

The Breakfast Club
Constitutional Minute for 26 October 2021

Does the Constitution Create Rights?

Continuing with our discussion of pertinent questions you should ask any candidate for elective office, both at the national and state levels since both governments deal with gun rights. I would recommend this question:

“Mr. Candidate. Do you believe the Second Amendment gives us a right to keep and bear arms or does it guarantee a pre-existing right?”

The question is intended to probe whether the candidate has a correct understanding of a fundamental principle of the Constitution: do they understand how the Constitution works or do they not?

The correct answer to the question is that the Constitution does not create or grant rights, it merely secures certain enumerated rights against government intrusion. Originally, this meant against federal government intrusion, but after the Supreme Court invented the Doctrine of Incorporation, it now means (in most cases) a security against state government intrusion as well.

One day I’ll go into more detail about the Doctrine of Incorporation, but for now suffice it to say that in this doctrine (which, I swear, the Court simply made up, it does not appear in the Constitution, even if you read between the lines) the Court decided that the framers of the 14th Amendment intended the amendment to require the states to honor the protections of the Bill of Rights, just like the national government must. Nearly all the provisions of the Bill of Rights have now been “incorporated” against the states. In 2010, the 2nd amendment was finally incorporated.¹

As we all know, the 2nd 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.”*

The simplest way to judge whether the Constitution created this right is to ask whether the people of 1787 America had such a right prior to the Constitution being ratified the next year? If they did (and they did), it should be obvious the Constitution didn’t create such a right.

Does our candidate understand this?

Many on the Left insist the 2nd Amendment be repealed, claiming that this would immediately make all firearms illegal in the country. It would not. But repeal of the 2nd would indeed open up the issue of keeping and bearing arms to widespread Congressional (and state) “infringement.” If a veto-proof majority in Congress wanted to then outlaw guns they could probably do it; but I think it is obvious that this would result in great bloodshed in this country when the government attempted to round up the millions upon millions of guns currently in citizen’s hands. There are indeed people in this country who would go down shooting.

¹ *McDonald v. City of Chicago*, 561 U.S. 742 (2010)

For the eight ears of the Obama administration, the White House website contained an explanation of the Constitution. In regards to the 2nd Amendment, the site stated: “The 2nd Amendment gives citizens the right to bear arms.” No, it does not. Americans had this right before the Constitution and 2nd Amendment came along.

So there is only one correct answer our candidate can give: “The Second Amendment secures your natural or preexisting right to keep and bear arms.”

If the candidate waffles on this answer, or insists “No rights are absolute,” or “we have a responsibility to keep our streets safe for children and small pets,” or “we have to stop the carnage,” you need to find another candidate to support.

The history of the 2nd Amendment is long and detailed. It goes back to pre-colonial England and one day I’ll delve into it in detail. But Madison didn’t hesitate to take the several suggestions of the states as they ratified the Constitution, distill them, and insert this great protection into the Bill of Rights.

We all hoped and thought that 2008’s D.C. v Heller and 2010’s McDonald decisions would settle the firearms issue once and for all, but several states continue to whittle away at this right and it looks like the Court is ready to take another case this Fall in order to issue an even more definitive opinion.

We’ll see. In any case, I’ll end this “minute” with the same admonition as last week:

We need to start asking better questions.