitutional challenges they have faced.

Both *Heller* and history corroborate the commonsense conclusion that background checks are facially constitutional. First, there is a strong argument that background checks fall squarely within the categories of laws that *Heller* puts beyond the reach of the Second Amendment. The Court said that nothing in its opinion should be taken to cast doubt “on longstanding prohibitions on the possession of firearms by felons and the mentally ill” nor on “conditions and qualifications on the commercial sale of arms.” Background checks are exactly that: “conditions ... on the commercial sale of arms” designed to enforce “longstanding prohibitions on the possession of firearms by felons and the mentally ill” and other prohibited groups.

Although the current federal background check system is just a few decades old—in part because instant background checks were not technologically possible a century ago—the lineage of barring prohibited persons from acquiring firearms is long. Analogous permit and licensing laws at the state level go back more than a century, which makes them older than some other gun laws that judges have found to be “longstanding” and thus presumptively lawful.

For many judges, *Heller* and history would be enough to uphold the constitutionality of expanded background checks. Others might apply a tiered-scrutiny approach similar to that applied in free speech doctrine, in which judges scrutinize a law more or less strictly

depending on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. Under that approach, there would be no need for especially heightened scrutiny when it comes to background checks, since the conduct being regulated—gun transfers—is something that *Heller* specifically says is subject to presumptively lawful regulation, and also because the burden on gun purchasers is minimal in the vast majority of cases.

But even if courts were to subject a system of expanded background checks to constitutional scrutiny, there should be little doubt that such a system is constitutional. The applicable standard would almost certainly be intermediate scrutiny, which asks whether a law is “substantially related to an important governmental objective.” Expanded background checks clearly satisfy that test.

There can be little debate that the relevant objective is important: preventing the transfer of guns to the categories of persons listed in the Gun Control Act, which has been upheld repeatedly in the face of Second Amendment challenges. This is part of the government’s interest in promoting public safety, and it is undoubtedly not only important, but compelling.

Intermediate scrutiny also requires that a law be substantially related to the objective in question. Since 1994 when the Brady Act was first implemented, millions of people have been denied a firearm transfer because of a failed background check. The most common reasons for a denial have been a prior felony conviction or status as a fugitive—demonstrating a substantial connection to the important government objective of keeping guns out of the hands of those the law deems too dangerous or irresponsible for gun ownership. Additionally, the system is not overly restrictive or invasive with regard to law-abiding and responsible gun buyers, because the vast majority of background checks are processed in a matter of minutes.

*Heller*, history, and common sense confirm that some people can be prohibited from possessing guns. Expanded background checks are a perfectly constitutional means of achieving that end.

Signed,

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