25. Restoring the Right to Bear Arms

Congress should

- reeducate itself about the original meaning and current constitutional implications of the Second Amendment,
- use its constitutional authority over the District of Columbia to overturn D.C.'s handgun ban and enact a ''shall-issue'' concealed carry licensing statute, and
- repeal the Gun Control Act of 1968.

For decades, the Second Amendment was consigned to constitutional exile, all but erased from constitutional law textbooks and effectively banished from the nation's courts. But no more. Recent developments in the law and in political culture have begun the process of returning the amendment to its proper place in our constitutional pantheon. Congress now has a historic opportunity, not simply to stave off new gun-control proposals, but to begin restoring Americans' right to keep and bear arms.

Understanding the Second Amendment

Ideas have consequences, and so does constitutional text. Though elite opinion reduced the Second Amendment to a constitutional inkblot for a good part of the 20th century, gun enthusiasts and grassroots activists continued to insist that the amendment meant what it said. And slowly, often reluctantly, legal scholars began to realize that the activists were right. Liberal law professor Sanford Levinson conceded as much in a 1989 *Yale Law Journal* article titled ''The Embarrassing Second Amendment.'' UCLA Law School's Eugene Volokh took a similar intellectual journey. After a 1990 argument with a nonlawyer acquaintance who loudly maintained that the Second Amendment protected an individual right, Volokh concluded that his opponent was a ''blowhard and even a bit of a kook.'' But several years later, as he researched the subject, he discovered to his

''surprise and mild chagrin, that this supposed kook was entirely right'': the amendment secures the individual's right to keep and bear arms.

That's also what the Fifth Circuit Court of Appeals concluded in October 2001 when it decided *United States v. Emerson.* It held that the Constitution ''protects the right of individuals, including those not then actually a member of any militia . . . to privately possess and bear their own firearms . . . that are suitable as personal individual weapons.''

U.S. Attorney General John Ashcroft has endorsed the *Emerson* court's reading of the amendment. First, in a letter to the National Rifle Association, Ashcroft stated his belief that ''the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms.'' That letter was followed by Justice Department briefs before the Supreme Court in the *Emerson* case and in *United States v. Haney.* For the first time, the federal government argued in formal court papers that the ''Second Amendment . . . protects the rights of individuals, including persons who are not members of any militia . . . to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or . . . firearms that are particularly suited to criminal misuse.''

The Right of the People

What's driving the new consensus? Let's look at the amendment's text: ''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.''

The operative clause (''the right of the people to keep and bear Arms, shall not be infringed'') secures the right. The explanatory clause (''A well regulated Militia, being necessary to the security of a free State'') justifies the right. That syntax was not unusual for the times. For example, the free press clause of the 1842 Rhode Island Constitution states: ''The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments of any subject.'' That provision surely does not mean that the right to publish protects only the press. It protects ''any person''; and one reason among others that it protects any person is that a free press is essential to a free society. Analogously, the Second Amendment protects ''the people''; and one reason among others that it protects the people is that it ensures a well-regulated militia.

As George Mason University law professor Nelson Lund puts it, imagine if the Second Amendment said, ''A well-educated Electorate, being necessary to self-governance in a free state, the right of the people to keep and

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read Books shall not be infringed.'' Surely, no rational person would suggest that only registered voters have a right to read. Yet that is precisely the effect if the text is interpreted to apply only to a well-educated electorate. Analogously, the Second Amendment cannot be read to apply only to members of the militia.

The Second Amendment, like the First and the Fourth, refers explicitly to ''the right of the people.'' Consider the placement of the amendment within the Bill of Rights, the part of the Constitution that deals exclusively with rights of individuals, not powers of the state. No one can doubt that First Amendment rights (speech, religion, assembly) belong to us as individuals. Similarly, Fourth Amendment protections against unreasonable searches and seizures are individual rights. In the context of the Second Amendment, we secure ''the right of the people'' by guaranteeing the right of each person. Second Amendment protections are not for the state but for each individual against the state—a deterrent to government tyranny.

And not just against government tyranny. The Second Amendment also secures our right to protect ourselves from criminal predators. After all, in 1791 there were no organized, professional police forces to speak of in America. Self-defense was the responsibility of the individual and the community and not, in the first instance, of the state. Armed citizens, responsibly exercising their right of self-defense, are an effective deterrent to crime.

Today, states' incompetence at defending citizens against criminals is a more palpable threat to our liberties than is tyranny by the state. But that incompetence coupled with a disarmed citizenry could well create the conditions that lead to tyranny. The demand for police to defend us increases in proportion to our inability to defend ourselves. That's why disarmed societies tend to become police states. Witness law-abiding inner-city residents, many of whom have been disarmed by gun control, begging for police protection against drug gangs—despite the terrible violations of civil liberties, such as curfews and anti-loitering laws, that such protection entails. The right to bear arms is thus preventive—it reduces the demand for a police state. George Washington University law professor Robert Cottrol put it this way: ''A people incapable of protecting themselves will lose their rights as a free people, becoming either servile dependents of the state or of the criminal predators.''

Over the years, our elected representatives have adopted a dangerously court-centric view of the Constitution: a view that decisions about constitu-

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tionality are properly left to the judiciary. But members of Congress also swear an oath to uphold the Constitution. Congress can make good on that oath by taking legislative action to restore our right to keep and bear arms. To that end, Congress should take the following steps.

Repeal D.C.'s Handgun Ban and Enact Concealed Carry

No jurisdiction in the United States works as doggedly to disarm citizens as does the District of Columbia, our nation's capital and on-again, off-again murder capital. Yes, the city council grudgingly legalized pepper spray in 1993 (provided, of course, that it's properly registered), but that brief concession to self-defense hasn't led to any revision of the District's gun laws, which are still among the most restrictive in America.

With very few exceptions, no handgun can be registered in D.C. Even those pistols grandfathered prior to the District's 1976 ban cannot be carried from room to room in the home without a license, which is never granted. Moreover, all firearms in the home, including rifles and shotguns, must be unloaded and either disassembled or bound by a trigger lock. In effect, no one in the District can possess a functional firearm in his or her own residence. And the law applies not just to ''unfit'' persons like felons, minors, or the mentally incompetent but across the board to ordinary, honest, responsible citizens. If ''reasonable'' regulations are those that prohibit bad persons from possessing massively destructive firearms, then the District's blanket prohibitions on handguns are patently unreasonable.

Some violations of the D.C. gun ban are prosecuted by the U.S. attorney for the District of Columbia, an employee of the Justice Department—the same Justice Department that is now on record as favoring an individual rights theory of the Second Amendment. To be sure, Attorney General Ashcroft had declared in an internal memorandum that the Justice Department ''will continue to defend the constitutionality of all existing federal firearms laws.'' But D.C. law, although enacted pursuant to congressional delegation, is not federal law.

It's one thing for Ashcroft to endorse the individual right to bear arms in a letter to a friendly interest group, or to affirm it in a footnote in a legal brief. It's quite another to follow up words with action. As an official with the District's Public Defender Service puts it, Ashcroft's Justice Department ''is currently prosecuting individuals solely for 'bearing' a pistol, even though many of those individuals have no prior convictions and are adult citizens of full mental capacity. Thus the United States

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persists in prosecuting District of Columbia residents for conduct that the Attorney General has expressly deemed protected by the United States Constitution.''

Whatever the reasons for Attorney General Ashcroft's perplexing decision to continue prosecuting gun-ban violations, Congress has the constitutional authority to protect District residents' right to bear arms. Article I, section 8, clause 17, of the Constitution gives Congress the power ''to exercise exclusive legislation in all cases whatsoever'' over the District of Columbia. Congress can and should use that authority to repeal the District's gun ban and enact a ''shall-issue'' concealed carry licensing statute. Such statutes mandate that handgun permits be issued to citizens who satisfy certain objective criteria such as mental competence, lack of a criminal record, and completion of a firearms training course.

More than 30 states have shall-issue laws, and, as exhaustive research by American Enterprise Institute scholar John R. Lott Jr. has shown, they deter crime. Lott found that ''the reductions in violent crime are greatest in the most crime prone, most urban areas. Women, the elderly and blacks gained by far the most from this ability to protect themselves.''

In contrast, since 1976 D.C. residents have served as guinea pigs in a public policy experiment in near-total gun prohibition. That experiment has failed catastrophically. Congress can and should end that illegitimate experiment and restore District residents' right to keep and bear arms. Unlike armed criminals in D.C., the city's disarmed residents pay their taxes and obey the laws. But the District of Columbia government says that if someone breaks into their houses, their only choice is to call 911 and pray that the police arrive in time. That's not good enough. The right to bear arms includes the right to defend your property, your family, and your life. No government should be permitted to take that right away.

Repeal the Gun Control Act of 1968

The Gun Control Act of 1968, with subsequent amendments, is bad law and bad public policy. It ought to be repealed. Full repeal is not a radical step; Ronald Reagan endorsed it in 1980. But until that can be accomplished, Congress should, at a minimum, repeal the most oppressive sections:

The 1994 Ban on So-Called Assault Weapons

Automatic firearms have been heavily regulated since 1934. Semiautomatic weapons, which fire only one round each time the trigger is pulled,

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have been available for more than 100 years. They are used by tens of millions of Americans for hunting, self-defense, target shooting, and in formal competitions, including the Olympics. Police statistics from around the nation show that such guns are rarely used in crime. Felons, drug addicts, illegal aliens, minors, and incompetents cannot legally buy firearms—semiautomatic or otherwise. Moreover, semiautomatic weapons are not more powerful than other guns. Indeed, they fire smaller bullets at lower velocities than do most well-known rifles used for hunting big game.

The ban on assault weapons expired in September 2004. The statute was purely cosmetic—banning guns because of politically incorrect features such as bayonet lugs (as if drive-by bayoneting were a problem) or a rifle grip that protrudes ''conspicuously'' from the gun's stock. The ban did little to curb criminal violence, but it did a great deal to inhibit the full exercise of Second Amendment rights. Congress should resist any attempt to re-enact the ban.

The 1994 Ban on Possession of Handguns by Persons under 18

Assuming that a ban on underage possession of a handgun by a 17-year-old could survive Second Amendment scrutiny, it is a topic that should be addressed by state, not federal, law. The statute does include some exceptions—for example, a parent may take a child target shooting—but, even if the child is under direct and continuous parental supervision, the parent commits a federal crime unless she writes a note giving the child permission to target shoot and the child carries the note at all times. The 1994 prohibition usurps traditional state powers, is overbroad, and encroaches on parental rights, despite a paucity of empirical evidence that the ban will reduce gun accidents or gun-related violence.

The Ban on Gun Possession by Specified Adults

When adult behavior is regulated, the Second Amendment weighs more heavily than when restrictions are imposed on minors. Even if Second Amendment constraints are somehow satisfied, the federal government has no constitutional authority in this area. Particularly unfair, whether imposed by federal or state law, is the ban on gun possession by anyone who is subject to a domestic restraining order, routinely issued by divorce courts without any finding that the subject of the order is a danger to another person. Such provisions ought not to be allowed to stand.

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Conclusion

The broader principle is this: Governments frequently fail to perform their single most important function—protecting American citizens against aggression. Armed civilians can deter aggression. That means safer homes, shopping malls, schools, and other public places. Law enforcement officers can't be everywhere, but an armed, trained citizenry can be.

For too long, elite opinion in America has been implacably opposed to armed self-defense. The underlying philosophy, expressed by Pete Shields, former president of Handgun Control, is that ''the best defense is . . . no defense—give them what they want.'' After 9/11, that philosophy is no longer valid, if it ever was. It's time for Congress to repudiate it.

Suggested Readings

Halbrook, Steven P. ''Second Class Citizenship and the Second Amendment in the District of Columbia.'' *George Mason University Civil Rights Law Journal* 5 (1995).

Kopel, David B. *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* Amherst, NY: Prometheus Books, 1992.

Lott, John R. Jr. *More Guns, Less Crime: Understanding Crime and Gun-Control Laws.* 2d ed. Chicago: University of Chicago Press, 2000.

Lund, Nelson. ''A Primer on the Constitutional Right to Keep and Bear Arms.'' Virginia Institute for Public Policy Report no. 7, June 2002.

Snyder, Jeffrey R. ''Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun.'' Cato Institute Policy Analysis no 284, October 22, 1997.

United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

—Prepared by Gene Healy and Robert A. Levy