

## The Breakfast Club

### Constitutional Minute for 29 November 2022

#### Death by a Thousand Cuts - Our Constitution of "Reasonableness"

I listened to a radio show several years ago where two supposed conservatives were discussing a recent mass shooting. One mentioned Australia where forced confiscation of certain (but not all) guns has led to a supposed decrease in gun-related crimes.<sup>1</sup> One commentator suggested that a repeal of the 2<sup>nd</sup> Amendment here could produce similar results. Had the radio program a call-in option I would have expressed the following view:

The 2<sup>nd</sup> Amendment did not and does not create a right to "keep and bear firearms." The opinion that it does is prevalent among many on both the left and right, but especially among what I will affectionately call "gun-grabbers." Until sometime during the four years of Trump you could find on the Whitehouse.gov website the statement: "The Second Amendment gives citizens the right to bear arms."<sup>2</sup> Were this true, the obvious way to negate or reverse this apparently positive right would be to repeal the 2<sup>nd</sup> Amendment. Thus we see calls for 2<sup>nd</sup> Amendment repeal following nearly every mass shooting in recent history. "Get rid of the 2<sup>nd</sup> and you can get rid of guns, which will save all these people from slaughter," goes the meme.

What the 2<sup>nd</sup> Amendment actually accomplishes is quite different than grant a positive right, it prohibits the federal government (and through the Supreme Court's contrived "Incorporation" doctrine, the States) from infringing on a pre-existing right to bear arms in defense of self and home. Long before the 2<sup>nd</sup> Amendment came along the Founders were affirming this right of bearing arms in strong terms.

The Founders recognized that the right to defend oneself and home, with appropriate weapons, is a right under natural law, and would exist with or without the 2<sup>nd</sup> Amendment. A Texas Court in *Cockrum v. State* (1859) said it best: *"The right of a citizen to bear arms, in lawful defense of himself or the State, is absolute. He does not derive it from the State government. It is one of the "high powers" delegated directly to the citizen, and is excepted out of the general powers of government.' A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the lawmaking power."*

The 2<sup>nd</sup> Amendment should not have been necessary. One of the chief arguments in 1787 against adding a "Bill of Rights" was that the federal government was provided with very limited and enumerated powers. *"For why declare that things shall not be done which there is no power to do?"* writes Alexander Hamilton in *Federalist 84*. No power was delegated the national government to regulate speech, control the press, conduct unreasonable searches, or... control the ownership of guns. The preamble to the "Bill of Rights" states the purpose of these amendments was simply to prevent misconstruction of the Constitution and abuse of its powers. There is no mention of granting positive rights. Since the Constitution provides the federal government no power whatsoever (that I can find) to regulate firearms, except as concerns their use in the military (Article 1, Section 8, Clauses 12 & 16) or as incidental to interstate commerce (Article 1, Section 8, Clause 3), the right to keep and bear arms as

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<sup>1</sup> It is highly disputed whether Australia's confiscation and accompanying buy-back program led to the decline.

<sup>2</sup> [www.whitehouse.gov/our-government/the-constitution](http://www.whitehouse.gov/our-government/the-constitution)

private citizens should be thought of as being secured first by the Ninth Amendment, and then by the Second, reinforced by the Tenth.

While I see the 2<sup>nd</sup> Amendment as a redundant protection; I nevertheless would not countenance its repeal. Opposed by people with seemingly little appreciation for true liberty or how our Constitution was intended to work, those who wish to have the means to defend themselves from evildoers (or their government) need all the protection they can get.

That's where the argument should end, but it doesn't. We have turned our Constitution of limited and enumerated powers instead into a constitution of "reasonableness." Is it reasonable to try to keep firearms out of the hands of felons and the mentally deranged? Is it reasonable to restrict the ownership of flamethrowers, Gatling guns, bazookas, and other such weapons? Of course it is. But the constitutional power to do so is completely missing. So instead of modifying the Constitution to provide the government with power we the people deem to be necessary and proper, we sit idly by while the government assumes that power without our consent, with or without the court's acquiescence. And thus the Constitution suffers yet another "cut."

The Death of a Thousand Cuts, practiced in China from the tenth century until its abolition in 1905, was a horrible way to die. But that is precisely the death our Constitution is suffering. Soon, there will be no limitations left. Many feel we have reached that point already. The Constitution then becomes a charming artifact of a bygone era, pleasant-looking when hung on a wall or ensconced under glass, but no longer of practical use - irrelevant. That's where we are headed unless "We the People" wake up and decide to take ownership of our document.

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p.s. Don't forget to sign up for the Virginia Constitution seminar on 10 December in Newport News.