

## INTRODUCTION

Few Americans can confront the question of private ownership of firearms dispassionately. And the Constitution's Second Amendment is to some the sacred text that raises the emotional issue to the lofty plane of basic rights and traditions of American freedom. While many of us regard guns in private hands as the scourge of our times, and favor government imposition of controls and punitive deterrence of all sorts, many others think of possession of firearms—the handguns and assault weapons along with the hunting rifles—as the gift of the Founders, immune to government restriction and regulation. The gun people and their friends point to the ringing language of the Second Amendment, “the right of the people to keep and bear arms shall not be infringed,” as well as the early ethic of self-reliance—and distrust of government—as support for the notion that the Constitution itself assures the people free access to firearms. And many commentators, some dedicated practitioners, some single-topic academics, and some others with genuine scholarly credentials have come forward to support this position.

For our part, we take no position on the question of whether guns in private hands are good or bad for society as a whole, nor do we opine on whether government-imposed gun control measures will be likely to reduce the extraordinary infliction of bullet wounds—as well as the rate of gun-assisted felonies—that have become the shame of American culture. It is possible, as John Lott and others have argued,<sup>1</sup> that wider handgun ownership by sane and law-abiding

citizens will actually reduce the incidence of violent crime. On the other hand, Lott's statistical methods have been challenged, and the debate does not lack vocal advocates of the contrary view.<sup>2</sup> Our only thesis here is that for better or for worse, the Constitution, and the Second Amendment in particular, have nothing whatever to contribute to the question. While the Second Amendment surely did once speak loudly and clearly to the issue of arms in private hands, we will conclude from an examination of the language of the provision, as understood by the ratifiers, and from the history of the militia since the eighteenth century, that the "right of the people" has become a vacant and meaningless sequence of words. It is not easy to take an unequivocal pronouncement of the Great Text and declare it null, but a fair examination of the original meaning of the clause and the historical development of its ingredients compels our conclusion.<sup>3</sup>

This, then, is our plan of argument. In part I we introduce the conceptual and political roots of the Second Amendment. Much of what we set forth here is familiar ground to scholars of the eighteenth century. In the light of the high-decibel controversy surrounding the modern import of the constitutional provision, it is reassuring — if somewhat surprising — to find such general accord regarding the seventeenth- and eighteenth-century antecedents of the provision, and the function of arms and the militia in the design of the new American political experiment. We describe the understanding of the founding generation as derived from the political thought that impressed itself on the minds of those concerned with the nature of just and enduring government and, in particular, the place of a military organization within it. Here we draw not only upon the influential sources in America in the late eighteenth century, but also upon the collateral expressions of the founders and their contemporaries to find the most likely purposes and assumptions underlying the text. This will constitute the web of historical context from which the meaning of the text may be read.

Specifically, in chapter 1 we identify and describe the two competing schools of thought on the meaning of the Second Amendment and analyze the four decisions of the United States Supreme Court interpreting the constitutional right to arms. Although these cases are old and, in some respects, flawed, we argue that they were correctly decided. We will here sound the first theme of the book: that in the Framers' minds, and in the text they left as a record of their purpose,

the right to arms was indissolubly linked to a “well-regulated militia,” an institution with clearly understood historical, ideological, political, and legal meaning in late eighteenth-century America.

Chapter 2 examines the political and constitutional history of the Anglo-American militia from the eve of English colonization until the War of Independence. It pays particular attention to the politically charged distinction between the citizen militia and the professional “standing army,” a distinction with which early American republicans were nothing less than obsessed. Chapter 3 turns to the efforts of the newly independent Americans to forge an effective system of national defense and to frame a workable constitutional structure of government. Both of these tasks required striking a just balance between the rival claims of an effective but potentially dangerous regular army on the one side of the scale and the politically favored but historically unreliable citizen militia on the other.

Resolution of these dilemmas, many republicans insisted, required revitalization of the militia as a universal, amateur, occasional obligation of citizenship in the best classical tradition. Meanwhile, veteran government officers and strong military men—George Washington, among them—hoped for a large army and lobbied for reorganization, regulation, and nationalization of the militia. Both of these competing visions found expression in the Constitution of 1787. But anti-federalist opponents of strong national government feared the sweeping military powers granted to the central authority and demanded express assurances that the federal government could not disarm the people’s militia as a pretext for installing a large and dangerous standing army. These urgent concerns were answered in the Second Amendment. Drafted by James Madison, the provision passed the First Congress with the rest of the Bill of Rights in 1789, and was ratified by the requisite three-fourths of the states in 1791.

In the second part of the book, we trace the evolution of the militia as a military organization from the earliest days of the Republic to the present time. Part II yields the second theme of the work: times change, and even once-cherished components of a written constitution may sometimes lose vitality. Thus, in chapter 4, we explore the beginnings of the end of the Framers’ militia. One year after ratification of the Second Amendment and the rest of the Bill of Rights, Congress passed the Militia Act of 1792, designed to breathe life into the militia of several states and to set national standards. But as the

decades unfolded, more and more Americans lost interest in the old militia. Though service was (at least in theory) still obligatory, by the 1830s the parade grounds and muster points were empty, and the militia of such importance to the founding generation was no more.

Chapter 5 carries the evolution of the amateur military unit through a new phase: the era of the volunteer soldier. From the 1840s through the close of the nineteenth century, volunteer companies rather than the defunct common militia constituted the bulk of America's military strength. Supplementing a smallish regular army, it was the volunteers who pulled the laboring oar in the imperialist conflicts with Mexico and Spain. And in the blood-drenched struggle to save the Union and bring an end to slavery, volunteers predominated in the northern forces. In chapter 6 we meet the modern form of the militia, the federalized National Guard, and trace its evolution through the twentieth century. The Guard, we will show, became a military organization utterly unlike the militia contemplated by the Framers: a component of the regular army rather than a counterweight to the federal military establishment, select rather than universal, and armed by the central government rather than by the citizens themselves.

With this history behind us, we encounter, in part III, the problem of interpreting ancient texts for faithful modern application. Here, the third major theme emerges: meaning should be permitted to swing only a few degrees on its mooring to language. Interpretation—a legitimate device for understanding—can shade meaning as context, technology, and social custom change, but only to a limited extent. Wide adjustments distort meaning and ultimately alter text. We do not believe in amendment by radical reinterpretation. In chapter 7 we explore the ingredients of meaning and the obligations of fidelity. We will stress that because the operative language of the Second Amendment recognizing the right to keep and bear arms was expressly predicated on the importance of an amateur, self-armed military organization, it cannot be read in our new century without a frank assessment of the extent to which a well-regulated militia is today necessary to the security of a free state. Indeed, we must ask whether there is today any military institution whatsoever on the landscape that resembles the militia of old. If, as we contend, the predicate institution for the acknowledged right has vanished, leaving no recognizable descendants, the right dependent upon it is deprived of its essence and becomes a vacant, silent relic.<sup>4</sup>

When we arrive, finally, at the twenty-first century, we explore further the ghost of this once-proud right. We then test our thesis, in chapter 8, against a few of the many competing interpretations. To this we have appended a postscript, chapter 9, in which we describe and comment on the most recent—indeed, the only recent—decision upholding a challenge to a gun control law on the basis of the Second Amendment, *United States v. Emerson*. In our Conclusion, the Second Amendment reemerges in its original contours, as a declaration protecting rights fundamental to the vitality of the militia, the constitutionally preferred system of national defense. But as the Second Amendment resurfaces with the shape and substance with which it was invested over two hundred years ago, it enters a modern America in which its voice has been stilled by the erosion of the meaning of its message.