

Select 'Print' in your browser menu to print this document.

Copyright 2010. ALM Media Properties, LLC. All rights reserved. National Law Journal Online

Page printed from: <http://www.nlj.com>

[Back to Article](#)

---

## Guns, virtuous history and Internet searches

Calvin H. Johnson

March 01, 2010

The U.S. Supreme Court will soon decide in *McDonald v. Chicago* whether the Second Amendment right to bear arms applies against the states. The case is set for oral argument on March 2. Attorneys for Otis McDonald, seeking to overturn Chicago's ban on handguns, have argued that the Court should not use research based on digital searches and should rely solely on established secondary histories. Virtuous history, however, should always check its prior conclusions against the surviving evidence from the adoption of the Constitution. The new digital searches allow us to collect a very large sample of the original evidence in a very short period of time.

The digital searches lend support to Chicago, which is defending its handgun ban. The issue at stake in the constitutional debates was preservation of the state power by preserving the militias. The Supreme Court has held that the Second Amendment serves individual rights, but the Second Amendment also serves states' rights. The word "militia," the digital searches show, meant the state army. To the extent that it is a state's right that is being served by the amendment, it is a state decision, for example, whether the militia may take home their muskets after a muster or must leave them in the armory. To the extent that preservation of the state militia is an important historical purpose, the Second Amendment has no power to tell Virginia, Georgia or Chicago (an entity within Illinois) what to do.

The new technology of digital searches means it increasingly easy to collect the surviving documents from the adoption of our Constitution. The superb Library of Congress site, A Century of Lawmaking, has put about 40% of the critical documents online, where they are available for free, day or night. <http://memory.loc.gov/ammem/amlaw/>. Some other great collections of the newspaper debates and founders' papers are, alas, not free, but they are at least available through major research libraries.

Two generations ago, a serious scholar of the Constitution's adoption had to drive 100,000 miles to visit archives from Georgia to New Hampshire. Collecting 100 hits was seven years' work. History once reflected those limitations. Even good historians overgeneralized from a single source, because each find was so hard to get. Even good historians had to rely on the secondary literature.

History needs to be very skeptical about the secondary literature. Historical writing can be like gossip, distorting the original message with each repetition. Prior works had inevitable biases they could not themselves see, but it once took too much effort to go behind their conclusions.

Digital searches will allow more virtuous history. Digital searches make it possible to collect hundreds of examples of the use of key words and phrases in a matter of hours. Today, one can test secondary sources against a large collection of documents within easy Internet reach.

Digital searches will also check on the lawyers. Advocates cherry-pick evidence. We need to be especially diligent to prevent "Barbie dolls in the archeological dig," whereby advocates read 21st century artifacts and ideas into the historical record. Having buried the Barbie doll, the lawyer comes back the next day, picks it up, and says "See what I found? You are bound by it." The best remedy for biased evidence is more evidence, and the best way to collect more of the original evidence is by digital search.

Searches sometimes yield marvelous surprises: Consider the 79 items from a Congressional Library site search for the word "militia" in Elliot's standard collection of the ratification debates. In those hits, "militia" is a synonym for state army controlled by the governor. Nothing from that list treats "militia" as just a group of able-bodied citizens. The opponents of the Constitution were worried that federal government had too much power over the state militias. "Have we the means of resisting disciplined armies," Patrick Henry demanded in Virginia, "when our only defence, the militia, is put into the hands of Congress?" "What sovereignty is left to [New York]," Anti-Federalist Thomas Treadwell asked, "when the control of every source of revenue, and the total command of the militia, are given to the general government?"

The Bill of Rights did not go so far as to restrict federal power over the state militias as Anti-Federalists wanted.

But James Madison, the author of the Bill of Rights, was prepared to offer amendments he considered safe. In context, the Second Amendment is Madison's response to the Anti-Federalists' demand to preserve state power by preserving state militias. The Supreme Court has held the amendment protects individual rights. Still, the function is also to preserve state power, and that purpose is important enough in the original context that the Second Amendment cannot legitimately be applied against the states. Access to the original sources by digital searches helps us reach that result.

*Calvin Johnson is the Andrews & Kurth Centennial Professor of Law at the University of Texas School of Law.*