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SECOND THOUGHTS

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So what *does* the Second Amendment mean? A lot, says the National Rifle Association. Not much, say gun-control advocates. Until recently, it did not much matter who was right—on all but the mildest of measures, the NRA had the votes (and the cash), and that was that. Then came Columbine. Now proposals for serious federal gun controls are in the air. If adopted, would such measures violate the Constitution?

Begin with the words of the amendment itself: "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." This curious syntax has perplexed most modern readers. How do the two main clauses with different subject-nouns fit together? Do these words guarantee a right of militias, as the first clause seems to suggest, or a right of the people, as the second clause seems to say? In one corner, gun controllers embrace a narrow, statist reading, insisting that the amendment merely confers a right on state governments to establish professional state militias like the National Guard or local SWAT teams. No ordinary citizen is covered by the amendment in this view. In the other corner, gun owners and their supporters read the amendment in a broad libertarian way, arguing that it protects a right of every individual to have guns for self-protection, for hunting, and even for sport. Virtually nothing having to do with personal weaponry is outside the amendment on this view. Both readings are wrong.

The statist reading sidesteps the obvious fact that the amendment's actual command language—"shall not be infringed"—appears in its second clause, which speaks of "the people" and not "the states." A quick look at the Tenth Amendment, which draws a sharp distinction between "the states" and "the people," makes clear that these two phrases are not identical and that the Founders knew how to say "states" when they meant states.[1] What is more, the eighteenth-century "militia" referred to by the first clause was not remotely like today's National Guard. It encompassed virtually all voters—somewhat like today's Swiss militia—rather than a small group of paid, semiprofessional volunteers.

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1. U.S. CONST. amend. X. "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."

The libertarian reading must contend with textual embarrassments of its own. The amendment speaks of a right of "the people" collectively rather than a right of "persons" individually. It also uses a distinctly military phrase, "bear arms." A deer hunter or target shooter carries a gun but does not, properly speaking, bear arms.[2] The military connotation was even more obvious in an earlier draft of the amendment, which contained additional language that "no one religiously scrupulous of bearing arms shall be compelled to render military service in person."[3] Even in the final version, note how the military phrase "bear arms" is sandwiched between a clause that talks about the "militia" and a clause (the Third Amendment) that regulates the quartering of "soldiers" in times of "war" and "peace."[4] Likewise, state constitutions in 1789 consistently used the phrase "bear arms" in military contexts and no other.[5]

By now it is evident that we need to understand how all the words of the amendment fit together, and how they, in turn, mesh with other words in the Constitution. The amendment's syntax seems odd only because modern readers persistently misread the words "militia" and "people," imposing twentieth-century assumptions on an eighteenth-century text. The key subject-nouns were simply different ways of saying the same thing. At the Founding, the militia was the people and the people were the militia. Indeed, the earlier draft of the amendment linked the two clauses with linchpin language speaking of "a well regulated militia, composed of the body of the people."[6] The stylistically clumsy linchpin was later pulled out, but the final version makes the same point in fewer words. A modern translation of the amendment might thus be: "An armed and militarily trained citizenry being conducive to freedom, the right of the electorate to organize itself militarily shall not be infringed."

Call this the communitarian reading as opposed to the statist and libertarian readings that dominate modern discourse. Statists anachronistically read the "militia" to mean the government (the paid professional officialdom) rather than the people (the ordinary citizenry). Equally anachronistically, libertarians read "the people" to mean atomized private persons, each hunting in his own private Idaho, rather than the citizenry acting collectively. When the Constitution speaks of "the people" rather than "persons," however, the collective con-

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2. *Cf.* Aymette v. State, 21 Tenn. (2 Hum.) 154, 161 (1840) (holding that the "bear arms" phrase had "a military sense, and no other . . . A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms.*").

3. THE COMPLETE BILL OF RIGHTS 172-73 (Neil H. Cogan ed., 1997).

4. U.S. CONST. amend. III. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

5. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 3, at 183-85.

6. *Id.*. at 170-73. *Cf.* 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 425 (Jonathan Elliot ed., AYER Co. reprint ed. 1987) (1836) (remarks of George Mason at Virginia ratifying convention: "Who are the militia? They consist now of the whole people . . ."); *id.* at 112 (remarks of Francis Corbin at Virginia ratifying convention: "Who are the militia? Are we not militia?"); Letters from the Federal Farmer (XVIII), *reprinted in* 2 THE COMPLETE ANTIFEDERALIST 341 (Herbert J. Storing ed., 1981) ("A militia, when properly formed, are in fact the people themselves . . . and include . . . all men capable of bearing arms . . .").

notation is primary.[7] "We the People" in the Preamble do ordain and establish the Constitution as public citizens meeting together in conventions and acting in concert, not as private individuals pursuing our respective hobbies. The only other reference to "the people" in the Philadelphia Constitution of 1787 appears a sentence away from the Preamble; here, too, the meaning is public and political, not private and individualistic. Every two years, "the people"—that is, the voters—elect Representatives to the House. To see this key distinction another way, recall that women in 1787 had the rights of "persons" (such as freedom to worship and protections of privacy in their homes) but did not directly participate in the acts of "the people"—they did not vote in constitutional conventions or for Congress, nor were they part of the militia/people at the heart of the Second Amendment.

The rest of the Bill of Rights confirms this communitarian reading. The core of the First Amendment's assembly clause, which textually abuts the Second Amendment, is the right of "the people"—in essence, voters—to "assemble" in constitutional conventions and other political conclaves. So, too, the core rights retained and reserved to "the people" in the Ninth and Tenth Amendments were rights of the people collectively to govern themselves democratically. The Fourth Amendment is a bit trickier: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Here, the collective "people" wording is paired with more individualistic language of "persons." And these words obviously focus on the private domain, protecting individuals in their private homes more than in the public square. Why, then, did the Fourth use the words "the people" at all? Probably to highlight the role that jurors, acting collectively and representing the electorate, would play in deciding which searches were reasonable and how much to punish government officials who searched or seized improperly. An early draft of James Madison's amendment protecting jury rights helps make this linkage obvious and also resonates with the language of the Second Amendment: ". . .[T]he trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[8] Note the obvious echoes here—"security" (Second Amendment), "secure" (Fourth Amendment), and "securities" (draft amendment); "shall not be infringed," "shall not be violated," and "ought to remain inviolate"; and, of course, "the right of the people" in all three places.

If we want an image of the people's militia at the Founding, we should think first of the militia's cousin, the jury. Like the militia, the jury was a local body countering imperial power, summoned by the government but standing outside it, representing the people, collectively. Like jury service, militia participation

7. Note the interpretive technique deployed in this paragraph and the next, trying to squeeze meaning from the fact that certain words and phrases recur in the Constitution. For a general discussion and critique of this technique, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

8. THE COMPLETE BILL OF RIGHTS, *supra* note 3, at 494.

was both a right and a duty of qualified voters, who were regularly summoned to discharge their public obligations. Nonvoters—women, children, aliens—were generally excluded from both the jury and the militia. Like the jury, the militia was composed of amateurs arrayed against, and designed to check, permanent and professional government officials (judges and prosecutors, in the case of the jury; a standing army in the case of the militia). Like the jury, the militia embodied collective political action rather than private pursuits.

Founding history confirms this. The Framers envisioned Minutemen bearing guns, not Daniel Boone gunning bears.[9] When we turn to state constitutions, we consistently find arms-bearing and militia clauses intertwined with rules governing standing armies, troop-quartering, martial law, and civilian supremacy. Libertarians cannot explain this clear pattern that has everything to do with the military and nothing to do with hunting. Conversely, statists make a hash of all these state constitutional provisions using language very similar to the Second Amendment to affirm rights *against* state governments.[10]

Keeping the jury-militia analogy in mind, we can see both a kernel of truth in each of the competing accounts and also what is missing from each. Statists are right to see the amendment as localist and to note that law and government help bring the militia together. So, too, with the jury. Twelve private citizens who simply get together on their own to announce the guilt of a fellow citizen are not a lawful jury but a lynch mob. Similarly, private citizens who choose to own guns today are not a well-regulated militia of the people; they are gun clubs. But what the statist reading misses is that, when the law summons the citizenry together, these citizens act as the people *outside* of government, rather than as a professional and permanent government bureaucracy. A lynch mob is not a jury, but neither is the Occupational Safety and Health Administration. Likewise, the NRA and other gun clubs are not the general militia, but neither is the National Guard. Libertarians rightly recoil at the authoritarianism of their opponents in the debate but wrongly privatize what is an inherently collective and political right. It is as if Ross Perot insisted that the First Amendment guaranteed him the right to conduct his own poll and, on the basis of this private poll, to proclaim himself president.

But to see all this is to see what makes the Second Amendment so slippery today: The legal and social structure upon which the amendment is built no longer exists. The Founders' juries—grand, petit, and civil—are still around today, but the Founders' militia is not. America is not Switzerland. Voters no longer muster for militia practice in the town square.

Of course, we are free today to read the Second Amendment more broadly if we choose. Thoughtful legal scholars of all stripes—from Sanford Levinson

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9. *Cf.* JED RUBENFELD, FREEDOM AND TIME 178-95 (2001) (discussing the role of paradigm cases in constitutional interpretation).

10. Note the technique of parsing one clause of a constitution in light of its neighboring clauses. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418-19 (1819). Note also that the specific wording of state constitutions is being invoked to parse similar words in the federal document. Both techniques feature prominently in my efforts to understand the Bill of Rights generally. *See* Amar, *supra* note *.

on the left to Eugene Volokh on the right[11]—remind us that other amendments have been read generously; why not the Second? But, given that a broad reading is a policy choice rather than a clear constitutional command, it must be functionally justified. The mere fact that, say, the First Amendment has been read expansively is not an automatic argument for equal treatment for the Second. For example, violent felons, while in prison and after their release, have a First Amendment right to print their opinions in newspapers. Yet such felons have never had a Second Amendment right to own guns. Even the NRA accepts this double standard. What underlies it? The obvious functional idea that sticks and stones and guns in the hands of dangerous felons can indeed hurt others in ways that their words cannot.

Today's guns are especially dangerous. At the Founding, single-fire muskets had certain attractive and democratic properties. A person often had to get close to you to kill you, and, in getting close, he typically rendered himself vulnerable to counterattack. Reloading took time, and thus one person could not ordinarily kill dozens in seconds. One person, one gun, one shot was not as perfect a system of majority rule as one person, one vote, but the side with the most men often won; there was a rough proportionality of capacity to kill and be killed. What is more, madmen were constrained by the strong social network of the well-regulated militia. Today, technological and social limits have loosened, perhaps rendering madmen more dangerous.

The Founders acted and wrote in a world where democratic self-government had never truly existed on a continental scale. Then-conventional wisdom associated liberty and democracy with localism, and linked geographically expansive regimes with empire and tyranny. If the Framers were slightly paranoid about the potential evil of a central Leviathan, they had good reason, given their lived experience with the British empire and the history of the world thus far. The last two centuries have shown that the federal government in general has redeemed the hopes of its friends more than it has confirmed the fears of its enemies. To rail against central tyranny today is to be considerably more paranoid than were the Founders, given the general track record of the United States since 1787. Put another way, given that ballots and the First Amendment have proved pretty good devices for keeping the feds under control, bullets and the Second Amendment need not bear as much weight today as some pessimists anticipated two centuries ago.

So, if we seek broad readings of the amendment faithful to the core values of the Founders, here are a few interpretations that the NRA hasn't proposed but that are at least as plausible as the ones it has proposed:

a. *Take the "mil" out of the militia.* In highly sophisticated scholarship transcending the typical statist-versus-libertarian debate, Indiana law professor David Williams has emphasized how the militia bound citizens together in a

11. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Eugene Volokh, *Guns and the Constitution*, WALL ST. J., Apr. 12, 1999, at A23.

common venture.[12] It played an important social function in the community and embodied a democratic culture in which rich and poor citizens from all walks of life came together as equals—as with the jury. Without some kind of democratic glue, our culture risks flying apart, especially in today's world of increasing demographic diversity and specialization of labor. Thus, a broad modern reading of the amendment would call for compulsory or quasi-compulsory national service, with both military and nonmilitary alternatives, like Volunteers in Service to America or the Civilian Conservation Corps. (Recall that an early version of the amendment provided for compulsory military service with an opt-out for conscientious objectors.) Instead of bowling alone, Americans would band together, building a more solid base of social capital and civic virtue.

b. *Create an army that truly looks like America.* At the Founding, a standing army in peacetime was viewed with dread and seen as Others—mercenaries, convicts, vagrants, aliens—rather than ordinary citizens. Today, we view our professional armed forces with pride. These forces represent Us, not Them. Thus, the Founders' militia has begun to morph into today's army. If so, women and gays should play as equal a role as possible in today's institutions of collective self-defense. The militia celebrated by the Second Amendment should reflect the people, just as the jury should. To put the point another way, the Second Amendment says that voters should bear arms and that arms-bearers should vote. Since the Nineteenth Amendment made women equal voters, the Second Amendment demands that they be given equal status in arms. Allowing women to buy guns at the local Wal-Mart might make them equal in libertarian gun-toting but does not make them equal in communitarian arms-bearing—it fails to include them on equal terms in modern America's militia-substitute. What's true for women may also be true for gay men. The armed forces' discrimination on grounds of sexual orientation is, formally at least, discrimination on the basis of sex, in tension with the Nineteenth Amendment ideal of equality. (If Leslie has sex with John, it is a form of sex discrimination to treat Leslie one way if she is a woman and a different way if he is a man.) Formal sex discriminations can be justified in some cases, but they should be closely scrutinized. Separate bathrooms for men and women are, formally, a kind of discrimination on the basis of sex, but this arrangement is widely seen as justified by legitimate privacy concerns. So, too, certain sex-based exclusions in military policy might be justifiable, where these exclusions reflect real physical differences relevant to modern warfare. But where exclusions of women and gays are justified merely by the need to maintain "morale" and "unit cohesion," we should be wary. Similar arguments were once used to maintain racial discrimination in our armed forces.[13]

12. *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

13. *See* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

c. *Rethink presidential power to use military force unilaterally*. At the Founding, standing armies were feared as engines of executive despotism and military adventurism. If the president could simply command hired guns who would mindlessly obey, he would have less need to persuade his fellow citizens before pursuing risky policies. Thus, the Founders' reliance on a militia effectively decentralized and democratized decisions about whether and how to go to war. In a brilliant article, Harvard's Elaine Scarry argues that our modern military system has betrayed the values and vision of the Second Amendment.[14] Today's Minuteman missiles, she suggests, are far less democratic than the Founders' Minuteman muskets.

These are a few broad readings that attempt to stay true to the vision of the Founders' Second Amendment while also making modern sense.[15] None of these readings is compelled, and all of them would require much more elaboration before they should be accepted.

What about the strong libertarian view? There is a great deal to be said on behalf of an individual's right to keep a gun in one's home for self-defense, as even Harvard Law School's Laurence Tribe—no pawn of the NRA—has publicly acknowledged of late.[16] But the best constitutional arguments for the libertarian view come not from the Founding but from Reconstruction some fourscore years later.

Even with regard to the Founding, it is simplistic to deny any link between collective self-protection and individual self-defense. Lawyer and legal scholar Don Kates reminds us that, somewhat like standing armies, roving bands of thugs and pirates posed a threat to law-abiding citizens, and trusty weapons in private homes were indeed part of a system of community policing against predators.[17] (Note that the amendment encompasses the right to "keep" as well as to "bear" arms.) But protection against thugs and pirates was not the main image of the Second Amendment at the Founding. The amendment was about Lexington, Concord, and Bunker Hill. When arms were outlawed, only the king's men would have arms.

The amendments forged in the afterglow of the Revolution reflected obvious anxiety about a standing army controlled by the new imperial government, and affection for the good old militia. But the world looked different to Americans after a bloody Civil War. Massachusetts militiamen had once died for liberty at Bunker Hill, but, more recently, Mississippi militiamen had killed for slavery at Vicksburg. The imperial Redcoats at the Founding were villains, but

14. Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991).

15. *Cf.* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (discussing the need to translate old texts to meet new contexts).

16. 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 894-903 (3d ed. 2000).

17. Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992). For a powerful presentation of Kates's overall vision, see Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

the boys in blue who had won under Grant and Sherman were heroes—at least in the eyes of Reconstruction Republicans. Thus, when this great generation took its turn rewriting the Constitution, it significantly recast the right to weapons. Textually, the Fourteenth Amendment proclaimed the need to protect fundamental "privileges" and "immunities" of citizens. The amendment explicitly limited state governments, but its authors made clear that no government, state or federal, should violate fundamental rights of citizens. Although the Supreme Court ignored this language for almost a century, there are recent signs that suggest the Justices may be willing to give this clause a second look.[18]

If they do, gun groups have reason to cheer. As scholars such as Stephen Halbrook, Michael Kent Curtis, Robert Cottrol, and Ray Diamond[19] have documented in great detail, the framers of the Fourteenth Amendment strongly believed in an individual's right to own and keep guns for self-protection. Blacks and Unionists down South could not always count on the local police to keep white night-riders at bay. When guns were outlawed, only Klansmen would have guns. Thus, the Reconstruction Congress made quite clear that a right to keep a gun at home for self-protection was indeed a constitutional right—a true "privilege" or "immunity" of citizens.[20]

That is good news for the NRA. Even better news is that, if the Court takes this Reconstruction vision seriously, state and local governments would be limited along with federal officials.[21] But the bad news, at least for ardent gun lovers, is that whatever Fourteenth Amendment right exists is a limited one. Virtually no one today is seriously arguing to take away all guns from homes.

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18. *See* Saenz v. Roe, 526 U.S. 489, 503-04 (1999) (relying squarely on the privileges and immunities clause to invalidate a state statute).

19. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986); STEPHEN HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998); STEPHEN HALBROOK, THAT EVERY MAN BE ARMED (1984); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); *see also* Lucas A. Powe, *Guns, Words, and Constitutional Interpretation,* 38 WM. & MARY L. REV. 1311 (1997).

20. The Fourteenth Amendment was linked to (though it also went farther than) the Civil Rights Act of 1866. Ch. 31, §1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981-82). The companion bill to the Civil Rights Act, the Freedman's Bureau Bill of 1866, read as follows: "personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms,* shall be secured to and enjoyed by all the citizens. . . ." 14 STAT. 173, 176 (1866) (emphasis added). Note also that *Dred Scott* held that, if blacks could ever be citizens, it would necessarily follow that they would enjoy all the "privileges and immunities of citizens" including "full liberty of speech in public and in private upon all subjects upon which [a state's] citizens might speak; [liberty] to hold public meetings upon political affairs, and to keep and carry arms wherever they went." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 416-17 (1857). Note, finally, the ways in which the language of both *Dred Scott* and the Freedman's Bureau Bill tended to privatize and demilitarize the image of gun-toting—the former by speaking of an individual's right to carry arms rather than bear arms, and the latter with its repeated use of the word personal.

21. Thus far, the Second Amendment is one of the few parts of the Bill of Rights that the Supreme Court has not held to be incorporated against state and local governments. Indeed, the Court has said very little about the Amendment in the last sixty years, the period in which incorporation of most other provisions of the Bill of Rights took place. For strong historical arguments in favor of incorporation, see the sources cited *supra* in note 19. Recently, one Justice has openly hinted that the Supreme Court might do well to revisit the question of the Second Amendment's meaning. *See* Printz v. United States, 521 U.S. 898, 937-39 (1997) (Thomas, J., concurring).

Trying to do so would be a nightmare for anyone who cares about liberty and privacy, given that guns are stashed everywhere and come close to outnumbering people in America. Instead, most proposals seek to regulate rather than prohibit—limiting the amount and type of ammunition, restricting the number of guns one can buy in a given week, and so on. Requiring registration of guns and even licenses with practical and book tests, on the model of licensing drivers, sends some gun lovers up the wall—the first step toward confiscation, they predict in dire tones. But this is hard to take seriously. The authors of the Second Amendment, after all, were perfectly comfortable knowing that the government would know who had guns—every voter—and also were perfectly comfortable requiring those who owned guns to be properly trained and monitored in their use. Realistic gun control today may not be exactly what the Framers had in mind when they wrote that the armed citizenry should be "well regulated." But, at least in a world that is so distant from the Founders, it is close enough.