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The Second Amendment and the Inalienable Right to Self-Defense

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Contemporary debates about the meaning of the Second Amendment—is it a collective right or an individual right?—would have been incomprehensible to the Founders. Everyone at the time agreed that the federal government had no power to infringe on the right of the people to keep and bear arms. Contemporary debates for the most part also fail to address the essential question of why the right to bear arms was enshrined in the Constitution in the first place. The right to self-defense and to the means of defending oneself is a basic natural right that grows out of the right to life. The Second Amendment therefore does not grant the people a new right; it merely recognizes the inalienable natural right to self-defense. Lawmakers may outlaw certain types of weapons, but they may not disarm the citizenry. This essay is adapted from the second edition of The Heritage Guide to the Constitution*, to be published in the fall of 2014 by Regnery.*

> 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 private right of individuals to keep and bear arms or a right that can be exercised only through militia organizations like the National Guard. This question, however, was apparently never even raised until long after the Bill of Rights was adopted. Early discussions took the basic meaning of the amendment for granted and focused instead on whether it added anything significant to the original Constitution. The debate later shifted because of changes in the Constitution and in constitutional law and because legislatures began to regulate firearms in ways undreamed of in our early history.

The Founding generation mistrusted standing armies. Many Americans believed, on the basis of English history and their colonial experience, that governments of large nations are prone to use soldiers 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

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or similar emergencies, the government might be restricted to using a militia that consisted of ordinary civilians who supplied their own weapons and received a bit of part-time, unpaid military training.

Using a militia as an alternative to standing armies had deep roots in English history and possessed considerable appeal, but it also presented some serious problems. Alexander Hamilton, for example, thought the militia system could never provide a satisfactory substitute for a national army. Even those who treasured the militia recognized that it was fragile, and the cause of this fragility was just what 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 onset of war is not always followed by a pause during which an army can be raised and trained. The convention therefore decided 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 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. Such a militia would have had to comprise a large percentage of the population in order to prevent it from becoming a federal army under another name, like our modern National Guard. This might have deprived the federal government of the excuse that it needed peacetime standing armies and might 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 unforeseeable changes in the nation's circumstances? It would almost certainly have been impossible.

Another approach might have been to forbid Congress from interfering with the states' control of their militias. This might have been possible, but it would have been self-defeating. Fragmented control of the militias would inevitably have resulted in an absence of uniformity in training, equipment, and command, and no really effective national fighting force could have been created.

Thus, the convention faced a choice between entrenching a multiplicity of militias controlled by the individual states, which would likely have been too weak and divided to protect the nation, or authorizing a unified militia under federal control, which almost by definition could not have been expected to prevent federal tyranny. The conundrum could not be solved, and the convention did not purport to solve it. Instead, the Constitution presumes that a militia will exist, but it gives Congress almost unfettered authority to regulate that militia, just as it gives the federal government almost unfettered authority to maintain an army.

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 of 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 to be structured differently from European governments. But he also pointed out another decisive difference between Europe's situation and ours: 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 whether an armed populace could adequately assure the preservation of liberty.

The Second Amendment conceded nothing to the Anti-Federalists' desire to sharply curtail the military power that the Constitution gave the federal government, but that very fact prevented the Second Amendment from generating any opposition. Attempting to satisfy the Anti-Federalists would have been hugely controversial and would have required substantial changes in 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 people's right to arms was something of a sop. The provision was easily accepted, however, 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 fell fairly quickly 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 more powerful than 18th-century armies, and Americans have largely lost their fear that the federal government will use that power to oppress them politically. Furthermore, 18th-century civilians routinely kept at home the very same weapons they would need if called to serve in the militia, while modern soldiers are equipped with weapons that differ significantly from those that are commonly thought to be appropriate for civilian uses. These changes have raised new questions about the value of an armed citizenry, and many people today reject the assumptions that almost everyone accepted when the Second Amendment was adopted.

The law has also changed. At the time of the Framing, gun control laws were virtually nonexistent, and there was no reason for anyone to discuss what kinds of regulations would be permitted by the Second Amendment. The animating concern behind the amendment was fear that the new federal government might try to disarm the citizenry in order to prevent armed resistance to political usurpations. That has never occurred, but a great many new legal restrictions on the right to arms have since been adopted. Nearly all of these laws are aimed at preventing the misuse of firearms by irresponsible civilians, but many of them also interfere with the ability of law-abiding citizens to defend themselves against violent criminals.

Another important legal development was the adoption of the Fourteenth Amendment. The Second Amendment originally applied only to the federal government, leaving the states to regulate weapons as they saw fit. During the 20th century, the Supreme Court invoked the Fourteenth Amendment's Due Process Clause to apply most provisions of the Bill of Rights to the states and their political subdivisions. The vast majority of gun control laws have been adopted at the state and local levels, and the potential applicability of the Second Amendment at these levels raised serious issues that the Founding generation had no occasion to consider. It is one thing to decide that authority over the regulation of weapons will be reserved largely to the states. It is quite another to decide that all regulations will be subjected to judicial review under a vaguely worded constitutional provision like the Second Amendment.

Until recently, the judiciary treated the Second Amendment almost as a dead letter. Many courts concluded that citizens have no constitutionally protected right to arms at all, and the federal courts never invalidated a single gun control law. In the late 20th century, however, the judicial consensus was challenged by a large body of new scholarship. Through analysis of the text and history of the Second Amendment, commentators sought to establish that the Constitution does protect an individual right to have weapons for self-defense, including defense against criminal violence that the government cannot or will not prevent.

In *District of Columbia v. Heller* (2008), the Supreme Court finally did strike down a gun control regulation, in this case a federal law that forbade nearly all civilians from possessing a handgun in the District of Columbia. A narrow 5–4 majority adopted the main conclusions and many of the arguments advanced by the revisionist commentators, ruling that the original meaning of the Second Amendment protects a private right of individuals to keep and bear arms for the purpose of self-defense.

The dissenters interpreted the original meaning differently. In an opinion that all four of them joined, Justice John Paul Stevens concluded that the Second Amendment's nominally individual right actually protects only "the right of the people of each of the several States to maintain a well-regulated militia." In a separate opinion, also joined by all four dissenters, Justice Stephen Breyer argued that even if the Second Amendment did protect an individual right to have arms for self-defense, it should be interpreted to allow the government to ban handguns in high-crime urban areas.

Two years later, in *McDonald v. City of Chicago*, the Court struck down a similar law at the state level, again by a 5–4 vote. The four-Justice *McDonald* plurality relied largely on substantive due process precedents that had applied other provisions of the Bill of Rights to the states. Justice Clarence Thomas concurred in the judgment but rejected the Court's long-standing doctrine of substantive due process, which he concluded is inconsistent with the original meaning of the Constitution. Instead, he set forth a detailed analysis of the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause and concluded that it protects the same individual right that is protected from federal infringement by the Second Amendment.

Notwithstanding the lengthy opinions in *Heller* and *McDonald*, their holdings are narrowly confined to invalidating bans on the possession of handguns by civilians in their own homes. Neither case provides clear guidance on the constitutionality of less restrictive forms of gun control, although *Heller* does set forth a non-exclusive list of "presumptively lawful" regulations that include bans on the possession of firearms by felons and the mentally ill, bans on carrying firearms in "sensitive places such as schools and government buildings," laws restricting the commercial sale of arms, bans on the concealed carry of firearms, and bans on weapons "not typically possessed by law-abiding citizens for lawful purposes."

In the short period of time since *Heller* was decided, the lower courts have struggled to divine how it applies to regulations that the Court did not address, such as bans on carrying weapons in public and bans on the possession of firearms by violent misdemeanants. At the moment, the dominant approach in the federal courts of appeals can be summarized roughly as follows:

- Some regulations, primarily those that are "long-standing," are presumed not to infringe the right protected by the Second Amendment. Thus, for example, the D.C. Circuit upheld a regulation requiring gun owners to register each of their weapons with the government. *Heller v. District of Columbia* (*"Heller II"*) (2011).

- Regulations that substantially restrict the core right of self-defense are scrutinized under a demanding test that generally permits only regulations that are narrowly tailored to accomplish a compelling government purpose. Applying a test of this kind, the Seventh Circuit found that a city had failed to provide an adequate justification for its ban on firing ranges. *Ezell v. City of Chicago* (2011).

- Regulations that do not severely restrict the core right are subject to a more deferential form of scrutiny, which generally requires that the regulation be substantially related to an important government objective. The Third Circuit, for example, held that a ban on possessing a handgun with an obliterated serial number was valid under this standard. *United States v. Marzzarella* (2010).

The application of this framework has varied somewhat among the courts, and *Heller* left room for other approaches to develop. One important outstanding issue is the scope of the right to carry firearms in public. *Heller* laid great stress on the text of the Second Amendment, which protects the right to keep *and bear* arms, while also giving provisional approval to bans on the concealed carry of firearms.

A ban (or severe restrictions) on both concealed and open carry would seem to conflict with the constitutional text. It would also seem hard to reconcile with the Court's emphasis on the importance of the

right to self-defense against violent criminals, who are at least as likely to be encountered outside the home as within it. *Heller*, however, did not unambiguously recognize any right to carry weapons in public. Some lower courts have concluded that no such right exists, while others have disagreed. The Supreme Court may eventually have to address the issue.

A more general question concerns the scope of the government's power to inhibit the possession and use of firearms through regulations that impose onerous conditions and qualifications on gun owners. In the analogous area of free speech, courts have struggled endlessly to draw lines that allow governments to serve what they see as the public interest without allowing undue suppression of individual liberties. If the Supreme Court is serious about treating the right to arms as an important part of the constitutional fabric, we should expect the Justices to encounter similar challenges in its emerging gun control jurisprudence.

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