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The Second Amendment as an Expression of First Principles

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We are currently mired in a frantic debate about the rights of gun owners. One example should suffice to prove that the debate has become hysterical: Second Amendment supporters, one prominent but less than articulate member of Congress alleges, have become "enablers of mass murder."

Special animus has been directed against so-called assault rifles. These are semi-automatic, not automatic weapons—the latter have been illegal under federal law since the 1930s—because they require a trigger pull for every round fired. Some semi-automatic firearms, to be sure, can be fitted with large-capacity magazines. But what inspires the ire of gun control advocates seems to be their menacing look—somehow they don't appear fit for polite society. No law-abiding citizen could possibly need such a weapon, we are told—after all, how many rounds from a high-powered rifle are needed to kill a deer? And we are assured that these weapons are not well-adapted for self-defense—that only the military and the police need to have them.

Now it's undeniable, Senator Dianne Feinstein to the contrary notwithstanding, that semi-automatic weapons such as the AR-15 are *extremely* well-adapted for home defense—especially against a crime that is becoming more and more popular among criminals, the home invasion. Over the past two decades, gun ownership has increased dramatically at the same time that crime rates have decreased. Combine this with the fact that most gun crimes are committed with stolen or illegally obtained weapons, and the formula to decrease crime is clear: Increase the number of responsible gun owners and prosecute to the greatest extent possible under the law those who commit gun-related crimes or possess weapons illegally.

Consider also that assault rifles are rarely used by criminals, because they are neither easily portable nor easily concealed. In Chicago, the murder capital of America—a city with draconian gun laws—pistols are the weapon of choice, even for gang-related executions. But of course there are the horrible exceptions—the mass shootings in recent years—and certainly we must keep assault weapons with high-capacity magazines out of the hands of people who are prone to commit such atrocities.

The shooters in Arizona, Colorado, and Newtown were mentally ill persons who, by all accounts, should have been incarcerated. Even the *Los Angeles Times* admits that "there is a connection between mental illness and mass murder." But the same progressives who advocate gun control also oppose the involuntary incarceration of mentally ill people who, in the case of these mass shootings, posed obvious dangers to society before they committed their horrendous acts of violence. From the point of view of the progressives who oppose involuntary incarceration of the mentally ill—you can thank the ACLU and like-minded organizations—it is better to disarm the entire population, and deprive them of their constitutional freedoms, than to incarcerate a few mentally ill persons who are prone to engage in violent crimes.

And we must be clear—the Second Amendment is not about assault weapons, hunting, or sport shooting. It is about something more fundamental. It reaches to the heart of constitutional principles—it reaches to first principles. A favorite refrain of thoughtful political writers during America's founding era held that a frequent recurrence to first principles was an indispensable means of preserving free government—and so it is.

Imprimis (im-prī-mis), [Latin]: in the first place

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The Whole People Are the Militia

The Second Amendment reads as follows: "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 immediate impetus for the amendment has never been in dispute. Many of the revolutionary generation believed standing armies were dangerous to liberty. Militias made up of citizen-soldiers, they reasoned, were more suitable to the character of republican government.

Expressing a widely held view, Elbridge Gerry remarked in the debate over the first militia bill in 1789 that "whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia."

The Second Amendment is unique among the amendments in the Bill of Rights, in that it contains a preface explaining the reason for the right protected: Militias are necessary for the security of a free state. We cannot read the words "free State" here as a reference to the several states that make up the Union. The frequent use of the phrase "free State" in the founding era makes it abundantly clear that it means a non-tyrannical or non-despotic state. Justice Antonin Scalia, writing for the majority in the case of *District of Columbia v. Heller* (2008), rightly remarked that the term and its "close variations" were "terms of art in 18th-century political discourse, meaning a free country or free polity."

The principal constitutional debate leading up to the *Heller* decision was about whether the right to "keep and bear arms" was an individual right or a collective right conditioned upon service in the militia. As a general matter, of course, the idea of collective rights was unknown to the Framers of the Constitution—and this consideration alone should have been decisive. We have James Madison's own testimony that the provisions of the Bill of Rights "relate [first] . . . to private rights."

The notion of collective rights is wholly the invention of the Progressive founders of the administrative state, who were engaged in a self-conscious effort to supplant the principles of limited government embodied in the Constitution. For these Progressives, what Madison and other Founders called the "rights of human nature" were merely a delusion characteristic of the 18th century. Science, they held, has proven that there is no permanent human nature—that there are only evolving social conditions. As a result, they regarded what the Founders called the "rights of human nature" as an enemy of collective welfare, which should always take precedence over the rights of individuals. For Progressives then and now, the welfare of the people—not liberty—is the primary object of government, and government should always be in the hands of experts. This is the real origin of today's gun control hysteria—the idea that professional police forces and the military have rendered the armed citizen superfluous; that no individual should be responsible for the defense of himself and his family, but should leave it to the experts. The idea of individual responsibilities, along with that of individual rights, is in fact incompatible with the Progressive vision of the common welfare.

This way of thinking was wholly alien to America's founding generation, for whom government existed for the purpose of securing individual rights. And it was always understood that a necessary component of every such right was a correspondent responsibility. Madison frequently stated that all "just and free government" is derived from social compact—the idea embodied in the Declaration of Independence, which notes that the "just powers" of government are derived "from the consent of the governed." Social compact, wrote Madison, "contemplates a certain number of individuals as meeting and agreeing to form one political society, in order that the rights, the safety, and the interests of each may be under the safeguard of the whole." The rights to be protected by the political society are not created by government—they exist by nature—although governments are necessary to secure them. Thus political society exists to secure the equal protection of the equal rights of all who consent to be governed. This is the original understanding of what we know today as "equal protection of the laws"—the equal protection of equal rights.

Each person who consents to become a member of civil society thus enjoys the equal protection of his own rights, while at the same time incurring the obligation to protect the rights of his fellow citizens. In the first instance,

then, the people are a militia, formed for the mutual protection of equal rights. This makes it impossible to mistake both the meaning and the vital importance of the Second Amendment: The whole people are the militia, and disarming the people dissolves their moral and political existence.

Arms and Sovereignty

The Preamble to the Constitution stipulates that "We the people . . . do ordain and establish this Constitution for the United States." It is important to note that the people establish the Constitution; the Constitution does not establish the people. When, then, did "we the people" become a people? Clearly Americans became a people upon the adoption of its first principles of government in the Declaration of Independence, which describes the people both in their political capacity, as "one people," and in their moral capacity, as a "good people." In establishing the Constitution, then, the people executed a *second* contract, this time with government. In this contract, the people delegate power to the government to be exercised for their benefit. But the Declaration specifies that only the "just powers" are delegated. The government is to be a limited government, confined to the exercise of those powers that are fairly inferred from the specific grant of powers.

Furthermore, the Declaration specifies that when government becomes destructive of the ends for which it is established—the "Safety and Happiness" of the people—then "it is the Right of the People to alter or to abolish it, and to institute new Government." This is what has become known as the right of revolution, an essential ingredient of the social compact and a right which is always reserved to the people. The people can never cede or delegate this ultimate expression of sovereign power. Thus, in a very important sense, the right of revolution (or even its threat) is the right that guarantees every other right.

And if the people have this right as an indefeasible aspect of their sovereignty, then, by necessity, the people also have a right to the *means* to revolution. Only an armed people are a sovereign people, and only an armed people are a free people—the people are indeed a militia.

The Declaration also contains an important prudential lesson with respect to the right to revolution: "Prudence . . . will dictate," it cautions, "that Governments long established should not be changed for light and transient causes." It is only after "a long train of abuses and usurpations pursuing invariably the same Object," and when that object "evinces a design to reduce [the People] to absolute Despotism," that "it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." Here the Declaration identifies the right of revolution, not only as a right of the people, but as a duty as well—indeed, it is the only duty mentioned in the Declaration.

The prudential lessons of the Declaration are no less important than its assertion of natural rights. The prospect of the dissolution of government is almost too horrible to contemplate, and must be approached with the utmost circumspection. As long as the courts are operating, free and fair elections are proceeding, and the ordinary processes of government hold out the prospect that whatever momentary inconveniences or dislocations the people experience can be corrected, then they do not represent a long train of abuses and usurpations and should be tolerated. But we cannot remind ourselves too often of the oft-repeated refrain of the Founders: Rights and liberties are best secured when there is a "frequent recurrence to first principles."

The Current Legal Debate

In *District of Columbia v. Heller*, the Supreme Court handed down a decision that for the first time held unambiguously that the Second Amendment guaranteed an individual the right to keep and bear arms for purposes of self-defense. Writing for the majority, Justice Scalia quoted Blackstone's *Commentaries on the Laws of England*, a work well known to the Founders. Blackstone referred to "the natural right of resistance and self-preservation," which necessarily entailed "the right of having and using arms for self-preservation and defense." Throughout his opinion, Justice Scalia rightly insisted that the Second Amendment recognized rights that preexisted the Constitution. But Justice Scalia was wrong to imply that Second Amendment rights were codified from the common law—they were, in fact, "natural rights," deriving their status from the "Laws of Nature and of Nature's God."

In his *Heller* dissent, Justice John Paul Stevens boldly asserted that "there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution." In a perverse way, Justice Stevens was correct for the same reason Justice Scalia was wrong: What the Framers did was to recognize the *natural right* of self-defense. Like the right to revolution, the right to self-defense or self-preservation can never be ceded to government. In the words of James Wilson—a signer of the Declaration, a member of the Constitutional Convention, and an early justice of the Supreme Court—"the great natural law of self-preservation . . . cannot be repealed, or superseded, or suspended by any human institution."

Justice Stevens, however, concluded that because there is no clause in the Constitution explicitly recognizing the common law right of self-defense, it is not a constitutional right and therefore cannot authorize individual possession of weapons. What Justice Stevens apparently doesn't realize is that the Constitution as a whole is a recognition of the "the great natural law of self-preservation," both for the people and for individuals. Whenever government is unwilling or unable to fulfill the ends

for which it exists—the safety and happiness of the people—the right of action devolves upon the people, whether it is the right of revolution or the individual's right to defend person and property.

Justice Scalia noted that those who argued for a collective-rights interpretation of the Second Amendment have the impossible task of showing that the rights protected by the Second Amendment are collective rights, whereas every other right protected by the Bill of Rights is an individual right. It is true that the Second Amendment states that "the people" have the right to keep and bear arms. But other amendments refer to the rights of "the people" as well. The Fourth Amendment, for example, guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure." But there seems to be universal agreement that Fourth Amendment rights belong to individuals.

And what of the First Amendment's protection of "the right of the people peaceably to assemble and to petition the Government for a redress of grievances?" Justice Stevens argues that these rights are collective rights. After all, he avers, "they contemplate collective actions." It is true, the Justice concedes, that the right to assemble is an individual right, but "its concern is with action engaged in by members of a group, rather than any single individual." And the right to petition government for a redress of grievances is similarly, he says, "a right that can be exercised by individuals," even though "it is primarily collective in nature." Its collective nature, he explains, means that "if they are to be effective, petitions must involve groups of individuals acting in concert." Even though individuals may petition government for redress, it is more "effective" if done in concert with others, even though "concert" is not necessary to the existence or the exercise of the right.

With respect to assembly, Justice Stevens argues, there cannot be an assembly of one. An "assembly" is a collection of individual rights holders who have united for common action or to promote a common cause. But who could argue that the manner in which the assemblage takes place, or the form that it takes, significantly qualifies or limits the possession *or* exercise of the right? We might as well argue that freedom of speech is a collective right because freedom of speech is most effectively exercised when there are auditors; or that freedom of the press is a collective right because it is most effectively exercised when there are readers. Justice Stevens' argument is thus fanciful, not to say frivolous.

The Court in *Heller* did indicate, however, that there could be some reasonable restrictions on gun ownership. "Longstanding prohibitions on the possession of firearms by felons and the mentally ill," for example, will continue to meet constitutional muster. Laws that forbid "carrying firearms in sensitive places such as schools and government buildings" are also reasonable regulations, as are "conditions and qualifications on the commercial sale of arms." The prohibition on "dangerous and unusual weapons"—including automatic firearms—fall outside Second Amendment guarantees as well.

But the *Heller* decision is clear that handgun possession for self-defense is absolutely protected by the Second Amendment. Can handguns be carried outside the home as part of "the inherent right of self-defense?" The Court indicated that handguns can be prohibited in "sensitive places," but not every place outside the home is sensitive. And if carrying weapons in a non-sensitive area is protected by the Second Amendment, can there be restrictions on concealed carrying? These are all questions that will have to be worked out in the future, if not by legislation, then by extensive litigation.

The Supreme Court took a further important step in securing Second Amendment rights in *McDonald v. Chicago* (2010), ruling that these rights as articulated in *Heller* were *fundamental* rights, and thus binding on the states through the due process clause of

the Fourteenth Amendment. We have to remember, however, that both of these cases were decided by narrow, 5-4 majorities, and that new appointments of more progressive-minded justices to the Court could easily bring about a reversal.

For the moment, Second Amendment rights seem safe, but in the long term a *political* defense will be a more effective strategy. As Abraham Lincoln once remarked, "Whoever moulds public sentiment, goes deeper than he who enacts statutes, or pronounces judicial decisions." Shaping and informing public sentiments—public opinion—is political work, and thus it is to politics that we must ultimately resort.

* * *

In the current climate of public opinion, Congress will have little appetite for passing an assault gun ban. More likely, it will be satisfied with passing legislation aimed at gun trafficking and tightening background checks. We must remember, however, President Obama's pledge: "If Congress won't act then I will." He has already issued 23 gun-related executive orders, and some of them are rather curious. One of them notes that there is nothing in the Affordable Care Act that prevents doctors from asking patients about guns in the home; another directs "the Centers for Disease Control to research the cause and prevention of gun violence."

The President's power to act through executive orders is as extensive as it is ill-defined. Congress routinely delegates power to executive branch agencies, and the courts accord great deference to agency rule-making powers, often interpreting ambiguous legislative language or even legislative silence as a delegation of power to the executive. Such delegation provokes fundamental questions concerning the separation of powers and the rule of law. Many have argued that it is the price we have to pay for the modern administrative state—that the separation of powers and the rule of law have been rendered superfluous by the development of this state. Some of the boldest proponents of this view confidently insist that the triumph of the administrative state has propelled us into a post-constitutional era where the Constitution no longer matters.

The Gun Control Act of 1968 gives the President the discretion to ban guns he deems not suitable for sporting purposes. Would the President be bold enough or reckless enough to issue an executive order banning the domestic manufacture and sale of assault rifles? Might he argue that these weapons have no possible civilian use and should be restricted to the military, and that his power as commander-in-chief authorizes him so to act? Or perhaps sometime in the near future he will receive a report from the Centers for Disease Control that gun violence has become a national health epidemic, with a recommendation that he declare a national health emergency and order the confiscation of *all* assault weapons. Congress could pass legislation to defeat such an executive order; but could a divided Congress muster the votes?—and in any case, the President could resort to his veto power. Individuals would have resort to the courts; but as of yet, we have had no ruling that assault weapons are not one of the exceptions that can be banned or regulated under *Heller*. We could make the case that assault rifles are useful for self-defense and home defense; but could we make the case that they are essential? Would the courts hold that the government had to demonstrate a compelling interest for a ban on assault rifles, as it almost certainly would have to do if handguns were at issue?

Are these simply wild speculations? Perhaps—probably! But they are part of the duty we have as citizens to engage in a frequent recurrence to first principles. ■