Chapter 23

The Right to Bear Arms

The Second Amendment is the only part of the Bill of Rights that contains a preamble: "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." These twenty-six words are bitterly contested in modern America. Does the amendment recognize an individual right to own guns for sport and self-defense or a collective right, exercised through a militia, or citizen guard, to possess firearms for defending the nation? The framers clearly believed the right was important, but what they meant by it has become a source of deep division. Is the preamble a restricting clause, one that restricts gun ownership to defense of the nation, or an amplifying clause, one that notes an important purpose for gun possession but does not limit other uses?

The English settlers in the New World were heirs to a five-century-old tradition governing both the right and the duty to bear arms. The idea of an armed citizenry responsible for the common defense existed in law alongside regula tion of gun ownership. As far back as the twelfth century, English law imposed an obligation on citizens to participate in law enforcement. All able-bodied men between the ages of sixteen and sixty had to join the sheriff 's *posse comitatus* (from the Latin, "force of the county") when the community was alerted to criminal danger. They were also part of the militia. Both of these legal duties required citizens to possess arms, but the law restricted the use of weapons according to social class. Common people had far more limited use of weapons than did noblemen. Laws also prohibited the carrying of arms in public places.

When the English monarchy attempted to disarm its political opponents in the late seventeenth century, what had been a duty came to be viewed as a fundamental right to defend liberty from political oppression. Conditions in colonial America strengthened this belief. Guns and militias were more common—and thought to be more necessary—in the harsher environment of the New World. At first, the goal was to provide food and to protect settlers against displaced natives, but the growth of slavery also spurred the arming of all white males. The conflict with Great Britain added another reason for an armed citizenry. Colonists began to view imperial regulations as an effort to strip them of their rights. Citizen militias were the ultimate defense against tyranny.

For the founding generation, the struggle with Great Britain reinforced the lessons their English ancestors had learned. It reminded Americans of the dangers of a standing, or permanent, army that could seize power or interfere in politics, and it transformed the idea of an armed population from a necessity to an important right. The Constitution gave Congress the power to organize, arm, and discipline the militia, which by custom included all white males from sixteen to sixty years of age, but opponents of ratification feared that this power could also be used to disarm the population at large. It was this concern that led to the Second Amendment. A universal militia and armed citizenry provided

"AND WHEREAS it is of the utmost Importance to the Safety of every State, that it should always be in a Condition of Defence; and it is the Duty of every Man who enjoys the Protection of Society, to be prepared and willing to defend it; This Convention therefore, in the Name and by the Authority of the good People of this State, doth ORDAIN, DETERMINE, AND DECLARE, That the Militia of the State, at all Times hereafter, as well in Peace as in War, shall be armed and disciplined, and in Readiness for Service."

—New York Constitution (1777)

a check on governmental power, especially on what was then a distant central government.

The decades following the adoption of the amendment provided little opportunity for judicial interpretation of the right to bear arms. Gun ownership was widespread, and most laws restricting firearms regulated or prohibited their possession by native tribes, slaves, and free blacks. Commentators pointed to the connection between the right to bear arms and liberty. An early Supreme Court justice, Joseph Story, voiced the common interpretation when he wrote that "it offers a strong moral check against the usurpation and arbitrary power of rulers" because it would "enable the people to resist, and triumph over them." By the mid-nineteenth century, concern about increased crime led to laws prohibiting concealed weapons, but no one considered these measures a threat to the basic right to own a gun.

Post–Civil War Reconstruction brought the Second Amendment to the Supreme Court for the first time. The defeated southern states enacted the socalled Black Codes to keep ex-slaves in a subservient status; one law required blacks to have a license to carry firearms. Northern Republicans objected to this denial of a right considered essential to liberty. The attempt to disarm blacks, as well as to strip them of other rights, led to the Fourteenth Amendment, through which lawmakers intended to apply the Bill of Rights to the states as well as the central government. The Supreme Court did not interpret the amendment in this manner at first, and in its only two cases involving the Second Amendment, the Court ruled that it limited the federal government only. This stance reaffirmed the power of states to regulate firearms.

The explosive growth of cities in the late nineteenth century, fueled by waves of immigration from southern and eastern Europe, led to new pressures for gun control. No one disputed the right to own guns, but increasingly people were concerned about their misuse. Many native-born Americans were especially fearful that new immigrants would bring crime and violence with them. In 1911, these fears led to the passage of New York's Sullivan Law, which went far beyond typical gun ordinances. It prohibited the unlicensed carrying of concealed weapons and required a permit for the purchase or ownership of a pistol. Violation of the act was a felony, punishable by a term in the state prison, and the first person convicted under the law was an Italian immigrant. The Sullivan Law was unusual, however. Most Americans enjoyed an unrestricted right to own and use guns.

World War I changed this situation. A new and fearsome weapon emerged from this bloody conflict, the Thomson submachine gun, or tommy-gun, which became the preferred gun of gangsters. During the 1920s and early 1930s, these automatic weapons, along with sawed-off shotguns and silencers, were associated with bootleggers and bank robbers, typified by John Dillinger, Pretty Boy Floyd, and Bonnie and Clyde. In response, Congress passed the first federal gun control law. The National Firearms Act of 1934 required registration, police permission, and a steep tax for so-called gangster weapons. This law, in turn, led to one of the few Supreme Court cases on the Second Amendment. In United States v. Miller (1939), the Court affirmed the right of citizens to own weapons suitable for use in the militia, but it ruled that the firearm in dispute, a sawed-off shotgun, was not a military weapon and could be controlled without violating the Second Amendment.

The 1960s put the question of gun control in a tragic new light. The assassinations of President John F. Kennedy, civil rights leader Martin Luther King, Jr., and Senator Robert F. Kennedy were only the most notable casualties in a decade of violence. Urban riots, civil rights repression, and political unrest prompted groups from the Ku Klux Klan to the Black Panthers to arm themselves or, in the Klan's case, to become more heavily armed. Homeowners followed suit; by decade's end, almost half of American households had at least one gun. Public concern led Congress to pass the Gun Control Act of 1968, the first federal law that seriously affected the right of Americans to buy and own firearms. The act limited the purchase of guns through the mails, restricted the importation of surplus military weapons, and prohibited convicted felons from owning guns.

The act also set off a continuing national debate about gun control, with the National Rifle Association and similar groups lobbying for no restrictions on gun ownership and gun control organizations and law enforcement agencies seeking even more limits. Finally in the 1980s, the often bitter conflict between the two positions came to a dramatic head when a small town in the Midwest sought to ban handguns for the first time in American history.

Morton Grove, Illinois, lies fourteen miles north of downtown Chicago. First settled in the 1830s, it was known at the turn of the twentieth century for its floral industry, with a local greenhouse producing the first-place rose at the 1904 St. Louis World's Fair. By the 1950s, the single-line railroad that had connected the village to Chicago had been replaced by a modern expressway, and Morton Grove grew rapidly into a suburban community of 15,000. Maintaining an orderly and peaceful town became paramount to residents, and in 1981, Morton Grove passed an ordinance restricting the private possession of handguns within the village. The ban on gun ownership was the first in the nation's history.

In October 1980, residents learned about an application to open a gun store inside the town limits. By the spring of the following year, with a local poll revealing overwhelming support for handgun legislation, opponents of the application pressed the village board not only to ban the sale of handguns but to prohibit their possession entirely. On a stormy night in June, hundreds of citizens packed the small council chambers, spilling over into the streets, to voice their opinions and witness the debate. At the end of the evening, the board passed the ordinance, which imposed a fine of up to $500 and six months in jail for violators. "I hope we saved a couple of lives," one of the supporting councilmen said. Significantly, the law did not seek to ban all guns, only handguns. The

"Penal Laws of Mississippi, Sec. 1. Be it enacted, . . . That no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife."

—Black Codes of Mississippi (1865)

next day, a local attorney,Victor Quilici, filed suit in the county court, seeking to block the ordinance from taking effect. A few weeks later, four other residents sued in federal court, claiming it violated the Second Amendment.

By now the board's action was national news, and ABC TV planned a documentary on the handgun ban. Both the National Rifle Association and the Second Amendment Foundation, pro-gun advocates, had joined the fight, alleging that the ordinance was unconstitutional. After reviewing the complaint, the federal district judge ruled that the ordinance did not violate the Second Amendment, which applied only to the federal government. Opponents quickly appealed to the U.S. Seventh Circuit Court. Regulation of handguns was not the issue—more than 22,000 measures already existed in cities and towns across the nation to control concealed weapons and ban them from such places as voting sites, public buildings, and schools—but Morton Grove's ordinance outlawed their possession, even in the privacy of one's home. The ordinance challenged traditional interpretations of an American right, but it also addressed a national concern over violence related to handguns. By 1980, 10,000 people were murdered annually in the United States with these small arms. A few months before the Morton Grove ordinance passed, an assailant used a handgun in an unsuccessful attempt to assassinate President Ronald Reagan; six weeks later, a would-be assassin shot Pope John Paul II in St. Peter's Square. In defense, gun advocates developed a slogan that soon became part of a national debate: "Guns don't kill people; people kill people." Kennesaw, Georgia, in protest of the Morton Grove ban, passed an ordinance requiring all homeowners to own a gun.

When the Morton Grove ordinance took effect on February 1, 1982, the legal campaign for reversal was well underway. Two cases were winding their way toward a decision—one in state courts, one in federal courts. Meanwhile, a survey revealed continued majority support for the ban among Morton Grove residents, although it also disclosed that handguns remained in 1,600 homes in the village. An attempt by local opponents to put the ordinance to a popular vote failed, but before other efforts could be made to repeal the measure, the federal appellate court upheld the district court ruling, 2 to 1. The majority accepted Morton Grove's argument that the framers had not intended handguns to be among the class of protected firearms. The words of the Second Amendment made it clear to them that the right to bear arms was "inextricably connected to the preservation of a militia." But the U.S. Supreme Court had not extended the amendment to the states, as it had done with other rights, so Morton Grove's action could not have been unconstitutional. The dissenting judge believed the ban on possession within the home abridged the right of privacy as well as a Second Amendment right of gun ownership.

Now, the case was headed to the U.S. Supreme Court, but in May 1983, the justices declined to hear the appeal. Their refusal meant that the appellate court's decision was final. When the state supreme court also rejected a challenge to the ordinance under the state constitution's guarantee of a right to bear arms—the right was subject to the power of the government to protect public safety, which the court ruled was the intent of the ordinance—the battle of Morton Grove was over. The village had the authority to ban the possession of handguns within its borders.

Quilici v. Village of Morton Grove remains the most important modern case on Second Amendment law, but the Supreme Court's refusal to hear the case meant the controversy would continue. As a result, the Second Amendment re-

mains one of only four parts of the Bill of Rights that have not been applied as limits on the states under the Fourteenth Amendment. The Third Amendment, which says that soldiers, in times of peace, cannot be quartered in any house without the owner's consent; the Fifth Amendment's requirement of an indictment by a grand jury for capital crimes; and the Seventh Amendment's requirement for a jury trial in civil suits are the other provisions that restrain the federal government alone.

The lack of a definitive interpretation of the right to bear arms—Is it an in dividual right? Is it a collective right?—means that the issue finds its way into hundreds of local, state, and federal forums. Courts, legislatures, and city councils have acted in different ways to reconcile the meaning of this right, which appears in most state constitutions as well, with the threat posed by weapons in the hands of criminals. At the same time Morton Grove acted, for example, several neighboring towns adopted similar ordinances, while other towns in Illinois rejected attempts to ban small arms. Two decades later, another federal appeals court interpreted the Second Amendment differently from the appellate court that heard the Morton Grove case; the judges who heard United States v. Everson (2001) concluded that the Second Amendment guaranteed an individual right to own a handgun. The U.S. Supreme Court has not thus far resolved these conflicting interpretations.

The debate about gun control is among the most raucous in American history, and the opposing sides often take positions that are hard, if not impossible, to reconcile. An appeal to the original understanding does not solve the problem for us. The founding generation clearly thought the right to bear arms required protection, but the language they used was not entirely clear. Who were "the people?" Does this phrase refer to individuals or to the community? Do the words "to bear arms" refer to ownership of guns or to their use in the common defense? In fact, the words have both public and private meanings, which is why we have such difficulty settling on a single interpretation of the amendment.

The stakes of the debate are high. From the fiery conflict between federal officers and a religious sect, the Branch Davidians, at Waco, Texas, in 1993 to the deaths of high school students in a shooting spree at Columbine, Colorado, in 1999, we have witnessed too many recent instances of violence not to be concerned about the availability and use of guns in our society. But the contest about the meaning of the Second Amendment is not the first time in American history we have been divided over the extent of our rights. The fight for abolition of slavery, the struggle for woman suffrage, the campaign for personal privacy—these claims to liberty are only three of numerous battles fought throughout our history over the definition of our rights.

What is most striking about the public controversy over gun control is its democratic character. It is an open and participatory conversation about fundamental rights and the fundamental character of an orderly and just society. Among all the partisanship and intemperate rhetoric, what is most reassuring is the debate itself. It is this passionate, continuing, democratic debate that has given liberty and the expansion of our rights their historic energy. To deny debate in this instance would deprive us of the potential of growth in our understanding of freedom, rights, and social responsibility.

The Constitution is the Supreme Law of the Land

Disagreements about the meaning of the right to bear arms—and even disputes about the reason for the right itself—have existed since the earliest days of the republic. John Adams, a leader of the Revolution and second President of the United States, viewed the unregulated use of firearms by citizens to be dangerous to liberty, a position he put forth in A Defence of the Constitutions of Government of the United States (1787–88).

To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defense, or by partial orders of towns, countries or districts of a state, is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man; it is a dissolution of the government. The fundamental law of the militia is, that it be created, directed and commanded by the laws, and ever for the support of the laws.

Joseph Story was a Supreme Court justice who served on the Court from 1811 until 1845. In his Commentaries on the Constitution (1833), he ties an armed citizenry to the defense of liberty but only through a regulated militia, a body similar to the modern National Guard but one in which all able-bodied men had to serve.

The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rules. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprinipled rulers, to subvert the government or trample upon the right of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a 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. And yet, though this truth would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see.There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.