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Ideas On Liberty

The Second Amendment in the Light of American Republicanism

by Joseph R. Stromberg

The "transforming" ideology of America's revolutionary period saw the chief conflict in society as one between liberty and power. That ideology synthesized themes from several sources.[1] Given the differing origins and jumping-off points of classical liberalism and classical republicanism (the two most important elements), the American "synthesis" might be expected to undergo some unraveling when up against the harder problems of political life. What is striking, however, is the surprising tenacity and coherence of American republicanism over the long haul, the persistence of its language, and the continuing relevance of its key ideas down to the present.

One of these key ideas is the notion of the individual properietor on his own land, capable of bearing arms in defense of himself, his property, his family, *and* the republic. In his role as defender of his free society, the armed citizen served with his fellows in the militia, which republican thinkers regarded as the military system most compatible with republican liberty and whose existence helped offset the menace of "standing armies" drawn from outside the community ("crimped scum") loyal only to their immediate superiors (men of "ambition" or a "court party"). The armed proprietor was the idealized republican citizen, and the Second Amendment enshrines his role in the ideological and political systems.

Some latter-day writers on republicanism have a way of overestimating the tensions within the American synthesis. But some of the alleged incompatibilities—"agrarianism" versus "commercialism," "virtue" versus "luxury"—were either handled well enough by Americans, or exist mainly in the eye of the beholder. Wendy Kaminer, for example, writes that "[a]t the heart of the gun-control debate is a fundamental tension between republicanism and individualism" (that is, liberalism).[2] A look at the Second Amendment is an opportunity to learn more about American republican ideology and to gain a better understanding of the Amendment itself.

Kaminer writes of "the challenge posed by republicanism to the individualist culture that many gun owners inhabit."[3] But when have Americans *not* inhabited an individualist culture? And when did American "individualists" *not* live in communities? (Re-read Tocqueville.)

The problem as set up by Kaminer rests on the old caricature of "atomistic liberalism." It does not follow that because John Locke started with individuals and their rights, that he or any other liberal writer overlooked the existence of families, churches, and other social institutions. It has never been strictly a matter of "the individual versus society"; rather it has been about what *kind* of society we live in, or wish to live in, and whether or not a free society is desirable and possible. If there are

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"atomistic" versions of liberalism, the French can answer for them, since the English, Scottish, and American writers did not create them. The rootless, abstract individual, who can only be made "whole" again by participating in an authoritarian-to-totalitarian form of republic, is central to Rousseau's system—not Locke's.[4]

The Second Amendment in a Distinctively American Republicanism

Anti-Second Amendment writers have great sport trying to separate the individual's right to bear arms from the same individual's role in the militia. On their reading of republicanism, the community stands opposed, somehow, to those who make it up, and the people have "the right to keep and bear arms" only in relation to their duties in the militia. We are asked to take seriously the view that these individuals only keep and bear arms at the command of the state, and really ought to store them all in a central warehouse, whence they will be issued when the state organs (of "national security"?) decide there is an emergency. The state militias, it is likewise asserted, mean nothing today, having been consumed by the National Guard, with its sort of Third World name. I shall demonstrate the leglessness of this stand directly.

As far as an individual right to self-defense goes, the law—which is very conservative—gives us examples from the earliest societies connected with the Indo-European language family. It was a settled thing in Greek, Roman, and Slavic law that a man who caught an intruder in his house by day, should seize him and hold him for the authorities; if the intruder came at night, he could kill him. I suppose he could do this barehanded, but more likely he was armed

We need not reach so far back for precedent, however. William Blackstone, whose views on English law were more or less committed to memory by the Founders, regarded self-defense as one of the three most fundamental rights embodied in that law. In the run-up to the American Revolution, colonial radicals held forth on natural rights and the Rights of Englishmen (which in their minds were much the same thing). James Otis advanced arguments from *both* directions in his speech against the Writs of Assistance, making good use of the truism that an Englishman's home is his castle.[5]

Much of that ground had been covered in the Puritan Revolution and the Glorious Revolution of 1688. The seventh item in the English Bill of Rights of 1689 stands in ancestral relation to our own and says: "That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law." This is not very "inclusive"—as we say these days—but this was the Parliament that had just deposed James II for being too absolutist and too Catholic, and we can hardly expect these lords and great landholders to have shared the right of self-defense fully with the lower orders.[6]

The immediate context of the Second Amendment is, of course, the struggle over the ratification of the second U.S. Constitution. Part of this context is the revolutionary generation's correct view that the militia had played an important role in the success of the American war of secession from the British Empire. Perhaps the only believable reason for throwing over the existing Articles of Confederation (the first constitution) was the claim that a slightly more effective federal government was needed to defend the confederacy from European powers that still held large parts of North America. This, in turn, raised many questions that went to the heart of republican theory: internal versus external taxation, standing armies versus militia, "empire" versus republican decentralization, and the like. It is not surprising, therefore, that seven state conventions ratified the second Constitution with reservations. They submitted declarations about rights to spell out their understanding of the new charter and proposed amendments to set right ambiguities they saw in it.

Some of these proposals spoke directly to the related questions of the militia and the people's right to bear arms. New Hampshire asked for amendments—among others—stating that "no standing army shall be Kept up in

time of Peace unless with the consent of three fourths of the Members of each branch of Congress" and that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." Asserting the power to "resume" (take back) powers granted if they should be abused, Virginia called for a Bill of Rights to include the following: "That the people have the right to keep and bear arms; that a well-regulated Militia *composed of the body of the people* trained to arms is the proper, natural and safe defence of a free state. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided. . . ." (My italics.) New York, also asserting the right of the people to "reassume" powers abused by the new federal government, declared that "the people have a right to keep and bear Arms; that a well-regulated Militia, including the body of the People *capable of bearing arms*, is the proper, natural and safe defence of a free State; [t]hat the militia should not be subject to Martial Law except in time of War, Rebellion or Insurrection. That standing armies in time of Peace are dangerous to liberty, and ought not to be kept up, except in Cases of necessity. . . ." (Italics in original.) North Carolina likewise: "[T]he people have a right to keep and bear arms; that a well-regulated militia *composed of the body of the people*, trained to arms, is the proper, natural and safe defence of a free state." (My italics.) Finally, Rhode Island, asserting the right of the people to "reassume" delegated powers, declared that "the people have a right to keep and bear arms," with the same language regarding militia, standing armies, etc., used by the other state conventions.[7]

It would seem that the men who demanded what became the Second Amendment expressed their views with great power and clarity. Yet it is this straightforward proposition that overmasters the reasoning power of several prominent northern congressmen and senators today.

The Hermeneutics of the Second Amendment

The wording of the actual text of the Second Amendment can be described as "sloppy draftsmanship" only in the sense that the sentence structure leaves itself open, perhaps, to deliberate and willful misreading that the amendment's framers could never have foreseen. That they and their contemporaries understood what they were about, and what the amendment means, is clear from the state proposals cited as well as from a mountain of related language in contemporary opinion and private communications. Judge Joseph Story of Massachusetts—High Federalist, U.S. Supreme Court Justice, and a founder of the Yankee theory of the union—wrote in 1840 that the right to keep and bear arms is "the palladium of the liberties of a republic; since it offers a strong moral check against the usurpations and arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[8]

Stephen P. Halbrook quotes Thomas Jefferson's and James Madison's comments on Virginia legislation to show that there is no mystery about the meaning of "bear" (it means "carry"). This goes to the modern liberal superstition that Second Amendment advocates believe in private ownership of tanks and nuclear bombs. If the private right were not already clear from the ratifying conventions' drafts, Robert Shalhope cites Thomas Jefferson's views: "Let your gun therefore be the constant companion of your walks." A ramble through the country with your gun is manifestly not service in the militia.[9]

The meaning of the Second Amendment is also clarified by a look at comparable provisions in eighteenth-century and nineteenth-century state bills of rights. Here I will cite only the Texas Constitution of 1876: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."[10] Here as elsewhere, there is no question that an individual right of self-defense exists alongside but separate from any militia issues. The point about the "wearing" of arms, and the state's right to regulate that, brings up some issues as to the scope of the Second Amendment within a federal system.

The original understanding—if we may use this phrase—was that the Bill of Rights applied against the new and feared general government and not against the several states. The language of the Second Amendment is so broad that it might be argued that the states bound themselves by it ("the right . . . shall not be infringed" versus "*Congress* shall make no law" in the First Amendment). Usage suggests, however, that protection of the right was left—at the state level—to bills of rights in the state constitutions where the actual details might vary. The Fourteenth Amendment (if actually ratified) may alter matters. The Supreme Court has proclaimed that the Fourteenth Amendment "incorporates" those rights in the first ten amendments to which the Court is partial. So far, it has not seen fit to extend this reasoning to the Second Amendment.

The Bad Faith of the Gun Grabbers

If the gun opponents were honest, they would—like George Will—concede the overwhelming case against their "interpretation" of the amendment, and then go out and work to get their own amendment. The opponents want to get by with "interpreting" the amendment away, or simply ignoring it as so much "irrelevant" eighteenth-century metaphysics, while Congress gets on with the important work of overriding, "infringing," and eliminating the right to keep and bear arms. They wish to proceed as if we were living under the Anti-Constitution composed by Rexford G. Tugwell, ex-New Deal technocrat and planner. Tugwell's version of the amendment reads, "No person shall bear arms or possess lethal weapons except police, members of the armed forces, or those licensed under law according to rules established by the Court of Rights and Duties." In 1941, Clarence G. Streit, Anglophile proponent of federation between the United States, Britain, Australia, New Zealand, and South Africa, wrote a draft "based on the U.S. Constitution" that simply left out any right to bear arms. More to the point may be the plan of government for the Philippine Islands drawn up in 1913 by the U.S. Secretary of War, which, as Philip Jessup put it, "secured to the Philippine people all the guarantees of our Bill of Rights except trial by jury and the right to bear arms"—that is, all but the two most important ones. Of course the American colonialists, having just fought a brutal counter-insurgency war to make good their claim to the islands, and which led to the death of some 200,000 Filipinos, were not in a mood to encourage unreliable Filipinos to bear arms.[11] It may be significant, however, that proponents of gun control think it appropriate to treat Americans the way an imperial power treats its far-off colonial subjects.

The gun-controllers, to put it another way, can't see why Americans are so reluctant to submit themselves unquestioningly to the benevolent rule of a social-democratic welfare-warfare state of the sort in place in the happy and peaceful nations of western Europe. In such a state things will be very orderly—and there is absolutely nothing to fear because we will all have that all-important right to trudge to the polls every so often to show (perhaps under threat of fines) our acquiescence in whatever the politicians decide to do with our lives, incomes, and property. No matter how detailed bureaucratic oversight of people's lives may become, they can always vote for a change in personnel—if not about anything substantive. This happy scenario looks to a re-creation of the Old Order in which priests and warriors rule over the economic producers who, after all, need only do what they are told.

Why Bother with Republican "Discourse"?

Law professor William Van Alstyne writes that the Second Amendment is not "mysterious, equivocal, or opaque"—"today it is simply unwelcome." As for those who dislike it, "it is for them to seek a repeal." He adds that "the essential claim" made by the NRA "is extremely strong."[12] Even so, it is likely that Congress will go on infringing the amendment and order the states to infringe it further, and that the courts will regard the right as "irrelevant" and of mere antiquarian interest. People will still believe in their right of self-defense.

So what do we gain by going over all this? We learn the truth, and that is probably a good thing in itself. We learn something about the American revolutionary synthesis and, alas, the difference between ourselves and our forefathers. And we may learn something about constitutional morality as against "stealth" amendment by Congress and the courts, which present us every few years with a brand new "constitution" they have found lurking inside the real one. □

1. For a discussion of the various themes and references, see my article "Tensions in Early American Political Thought," *The Freeman*, May 1999.

2. Wendy Kaminer, "Second Thoughts on the Second Amendment," *The Atlantic Monthly*, March 1996, p. 32.

3. Ibid., p. 43.

4. See Robert A. Nisbet, *Tradition and Revolt* (New York: Vintage Books, 1970), "Rousseau and the Political Community," pp. 15–29.

5. James Otis, "On the Writs of Assistance" in *Orations of American Orators*, I (New York: The Co-operative Publication Society, 1900), pp. 19–24.

6. English Bill of Rights, 1689, in Irwin Edman, ed., *Fountainheads of Freedom: The Growth of the Democratic Ideal* (New York: Reynal & Hitchcock, 1941), p. 338. The Whig landlords who ousted the Stuarts soon passed the draconian Black Act, which almost made it a capital crime to even think about shooting any game on their vast estates. See E.P. Thompson, *Whigs and Hunters* (New York: Pantheon Books, 1975). The connection between game laws, arbitrary search and seizure, and gun confiscation seems fairly obvious.

7. The full text of ratifications is in Charles C. Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 1009–1059.

8. Joseph Story, *Familiar Exposition of the Constitution of the United States* (Lake Bluff, Ill.: Regnery Gateway, 1986), p. 319.

9. Stephen P. Halbrook, "What the Framers Intended: A Linguistic Analysis of the Right to 'Bear Arms,'" *Law and Contemporary Problems*, Winter 1986, pp. 151–162, and Robert E. Shalhope, "The Armed Citizen in the Early Republic," ibid., pp. 125–141.

10. *Texas Almanac, 1980–1981* (Dallas: A.H. Belo Company, 1979), p. 482.

11. Rexford Guy Tugwell, *Model for a New Constitution* (Santa Barbara: Center for the Study of Democratic Institutions, 1970), p. 81; Clarence G. Streit, *Union Now with Britain* (New York: Harper & Brothers, 1941), pp. 215–16; and Philip C. Jessup, *Elihu Root*, vol. I (Hamden, Conn.: Archon Books, 1964 [1938]), p. 354.

12. William Van Alstyne, "The Second Amendment and the Personal Right to Arms," *Duke Law Journal*, April 1994, p. 1250.

A Tax Is Not a User Fee!

Politicians and bureaucrats are notorious for manufacturing euphemisms—clever but deceptive substitutes for what they really mean but don't want to admit. That's how the phrase "revenue enhancement" entered the vocabulary. Some of our courageous friends in government couldn't bring themselves to say "tax hike."

At all levels of government, a bipartisan effort to impose new or higher taxes and mislabel them as seemingly less onerous "user fees" provides another example. Sometimes, a user fee is indeed a user fee. Other times, it's not that at all. Instead, it's a tax hike disguised by a misnomer.

When someone chooses to use a government service and pays for it, he's paying a user fee. Furthermore, what he pays should cover the cost of the service he is receiving; if it goes for something he isn't getting or doesn't want, then he's paying a little of both—a user fee *plus* a tax. Taxes differ from user fees in that paying them isn't a matter of choice and what you pay is not tied directly to what you're using.

In principle, true user fees make a lot of sense, especially if you want people to understand that nothing from government is truly "free." Indeed, the more government finances itself through user fees instead of taxes, the less it looks like government and the more it gets out of the redistribution business and begins to resemble private firms operating in free markets.

Instinctively, most people sense a certain fairness about true user fees. You pay for what you get, and you get what you pay for. Most people understand and support user fees for such things as toll roads, harbors and waterways, and even parks and recreational facilities. If they understand that private enterprise would probably do a better job with these things, they know that at least a user fee approach for government services gives them an opportunity to make a rational economic choice: buy it if it's worth the price, patronize an alternative, or do without. All this makes for useful background to a victory that advocates of liberty and sound economics recently won in my state of Michigan.

In 1978, Michigan voters approved the Headlee Amendment to the state constitution. Among other provisions, the amendment requires voter approval before a tax can be imposed or increased. In its 1994 report, the Headlee Amendment Blue Ribbon Commission found that a growing number of Michigan townships, counties, and cities were skirting that requirement by mislabeling certain taxes "user fees." The commission recommended that the legislature clarify the difference between a tax and user fee. The Michigan Supreme Court now has done what the legislature never got around to doing. Here's how the case arose:

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