

Federalism and the Constitutional Right to Keep and Bear Arms

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Until recently, the federal courts agreed that the Second Amendment protects the interest of states in maintaining their own militias. In United States v. Emerson, the U.S. Court of Appeals for the Fifth Circuit rejected this consensus, and held that the Constitution protects a right of private individuals to keep and bear arms. The fifth circuit's position is more plausible than the consensus view, and the arguments for treating the Second Amendment as a kind of federalism device are weak. A different set of federalism issues is raised by the prospect that the Supreme Court might adopt the fifth circuit's position, and then take the next step of applying the Second Amendment to the states through the Fourteenth Amendment. Finally, Emerson shows how certain technical legal doctrines that protect the dignity of the states can operate to strengthen the federal government's ability to undermine protections afforded by the Second Amendment.

The Constitution's Second Amendment¹ has been given substantial attention—even veneration—by activists and politicians opposed to the gun-control regulations that many jurisdictions have adopted in an effort to curtail violent crime. Until recently, academic commentators have not displayed a corresponding interest in this constitutional provision. At least one reason for this neglect is that the federal courts have never found that any state or federal regulation violated the Second Amendment. Indeed, they have developed a body of doctrine under which all such regulations are valid because the Second Amendment deals with the structural relations between the states and the federal government, without protecting any right belonging to private citizens.

Beginning in the 1980s, a small band of scholars (most of whom were not professional academics) began to question the validity of this judicial consensus. Their writings eventually attracted attention from the legal academy, and there is now a substantial body of literature criticizing the assumptions and conclusions adopted by the courts. In 2001, the United States Court of Appeals for the Fifth Circuit (which has jurisdiction over Texas, Louisiana, and Mississippi) joined these academic critics in repudiating the analysis underlying almost all of the existing case law. This decision, styled *United States v. Emerson*,² will undoubtedly stir additional academic

AUTHOR'S NOTE: Thanks to John Kincaid and three anonymous referees for comments on a previous draft, and to the Law and Economics Center at George Mason University School of Law for financial assistance. I participated in an *amicus* role in the *Emerson* litigation.

¹The Second Amendment provides: "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."

²270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002). The Supreme Court's denial of *certiorari*, of course, was not accompanied by any explanation and has no precedential value. For at least two reasons,

debate, and its analysis has itself already been expressly repudiated by the ninth circuit.³ Eventually, the U.S. Supreme Court will probably have to resolve the disagreement.

Emerson is important primarily for what it says about the meaning of the Second Amendment. The case, however, and the Second Amendment itself, also raise some other interesting questions about federalism.

THE EMERSON CASE

Timothy Joe Emerson purchased a pistol in 1997. About a year later, Emerson's wife filed for divorce and sought a temporary restraining order against him. Mrs. Emerson's application for the restraining order, which was essentially a standardized form routinely used in Texas divorce courts, stated no factual basis for the relief sought. The order itself, which was issued *ex parte*, contained 29 separate prohibitions, most of which sought to ensure that Emerson did not engage in significant financial transactions or otherwise use the family property in a manner adverse to his wife's interests. The order also prohibited various sorts of interference with the couple's child, and it forbade Emerson to threaten or injure his wife or to communicate with her in vulgar or indecent language.

At a hearing a few days later, a Texas divorce-court judge explored in considerable detail the financial circumstances of the couple, and fixed the amount of temporary child support to be paid by Emerson. The hearing also included a brief colloquy in which Mrs. Emerson stated that Emerson had threatened to kill a "friend" of hers, but that he had never threatened to kill her. Although the judge made no findings that Emerson had committed or was likely to commit any of the 29 separate acts prohibited in the temporary restraining order, he converted that order to a temporary injunction.

Nothing in the story so far is unusual. It is apparently routine for Texas courts to issue prophylactic restraining orders in divorce cases, without findings or even evidence that the acts prohibited in those orders would otherwise be likely to occur. The story became less commonplace when the federal government indicted Emerson for violating 18 U.S.C. § 922(g)(8), which imposes a total firearms disability on any person:

who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening

denial of the petition was unsurprising. First, the fifth circuit's decision did not create a technical conflict with any other circuit's application of the federal statute at issue in the case. Second, the fifth circuit's decision depended in a crucial respect on the court's interpretation of Texas state law, which means that the case would have been an awkward vehicle for Supreme Court consideration of the proper interpretation of the Second Amendment.

³*Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003).

an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

Because the Texas divorce-court judge had made no finding that Emerson represented a threat to the safety of his wife or child, the federal government indicted Emerson only under subsection (C) (ii). On its face, that provision applied to Emerson because the restraining order "explicitly" prohibited violence against Mrs. Emerson, even though she had testified that Emerson had not threatened her and even though the judge made no finding that he posed any danger to her. According to the prosecutor, the mere fact of an "explicit" prohibition in a state-court restraining order is enough to impose a total firearms disability on an American citizen. According to Emerson, this violated his Second Amendment rights.

Under the prevailing interpretation of the Second Amendment at the time Emerson was prosecuted, this should have been an easy case. Although the U.S. Supreme Court has had very little to say about the meaning of the Second Amendment,⁴ almost all of the courts of appeals had agreed that it protects only a "collective right" of the states to maintain organized militias⁵ or, at most, a right of citizens to have arms as part of their service in such organizations.⁶ Because Emerson was a civilian who kept his pistol for private use, his constitutional challenge to the federal disarmament statute would necessarily fail under this interpretation of the Second Amendment. As it

⁴The most important decision, *United States v. Miller*, 307 U.S. 174 (1939), reversed a lower court decision that had found the possession of a sawed-off shotgun protected from federal regulation by the Second Amendment. The *Miller* opinion focused on the nature of the weapon involved in the case, without addressing questions about the "collective" or "individual" nature of Second Amendment rights. The opinion indicates that the Court believed that the "obvious purpose" of the Second Amendment was to assure the continuation and render possible the effectiveness of the militia, and that it must be interpreted with that end in view. *Ibid.*, 178. At the same time, the Court did not even suggest that it mattered whether the defendants in the case were members of the militia or not, and the Court seemed to imply that it did not matter. The ambiguities in the opinion have permitted advocates for both sides of the collective-right/individual-right debate to claim that *Miller* is consistent with their position. For more detailed discussions of the *Miller* case, see, for example, L.A. Powe, "Guns, Words, and Constitutional Interpretation," *William & Mary Law Review* 38 (May 1997): 1326-32; Nelson Lund, "The Past and Future of the Individual's Right to Arms," *Georgia Law Review* 13 (Fall 1996): 39-46.

⁵*United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *Stevens v. United States*, 440 F.2d 144, 149-50 (6th Cir. 1971).

⁶*Cases v. United States*, 131 F.2d 916, 922-23 (1st Cir. 1942); *United States v. Wright*, 117 F.3d 1265, 1276-77 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 285-86 (3rd Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977).

happened, however, the fifth circuit was one of only three courts of appeals that had never decided, one way or the other, whether the Second Amendment protects an individual right that can be exercised by civilians.

The federal trial court took advantage of the absence of binding precedent to dismiss the indictment, holding that the statute "is unconstitutional because it allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights. . . . [B]y criminalizing protected Second Amendment activity based upon a civil state court order with no particularized findings, the statute is over-broad and in direct violation of an individual's Second Amendment rights."⁷

In a lengthy opinion, the fifth circuit reversed. The appellate court concluded that the Second Amendment does protect an individual right of American civilians to keep and bear arms, and held that the application of the federal statute to Emerson raised serious constitutional questions. Nevertheless, the court interpreted Texas law to forbid the issuance of restraining orders like the one to which Emerson was subject without "a realistic threat of imminent physical injury to the protected party,"⁸ and it concluded that federal law forbids a federal court from inquiring whether this requirement was actually met in a particular case. The court also implied quite clearly that if a state's law did permit a restraining order to issue without a realistic threat of lawless violence, the Second Amendment would be violated by a federal statute that automatically disarmed someone merely because he was subject to such an order.

The *Emerson* decision is the first significant judicial recognition that the right to keep and bear arms may have a meaningful role to play in modern America. The Second Amendment was, no one doubts, a response to Anti-Federalist fears that the states had ceded a dangerously excessive amount of military power to the new federal government. The nature of that response, however, has proved to be a matter of considerable controversy. Much of the modern debate about the meaning of the Second Amendment has dealt with whether it protects the ability of the states to maintain their own military organizations or a right belonging to individual citizens in their private capacity. The following brief discussion explains why the *Emerson* court plausibly interpreted the Second Amendment to protect an individual right, and why the states' right interpretation suffers from some serious difficulties.⁹

⁷*United States v. Emerson*, 46 F. Supp. 2d 598, 610-11 (N.D. Tex. 1999).

⁸*United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001).

⁹This article draws from the more detailed discussions of the Second Amendment in Nelson Lund, "A Primer on the Constitutional Right to Keep and Bear Arms," Policy Paper No. 7, Virginia Institute for Public Policy (June, 2002); Nelson Lund, "Outsider Views on Guns and the Constitution," *Constitutional Commentary* 17 (Winter 2000): 701-720; Nelson Lund, "The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders," *Texas Review of Law and Politics* 4 (Fall 1999): 157-191; Nelson Lund, "The Past and Future of the Individual's Right to Arms," 1-76; and Nelson Lund, "The Second Amendment, Political Liberty, and the Right to Self-Preservation," *Alabama Law Review* 39 (Fall 1987): 103-130.

THE OPERATIVE CLAUSE OF THE SECOND AMENDMENT

Before looking at the prefatory language of the Second Amendment, upon which the states' right interpretation rests, we should note that the language of the operative clause is parallel to that used in the First and Fourth Amendments:

Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . .

All three amendments were framed together, and the First and Fourth Amendment rights have always been treated as individual rather than governmental rights. It would be odd to use the same reference to "the right of the people" to create a right belonging to states, especially when one notes that the Tenth Amendment plainly distinguishes the states from the people:

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.¹⁰

It is true that in the original Constitution, "the people" is sometimes used to include only a subset of the entire citizenry. The preamble, for example, states that the Constitution was established by "the people," but many citizens were barred from participating in the state ratifying conventions. Similarly, Article I requires that members of the U.S. House of Representatives be elected by "the people," but we know that women were not permitted to vote and that property qualifications were common at the time. Thus, "the people" referred to in the Second Amendment could be a subset of the citizenry.

Nonetheless, the Constitution nowhere uses the term "the people" to refer to state governments. Article I, for example, specified that the House of Representatives would be elected by "the people," but that senators would be chosen by the legislature of each state. The importance of the linguistic distinction between the people and the states is confirmed by the Seventeenth Amendment, which created a new rule providing that senators would be elected "by the people" of each state. Similarly, the members of the electoral college are appointed by each state in whatever way the state legislature directs, which may involve election by the people or some other

¹⁰U.S. Const. art. I, § 8, cl. 8.

means. The Constitution never identifies the people with their state governments.

Interpreting the Second Amendment so as to identify the people with the state governments would be surprising for another obvious reason. A basic principle of American political thought—beginning long before the federal Constitution was made, continuing down to the present day, and unmistakably implied in the Constitution's preamble—is that the people are supreme, while legitimate governments are mere creatures of the people. To take only one of countless examples, Chief Justice John Marshall considered the following proposition self-evident: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected."¹¹ Treating any government as if it were identical with the people would tacitly claim a status for the government that has never been publicly respectable in the United States.

THE GRAMMATICAL STRUCTURE OF THE SECOND AMENDMENT

Before turning to the prefatory language of the Second Amendment, we should pause to focus on a few things that the Second Amendment does *not* say:

It emphatically does not say that it protects the right of the *militia* to keep and bear arms.

Nor does the Second Amendment say that the people's right to arms is *sufficient* to establish a well regulated militia, or that a well regulated militia is *sufficient* for the security of a free state.

Nor does the Second Amendment say that the right of the people to keep and bears arms is protected *only to the extent* that such a right fosters a well regulated militia or the security of a free state.

The grammar of the Second Amendment is often given insufficient attention. The first half of the sentence is an ablative absolute (or absolute phrase) that does not modify or limit any word in the main clause. The usual function of absolute phrases is to convey information about the circumstances surrounding the statement in the main clause, such as its cause. For example, a dean might announce: "The teacher being ill, today's class is cancelled." Even if the teacher were only faking illness, the class would still be cancelled. The explanation in the ablative absolute does not modify or qualify the directive given in the main clause.

Thus, although we will need to ask what useful information the prefatory language offers, the language of the Second Amendment simply cannot

¹¹*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

be read to mean: "The states shall have the right to maintain a well regulated militia."

THE PATENT AND COPYRIGHT CLAUSE AND THE CONSTITUTION'S PREAMBLE

The Second Amendment is unique among the elements of the Bill of Rights in containing an explanation of its purpose. One provision of the original Constitution, however, is similar to the Second Amendment in this respect:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Unlike the Second Amendment, this constitutional provision does seem to imply through its grammatical structure that its statement of purpose serves a definite limiting function. On its face, the provision grants Congress a power to pursue a stated goal and to do so only by specified means. The natural reading of the provision is that Congress may grant copyrights to authors and patents to inventors only in order to promote the progress of science and useful arts. From this natural and logical reading, it would seem to follow that Congress has no power to grant copyrights to pornographers or racist hatemongers, whose writings do nothing to promote the progress of science or useful knowledge. Similarly, it would seem to follow that Congress has no power to grant copyrights to Luddites, who are actively seeking to retard the progress of science and the useful arts.¹²

Notwithstanding these obvious implications from the text of the clause, Congress has extended copyright protection to all manner of writings that obviously contribute nothing, or less than nothing, to the progress of knowledge. Yet, the courts have never held that Congress has thereby exceeded its authority. Even more striking, the Supreme Court recently held that Congress has the power to extend the term of existing copyrights retroactively, even if it is virtually impossible for such an extension to promote the progress of knowledge.¹³

If the grammatically limiting language of the patent and copyright clause does not in fact limit the power granted by that clause, it would seem to follow *a fortiori* that the ablative absolute in the Second Amendment—which does not even serve a limiting function grammatically—cannot limit the scope of the right specified in the operative clause.

Similarly, the Constitution's preamble says that its purposes include the establishment of "justice" and promotion of "the general welfare." No one believes that this authorizes the courts to strike down every unjust statute

¹²Leaving aside modern case law, there would be no necessary conflict between the First Amendment and this reading of the patent and copyright clause because the refusal to grant a copyright would not prevent pornographers, racists, and Luddites from disseminating their views.

¹³*Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

or every special interest pork-barrel appropriation. Moreover, state constitutions from the founding period were littered with explanatory prefaces like the one in the Second Amendment; yet, these prefaces were not construed to change the meaning of the operative clauses to which they were appended.¹⁴

The conclusion is inescapable: the prefatory language of the Second Amendment does not imply that the operative clause means anything different than it would mean without the prefatory explanation.

THE PURPOSE OF THE SECOND AMENDMENT

At this point, one might reasonably ask: If the prefatory phrase simply explains the operative clause, without limiting or qualifying it, what, then, does an individual right to arms have to do with a well regulated militia? The answer to this question requires some historical background, and it requires some additional attention to the text of the original Constitution.

First, the founding generation had a deep and widespread mistrust of peacetime standing armies. Many people believed, on the basis of English history and the colonial experience, that central governments are prone to use armies to oppress the people. One way to reduce that temptation would be to allow the government to raise armies (consisting of full-time paid troops) only when they are needed to fight foreign adversaries. For other purposes, such as responding to sudden invasions or similar emergencies, the government could be restricted to using a militia consisting of ordinary civilians who receive a bit of unpaid military training on a part-time basis.

Such an approach had deep roots in English history, but the original Constitution did not take this approach, for reasons we shall explore. Before doing so, we should focus on five features of the original Constitution that are crucially important in understanding the Second Amendment.

First, the militia is not the army. The Constitution has separate provisions for each, and it never confuses or blends the two.¹⁵

Second, Congress was given almost plenary authority over the army and the militia alike. The only powers reserved to the states were the rights to appoint militia officers and to train the militia according to rules prescribed by Congress.¹⁶

¹⁴See Eugene Volokh, "The Commonplace Second Amendment," *New York University Law Review* 73 (June 1998): 793-821.

¹⁵Congress is given authority over the army and navy in clauses 12-14 of Article I, section 8. Authority over the militia is conferred separately in clauses 15-16. Similarly, Article II, section 2 makes the president the commander in chief of the army and navy, and separately makes him commander in chief of the militia in certain limited circumstances.

¹⁶U.S. Const. art. I, § 8, cls. 12-16, provides Congress with the power:

- To raise and support Armies, but no Appropriation of Money to that Use shall be for longer Term than two Years;
- To provide and maintain a Navy;
- To make Rules for the Government and Regulation of the land and naval forces;
- To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States

Third, the Constitution nowhere defines the militia. There is abundant historical evidence that the founding generation saw a fundamental difference between armies (usually composed of professional soldiers) and the militia (consisting of civilians temporarily summoned to meet public emergencies). But there is also abundant evidence that the founding generation was acutely aware that the militia could readily be converted into the functional equivalent of an army. There had been examples of this in England,¹⁷ and we have an example today in the form of the National Guard, which is now a fully integrated component of the federal armed forces.¹⁸

Fourth, the Constitution imposes no duties whatsoever on the federal government, either with respect to armies or with respect to the militia. Congress is not required to organize the militia in any particular way, or to keep it well regulated, or indeed to do anything at all to secure its existence.

Fifth, the Constitution expressly prohibits the states from keeping troops without the consent of Congress.¹⁹

Turning back to the Second Amendment with these facts in mind, it becomes apparent why the Second Amendment does not appear to constitutionalize a right of the states to keep up military organizations like the National Guard, or even a traditional militia. That theory implies that the Second Amendment silently repealed or amended two separate provisions of the Constitution: the clause giving the federal government virtually complete authority over the militia, and the clause forbidding the states to keep troops without the consent of Congress. When the Bill of Rights was adopted, no one suggested that it would have these effects, and no one openly claims such a thing today. On the contrary, the Supreme Court has consistently held that Congress has plenary authority to preempt any or all state militia regulations, and even to cause the complete disappearance of the militia.²⁰ In practice, that has effectively been done because the state militias have now been converted to integral components of the federal armed forces through the National Guard reserve system. Under the states' right theory of the Second Amendment, the National Guard system would seem to be unconstitutional, which everyone (including the Supreme Court²¹) agrees is not the case.

The five elements of the original Constitution described above also help to explain the relationship between its introductory phrase and its operative clause. The relationship turns out to be deceptively simple.

respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

¹⁷See, for example, Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, Mass.: Harvard University Press, 1994), pp. 35-38.

¹⁸See, for example, *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

¹⁹U.S. Const., art. I, § 10, cl. 3: "No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . ."

²⁰See, for example, *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820); *Selective Draft Cases*, 245 U.S. 366, 382-383 (1918). For a useful discussion of the cases, see J. Norman Heath, "Exposing the Second Amendment: Federal Preemption of State Militia Legislation," *University of Detroit Mercy Law Review* 70 (Fall 2001): 39-73.

²¹*Perpich v. Department of Defense*, 496 U.S. 334 (1990).

The most obvious way in which a militia would become "well regulated" is through becoming well trained or well disciplined as a military organization. The term "well regulated," however, is broader than the terms "well trained" and "well disciplined." Furthermore, the Second Amendment added absolutely nothing to Congress' virtually plenary Article I authority to provide for training and disciplining the militia. On the contrary, the Second Amendment either subtracted or reserved some regulatory power from Congress. Whatever questions there may be about the meaning of the Second Amendment, there can be no doubt about the fact that it commands some kind of governmental inaction, not some kind of action. How could that contribute to producing a well regulated militia? The answer requires us to abandon the habit of assuming that something can become "well regulated" only through more regulation. In fact, the term "well regulated" does not imply heavy regulation or more regulation. What is more relevant is that something can only be "well regulated" when it is not overly regulated or inappropriately regulated.

Recall that the original Constitution gave Congress almost unlimited authority to regulate the militia. As the operative clause of the Second Amendment makes clear, its purpose is simply to forbid one specific kind of inappropriate regulation (among the infinite possible regulations) that Congress might be tempted to enact under its sweeping authority to make all laws "necessary and proper" for executing the powers granted by the Constitution.²² The proscribed regulations are those that would disarm the citizenry from among which any genuine militia must be constituted.

Congress is permitted to do many things to ruin the militia, and to omit many things that are necessary for a well regulated militia. Congress may pervert the militia into the functional equivalent of an army, or even deprive it completely of any meaningful existence. Many of those things have been done, and many members of the founding generation would have disapproved strongly. But the original Constitution allowed it, and the Second Amendment did not purport to interfere with congressional latitude to regulate the militia. What the Second Amendment does is to expressly forbid a particular, and to the framing generation a particularly worrisome, extension of Congress' authority to make laws "necessary and proper" for exercising its control over the militia. Whatever the federal government does or fails to do about the militia, the Second Amendment forbids it from disarming citizens under the pretense of regulating the militia.

THE CONSTITUTIONAL CONVENTION

At this point, it might be objected that simply forbidding one particular inappropriate regulation makes a rather trivial contribution to fostering a

²²U.S. Const., art. I, § 8, cl. 18: "The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

well regulated militia. There is some truth in this claim, but the objection itself is not particularly powerful.

The Second Amendment was a response to a more specific and difficult political problem than most other provisions in the Bill of Rights. Because of historical memories going back to the period before the English Revolution of 1689, and because of actual memories of abuses by British troops in the colonies, the founding generation was marked by an aversion to peacetime standing armies. The militia system was treasured by many people primarily because the existence of a well regulated militia, composed of civilians readily available for emergency military service, tended to deprive the government of an excuse for maintaining standing armies.

Not everyone shared this sentiment. Alexander Hamilton, for example, thought the militia system was foolish, primarily because it violated the basic economic principle of the division of labor.²³ More important, however, even those who treasured the militia recognized that it was fragile. The reason it was fragile was the same reason that made Hamilton think it was foolish: citizens would always resist undergoing unpaid military training, and governments would always be strongly tempted to acquire 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. The decision was therefore made to give the federal government almost unfettered authority to establish armies, including peacetime standing armies. That decision, however, created a threat to liberty, especially in light of the fact that the Convention also decided to forbid the states to maintain their own armies without the consent of Congress.

One solution might have been to require Congress to establish and maintain a well disciplined militia. This would have deprived the federal government of the excuse that it needed standing armies, and it would have established a meaningful counterweight to any rogue army that might be created by the federal government. 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? It would almost certainly have been impossible.²⁴

Another solution might have been to forbid Congress to interfere with state control over the militia. This was also unworkable. Fragmented control over the militia would inevitably have resulted in an absence of uniformity in training, equipment, and command, and no really effective fighting force could have been created under these conditions.

²³See Alexander Hamilton, "Federalist No. 29," *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), pp. 182-186.

²⁴Congress could easily evade any general injunctions requiring the maintenance of the militia, like the one in the Articles of Confederation (art. VI, § 4), by creating a "select militia" resembling the National Guard, which would operate as the functional equivalent of an army.

In effect, the choice was between a militia under state control, which would be too weak to be militarily effective, and a militia under federal control, whose military effectiveness could be put to bad use. This conundrum could not be solved, and the Convention did not purport to solve it. The Second Amendment does not solve it either. What the Second Amendment does is to ameliorate the problem to a very limited extent. Faced with a choice between a standing army and a well regulated militia, the federal government might well prefer to establish a standing army and allow the militia to fall into desuetude. However, faced with the choice between a well trained militia and an armed but undisciplined citizenry, the government might prefer to keep the militia in good order. In this way, and in this way alone, the Second Amendment could contribute to fostering a well regulated militia.

This interpretation of the Second Amendment is consistent with the historical evidence. Consider, for example, just one illustration from the ratification debates about the original Constitution. A number of Anti-Federalists argued that federal control over the militia would take away from the states their principal means of defense against federal oppression and usurpation, and that European history demonstrated the seriousness of this danger. James Madison responded that such fears of federal oppression were overblown, in part because the new federal government was structured differently from European governments. Even so, he then pointed out another important difference between America and Europe. 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 its armies to do so:

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.²⁵

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.

²⁵James Madison, "Federalist No. 46," *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), p. 299.

The disagreement was only over the narrower question of how effective armed civilians could be in protecting liberty. Anti-Federalists undoubtedly regarded the armed citizenry, and hence the Second Amendment itself, as a rather trivial safeguard against federal oppression. They may well have recognized that it had some value, for the mere existence of arms among the populace would raise the costs and risks to the government of oppressing the people.²⁶ At the same time, they could easily and plausibly have believed that there was no realistic prospect, even in the eighteenth century, that an unorganized and untrained body of citizens could prevail in battle against a determined federal government deploying a genuine army.

The very inadequacy (from an Anti-Federalist point of view) of the protection that an armed citizenry could offer against federal oppression, however, also rendered the Second Amendment completely noncontroversial. It is true that it could not satisfy Anti-Federalist desires for constitutional provisions aimed at preserving the military superiority of the states over the federal government. Attempting to satisfy that desire would have been hugely controversial, and it would have entailed amending the original Constitution. No one 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. Not a single person ever so much as hinted that the Second Amendment created or protected any sort of right belonging to state governments.²⁷

As a political gesture to the Anti-Federalists, a gesture highlighted by the Second Amendment's prefatory language, express recognition of the right to arms was something of a sop. The provision was easily accepted, though, because all sides 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. Like those freedoms, the right of individual citizens to keep and bear arms was one that no one thought the federal government would have a legitimate reason to infringe.

FEDERALISM COMPLICATIONS: THE FOURTEENTH AMENDMENT

Assuming, as the fifth circuit concluded, that the Second Amendment protects a right of individual citizens to keep and bear arms,²⁸ that conclusion

²⁶See Lund, "The Second Amendment, Political Liberty, and the Right to Self-Preservation," 114-116; Lund, "The Past and Future of the Individual's Right to Arms," 56-58.

²⁷See, for example, Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (Albuquerque: University of New Mexico Press, 1984), p. 83.

²⁸For the most part, judicial and academic defenses of the states' right or collective right interpretation of the Second Amendment do not respond directly to the textual and historical arguments supporting the individual-right interpretation. The strongest arguments against judicial adoption of the individual-right interpretation essentially take the position that the purpose foremost in the minds of those who adopted this constitutional provision—creating a barrier to federal tyranny—can no longer be served by

leaves open a huge number of interesting and difficult questions about the exact scope of the right. No one would suggest for example, that everyone—including felons, children, and the insane—has a right to possess any kind of weapon, up to and including nuclear devices and guided missiles. Thanks to technological progress, the line-drawing problems that courts will necessarily encounter today are much more severe than they would have been in the late eighteenth century when soldiers and civilians were armed with essentially identical weapons.²⁹ Trusting the general population with standard military weapons is a far different matter today than it was then.

The line-drawing problems that courts will face if they accept the individual-right interpretation adopted by the fifth circuit, however, are not primarily the result of technological advances in military weaponry. Rather, they are the result of legal developments that have occurred since the Bill of Rights was adopted in 1791. The Second Amendment, like the other guarantees of individual liberty in the Bill of Rights, at first acted only as a restriction on the federal government.³⁰ There was little need for the framers to be concerned about the details of the inevitable tradeoffs between individual freedom and public safety because the Constitution left the states free to balance those competing goals in whatever ways they thought fit.

Every state was left free by the federal Bill of Rights to establish an official religion, to require government licenses in order to publish a newspaper, to abolish the right of trial by jury, to take private property without just compensation, and to deprive citizens of life, liberty, or property without due process of law. Similarly, the states were left free to regulate the private possession of weapons in whatever way seemed appropriate to themselves. The framers could, therefore, have reasonably expected that new issues, like those arising from technological developments in weaponry, could and would be addressed by the state governments as they arose. So long as the states were left with their almost unbounded regulatory powers, moreover, there would be little danger to public order arising from straightforward interpretations of the Constitution's efforts to disable the national government. If something really needed to be done to prevent disorders

guaranteeing to the people a right to keep and bear arms because the militia tradition that the founders presupposed has been thoroughly undermined. For a particularly sophisticated and elaborate version of this argument, see David Yassky, "The Second Amendment: Structure, History, and Constitutional Change," *Michigan Law Review* 99 (December 2000): 588-668. My position is that constitutional provisions that can no longer serve their original purposes should be repealed only through the formal amendment process set out in Article V, and that the purpose of the Second Amendment was in any event broad enough to encompass the aim of guaranteeing to civilians the means of protecting themselves from non-governmental oppression (such as criminal violence) from which the government fails to protect them. For further detail, see Lund, "The Past and Future of the Individual's Right to Arms," 59-67.

²⁹The term "arms" in the Second Amendment may have been meant to refer only to those weapons that can be deployed by an unassisted individual. See Stephen P. Halbrook, "What the Framers Intended: A Linguistic Analysis of the Right to 'Bear Arms'," *Law & Contemporary Problems* 49 (Winter 1986): 159-160. Today, in contrast to the eighteenth century, some extraordinarily lethal weapons (such as portable nuclear devices and antiaircraft missiles) fit this description.

³⁰The Supreme Court accepted this understanding of the Bill of Rights at an early date. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

arising from an excess of liberty, and if the Bill of Rights forbade Washington to do it, the states could take care of the problem.³¹

That state of affairs has now been altered drastically. During the twentieth century, the Supreme Court began invoking "substantive due process" to apply selected provisions of the Bill of Rights against the state governments.³² Concomitantly with that development, the Court began deciding a wide range of questions that had not arisen earlier, and that might never have arisen but for this process of Fourteenth Amendment "incorporation." Even after the enormous transfer of responsibility to the federal government beginning in the 1930s, it is still the states that engage in most of the regulatory actions that tend to generate hard questions under the Bill of Rights. The effect has been profound. When the Supreme Court interprets a provision of the Bill of Rights in a way that leads to a dangerous curtailment of government power, there is no longer a safety valve in the system, for the Court's decision disables the states as well as the federal government. Consequently, the Court has increasingly, and almost necessarily, assumed the essentially legislative function of balancing the competing policy goals of public safety and individual liberty. Because its decisions about the limits of government power apply to the federal and state governments alike, the Court now engages in an endless process of adjusting and readjusting the permitted bounds of liberty in a variety of sensitive contexts.

Before the Court faces the necessity of undertaking this balancing process in the area of gun control, it will have to decide that the Second Amendment does apply to the states. In the years since the incorporation process began, the Supreme Court has refused, without explanation, to address the issue of Second Amendment incorporation.³³ In this respect, the Second Amendment is unique.³⁴

³¹As a matter of constitutional design, a case can be made in favor of restoring this state of affairs, not only with respect to the right to arms but also with respect to the other individual immunities in the Bill of Rights. See Nelson Lund, "Federalism and Civil Liberties," *University of Kansas Law Review* 45 (July, 1997): 1045-1073.

³²An extensive academic debate has arisen about the original meaning of the Fourteenth Amendment and whether it was meant to make the restrictions in the Bill of Rights applicable to the states. The serious arguments in favor of treating some or all of these rights as "incorporated" all involve the privileges or immunities clause, not the due process clause. The Supreme Court, however, has relied entirely on substantive due process, and has rejected incorporation arguments based on the privileges or immunities clause.

³³The Court has declined at least two opportunities to address the issue. See *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *Burton v. Sills*, 53 N.J. 86, 248 A.2d 521 (1967), *appeal dismissed*, 394 U.S. 812 (1969).

³⁴Beginning in the late nineteenth century, the Court has incorporated all the provisions of the first eight amendments, with the following exceptions. The Court has expressly refused to incorporate the Seventh Amendment and the grand jury indictment provision of the Fifth Amendment. See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916) (Seventh Amendment does not apply to the states); *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972) (same), *aff'd*, 409 U.S. 943 (1972); *Hurtado v. California*, 110 U.S. 516 (1884) (Fifth Amendment indictment provision not applicable to states); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (endorsing *Hurtado*); *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (recalling *Hurtado's* holding with apparent approval). The Court has assumed, without expressly holding, that the excessive bail clause of the Eighth Amendment applies to the states. *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). The Court has not been asked to consider a case involving the Third Amendment. That leaves only the Second Amendment.

There are powerful legal arguments in favor of incorporating the Second Amendment.³⁵ One must note, however, that the Court's important incorporation precedents have seldom relied on legal arguments,³⁶ which makes any prediction about the Second Amendment hazardous. Assuming, however, that the Court both accepts the individual-right interpretation of the Second Amendment, and decides to make the provision applicable to the states, it will open an important area of state regulatory authority to federal judicial supervision. In drawing lines between appropriate and inappropriate restrictions on civilian access to weapons, the courts will find little direct guidance in the thinking of those who framed and adopted the Second Amendment. As with the First Amendment, the courts will be largely on their own.

Nor is there any reason to think that the Supreme Court will look for guidance in general principles of federalism, or in the recent cases that have evinced a renewed judicial interest in those principles. It is true that the Court has lately become more respectful of the dignity and importance of the state governments. The Court has, for example, begun to recognize that congressional power under the commerce clause and the Fourteenth Amendment cannot be unlimited.³⁷ The Court has also articulated some limits, based on the Tenth Amendment or general principles of federalism, on congressional power to compel state governments to implement federal regulatory programs.³⁸ Additionally, the Court has breathed new life into old concepts of sovereign immunity, thus insulating state governments from certain kinds of lawsuits.³⁹ None of these developments, however, has in any way undermined the doctrinal foundation on which Fourteenth Amendment incorporation rests, or signaled in the slightest way any relaxation of the protections afforded by the individual immunities in the Bill of Rights.

On the contrary, the Court has recently taken a number of steps that suggest a strong commitment to maintaining, and even expanding, the protection of these individual rights from infringement by the states. Consider, for example, the famous 1966 decision in *Miranda v. Arizona*.⁴⁰ Notwithstanding the difficulty of deriving the *Miranda* decision from the Constitution, and notwithstanding the fact that the Supreme Court had

³⁵For two somewhat different approaches, see Lund, "The Past and Future of the Individual's Right to Arms," 46-55; Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Westport, CT: Praeger, 1998), pp. 183-196.

³⁶See, for example, Paul M. Bator, "Some Thoughts on Applied Federalism," *Harvard Journal of Law and Public Policy* 6 (Special Issue 1982): 58; *Carter v. Kentucky*, 450 U.S. 288, 308-309 (1981) (Rehnquist, J., dissenting).

³⁷See, for example, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

³⁸See, for example, *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

³⁹See, for example, *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

⁴⁰384 U.S. 436 (1966) (holding that certain warnings must be given before a suspect's statement made during custodial interrogation may be admitted in evidence).

repeatedly concluded that the case articulated a prophylactic rule that was not compelled by the Constitution,⁴¹ a strong majority of the Court recently reaffirmed the decision, which it characterized as a "constitutional rule."⁴² In another example, after decades of cases resting on a strong presumption that almost any government regulation of commercial activity is constitutionally valid, the Court has recently begun to look less favorably on state regulatory actions that may operate so as to take private property for public use without just compensation. In one recent case, the Court said: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."⁴³ Thus, if the Court proves unwilling to assume responsibility for supervising the states' experiments with gun control, it will not be because of any tension between its emerging new jurisprudence of federalism and its traditions of protecting individual constitutional rights from infringement by the state governments.⁴⁴

FEDERAL COURTS AND STATE LAW

Emerson is notable primarily because the fifth circuit adopted the individual-right interpretation of the Second Amendment. The fifth circuit nonetheless rejected the trial court's straightforward application of that principle, under which the federal statute violated the Constitution because it took Emerson's Second Amendment rights away without any particularized findings that he posed a threat of future violence. The appellate court's reasons for reversing the trial court introduce another federalism complication.

Invoking an "almost universal rule of American law,"⁴⁵ the fifth circuit concluded that Congress intended its statute to apply only to prohibitions by state courts that are uncontested by the party against whom they operate, or that are supported by evidence from which the court concludes that there is a real threat or danger of injury to the protected party. The court also concluded that Texas law does not permit restraining orders to issue unless they meet this requirement.

This interpretation of Texas law was less than obvious. For most orders outside the context of domestic relations, Texas law did indeed impose such

⁴¹See, for example, *Michigan v. Tucker*, 417 U.S. 433 (1974); *Oregon v. Hass*, 420 U.S. 714 (1975); *New York v. Quarles*, 467 U.S. 649 (1984); *Oregon v. Elstad*, 470 U.S. 298 (1985).

⁴²*Dickerson v. United States*, 530 U.S. 428 (2000). Chief Justice William H. Rehnquist wrote the Court's opinion in this case, which was decided by a vote of 7-2.

⁴³*Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Chief Justice Rehnquist wrote the Court's opinion in this case, which was decided by a vote of 5-4.

⁴⁴Similarly, the fact that many state constitutions contain provisions protecting the right to arms should not affect the Supreme Court's treatment of the Second Amendment or of the incorporation issue. Many state constitutions also contain provisions analogous to other guarantees in the Bill of Rights, and the Court has not considered this a reason either to narrow or to broaden its own interpretation or application of those guarantees.

⁴⁵*United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001).

a requirement. The special statute applicable in divorce cases included many of the other ordinary requirements for restraining orders to issue, but it omitted the requirement that the court find a real threat of danger or injury. Noting that the predecessor statute to the statute on which the divorce court relied in this case had been construed to require a showing of "reasonable necessity," the fifth circuit read a similar requirement into the newer statute.

This somewhat questionable interpretation of Texas law might have had little significance in this case except for the fact that the record contained no evidence that Emerson had ever threatened his wife, either expressly or by implication. Relying on Supreme Court and fifth circuit precedents that addressed somewhat different issues, the *Emerson* court held that a federal court may not inquire into the legality of the underlying state court order unless the order is so "transparently invalid" as to have "only a frivolous pretense to validity."⁴⁶

By construing Texas law in the way most favorable to Emerson's federal rights, but then refusing to inquire whether the Texas divorce-court judge had followed the law as thus construed, the fifth circuit appeared in a formal sense to be highly respectful of the state's independent dignity. The real effect, however, is primarily to make it very easy for state courts to deprive parties in routine divorce-court actions of their Second Amendment rights, perhaps quite inadvertently. This could happen, for example, if a state court interpreted the requirements of Texas law differently than did the fifth circuit, or if a state court was unaware of the collateral consequences its order would have under the federal statute, or if a party in Emerson's position did not realize that he needed to object to a standard provision in a restraining order lest he lose his Second Amendment rights. In effect, the fifth circuit told those who want to retain their Second Amendment rights that they should not acquiesce in the issuance of state court restraining orders that implicitly embody factually unsupported assumptions about their proclivity to violence. This result derives from the peculiar interaction between state court domestic-relations proceedings and the federal statute that attaches collateral consequences to orders issued in such proceedings. It is thus another artifact of the American federal structure, and one that the Constitution's framers almost certainly did not foresee.

CONCLUSION

United States v. Emerson will stimulate and enrich the debate about the original meaning of the Second Amendment, and it may be an important step toward the Supreme Court's eventually deciding between the "individual right" and "states' right" interpretations of the amendment. The interesting questions about federalism raised by these competing interpretations,

⁴⁶*Ibid.*, 263-264.

however, are only the beginning of the federalism questions generated by the Constitution's guarantee of the people's right to keep and bear arms. Perhaps the most important of these questions is whether the Second Amendment will be applied to restrict state discretion in the area of gun control. If that happens, federal reduction of the states' authority to experiment with the appropriate balance between individual freedom and concerns with public order—which has become ingrained in our law and culture with respect to so many other civil liberties—may begin to bite in one of the last remaining areas of state autonomy.
