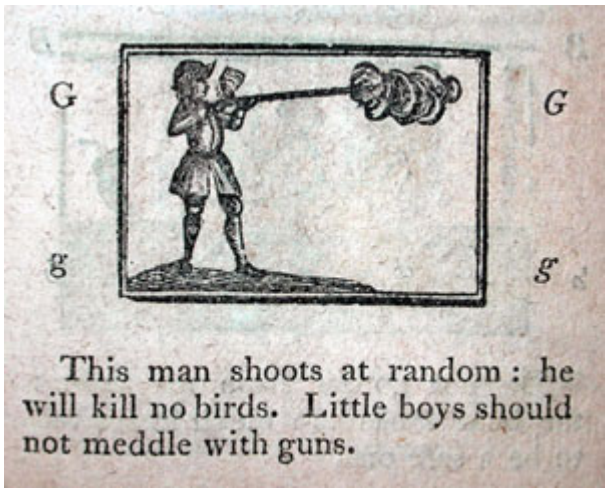
The Second Amendment: Constitutional Meanings



Editors' note: as many readers may be aware, Professor Bellesiles's research methods and scholarly standards have become the subject of considerable debate since Common-place first published this essay. In October 2002, Bellesiles resigned his faculty position at Emory University. Both the Final Report of the independent investigative committee whose findings led to his resignation, and Bellesiles's response are available online.

Many politicians and even some scholars look to history for quick validations of current positions. At their most useful, these evaluations fit in a single sentence, such as a "the Second Amendment was intended to protect an individual's right to bear arms," or "the Second Amendment was intended to enhance the militia." Each of these two positions can find support in the historical record, which raises the troubling question of how understandings of the original intention of the author and ratifiers of the Second Amendment can be in direct contradiction. But then that is precisely the point: people attempting to use original intent for current political purposes want the Framers of the Constitution and its amendments to share current political concerns. They did not. They lived in a different world with distinctive problems and issues of their own. It is, in my estimation, an error to try and force an original meaning of the Second Amendment or any other part of the Constitution into the polarized political debates of our own times. That is not to say that history should not inform our discussions, but that it should not determine our actions.

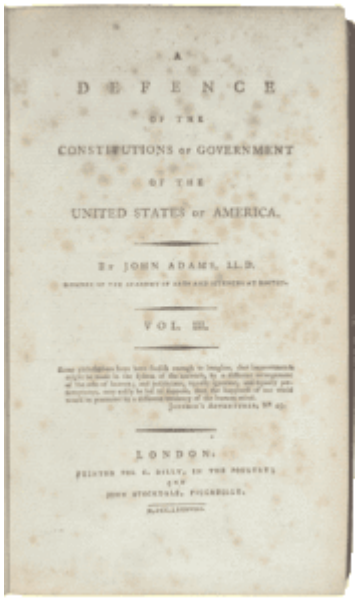

A
DEFENCE
OF THE
CONSTITUTIONS OF GOVERNMENT
OF THE
UNITED STATES OF AMERICA.
By JOHN ADAMS, LL.D.
VOL. III.
LONDON:

Fig. 1. John Adams, A Defence of the Constitutions of the Government of the United States, 1787. The Gilder Lehrman Collection, courtesy of the Gilder Lehrman Institute of American History, New York.

There is a case to be made for bringing the Constitution into service of current political positions. It is politically useful to link oneself to the Framers of the Constitution as directly as possible, and even more so if it can be done in such a way so as to preclude further debate by framing a Constitutional absolute. Constructing such a constricted vision of the past generally requires the avoidance of context and is often undertaken in the style of a legal brief, in which only supportive evidence is considered and all complications eschewed. Such “law-office history” is, in the words of John Phillip Reid, little more than “rummaging through history and picking out bits and pieces to sustain an argument about current law.” Laura Kalman has nicely distinguished the differing methods: “It is the lawyers’ business to build paradigms. Too much orderliness, however, makes historians suspicious.” Edmund Morgan once wrote Felix Frankfurter that the historian rejects “the demand for symmetry,” avoiding sharp dichotomies which misrepresent the past. Historians doubt any case for which all the evidence falls consistently on one side and work on the assumption that the past is pitted with ambiguities and paradoxes.

When it comes to the United States Constitution, most historians reject the idea that its meaning can be reduced to some easy formula or series of sweeping generalizations. One important aspect of the historians’ role in attempting to fix the original meaning of the Constitution is that we are constantly exploring the subject. Even the same historian may adjust his or her opinion of that meaning over time, as is evidenced by Leonard Levy on the First Amendment and Robert Shalhope on the Second. Neither of these two fine scholars felt that their initial understandings were wrong; rather further study led them to an appreciation for the greater complexity of the topic.

It is that respect for historical complexity that makes the scholars’ participation in these debates most valuable in the long run yet most

frustrating in the immediate present. We need go no further for an example of the latter than Judge Richard A. Posner, whose book on the impeachment of President William J. Clinton concludes that historians do not know history and are useless in offering guidance on public policy. Posner's complaint is based in part on what most historians see as their primary task, attempting to bring a precise context back to life in all its intricacy. Advocates for current policy positions do not want their views complicated; they want a pedigree. As the self-proclaimed "Standard Model" of the Second Amendment evidences in its insistence that the Framers adhered unswervingly to an individual right to bear arms, the era in which the Constitution and Bill of Rights was formulated must be one of solid consensus. The deep divisions over fundamental political, social, and cultural issues in our own times offer no hints as to the nature of the past; previous ages were united and cohesive.

Anyone familiar with the history of the American Revolution and the first decades of the United States can only be baffled by such assertions of consensus. The Revolution itself divided the populace, with patriots and loyalists battling one another for control of what each saw as their country. Supporters of independence disagreed on many significant issues, including how best to respond to their opponents. Those who remained true to the British Crown found their arms and property confiscated, with many forced into confinement and exile. Even many people who attempted to remain neutral were subject to suspicion and civic disenfranchisement. And of course African Americans, about one-fifth of the population, had all their rights denied them; many fled to the British in search of freedom. Even though most loyalists reconciled themselves to independence or were removed from the political mix, post-Revolutionary American politics remained highly contentious. Shays' Rebellion was only the most dramatic incident in a nation that was quickly unraveling. The Constitution cannot be understood outside the experiences of those who participated in its writing and ratification. Those twenty years prior to the beginning of constitutional government witnessed upheaval, uncertainty, and violence. It may be true that most of those involved in the drafting of the Constitution hoped for security and stability while preserving fundamental liberties, but they saw many different paths toward that end.

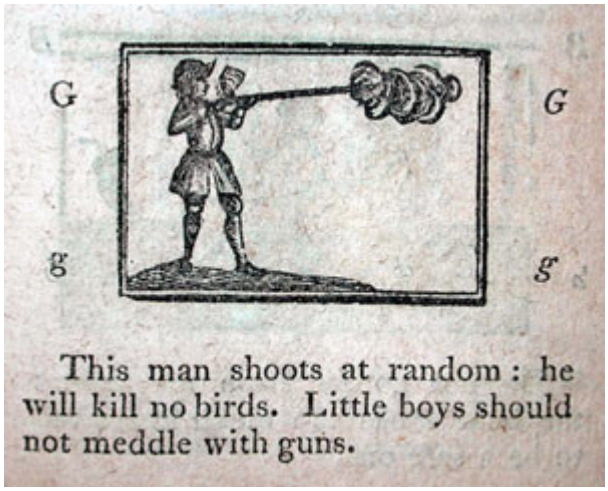


Fig. 2. From A Picture Book for Little Children (Philadelphia, 1812). Courtesy of the American Antiquarian Society.

For all but the most ideologically inclined reader, Jack Rakove has effectively destroyed the idea of original intent. The Framers of the Constitution not only held that their intentions should offer no guide to future generations, they also considered such an approach inherently dangerous. Convention delegates took oaths of secrecy because they appreciated that their deliberations would include a number of necessary political and intellectual compromises. Far better, they reasoned, if no one ever knew exactly what went into producing the simple language of the Constitution.

James Madison evoked this position of irreverence for the Framers in a speech before the House of Representatives in April 1796. Madison stated flatly that the Convention's debates should "never be regarded as the oracular guide" for understanding the Constitution. "As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions." It is hard to be clearer than that. At least Madison's original intention was that his original intention should not matter.

What should matter to us if we hope to understand the origins and meanings of the Constitution is the political process by which that "dead letter" came to life. That development, from the perceived crisis of the Confederation through the first Congress, must serve as our guide. The constant negotiation of the Convention, Rakove has written, meant that "the real challenge did not involve solving theoretical dilemmas posed by Hobbes or Locke or Montesquieu; it instead required efforts to accommodate the conflicting interests of different states and regions on such matters as the apportionment of representation and taxes, the regulation of commerce, and the extension of the slave trade."

Even with these compromises, the Constitution met strenuous opposition. The majority of those who voted for delegates to the ratification conventions probably did so in opposition to the proposed Constitution. As Saul Cornell reminds us in his marvelous book, *The Other Founders*, there was no consensus

within that founding generation, no agreement within the camps of the Federalists and Anti-Federalists about what the Constitution meant. Almost no historian speaks any more of a uniform, cohesive American culture; there are too many strands to the fabric of early American society to maintain that just one represents the whole. To vary the metaphor, we cannot stop the reel of historical development and say that this single Framer, this particular moment, captures precisely the meaning of the Constitution.

Nor can the amendments presented by Congress to the states in 1789 (what came to be called the Bill of Rights) be said to represent adequately the political values of even those who supported the new form of government. Madison was responding to the critiques of the Anti-Federalists, his friend Thomas Jefferson, and the concerns of many Federalists. He considered a variety of different wordings for each of the amendments—including the Second—and submitted them to Congress with the expectation that people would understand each in distinctive ways. As Rakove has shown, Madison did not want the Bill of Rights to be the final word on what rights were protected by the Constitution.

Madison appreciated that the majority could easily trample on the rights of the minority, that Congress might extend its power if nothing prevented it except a weak executive and judiciary. Madison knew what he was talking about, for he was a slave owner. He showed no respect for the rights of his slaves because he did not have to. Madison was surprisingly honest in using slavery as a prime example of "the danger of oppression to the minority from unjust combinations of the majority." For Madison, bills of rights were "parchment barriers" against human ambition and avarice. If the people did not respect rights, putting them in writing would make little difference. American history is rife with the violations of individual rights, but then in the eighteenth century rights were held collectively, not individually. If you were a white male Protestant property owner, then you enjoyed substantial liberty. In most states, however, there were gradations of rights descending from that pinnacle. To the majority of Americans in the 1790s, the Bill of Rights was an abstract and irrelevant document that only marked how far they stood below full citizenship. It was a mockery of the very idea of rights. Anyone arguing today that we should adhere to that original understanding of rights would, I hope, be dismissed as grotesquely out of touch with reality.

So do historians have anything to offer to this debate over the meaning of the Constitution? They enter current policy disputes at their own risk. A historian may believe that he or she is not involved in a political discourse, but will soon discover otherwise. The experience of Gary Nash and the other members of his committee to set national history standards serves as a cautionary tale. They thought that they were addressing matters of secondary education. They failed to appreciate that politicians saw advantage in attacking scholars for fostering an anti-American agenda. When senators voted by an amazing 99 to 1 to condemn the national history standards, they were in keeping with a tradition of anti-intellectualism that Richard Hofstadter has traced back to the 1790s. It is of course ironic that a country founded by a generation obsessed with

ideas should prove so uncongenial to them; but, as Tocqueville indicated, that is the nature of American conceptions of equality—the history buff equals the historian. As David Brock's recent and highly significant book, *Blinded by the Right*, makes evident, the far right (and it is inaccurate to call them "conservatives") is especially good at destroying the careers of those they perceive as threats, even if they have to make things up.

Clearly, aspects of the Constitution have outlasted their usefulness—the electoral college springs to mind—but dealing with them is a political issue, not a historical one. What the historian can do is make clear the roots of that anomaly in its precise context. In the case of the electoral college, the often baffling and excruciatingly detailed debates and compromises produced what almost everyone at the convention admitted was about the best they could hope for in balancing so many interests and demands. One cannot help but wonder what a member of that convention would think of our modern system of universal suffrage combined with the eighteenth-century expedient of the electoral college. Likewise, one wonders what they would think of using the Second Amendment to justify private arsenals equal to the firepower of the entire U.S. Army (which numbered just seven hundred men) at the time the Constitution was written.

The Second Amendment itself became part of the Constitution in a context of many different intellectual and social currents. The continuing efforts of states to control access to and use of guns once the Second Amendment was part of the Constitution seemingly indicates a lack of concern for an individual "right" to own a gun. The absence of notable opposition to such state action, even when it extended to disarming a portion of the population, reveals popular attitudes that failed to see gun ownership as a protected individual right. At the same time, the federal government came to see public indifference to firearms ownership as a major threat to national security, and responded by slowly building a standing army and beginning a program to provide guns directly to members of the militia at no cost. Popular disinterest undermined both efforts, with government censuses repeatedly revealing a surprising shortage of firearms. In brief, those responsible for its ratification never saw the Second Amendment as a hindrance to either government regulation of firearms or to efforts by the federal government to arm specific groups of citizens. The debates over how federalism would work in terms of the nation's defense against external enemies and domestic insurrection, the federal effort to reform and strengthen the militia, the continued presence of laws regulating firearms, government support for gun production, all point to a more complicated relation to the place of firearms in private hands than can easily fit on a bumper sticker.

It may be possible to construct an understanding of the ownership of guns as an individual right, collectively defined. To be as clear as possible about how this translated into general attitudes, there is no evidence that any government official in 1800 would presume to interfere with a white male Protestant property owner who sought to purchase and possess a firearm, unless

there was reason to suspect that he was linked to some sort of domestic disorder or if the militia needed the gun to resist a threatened foreign invasion (there were several invasion scares in different parts of the country between 1798 and 1815). Should any other criteria apply, the reserved sovereignty of the state would empower even local officials to prevent the purchase of or to confiscate a firearm if they deemed such action necessary for the preservation of public safety. Leonard Levy insisted on a distinction between the law as text and the law as practiced. A First Amendment right to freedom of speech and assembly did not mean that James Madison allowed his slaves to speak their minds and organize resistance to his tyranny.

The troubling aspect of the current debates over gun regulation in America is that many refuse to acknowledge the broad spectrum of possible alternatives between absolute libertarianism and total confiscation (prying one's gun from cold, dead fingers). In the cover letter that Gouverneur Morris sent out with the draft constitution to the state legislatures, he drew upon Lockean notions of the social contract in writing, "[A]ll individuals entering into society must give up a share of liberty to preserve the rest." His audience, his time, understood what he meant. It is more difficult to get ideas of limited sacrifice across today. Few people can conceive giving up their convenience for the general good. But entering into a discussion of the historical origins of the Constitution requires some degree of humility. Or as Benjamin Franklin put it in his final, noblest speech at the Constitutional Convention, the person who finds fault in some part of the Constitution, should "doubt a little of his own infallibility."

Further Reading: See David Brock, *Blinded by the Right: The Conscience of an Ex-Conservative* (New York, 2002); Patrick T. Conley and John P. Kaminski, eds., *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison, Wisc., 1992); Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill, N.C., 1999); Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (New Haven, Conn., 1937); Richard Hofstadter, *Anti-Intellectualism in American Life* (New York, 1962); James H. Hutson, "The Creation of the Constitution: The Integrity of the Documentary Record," *University of Texas Law Review* 65 (1986): 1-39; Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven, Conn., 1996); Gary B. Nash, Charlotte Crabtree, and Ross E. Dunn, *History on Trial: Culture Wars and the Teaching of the Past* (New York, 1997); Richard A. Posner, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (Cambridge, Mass., 1999) and *Public Intellectuals: A Study in Decline* (Cambridge, Mass., 2001); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1997) and *Declaring Rights: A Brief History with Documents* (Boston, 1998); John Phillip Reid, *Constitutional History of the American Revolution*, 4 vols. (Madison, Wisc., 1986-93) and *Patterns of Vengeance: Crosscultural Homicide in the North American Fur Trade* (Ninth Circuit Historical Society, 1999). Antonin Scalia, et al., *A Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J., 1997). Bernard

Schwarz, *The Great Rights of Mankind: A History of the American Bill of Rights* (Madison, Wisc., 1992). James Roger Sharp, *American Politics in the Early Republic: The New Nation in Crisis* (New Haven, Conn., 1993); Robert J. Spitzer, *The Politics of Gun Control*, 2d ed. (New York, 1998); William J. Vizzard, *Shots in the Dark: The Policy, Politics, and Symbolism of Gun Control* (Lanham, M.D., 2000); Lord Windlesham, *Politics, Punishment, and Populism* (New York, 1998); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, N.C., 1969).

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