

## Book Review Essay

### Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?

THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT. By H. Richard Uviller<sup>†</sup> and William G. Merkel.<sup>††</sup> Durham: Duke University Press, 2002. Pp. xii, 340. \$19.95.

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*Those who deny that the original meaning of the Second Amendment protected an individual right to keep and bear arms on a par with the rights of freedom of speech, press, and assembly no longer claim that the amendment refers only to a “collective right” of states to maintain their militias. Instead, they now claim that the right, although belonging to individuals, was conditioned on service in an organized militia. With the demise of organized militias, they contend, the right lost any relevance to constitutional adjudication. In this Essay, I evaluate the case made for this historical claim by Richard Uviller and William Merkel in their book, The Militia and the Right to Arms, or, How the Second Amendment Fell Silent. I also evaluate their denial that the original meaning of the Fourteenth Amendment protected an individual right to arms unconditioned on militia service. I find both claims inconsistent with the available evidence of original meaning and also, perhaps surprisingly, with existing federal law.*

Who says that even heated conflicts over constitutional meaning can never progress? Over the past ten years, the intellectual clash between those who claimed that, at the time of the founding, the “right to keep and bear arms” protected by the Second Amendment was a “collective right” of the states to preserve their militia and those who maintain instead that it originally referred to an individual right akin to the others protected in the Bill of Rights has been resolved. That the individual right view prevailed definitively is evidenced by the fact that no Second Amendment scholar, no matter how inimical to gun rights, makes the “collective right” claim any more. All

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now agree that the Second Amendment originally referred to the right of the individual.<sup>1</sup>

Indeed, the fact that the collective right theory was once so confidently advanced by gun control enthusiasts<sup>2</sup> is on its way down the collective memory hole as though it had never been asserted. With its demise, the intellectual debate over the original meaning of the Second Amendment has turned in a different direction. Although now conceding that the right to keep and bear arms indeed belongs to individuals rather than to states, almost without missing a beat, gun control enthusiasts now claim with equal assurance that the individual right to bear arms was somehow “conditioned” in its exercise on participation in an organized militia.

The “militia-conditioned individual right” theory represents an advance for the anti-gun-rights position. It obviates (a) the copious evidence, both direct and circumstantial, that “the right to keep and bear arms” belonged to individuals<sup>3</sup> and (b) the lack of any direct evidence that the Second Amendment protected some sort of a never-very-well-specified power of states, while (c) allowing opponents of gun rights to maintain, as they did with the “collective right” theory, that the Second Amendment is irrelevant to the constitutionality of modern gun laws. But is the theory supported by the available evidence?

The latest to make this historical claim are Richard Uviller and William Merkel. In their book, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent*, Uviller and Merkel reject the collective right theory and characterize the Second Amendment “right to keep and bear arms” as an individual right.<sup>4</sup> However, they further claim that, because the right to arms may be exercised only while participating as part of an organized militia,<sup>5</sup> its existence as a constitutional right is conditioned on the continued existence of a well-regulated militia. With the demise of the organized militia, so too has vanished the right to keep and bear arms. In their

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1. The viewpoint of Uviller and Merkel is representative: “[W]e cannot join . . . in the contention that the constitutional right to arms belongs to the states rather than to natural persons. . . . This reading is, we think, misguided.” H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 179 (2002).

2. E.g., Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 408 (1998) (asserting that “to the extent original intent matters, the hidden history of the Second Amendment strongly supports the collective rights position”).

3. For a succinct summary of this evidence, which has been developed by scholars over the past ten or more years, see *United States v. Emerson*, 270 F.3d 203, 236–59 (5th Cir. 2001).

4. UVILLER & MERKEL, *supra* note 1, at 23 (“From the text as well as a fair understanding of the contemporary ethic regarding arms and liberty, it seems to us overwhelmingly evident that the principal purpose of the Amendment was to secure a personal, individual entitlement to the possession and use of arms.”).

5. *Id.* at 31 (“To return to our central theme, then, the individual right to keep and bear arms that is secured in the Second Amendment in our analysis is a right without application outside the context of service in state or federal militia.”).

words, “historical developments have altered a vital condition for the articulated right to keep and bear arms.”<sup>6</sup>

In this Essay, I will comment briefly on the authors’ interpretive methodology before moving on to discuss specific problems with their effort to interpret the Second Amendment. One of the peculiarities of the modern debate over the Second Amendment is its single-minded preoccupation with the issue of original meaning or original intent. This is odd because, to my knowledge, none of the right-limiting theorists are themselves originalists, and consequently they would surely not limit, for example, their interpretation of the First Amendment by its original meaning. But as the modern academic debate over the Second Amendment is entirely a historical one, in this Essay I limit my attention to this issue.

I will confine myself to evidence, some previously unconsidered in this debate, that specifically disproves that the Second Amendment protected a militia-conditioned individual right. I do not reiterate here the other direct and circumstantial evidence that supports an individual, as opposed to a “collective,” right, but the full strength of the individual-right position cannot fully be appreciated without taking that evidence into account.<sup>7</sup>

## I. The Authors’ Originalism

Uviller and Merkel (hereinafter “the authors”) are to be commended for explicitly discussing their method of interpretation.<sup>8</sup> Few law professors and even fewer historians so much as attempt this. Unfortunately, I found their discussion of interpretation rather confused. Increasingly, originalists like myself focus entirely on the original meaning of the text—the meaning that a reasonable speaker of the language would have attached to the words at the time of the text’s enactment.<sup>9</sup> What did “militia” mean in 1791? Or “well-regulated” or “arms” or “bear” or “right” or “the people”? Of course, speakers then, like speakers today, would be influenced by the context in which a particular word or phrase is used. For example, because of the context of the Second Amendment, we can be quite sure that the term “arms” refers to weapons, not the appendages to which our hands are attached.

Discerning the original public meaning of the text requires an examination of linguistic usage among those who wrote and ratified the text as well as the general public to whom the Constitution was addressed.

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6. *Id.* at 35.

7. See *Emerson*, 270 F.3d at 236–59 (surveying that other evidence).

8. UVILLER & MERKEL, *supra* note 1, at 147–67.

9. I explain the version of originalism described in this Part in RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–130 (2004) [hereinafter BARNETT, *RESTORING*]. There, I defend original-meaning originalism as entailed by the commitment to a written constitution—a structural feature of the U.S. Constitution (like federalism or separation of powers) that is needed to impose law on those who make, enforce, and interpret legislation that they then impose on the citizenry. For a written constitution to fulfill the function of providing a higher law, its meaning must remain the same until it is properly changed.