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Mark A. Graber

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## SYMPOSIUM: THE MILITIA AND THE RIGHT TO BEAR ARMS

## INTRODUCTION: ANCIENTS, MODERNS AND GUNS


Mark A. Graber


When public policy problems arise, some persons seek divine guidance. Others do statistics. Americans commune with their constitutional founders. Professor Sanford Levinson notes in his contribution to this symposium:

> Both proponents of . . . a "strong" Second Amendment — strong because it would rebuff to some significant extent, efforts by both state and national governments to regulate arms — and their opponents, who support extensive gun control . . . seem intent on enlisting James Madison and other members of the Founding generation on their side.[1]

What the founders had to say and how their sayings are best interpreted is the crucial bone of contention in Second Amendment and other constitutional debates.

Partisans fight over the specific policies the Framers sought to entrench in the Constitution of 1787/1791 and their more general constitutional commitments. Some commentators emphasize liberal elements in framing thought, highlighting perceived constitutional commitments to civic peace, commercial prosperity and human fulfillment in the private sphere.[2] Others believe the Framers were influenced by a classical republican ideology that stressed civic virtue, political

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[1] Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel*, The Militia and the Right to Arms, 12 WM. & MARY BILL RTS. J. 315, 316 (2004).

[2] *See, e.g.*, ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 18–35 (1985).

participation and human fulfillment in the public sphere.[3] Time may have altered particular constitutional policies and more general constitutional principles. Debate exists over which framers command obedience, the Framers in 1789 or the Framers in 1868.[4] Bruce Ackerman suggests that New Deal Democrats are constitutional authorities, as well as the persons responsible for various mini-constitutional moments in American history.[5] The republican commitments of the constitutional past, such commentaries often suggest, may have evolved into the liberal commitments of the constitutional present.[6]

The subject of this symposium, H. Richard Uviller and William G. Merkel's acclaimed *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* (hereinafter *The Militia*), superficially rejects this practice of regarding some framers as political authorities.[7] Uviller and Merkel insist that "the Constitution, and the Second Amendment in particular, have nothing whatever to contribute to" the debate over "whether guns in private hands are good or bad for society as a whole."[8] In their view, in 1791, "the right to arms was indissolubly linked to a 'well-regulated militia,' an institution with clearly understood historical, ideological, political, and legal meaning in late eighteenth-century America."[9] This bond dooms the Second Amendment to desuetude, a constitutional museum piece rather than a living limit on governmental power. "[T]here is today [no] military institution whatsoever on the landscape that resembles the militia of old,"[10] Uviller and Merkel assert. In the absence of a militia, persons cannot exercise rights inextricably associated with the militia. As Merkel and Uviller conclude, "the predicate institution for the acknowledged right [to arms] has vanished," and therefore, "the right dependent upon it is deprived of its essence and becomes a vacant, silent relic."[11] The present right to bear arms seems analogous to California's right to be represented in Congress by two senators after an earthquake causes the entire land mass of that state to fall into the ocean.

Uviller and Merkel nevertheless demonstrate their obsequiousness to the Framers even as they declare independence. Americans are free to determine public policy for themselves, Uviller and Merkel assert, only when the Framers fail to hand

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[3] *See, e.g.*, HANNAH ARENDT, ON REVOLUTION 114–35 (1963).

[4] *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xi–xv (1998).

[5] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 47–57 (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 255–79 (1998).

[6] *See, e.g.*, GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 7–8 (1992).

[7] H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002).

[8] *Id.* at 1–2.

[9] *Id.* at 3.

[10] *Id.* at 4.

[11] *Id.*

down meaningful instructions.[12] Constitutional language, in their view, is mandatory. They oppose "amendment by radical interpretation."[13] The interpretive problem Americans face in the twenty-first century is that the persons responsible for the Constitution of 1787/1791, by permanently attaching the right to bear arms to the traditional republican militia, omitted making rules about gun policy for a world of modern armies and police forces. However much one may want to follow the rules, time and unforeseen political developments may render some rules meaningless. Chief Justice Salmon Chase's famous dictum, "[t]he Constitution . . . looks to an indestructible Union, composed of indestructible States,"[14] provides no meaningful guidance for determining the constitutional consequences of an earthquake that makes the land mass of a state disappear.

One signal contribution made by *The Militia* is the way the authors elaborate a republican alternative to claims that the Second Amendment protects a state right or an individual right. While Uviller and Merkel might be fairly described as championing a "militia-conditioned individual right,"[15] the better phrase may be "republican individual right" or, better yet, a "liberty of the ancients" as opposed to a "liberty [of] the moderns."[16] Liberal individual rights are typically understood as freedoms from government. "Individual rights are political trumps," Ronald Dworkin declares, "when . . . a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do."[17] Republican individual rights are associated with "active and continuous participation in the collective power."[18] Liberty is not independence from the collective, but consists of equal membership in the collective, collective associations, and collective activities. To the extent the right to bear arms is associated with the liberty to belong to such collective associations as the militia, when the collective associations or collectivity disappears, so do the associated rights.

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[12] *See id.* at 167. Uviller and Merkel explain:

> The Constitution offers only that protection articulated in its text, understood in the light of prevailing context, and applied in new circumstances only to the extent consistent with generic meaning. And all the historic evidence points to a right heavily dependent on public purpose. Legislation or Amendment must do the rest.

*Id.*

[13] *Id.* at 4.

[14] Texas v. White, 74 U.S. 700, 725 (1868).

[15] Randy E. Barnett, *Is the Right to Keep and Bear Arms Conditioned on a Militia*?, 1 (2004) (unpublished manuscript, on file with the Boston University School of Law Working Paper Series, Public Law & Legal Theory, No. 03-12), *available at* http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID420981_code030716570.pdf? abstractid= 420981 (last visited Feb. 22, 2004).

[16] Benjamin Constant, The Liberty of the Ancients Compared with that of the Moderns, Speech Before at the Athénée Royal (1819), *in* BENJAMIN CONSTANT: POLITICAL WRITINGS 309, 316 & 324 (Biancamaria Fontana ed., 1988).

[17] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1978).

[18] Constant, *supra* note 16, at 316.

The liberties of the ancients were as much duties as rights. Modern rights holders have no constitutional obligation to exercise their liberal freedoms. Privacy law protects most intimate associations in which adults choose to engage.[19] Ancient rights holders were constitutionally expected to exercise their freedoms. Brandeis pointed to the republican aspect of free-speech liberties when he declared, "[f]ull and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself."[20] The right to bear arms was similarly linked to public obligations, in this case the obligation to serve in the militia. "[E]very citizen who enjoys the protection of a free Government," George Washington declared, "owes not only a proportion of his property, but even his personal services to the defence of it."[21] Disarming citizens was prohibited because such policies prevented persons from fulfilling political obligations, not because such measures prevented individuals from pursuing private goods.

Many prominent advocates of broad Second Amendment rights, such as Professors Randy Barnett and Nelson Lund, dispute claims that the Framers had nothing to say about contemporary gun control.[22] Barnett insists that at least some elements of the right to bear arms were justified independently of what was then the militia. He declares that "ample evidence exists to suggest that the right to keep and bear arms existed apart from active service in a militia for the common defense, and reasonable members of the public would have and did so read it."[23] Pennsylvanians during the late eighteenth century asserted, "the people have a right to bear arms for the defence of themselves and their own state . . . or for the purpose of killing game."[24]

Professor Levinson's contribution to the symposium suggests a second group of framers are the relevant authorities. He faults Uviller and Merkel for not explaining "why their historical clock stops in 1787 rather than going on to 1868."[25] *The Militia* fails to appreciate "doctrinal development[s]" during "the run-up to the Fourteenth Amendment," which included recognition by both pro-slavery apologists and antislavery advocates of a more individual right to bear arms.[26] Following

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[19] *See, e.g.*, Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) (holding that the Constitution protects the privacy right of individuals to engage in certain homosexual conduct); Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (discussing the privacy interests protected by the Constitution); Roe v. Wade, 410 U.S. 113, 152–53 (1973) (explaining that the Court has interpreted the Constitution to protect certain areas of private conduct); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (discussing the right to privacy in the marriage context).

[20] Gilbert v. Minnesota, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting).

[21] UVILLER AND MERKEL, *supra* note 7, at 70.

[22] *See, e.g.*, Barnett, *supra* note 15; Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996) .

[23] Barnett, *supra* note 15, at 17.

[24] HISTORICAL SOC'Y OF PA., PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, 422 (John Bach McMaster and Frederick D. Stone eds., 1888).

[25] Levinson, *supra* note 1, at 316.

[26] *Id.* at 326–27; *see also* Dred Scott v. Sandford, 60 U.S. 393, 417 (1856); 1 NATIONAL

Akhil Reed Amar,[27] Levinson notes that the Republican framers of the post-war Constitution believed that the right to bear arms was one of the individual rights or "privileges and immunities" that state governments were now constitutionally obligated to respect. "[T]here are *two* 'Second Amendments' that the historian must consider," Levinson declares, "One is the version proposed and ratified in 1789–91; the other is what well-trained lawyers believed they were referring to and supportive of in 1868."[28] The Privileges and Immunities Clause, in this view, not only incorporated the Second Amendment, but may have subtly changed its meaning. Republicans unhinged the right to bear arms from the militia and created an individual right that contemporary Americans are constitutionally obligated to obey if they wish to adhere to original intent or original meaning.[29] Recent analysis of nineteenth-century free-speech debates supports this claim that the Fourteenth Amendment amended the substance of the liberties the Bill of Rights protected against federal intrusion. Given the explicit framing concern in 1868 with preventing the censorship of antislavery speech that took place before the Civil War,[30] the post-war Constitution makes sense only if interpreted consistently with Republican understanding of fundamental rights in 1868, not Federalist understandings in 1791.[31]

Professor Jonathan Simon's contribution to the symposium suggests that a third group of framers are the relevant authorities. Following "the groundbreaking work of Bruce Ackerman,"[32] Simon claims that the reaction to violent crime during the latter third of the twentieth century may have altered the constitutional capacity of state and local governments to pass gun control legislation. His article "make[s] a case that we have had a constitutional moment around criminal violence and victimization and that this moment of higher law making could well be interpreted by judges as sustaining an individual right to arms."[33] The legislative and electoral reaction to such decisions protecting the procedural and substantive rights of persons accused of crime as in *Mapp v. Ohio*,[34] *Miranda v. Arizona*,[35] and *Furman*

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PARTY PLATFORMS: 1840–1956, at 27–28 (Donald Bruce Johnson ed., 1978) (presenting the Republican Party Platform of 1856). Barnett makes similar observations, although he interprets the case law as supplementary evidence of the original meaning in 1791. *See* Barnett, *supra* note 15.

[27] See AMAR, *supra* note 4, at 216–223.

[28] Levinson, *supra* note 1, at 329.

[29] Levinson, I should note, rejects both original intent and original meaning as constitutionally authoritative. *Id.* at 330.

[30] *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 296–97 (2000).

[31] *See* Mark A. Graber, *Antebellum Perspectives on Free Speech*, 10 WM. & MARY BILL RTS. J. 779, 796–810 (2002).

[32] Jonathan Simon, *Gun Rights and the Constitutional Significance of Violent Crime*, 12 WM. & MARY BILL RTS. J. 335, 335 (2004).

[33] *Id.* at 339.

[34] 367 U.S. 643 (1961).

[35] 384 U.S. 436 (1966).

*v. Georgia*,[36] he suggests, triggered a political movement that saw "a central purpose of the federal government" as "protect[ing] ordinary Americans . . . from acts of criminal violence by other Americans."[37] Proponents of this new constitutional vision eschewed traditional "emphasis on deterrence, incapacitation and rehabilitation" when making public policy on crime in favor of an increased concern with the "individual feelings" of "crime victims."[38] Their political movement triumphed during the 1980s as Republican presidential candidates effectively played on fears of violent crime to distract attention from the economy and Iran-Contra. By 1992, Democrats were actively competing with Republicans to determine who was tougher on crime and criminals, and who was more sensitive to the victims of criminal violence.[39]

Substituting the elder George Bush and Willie Horton for James Madison and King George III might alter the constitutional law of gun control in two different directions. One possibility, Simon notes, is that "since gun violence is the primary source of lethality in violent crime, 'We the People' must be assumed to have assented to the federal government's (and certainly the states') actions to control access to guns, when such actions have a rational relationship to diminishing crime."[40] Simon fears, however, that the more dominant theme of contemporary constitutional politics favors limits on federal power. Persons who believe "gun ownership offers the most direct way for citizens to assure their own defense against lethal violence by others," he writes, might conclude "that 'We the People' . . . have chosen to protect this valuable right against further errors by an unresponsive state that limits access to guns."[41] This conclusion is fortified by other developments in contemporary constitutional culture that include a more generalized suspicion of government, "celebrat[ion] [of] crime victims" and increased public enthusiasm for "lethal violence as a legitimate response to lethal violence."[42]

Each of these important criticisms may be situated within the debate between the ancients and moderns. For proponents of broad Second Amendment freedoms, gun rights from the very beginning of the republic were a liberty of the moderns as well as a liberty of the ancients.[43] Levinson suspects that gun ownership in the United States first became a liberty of the moderns after the American Revolution, and that this modern liberty was codified by the Fourteenth Amendment.[44] Simon thinks that the modern right of gun ownership was further entrenched by the constitutional revolution of the late twentieth century.[45] The constitutional

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[36] 408 U.S. 238 (1972).

[37] Simon, *supra* note 32, at 344.

[38] *Id.* at 348.

[39] *See id.* at 353.

[40] *Id.* at 355.

[41] *Id.*

[42] *Id.* at 356.

[43] *See* discussion *supra* p. 310.

[44] *See* discussion *supra* pp. 310–11.

[45] *See* discussion *supra* pp. 311–12.

transformations discussed in his essay may be bringing forth a constitutional order in which all constitutional rights have become or are becoming exclusively liberties of the modern.[46]

*The Militia* and the essays in this symposium give readers the option of exercising a liberty of the ancients or a liberty of the moderns. Those who exercise their liberty of the ancients will find a treasure trove of information bearing on contemporary gun policy and on how it should be debated. Those who exercise their liberty of the moderns will find fascinating historical and political information, as well as a debate in the best tradition of American constitutionalism. Both Aristotle and John Stuart Mill would be pleased with the ways in which Uviller, Merkel, Levinson and Simon have contributed to a better understanding of liberty and enhanced the liberty of their readers.

[46] Consider the constitutional significance of the volunteer Army and the relative status of the right to privacy and right to vote in contemporary popular, political, and academic culture. *See generally* Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997) (discussing the modern recognition of a fundamental right to abortion grounded in the constitutional right to privacy).