

WebMemo



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To Keep and Bear Arms

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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.

(Amendment II)

Modern debates about the meaning of the Second Amendment have focused on whether it protects a right of individuals to keep and bear arms or, instead, a right of the states to maintain militia organizations like the National Guard. This question, however, was apparently never even discussed for a long time after the Bill of Rights was framed. The early discussions took the basic meaning of the amendment largely for granted and focused instead on whether it actually added anything significant to the original Constitution. The debate has shifted primarily because of subsequent developments in the Constitution and in constitutional law.

The Founding generation mistrusted standing armies. Many Americans believed, on the basis of English history and their colonial experience, that central governments are prone to use armies to oppress the people. One way to reduce that danger would be to permit the government to raise armies (consisting of full-time paid troops) only when needed to fight foreign adversaries. For other purposes, such as responding to sudden invasions or similar emergencies, the government might be restricted to using a militia, consisting of ordinary civilians who supply their own weapons and receive a bit of part-time, unpaid military training.

Using a militia as an alternative to standing armies had deep roots in English history, and pos-

essed considerable appeal, but it also had some serious problems. Alexander Hamilton, for example, thought the militia system could not serve its purpose effectively, primarily because it violated the basic economic principle of the division of labor. And even those who treasured the militia recognized that it was fragile. The reason it was fragile was the same reason that made Hamilton disparage it: citizens were always going to resist undergoing unpaid military training, and governments were always going to want 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, and the occasions requiring a defense of the nation might not always be foreseen very far in advance. The Convention therefore decided to give the federal government almost unfettered authority to establish armies, including peacetime standing armies. But

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that decision created a threat to liberty, especially in light of the fact that the proposed Constitution also forbade the states from keeping troops without the consent of Congress.

One solution might have been to *require* Congress to establish and maintain a well-disciplined militia, which would have to comprise a very large percentage of the population (in order to prevent it from becoming in effect a professional army under another name, like our modern National Guard organizations). 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 and with the necessary regard for changes in future circumstances and national needs? It would almost certainly have been impossible.

Another solution might have been to forbid Congress from interfering with state control over the militia. This might have been possible, but it would have been self-defeating. 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.

Thus, the choice was between a variety of militias controlled by the individual states, which would likely be too weak and divided to protect the nation, and a unified militia under federal control, which almost by definition could not be expected to prevent federal tyranny. This conundrum could not be solved, and the Convention did not purport to solve it. Instead, the Convention presumed that a militia would exist, but it gave Congress almost unfettered authority to regulate that militia, just as it gave the new federal government almost unfettered authority over the army and navy.

This massive shift of power from the states to the federal government generated one of the chief objections to the proposed Constitution. 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, for one, responded that such fears of federal oppression were overblown, in part because the new federal government was structured differently from European governments. But he also 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 one assumed that the federal government would try to use an army to do so. In *Federalist No. 46*, he wrote:

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 between Federalists and Anti-Federalists was only over the narrower question of how effective an armed population could be in protecting liberty.

The Second Amendment left that disagreement unresolved, and it therefore did not satisfy the Anti-Federalist desire to preserve the military superiority of the states over the federal government. But that inadequacy also prevented the Second Amendment from generating any opposition. Attempting to satisfy the Anti-Federalists' 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.

As a political gesture to the Anti-Federalists, a gesture highlighted by the Second Amendment's prefatory reference to the value of a well-regulated militia, 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.

A great deal has changed since the Second Amendment was adopted. The traditional militia fairly quickly fell into desuetude, and the state-based militia organizations were eventually incorporated into the federal military structure. For its part, the federal military establishment has become enormously powerful in comparison with eighteenth-century armies, and Americans have largely lost their fear that the federal government will use its power to oppress them politically. And whereas eighteenth-century civilians routinely kept at home the very same weapons that they would need if called to war, modern soldiers are equipped with weapons that differ significantly from those that are commonly thought appropriate for civilian uses. These changes have raised questions about the value of an armed citizenry, and many people today reject the assumptions that almost everybody accepted when the Second Amendment was adopted.

The law has also changed. Perhaps most significantly, the Fourteenth Amendment has been interpreted to make most provisions of the Bill of Rights applicable to the states. When it was enacted, the Second Amendment applied only to the federal government, which left the states free to regulate firearms in whatever ways they saw fit. The Supreme Court has not yet decided, one way or the other, whether the Second Amendment will be added to the list of provisions that apply to the state governments. If the Court does extend its reach to the states, that decision will generate a great many questions about the appropriate balance between public safety and private liberty that the Framers of the Second Amendment had no reason at all to consider.

Apart from the potentially important effects of the Fourteenth Amendment, a rather small but significant body of Second Amendment case law has developed. In *United States v. Miller* (1939), the Supreme Court issued what is still its only important decision interpreting the scope of the right to keep and bear arms. In that case, the Court upheld a federal statute that regulated the interstate transportation of machine guns and short-barreled shotguns. For better or worse, the Court's opinion is so ambiguous that advocates for almost every conceivable interpretation of the Second Amendment have been able to claim that it supports their view.

Initially, however, the lower federal courts were unanimous in their interpretation of *Miller*. Every court that considered the question concluded that the Second Amendment does not protect any meaningful individual right to keep or bear arms. One line of cases in the lower courts read *Miller* to endorse the proposition that the Second Amendment merely guarantees a right of the states to maintain their own military organizations. Another line of cases arrived at much the same result by concluding that individuals can only exercise their Second Amendment rights by joining a state militia organization. Under either line of reasoning, the Second Amendment effectively becomes a nullity because it places virtually no limits on government's power to disarm American citizens.

The view of the Second Amendment reflected in these lower-court decisions was subjected to sustained and powerful criticism by academic commentators during the last few years of the twentieth century. Eventually, these critics saw their views accepted by the United States Court of Appeals for the Fifth Circuit, in the case of *United States v. Emerson* (2001). The *Emerson* court issued a lengthy and scholarly opinion that rejected the states'-rights interpretation adopted over the years by all of the other courts of appeals that had ruled on the issue. According to the *Emerson* court:

the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons and are not of the general kind or type excluded by *Miller*, regardless of whether the particular individual is then actually a member of a militia.

Although the court upheld the somewhat complicated federal regulation at issue in the case, it also indicated that the law barely passed constitutional muster and strongly signaled that there are sharp limits on the federal government's authority to disarm individual Americans.

The *Emerson* decision unsettled a longstanding judicial consensus, and it quickly provoked a counterattack from the Ninth Circuit. This debate among the lower courts invites the Supreme Court to give the Second Amendment the kind of serious consideration that it has never received. But that may not happen soon. One reason is that the *Emerson* court did uphold the statute at issue in the case. Thus, notwithstanding the fundamental difference between the Fifth Circuit's interpretation of the Constitution and that of other lower courts, the statute will continue to be applied throughout the country. Without a real, practical discrepancy in the way that the law applies in various sections of the nation, the Supreme Court may not feel the need to resolve what is an essentially theoretical disagreement among the lower courts.

No court has yet held that the Fourteenth Amendment makes the Second Amendment applicable to the state governments, which have been the source of almost all of the most restrictive regulations on guns. Except in the District of Columbia, federal law has created relatively few serious obstacles to civilian possession and use of firearms. Thus, unless Congress enacts new laws, or the D.C. Circuit joins the Fifth Circuit in adopting the individual-right interpretation, the actual application of federal law may not be affected by *Emerson*, and the Supreme Court may see no need to resolve the debate that *Emerson* initiated.

Emerson's significance could prove limited for another reason. Even if the Supreme Court accepts the individual-right interpretation adopted by the Fifth Circuit, the Court could easily create a legal test under which almost any conceivable gun-con-

trol regulation would pass constitutional muster. One possibility would be an adaptation of the so-called rational basis test that is used to uphold virtually all economic regulations against challenges under the Due Process and Equal Protection Clauses. Under that test, any firearm regulation would be upheld so long as it was not so completely arbitrary that no rational legislature could believe that it served any legitimate governmental purpose. Because the prevention of death and injuries to innocent people is certainly a legitimate purpose, almost any gun-control statute would survive this test, whether or not it was actually or even plausibly effective in achieving such a purpose.

It is also possible, of course, that the Court will choose to adopt a much more stringent legal test, perhaps along the lines of those used to put meaningful restrictions on the government's power to abridge the freedom of speech or the free exercise of religion. This approach, which *Emerson* appeared to adopt, could lead to truly significant developments in constitutional law, especially if the Supreme Court were also to apply the Second Amendment to the states through the Fourteenth Amendment.

Thus, in the end, the future role of the Second Amendment in constitutional law is likely to depend less on the debate between the individual-right and states'-rights interpretations, and more on whether the Justices of the Supreme Court recognize a high constitutional value in the preservation of an armed citizenry. Whether they will do so in a case that really matters is a question to which we cannot yet know the answer now.

—Nelson Lund is the Patrick Henry Professor of Constitutional Law and the Second Amendment at the George Mason University School of Law. This essay is excerpted from *The Heritage Guide to the Constitution, a line-by-line analysis of the original meaning of each clause of the United States Constitution*, edited by David Forte and Matthew Spalding.

See Also

Article I, Section 8, Clauses 12–16

Article I, Section 10, Clause 3 (Compact Clause)

Amendment XIV, Section 1 (Privileges or Immunities)

Suggestions for Further Research

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