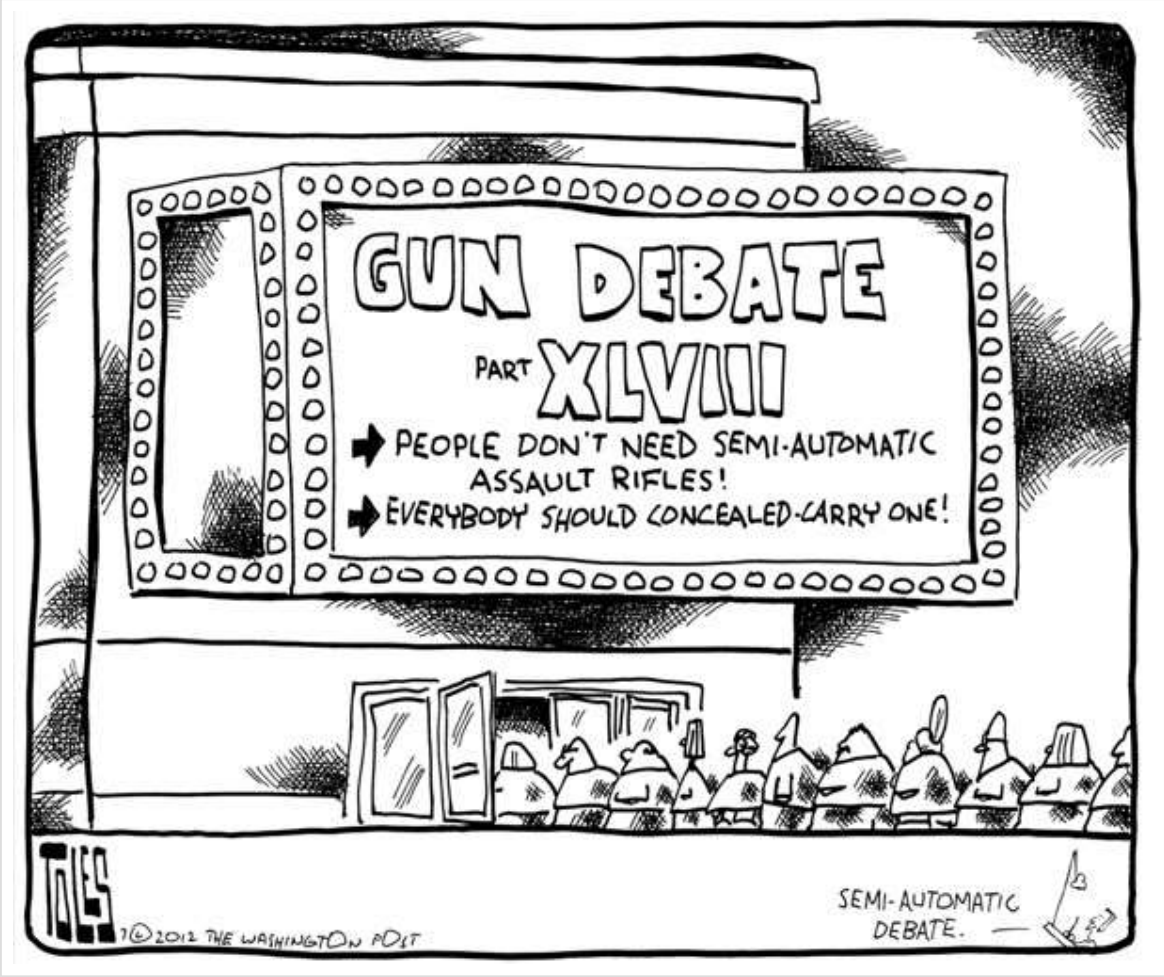
## Our Curiously Disjointed Gun Debate

Posted on **March 12, 2013** by **Daniel Kelly**




What a curiously disjointed debate we've been having over the subject of guns – gun ownership, gun violence, the right to carry guns concealed. This isn't anything new. In fact, it's been disjointed for as long as I can remember. Whittled down to its barest essence, this is how we talk about it:

Random Politician: "In light of [*insert here the latest horrific and senseless mass shooting*], we need to do something to control gun violence. And so I am introducing a bill that bans assault-style rifles, limits magazine capacity, and requires a universal background check before purchasing a firearm."

Gun Owner: "Wait just a doggone minute. I have a Constitutional right to keep and bear arms. You'd better not be thinking for even a minute that we're going to let you interfere with our right to defend ourselves and go hunting."

Random Politician: "No, we're not going to do that. But you don't need an AR-15, or a 30-round clip to go hunting or protect yourself. And we certainly don't want felons and others who are prohibited from owning guns to skirt the law by getting their weapons through a back-alley transaction with some sketchy arms-dealer. These are just common-sense regulations."

Gun Owner: "The Second Amendment settled this question in 1791! You can have my gun when you pry it from my cold, dead hands!"

And so it goes, with the combatants warily circling the Second Amendment, but never looking directly at it. Neither side is eager to engage the other on what this constitutional provision actually *means*. And that's because one side can't find in it the historical succor it wants, and the other fears what would happen if it did.

Here's the thing. The Second Amendment was written as a very practical response to the way the world worked at the time of its enactment. That's not to say there isn't an unchanging principle that undergirds it – there is. But it is to say that some of the practicalities of the world circa the 1790's just don't obtain anymore. Let me see if I can explain.

The Second Amendment says this: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." A terse statement, with a dash of enigmatic grammar. But there can be no doubt that the Amendment sees the right to keep and bear arms as somehow related to a well-regulated militia.

The historical understanding of the rationale for this connection may surprise some and offend others. So instead of paraphrasing it in my own words, I'll direct you to someone with great historical and scholarly heft. I give you the late Joseph Story, who was once a Justice of the United States Supreme Court (1811-1845) and Dane Professor of Law at Harvard University (back when that meant something about the caliber of your constitutional analysis), and will always be the author of "A Familiar Exposition of the Constitution of the United States." He is still considered to have provided the most authoritative commentary on our Constitution. And his temporal proximity to that document grants him unmatched credibility on the subject.

If you are prone to the vapors, you might want to sit down for this. In describing the purpose of the Second Amendment, Justice Story said:

> "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men." Exposition, §450.

Oh my. Can it really be that a Justice of the Supreme Court suggested that a significant inequity in martial capabilities between the national government and the people might pose some danger to our liberties? Well . . . he not only suggested it, he emphasized it:

> "It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people." Story, §451.

That's the danger Justice Story saw. So how does this relate to the Second Amendment? He said the State-based militias, composed of citizens with the right to keep and bear arms, would act as a deterrent to federal overreach, and even provide a military response if necessary:

> "The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. . . . The right of the citizens to keep and bear arms has justly been considered, as 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." Story, §451.

So, as it turns out, the Second Amendment is not, in the first instance, about hunting, nor personal self-defense. According to Justice Story, it's about a military response to federal encroachment on the citizenry's liberties. In the 18th and 19th centuries one could still speak of such things in rational terms. After all, the military's basic firearm wasn't much different from what Farmer John used to hunt deer. And when we adopted the Second Amendment it hadn't been that long since a citizen-army (with, admittedly, some significant outside help) defeated the world's premier military power. There just wasn't that much disparity between a regular army's basic weapons and what was available to everyone else.

That's just not the case anymore. Not by a long shot (pardon the pun). Farmer John still has the rifle he uses to hunt deer, and his neighbor might have a Smith & Wesson handgun with a 17-round clip. But so what? The United States military has aircraft that can engage targets before they are even seen, cruise missiles that can cross entire states, tanks that fire on the run with pinpoint accuracy, and aircraft carrier groups that each contain more military might than the world's most powerful countries when the Second Amendment was written.

Even if we were to determine the federal government had so seriously infringed on our rights that an armed response was necessary, what could we do about it? That's right – nothing. As a

practical matter, we long ago grew beyond the justification for the Constitutionally-protected right to keep and bear arms. The necessity of a hyper-capable, permanent military made militias obsolete as any kind of counter against the "usurpations and arbitrary power of rulers," as Justice Story would say.

That's why our gun debate is so disjointed. If pro-gun activists invoked the primary meaning of the Second Amendment, they wouldn't be talking about hunting or self-defense. They would be talking about State-based militias with enough combined firepower to resist our federal military if necessary. They would also be talking about forming those "well regulated" militias, complete with the obligations, training, regulations, and accountability to State governments that go with them. If you want the right, you've got to take the correlative responsibilities as well. But we don't talk about this, of course, because no one seriously contemplates ever challenging the military power of the United States.

The pro-gun crowd tends to ignore the primary justification for the Second Amendment, and focuses instead on its derivative benefits. That is to say, the Second Amendment protects the right to keep and bear firearms so that you can participate in a well-regulated militia. Once that right is protected, however, you can then use the arms for any other legitimate purpose as well. But it starts with the militia. If you can't defend the necessity for a militia, then the Second Amendment doesn't count for very much in your argument.

Anti-gun activists, on the other hand, are also afraid to talk about the real Second Amendment. If they did, the conversation wouldn't be about banning "assault rifles" or high-capacity magazines anymore, it would shift pretty quickly to identifying what types of *real* assault rifles – military-grade weaponry, that is – the citizens *must* have so that they may form effective militias. And that might call to mind the Swiss militia and the rampant non-violence attendant on every Swiss male between 19 and 34 having a military weapon sitting in his closet. That'll douse the more fiery anti-gun rhetoric in a heartbeat.

If we aren't willing to engage the primary meaning and purpose of the Second Amendment in our gun debates, then we must instead rely on the natural law right to provide for oneself – both food (through hunting) and self-defense. Just because this is not the motivating rationale and purpose behind the Second Amendment doesn't mean the rights don't exist or may be infringed by the government at will. But it does mean that reasonable regulations are permissible.

Should the government limit the capacity of a magazine? Should it outlaw scary looking guns? The answers will differ depending on whether we are talking about participation in a militia, or instead self-defense and hunting.

The nature of the right informs its exercise. If you're talking about potentially having to fight as part of a militia, you'll want the biggest, baddest, highest-capacity weapon you can keep pointed in the right direction while you're firing it. If you're instead talking about hunting or self-defense, you won't likely need that machine gun you've had your eye on.

These are questions of prudence, not principle. They require us to conduct cost-benefit analyses, not draw up in battle formations. So if there is evidence that fully automatic weapons create a public hazard that outweighs their utility in exercising your right to hunt and self-defense, there is an opportunity for reasonable regulation that is fully consistent with conservative principles. But let's make sure it's actual evidence, not scare tactics.

To do this, however, we have to re-joint our conversation. We have to accurately identify the source and nature of the right we are trying to protect, and then take a hard look at whether the way we propose exercising that right creates an unjustifiable public hazard. There is a way through this thicket. We just have to be jointed, so to speak.



This entry was posted in **Uncategorized** by **Daniel Kelly**. Bookmark the **permalink [https://web.archive.org/web/20130430015450/http://www.hangtogetherblog.com/2013/03/12/our-curiously-disjointed-gun-debate/]** .

14 THOUGHTS ON "OUR CURIOUSLY DISJOINTED GUN DEBATE"

Geoff Hemphill
on **March 12, 2013 at 4:37 pm** said:

Query: How would the specifics of the debate be framed were the gun rights advocate to draw upon the "natural law right to provide for oneself – both food (through hunting) and self-defense" for justification? Without the almighty Constitutional battlement to provide defense, I predict a one sided beat down of a debate – a successful siege by the gun control advocates if there ever was one. Such is the state of adherence to, or knowledge of, natural law in American jusrisprudence and politics.

Daniel Kelly
on **March 12, 2013 at 6:47 pm** said:

I suspect you are right about the fate of the natural law argument, but that (of course) doesn't mean it's not right. Professor Hadley Arkes at Georgetown is doing some important work in revivifying the natural law understanding of the relationship between the people and the governments they form. There's a lot of work to be done just to bring back the basic understanding of the concept, and we have to do that before we'll be ready to apply it to contemporary issues as a basis for decision-making.

The argument would start with the equality mandate (that is, no one has the inherent right to supplant his neighbor's discretionary decision with his own). Which

means that (in the context of hunting) everyone has the right to take game in any manner that does not unreasonably endanger others. So if you can use a gun in a way that does not pose a significant risk to your neighbors, you may hunt with a firearm. Similarly, if you can employ a firearm to defend yourself without creating unreasonable risk to those around you, you are free to do so because no one has the authority to gainsay your discretionary decisions when it does not interfere with the rights of others.

Karen Rupprecht
on **March 17, 2013 at 2:20 pm** said:

Dan, this is probably the best-articulated article I've read on the gun debate; thanks so much for this.

I've been following Hadley's arguments and such a bit lately, and I just went to his latest talk on the issue. I study natural law in political theory, but I have to confess that I'm still a bit wary of it when it comes to the judiciary. It seems to me – and I would love to be disabused of this, but so far Hadley hasn't convinced me – that the political realm (loosely defined here as public discourse surrounding issues of political and legal interest) and certainly the legislative realm should take natural law considerations into account, if not begin from (though not end with) the natural law. But if the oath of a judge is to the constitution, is it not his role, essentially, to interpret the positive law? If he goes outside of that based on his own machinations concerning the natural law, is this not an abuse of judicial authority?

Given, then, that we do have a constitutional amendment dealing with the matter, it seems to me that that question has to be settled first. If indeed your interpretation is correct, then we either need to a) get rid of all talk of reducing personal gun ownership, since we're supposed to raise militias, or else b) repeal the 2nd Amendment as no longer applicable to our contemporary conditions. From there we could start crafting laws and policies taking into consideration the natural law, but if we switch the order around, it seems like we're circumventing Article I of the Constitution.

Again, though, I'm really open to what Hadley is trying to do, but I'm either misunderstanding him or I otherwise am unable to see how what he is proposing doesn't amount to legislating from the bench.

Daniel Kelly
on **March 23, 2013 at 8:54 am** said:

Karen, I agree that we need to be careful of the interaction between natural law and constitutional law when it comes to the judiciary.

Here is where I see Prof. Arkes' work having significant value. All judges swear allegiance to the Constitution, and in performing their jobs, they must be faithful to that pledge. But not every question presented to the bench will find its answer in the Constitution. The framers themselves recognized they were putting together a structure, not a codification of rights.

In fact, Madison was so wary of enumerating rights (as opposed to granting the government tightly circumscribed authority) that he initially resisted the idea of a Bill of Rights for our Constitution. He was concerned that a list of rights would eventually come to be seen as exhaustive.

Although he eventually relented, and became the chief draftsman for the Bill of Rights, he was careful to include the Ninth Amendment to address the concerns that prompted his initial reluctance ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

Well, it turns out Madison's concerns were prescient. One of the reasons our constitutional jurisprudence is so screwy is that jurists believe that if you can't locate a right in a particular constitutional provision, it doesn't exist. It is that type of approach that causes Justices to write about emanations of penumbras cast by certain constitutional amendments, and the right to define your own reality, and other exotic arcana that would would make the framers blush.

The Constitution simply does not answer every question, nor does it contain a provision specifically protecting every right. That is why the Ninth Amendment is so important. Madison was saying that there is a whole universe of rights that exists outside of the Bill of Rights. He was saying the legal maxim "expresio unius est exclusio alterius" does not apply to the enumeration of rights in the Constitution. Which necessarily means those rights find their source and protection somewhere else.

It is in this space that I think Prof. Arkes' work is especially valuable. The rights we have, the true rights, derive from the fact that we are human beings, created in the image of God, and that we are created equal – that is to say, no one has a claim of sovereignty over another. But because our jurists know nothing of the natural law, they default to what comes to hand – namely, the positive law. Well, unless you fold, spindle or mutilate that law, it will never be enough to explain the totality of our rights vis-a-vis others in society, nor our relationship to the government we created. Judges must be faithful to the Constitution, but when the Constitution does not answer the

question presented, they need to know where to go for the answer. Otherwise, they'll just keep finding more penumbras, which in actuality are nothing more than their personal preferences.

So here's how this plays out with the Second Amendment. I think it would be helpful to settle the debate over its actual meaning. We would then, as you say, start building militias or discard the amendment as a dead letter. And perhaps in a pedagogical sense this needs to come first. But from a conceptual standpoint, the right to hunt and defend yourself precedes the Second Amendment and is not dependent on it, so we could logically and coherently discuss the substance and contours of those rights independently of our discussion about the Second Amendment. Then again, perhaps that would make things more, not less, confusing.

Jennifer
on **March 12, 2013 at 4:56 pm** said:

Hey kids, this is very simple. The right to bear arms is there so government can't substitute its judgment for our own. It most defnitely is to keep the government in check. On a wider scale, that's like saying — do you really need this huge military and all those weapons to defend yourself against other countries? They're not trying to do anything to you. Um, ya, that's why they're not trying to do anything to us. Period.

Daniel Kelly
on **March 12, 2013 at 6:58 pm** said:

You are exactly right about the purpose of the Second Amendment. Your analogy about the deterrent effect of the United States' armed forces is instructive. Other countries dare not engage us in conventional conflict because they know it would end badly for them, and quickly.

However, if the federal government was inclined to act tyrannically, don't think the collected weaponry of the people of this country would cause even a moment's hesitation. That is to say, our possession of firearms is not providing any deterrent effect. Consequently, the purpose behind the Second Amendment is not being

served, and no one is seriously advocating we adopt policies that would make the citizenry an effective counterweight to the United States military.

Michael Hintze
on **March 12, 2013 at 5:20 pm** said:

Dan, this is perhaps your best post to-date. Clear and well-reasoned. But (and by now you had to know there would be a "but …"), I think one point Dan made deserves further emphasis.

Dan rightly indicates that how one views the seemingly never-ending gun control debate stems largely from one's understanding of the meaning and purpose of the Second Amendment. In my opinion, the correct meaning and purpose of the Second Amendment is related to a well-regulated militia.

Every right carries with it a corresponding responsibility, and cumulative rights, whether natural rights or rights that are a result of man's ratiocination, ultimately impose the responsibility to defend those rights, even at the expense of having to give the "last full measure of devotion" to preserve them.

Shared acceptance of the ultimate responsibility for defense of common rights creates a bond and sense of community that no other responsibility can provide for a diverse and geographically extended populace. Our society is coming apart for many reasons, but I submit that the most important reason is a lack of shared responsibility.

Too often, the few are asked to carry the burden for the many. Such a state of affairs creates a sense of resentment in the few, and a need to justify their lack of acceptance of their common responsibility for the welfare and rights of all by engaging in victimology for themselves and those who are likeminded.

If you are looking for a way to re-create the sense of community that was once a hallmark of this country's people, a people great-hearted enough to welcome all those who came here "yearning to breathe free," then serious consideration must be given to re-creating the environment in which such a people grew, were nurtured, and became like a shining city upon a hill. Universal STATE military service would answer the call very nicely.

Daniel Kelly
on **March 12, 2013 at 6:59 pm** said:

> Thanks Mike, and these are — as usual — good and insightful thoughts.

Michael Hintze
on **March 12, 2013 at 5:26 pm** said:

The next to last paragraph of my post SHOULD have ended "…in victimology for themselves and those who are likeminded in the many."

I apologize for my error.

Tom Kamenick
on **March 12, 2013 at 6:15 pm** said:

Don't underestimate the ability of minimally-armed citizens to resist (and by resist, I do not mean conquer) vastly superior government forces. People all around the world have gotten a lot of practice in it over the last 40 years against American military forces.

Daniel Kelly
on **March 12, 2013 at 7:27 pm** said:

True enough. But if you don't conquer, what's the point? Asymmetrical warfare may get an invading force to go home, but if the United States became tyrannical, it's unlikely it would be impressed with a handful of shotguns, deer rifles, and semi-automatic pistols.

We are in a novel historical period. Never before has there been such a pronounced disparity in martial capabilities between the people and their government. Past indigenous revolts and revolutions — successful ones, at least (which are the minority) — have all occurred in much less-developed countries or have required the significant support of third parties. A purely domestic revolt here would be unsuccessful because the combined capability of private arms couldn't stand up to a single squadron of F-16s.

Michael Hintze
on **March 12, 2013 at 11:32 pm** said:

There is one more possibility to consider. The Russian Revolution was successful, in part, because the Czar's troops refused to fire on the revolutionaries gathered in St. Petersburg. Fast forward 70 years, and Russian troops refused to fire upon the revolutionaries gathered in Red Square. It is not beyond the realm of possibility that a like occurrence would happen here.

Our troops are not foreign mercenaries, they are drawn from the American people. For as long as that remains true, it is more likely that our troops would refuse to obey an unlawful order than that they would fire upon their families, friends, and neighbors.

We have not reached a state of affairs in which another civil war would erupt, but that, too, is not beyond the realm of possibility. Such a war would be unlikely–in fact so unlikely as to be not worth considering except as an intellectual exercise–to be a war that would pit the U.S. military against non-military citizens. A civil war that occurred in America now would look much like the war that freed the slaves and saved the Union, except that the toll in lives and fortunes lost would be much higher due to the far greater lethality of modern weapons.

With all that said, unlikely is not impossible, and the unlikely but not impossible is precisely that against which we must guard.

Daniel Kelly
on **March 15, 2013 at 10:22 am** said:

Yes, true enough. And I would hope that, if push came to shove (or worse), the military would not engage civilians. But then we're not talking about the Second Amendment anymore, are we? We would be talking about a Ghandi-like peaceful resistance, for which no arms are necessary.

I think the key is your statement that a civil war is "so unlikely as to be not worth considering except as an intellectual exercise." The rationale behind the Second Amendment, however, is that we consider it a rational and viable option for which the people need to be prepared. If it's not, then the Second Amendment provides no rationale for keeping and bearing arms.

There is still an argument for the private ownership and use of firearms outside of the Second Amendment. But it is rooted in the natural law right to provide for oneself (through hunting) and for self-defense. And that may suggest broader latitude for the scope of regulation.

Ultimately, the point is that we must match our arguments to their source. If we want a well-regulated militia that could potentially stand against the United States armed forces, then we may have resort to the Second Amendment. But if it's just to hunt and provide self-defense, then we base our argument on natural law.

Michael Hintze
on **March 23, 2013 at 7:20 pm** said:

Do not mistake my assertion that a civil war is unlikely to mean that there is little or no likelihood of private citizens having to defend themselves against a tyrannical government … especially, though not exclusively, against government at the federal level. That scenario grows more likely every moment Obama is in office.

When we find ourselves living under a federal government so enamored of its powers that it has convinced itself that it can ignore the Second Amendment (or infringe the people's natural law rights) at will, when we find whole states and many county sheriffs stating publicly that they will not enforce any federal law that seeks to limit the people's right to keep and bear arms, when the federal government finds it necessary to purchase billions of rounds of ammunition for no discernible reason–and when no logical reason is given–then we are not looking at a pending civil war, we are looking at the possibility of another American Revolution.