

The Second Amendment: Infringement



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.

–Amendment II, United States Constitution

In April 1995, I joined three other scholars testifying before the U.S. House Judiciary Committee's Subcommittee on Crime about our research into the meaning of the Second Amendment. As we gave evidence that the Second Amendment guaranteed an individual right to be armed and why the Founders believed it essential, the Republican members of the committee listened politely and with interest. Every Democrat on the committee, however, turned upon us with outrage and disdain. I felt startled and dismayed. The meaning of the amendment, at least for these representatives, seemed less a matter of evidence than of party politics. Sitting opposite us, arguing against an individual right, Dennis Henigan, general counsel for Handgun Control, Inc., presented the committee with a full-page advertisement from the *New York Times* signed by scores of scholars denying that a right to be armed existed. At this juncture one of my copanelists, Daniel Polsby, then a professor at Northwestern School of Law, pointed out that one signer, a colleague of his, was no expert on constitutional law, let alone the Second Amendment, and that to his knowledge none of the other signers had ever conducted research into the issue. For the

scholars who put their names to that testimonial, the conviction that there was no individual right to be armed was an article of faith. The attitudes of both the politicians and the scholars are regrettable. We are all the losers when constitutional interpretation becomes so politicized that otherwise reasonable people are neither willing to accept, nor interested in, historical truth.



Fig. 1. Edmund Randolph, "Objections to the Constitution as far as it has advanced . . ." August 30, 1787. The Gilder Lehrman Collection, courtesy of the Gilder Lehrman Institute of American History, New York.

Political wrangles over the limits of constitutional guarantees are common, proper, and even necessary. The battle over the Second Amendment, however, is being waged at a more basic level, the very meaning of the amendment. This too is understandable where there is doubt about the Framers' intent. But once evidence of that intent is clear, as it now is, further argument, even in the service of a worthy political agenda, is reprehensible. It becomes an attempt to revise the Constitution by misreading, rather than amending it, a precedent that puts all our rights at risk. The argument over the Second Amendment has now reached that stage. But first, some background.

Two important points should be kept in mind as we briefly review this history. First, the debate over the meaning of the Second Amendment is surprisingly recent. Second, many of those who question or disparage the right do so because they believe that guns, in and of themselves, cause crime. Until the end of the nineteenth century, few Americans doubted their right to be armed. The Founders believed privately owned weapons were necessary to protect the three great and primary rights, "personal security, personal liberty, and private property." An armed people could protect themselves and their neighbors against crime and their liberties against tyranny. Madison and his colleagues converted their English right to "have Armes for their defence Suitable to their Condition, and as allowed by Law," into a broader protection that took no account of status and forbade "infringement." "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize," the *Philadelphia Federal Gazette* explained when the proposed amendment was first publicized, "and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed . . . in their right to keep and bear their private arms." In the 1820s William Rawle, who had been offered the post of attorney general by George Washington, found, "No clause in the constitution could by any rule of construction be conceived to give Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." Supreme Court Justice Joseph Story, writing in 1840, agreed that the right of the people to keep and bear arms had "justly been considered, as the palladium of

the liberties of a republic." And after the Civil War, the charge Southern whites were depriving blacks of their right to be armed was instrumental in convincing Congress to pass the Fourteenth Amendment.



Fig. 2. The Concord Minuteman by Daniel Chester French. This sculpture can be found today at the Old North Bridge in Concord, Massachusetts. Photo by Douglas Yeo, www.yeodoug.com.

Then politics intervened. Early in the twentieth century when American whites, fearful of blacks in the South and the millions of foreign immigrants in the North, wanted to restrict access to firearms, alternative readings of the amendment gained credence. In the absence of serious scholarship, constructions that reduced or eliminated the individual right to be armed seemed plausible, especially in light of the awkward construction of the Second Amendment and the sparse congressional debates during its drafting, both of which relied upon common understandings of the value of a society of armed individuals that had faded over time. These new interpretations emphasized the dependent clause referring to the militia, to the neglect of the main clause's guarantee to the people. The theory developed that the Second Amendment was merely intended to enhance state control over state militia; that it embodied a "collective right" for members of a "well-regulated" militia—today's National Guard—to be armed, not a personal right for members of a militia of the whole people, let alone for any individual. Even when an individual right was conceded, the amendment was proclaimed a useless anachronism. After all, twentieth-century Americans had the police to protect them while armed individuals would be helpless against a government bent on oppression.

Beset by fears and armed with alternative readings of the Second Amendment, restrictive gun legislation followed. In 1911 New York State passed the Sullivan Law that made it a felony to carry a concealed weapon without a license, or to own or purchase a handgun without obtaining a certificate. Discriminatory laws in the South kept blacks disarmed. The first federal gun legislation, the National Firearms Act of 1934, introduced controls on automatic weapons, sawed-off rifles and shotguns, and silencers, weapons popular with gangsters. It was more than thirty years before rising crime-rates, urban riots, and three political assassinations again led to demands for stricter federal firearms legislation. The resulting Gun Control Act of 1968 limited mail-order sales, the purchase of firearms by felons, and the importation of military weapons. Professor Robert Cottrol finds this statute "something of a watershed" for, since its passage, the debate over gun control and the right to be armed have become "semi-permanent features" of late twentieth century American life. And "semi-permanent" the debate remains as we enter the twenty-first century.

The argument over the Second Amendment became and remains intense and highly political because the stakes are so great. Americans suffer from a high rate of

armed crime that many insist is caused, or made worse, by easy access to firearms. Eliminate these, the thinking goes, and streets will be safer. Thousands of federal, state, and local firearms regulations adorn statute books, but a Second Amendment guarantee of the right to be armed blocks the dramatic reduction or banning of firearms that gun-control groups seek. There is a deep desire on their part to believe no individual right exists. On the other side, the traditional belief that guns protect the innocent and deter offenders is even more widely accepted. Studies show the majority of Americans have always believed the Constitution guarantees them a right to be armed. Approximately half of America's households have at least one gun, an estimated arsenal of some 200-240 million weapons, kept for sport and, more crucially, for personal protection. Every new threat to regulate weapons provokes thousands of additional purchases.

Both sides seek a safer nation. But whether one believes guns cause crime or prevent it, the Second Amendment figures in the political solution at every level. National elections turn on a candidate's position on the right to be armed. A small Illinois town bans handguns completely; a small Georgia town requires a gun in every home. The state of Vermont, with no gun restrictions at all, boasts the lowest crime rate in the nation. In the name of public safety, the cities of New York, Chicago, Boston, and Washington, D.C., impose ever tighter gun restrictions. In the name of public safety, thirty-three states—some two-thirds—now allow every law-abiding citizen to carry a concealed weapon. Is an individual right to be armed an anachronism? Not in their opinion. Other states are considering this option.

In this clash of strategies, political gestures and competing claims abound. The Clinton administration allocated millions of dollars for gun buy-back programs, knowing a Justice Department study found this approach ineffective. Flushed with the success of lawsuits against tobacco companies, public officials in thirty-one municipalities sued gun manufacturers claiming millions in damages for gun crimes. In response, twenty-six states passed legislation forbidding such suits. Philanthropic foundations finance research that favors gun control, some even establishing whole institutes for "the prevention of violence." Notwithstanding plummeting rates of gun homicides, leading medical journals publish articles that proclaim guns a health emergency. They print seriously flawed research that purports to demonstrate that the presence of a firearm transforms peaceful citizens into killers, although studies of police records show the great majority of murderers are individuals with a long history of violence.

Nor has the popular press been shy in broadcasting its preferences. For seventy-seven consecutive days in the fall of 1989, the *Washington Post* published editorials calling for stricter gun controls. This was something of a record, but it is indicative of a national media in which three-quarters of the newspapers and most of the periodical press have advocated severe curbs on gun ownership and have denied a right to be armed exists. The press is entitled to its opinions, but unfortunately this bias has often affected and

distorted news coverage. Every gun accident or shooting, every study that supports gun restrictions, is intensively reported, while defensive uses of firearms are downplayed along with scholarly investigations that tabulate these or that call into question the notion that legally owned firearms increase violent crime.

As a result, much conventional wisdom about the use and abuse of guns is simply wrong. Such reporting, for example, gives the impression that gun accidents involving young children are common and increasing when, in fact, they are happily rare and declining. The same is true of gun violence in schools. Do guns cause violence? In the thirty-year period from 1968 through 1997 as the stock of civilian firearms rose by 262%, fatal gun accidents dropped by 68.9%. Numerous surveys have shown that far more lives are saved than lost by privately owned guns. And John Lott's meticulous study of the impact of statutes permitting citizens to carry concealed weapons found them of value in reducing armed crime. Yet, convinced advocates are unwilling to examine the evidence of the constitutional protection or studies that contradict their view of the danger of private gun use.

All this has taken its toll. Alone among the articles comprising the Bill of Rights, the Second Amendment has, in recent years, come very near to being eliminated from the Constitution, not through the prescribed process of amendment, but through interpretations that reduced it to a meaningless anachronism. The low point came in 1975 when a committee of the American Bar Association was so befuddled by competing interpretations that members concluded, "It is doubtful that the Founding Fathers had any intent in mind with regard to the meaning of this Amendment." Leading textbooks on constitutional law, such as that by Lawrence Tribe, had literally relegated the Second Amendment to a footnote. Yet the American people remained convinced of their right to be armed despite textbooks and newspaper advertisements to the contrary.

Now scholarship has come to the rescue. The past twenty-five years have witnessed a growing number of studies of the Second Amendment, and these have found overwhelming evidence that it was meant to guarantee an individual right to be armed. In 1997, Supreme Court Justice Clarence Thomas in *Printz v. United States*, noting that the Court "has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment," hoped, "Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'" Thomas added, "[A]n impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right." Such evidence includes the individual right to be armed inherited from England; Madison's intent to list the right to be armed with other individual rights, rather than in the article dealing with the militia; his reference to his proposed rights as "guards for private rights"; the Senate's rejection of an amendment to tack

the phrase “for the common defense” to the “right of the people to keep and bear arms”; and numerous contemporary comments. By contrast, no contemporary evidence has been found that only a collective right for members of a militia was intended. The evidence has convinced our leading constitutional scholars, among them Lawrence Tribe, Akhil Amar, and Leonard Levy, that the Second Amendment protects an individual right. In March 1999, Judge Sam Cummings of the Fifth Circuit, in the case of *United States v. Timothy Joe Emerson*, found a federal statute violated an individual’s Second Amendment rights. The Fifth Circuit Court of Appeals, in a meticulously researched opinion, agreed that the Second Amendment protected an individual right to keep arms. As the Court of Appeals in Ohio pointed out when, in April 2002, it found Ohio’s prohibition against carrying a concealed weapon unconstitutional, “We are not a country where power is maintained by people with guns over people without guns.”

Since the evidence clearly shows an individual right was intended, we should now move on to discuss the prudent limits of that right. Yet that discussion can’t take place because denials of that right continue along with ever more tenuous theories to refute it, claims that the phrase “bear arms” was used exclusively in a military context; that the amendment resulted from a conspiracy between Northern and Southern states to control slaves; and that since the phrase “the right of the people to keep and bear arms” is set off by a comma it can be eliminated. But in early American discourse, as today, “bear arms” often meant simply carrying a weapon; there is no direct evidence of any conspiracy; and the elimination of every phrase set off by commas would play havoc with constitutional interpretation. Michael Bellesiles claimed to have evidence there were few guns in early America, Americans were uninterested in owning them, and therefore no individual right to be armed could have been intended. However, his results seriously underestimate numbers of weapons and distort the attitudes toward them. Other scholars looking through some of the same evidence have found widespread ownership of guns.

Why does the debate over original intent continue? Lawrence Tribe, who concluded there is an individual right after considering the new evidence, points to the “true poignancy,” “the inescapable tension, for many people on both sides of this policy divide, between the reading of the Second Amendment that would advance the policies they favor and the reading of the Second Amendment to which intellectual honesty, and their own theories of constitutional interpretation, would drive them if they could bring themselves to set their policy convictions aside.” The time has come for those who deny an individual right exists to set policy convictions aside in favor of intellectual honesty—and a more productive discussion.

Further Reading: On the origins and constitutional interpretation of the Second Amendment see Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, Mass., 1994); Leonard W. Levy, *Origins of the Bill of Rights* (New Haven, 1999), chap. 6; Lawrence Tribe, *American Constitutional Law*, 3d ed. (New York, 2000), 894-903; Sanford Levinson, “The Embarrassing Second Amendment,” *The Yale Law Journal* 99 (1989); Don B. Kates

Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 (December 1982); Robert Shalhope, "The Ideological Origins of the Second Amendment," *The Journal of American History* 69 (December 1982); and Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (Albuquerque, N.M., 1984). The recent, landmark opinions in the Emerson Case by Federal Judge Sam Cummings and the Fifth Circuit Court of Appeals provide excellent and readable historical treatment and analysis of the intent of the Second Amendment and its legal history in the courts. See [United States v. Timothy Joe Emerson](#), 46 F.Supp.2d 598 (1999) and [United States v. Emerson](#), 270 F.3d 203(5th Cir. 2001). For up-to-date scholarship on the efficacy of gun control legislation and a review of the scholarly studies on the subject see John Lott Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws*, 2d ed. (Chicago, 2000). Gary Kleck & Don B. Kates, *Armed: New Perspectives on Gun Control* (Amherst, N.Y., 2001) is an excellent source of information on numerous aspects of the issue. Also see an older but important study by James D. Wright and Peter H. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* (New York, 1986).

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