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The Authors' Reply to Commentaries On, and Criticisms of The Militia and the Right to Arms, Or, How the Second Amendment Fell Silent

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THE AUTHORS' REPLY TO COMMENTARIES ON, AND CRITICISMS OF *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT*[1]

H. Richard Uviller & William G. Merkel*

INTRODUCTION

We are happy to have the opportunity to respond to some of the comments offered by our critics.[2] Indeed, we are grateful for the criticism that hits the mark, and much of it does. We wish only that we had been able to deal here in greater detail and specificity with the points with which we agree and disagree, as well as those we believe to be plain wrong. However the format — and the constraints of time — are such that we will have to rely primarily on the book itself — and its copious notes — to make our case for us. We hope on another occasion to offer some more developed thoughts on the theme that is perhaps most weakly argued in the text of *The Militia and the Right to Arms*: the effect of the Reconstruction Amendments — and in particular, the Privileges and Immunities Clause of the Fourteenth on the meaning of the Second Amendment. Mr. Merkel, the younger of us, especially wants to make it known that he intends on another occasion to deal further with the most provocative issues raised by our critics. For the moment,

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

[2] A third participant in this forum, Professor Randy Barnett of Boston University Law School, withdrew his comment after he read our reply thereto. Professor Barnett did, however, post his comment on the Social Science Research Network (SSRN). *See* Randy E. Barnett, *Is the Right to Keep and Bear Arms Conditioned on a Militia?*, 1 (2004) (unpublished manuscript, on file with the Boston University School of Law Working Paper Series, Public Law & Legal Theory, No. 03-12), *available* at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). Our reply to that comment is also posted on the SSRN, available at http://ssrn.com/abstract=509295.

these somewhat scattered reactions will have to do, and we sincerely hope that our commentators will understand that neither our cursory comments, nor our disparate detail of reply intends any disrespect for the thoughtful reviews that our critics gave our work.

PROFESSOR SANFORD LEVINSON

Let us first say a few words in response to Professor Sanford Levinson, according him the primacy he deserves as the (proud) father of Second Amendment scholarship. We are grateful for the many appreciative comments he offered. We never expected that we could quote praise from Levinson on the cover of the book, which contains scant praise for his seminal work. His comments here make it clear where our paths of understanding diverge. But before we get to that, a couple of smaller matters.

First, we hope that in his opening, Professor Levinson does not mean to suggest that we are arguing backwards from a political stance on gun control to the most compatible constitutional construction. We know he does not mean to include us among those who favor what he calls "weak emanations" from the Second Amendment because we favor gun control.[3] We have studiously declined to take a position on the advisability of strict gun control because we do not view the issue as affected by constitutional construction. So, Sandy, please do not lump us with the strict-gun-control bunch, who recognize only "weak emanations" from the Second. We do not care whether states or the federal government choose strict or lax gun laws; we say only the choice is theirs. Far from insisting that the Founders control contemporary policy toward guns, our whole thesis is that whatever the Founders would have thought about unlicenced automatic weapons, it does not matter since their underlying interest in a strong militia is no longer pertinent to the debate.[4]

Second, we must address the matter of "originalism." As Levinson recognizes, we are not orthodox originalists.[5] We respect precedent (up to a point), and we do not think that the First Amendment today means precisely what it did in the eighteenth century. But (with a few notable — and controversial — exceptions) we read the development of our understanding of the major provisions of the Bill of Rights, and the concomitant adjustments of "meaning," as within the framework of the original contemplation. Sure, the framers did not conceive of electronic surveillance, or search by thermal imaging, but they knew what eavesdropping was,

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[3] *See* 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 (2004).

[4] UVILLER & MERKEL, *supra* note 1, at 24, 227–29.

[5] *See* Levinson, *supra* note 3, at 321.

and they used the word "unreasonable" at the heart of the Fourth Amendment— a word they surely knew was subject to reinterpretation with the changing times. But there is no way that changing times or the demands of post-bellum reconstruction could sever the link in the Second Amendment between the right to arms and the service of private arms to the necessity of a well-regulated militia. The fact that Chief Justice Taney in the infamous *Dred Scott* decision — and perhaps others in that era along with him — thought that the privileges and immunities of federal citizenship referred to the private right to unrestricted arms for personal use affords little help in understanding the Fourteenth Amendment.[6]

We might even agree with Professor Akhil Amar (Levinson's ally on this)[7] that incorporation of the injunctions against federal abuse should be obligatory on the state governments through the Privileges and Immunities Clause, but the law is that due process, not privileges and immunities, is the vehicle of incorporation.[8] And presumably Levinson, and those who respect *stare decisis*, are not eager to reargue this issue. It is surely awkward — to the point of straining even Taney's jurisprudence — to contend that the right to carry personal weapons for personal use is so clearly implicit in the concept of ordered liberty as to be ranked as fundamental, as required by Cardozo's test in *Palko v. Connecticut* for incorporation through the Due Process Clause.[9] Perhaps that is why the Second Amendment remains one of the very few that are not binding on the states — a point that Amar and Levinson ignore in arguing that the Fourteenth Amendment rewrote the Second.

But basically (to come to the main point in contention between us), Levinson is right when he says that we have given short shrift to the theory that the constitutional reconfiguration of the Reconstruction Era radically altered the meaning of the Second Amendment.[10] It is not, as Levinson suggests, that we are in love with the amendment provision[11] — though we do honor the Founders for having recognized that their constitution was not immutable, and for providing the orderly means for its revision. We readily recognize the implicit amendment of most of the provisions of the Bill of Rights by the adoption of the Reconstruction Amendments.

And it is not that we fail to see the need for personal arms and self-protection among the recently emancipated slaves under attack by militant and aggressive

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[6] *See* Dred Scott v. Sanford, 60 U.S. 393, 416–17 (1856) (contending that the Framers did not intend to allow slaves and free blacks to "carry arms wherever they went"); *see also* Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 651 (1989) (discussing Taney's opinion in *Dred Scott*).

[7] *See* Levinson, *supra* note 3, at 329.

[8] UVILLER & MERKEL, *supra* note 1, at 204–05.

[9] Palko v. Connecticut, 302 U.S. 319 (1937).

[10] *See* Levinson, *supra* note 3, at 325–28.

[11] *Id.*

whites. Perhaps it was time to repeal or supercede the militia amendment (already largely inoperative) with a clear provision guaranteeing unrestricted access for personal arms for self-protection. We do not think that was done, nor indeed seriously contemplated. And we think it imaginative, but not persuasive, for law professors, some 135 years later (when the world has changed again), to tell us that the proper construction of this eighteenth-century relic is the reading it should have been accorded in the immediate wake of the nation's most catastrophic war.

We hope our understanding does not merit the appellation "historical amnesia" for our failure to recognize what Amar and Levinson claim is the "general understanding" that the Second Amendment became "far more 'individualist'" in 1868 than it was in 1791 — and indeed that this general understanding dictates its meaning to the present day.[12] Levinson is right to stress that between the War of 1812 and the end of Reconstruction respectable persons articulated a private-sounding right to arms of a sort endorsed only by fringe radicals during the period of the founding.

To be sure, we dispute the assertion that their voices became dominant. Consider, for instance, the militia-focused entry on the Second Amendment in Story's *Commentaries on the Constitution of the United States*,[13] or the Tennessee Supreme Court's militia-focused reading of the right to arms in *State v. Aymette*,[14] or even St. George Tucker's comments on the right to arms,[15] which, we think, fit more naturally into our militia-centered paradigm than into a private-right model.

Levinson is right also to point out that we can not rely solely on the meaning ascribed to constitutional language in 1789 or 1791 to determine the meaning of the same text today.[16] As he correctly notes, the First Amendment today prevents state and federal action (for instance, enforcement of defamation judgments in favor of maligned public figures where neither intent nor recklessness as to the untruth of the matters published has been established) that was not deemed prohibited to the federal government when the Amendment was ratified in 1791.[17]

Our point about the meaning of the Second Amendment is, however, stronger, and altogether different. The text of the Amendment expressly links the right to arms to the militia. The linkage endures, for the text has not been modified. The constitutionally specified militia, however, is no more. The unorganized militia

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[12] *Id.* at 328.

[13] *See* UVILLER & MERKEL, *supra* note 1, at 30–31 (discussing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 607–08 (2d ed. 1851) (1833)).

[14] *Id.* at 27 (discussing State v. Aymette, 21 Tenn. 154 (1840)).

[15] ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAW OF THE FEDERAL GOVERNMENT AND THE COMMONWEALTH OF VIRGINIA 289 (1803).

[16] *See* Levinson, *supra* note 3, at 329.

[17] *Id.*

exists on the statute books, but it has not made muster since before the Civil War.[18] No one now alive has either served in the general militia, nor been fined for nonattendance. The organized militia, meanwhile, has been called by another name (The National Guard) since 1903, and it bears no resemblance to the institution linked to the right to arms in the Bill of Rights.[19] It is not universal, service in it is not compelled, it is not privately armed, and it is no longer distinct from the regular Army. Until the well-regulated militia of the Second Amendment is restored, we maintain, the right to arms enshrined in the Constitution has no scope for application.

This brings us squarely back to the point that probably most concerned each of the commentators whose pieces are reprinted here, which is that in the years since the right to arms was enshrined in the Constitution many persons have expressed their faith in a right to arms wholly unconnected to the militia. Indeed, in 1866 those persons included Congressman John Bingham and Senator Jacob Howard, the Republican managers of the proposed Fourteenth Amendment to the Constitution. Their voices, Professor Levinson maintains (as, indeed, does Professor Amar), suggest strongly the intent of the nation to write a private, non-militia-focused right to arms in the post-Civil War constitutional order.[20] Though we certainly plan to say a great deal more on this point in the future, we think our essential Fourteenth Amendment rejoinder worth reasserting. The claim that the Privileges and Immunities Clause of the Fourteenth Amendment, though it says nothing about the Bill of Rights, was designed and understood to apply the Bill of Rights against the states is a bold one. In both the House and Senate debates, some members listed elements of the Bill of Rights (sometimes including the right to arms, sometimes including a private- sounding right to arms) among privileges and immunities,[21] but others (perhaps more) insisted that privileges and immunities referred only to civil rights — that is to say in nineteenth-century parlance economic liberties, such as the right to contract, to travel, to sue and be sued, to practice a trade.[22] Even granting the possibility of an occasional Ackermanian reworking of the Constitution outside the procedures specified in Article V, the constitutional requirements that official new amendments be ratified by two-thirds of each House of Congress and three-fourths of the states (either in convention or through their legislatures) remain worth emphasizing respecting the meaning of the Fourteenth Amendment, because unlike the reinterpretation of the Constitution that accompanied the New Deal, the

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[18] UVILLER & MERKEL, *supra* note 1, at 125–32.

[19] *Id.* at 132–44.

[20] *Id.* at 204 (discussing Amar's perspective on the effect of the Fourteenth Amendment's Privileges and Immunities Clause).

[21] *Id.* at 197–200.

[22] *Id.*; *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 30–69 (2d ed. 1997).

reshaping of the Constitution affected during Reconstruction did find formal expression. Since we did get tangible new constitutional text in 1866–1868 — text that says nothing about the Bill of Rights, the right to arms, or designs to alter the meaning of the Second Amendment — it hardly seems unfair to ask those who would read the Fourteenth Amendment to constitutionalize a private right to arms to demonstrate that two-thirds of the members of each House in 1866 and a majority of the ratifiers in three-quarters of the states from 1866 to 1868 understood the Amendment to create a constitutional right to have and to hold guns for all and any lawful purposes. Needless to say, to this point, neither Amar, Levinson, nor ourselves have counted the heads, but unless Saul Cornell does so first, we propose to do precisely that as soon as we can find the time. It is our strong suspicion that the head count will show that no constitutional majority in favor of the Amar/ Levinson position existed.

Our other major point of contention with Professor Levinson concerns the ultimate political question, that is, the right to revolution against the established government, or, perhaps even against the established constitutional order (these being generally distinct issues). In our book, we took issue with Levinson's linkage of the Second Amendment to the Lockean right to resistance, and argued that the Constitution of 1788 had relegated that right into obsolescence.[23] But as Levinson points out in this forum, "[i]t is hard to believe that a generation that had exercised just such a right — many of them finding intellectual sustenance in John Locke and his apparent support of a revolutionary 'appeal to heaven' — had completely turned their back on the right's legitimacy."[24] It is indeed counterintuitive to believe that the Americans who had fought the Revolution had by 1789/ 1791 disowned their own tradition.

But it is less difficult to conceive that the majority of them decided that they could not envision a legitimate revolution against the new order they had established after their Revolution. After all, these same people by and large — or at least those of them old enough to have thought about such things before the Revolution of 1776 — once thought of the Constitution of 1689 as permanent and immune from revolutionary challenge, and, indeed, many of them had taken up arms in 1775 precisely because they felt justified in restoring that constitution then imperiled in its operations on the western side of the Atlantic by the overreaching of ministers at Whitehall and parliamentarians at Westminster. Having fought what began as a revolution to restore the old constitution that had been deemed fixed, perpetual, and secure all their lives, it seems not improbable that Americans would be able to endorse in principle a new constitutional order that was at least in theory perfected against corruption from above and below, and hence immune to revolution.

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[23] *Id.* at 170–78.

[24] Levinson, *supra* note 3, at 318.

But nothing lasts forever, these same Americans might have observed, looking back on the tumultuous twenty-seven years spanning the Sugar Act and ratification of the Bill of Rights. And so change and challenge might come even to the new constitutional order, but not for "light and transient causes."[25] Here then, we think, is the point where we join debate with Professor Levinson: when, and at what level, do causes for revolution become sufficiently heavy and persistent to trigger the ultimate remedy? Does the Second Amendment contain an implied failsafe to invoke if the constitutionally specified remedies of Articles I through VII should falter? Or, does it merely represent another check and balance that makes such failure all the more improbable, remote, and unthinkable (i.e., by making dependence on a dangerous standing army less likely)?

Our answer remains that this question need only be reached when all those constitutional remedies (and with them the Constitution itself) should have ceased to operate, at which point, by definition, the Second Amendment would too have been overcome or supplanted in the crisis of the old order and the coming of the new. In other words, this is on one (very practical) level a question that cannot be reached while the system of constitutional law we discuss here continues in operation. But it is a question, like so many others raised in Levinson's famous article and in his current comment, that merits much further reflection and discussion.

PROFESSOR JONATHAN SIMON

Professor Simon believes, along with Yale's Bruce Ackerman, that Article V of our Constitution is not the exclusive means for amending that charter.[26] The interpretation of the Commerce Clause, they point out, was transmuted during the New Deal, as a response to changing circumstances and the urgent demands of the people.[27] The result was a new constitution that recognized a redefined government — and certainly, a redefined executive branch.

Simon agrees with us about the meaning of the right to arms set down in the Bill of Rights in 1789.[28] That right, Simon accepts, was originally understood to be linked to the militia, and to have no application in purely private situations such as sport shooting or individual self-defense. But Simon argues, since at least the 1960s, growing numbers of Americans have seen the right to arms rather differently

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[25] THE DECLARATION OF INDEPENDENCE (U.S. 1776).

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

[27] *See id.* at 336–39.

[28] *See id.* at 335 ("For the framers of the [Second] Amendment and the generation of Americans who ratified the Constitution, the possession of firearms had constitutional significance, but only insofar as it served to sustain the unique institution of state militias as a vital part of the defense of the new nation.").

than did their militia-focused ancestors.[29] In large part, Simon quite plausibly suggests, this changed perception reflects the nation's contemporary fixation with the danger of violent crime, and the perceived need of citizens to defend themselves privately when and where the police cannot or do not do so. Simon is also on the money when he asserts that, for many of the people for whom these concerns loom most important, the Second Amendment has become a cherished icon. On these points it is difficult to disagree with Simon.

Where we part company is on the constitutional significance of this social concern. That those who fear crime look to the Second Amendment to guarantee them access to weapons does not convert the meaning of that provision to accommodate their most urgent demand. Unlike Professor Simon, we resist the idea that the Constitution bends to reflect the wishes of even a majority of the citizens (and we have difficulty knowing what the majority want from the Constitution with regard to free access to handguns). The majority (if such it is) must follow the amendment procedure — a device, which both by its availability and the difficulty of its use, contributes to the stability of our government. And to those (and Simon is one) who call upon the example of the New Deal and assert that judicial interpretation of the Second Amendment, like that of the Commerce Clause, may be adjusted to reflect contemporary needs, we say that the Commerce Clause is a very different animal from the Second Amendment. The Commerce Clause, found in the all-encompassing Article I, Section 8, provides simply that, among its other powers, "Congress shall have Power . . .[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."[30]

Regulating commerce may take many forms, and it was no great stretch for the court to approve legislation that regulated interstate commerce by imposing restrictions on unfair labor practices.[31] By contrast, the Second Amendment — today no less than in 1791 — couples the right to keep and bear arms to the indispensability of a military organization known as the militia. To eradicate that interdependence, we claim, requires the arduous amendment process; it can not be accomplished by the relatively easy device of judicial "interpretation" or "reinterpretation." And certainly the clear and explicit language of the Second Amendment has not been magically transmuted to an altogether different entitlement simply by the prevalence of frightened people who would like to have a constitutional argument against restrictive federal and local efforts to limit access to guns.

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[29] *Id.* at 339.

[30] U.S. CONST. art. I, § 8.

[31] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

CONCLUSION

Perhaps the most salient theme joining the comments and rejoinders of this forum and the participants' earlier presentations at the William and Mary Conference of February, 2003 concerns the Second Amendment's continuing, altered, or abated relevance in the modern world. Jonathon Simon has argued that fear of crime and loss of faith in law enforcement lent the right to arms renewed meaning in the last years of the twentieth century. For Sanford Levinson, the passage of the Fourteenth Amendment altered the character of the right to arms, rendering what was once a civic entitlement much more liberal and individualistic. To others, the constitutional right to arms has always had a private dimension, and in that capacity, the right endures to this very day.[32] In *The Militia and the Right to Arms* and in our remarks here, we have argued that the disappearance of the well-regulated militia envisioned by the Framers and memorialized in the Second Amendment has sapped the right to arms of meaning and application — at least until such time as state or federal governments restore a militia bearing some of the defining attributes of the militia known to the framers: qualities such as universal rather than selective membership, compulsory rather than voluntary service, the availability of sanctions to enforce participation and compliance with regulations, individual responsibility (perhaps with government assistance) for equipment and arms, and an identity clearly distinct from that of the regular Army.

While the constitutional right to arms has become, in our analysis, inoperative, there is another sense in which we think the values behind the Second Amendment retain a curious and vital currency. The anti-Federalists who lobbied so hard to preserve the citizen militias as a bulwark against a dangerous standing army were animated by Republican principles. Their most extreme fear was that a federal army, answerable to a Caesarist president, would dissolve Congress and the state governments and institute dictatorial rule. But the Republicans had many palpable worries that stopped short of so grave a perversion of constitutional governance. They — and many moderates in the First Congress — feared that access to a massive federal army would tempt governments to empire building. They feared that entanglement in overseas wars would be expensive, that it would lead to profiteering, deficit spending, and to creeping debt that would drain the exchequer and enfeeble the nation. They feared that the resulting system of debt-servicing financed by borrowing and taxation would lead to corruption, to government dependency on wrongheaded men and measures. They feared that irresponsible leaders with access to armies would be tempted to bid for glory by starting wars that did not serve legitimate defensive ends. They feared that a Congress full of placemen and dependent members would yield up their powers too readily to the

[32] *See, e.g.*, Barnett, *supra* note 2.

president, and place no obstacles in the path of his martial dreams. And they feared that unchecked federal control over the citizen soldiery would lead to coerced deployment in oppressive campaigns far from family and community. Historians have long debated whether these Republicans were paranoid or prescient. For a decade at least, the historical pendulum has swung against the soundness of the Republican vision, but in recent months, the Republicans' misgivings have lost some of their former quaintness.