



A Primer on the Constitutional Right to Keep and Bear Arms

by Nelson Lund, J.D., Ph.D.

Virginia Institute for Public Policy

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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 Second Amendment

INTRODUCTION

The Second Amendment is among the most misunderstood provisions of the U.S. Constitution. That is not because it is particularly difficult to understand. On the contrary, for more than a hundred years after it was adopted, hardly anyone seemed the least bit confused about what it meant. The confusion, and some serious mistakes, only became widespread in the twentieth century, when influential people began to think it was a good idea to disarm the civilian population. Because the plain meaning of the Second Amendment rather obviously creates an obstacle to these disarmament schemes, the temptation to misinterpret this provision of the Constitution became very strong.

Until very recently, all the federal courts that had considered the matter had done just that, consistently misinterpreting the Second Amendment in a way that left it essentially meaningless. Two years ago, however, a federal judge in Texas did what many had considered unthinkable: he struck down a federal statute on the ground that it violated the Second Amendment.¹ The United States Court of Appeals for the Fifth Circuit has now reversed that judgment and upheld the statute, but it did so in an opinion that revived the straightforward constitutional interpretation that had prevailed throughout the nineteenth century.²

The Supreme Court has never addressed the question at all. Will that court follow the well-reasoned approach of the Fifth Circuit? Or will it instead ratify the predominant view of other courts that the Second Amendment should be deprived of any significance? No one knows. Whatever the future may hold, however, it is worth taking the trouble to understand the Constitution itself. This essay aims to provide a basic understanding of the meaning of the Second Amendment, and thus to enable the reader to exercise the kind of independent judgment with which American citizens are entitled to evaluate the work of all our courts.

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THE TEXTUAL PUZZLE

For much of the twentieth century, there were two schools of thought about the meaning of the Second Amendment. Virtually the entire legal establishment, including most federal courts, contended that it protects only the right of state governments to maintain military organizations like the National Guard, or at most the right of military personnel to have arms while serving in that capacity. On the other hand, people who read English in the normal way thought that it protects a private right of individual citizens to keep and bear arms. If the framers of the Second Amendment had simply provided that “the right of the people to keep and bear arms shall not be infringed,” even a lawyer would have trouble denying that it creates an individual right like the others in the Bill of Rights. But that is not what they did. Instead, they appended an explanatory introduction, so that the constitutional text says: “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.”

Properly understood, the Second Amendment means exactly the same thing that it would have meant had the prefatory phrase about the militia been omitted.

The Second Amendment is the only provision in the Bill of Rights that contains a prefatory statement of purpose. This prefatory language may seem to create an inconsistency or tension between the stated purpose and the operational language used by the framers to advance that purpose. If the Constitution protects a personal and individual right to keep and bear arms, why does the text begin with a reference to a “well regulated militia” and its role in fostering the security of a free state? On the other hand, if the Framers meant to ensure that the militia was “well regulated,” why did they choose to pursue that goal by guaranteeing an apparently much broader “right of the people to keep and bear arms”?

Modern commentators have proposed two principal ways to resolve the apparent tension between the prefatory phrase and the operative clause. One approach is to argue that the Second Amendment creates a right of the state governments to maintain organized militia forces that will enable them to offer military resistance against the federal government. This “states’ right” or “collective right” theory is extremely important because it has been widely accepted in the courts for several decades. It is important to note, however, that the U.S. Supreme Court has never endorsed it. In fact, the Supreme Court has so far said very little about the Second Amendment, and nothing really definitive.³

The main alternative approach, common in late twentieth century academic commentary, is to argue that the apparent tension within the Second Amendment is illusory because its Framers conceived of the “militia” as a broad-based institution that effectively included all of “the people.” In effect, the states’ right theory depends upon conflating “the people” with the state governments, while this alternative argument depends on conflating “the people” with the “well regulated militia.”

Both theories are wrong. The judicially regnant collective right theory is completely wrong, and demonstrably so. The alternative theory is correct to the extent that it treats the right to arms as one belonging to individuals rather than to governments, but it goes astray in trying to “match” the militia with the people. Properly understood, the Second Amendment means exactly the same thing that it would have meant had the prefatory phrase about the militia been omitted. That prefatory phrase helps to illuminate the animating purpose of the Second Amendment, and it addressed a very specific eighteenth century political issue, but it

does not create any tension or inconsistency with the operative clause, and it certainly does not alter or modify the meaning of the operative clause.

THE OPERATIVE CLAUSE

Before examining the prefatory language, let us look more closely at the operative clause. It is worth emphasizing at the outset that this language is no more ambiguous or unclear than other provisions of the Bill of Rights. It states with unmistakable clarity that “the right of the people to keep and bear Arms, shall not be infringed.” This language is parallel to that used in the First and Fourth Amendments:

Congress shall make no law... abridging... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁴

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.⁵

All three amendments were framed together, and the First and Fourth Amendment rights have always been treated as individual rather than governmental rights. The framers of the Bill of Rights were apparently confident, and with good reason, that nobody would ever interpret the First Amendment to create a right that could only be exercised by lobbyists working for the state governments. And they were similarly confident that the Fourth Amendment would not be limited to protecting state bureaucrats from unreasonable searches and seizures. The utter strangeness of the states’ right theory of the Second Amendment is immediately apparent when one tries to imagine why the framers of the Bill of Rights would have used an identical phrase—“the right of the people”—to describe two rights indubitably belonging to individual citizens and one right belonging solely to state governments or at most to certain employees of the state governments.

This sense of strangeness is reinforced when one reads the final provision of the Bill of Rights, which provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.⁶

This provision makes it unmistakably clear that the framers of the Bill of Rights knew very well that there is a meaningful distinction between “the states” and “the people.” Interpreting the word “people” in the Second Amendment to refer to the state governments requires one to assume that the framers of the text were unbelievably sloppy or whimsical in their use of language. If one is going to make assumptions like that, one might just as well go all the way and assume that the Second Amendment uses the word “arms” to mean the upper limbs of the human body.

The bizarreness of assuming that “the people” means “the state governments” does not quite disprove the collective right theory. Legal draftsmen do make mistakes, including sloppy mistakes. Perhaps more important, legal draftsmen also sometimes assume, and not always justifiably, that their language will be interpreted by people who accept certain unstated premises and shared understandings.

Interpreting the word “people” in the Second Amendment to refer to the state governments requires one to assume that the framers of the text were unbelievably sloppy or whimsical in their use of language. If one is going to make assumptions like that, one might just as well go all the way and assume that the Second Amendment uses the word “arms” to mean the upper limbs of the human body.

One of the most basic principles of American political thought—beginning long before our Constitution was made, continuing down to the present day, and unmistakably implied in the Constitution’s Preamble—is that the people are sovereign, while legitimate governments are mere creatures of the people. Treating any government as if it were the people would tacitly claim a status for the government that has never been publicly respectable in the United States.

Take, for example, the constitutional provision forbidding the enactment of “ex post facto” laws.⁷ Many normal users of the English language might not have a clue about the meaning of this term, which isn’t in English. Someone who knew a little Latin might easily figure out that it constitutes a prohibition against retroactive legislation. But only someone versed in the law would realize that it might extend only to retroactive *criminal* laws. As it happens, the “ex post facto” language actually generated some confusion at the Constitutional Convention, and it is less than clear whether there was any consensus about its meaning among those responsible for ratifying the Constitution.

We shall need to be alert to the possibility that the Second Amendment uses language in a way that is foreign to modern or colloquial usage. With respect to the debate between the collective right and individual right interpretations, the only term in the operative clause that might be affected by this possibility is “the people.” When we look at the original Constitution, it becomes plain that this term is sometimes used to include only a subset of the entire citizenry. The Preamble, for example, tells us that the Constitution was established by “the people,”⁸ but we know that many citizens were barred from participating in the state ratifying conventions. Similarly, Article I requires that members of the House of Representatives be elected by “the people,”⁹ but we know that women were not permitted to vote and that property qualifications were common at the time. So it’s not at all impossible that “the people” referred to in the Second Amendment is a subset of the citizenry.

But “the people” still can’t be the state governments. The Constitution *nowhere* uses the term “the people” to refer to state governments. Article I, for example, originally specified that the House of Representatives will be elected by “the people,” but that Senators will be chosen by the legislature of each state.¹⁰ The importance of the linguistic distinction is confirmed by the Seventeenth Amendment, which created a new rule providing that Senators would be elected “by the people” of each state. Similarly, the members of the electoral college are appointed by each state in whatever way the state legislature directs, which may involve election by the people or some other means.¹¹ The Constitution *never* identifies the people with their state governments.

Interpreting the Second Amendment so as to identify the people with the state governments—an identification that the Constitution nowhere else even suggests—is far fetched for an additional immediately obvious reason. One of the most basic principles of American political thought—beginning long before our Constitution was made, continuing down to the present day, and unmistakably implied in the Constitution’s Preamble—is that the people are sovereign, while legitimate governments are mere creatures of the people. To take only one of countless examples, Chief Justice John Marshall considered the following proposition self-evident: “That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.”¹² Treating any government as if it were the people would tacitly claim a status for the government that has never been publicly respectable in the United States. There is simply no reason to think that the Second Amendment does any such thing.

THE MILITIA PREFACE

It should come as no surprise that there are so many obvious problems with reading the operative clause of the Second Amendment to protect any sort of right belonging to state governments. If the Constitution had simply provided that “the right of the people to keep and bear arms shall not be infringed,” nobody could maintain with a straight face that the provision could mean anything other than that individuals have that right. Doubts about the plain and obvious meaning of *that* clause have been raised only because of the prefatory phrase “A well regulated Militia, being necessary to the security of a free State”

Before looking at these words more closely, we should pause to focus on a few things that the Second Amendment does *not* say:

1. It emphatically does not say that it protects the right of the *militia* to keep and bear arms.
2. Nor does the Second Amendment say that the people’s right to arms is *sufficient* to establish a well regulated militia, or that a well regulated militia is *sufficient* for the security of a free state.
3. Nor does the Second Amendment say that the right of the people to keep and bears arms is protected *only to the extent* that such a right fosters a well regulated militia or the security of a free state.

As these observations suggest, the grammar of the Second Amendment emphasizes the indefiniteness of the relation between the introductory participial phrase and the main clause. If you parse the Amendment, it quickly becomes obvious that the first half of the sentence is an absolute phrase (or ablative absolute) that does not modify or limit any word in the main clause. The usual function of absolute phrases is to convey information about the circumstances surrounding the statement in the main clause, such as its cause. For example: “The teacher being ill, class was cancelled.”

The importance of this can be illustrated with a simple example. Suppose the Constitution provided:

A well educated Electorate, being necessary to self-governance in a free State, the right of the people to keep and read Books, shall not be infringed.¹³

This provision, which is grammatically identical to the Second Amendment, obviously means the following: because a well educated electorate is necessary to the health of a free state, the right of the people to keep and read books shall not be infringed. The sentence does not say, imply, or even suggest that *only* registered voters have a right to books. Nor does the sentence say, imply, or even suggest that the right to books may be exercised *only* by state employees. Nor does the lack of identity between the electorate and the people create some kind of grammatical or linguistic tension within the sentence. It is perfectly reasonable for a constitution to give *everyone* a right to books as a means of fostering a well educated electorate. The goal might or might not be reached, and it could have been pursued by numerous other means. The creation of a general individual right, moreover, would certainly have other effects besides its impact on the electorate’s

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The conclusion is inescapable: the prefatory language of the Second Amendment does not imply, or even suggest, that the operative clause means anything different than it would mean without the prefatory explanation.

educational level. And lots of legitimate questions could be raised about the scope of the right to books. But none of this offers the slightest reason to be mystified by the basic meaning of the sentence.

The Second Amendment is no different. Modern readers may have difficulty in seeing how a general right of individuals to keep and bear arms could contribute to a well regulated militia and to the security of a free state, and we shall explore that question in more detail below. But the text of the Second Amendment offers not the slightest warrant for presupposing that the answer to the question is that its framers were semi-literate fools who meant to say something like “The states shall have the right to maintain independent military forces for use against the federal government.”

THE PATENT AND COPYRIGHT CLAUSE AND THE CONSTITUTION’S PREAMBLE

The Second Amendment is unique among the elements of the Bill of Rights in containing an explanation of its purpose. But one provision of the original Constitution is similar to the Second Amendment in this respect. The Patent and Copyright Clause provides:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.¹⁴

Unlike the Second Amendment, this constitutional provision really does seem to imply through its grammatical structure that its statement of purpose serves a definite limiting function. On its face, the provision grants Congress a power to pursue a stated goal and to do so only by specified means. The natural reading of the provision is that Congress may grant copyrights to authors and patents to inventors *only if* doing so will promote the progress of science and useful arts. From this natural and logical reading, it would seem to follow that Congress has no power at all to grant copyrights to pornographers or racist hate mongers, whose writings do nothing to promote the progress of science or useful knowledge. Similarly, it would seem to follow that Congress has no power to grant copyrights to Luddites, who are actively seeking to *retard* the progress of science and the useful arts.¹⁵

Notwithstanding these obvious implications from the text of the clause, Congress has extended copyright protection to all manner of writings that obviously contribute nothing, or less than nothing, to the progress of knowledge. And the courts have never held or even suggested that Congress has thereby exceeded its authority. If the grammatically limiting language of the Patent and Copyright Clause does not in fact limit the power granted by that clause, the prefatory language of the Second Amendment—which does *not* serve a limiting function grammatically—cannot possibly limit the scope of the right in the amendment’s operative clause.

Similarly, the Constitution’s Preamble says that its purposes include the establishment of “justice” and promotion of the “general welfare.” Nobody thinks that this authorizes the courts to strike down every unjust statute or every special interest pork barrel appropriation. Moreover, state constitutions from the founding period were littered with

explanatory prefaces like the one in the Second Amendment, and they have never been construed to change the meaning of the operative clauses to which they were appended.¹⁶

The conclusion is inescapable: the prefatory language of the Second Amendment does not imply, or even suggest, that the operative clause means anything different than what it would mean without the prefatory explanation.

THE PURPOSE OF THE SECOND AMENDMENT

At this point, one might reasonably ask: If the prefatory phrase simply explains the operative clause, without limiting or qualifying it, what in the world does an individual right to arms have to do with a well-regulated militia? The answer to this question requires some historical background, and it requires some additional attention to the text of the original Constitution.

First, it must be recalled that the founding generation had a deep and widespread mistrust of peacetime standing armies. Many Americans believed, on the basis of English history and the colonial experience, that central governments are prone to use armies to oppress their own people. One way to reduce that temptation would be to allow the government to raise armies (consisting of full-time paid troops) only when they're needed to fight foreign adversaries. For other purposes, such as responding to sudden invasions or similar emergencies, the government could be restricted to using a militia consisting of ordinary civilians who receive a little bit of unpaid military training on a part-time basis.

This was part of a tradition deeply rooted in English history, but the original Constitution did *not* take this approach, for reasons we'll explore. But before going into the details, we should focus on five features of the original Constitution that are crucially important in understanding the Second Amendment.

- First, *the militia is not the army*. The Constitution has separate provisions for each and it never confuses or blends the two.¹⁷
- Second, *Congress was given almost plenary authority over the army and the militia alike*. The only powers reserved to the states were the rights to appoint militia officers and to train the militia according to rules prescribed by Congress.¹⁸
- Third, *the Constitution nowhere defines the militia*. There is abundant historical evidence that the founding generation saw a fundamental difference between armies (usually composed of professional soldiers) and the militia (consisting of civilians temporarily summoned to meet public emergencies). But there is also abundant evidence that the founding generation was acutely aware that the militia could readily be converted into the functional equivalent of an army. There had been examples of this in England, and we have an example today in the form of the National Guard, which is now a fully integrated component of the federal armed forces.¹⁹
- Fourth, *the Constitution imposes no duties whatsoever on the federal government, either with respect to armies or with respect to the militia*. Congress is not required

The Second Amendment cannot possibly have been meant to constitutionalize a right of the states to keep up military organizations like the National Guards. That theory implies that the Second Amendment silently repealed or amended two separate provisions of the Constitution: the clause giving the federal government virtually complete authority over the militia, and the clause forbidding the states to keep troops without the consent of Congress.

Whatever the federal government does or fails to do about the militia, the Second Amendment forbids it from disarming citizens under the pretense of regulating the militia.

to organize the militia in any particular way, or to keep it well regulated, or indeed to do anything at all to secure its existence.

- Fifth, *the Constitution expressly prohibits the states from keeping troops without the consent of Congress.*²⁰

Turning back to the Second Amendment with these facts in mind, it becomes apparent why the Second Amendment cannot possibly have been meant to constitutionalize a right of the states to keep up military organizations like the National Guards. That theory implies that the Second Amendment silently repealed or amended two separate provisions of the Constitution: the clause giving the federal government virtually complete authority over the militia, and the clause forbidding the states to keep troops without the consent of Congress. When the Bill of Rights was adopted, nobody so much as suggested that it would alter these provisions, and nobody claims such a thing today. Indeed, these two provisions of the original Constitution have allowed the federal government essentially to eliminate the state militias as independent military forces by turning them into adjuncts of the federal army through the National Guard system. Under the states' right theory of the Second Amendment, the National Guard system must be unconstitutional, which everyone (including the Supreme Court) agrees is not the case.

The five elements of the original Constitution described above also help to explain the relationship between its introductory phrase and its operative clause. The relationship turns out to be deceptively simple, once we set aside the frame of mind encouraged by our experience with the modern bureaucratic Leviathan.

When we talk about making some aspect of life “well regulated” today, we usually mean that it should be *heavily* regulated, or at least *more* regulated. But this is simply a modern prejudice. The term “well regulated” does not imply heavy regulation, or more regulation. When you pause over the term, you should easily recognize what would have been much more immediately apparent to any eighteenth-century reader: something can only be “well regulated” when it is not *overly* regulated or *inappropriately* regulated.

Recall that the original Constitution gave Congress almost unlimited authority to regulate the militia. As the operative clause of the Second Amendment makes clear, its purpose is simply to forbid one kind of inappropriate regulation (among the infinite possible regulations) that Congress might be tempted to enact under its sweeping authority to make all laws “necessary and proper” for executing the powers granted by the Constitution.²¹ What is that one kind of inappropriate regulation? *Disarming the citizenry from among which any genuine militia must be constituted.*

Congress is permitted to do many things to ruin the militia, and to omit many things that are necessary for a well regulated militia. Congress may pervert the militia into the functional equivalent of an army, or even deprive it completely of any meaningful existence. A lot of those things have in fact been done, and many members of the founding generation would have strongly disapproved. But the original Constitution allowed it, and the Second Amendment did not purport to interfere with congressional latitude to regulate the militia. What the Second Amendment does is to expressly forbid one particular, and particularly extravagant, extension of Congress' authority to make laws “necessary and proper” for exercising its control over the militia. Whatever the federal government does or fails to do

about the militia, the Second Amendment forbids it from disarming citizens under the pretense of regulating the militia.

THE CONSTITUTIONAL CONVENTION

At this point, one might object that simply forbidding one particular inappropriate regulation makes a pretty trivial contribution to fostering a well regulated militia. There is some truth in this objection, but less than one may think at first.

The Second Amendment was a response to a more specific and difficult political problem than most other provisions in the Bill of Rights. Because of historical memories going back to the period before the English Revolution of 1689, and because of actual memories of abuses by British troops in the colonies, the founding generation was marked by a strong and widespread aversion to peacetime standing armies. The militia system was treasured by many people primarily because the existence of a well regulated militia, composed of civilians readily available for emergency military service, tended to deprive the government of an excuse for maintaining standing armies.

Not everyone shared this sentiment. Alexander Hamilton, for example, thought the militia system was stupid, primarily because it violated the basic economic principle of the division of labor.²² More important, however, even those who treasured the militia recognized that it was fragile. And the reason it was fragile was the same reason that made Hamilton think it was stupid: citizens were always going to resist undergoing unpaid military training, and governments were always going to be strongly tempted to acquire more professional (and therefore more efficient and tractable) forces.

This led to a dilemma at the Constitutional Convention. Experience during the Revolutionary War had demonstrated convincingly that militia forces could not be relied on for national defense. The decision was therefore made to give the federal government almost unfettered authority to establish armies, including peacetime standing armies. But that decision created a threat to liberty, especially in light of the fact that the Convention also decided to forbid the states from maintaining armies without the consent of Congress.

One solution might have been to require Congress to establish and maintain a well-disciplined militia. This would have deprived the federal government of the excuse that it needed peacetime standing armies, and it would have established a meaningful counterweight to any rogue army that the federal government might create. That possibility was never taken seriously, and for good reason. How could a Constitution define a well-regulated or well-disciplined militia with the requisite precision and detail? It would almost certainly have been impossible.

Another solution might have been to forbid Congress from interfering with state control over the militia. This was also unworkable. Fragmented control over the militia would inevitably have resulted in an absence of uniformity in training, equipment, and command, and no really effective fighting force could have been created.

“Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.”

—The Federalist No. 46

Implicit in the debate between the Federalists and Anti-Federalists were two shared assumptions: first, that the proposed new Constitution gave the federal government almost total legal authority over the army and the militia; and, second, that the federal government should not have any authority at all to disarm the citizenry.

In effect, the choice was between a militia under state control, which would be too weak to prevent federal tyranny, and a militia under federal control, which almost by definition could not be expected to prevent federal tyranny. This conundrum couldn't be solved, and the Convention did not purport to solve it. Neither does the Second Amendment. What the Second Amendment does is ameliorate the problem to a very limited extent. Faced with a choice between a standing army and a well-regulated militia, the federal government might well prefer to establish a standing army and allow the militia to fall into desuetude. But faced with the choice between a well-trained militia and an armed but undisciplined citizenry, the government might prefer to keep the militia in good order. In this way, and in this way alone, the Second Amendment could contribute to fostering a well-regulated militia.

This interpretation of the Second Amendment is consistent with the historical evidence. Consider, for example, just one illustration from the ratification debates about the original Constitution. A number of Anti-Federalists argued that federal control over the militia would take away from the states their principal means of defense against federal oppression and usurpation, and that European history demonstrated how serious the danger was. James Madison responded that such fears of federal oppression were overblown, in part because the new federal government was structured differently from European governments. But then he pointed out a decisive difference between America and Europe: the American people were armed and would therefore be almost impossible to subdue through military force, even if you assumed that the federal government would try to use its armies to do so. Here is what he said in *The Federalist No. 46*:

Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes.

Implicit in the debate between the Federalists and Anti-Federalists were two *shared* assumptions: first, that the proposed new Constitution gave the federal government almost total legal authority over the army and the militia; and, second, that the federal government should not have any authority at all to disarm the citizenry.

The disagreement was only over the narrower question of how effective armed civilians could be in protecting liberty. Anti-Federalists undoubtedly regarded the armed citizenry, and hence the Second Amendment itself, as a rather trivial safeguard against federal oppression. They may well have recognized that it had some value, for the mere existence of arms among the populace would raise the costs and risks of governmental oppression. But they could easily and plausibly have believed that there was no realistic prospect, even in the eighteenth century, that an unorganized and untrained body of citizens could prevail in battle against a determined federal government deploying a genuine army.

The very inadequacy (from an Anti-Federalist point of view) of the protection that an armed citizenry could offer against federal oppression, however, also rendered the Second Amendment completely noncontroversial. It is true that it could not satisfy Anti-Federalist

desires for constitutional provisions aimed at preserving the military superiority of the states over the federal government. Attempting to satisfy that desire would have been hugely controversial, and it would have entailed amending the original Constitution. Nobody suggested that the Second Amendment could have any such effect, but neither did anyone suggest that the federal government needed or rightfully possessed the power to disarm American citizens. And not a single person ever so much as hinted that the Second Amendment created or protected any sort of right belonging to state governments.

As a political gesture to the Anti-Federalists, a gesture highlighted by the Second Amendment's prefatory language, express recognition of the right to arms was something of a sop. But the provision was easily accepted because *everyone* agreed that the federal government should not have the power to infringe the right of the people to keep and bear arms, any more than it should have the power to abridge the freedom of speech or prohibit the free exercise of religion. Like those freedoms, the right to keep and bear arms is an individual right belonging to every citizen, and one that nobody thought the federal government would have a legitimate reason to infringe.

Where does this leave us? It leaves us with a great many interesting and important questions about the meaning of the Second Amendment. But before those questions can be addressed properly, we have to free ourselves from the notion that the constitutional right to keep and bear arms is essentially tied up with military service, or that it was meant to create a right of states to maintain a military counterweight against the federal government. Such notions have no basis in the text or history of the Constitution.

THE SECOND AMENDMENT TODAY ²³

The Second Amendment was not the least bit controversial when it was adopted, except among some Anti-Federalists who complained that it was too weak. This may seem quite odd to the modern reader, for it is self-evident to almost all of us that some forms of gun control are indispensable in a civilized society. Even the most ardent libertarians recognize that private citizens should not possess nuclear weapons or shoulder-fired antiaircraft rockets, and very few people think that everyone should be able to buy a machinegun or a flamethrower at the hardware store. But don't the laws restricting access to these weapons infringe the right of the people to keep and bear arms?

Two principal factors explain the relative insouciance of the founding generation. First, the "arms" referred to in the Second Amendment probably included only those that a single person could carry and operate (not artillery), and these so-called small arms were fairly primitive in the late eighteenth century. No Stinger missiles. Not even revolvers or other rapid-fire devices, let alone machineguns. Furthermore, the weapons carried by soldiers were no more lethal or subject to abuse than those typically kept by civilians for hunting and self defense.

Second, and much more important, the Second Amendment (and the rest of the Bill of Rights as well) originally restricted only the federal government, not the state governments. There was little need for the Framers to be concerned about the details of the

The provision was easily accepted because everyone agreed that the federal government should not have the power to infringe the right of the people to keep and bear arms, any more than it should have the power to abridge the freedom of speech or prohibit the free exercise of religion.

Anyone who thinks the anti-tyranny function of the Second Amendment is completely irrelevant today should also spend some time considering the historical experience of black Americans. At least until quite recently, one of the chief purposes of many gun control laws was to help secure the political subordination of the black population.

inevitable tradeoffs between individual freedom and public safety because the Constitution left the states free to balance those competing goals in whatever ways they thought fit. Every state was left free by the federal Bill of Rights to establish an official religion, to require a government license in order to publish a newspaper, or to abolish the right of trial by jury. Similarly, the states were left free to regulate the private possession of weapons in whatever way seemed appropriate to them. The Framers could therefore have reasonably expected that new issues, like those raised by technological developments in weaponry, could and would be addressed by the state governments as they arose.

Beginning in the late nineteenth century, the Supreme Court began making some (though not all) provisions of the Bill of Rights operate as restrictions on the states as well as on the federal government. The story underlying this legal development is too complex to summarize here,²⁴ but the important point is this: The Supreme Court has never decided whether the Second Amendment will be applied against state laws, and it is impossible to predict what answer the Court will give if it ever chooses to decide the question. This uncertainty has considerable practical significance because almost all of the most severe gun control laws on the books today are state (and local) laws rather than federal laws.

Whether the Second Amendment is applied to the federal government alone, or to state and local governments as well, we have to ask whether it has become outmoded. If one focuses on the concern that primarily animated the founding generation—preventing tyranny—it is quite plain that an armed citizenry is much less important today than it was when the Second Amendment was adopted. Two hundred years of relative political stability have assured us that we have less reason to fear political coups than we might have had when the nation was young. And the great leaps forward in military technology have created a situation in which armed civilians would be less effective in resisting a tyrannical government than their eighteenth century counterparts.

This does not mean, however, that an armed citizenry is completely useless as a deterrent to government oppression. The mere existence of a large stock of arms in private hands inevitably raises the expected costs of governmental repression, and thereby makes it less likely to occur. This insight emphatically does not depend on the assumption that the federal government must be kept militarily inferior to the unorganized militia. On the contrary, it requires only a recognition of the simple fact that decisions about the use of military force are rationally determined, not by the feasibility or even the probability of ultimate success but rather by the ratio of an operation's expected benefits to its expected costs (with the magnitude of the prospective costs and benefits discounted by the probability of their being incurred and attained respectively). Anyone who doubts that proposition should spend a moment trying to figure out why the United States lost the Vietnam War and why the Soviets failed to subdue Afghanistan.

Anyone who thinks the anti-tyranny function of the Second Amendment is completely irrelevant today should also spend some time considering the historical experience of black Americans. At least until quite recently, one of the chief purposes of many gun control laws was to help secure the political subordination of the black population.²⁵ That goal was successfully achieved for a long time, but it might not have been so easy if blacks had enjoyed the same right of access to firearms that the white population reserved for itself.

Apart from the Second Amendment's role in deterring government oppression, the right to arms has another purpose that is every bit as important and urgent today as it was in the eighteenth century. That purpose is to enable American citizens to defend themselves, not against direct oppression by the government, but against oppression from which the government fails to protect them. The principal source of such oppression today is violent criminals.

Those responsible for the adoption of the Second Amendment accepted the individual right of self-defense as the natural basis for the right to arms. Like William Blackstone, and no doubt heavily influenced by him and other natural rights theorists, the people who gave us the Second Amendment drew no fundamental distinction between an individual's right to defend himself against a robber or a marauding Indian and that same individual's right to band together with others in a state-regulated militia. The inseparability of these concepts was reflected in two early state constitutions, which provided: "That the people have a right to bear arms for the defence of themselves and the state" ²⁶ The breadth of the purpose of the right to arms was also apparent in the very first proposal for a bill of rights, which came from an Anti-Federalist minority at the Pennsylvania ratifying convention. The right to arms provision in this proposal reads:

That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power. ²⁷

The Pennsylvania minority report became an influential Anti-Federalist document, and it appears to have reflected typical republican concerns. Virtually every proposal for a bill of rights included a right to arms (which appeared with twice the frequency of demands for protecting the freedom of speech). Additional language praising the militia was added only in three states that acted late in the ratification process. ²⁸

The individual right of self-defense, moreover, was also tied up with the institution of the militia. The eighteenth century militia did not serve merely as a military force in the modern sense. One of the militia's functions in eighteenth century America was to serve as an informal police force in a society that did not have organized government agencies designed to apprehend criminals. Indeed, the Constitution itself recognizes this by authorizing use of the militia "to execute the Laws of the union." More fundamentally, the armed defense of oneself and one's family against criminals was regarded as a legitimate and necessary defense of the community itself, in much the same way that private prosecutors were expected to help enforce the criminal laws. ²⁹

The development of modern police forces has not eliminated this function. Although we seldom call out the traditional militia to keep the peace any more, this practice has in fact survived into modern times. More important, the police do not and cannot protect law-abiding citizens from criminal violence. The impotence of our governments in the face of criminal violence is so obvious that it is simply preposterous to maintain that those individuals with the means and the will to arm themselves are not thereby enhancing their ability to exercise their natural right of self-defense. This thought may not occur to wealthy

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people who can shelter themselves in low-crime enclaves and who care not at all about their less fortunate neighbors. But no one knows it better than the police, who vigorously defend their own right to carry firearms when they are *not* on duty (and often after they retire as well), even while some of them advocate disarming those whom the police cannot protect.

Contrary to a widespread misconception, moreover, violent crime is not reduced by disarmament laws aimed at the general population. The founder of modern criminology, Cesare Beccaria, offered the essential insight that explains this phenomenon over two centuries ago:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.³⁰

Thousands of experiments with firearms restrictions in American states and localities over a long period of time have now provided a rich source of empirical evidence against which Beccaria's conclusion can be tested. When evaluated using the standard tools of quantitative social science, this evidence does not indicate that American gun control laws restricting the availability of firearms to the general population reduce violent crime.

This fact deserves the utmost emphasis, although it is not practicable to attempt a detailed summary of the empirical studies here. The conclusions of these studies should not be surprising, for they can only seem counterintuitive to those who fall into the fallacy identified by Beccaria, of wishing to “take fire from men because it burns, and water because one may drown in it.” Firearms can be used for both illegitimate purposes and for legitimate purposes. Restrictions on civilian access to firearms cannot even claim to make any sense unless they can plausibly be expected to reduce illegitimate violence more than they reduce legitimate acts of self-defense and law enforcement. Illegitimate violence occurs in three main ways: (1) an individual procures a gun in order to use it in crime; (2) an individual procures a gun for legitimate purposes, but ends up misusing it spontaneously; and (3) a gun obtained for legitimate purposes kills or injures someone through an accident.

The problem associated with the first category is extremely unlikely to be ameliorated by firearms restrictions that apply to the general population, essentially for the reason identified by Beccaria. The demand for guns by criminals is highly inelastic, while the supply is very elastic indeed. Criminals simply are going to obtain firearms so long as the cost of obtaining them does not exceed the benefits the criminal expects them to bring. How could gun control laws change this cost-benefit ratio? If the penalties for possessing firearms were raised to a very high level, many potential *victims* would certainly be disarmed. A significant fraction of *criminals*, however, would continue to arm themselves in the expectation of violent encounters with other criminals (as in the drug trade) or with the police.

At the same time, we would expect to see guns used less frequently in some crimes that involve preying on civilians, such as burglary and robbery, because the potential victims would themselves be less likely to be armed. That, however, does not mean that these crimes would themselves decrease. On the contrary, substitution effects would occur. Other weapons, such as knives and clubs, would be used instead of guns to commit the same crimes. There might, in addition, be some substitution of burglaries for robberies. Similarly, stringent gun control laws might well cause the criminals who commit crimes like robbery to be more careful to seek physically weaker victims like women and the elderly. No one has ever explained why such substitution effects should count as a gain in social welfare, especially when potential victims would also be more vulnerable to those criminals who would continue to use firearms.

In theory, general restrictions on the possession of firearms by civilians could reduce the incidence of violence arising from the other two categories. Accidents, however, are a trivially small cause of firearms deaths. That leaves the so-called "crimes of passion"—unplanned murders that would not occur if the perpetrator did not happen to have ready access to a firearm. The effect of gun control laws on this category of crime is extremely difficult to isolate, for a variety of reasons. First, the criminal justice system's statistical records do not distinguish systematically between planned and unplanned crimes. Second, many apparently spontaneous murders in which a gun was used, especially those resulting from domestic disputes, might have been committed with other weapons if a gun had been unavailable. Third, the number of spontaneous murders prevented by gun control laws would be partially offset, or more than offset, by murders (including some spontaneous murders) that took place only because the gun control laws themselves caused the victims to be unarmed when they were attacked.

The virtual inevitability of substitution effects and offsetting effects suggest that there is no particularly good reason to expect that general restrictions on firearms would reduce the overall incidence of gun violence. In fact, the empirical evidence has not shown any such effect, while it *has* shown that crime victims are quite successful in using firearms to defend themselves.³¹ It may be possible to devise regulations that would reduce the incidence of spontaneous murders and negligent shootings without significant negative offsetting effects, but such regulations might also be distinguished for constitutional purposes from the usual restrictions that apply indiscriminately to the general population.

This does not imply that a well armed populace is a panacea for the problem of violent crime. The same merciless realities that prevent the usual forms of gun control from accomplishing their stated purposes also ensure that civilian access to firearms can continue to co-exist quite easily with a high rate of crime. It does imply, however, that the government is on very weak ground when it offers vague and speculative social welfare goals to justify depriving a complaining individual of the right to have tools that are manifestly helpful in serving that individual's interest in defending himself (and especially herself, since women are generally more physically vulnerable to violent attacks than men and much more likely to be the victims of certain violent crimes).

In any event, the judicial obligation to enforce the Second Amendment is not contingent on someone's proving that an armed citizenry is a cure-all for crime, any more than the obligation to enforce the First Amendment depends on its ability to eliminate lies and corruption from the public discourse. In terms suggestively reminiscent of Beccaria's

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This direct evidence tended to confirm the results of a careful study of the attitudes of imprisoned felons, who reported both considerable sensitivity to the odds of their victims being armed and numerous occasions on which they had refrained from committing a crime because of the prospect that the chosen victim might be armed.

critique of gun control laws, Justice William Brennan eloquently explained why it is a mistake to think that freedom should be abolished merely because some people are bound to misuse it:

The constitutional protection [provided by the First Amendment] does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."...[T]o persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of *the probability of excesses and abuses*, these liberties are, *in the long view*, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.³²

Someone who strongly disapproved of our raucous and often degrading marketplace of ideas could easily believe that the freedoms of speech and press protected by the Court's First Amendment jurisprudence do not have enough social utility (even "in the long view") to outweigh the excesses and abuses to which they frequently lead. The constitutional test, however, cannot depend on its acceptability to people who take that position, even if they are very numerous or politically influential. As the quotation above suggests, and as hundreds of decisions over the course of many decades confirm, the courts do not demand that First Amendment rights be held to such a standard. Doing so would obviously amount to repealing the First Amendment by judicial fiat. Instead, the Court has declared that the Constitution creates a strong presumption in favor of individual freedom, and has imposed a heavy burden of justification on governments that impose restrictions on speech or the press.

The differences between the First and Second Amendments are obvious enough, but the similarities are more important. In both cases, the Constitution establishes a rule that protects a human activity that its Framers regarded as a natural right: thought and self-governance in the one case and self-defense in the other. In both cases, the Constitution reflects a determination that the social benefits of giving legal protection to the instruments needed for the pursuit of those goals will outweigh the inconveniences arising from their misuse. In both cases, the erection of this barrier against the state governments will necessarily involve the courts in the business of balancing the public welfare against the interests of those individuals whose liberty the government wants to restrict. In neither case, however, does the accretion of this power to the courts justify them in striking the balance differently than an honest reading of the Constitution suggests.

Supreme Court Justices, it is true, are drawn from a class of people who are among the least vulnerable to violent criminals. The reputations of individual Justices, moreover, are highly dependent on the good will of the journalists and academics who depend on the freedom of speech for their livelihoods and social ascendancy. This may make it easier for members of the Court to appreciate the value of the First Amendment than to see why the Second Amendment still matters. If they gave the matter the disinterested attention that we have a right to expect from our judicial magistrates, however, the Justices should acquire serious doubts about the constitutionality of many currently popular restrictions on firearms. I will conclude with brief discussions of three examples, not in an effort to carry out the

impossible task of offering a comprehensive exposition of an undeveloped jurisprudence, but to illustrate that serious legal questions need to be raised about statutes whose constitutionality is too often taken for granted.

First, consider the federal ban on certain so-called “semiautomatic assault weapons.” This law applies to nineteen guns specifically identified by make and model, and to any other rifle (except some that are specifically exempted) that both accepts a detachable magazine and possesses any two of the following characteristics: a folding or telescoping stock, a bayonet lug, a flash suppressor, a pistol grip, or a grenade launcher.³³

This statute is fundamentally irrational because it restricts access to certain weapons on the basis of essentially cosmetic features, leaving functionally identical arms unaffected. There is no general principle related to public safety that one can use to distinguish two otherwise identical carbines, one of which has a pistol grip and folding stock and the other of which has a grenade launcher but none of the other four suspect attachments. Nor can one rationally explain why a carbine that has a flash suppressor should become illegal when a bayonet lug is added, but should then become legally innocuous when either the lug or the flash suppressor is removed.

Ironically, this “assault weapon” statute is so deeply arbitrary that it cannot itself actually undermine the purposes of the Second Amendment in any appreciable way. It bans only a limited class of weapons configured with certain random accouterments, leaving essentially identical arms unrestricted and leaving citizens free to keep any of the accouterments ready to be attached to the weapon if need be.

This does not imply, however, that courts should uphold the regulation. As the Supreme Court has recognized in the analogous area of the First Amendment, leaving legislatures free to engage in whimsical infringements on fundamental rights prepares the way for more serious assaults on individual liberty. Just as no court would interpret the First Amendment to allow Congress to ban the use of words that contain diphthongs, even if perfectly adequate synonyms for all such words remained available, so the courts should decline to authorize equally trivial but irrational infringements on the right to arms.

A Court that takes its constitutional responsibilities seriously would also be likely to invalidate laws that affect less bizarrely defined classes of weaponry. Consider, for example, the law in Washington, D.C., where virtually all civilians are forbidden to possess any handgun that was not registered prior to September 24, 1976.³⁴ Because citizens are permitted to possess rifles and shotguns, though only if they comply with onerous registration requirements and only if they keep them unloaded and disassembled,³⁵ the infringement on the right to keep and bear arms is not absolutely complete. The infringement is nonetheless very substantial, for handguns have important functional advantages in self-defense, primarily arising from their concealability, portability, and maneuverability in confined spaces like those in which many city residents live. Moreover, to the extent that handguns can be and are replaced by rifles and shotguns, the likely effect of the law is to increase the number of deaths from gunfire because shoulder-fired weapons are generally much more lethal than handguns.³⁶

It is unlikely that the government could present any plausible argument for concluding that the handgun ban serves a genuine public purpose in a way that justifies the infringement of constitutional rights. To see how problematic the constitutionality of this law

The Lott study, which is far more successful in controlling for relevant variables than previous gun control studies, dramatically confirms Beccaria's theoretical insight and refutes long-standing conventional wisdom. When the chances of encountering an armed victim go up, violent crime goes down, and this effect is particularly pronounced in urban areas with high crime rates.

If the entire nation had adopted concealed carry laws like Florida's in 1992, Lott's evidence indicates, many thousands of murders and rapes would have been prevented. In the face of such evidence, it is hard to see why courts should allow governments to rely on slogans and prejudices as a reason for stripping potential victims of their right to protect themselves from violent predators.

is, imagine that the government banned cable television from Washington, D.C. on the theory that the corrupting nature of television programming was contributing to the city's notoriously high rate of violent crime. This would not be an irrational statute. The government has an obvious and legitimate interest in reducing such crime, and there is research indicating that television programming may be a contributing factor to high crime rates.³⁷ Indeed, the evidence to support this conclusion may be significantly stronger than any evidence suggesting that Washington's gun ban could have an ameliorative effect on the rate of violent crime.³⁸ It is inconceivable that any court would uphold such a ban on cable television, and it is not the least bit obvious that the Supreme Court would have any greater justification for upholding the existing gun control law.

Finally, consider the restrictions that our governments commonly place on carrying weapons in public. If the courts took the right of self-defense as seriously as they should, and thought through its implications with respect to the tools needed to exercise that right when it matters, they would have to confront the fact that the Second Amendment protects both the right to keep arms and the right to *bear* them. That does not mean that the government can put no restrictions on the people's right to carry weapons about in public, any more than the First Amendment forbids government from imposing certain kinds of restrictions on the exercise of free speech. It does mean, however, that the government should face a heavy burden when called upon to justify such restrictions, which often operate to deprive the people of access to weapons in just those circumstances when they are most needed.³⁹

This burden might be quite difficult to meet. An important body of evidence began to develop after the state of Florida dramatically loosened its restrictions on the carrying of concealed weapons in 1987. Although it has long been true that American jurisdictions with the most restrictive gun controls have also tended to have the highest crime rates, it has also been plausible to suppose that the restrictive laws were a result rather than a cause of the high crime rates. Like many states with high crime rates, Florida had traditionally left considerable discretion to issue concealed-carry permits in local government officials, and most urban areas issued very few permits. In 1987, the state adopted a new system, in which an applicant who passed a background check and took a training class was automatically issued a permit upon payment of a small fee. Infinitesimal numbers of concealed-carry permit holders used their guns for criminal purposes, and criminal violence overall may well have dropped because of the new law.⁴⁰ In fact, there is apparently direct evidence that Florida criminals began to target tourists specifically because they knew that tourists are less likely than residents to be armed.⁴¹ This direct evidence tended to confirm the results of a careful study of the attitudes of imprisoned felons, who reported both considerable sensitivity to the odds of their victims being armed and numerous occasions on which they had refrained from committing a crime because of the prospect that the chosen victim might be armed.⁴²

Florida's well-publicized success with liberalized carry laws encouraged other states—including Virginia—to adopt similar reforms, and it has now become possible to make meaningful statistical estimates of the effect that concealed-carry laws have on crime rates. A very sophisticated study by John R. Lott, Jr. used cross-sectional time-series data at the county level to confirm a strong connection between giving law-abiding citizens the right to carry a concealed weapon and a large deterrent effect on violent crime.⁴³ The Lott study, which is far more successful in controlling for relevant variables than previous gun control studies, dramatically confirms Beccaria's theoretical insight and refutes long-standing

conventional wisdom. When the chances of encountering an armed victim go up, violent crime goes down, and this effect is particularly pronounced in urban areas with high crime rates. While it may be true that high rates of violent crime provoke stricter gun control laws, those laws in turn drive the rates even higher. If the entire nation had adopted concealed carry laws like Florida's in 1992, Lott's evidence indicates, many thousands of murders and rapes would have been prevented. In the face of such evidence, it is hard to see why courts should allow governments to rely on slogans and prejudices as a reason for stripping potential victims of their right to protect themselves from violent predators.

This is not to say, of course, that empirical social science can offer meaningful assistance with every question that will arise concerning the costs and benefits of gun control laws. If the Second Amendment were treated like the First Amendment, cases involving restrictions on the right to carry weapons in public would present the courts with some difficult questions, and they would surely make some mistakes. That, however, is simply one more way in which the Second Amendment resembles the First Amendment.

A RAY OF LIGHT

The United States Court of Appeals for the Fifth Circuit recently took the first crucial step toward a restoration of the Second Amendment to its rightful place in our constitutional jurisprudence. In *United States v. Emerson*, that court emphatically embraced the conclusion that the right to keep and bear arms is a private right belonging to individual American citizens. In a lengthy and scholarly opinion, the court offered a careful textual exegesis and a thorough review of the relevant constitutional history. On the basis of this analysis, the court unequivocally repudiated the views of the many other appellate courts that had adopted the collective- or states'-right theory of the Second Amendment.

Notwithstanding its embrace of the individual-right interpretation, the Fifth Circuit upheld the federal criminal statute under which Emerson had been prosecuted. That statute forbids an American citizen to possess firearms while he is subject to a state court restraining order that prohibits the use or threat of physical violence against his "intimate partner" or child. A serious constitutional question arose because such a restraining order had been issued to Emerson as part of a routine divorce case even though (1) the divorce court judge had not explicitly ruled that there was any actual danger of such violence, and (2) the record of the state court proceeding contained no evidence of any direct threats by Emerson against his wife or child. The trial court had concluded, plausibly enough, that Emerson should not lose his Second Amendment rights merely because a state judge had ordered him to obey laws that he had never broken or threatened to break.

In reversing the trial court, the Fifth Circuit interpreted Texas law to forbid the issuance of such restraining orders in the absence of "a realistic threat of imminent physical injury to the protected party," but it *also* concluded that federal law forbids a federal court from inquiring whether this requirement was actually met or not in a particular case. The court also implied quite clearly that if a state's law *did* permit a restraining order to issue without a realistic threat of lawless violence, the Second Amendment would be violated by a federal statute that automatically disarmed someone merely because he was subject to such an order.

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The Second Amendment can continue to serve its fundamental purpose. That purpose is to secure the natural right of self-defense, which is no less threatened when government deprives its citizens of the tools for resisting criminal predators than it would be if the government itself turned outlaw.

In effect, the court is telling those who want to retain their Second Amendment rights that they should not acquiesce in the issuance of restraining orders that are based on factually unsupported assumptions about their proclivity to violence. One might reasonably argue that American citizens should not be able to lose their fundamental constitutional rights as easily as Emerson lost his rights in this case. And one would be right to worry about cases in which state courts are far too quick to perceive a threat of violence that doesn't really exist. But the Fifth Circuit was not behaving outlandishly when it concluded that this particular disarmament statute was adequately supported by overriding governmental interests in preventing the misuse of firearms. And, perhaps more important, the court regarded this as a genuinely close case, for it acknowledged that the nexus between the government's legitimate goal and the means it chose to advance that goal appeared to be only "minimally" sufficient to uphold the statute. For once, a federal appellate court has actually taken the Second Amendment seriously, and that is a great step forward for constitutional law.

CONCLUSION

The Second Amendment unambiguously and irrefutably establishes an individual right to keep and bear arms. This conclusion, which is dictated by the language of the Constitution, is confirmed by an abundance of historical evidence. Nor is it contradicted by anything yet discovered in the Constitution's legislative history or in the historical background that illuminates the understandings of those who adopted the Bill of Rights.

The precise scope of the Second Amendment's guarantee, however, and its proper application in a world that has changed enormously since 1791, cannot be determined solely by reference to the Constitution's text and history. Subsequent developments in the technology of weapons and in military technique have rendered the armed citizen wholly impractical as a substitute for standing armies and much less potent as a deterrent to despotism. At the same time, the increased destructive potential of small arms has raised new questions about the type of "arms" that may appropriately be left in civilian hands and about the regulations that may constitutionally be imposed on civilians' use of their weapons. These questions will assume real importance if the Supreme Court takes up the Second Amendment with the same serious attention that it has given to the First Amendment and other provisions of the Bill of Rights.

Despite all the changes that have occurred, the Second Amendment can continue to serve its fundamental purpose. That purpose is to secure the natural right of self-defense, which is no less threatened when government deprives its citizens of the tools for resisting criminal predators than it would be if the government itself turned outlaw. This simple but momentous insight is the key that opens the door for a serious Second Amendment jurisprudence, and it thus gives the constitutional scheme of ordered liberty its best hope of surviving in the crucible of litigation.

ENDNOTES

¹ *United States v. Emerson*, 46 F. Supp.2d 598 (N.D. Tex. 1999). For a detailed analysis of the case, which was written before the Fifth Circuit's subsequent decision, see Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Texas Review of Law & Politics 157 (1999).

² *United States v. Emerson*, 270 F.3d 203 (5th Cir., 2001). I participated in an *amicus curiae* role in this case, and some of the arguments presented here were adopted by the Fifth Circuit. I will comment briefly on the potential significance of that decision at the end of this essay.

³ The Court's one significant interpretation of the Second Amendment came in *United States v. Miller*, 307 U.S. 174 (1939). The Court's opinion, which was extremely ambiguous, left the lower courts and academic commentators free to argue that the *Miller* decision is consistent with a wide variety of interpretations of the Second Amendment.

⁴ U.S. Const., amend. I.

⁵ U.S. Const., amend. IV.

⁶ U.S. Const., amend. X.

⁷ U.S. Const., art. I, § 9, cl. 3: "No Bill of Attainder or ex post facto Law shall be passed."

⁸ "We the People of the United States . . . do ordain and establish this Constitution . . ."

⁹ U.S. Const., art. I, § 2, cl. 1: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."

¹⁰ Compare U.S. Const., art. I, § 2, cl. 1 with *id.* § 2, cl. 1.

¹¹ U.S. Const., art. II, § 1, cl. 2.

¹² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

¹³ I have borrowed this example, with a slight modification, from Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 University of Detroit Mercy Law Review 1 (1999).

¹⁴ U.S. Const., art. I, § 8, cl. 8.

¹⁵ There would be no necessary conflict between this reading of the Patent and Copyright Clause and the First Amendment because the refusal to grant a copyright would not prevent pornographers, racists, and Luddites from disseminating their views.

¹⁶ See Eugene Volokh, *The Commonplace Second Amendment*, 73 New York University Law Review 793, 807-14 (1998).

¹⁷ Congress is given authority over the army and navy in clauses 12-14 of Article I, section 8. Authority over the militia is conferred separately in clauses 15-16. Similarly, Article II, section 2 makes the President Commander in Chief of the army and navy, and separately makes him Commander in Chief of the militia in certain limited circumstances.

¹⁸ U.S. Const. art. I, § 8, cls. 12-16, provides Congress with the power:

To raise and support Armies, but no Appropriation of Money to that Use shall be for longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

¹⁹ See, e.g., *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

²⁰ U.S. Const., art. I, § 10, cl. 3: “No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace”

²¹ U.S. Const., art. I, § 8, cl. 18: Congress shall have power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and

all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

²² See *The Federalist No. 29*.

²³ For a more detailed version of the following discussion, see Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 *Georgia Law Review* 1 (1996).

²⁴ For a brief introduction to the debate about applying the Second Amendment to the states, see Nelson Lund, *Outsider Views on Guns and the Constitution*, 17 *Constitutional Commentary* 1701 (2000).

²⁵ See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Georgetown Law Journal* 309, 335-58 (1991).

²⁶ Pa. Const. of 1776, art. XIII; Vt. Const. of 1777, art. XV.

²⁷ “Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents” (Dec. 18, 1787), reprinted in 2 *The Documentary History of the Ratification of the Constitution* 623-24 (Merrill Jensen ed., State Hist. of Wis. 1976).

²⁸ See David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 *Journal of Law & Politics* 1, 54 (1987).

²⁹ See Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 *Constitutional Commentary* 87 (1992).

³⁰ Cesare Beccaria, *On Crimes and Punishments* 87-88 (Henry Paolucci trans., 1963) (1764).

³¹ See, e.g., Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 *Journal of Criminal Law & Criminology* 150 (1995).

³² *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964) (emphasis added) (citations omitted).

³³ 18 U.S.C. § 921(a)(30), 922(v). The statute includes similar rules defining certain pistols and shotguns as “assault weapons.” 18 U.S.C. § 921(a)(30)(C)-(D).

³⁴ D.C. Code Ann. §§ 6-2311-2312 (1995). A challenge to this law would not require the Court to decide whether the Second Amendment applies to state laws, but it might well require an analysis of the Exclusive Legislation Clause, U.S. Const. art. I, § 8, cl. 17, and the Territorial Regulation Clause, U.S. Const. art. IV, § 3, cl. 2. Cf. *Cases v. United States*, 131 F.2d 916, 920 (1st Cir. 1942) ("The applicability of the restriction imposed by the Second Amendment upon the power of Congress to legislate for Puerto Rico, or for that matter for any territory, raises questions of no little complexity."); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 105-07 (1953) (noting similarity of powers granted under Exclusive Legislation and Territorial Regulation Clauses).

³⁵ D.C. Code Ann. §§ 6-2313-2320.

³⁶ Rifles and shotguns of the kind typically used for hunting are much more powerful than ordinary handguns, a characteristic made possible by their greater weight and by the fact that they are braced against the shoulder when fired. As a result, people shot with handguns die from their wounds at a rate of approximately 5-10%, whereas shotgun wounds produce death rates of approximately 80%. Gary Kleck, *Handgun-Only Gun Control: A Policy Disaster in the Making*, in *Firearms and Violence: Issues in Public Policy* (Don B. Kates, Jr. ed., 1984).

³⁷ See, e.g., Brandon S. Centerwall, *Exposure to Television as a Risk Factor for Violence*, 129 *American Journal of Epidemiology* 643 (1989) (discussing studies that indicate strong relationship between television and violent crimes); Kenneth D. Gadow & Joyce Sprafkin, *Field Experiments of Television Violence with Children: Evidence for an Environmental Hazard?*, 83 *Pediatrics* 399 (1989) (explaining findings from experiment to determine short-term effect of violent television on child social behavior).

³⁸ The empirical evidence suggests, if anything, that the D.C. regulations may have led to an increase in the homicide rate in that jurisdiction. See Bruce H. Kobayashi, *Gun Control, Strict Liability, and Excise Taxes*, in W.F. Shughart, II ed., *Taxing Choice: The Predatory Politics of Fiscal Discrimination* (1997).

³⁹ Approximately nine out of ten violent crimes occur outside the home. U.S. Dept. of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States, 1991*, at 75 (1992).

⁴⁰ See, e.g., Gary Kleck, *Point Blank: Guns and Violence in America* 411-14 (1991).

⁴¹ Wayne LaPierre, *Guns, Crime, and Freedom* 22-23 (1994).

⁴² James D. Wright & Peter H. Rossi, *Armed and Dangerous: A Survey of Felons and Their Firearms* 141-59 (expanded ed. 1994).

⁴³ John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (2d ed., 2000).

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