

**A HANDOUT FOR
EVERYONE?
JOHN J. DIULLO JR.**

the weekly

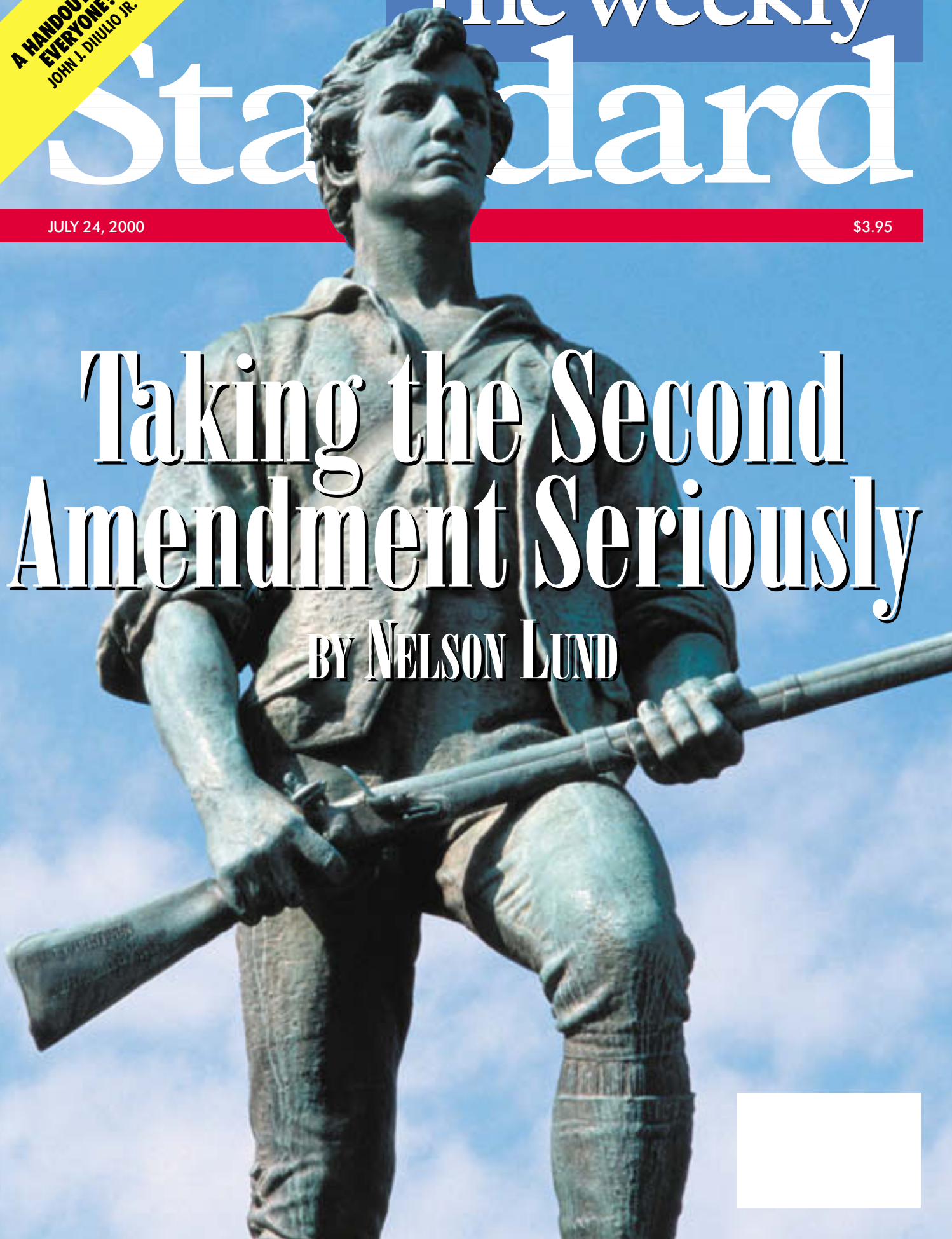
Standard

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Taking the Second Amendment Seriously

BY NELSON LUND



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Taking the Second Amendment Seriously

*Finally, and for good reason, a gun control statute
has been struck down as unconstitutional.*

BY NELSON LUND

Timothy Joe Emerson is a Texas physician who lawfully bought a pistol in 1997. About a year later, Emerson's wife filed for divorce and sought a temporary injunction containing 29 separate prohibitions, most of them aimed at protecting Mrs. Emerson's financial interests. The proposed 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 on whether to grant the injunction, the state divorce court judge explored the financial circumstances of the couple and decided on the amount of temporary child support Emerson should provide. In her testimony, Mrs. Emerson reported that her husband had threatened her new boyfriend but denied that Emerson had threatened her. The judge issued the injunction, but he made no findings that Emerson was likely to commit any of the 29 separate acts prohibited in the temporary restraining order, many of which were not alluded to in any way during the hearing.

Nothing in the story so far is unusual. It is apparently routine for Texas courts to issue such prophylactic restraining orders in divorce cases, without evidence that the acts prohibited in those orders would otherwise be likely to occur. The story became less commonplace when Mrs. Emerson subsequently accused her husband of brandishing the pistol, and federal prosecutors took up the case. A federal grand jury indicted Emerson in December 1998 for violating an obscure portion of the 1994 Violent Crime Control Act, which is better known for its prohibition of certain so-called assault weapons. The provision used

against Emerson appears on its face to impose a ban on firearms possession by any person who is subject to a court order that prohibits him from using or threatening physical violence against an "intimate partner" or that partner's child.

This was too much for Judge Sam R. Cummings, a federal trial judge in Texas, who last year declared the indictment unconstitutional. Cummings reasoned that if the federal statute had been triggered by a court order based on a finding of danger to Mrs. Emerson or her child, forbidding Mr. Emerson to own a gun might be a reasonable regulation. But because the prosecution was based on a boilerplate order that was unsupported by any such finding, it violated Emerson's Second Amendment right to keep and bear arms.

Had this case concerned any other part of the Bill of Rights, Cummings's analysis would have bordered on the obvious. The law, for example, forbids us to libel other people. But this doesn't mean that anyone who has been officially told to refrain from breaking the libel laws can also be told to remain completely silent, or be barred from possessing a printing press. If it did, a legislature could simply outlaw speech, or printing presses, on the ground that this would help prevent libel. While this sort of sweeping prior restraint might be very effective in preventing libel, it would violate the First Amendment.

Judge Cummings thought that the same kind of analysis should apply to Emerson's case. The law forbids people to cause or threaten bodily injury to others. But how can people be deprived of their right to possess arms merely because they have been told to obey the law? If they could, it would seem to follow that Congress could choose to promote obedience to the laws against murder and assault by forbidding everyone to possess weapons. And the Second Amendment would then mean only that the right of the people to keep and bear arms shall not be infringed unless the government decides to infringe it.

Nelson Lund, a professor at George Mason University School of Law, has participated in the Emerson case in an amicus curiae role.

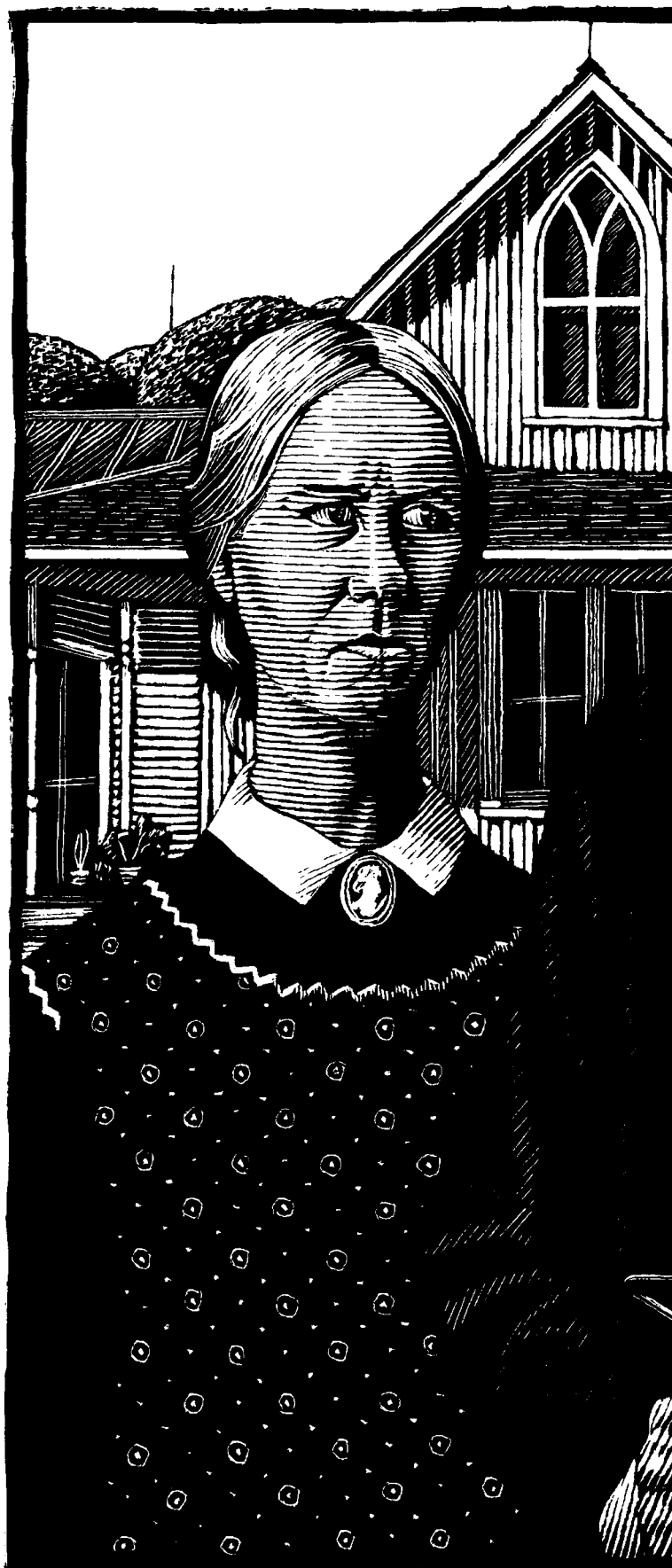
Despite the obvious logic in Cummings's opinion, his decision has created a stir, and rightly so. The federal courts had never before invalidated any gun control statute for violating the Second Amendment. What's more, almost every court of appeals in the country has concluded that this part of the Bill of Rights means nothing at all, or so close to nothing that it might as well not exist.

Cummings's decision, however, is not doomed to inevitable reversal. Unlike most lower courts, the Supreme Court has never decided to boot the Second Amendment out of the Constitution, and neither has the Fifth U.S. Circuit Court of Appeals (which covers Judge Cummings's northern Texas jurisdiction). Those two courts have decided only a handful of Second Amendment cases and always on narrow grounds. It is therefore possible that the long pattern of judicial hostility to the Second Amendment could soon be broken.

The Fifth Circuit heard oral arguments in the government's appeal of Cummings's decision on June 13. The session featured a number of humorous exchanges, including comments by the judges about their own personal arsenals, and an embarrassing display of ignorance by the government's lawyer about the statutory definition of the term "militia." But the most promising aspect of the argument was how little interest the judges showed in joining the many other courts that have treated the Second Amendment as a kind of enemy alien within the Bill of Rights.

Though it is always dangerous to predict what courts will do on the basis of judges' questions at oral argument, the following possibilities seem most likely. The court may simply avoid the Second Amendment issue by holding that the 1994 Violent Crime provision exceeds congressional authority under the Supreme Court's recent federalism decisions. Another way of avoiding serious Second Amendment questions would be to dismiss the indictment of Emerson on the ground that the federal statute includes an implied limitation to cases where there has been a judicial finding of dangerousness to the "intimate partner" or child. But it is also possible that the Fifth Circuit will conclude Cummings was right, and that the statute violates the Second Amendment.

If the court goes down this last road, the *Emerson* case could be headed for the Supreme Court. And whether in this case or some other, the Supreme Court will eventually have to decide whether the Second Amendment is going to remain in the Constitution. It is therefore worth understanding why expunging it would require a level of sophistry and willfulness on a par with such disastrous instances of high court usurpation as *Dred Scott* and *Roe v. Wade*.





For much of the twentieth century, there were two schools of thought about the meaning of the Second Amendment. Virtually the entire legal establishment, from the professoriate to most appeals courts, asserted that it protects only the right of state governments to maintain military organizations like the National Guard. On the other hand, people who read English in the normal way thought that it protects the right of individual citizens to keep and bear arms.

If the framers of the Second Amendment had simply provided that “the right of the people to keep and bear arms shall not be infringed,” even a lawyer would have trouble denying that it creates an individual right like the other “rights of the people” described in the Bill of Rights. But that’s not what they did. Instead, they appended an explanatory introduction, so that the constitutional text says: “A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”

The introductory phrase, however, does not change the meaning of the operative clause, and the Second Amendment means exactly what it would have meant had the preface been omitted. To see why that’s so, and also why such an explanatory preface makes perfect sense, one needs to grasp two interrelated arguments. The first is based on the text of the Second Amendment and its relationship with other clauses in the Constitution. The second focuses on the immediate political problem that the preface was meant to address.

Let’s start with the text of the Second Amendment. The operative clause protects a “right of the people,” which is exactly the same terminology used in the First Amendment and the Fourth Amendment. Those two provisions indubitably protect individual (not states’) rights, and so does the Second Amendment.

What the introductory phrase tells us is that this individual right is protected, at least in part, because doing so will foster a well-regulated militia. Before asking how it can do that, it’s worth emphasizing what the Second Amendment does *not* say.

It emphatically does not protect the right of the *militia* to keep and bear arms. The people and the militia were and are two very different entities. 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 bear arms is protected *only to the extent* that such a right fosters a well-regulated militia or the security of a free state.

In order to see why the introductory phrase cannot be interpreted as qualifying the right of the people to keep and bear arms, one need only consider the Patent and Copyright Clause, which is the Constitution's nearest grammatical cousin to the Second Amendment. That clause gives Congress the 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."

Nobody thinks the prefatory language limits the reach of the granted power. It doesn't mean Congress must stop granting copyrights to racists or pornographers or Ludites, who are hardly promoting the progress of science. And yet the grammatical case for this interpretation would be much stronger than the legal establishment's reading of the Second Amendment's militia phrase as a limitation on the right to arms. Moreover, state constitutions from the founding period were littered with explanatory prefaces like the one in the Second Amendment, which were never construed to change the meaning of the operative clauses to which they were appended.

How, then, can the individual right to keep and bear arms contribute to fostering a well-regulated militia? To answer that question, we have to look at the original Constitution, which allocates responsibility for governing the militia. It tells us five things 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.

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

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 the militia could be converted into the functional equivalent of an army. There had been examples of this in England, and we have an example today in the National Guard.

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*.

Turning back to the Second Amendment with these facts in mind, it becomes apparent why the Second Amendment cannot possibly have been a states' rights amendment—meant to constitutionalize a right of *states* to keep up military organizations like the National Guard. 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. These provisions have allowed the federal government essentially to eliminate the state militias as independent military forces by turning them into adjuncts of the federal army through the National Guard system. Under the states' rights theory of the Second Amendment, this takeover of the National Guard would represent an unconstitutional usurpation of state power by Washington.

But of course the Second Amendment is not about states' rights, and the relationship between its introductory phrase and its operative clause turns out to be deceptively simple. A well-regulated militia is not one that is heavily regulated, but rather one that is not inappropriately regulated. Recall that the original Constitution gives Congress almost unlimited authority to regulate the militia. As the operative clause of the Second Amendment makes perfectly clear, its purpose is simply to forbid one kind of inappropriate regulation (among the infinite possible regulations) that Congress might be tempted to enact. What is that one kind of inappropriate regulation? *Disarming the citizenry from among whom any true militia must be constituted*.

Congress is permitted to do many things that harm 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. A lot of those things have in fact been done, and many members of the founding generation would have strongly disapproved. But the original Constitution allowed it, and the Second Amendment did not purport to interfere with congressional latitude to regulate the militia. The one and only thing the Second Amendment does is expressly forbid a particular, and particularly extravagant, extension of Congress's authority 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 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 Glorious Revolution, and because of actual memories of abuses by British troops in the colonies, the founding generation was marked by a strong and widespread aversion to peacetime standing armies. The militia system was treasured by many people 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 one, complained that the militia system violated the economic principle of division of labor. More important, even those who treasured the militia recognized that it was fragile. And the reason it was fragile was the same reason that made Hamilton think it was stupid: Citizens were always going to resist unpaid military training, and governments were always going to 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 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. But that decision created a threat to liberty, especially in light of the fact that the Convention also decided to forbid the states from establishing armies of their own without the consent of Congress.

One solution might have been to require Congress to establish and maintain a well-disciplined militia, but it was impossible for the Constitution to define a well-regulated or well-disciplined militia with the requisite precision and detail. Another solution might have been to give the states control over the militia and forbid Congress from interfering. The Anti-Federalists favored this solution, but it was also unworkable. Collective action and coordination problems would have resulted in an absence of uniformity in training, equipment, and command; no really effective fighting force could have been created.

The conundrum could not in fact be solved, and the Convention did not purport to solve it. Neither does the Second Amendment. What the Second Amendment does is ameliorate the problem slightly. 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. But

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 all the historical evidence. For instance, in the ratification debates about the original Constitution, 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—a serious danger by their reading of European history.

James Madison responded that such fears of federal oppression were overblown, in part because the new government would be structured differently from European governments. He then pointed to another, and decisive, difference between America and Europe: The American people were armed and would therefore be almost impossible to subdue through military force, even if you imagined that the federal government would try to use its armies to do so.

In this debate, the Federalists and Anti-Federalists shared two assumptions: that the proposed new Constitution gave the federal government almost total legal authority over the army and the militia; and that the federal government should not have any authority to disarm the citizenry.

The disagreement was only over the narrower question of how effective armed civilians could be in protecting liberty. Anti-Federalists regarded the armed citizenry, and hence the Second Amendment itself, as a rather trivial safeguard against federal oppression. But the very inadequacy (from an Anti-Federalist point of view) of the protection that an armed citizenry could offer against federal oppression also rendered the Second Amendment non-controversial. It could not satisfy the Anti-Federalist desire to preserve the military superiority of the states over the federal government. That would have been very controversial, and nobody so much as hinted that the Second Amendment created or protected any sort of right belonging to state governments.

As a political gesture to the Anti-Federalists, the Second Amendment's express recognition of the right to arms was something of a sop. But the provision was easily accepted because *everyone* 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.

Where does this leave us? It leaves us with a great many

interesting and important questions about the meaning of the Second Amendment. But before those questions can be addressed properly, we have to free ourselves from the notion that has for decades held sway in the courts and among the legal establishment—that the constitutional right to keep and bear arms is essentially tied up with military service, or that it was meant to create a right of states to maintain a military counterweight against the federal government.

What the courts should do, starting with the *Emerson* case, is subject federal gun control laws to the same close scrutiny they apply to other statutes that are challenged under the Bill of Rights. That undertaking will leave room for many debates in which reasonable minds can differ, as is true with other provisions of the Bill of Rights. But anarchy will not descend upon the land.

Indeed, most existing federal regulations of gun ownership would probably survive such scrutiny because they are sufficiently well tailored to achieve sufficiently important government purposes. It is not constitutionally problematic, for instance, to limit the Second Amendment rights of exceptionally dangerous people, such as violent felons and adjudicated mental defectives.

Even the statute at issue in *Emerson* could be applied constitutionally in cases where a court has reasonably found that someone represents a real threat to the physical safety of his family. Just as a divorce court judge may forbid an abusive husband to continue subjecting his wife to hateful late-night telephone tirades, so a judge should be able to deprive a genuinely threatening man of the right to acquire convenient tools for murdering his wife.

But the *Emerson* case itself is different. An injunction was issued with no evidence that the defendant had ever threatened his wife, and no court had ever found that he was a danger to her. By its literal terms, the 1994 Violent Crime Control statute purports to impose gun controls on citizens like Emerson who have never been convicted of a crime and who have never been shown to be any more dangerous than anyone else. If these individuals can lose their Second Amendment rights merely because a divorce court judge has entered a routine order instructing them to obey the law, it becomes difficult to imagine that any civilian disarmament statute could violate the Constitution.

The courts have no legitimate authority to adopt an “interpretation” of the Second Amendment that renders it nugatory. Nor should one suppose that this provision of the Constitution has lost its value because we lack the founding generation’s intense fear of standing armies and federal

oppression. The Second Amendment makes no sharp distinction between the use of guns to resist oppression by the government and their use to resist oppression from which the government fails to protect us.

The purpose of the Second Amendment is to protect the fundamental right of self-defense, and thereby to protect the interests of a free political community. For the Framers, those interests were at stake whether the threat took the form of a foreign invasion, a political coup, marauding Indians, or a simple highwayman. It was for this reason natural that the Constitution authorized the militia to be used “to execute the laws of the Union, suppress insurrections and repel invasions.”

Even if one supposes that civilians will never need arms to resist political oppression, the Second Amendment will thus continue to serve an important constitutional purpose. The government has neither the obligation nor the ability to offer its citizens reliable protection from murder, rape, and robbery. The police almost always arrive at the scene of a crime well after the crime has been committed, and no one would want to have police officers stationed everywhere that crime might occur. These fundamental aspects of American society have *not* changed since the eighteenth century, and an armed citizenry continues to have great value both to those who choose to be armed and to their fellow citizens.

In fact, armed resistance to criminal violence is very common. It occurs on the order of two million times each year, and in most of these cases a mere display of the weapon scares off the attacker. Furthermore, armed resistance is much more often successful than passive acquiescence in preventing injuries to the victim, especially when a woman is the target of an attack.

An armed citizenry is also an extremely powerful *deterrent* to violent crime. Burglary rates of occupied dwellings, for example, are much lower in America than in England. Similarly, states adopting laws that allow civilians to carry concealed weapons have seen significant drops in violent crime rates. The huge number of crimes that are invisibly deterred by America’s armed citizenry constitute an important private and public benefit. Congress has no more right to take away this benefit than it does to deprive us of the benefits of a free press or the free exercise of religion. It is true that these freedoms, like the right to arms, have costs as well as benefits. But it is also true that in all three cases the framers of our Constitution rightly calculated that the benefits outweigh the costs. It is time for the courts to stop substituting ill-considered policy preferences for the legally binding wisdom embodied in the Constitution. ♦