— C H A P T E R 5 —

The Right to Bear Arms

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

— Second Amendment to the U.S. Constitution

Interpreting the Second Amendment's statement of a right to bear arms is one of the most controversial of all the questions involving the rights of the people. Unlike the rights of free expression and those protecting persons accused of crimes, the Supreme Court has rarely addressed the issue, and so there is no authoritative judicial interpretation of what those words mean. But the American public, Congress, and the state legislatures are engaged in a continuous debate over the sense of the Second Amendment, over whether the Constitution permits legislative regulation of guns, and if so, to what extent. Advocates of stringent control point to the high crime rates and the number of people killed — deliberately and accidentally — each year by guns; opponents argue that guns do not kill people, but people kill people. The fact remains, however, that there are more

guns in private hands in the United States than in most countries in the world, and thanks to Hollywood movies and television shows, there has arisen a largely inaccurate image of Americans as a gun-toting people who settle their disputes by armed violence.

Because of these current controversies, the origins of the Second Amendment, the reasons for its inclusion in the Bill of Rights, and the fact that millions of Americans own guns that they use for non-criminal activities such as hunting or sports competition are often lost in the heat of the debate. The excesses of rhetoric on both sides have generated a great deal of heat but little light.

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The forebear of the modern gun is the musket, developed around the mid-1500s. Compared to modern rifles, muskets were cumbersome weapons difficult to use, but extremely effective in battle. By the time of the English Civil War in the mid-17th century, the ownership of muskets and their smaller counterparts, pistols, had become widespread among the gentry. One of the complaints that the English had against James II when they deposed him in the Glorious Revolution of 1688 is that, in his efforts to restore Catholicism in England, he caused "Protestants to be disarmed at the same Time when Papists were both armed and employed contrary to Law." When the English Bill of Rights was passed in 1689, it appeared that the right to own guns had become one of the rights of the people.

William Blackstone, *Commentaries on the Laws of England* (1765)

The fifth and last auxiliary right of the subject . . . is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. It is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and law are found insufficient to restrain the violence of oppression.

This passage, however, points to historical facts often overlooked in the debate, namely, that the ownership of guns was strictly regulated in England. Only the nobility and the gentry could own arms; the ordinary citizen had no right to bear arms.

In the English colonies, as recent scholarship has shown, private gun ownership was also relatively limited. The threat from

hostile native tribes, however, required that the colonists be able to defend themselves, and in the more settled areas they relied on the militia, not on standing professional armies. All able-bodied men were supposed to serve in the common defense, and the community owned stocks of weapons, which would be handed out for practice or in times of need, and then returned to the armory. As settlement became more attenuated, with individual homesteads far from the major towns, individual defense required that there be at least one gun for each able-bodied male. Quite often the women would learn to use the weapons as well.

Throughout the colonial and early federal periods in America, government closely regulated gun ownership. On the one hand, local law often required males between the ages of 18 and 45 to own guns so they could participate in the militia; on the other hand regulations prohibited certain groups — such as Catholics, slaves, and indentured servants — from owning guns at all.

The newly created United States fought its revolution against Great Britain with a combination of a semi-regular, semi-trained Continental Army augmented by state militias. Although in later years the role of the militias would be highly exaggerated, and George Washington for political purposes praised them, in fact they were a continuous administrative as well as military thorn in his side. Often poorly trained (most of their training had involved marching around village greens followed by parties) and even more poorly disciplined, they could not be counted upon as reliable forces.

George Washington on the militia

To place any dependence upon Militia is, assuredly, resting upon a broken staff. Men just dragged from the tender Scenes of domestick life; unaccustomed to the din of Arms; totally unacquainted with every kind of military skill, which being followed by a want of confidence in themselves, when opposed to Troops regularly train'd, disciplined, and appointed, superior in knowledge and superior in Arms, makes them timid, and ready to fly from their own shadows. If I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter.

Yet in some ways the militias did prove useful, if for no other reason than allowing the new nation to field over 400,000 men during the course of the Revolutionary War. It also helped to make the revolution a truly local enterprise in that nearly every town and hamlet had men serving under General Washington's

direction.

Despite the popularity of the militia in the late 1790s, the states did not abandon gun control. Laws regulating who could own firearms continued during and after the war. State laws required private owners to surrender their arms to the government if needed for military purposes. In Pennsylvania, only citizens who swore a loyalty oath to the state and to the new nation could own firearms; those who refused could be forced to surrender their weapons. In many states regulations continued prohibiting Catholics, Jews, slaves, indentured servants, and propertyless whites from owning guns. Moreover, state governments conducted gun censuses — that is, a listing of type and ownership of all firearms — well into the 19th century. One scholarly study holds that less than 14 percent of the adult white male population, those otherwise eligible to own guns, actually possessed firearms in 1790. At the time the states adopted the Second Amendment, then, it is fair to say that a considerable measure of gun control, not an unlimited right to own firearms, was the rule throughout the 13 states.

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The development of the Second Amendment must also be understood in the context of the American mistrust of standing armies, a mistrust inherited from England, and magnified by the behavior of the royal government in the two decades leading up to independence in 1776. When Thomas Jefferson listed the grievances of the colonists against George III in the Declaration of Independence, he wrote that "He has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures. He has affected to render the Military independent of and superior to the Civil Power." Several other complaints in the Declaration related directly to the presence of standing armies on American soil, as well as to the British efforts to confiscate American weapons and ammunition.

At the Constitutional Convention in 1787, the delegates debated the merits of standing armies as opposed to militias, but aside from granting Congress the power to raise and support armies and a navy, did not address the private ownership of arms as an issue. During the debate over ratification, however, opponents of the Constitution complained that the document lacked a bill of rights, and among the rights they saw as missing was that of maintaining arms by private citizens in order to staff the militia. The old fear of standing armies had not gone away, and the anti-Federalists worried that a strong central government, backed by its own standing army, would run roughshod over the liberties of the people. In many states, part of the agreement over ratification included a call for a bill of rights to be added to the Constitution as soon as possible, and one of the rights listed was ownership of guns for militia purposes.

The Virginia Ratifying Convention (1788)

[We believe] that the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.

The first Congress to meet under the Constitution did indeed draft a Bill of Rights, which the states ratified in 1791. There appears to have been little debate over what became the Second Amendment, other than some tampering with the wording, and as some scholars have noted, the drafters agreed on certain basic premises, namely, that citizens should have a constitutional right to serve in militias in defense of state and country, and that in order for the militias to be viable, individuals had to have the right to own weapons. The importance of the amendment at the time lay not in its ensuring individual rights; rather, it should be seen as part of a larger debate over federalism, the balance of power that would be shared by the states and the national government. Although the Constitution provided a far stronger central government than had existed under the Articles of Confederation, fears about a powerful national government, backed by standing armies, still existed, and the militias would give the states and their people not only the means to defend themselves against external attack but also, should the worst fears of the anti-Federalists materialize, against a depraved national government itself.

In keeping with this sentiment, Congress in 1792 passed the Uniform Militia Act, defining who had responsibility to serve ("every free able-bodied white male citizen" between the ages of 18 and 45), and calling upon every citizen eligible to serve to provide their own weapons, ammunition and other equipment.

Uniform Militia Act (1792)

Every citizen so enrolled shall provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges . . . each cartridge to contain a proper quantity of powder and ball.

This law in many ways marked the high point of the militia movement, and within a few years, George Washington's

estimate of militias' ineffectiveness proved devastatingly accurate. Although state militias won some battles against the Indian tribes and showed up in reasonable force in the Whiskey Rebellion of 1794, on at least two occasions militias wound up nearly coming to blows with federal forces in Georgia and Virginia. Whatever reputation citizen militias may have had disappeared completely following their awful performance during the War of 1812, and consequently, by the 1840s, whatever vision of a citizen militia had been present in the Second Amendment or in the Uniform Militia Act of 1792 had long disappeared. Local militias continued to gather for so-called musters throughout the 19th century, but as historians have noted, these amounted to little more than strutting around in front of the womenfolk and then repairing to the local tavern for a long afternoon.

In 1901, President Theodore Roosevelt called for a reform of the system, declaring that "our militia law is obsolete and worthless." Congress passed the Militia Act of 1903, which, despite its name, essentially did away with the type of militia that had been common at the time of the Revolution. The fact was that modern warfare needed trained men with modern weaponry, and the law provided for these in a regular army as well as the National Guard, founded in 1903. Although the Guard is the descendant in many ways of the old unorganized militia, it is a far more disciplined and trained entity, since their program is now held to high standards set by the regular army. The members get their weapons from the national government, and do not own them individually.

A literal reading of the Second Amendment in its historical context, then, would seem to imply that the right to keep and bear arms for the purpose of serving in a militia is no longer applicable. No state has called up the old, unorganized militia (as opposed to the National Guard) since well before the Civil War. Moreover, the necessity for an individual to provide arms when called into service has also long passed. As the historian Robert Spitzer has noted, "the Second Amendment has been rendered essentially irrelevant to modern American life."

This may very well be true in terms of the original intent of the Framers, but just as the times have changed in regard to the militia, so too have they changed in terms of individual gun ownership. Whatever the Second Amendment may have meant then, it has taken on a whole new meaning today.

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Before looking at the current debate, one should stop and ask, What has the Supreme Court said on the Second Amendment and its meaning? After all, as far as every other liberty of the

people is concerned, the meaning of the constitutional text has been authoritatively determined by the nation's highest tribunal. But there is a strange silence regarding the Second Amendment. The issue has come before the high court only a few times, and the Court's rulings, while consistent, do not relate directly to the modern debate.

In *United States v. Cruikshank* (1876), the Court laid down two principles: first, the Second Amendment poses no obstacle to the regulation of firearms; and, second, it applies only to federal power, not to the states. In other words, whatever limits the Second Amendment may pose on gun regulation, these do not apply to the states, which would seem to have unlimited power to regulate firearms.

Ten years later, the Court addressed the issue of state power in *Presser v. Illinois* (1886), when it upheld a state law that prohibited paramilitary organizations from drilling or parading without a license from the governor. Once again, the Court noted that the Second Amendment applied only to the federal government, and that states were free to regulate the ownership and use of weapons by individual citizens. The right to keep and bear arms related only to the need for a militia. The Court reiterated this view in other cases challenging state firearms regulations.

The most important Second Amendment case to come before the Court was *United States v. Miller* in 1934, a challenge to the constitutionality of the National Firearms Act of 1934, which regulated the interstate transportation of various weapons. Two men had been convicted of transporting an unregistered sawed-off shotgun (a weapon commonly used in robberies) across state lines, and they claimed that the law violated their rights under the Second Amendment. The Court unanimously upheld the federal law, as well as congressional power to regulate firearms, and insisted that the Second Amendment had to be read in the context of its original intent, namely staffing the militia.

Justice James C. McReynolds in *United States v. Miller* (1934)

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use would contribute to the common defense.

None of the Court's rulings address the question of whether private gun ownership, unrelated to any militia connection, is illegal; in fact, in a 1994 case the Court noted that "there is a long tradition of widespread lawful gun ownership by private individuals in this country." The Court has never said, however, that this long tradition is somehow protected by either the Second Amendment or any other part of the Constitution.

The contemporary debate is exactly over that question: Do Americans have a constitutional right to keep and bear arms outside the context of a militia which no longer exists? Recently, that debate has taken a new turn. For the most part, previous administrations had taken the view that so long as the Supreme Court ruling in *Miller* held, then the Second Amendment did not expressly provide an individual right. In 2002, however, Attorney General John Ashcroft added a statement to a government brief in a gun control case indicating that the administration of George W. Bush believes that the Second Amendment does, in fact, articulate an individual right to bear arms. It is too early to determine if that policy will affect how the Court decides in future Second Amendment cases.

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Although the initial right to keep and bear arms related to the militia, Americans kept and bore arms for other reasons, such as protection on the frontier, hunting, and later on sport, such as marksmanship contests. In the 1800s, many parts of the American West were essentially lawless, with roving gangs of cattle thieves and highwaymen preying on ranchers and travelers. While U.S. marshals and local sheriffs provided some protection, in many places self-defense provided the only true safety. Although the frontier moved ever further west in the 19th century, disappearing altogether by its end, the ownership of guns had become for many people a personal "right," much as they could own a horse or property. People recognized that the state could regulate that ownership, and even restrict it on reasonable grounds (i.e., persons convicted of felonies could not own firearms after their release from prison).

In 1960, a law professor, Stuart Hays, first suggested that private ownership of guns was a privilege protected by the Second Amendment, and that prior court decisions tying it only to the militia had been mistaken. Hays asserted that the Second Amendment protected an individual right to own a gun, perhaps primarily for self-defense, but totally apart from any militia duty. He also argued that the amendment created a citizen "right of revolution," and that armed citizens could launch an armed revolt against a government they believed had acted in an unjust manner. Essentially, Hays seemed to be arguing that

the real purpose of the Second Amendment was to preserve to future generations the right of rebellion against tyranny that had been exercised by the patriotic generation of the American Revolution.

Three years after Hays published his article, the nation was shocked at the assassination of John F. Kennedy in Dallas, Texas, by Lee Harvey Oswald, who had bought the rifle that he used to kill the president by mail order from an advertisement in *American Rifleman*, the official publication of the National Rifle Association (NRA). Two days later Oswald was himself gunned down by Jack Ruby, who carried a concealed handgun right into the Dallas police headquarters.

The Hays article and the Kennedy assassination precipitated a continuing debate in the academy over the original and contemporary meaning of the Second Amendment, but more importantly, the constitutional debate was seized on by political groups who supported or opposed stronger gun control laws. Since then, the debate has raged between gun advocates defending their "constitutional right" to own firearms as opposed to those wanting to regulate gun ownership, and who deny there is any "right" involved at all.

On one side, the National Rifle Association (NRA) and its allies believe that the right of individuals to own weapons is embedded in the Second Amendment, that it is an absolute right, and that any controls other than basic ones are a diminution of the right, and will eventually end in it being taken away entirely. Often the argument is phrased in terms of hunting as an American tradition as well as the need for the citizenry to defend themselves against criminals. Some of the more militant gun advocates believe the real reason behind gun control laws is to disarm the citizenry, so that a despotic government can take over complete control and do away with all the rights of the people. Some such groups have organized themselves into modern-day "militias," and as such claim that the Second Amendment protects their activities fully.

The opposition bases its arguments on the thousands of people killed each year by guns, many of these deaths resulting from domestic disputes or accidents. They also point to the ease with which deranged persons can get weapons, such as the two teenage boys who on April 20, 1999, entered Columbine High School in Littleton, Colorado, with four guns. Within minutes they had killed 12 students and a teacher, and had wounded 23 others before turning their guns on themselves. For proponents of gun control there is no constitutional right involved. In fact, advocates of gun control range across a wide spectrum, in which hardly anyone is calling for a complete outlawing of private gun ownership. Rather they propose a variety of laws aimed at controlling who can buy a gun, registration of weapons

and their owners, stricter training requirements for getting a handgun, and limits on the type of weapons private citizens can own. This last is advocated particularly by police officers, who often claim that the criminals they face often have better and more deadly weaponry than they do. A real hunter, they argue, uses a rifle or a shotgun, not a semi-automatic machine gun.

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There are several issues involved in the current debate, and while laying out the arguments of both sides can help us understand the debate, it is not possible to capture on paper the intensity, the emotional energy, and the political convolutions involved. Briefly, the following points are essential to the debate:

Individualism. The United States, gun advocates claim, has long enjoyed a democratic government and society in which the rights of the individual are protected against the authority of the state. Just as a citizen is entitled to speak his or her mind, or to worship in a manner different from the majority, or to enjoy certain rights when accused of a crime, so the individual citizen has a right to own a gun. The Second Amendment is of a piece with the other parts of the Bill of Rights, and as Founding Father Patrick Henry said, "The great object is, that every man be armed. . . . Every one who is able may have a gun."

This argument, however, seems to ignore the fact that no constitutional right is absolute in the United States. Even freedom of speech, for example, has been limited by the courts. Moreover, gun control proponents point out, that well before the adoption of the Second Amendment the rule was not unlimited gun ownership but close control, and that courts have consistently held that the right to bear arms is limited by the wording of the Second Amendment itself. Thus, they would claim, a right to bear arms is not an individual right but a right of the people as a whole when, and only when, they come together to form a militia. As for the quote by Patrick Henry, in fact he was talking about the militia.

Patrick Henry at the Virginia Ratifying Convention (1788)

May we not discipline and arm them [the states] as well as Congress, if the power be concurrent? so that our militia shall have two sets of arms, double sets of regimentals, &c.; and thus, at very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms &c.? Every one who is able may have a gun. But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the

militia completely armed, it is still far from being the case.

The Meaning of "The People": Does the phrase "the people" in the Second Amendment have the same meaning as it does elsewhere, for example, in the First Amendment's "right of the people to peaceably assemble"? If it does, the argument goes, then "the people" have a right to own a gun as much as they have the Fourth Amendment right to be secure in their homes and persons.

The answer to this argument is that the courts have consistently said that the Second Amendment is different, and that the phrase has a different meaning. Even at the time of the amendment's adoption, state laws limited gun ownership to only certain "people," namely those between 18 and 45 able to serve in the military.

Self-defense: Historically, so the argument goes, Americans have defended themselves, and, on the frontier, guns were essential to warding off attacks by Indians, rustlers, and other predators, both human and animal. In modern society, people ought to be able to protect themselves against robbery, rape, assault, and burglary. Crime is as much a fact of modern urban life as were the dangers confronting the generations that tamed the frontier. The right to self-defense is part of the natural right of life, liberty, and happiness announced in the Declaration of Independence. Gun ownership is the means by which one can protect that natural right.

Here the issue is not really the Second Amendment, since English and American law have long recognized that every individual has the right to protect himself or herself against bodily harm or theft of property. If one uses a gun to shoot an attacker, the killing will be excused not as a constitutional right, but as a matter of criminal law. The Second Amendment was never intended to augment or diminish this traditional right, and advocates of gun control have never argued that they want to deny individuals the ability to protect themselves against criminals.

American Law Institute, *Model Penal Code and Commentaries* (1985)

A man may repel by force in defense of his person, habitation, or property, against one or many who manifestly intend . . . to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary until he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. The right of self-defense in cases of this kind is founded on the law of nature;

and is not, nor can be, superseded by any law of society.

The Right of Revolution: As a nation born out of a revolution against its lawful king, and whose people are taught from infancy that eternal vigilance is the price of liberty, the argument that the Second Amendment supports a right of revolution is not without attraction. More than a century ago, Lord Acton declared that "power tends to corrupt and absolute power corrupts absolutely," and the men who wrote the Constitution and the Bill of Rights understood that concept perfectly, even if they had not heard of Acton's exact words. Any government, even a democratic one, tends to accumulate power, and in doing so will fight off any attempt to diminish that power. An unarmed citizenry will be unable to preserve its liberties when confronted by the powers of the government; an armed citizenry can and will resist, as did the colonists in 1776.

Roscoe Pound, dean of the Harvard Law School and a noted scholar, however, pointed out difficulties applying this argument in the modern world.

Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (1957)

A legal right of the citizen to wage war on the government is something that cannot be admitted. . . . In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extralegal rule which would defeat the whole Bill of Rights.

In addition, historians will argue that the American Revolution was not an armed uprising against the government, but rather a war between one government, that of the United States, against another, that of Great Britain. The Revolution was organized and managed by the Continental Congress with the assistance of the state governments, and not by armed individuals, or even roaming bands of militia.

Today, the vast majority of the American people rely on the accepted methods of democracy to both influence and to limit government — the ballot box, political interest groups, a free press, and the courts. Very few Americans approve or sympathize with fringe groups who have declared the U. S. government a tyranny that must be resisted by force of arms. In fact, the only time in our history under the Constitution when citizens rebelled on a large scale was the Civil War, and very few will argue today that the South had a right of revolution. Indeed, the Constitution specifically gives the federal

government the right and the power to suppress insurrections.

Those who advocate widespread personal gun ownership seize upon arguments such as individualism and self-defense, both to prevent federal and state legislatures from enacting more stringent gun controls, and to convince the American people that individual gun ownership is in fact a constitutional right. Led by the NRA, the gun ownership advocates have deluged members of Congress and the state legislatures, as well as newspapers and citizens at large with letters and pamphlets trumpeting a right to bear arms.

NRA membership letter

They [the government] try to take away our right to bear arms. . . . The gun banners simply don't like you. . . . They don't want you to own a gun. And they'll stop at nothing until they've forced you to turn over your guns to the government. . . . *If the NRA fails to restore our Second Amendment freedoms, the attacks will begin on freedom of religion, freedom of speech, freedom from unreasonable search and seizure.*

The efforts of groups like the NRA and the Gun Owners of America to convince the public that the Second Amendment protects an individual right involve essay contests, letter-writing campaigns, and readiness to fight in court any effort at regulation that Congress or a state legislature might pass. Even so, in the last decade Congress has passed three important pieces of gun regulation, two of which have been struck down by the Supreme Court, but *not on Second Amendment grounds*.

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In January 1989, a drifter with an AK-47 assault weapon stood outside a schoolyard fence in Stockton, California, and began firing at the children playing inside. Before he was finished, five children lay dead and 29 others had been wounded. In response, Congress in 1990 enacted the Gun-Free School Zones Act that made it a federal offense for an individual to possess a firearm within the boundaries of a school zone. A 12th-grade student in San Antonio, Texas, came to school with a .38 caliber handgun and five bullets; he was arrested under the new act, but then appealed his conviction under this act on the grounds that Congress had exceeded its authority.

By a bare 5-4 majority the Court agreed with the armed student. The Supreme Court in recent years has been very receptive to the idea of a reinvigorated federalism, in which less power resides with the federal government and more is placed with the states. In *United States v. Lopez* (1995) the Court

declared that Congress had exceeded its powers in the Gun-Free School Zones Act. There is nothing in the majority decision to indicate that the Second Amendment played any role in the decision; rather, five justices of the Court believed that congressional power did not extend to what they saw as essentially a local situation, to be regulated and punished by local law.

Justice Breyer, dissenting in *United States v. Lopez* (1995)

Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects interstate or foreign commerce [and thus falls under the purview of federal regulation]? The answer to this question must be yes. . . .

The wide-spread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. . . . Congress obviously could have thought that guns and learning are mutually exclusive. . . . And, Congress could therefore have found a substantial educational problem — teachers unable to teach, students unable to learn — and concluded that guns near schools contribute substantially to the size and scope of that problem.

In the attempted assassination of President Ronald Reagan in 1981, the gunman also severely wounded Reagan's press secretary, James Brady, and left him partially brain damaged. Brady and his wife Sarah thereafter became ardent advocates of federal gun control legislation, and despite massive opposition from the gun lobby, saw their efforts rewarded in 1993. The Brady Handgun Violence Prevention Act established a five-day waiting period for handgun purchases, and also required a background check to ensure that the would-be purchaser was not a convicted felon, wanted by the police, an illegal alien, or had been certified as mentally unstable. The law also provided money to help states upgrade their computerization of criminal records to facilitate the background search.

Opponents of the law, including the NRA, immediately challenged the Brady law in court. They did not put forth a Second Amendment argument, but focused on the law's requirement that local law enforcement officials do the background check, and claimed that this was a violation of states' rights. The Supreme Court once again invoked the doctrine of federalism, and agreed with the NRA by a bare majority in *Printz v. United States* (1997). The ruling did not mention the Second Amendment, and it seems clear from both the majority and dissenting opinions that the Court saw nothing in the Constitution that would bar the Congress from enacting

handgun restrictions as long as these did not violate states' rights.

In 1994, Congress passed the Assault Weapons Ban of 1994 as part of a larger bill aimed at controlling violent crime. Police chiefs from all over the country urged the Congress to act, claiming that in their efforts to control violent crime the criminals often had better and more powerful weapons than the peace officers. Two events that contributed to the ultimate passage of the measure were the schoolyard massacre in Stockton, California, and then an attack in a Killeen, Texas, cafeteria that left 23 people dead and a similar number wounded, the worst such massacre in American history. Although on several occasions the NRA appeared to have killed the bill in Congress, support from the Clinton Administration as well as congressional leaders in favor of gun control finally managed to get the measure passed. Since the new law was clearly drafted to assure no federalism issues could be invoked, no realistic court challenge could be made.

Following the shootings at Columbine High School in Littleton, Colorado, national shock at the ease with which two disgruntled students had managed to get four guns brought pressure to bear upon a reluctant Congress to act. The Senate quickly passed a bill that would have tightened up the procedures for purchasing a gun, as well as a ban on certain types of ammunition, but it ran into a roadblock in the House where anti-control groups lobbied successfully to defeat the measure. It is a measure of just how strong the gun lobby is in the United States that they managed to influence a Congress that saw public opinion polls strongly supporting stringent gun control measures.

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Many people, including many Americans, find the gun control debate puzzling, because despite the presence of millions of privately owned weapons, a majority of Americans do not own a gun. And most Americans, according to polls, favor tighter controls on who could own a gun, and what kind of weapon a private citizen could possess.

But unlike the other rights of the people, where limits and interpretations have been accorded by the courts, the right to bear arms has become a political test, pitting advocates of gun control against those who see gun ownership as a constitutionally protected right that is beyond legislative control. So far the Supreme Court has struck down two recent efforts at gun regulation, but on grounds having nothing to do with the Second Amendment. At some time, perhaps in the not-too-distant future, the Court will be faced with a direct challenge to

gun control laws based on the Second Amendment, and its voice will play an important, perhaps a decisive, part in shaping the debate over the right of the people to keep and bear arms.

For further reading:

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Robert J. Spitzer, *The Right to Bear Arms: Rights and Liberties under the Law* (Santa Barbara: ABC-CLIO, 2001).

Chapter 6: Privacy »