

Gun Control Is Not Constitutional

Gun Control Is Not Constitutional Lee, Robert W. *At Issue: Is Gun Ownership a Right* Kelly Doyle Greenhaven Press 2005 Viewpoint On October 18th [2000], a Texas jury found San Angelo physician Timothy Joe Emerson not guilty of aggravated assault and child endangerment. In August 1998 his wife, who became involved in an adulterous affair with another man, had filed for divorce and applied for a temporary restraining order barring Dr. Emerson from, among other things, threatening or attacking her during the divorce proceedings. A few days later at a hearing, Mrs. Emerson claimed that her husband had threatened during a telephone conversation to kill her boyfriend. Largely based on that allegation, a county district court judge, without showing or finding that Dr. Emerson actually posed a threat to his wife or their four-year-old daughter, issued a restraining order enjoining him from threatening or physically harming either. The judge also neglected to advise Dr. Emerson that he could face federal prosecution if found with a firearm, due to an obscure provision of the 1994 Violent Crime Control Act that prohibits possession of a gun by anyone subject to such a restraining order. Following a confrontation between the contentious couple at his office on November 16, 1998, Mrs. Emerson claimed that Dr. Emerson had threatened her and their daughter by brandishing a handgun. He was indicted on the state charges of which he was recently acquitted, and was also indicted by a federal grand jury for allegedly violating the 1994 statute. On March 30th of [1999], Judge Sam R. Cummings of the U.S. District Court for the Northern District of Texas dismissed the federal indictment, ruling that it violated Dr. Emerson's constitutional rights under the Second and Fifth Amendments. A key issue was whether or not the Second Amendment secures an individual right to keep and bear arms, or was intended by the Founders to apply only to a collective entity such as the National Guard. Basing his opinion on cogent historical analysis and copious documentation, Judge Cummings held that "a textual analysis of the Second Amendment supports an individual right to bear arms" and that "the very inclusion of the right to keep and bear arms in the Bill of Rights shows that the framers of the Constitution considered it an individual right." After all, the Bill of Rights protects individual rights to freedom of religion, freedom of speech, freedom of the press, etc., from government. Why would the Founding Fathers add to such a list a collective right of government to possess arms Judge Cummings' ruling is particularly significant since it is the first time a federal court invalidated a gun control statute on grounds of the Second Amendment. Prosecutors promptly appealed this ruling to the U.S. Fifth Circuit Court of Appeals, which heard oral arguments in June. A decision is expected by year's end, but regardless of the outcome, *United States of America v. Timothy Joe Emerson* is likely to eventually reach the Supreme Court. What began as a rather routine divorce squabble has metastasized into what could become the most important Second Amendment case in our nation's history. [In 2001, the 5th Circuit Court of Appeals reversed the lower court's opinion. In 2002, the U.S. Supreme Court declined to hear the case.] America's legacy of freedom The historical record clearly supports Judge Cummings' analysis and opinion. The "collective" interpretation of the Second Amendment is a 20th century invention conjured up by anti-gun academics and pressure groups determined to disarm ordinary Americans and thereby grant government entities a firearms monopoly (gun control has never been about the elimination of guns, but about who will control them). The reference to the "Militia" in the Second Amendment is not a reference to the National Guard, which did not even exist at the time, but to the people themselves. As George Mason, the author of Virginia's Bill of Rights, explained, the militia consists "of the whole people, except a few public officers." David E. Young, editor of *The Origin of the Second Amendment: A Documentary History of the Bill of Rights in Commentaries on Liberty, Free Government & an Armed Populace 1787-1792* (1995) has noted, "There were NO comments by ANYONE that any of [James] Madison's proposals, or those in Congress, related to 'collective rights.'... In fact, the 'collective right' terminology so popular today among advocates of government gun control was never used during the Constitutional Era by anyone." The founding generation, Young continues, "did not interpret the Second Amendment and predecessor Bill of Rights language as related to the militia powers of government or the authority of the states, but rather as related ONLY to private rights to keep and bear arms." America's legacy of freedom is heavily predicated on the right of individual citizens to keep and bear arms. Indeed, the Second Amendment is arguably the most important constitutionally protected right of all, since it serves to safeguard all others (free speech, freedom of the press, religious freedom, etc.). As U.S. Supreme Court Justice Joseph Story explained in his authoritative *Commentaries on the Constitution* (1833): "The right of a citizen to keep and bear arms has justly been considered the palladium of the liberties of the republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." Keeping arms is a duty The Revolutionary War itself was triggered when the British attempted to confiscate private arms stored by the American colonists in private homes at Concord. Before sunrise on April 18, 1775, scores of colonists armed with loaded muskets gathered on and near the Lexington green. When the British arrived, the officer in charge ordered the rebels to "disperse, you villains-lay down your arms," but they refused. The officer then gave the order to surround the rebels, and in the ensuing confusion shots were fired. Three British soldiers were wounded and eight militiamen were killed. Following that initial skirmish, the British continued their march to Concord, but when they began tearing off planks of the bridge spanning a strategic river, American militiamen rallied to stop the destruction. Again, shots were fired by both sides, and British officers ordered a retreat during which, as described by historian Donzella Cross Boyle in *Quest of a Hemisphere* (1970), "the regulars were fired upon from behind walls and trees, houses and barns, by marksmen, who seemed 'to drop from the clouds.'" Thus began the long, bitter military struggle for American independence that could never have succeeded if the colonists had allowed themselves to be disarmed. Fortunately, the colonists had refused to do so. In 1671, more than a century before Lexington and Concord, King Charles II imposed legislation to disarm Englishmen, while his royal governor for the colonies did the same to disarm Americans. Attorney Steven Halbrook, an authority on the Second Amendment, writes in *That Every Man Be Armed: The Evolution of a Constitution Right* (1984): "Thus, arms control laws in the English experience served not only to subjugate domestically the poor and middle classes and religious groups, but also to conquer and colonize the Scots, the Irish, the American Indians, and finally the English settlers in America." When the "embattled farmers stood" at Concord Bridge in 1775 and "fired the shot heard round the world," they did so with an

unregistered and unconfiscated gun. Today's anti-gun hysteria is in sharp contrast to the attitude of early American colonists regarding firearms. A 1982 report of the Subcommittee on the Constitution of the U.S. Senate Judiciary Committee recalled, for instance: In 1623, Virginia forbade its colonists to travel unless they were "well armed"; in 1631, it required colonists to engage in target practice on Sunday and to "bring their peeces [sic] to church." In 1658, it required every householder to have a functioning firearm within his house and in 1673 its laws provided that a citizen who claimed he was too poor to purchase a firearm would have one purchased for him by the government, which would then require him to pay a reasonable price when able to do so. In Massachusetts, the first session of the legislature ordered that not only freemen, but also indentured servants own firearms and, in 1644, it imposed a stern 6 shilling fine upon any citizen who was not armed. Writing in the *Michigan Law Review* for November 1983, attorney Don B. Kates further noted that "the duty to keep arms applied to every household, not just to those containing persons subject to militia service. Thus, the over-aged and seamen, who were exempt from militia service, were required to keep arms for law enforcement and for the defense of their homes from criminals or foreign enemies. In at least one colony a 1770 law actually required men to carry a rifle or pistol every time they attended church; church officials were empowered to search each parishioner no less than fourteen times per year to assure compliance." The intent of the Founders

Our country's Founders, though at odds with each other about many other matters, were united in their belief that private citizens, armed with their own firearms, were vital to a free nation. Anti-Federalist icon Patrick Henry, in his famous "give me liberty or give me death" address to Virginia's Second Revolutionary Convention on March 23, 1775, underscored the importance of an armed citizenry when he declared: "They tell us ... that we are weak-unable to cope with so formidable an adversary [as the British]. But when shall we be stronger Will it be when we are totally disarmed, and when a British guard shall be stationed in every house Three million people, armed in he holy cause of liberty ... are invincible by any force which our enemy can send against us." The Census Bureau estimates that the population of the colonies in 1700 was 2.1 million, and that by 1780 it reached 2.9 million. Henry's reference in 1775 to "three million people, armed in the holy cause of liberty" clearly encompassed all competent citizens, not merely those qualified by age and gender for militia service. Years later, when the Constitution was considered, Henry further expressed his unequivocal support of the individual right to keep and bear arms. During Virginia's ratification convention he objected to the omission of a clause in the proposed Constitution that would forbid the disarming of individual citizens (the Second Amendment was adopted to solve that problem). "The great object," he declared, "is that every man be armed.... Everyone who is able may have a gun." Thomas Paine, who voiced the colonists' demands for freedom in his famous pamphlet *Common Sense* (1776), wrote in an earlier essay entitled "Thoughts on Defensive War" (1775): "The supposed quietude of a good man allures the ruffian; while on the other hand, arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world as well as property." And in *The Federalist*, No. 28, Alexander Hamilton stated: "If the representatives of the people betray their constituents, there is no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government." In essay 29 of *The Federalist*, Hamilton further observed that "little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped," since "this will not only lessen the calls for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army an never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to hem in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens." In a similar spirit, James Madison pointed out in *The Federalist*, No. 46, that "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," since, were the people armed and organized into militia, "the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it." On June 18, 1789, 10 days after James Madison proposed the Bill of Rights in the House of Representatives, Tench Coxe, a Federalist and friend of Madison, published in Philadelphia's *Federal Gazette* (under the pen name "A Pennsylvanian") what Steven Halbrook describes as "probably the most complete exposition of the Bill of Rights to be published during its ratification period." Coxe's analysis included this comment: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article in their right to keep and bear their private arms." "In short," Halbrook states, "what is now the Second Amendment was designed to guarantee the right of the people to have 'their private arms' to prevent tyranny and to overpower an abusive standing army or select militia [such as today's National Guard]." It is worth noting that Coxe sent a copy of his article, with a cover letter, to Madison, and that the father of the Constitution expressed no objection to his comments. Rather than disagreeing that the proposed amendment protected the possession and use of "private arms," Madison stated in his reply that ratification of the entire package of amendments "will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen." Halbrook points out that a "search of the literature of the time reveals that no writer disputed or contradicted Coxe's analysis that what became the Second Amendment protected A fundamental right Federalist Noah Webster (of dictionary fame), in a pamphlet aimed at convincing Pennsylvania to ratify the Constitution, warned that "before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe." But he believed that the "supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." Thomas Jefferson also favored individual gun ownership. In the model state constitution he drafted for Virginia in 1776, he included the guarantee that "no free man shall be debarred the use of arms in his own hands." He had earlier copied into his *Commonplace Book* (the source for his ideas on government) these sentiments from *On Crimes and Punishments* (1764) by criminologist Cesare Beccaria: False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are

neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if so dear to the enlightened legislator-and subject innocent persons to all the vexations that the guilty alone ought to suffer Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree. According to a nephew, Jefferson was given a gun at age 10 and believed that every boy should receive one at that age. In a letter to another nephew, Jefferson wrote: "A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives a moderate exercise to the Body, it gives boldness, enterprise and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be the constant companion of your walks." Throughout our history, young Americans have used firearms responsibly for recreation, hunting, and defense of their homes, families, and nation. For examples, see "Young Patriots at Arms" in the July 31, 2000 issue of The New American. The Second Amendment is absolute It is important to note that the Second Amendment is absolute in its wording. While some inherent rights are protected by the Bill of Rights in rather vague, general terms (such as the Fourth Amendment's ban of only "unreasonable" searches and seizures), the Second Amendment unambiguously prohibits any interference (the right to keep and bear arms "shall not" be infringed). Halbrook suggests that since the Second Amendment "is written in a universal form," it "provides protection against both federal and state infringement. In contrast to the language of the First Amendment, which states only that 'Congress shall make no law,' the Second Amendment provides generally that the right 'shall not be infringed.'... Thus, there is strong support for the proposition that the absolute and universal language of the Second Amendment precludes any federal or state infringement whatever." Adding further weight to that conclusion, Attorney Don B. Kates points out in his Michigan Law Review article that "a state would directly infringe the congressional prerogative [to call forth an armed citizenry when necessary to execute the laws, suppress rebellion, or repel invasion] if it prohibits firearms possession by the constitutional militia, i.e., the military-age male populace." And in *Presser v. Illinois* (1886), the Supreme Court held that "it is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general power, the States cannot, even laying the constitutional provision in question [i.e., the Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government." Steven Halbrook perceptively points out that if, for the sake of argument, we accept the modern anti-gun view that the Second Amendment's reference to "the people" means only a select militia such as the National Guard, and that its reference to "arms" means only militia-type arms, then "the Ninth amendment's guarantee of all preexisting unenumerated rights would encompass the natural and common-law rights of the individual to keep and carry arms for such purposes as self-defense and hunting." In other words, either the inherent right of peaceful individuals to keep and bear arms is secured by the Second Amendment, or it falls under purview of the Ninth Amendment, which reads: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Yet make no mistake about it, Halbrook maintains, "the intent of the state conventions that requested adoption of a bill of rights and of the framers in Congress ... was that the Second Amendment recognized the absolute individual right to keep arms in the home and to carry them in public." The lessons of history History is replete with examples of would-be tyrants who have sought to disarm the people they intended to enslave. Julius Caesar, in his account of the Gallic wars, recognized the difficulty of conquering an armed people, as indicated by such observations as "all arms were collected from the town" and "there could be no terms of surrender save on delivery of arms," and his claim that he had "cut off the hands of all who had borne arms" and had slain "a great number of them and stripped all of their arms." During the 20th century, totalitarian and authoritarian regimes have used gun registration records and other means to confiscate firearms from those who might otherwise jeopardize their rule. Stringent gun laws established by the anti-Communist Cuban government of Fulgencio Batista, for instance, enabled Communist despot Fidel Castro to solidify his control after toppling Batista. Under Batista, gun owners had to register their firearms with the police, which made it a simple matter for Castro's agents to locate and collect the guns. In Nazi Germany, as documented in "Gun Control": Gateway to Tyranny by Jay Simkin and Aaron Zelman (1992), a pre-Nazi law of 1928 required the registration of anyone having anything to do with firearms or ammunition. When the Nazis assumed power, they simply declined to renew the relevant permits, thereby justifying the confiscation of firearms and ammunition and clearly demonstrating how registration paves the way for confiscation. In 1938, the Nazis' own draconian gun control legislation further deterred effective opposition to their increasingly oppressive rule. It included a provision under which Jews were "prohibited from acquiring, possessing, and carrying firearms and ammunition, as well as truncheons or stabbing weapons." And in his early years as Italy's Fascist ruler, Prime Minister Benito Mussolini, in a speech delivered at the Italian Senate on June 8, 1923, asserted: "The measures adopted to restore public order are: First of all the elimination of the so-called subversive elements.... They were elements of disorder and subversion. On the morrow of each conflict I gave the categorical order to confiscate the largest possible number of weapons of every sort and kind. This confiscation, which continues with the utmost energy, has given satisfactory results." Government oppression thrives when a people are disarmed. But when the people are armed, exactly the opposite is the case. Which is why the Founding Fathers included the Second Amendment in the Bill of Rights.

About the Author

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