

YOUR CONSTITUTION IS KILLING YOU

A reconsideration of the
right to bear arms
By *Daniel Lazare*

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.

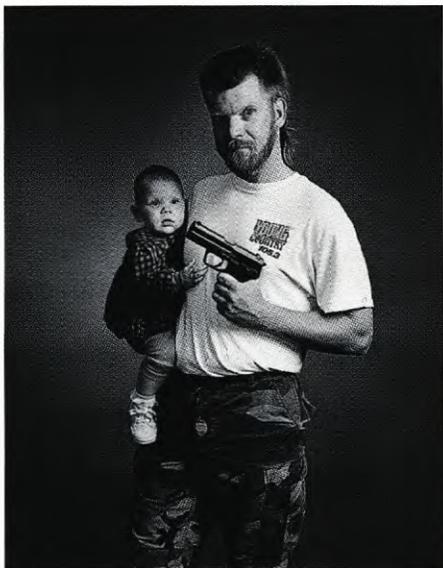
—Second Amendment to the Constitution of the United States

On June 17, in the aftermath of the massacre at Columbine High School and a similar, if less grisly, incident the following month in Conyers, Georgia, the House of Representatives passed a “juvenile crime bill” steadfast in its refusal to limit the ease with which juveniles can lay their hands on firearms. House Republicans, it was clear, were determined to avoid making any connection between the fact that there are an estimated 240 million guns in the United States, nearly one per person, a number that is increasing by some 5 to 7 million a year, and the increase of violence in our culture. Instead, the problem was that we had forgotten the importance of “family values,” that our children had become “spoiled with material things,” that we had given in to “liberal relativism.” Guns weren’t the problem; the problem was “the abandonment of God” in the public sphere.

Representatives Henry Hyde (R., Ill.) and Tom DeLay (R., Tex.) were particularly enthusiastic in their efforts to look beyond guns for a solution. Hyde put the blame on the entertainment industry and tried to push through an amendment to the crime bill that would have made it a jailable offense to sell overtly violent or sexual material to minors. Even when 127 of his fellow Republicans voted against the measure, Hyde refused to let go. “People were misled,” he said, “and disinclined to oppose the powerful entertainment industry.” DeLay’s approach was even more entertaining. At a “God Not Guns” rally, he read aloud an e-mail he claimed to have received that very morning: “The student writes, ‘Dear God, Why didn’t you stop the shootings at Columbine?’ And God writes,

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LIBERALS CANNOT BEAR TO ADMIT THE TRUTH ABOUT GUN CONTROL: THE RIGHT WING IS RIGHT. THE SECOND AMENDMENT CONFERS AN *INDIVIDUAL* RIGHT



“Dear student, I would have, but I wasn’t allowed in school.” (So much for divine omnipotence.) An hour later DeLay was on the House floor, telling his colleagues that “our school systems teach the children that they are nothing but glorified apes who are evolutionized out of some primordial soup of mud.” Other DeLayisms: “We place our children in day-care centers where they learn their socialization skills . . . under the law of the jungle . . .”; “Our children, who historically have been seen as a blessing from God, are now viewed as either a mistake created when contraception fails or inconveniences that parents try to raise in their spare time.” A proposal to allow the display of the Ten Commandments in public schools was subsequently voted into the bill.

Among the further futile gestures housed in a second piece of crime legislation that failed the next day was a measure to reduce the Senate’s proposed waiting time for purchases at gun shows and to limit the number of gun shows subject to any waiting period whatsoever. All this despite polls showing two-to-one support for stricter gun control even before Columbine. Two centuries ago, the great fear among the men who drew up the United States Constitution was of a popularly elected legislature falling all over itself to do the public’s bidding; today we are witness to a popularly elected body falling all over itself *not* to carry out the democratic will. Why?

The standard liberal response is that the National Rifle Association made them do it. The NRA has used its immense campaign war chest to punish gun-control advocates and stifle dissent. It has twisted and distorted the Constitution. It has cleared a path for troglodytes like Hyde and DeLay. But the real problem is more disconcerting. The reason that Hyde and Co. are able to dominate the gun debate, the reason that the gun lobby is so powerful, is not the NRA but the basis on which the NRA’s power rests; i.e., the Second Amendment. The truth about the Second Amendment is something that liberals cannot bear to admit: The right

wing is right. The amendment *does* confer an individual right to bear arms, and its very presence makes effective gun control in this country all but impossible.

For decades liberal constitutional scholars have maintained that, contrary to the NRA, the Second Amendment does not guarantee an individual’s right to own guns, merely a right to participate in an official state militia. The key phrase, they have argued, is “[a] well regulated Militia,” which the introductory clause describes as nothing less than essential to “the security of a free State.” A well-regulated militia is not just a goal, consequently, but *the* goal, the amendment’s *raison d’être*. Everything else is subordinate. The right “to keep and bear Arms” is valid only to the degree that it serves this all-important end. There is therefore no *individual* right to bear arms in and of itself, only a *collective* right on the part of the citizens of the states to do so as members of the various official state militias. The right to own the assault weapon of one’s choice exists only in the fevered imagination of the National Rifle Association. Its constitutional basis is nil. The only right that the Second Amendment confers is the right to emulate Dan Quayle and join the National Guard.

This is the cheerful, anodyne version of the Second Amendment we’re used to from the American Civil Liberties Union and other liberal groups. But as the gun issue has heated up since the Sixties and Seventies, constitutional scholars have taken a second look. The result has been both a renaissance in Second Amendment studies and a remarkable about-face in how it is interpreted. The purely “collectivist” interpretation has been rejected across the board by liberals and conservatives as ahistorical and overly pat. The individualist interpretation, the one that holds that Americans have a right to bear arms whether they’re serving in an official state militia or not, has been more or less vindicated. In fact, some academics have gone so far as to compare the NRA’s long campaign in behalf of an

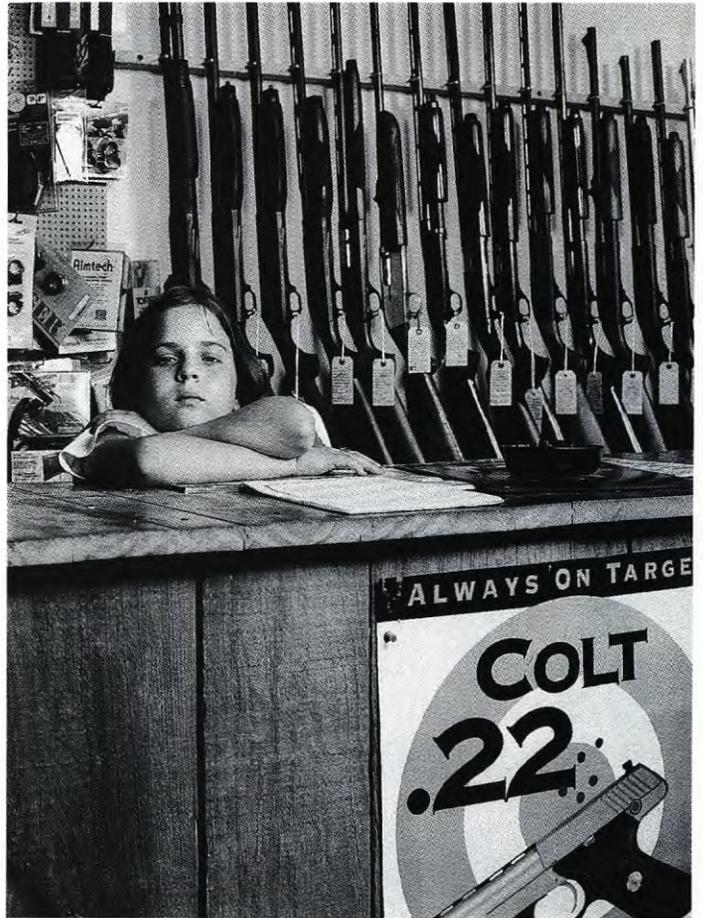
expansive interpretation of the Second Amendment to the ACLU's long campaign in behalf of an expansive reading of the First. As the well-known constitutional scholar William Van Alstyne put it, "The constructive role of the NRA today, like the role of the ACLU in the 1920s, . . . ought itself not lightly to be dismissed. Indeed, it is largely by the 'unreasonable' persistence of just such organizations in this country that the Bill of Rights has endured." Language like this is what one might expect at some Texas or Colorado gun show, not in the pages of the *Duke Law Journal*.

No less strikingly, the Second Amendment renaissance has also led to a renewed appreciation for the amendment's ideological importance. Previously, scholars were inclined to view the Second Amendment as little more than a historical curiosity, not unlike the Third Amendment, which, as almost no one remembers, prohibits the peacetime quartering of troops in private homes without the owners' consent. Harvard's Laurence Tribe gave the Second Amendment no more than a footnote in the 1988 edition of his famous textbook *American Constitutional Law*, but a new edition, published this August, treats the subject much more extensively. It is now apparent that the amendment, despite its brevity, encapsulates an entire worldview concerning the nature of political power, the rights and duties of citizenship, and the relationship between the individual and the state. It is virtually a constitution-within-the-Constitution, which is undoubtedly why it fuels such fierce passions.

With crazed day traders and resentful adolescents mowing down large numbers of their fellow citizens every few weeks, the implications of this new, toughened-up version of the Second Amendment would seem to be profound. Politically, there's no doubt that it has already had an effect by encouraging the gun lobby to dig in its heels after Littleton, Conyers, the Mark Barton rampage in Atlanta, and the earlier shootings in Kentucky, Arkansas, and elsewhere. When Joyce Lee Malcolm, professor of history at Bentley College in Waltham, Massachusetts, and the author of a pathbreaking 1994 study, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Harvard University Press), told a congressional committee a year later that "[i]t is very hard, sir, to find a historian who now believes that it is only a collective right . . . [t]here is no one for me to argue against anymore," it was just the sort of thing that pro-gun forces on Capitol Hill wanted to hear. If it wasn't a sign that God was on their side, then it was a sign that the Constitution was, which in American politics is more or less the same thing.

The judicial impact is a bit harder to assess. Although the Supreme Court has not ruled on the Second Amendment since the 1930s, it has repeatedly upheld gun control measures. But there is evidence that judicial sentiment is beginning to take heed of the academic change of heart. Two years ago, Supreme Court Justice Clarence Thomas indicated that he thought it was time to rethink the Second Amendment; Justice Antonin Scalia apparently thinks so as well. Then, just this past April, two weeks before Eric Harris and Dylan Klebold shot up Columbine High School, a federal judge in a Texas gun case issued a ruling so enthusiastically "individualist" that it was virtually a brief in favor of what is now known in ac-

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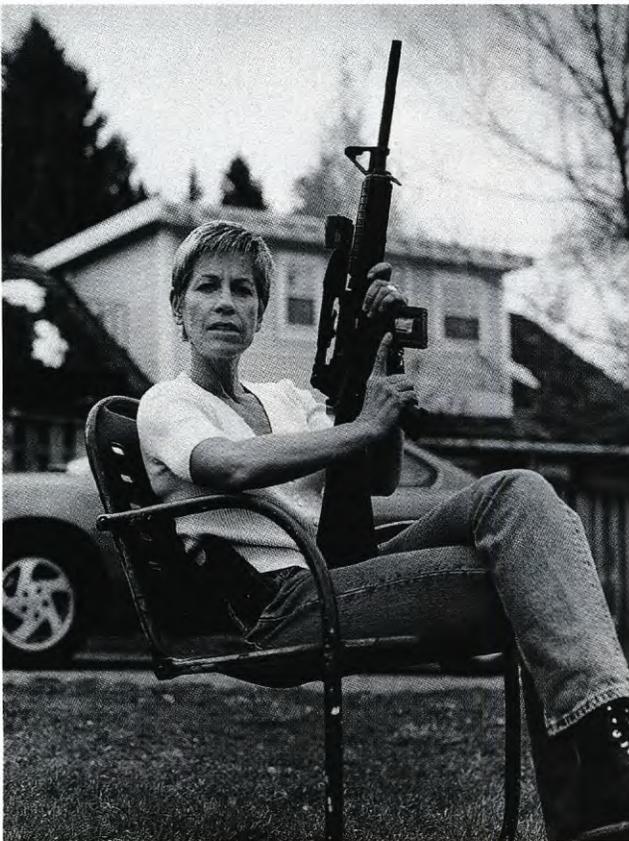
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demic circles as the "Standard Model" of the Second Amendment. "The plain language of the amendment," declared Judge Sam R. Cummings, "shows that the function of the subordinate clause [i.e., the portion referring to a well-regulated militia] was not to qualify the right [to keep and bear arms], but instead to show why it must be protected." Rather than mutually exclusive, the collective right to join a state militia and the individual right to own a gun are, according to Cummings, mutually reinforcing. Although anti-gun groups predicted that the decision would soon be overturned, it is clear that a purely collectivist reading is becoming harder and harder to defend; the individualist interpretation, harder and harder to deny.

We have long been in the habit of seeing in the Constitution whatever it is we want to see. Because liberals want a society that is neat and orderly, they tell themselves that this is what the Constitution "wants" as well. This is a little like a nineteenth-century country vicar arguing that the Bible stands for moderation, reform, and other such Victorian virtues when in fact, as anyone who actually reads the text can see, it is filled with murder, mayhem, and the arbitrary vengeance of a savage god. By the same token, the increasingly sophisticated scholarship surrounding the Second Amendment has led to renewed respect for the constitutional text as it is rather than as we would like it to be. The Constitution, it turns out, is not neat and orderly but messy and unruly. It is not modern but pre-modern. It is not the product of a time very much like our own but reflects the unresolved contradictions of a time very different from our own.

Could it be that the Constitution is not the greatest plan on earth, that it contains notions that are repugnant to the modern sensibility? "When we are lost, the best thing for us to do is to look to our Constitution as a beacon of light and a guide to get us through trying times." So declaimed Representative Zoe Lofgren (D., Calif.) during the House impeachment debate last October. Considering how we've all been taught since childhood to revere this document, probably not one American in a thousand would disagree. But what if Zoe Lofgren is wrong—what if the sacred text is seriously, if not fatally, flawed? Could it be that constitutional faith is *not* enough to get us through trying times? In a faith-bound republic like the United States, this is pretty heretical stuff. Yet one of the nice things about the Second Amendment renaissance is the way it forces us to grapple with such heresy. Instead of allowing us to go on blindly trusting in the wisdom of a group of tribal patriarchs known as the Founding Fathers, it compels us to think for ourselves.

The framers, as it turns out, were of two minds where the power of the people was concerned. The Preamble to the Constitution implies a theory of unbounded popular sovereignty in which "we the people" are so powerful that we can "ordain and establish" new constitutions and, in the process, abrogate old ones such as the disastrous Articles of Confederation. The rest of the document implies that "we the people" are so powerless that when it comes to an anachronism such as the Second Amendment, the democratic majority is effectively precluded from changing a Constitution made in the people's name. We the people can move mountains, but we cannot excise one troublesome twenty-seven-word clause. Because we have chained ourselves to a premodern Constitution, we are unable to deal with the modern problem of a run-



away gun culture in a modern way. Rather than binding society together, the effort to force society to conform to the dictates of an outmoded plan of government is tearing it apart. Each new crazed gunman is a symptom of our collective—one might say our constitutional—helplessness. Someday soon, we will have to emancipate ourselves from our eighteenth-century Constitution. The only question is how.

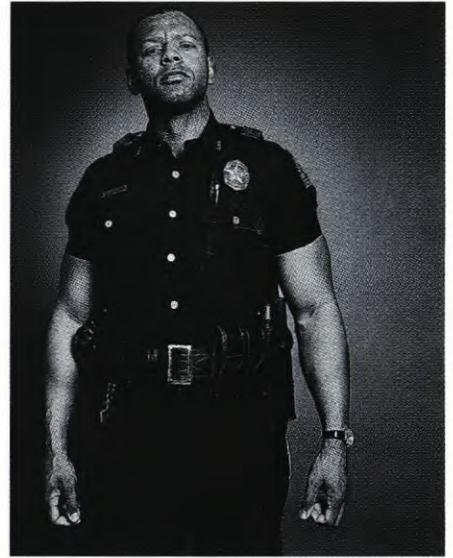
Americans tend to give history short shrift; after all, when your Constitution is a timeless masterpiece, who needs to bother with something as boring as the past? But in order to unlock the meaning of the Second Amendment, it is necessary to know a little about the world in which it was created. The most important thing to understand is the eighteenth century's role as the great transitional period. Capitalism, industrialism, the rise of the great metropolis, the creation of new kinds of politics—these were beginning to make themselves felt, and as they did so they were creating shock waves and counter shock waves from one end of the English-speaking world to the other. Urbanization fueled passionate defenses of the old agrarian way of life. A new system of government centered on a prime minister, a cabinet, and an all-powerful House of Commons provoked endless screeds in favor of the old system of checks and balances among a multitude of coequal governing institutions.

This is the source of the great eighteenth-century polarization between what was known as Court and Country—the powerbrokers, influence-wielders, and political fixers on one side, and all those who felt shut out by the new arrangement on the other. Since the 1960s, historians have made immense strides in reconstructing this Anglo-American ideological world. In essence, we now know that it was dominated by fierce controversy over the nature of political power: whether it was harmful or beneficial, oppressive or liberating, whether it should be concentrated in a single legislative chamber or distributed among many. The Country opposition believed passionately in the latter. As a couple of coffeehouse radicals named John Trenchard and Thomas Gordon put it in their hugely popular *Cato's Letters* in the 1720s, "Power is like fire; it warms, scorches, or destroys according as it is watched, provoked, or increased." The solution was to divide power among so many competitive institutions that politicians' "emulation, envy, fear, or interest, always made them spies and checks upon one another." Since power was growing, oppression was growing also. "Patriots," therefore, were continually fighting a rear-guard action against corruption and tyranny, which were forever on the increase.

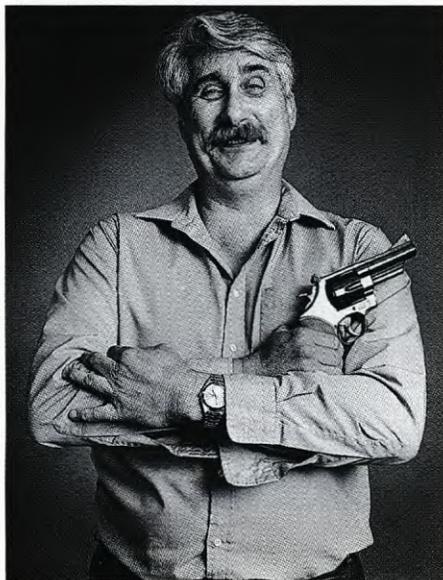
We can recognize in eighteenth-century beliefs like these such modern U.S. attitudes as the cult of checks and balances, hostility to "big government," and the Zoe Lofgrenesque conviction that everything will turn out well so long as we remain true to the constitutional faith of our forefathers. Guns, as it turns out, were also a big part of the eighteenth-century Anglo-American debate. "Standing armies," the great bugaboo of the day, represented concentrated power at its most brutal; the late-medieval institution of the popular militia represented freedom at its most noble and idealistic. Beginning with the highly influential Niccolò Machiavelli, a long line of political commentators stressed the special importance of the popular militias in the defense of liberty. Since the only ones who could defend popular liberty were the people themselves, a freedom-loving people had to maintain themselves in a high state of republican readiness. They had to be strong and independent, keep themselves well armed, and be well versed in the arts of war. The moment they allowed themselves to surrender to the wiles of luxury, the cause of liberty was lost.

Thus, we have Sir Walter Raleigh warning that the first goal of a would-be tyrant is to "unarm his people of weapons, money, and all means whereby they may resist his power." In the mid-seventeenth century, we

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have the political theorist James Harrington stressing the special importance of an armed yeomanry of self-sufficient small farmers, while in the early eighteenth we have Trenchard and Gordon warning that “[t]he Exercise of despotick Power is the unrelenting War of an armed Tyrant upon his unarmed Subjects.” In the 1770s, James Burgh, another writer in this long Country tradition, advised that “[n]o kingdom can be secured [against tyranny] otherwise than by arming the people. The possession of arms is the distinction between a freeman and a slave.” A pro-American English radical named Richard Price added in 1784 that

[T]he happiest state of man is the middle state between the *savage* and the *refined*, or between the wild and the luxurious state. Such is the state of society in CONNECTICUT, and in some others of the *American* provinces; where the inhabitants consist, if I am rightly informed, of an independent and hardy YEOMANRY, all nearly on a level—trained to arms,—instructed in their rights—cloathed in home-spun—of simple manners—strangers to luxury—drawing plenty from the ground—and that plenty, gathered easily by the hand of industry.

This was the Country myth in all its glory, the image of the rough-hewn, liberty-loving “republican” as someone who called no one master, equated freedom and independence, and was not afraid to fight in defense of either or both. Joyce Lee Malcolm points out that where English patriots were content to pay lip service to the importance of arming the people, their cousins across the sea took the notion quite literally. A law passed by the Plymouth Colony in 1623 required “that every freeman or other inhabitant of this colony provide for himselfe and each under him able to beare arms a sufficient musket and other serviceable peece for war.” A 1639 law in Newport ordered that “noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon.” Measures like these were both practical and symbolic. Not only were guns necessary for self-defense but their widespread possession confirmed America’s self-image as a homeland of liberty.

Ideas like these do not seem to have abated the least bit during the colonial period; indeed, by the 1770s they were at full boil. By the time British Redcoats faced off against heavily armed colonial irregulars at the Battle of Lexington and Concord in April 1775, it was as if both sides were actors in a political passion play that had been centuries in the making. It was the standing army versus the people’s militia, the metropolis versus the hinterlands, centralized imperial power versus the old balanced constitution. Although the militias performed less than brilliantly in the Revolutionary War—Washington, professional soldier that he was, thought that the rag-tag volunteer outfits were more trouble than they were worth—the myth lingered on. Americans needed to believe that amateur citizen-soldiers had won the war because their ideology told them that it was only via a popular militia that republican virtue could be established.

It is worth noting that even among those who were skeptical about the militias’ military worth, the concept of a people in arms does not seem to have been at all problematic. Although Alexander Hamilton argued against separate state militias at the Constitutional Convention in 1787, for example, he seemed to have had nothing against popular militias per se. In 1788, he argued in *The Federalist Papers* that in the unlikely event that the proposed new national government used what was known at the time as a “select” militia—i.e., an elite corps—to oppress the population at large, the rest of the militia would be more than enough to fight them off. Such “a large body of citizens,” he wrote, “little if at all inferior to them in discipline and the use of arms, . . . [would] stand ready to defend their own rights and those of their fellow-citizens.” This is one reason why the argument that the Second Amendment confers only a collective right to join the National Guard is specious: today’s National Guard is far closer to the

eighteenth-century concept of a select militia than to the broad, popular militia the Framers clearly had in mind. And if the Second Amendment was nothing more than a guarantee of a right on the part of the states to organize state militias, it would imply that only the federal government was potentially tyrannical. Yet it is clear from James Madison's writings in *The Federalist Papers* that he saw state governments as potential sources of tyranny as well. Madison wrote that "the advantage of being armed" was one of the things that distinguished Americans from all other nations and helped protect them against abuse of power at all levels of government, federal and state. Anti-federalists quite agreed. Their only quibble was that they demanded a Bill of Rights; they wanted the right to bear arms put in writing for all to see.

The meaning of what is now the Second Amendment becomes clearer still if we take a look at how its wording evolved. Madison's original version, which he drew up in 1789 as a member of the newly created House of Representatives, was on the wordy side but at least had the merit of clarity:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

By reversing the order between the right to bear arms and a well-regulated militia, Madison reversed the priority. Rather than a precondition, his original version suggested that a well-ordered militia was merely one of the good things that flowed from universal gun ownership. A committee to which the amendment was referred, however, changed the order so that the amendment now read,

A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms.

This was confusing but at least made plain that a militia was essentially synonymous with the people at large. Unfortunately, that notion, too, was lost when the Senate got hold of the amendment and began chopping out words right and left. The reference to "the body of the people" wound up on the cutting-room floor, as did the final clause. The effect was to deprive later generations of an important clue as to what a well-regulated militia actually meant. Although the final version was leaner and more compact, it was also a good deal less clear.

Nonetheless, a few things seem evident. If the Framers were less than explicit about the nature of a well-regulated militia, it was because they didn't feel they had to be. The idea of a popular militia as something synonymous with the people as a whole was so well understood in the eighteenth century that it went without saying, which is undoubtedly why the

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Senate felt that the reference to “the body of the people” could be safely eliminated. It is also important to note that the flat-out declaration “[t]he right of the people to keep and bear arms shall not be infringed” remained unchanged throughout the drafting process. As Joyce Lee Malcolm has noted, the Second Amendment is a reworking of a provision contained in the English Bill of Rights of 1689. But whereas the English Bill of Rights specified that subjects “may have arms for their defense suitable to their conditions, and as allowed by law,” the American version avoided any such restrictions. Since all Americans (or, rather, members of the white male minority) were of the same rank, they possessed the same rights. They could bear arms for any purpose. And since the amendment was now part of the Constitution, the right was not limited by ordinary law but was over and above it. It was the source of law rather than the object.

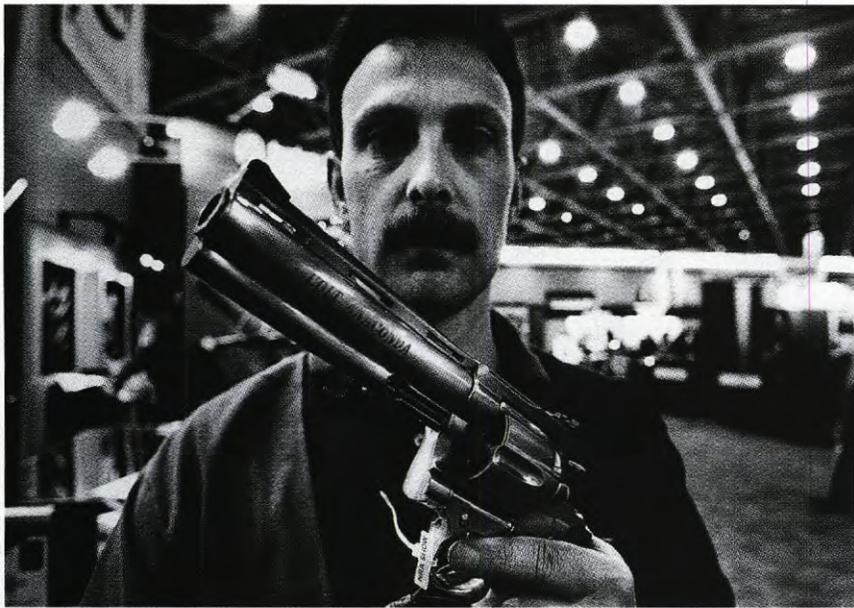
In this regard, as in virtually all others, Americans saw their role as taking ancient liberties and strengthening them so as to render tyranny all the more unlikely.

Although members of the legal academy assume that this is where the discussion ends, they’re wrong: it’s where the real questions begin. In attempting to nail down the meaning of the Second Amendment, we are therefore forced to recognize that “meaning” itself is problematic, especially across the span of more than two centuries. Once we have finished dissecting the Second Amendment, we are still left with a certain tension that necessarily exists between a well-regulated militia on the one

hand and a right to bear arms on the other. One suggests order and discipline, if not government control; the other suggests voluntarism and a welling up from below. Eighteenth-century Country ideology tried to resolve this contradiction by envisioning the popular militia as a place where liberty and discipline would converge, where a freedom-loving people would enjoy the right to bear arms while proving their republican mettle by voluntarily rising to the defense of liberty. But although this certainly sounded nice, a harrowing eight-year war for independence had demonstrated the limits of such voluntarism. No-nonsense Federalists such as Washington and Hamilton recognized that there was no substitute for a professional army, not to mention a strong,

centralized nation-state. But they also recognized that they had to get along with elements for whom such ideas were anathema. As a result, they felt they had no choice but to put aside their scruples and promise effective discipline from above *and* spontaneous self-organization from below, strong national government *and* states’ rights, as contradictory as those notions might now seem.

The *meaning* of the Second Amendment, therefore, incorporates the contradictions in the Founders’ thinking. But what’s true for the Second Amendment is true for the Constitution as a whole. In June, William Safire rather naively suggested in his *New York Times* column that the solution to the problem of “the Murky Second” was to use the constitutional amending process to clarify its meaning. Did Americans have an un-



qualified right to bear arms or merely a right to enlist in the National Guard? Since the Founders had “botched” the wording, the solution was simply to fix it. This is indeed logical, but the problem is that the amending process is entirely useless in this instance. Because Article V stipulates that two thirds of each house, plus three fourths of the states, are required to change so much as a comma, as few as thirteen states—representing, by the way, as little as 4.5 percent of the total U.S. population—would be sufficient to block any change. Since no one would have any trouble coming up with a list of thirteen states in the South or the West for whom repealing the sacred Second Amendment would be akin to repealing the four Gospels, the issue is moot.

Since “we the people” are powerless to change the Second Amendment, we must somehow learn to live within its confines. But since this means standing by helplessly while ordinary people are gunned down by a succession of heavily armed maniacs, it is becoming more and more difficult to do so. As a result, politicians from President Clinton on down are forever coming up with ways of reconciling the irreconcilable, of reining in the gun trade without challenging the Second Amendment-fueled gun culture. The upshot is an endless series of ridiculous proposals to ban some kinds of firearms but not others, to limit handgun purchases to one a month, or to provide for background checks at otherwise unregulated traveling gun bazaars. Instead of cracking down on guns, the administration has found it easier to crack down on video games and theater owners who allow sixteen-year-olds to sneak into adult movies. The moral seems to be that guns don’t kill people—fart jokes in the R-rated *South Park: Bigger, Longer & Uncut* do.

This is the flip side of the unbounded faith of a Zoe Lofgren or a Barbara Jordan, who famously declared during Watergate, “My faith in the Constitution is whole, it is complete, it is total . . .” If one’s faith in the Constitution is total, then one’s faith in the Second Amendment is total as well, which means that one places obedience to ancient law above the needs of modern society. Once all the back-and-forth over the meaning of the Second Amendment is finished, the question we’re left with is: So what? No one is suggesting that the Founders’ thinking on the gun issue is irrelevant, but because they settled on a certain balance between freedom and order, are we obliged to follow suit? Or are we free to strike a different balance? Times change. From a string of coastal settlements, the United States has grown into a republic of 270 million people stretching across the entire North American continent. It is a congested, polluted society filled with traffic jams, shopping malls, and anomic suburbs in which an eighteenth-century right to bear arms is as out of place as silk knee britches and tricornered hats. So why must we subordinate ourselves to a 208-year-old law that, if the latest scholarship is correct, is contrary to what the democratic majority believes is in its best interest? Why can’t we create the kind of society we want as opposed to living with laws meant to create the kind of society *they* wanted? They are dead and buried and will not be around to suffer the consequences. *We* the living will.

There is simply no solution to the gun problem within the confines of the U.S. Constitution. As the well-known Yale law professor Akhil Reed Amar put it recently, the Constitution serves to “structure the conversation of ordinary Americans as they ponder the most fundamental and sometimes divisive issues in our republic.” In other words, the Constitution’s hold on our society is so complete that it controls the way we discuss and debate, even the way we think. Americans are unable to conceive of an alternative framework, to think “outside the box,” as the corporate strategists put it. Other countries are free to change their constitutions when it becomes necessary. In fact, with the exception of Luxembourg, Norway, and Great Britain, there is not one advanced industrial nation that has not thoroughly revamped its constitution since 1900. If they can do it, why can’t we? Why must Americans remain slaves to the past? ■

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