



Case Western Reserve Law Review

Volume 63 | Issue 1

2012

Essay: The Original Plain Meaning of the Right to Bear Arms

Peter D. Junger

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Peter D. Junger, *Essay: The Original Plain Meaning of the Right to Bear Arms*, 63 Case W. Res. L. Rev. 141 (2012)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol63/iss1/11>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

— Essay —

THE ORIGINAL PLAIN MEANING
OF THE RIGHT TO BEAR ARMS*Peter D. Junger*[†]

The Second Amendment is the fly in the ointment—if not the trout in the milk—of constitutional interpretation. The accepted stratagem of constitutional scholars is to pretend that it is not there—or, at most, to pass it off in a footnote. But even in a footnote the constitutional protection of the right “to keep and bear arms” is an embarrassment; consider Tribe’s claim in a footnote—the footnote that contains the only reference to the Second Amendment in his brilliant treatise—that

[t]he congressional debates . . . indicate that the sole concern of the second amendment’s framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy.¹

Totally ignoring it is equally embarrassing for, no matter how much we wish it would go away, it is there. It is almost enough to make one wish that the Constitution had remained unwritten.

† Editor’s Note: Peter Junger was an esteemed professor of law at Case Western Reserve School of Law from 1970 until 2001. See Cindy Cohn & Lee Tien, *Peter Junger, Digital Freedom Fighter*, 58 CASE W. RES. L. REV. 315 (2008) (“Peter Junger is best known on the internet as the plaintiff in *Junger v. Daley*, a successful challenge to U.S. export regulations that had hampered the development of strong encryption technology.”). Professor Junger was a frequent contributor to this law review, but this essay was unpublished at the time of his death in 2006. Peter D. Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3 (1971); Peter D. Junger, *A Recipe for Bad Water: Welfare Economics and Nuisance Law Mixed Well*, 27 CASE W. RES. L. REV. 3 (1976); Peter D. Junger, *You Can’t Patent Software: Patenting Software Is Wrong*, 58 CASE W. RES. L. REV. 333 (2007). Since then, the Supreme Court handed down its interpretation of the meaning of the right to bear arms in *Heller* and *McDonald*, breathing new life into Second Amendment jurisprudence. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). We felt it important to now publish Professor Junger’s theory on the meaning of the right to bear arms. Editorial additions to the unpublished manuscript are enclosed in braces.

1. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 226 n.6 (1978).

Only the Humpty Dumpty—*sic volo, sic jubeo*—school of constitutional analysis appears capable of dealing with it.² The members of the plain meaning school, which is not to be confused with the “ordinary language” school of philosophy, are likely to be embarrassed by its words: “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.”³ Either this language does not have a plain meaning or it plainly forbids laws, at least federal laws,⁴ outlawing the possession of arms, at least those arms, such as swords, rifles, and pistols, that existed when the Constitution was adopted.⁵ The conclusion, however, that the Second Amendment forbids gun control laws is politically unacceptable to either the “conservatives” who believe that the government can constitutionally do whatever it wants (except violate the “Takings Clause” of the Fifth Amendment), or the “liberals” who believe in the First Amendment, equal opportunity, and gun control laws. The plain meaning of the Second Amendment—if there is one—is palatable only to libertarians who find the plain meaning of other parts of the Constitution, such as the Sixteenth Amendment, anathema.

-
2. For an outstanding example of what this school can do to a constitutional provision, peruse Richard Epstein’s analysis of the “Takings Clause.” RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).
 3. U.S. CONST. amend. II.
 4. Subscribers to plain meaning analysis may somehow try to limit the restrictions of this amendment to laws passed by Congress, citing cases like *Baron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and ignoring the fact that the words “Congress shall pass no law” appear only in the First Amendment, but Justice Black, the most consistent advocate of plain meaning, took the position that, somehow or other, the Bill of Rights was incorporated—despite a remarkable absence of any language which could support such an interpretation—into the Due Process Clause of the Constitution. {Since this Essay was unavailable at the time, the Court held in *Heller* that the Second Amendment guaranteed the right to possess working firearms, including handguns, in one’s home for the purpose of self-defense. *District of Columbia v. Heller*, 554 U.S. 570 (2008); see Jonathan L. Entin, *Peter Junger: Scholar and Stylist*, 58 CASE. W. RES. L. REV. 319, 324 (2008) (“If only the Supreme Court had access to this analysis amid the torrent of briefs in its recent gun-control case, *District of Columbia v. Heller*.”). And, although the Court never adopted Justice Black’s “total incorporation” theory, it held that the Fourteenth Amendment incorporated that right. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3033–34, 3050 (2010).}
 5. *Cf. Hill v. State*, 53 Ga. 472, 475 (1874) {“(The call ‘to arms,’ was a call to put on the habiliments of *battle*, and I greatly doubt if in any good author of those days, a use of the word arms when applied to a people, can be found, which includes pocket-pistols, dirks, sword-canes, toothpicks, Bowie-knives, and a host of other relics of past barbarism, or inventions of modern savagery of like character.”)}.

Those who advocate interpreting the Constitution in accordance with the original intent of the framers are no better off. The original intent is ambiguous: either the framers intended to outlaw standing armies as Tribe suggests,⁶ or they intended to outlaw gun control laws, neither conclusion being palatable to the liberal-conservative consensus, though true libertarians—*i.e.*, anarchists—might embrace both horns of the dilemma. The only other conclusion that can be reached is the Second Amendment was intended to be a nullity, which reveals the framers in a rather farcical light.

Other schools of constitutional interpretation may have less difficulty with the constitutional right to bear arms, but only to the extent that they emulate Humpty Dumpty. Those who believe in “ordered liberty”⁷ must surely be embarrassed that such a disorderly, uncivilized liberty as the right to bear arms is enshrined within our Bill of Rights. Those who believe that their principles are the principles that must govern constitutional and other legal decisions⁸ can hardly be comfortable with the Second Amendment, unless, of course, their principles are opposed to gun control.

It thus appears that only anarchists, nihilists,⁹ and solipsists can be comfortable with the right to bear arms. Clearly something has gone wrong with constitutional analysis.

It is easy enough to spot the mistake. When philosophers abandoned metaphysics, metaphysics found a new home in the law schools and in the courts and brought with it all its old baggage of paradox and irrelevancy. Once this is recognized, it is easy, in the abstract, to see what we must do to save the Constitution from its interpreters. The task of legal academics must be to dissolve, rather than resolve, problems of constitutional interpretation, just as philosophers since Wittgenstein have learned to dissolve metaphysical

-
6. See *supra* text accompanying note 1.
 7. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.) (referring to rights that are “the very essence of a scheme of ordered liberty” as the test for incorporation of the Bill of Rights against the states).
 8. See, *e.g.*, RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).
 9. Nihilists are sometimes called Crits and vice versa. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); {Peter W. Martin et al., “*Of Law and the River*,” and *of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985)}. Crits do not get tenure at Harvard and believe that the law is nothing but a game played by the powerful against the poor. Crits are probably the only competent doctrinal analysts left in the world; they use their analytical skills to prove that the law is inconsistent and incoherent. Crits are gentlemen—except when they are ladies: they do not write about the Second Amendment or shoot fish in a barrel.

problems. The key to such a dissolution lies in the recognition of the fact that there need be, and can be, no single correct way of analyzing constitutional issues. What is needed is simply the pragmatic recognition that different problems must be analyzed in different ways.¹⁰

In this Essay I shall demonstrate how it is possible to get rid of the embarrassment of the Second Amendment and thus restore that much abused provision to its rightful position among our fundamental liberties. Only those who still dream of the one true mode of constitutional interpretation will be dissatisfied by my demonstration, for it turns on the creation of a new mode of analysis—which I call “original plain meaning”—that has never been tried before and which almost certainly cannot be applied to any other provision of the Constitution.

We have seen that neither “original intent” nor “plain meaning” can remove the embarrassment of the right to bear arms. The obvious solution—or, rather dissolution—lies in the discovery of another intent than those which the historical sources indicate motivated the framers or another meaning than the one we see so plainly in their words.

As it turns out, this can be done. Clearly the intent of the framers is to be found in the plain meaning of their words in 1789 when Congress adopted the Bill of Rights¹¹ and proposed them for ratification by the states. But what did the “right to bear arms” mean in 1789? The obvious answer is given by the 1955 judgment of the Court of Chivalry in *Manchester Corp. v. Manchester Palace of Varieties, Ltd.*¹² It turns out that the “right to bear arms” is the same as the right to display armorial bearings,¹³ and that the

10. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

11. 1 Stat. 97 (1789).

12. *Manchester Corp. v. Manchester Palace of Varieties, Ltd.*, [1955] 1 All E.R. 387 (Ct. Chivalry) (Lord Goddard C.J.).

13. {The Court of Chivalry outlined the practice of bearing arms in its overview of the court’s history and jurisdiction, noting that the court

has probably existed since the Conquest. . . . In origin, no doubt, the court was essentially a military tribunal, the forerunner of courts martial As the origin of armorial bearings was . . . a method of identifying knights clothed in armour, it was natural that disputes with regard to the right to display a particular achievement on a shield should have fallen within the cognisance of this court. . . . The right to bear arms is, in my opinion, to be regarded as a dignity and not as property within the true sense of that term. . . .} It was not contended before me that armorial bearings were an incorporeal hereditament, and in any case it is clear that the right to bear arms is not a matter cognisable by the common law which seems to show that there is no property in arms in the legal sense, otherwise the courts of law would protect them.

Id. at 392.

original plain meaning of the Second Amendment is that the government shall not infringe upon one's right to be a lady or a gentleman. That the Second Amendment so skillfully avoids the use of sexist language suggests that, rather than a barbarous anachronism, it is one of the most principled provisions of the pre-Civil War Constitution. And once we understand this original plain meaning, the intent of the framers is revealed: since a well regulated militia requires officers, and officers must be gentlemen,¹⁴ the framers intended to preserve the gentry from the leveling tendencies of the masses.¹⁵

Of course, stated so boldly this original plain meaning may seem improbable. A careful analysis of the Constitution and the Bill of Rights will, however, do much to dispel such doubts. If it seems remarkable that the original plain meaning of the 1789 words of the American Constitution should be discovered only in an English case decided in 1955, it should be noted that the earlier decisions of the Court of Chivalry (the most recent before *Manchester* was decided in 1737) were not reported, but that its jurisdiction was recognized by Coke and Blackstone and other authorities familiar to the framers.

-
14. The Uniform Code of Military Justice still requires officers to be gentlemen, or at least to act that way. {See 10 U.S.C. § 933 (2006) (“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”).}
 15. The French revolution broke out in 1789, and there was the long English radical tradition of Piers Plowman and Jack Cade. The analysis proposed here, though not technically economic, the right to bear arms not being property (*see supra* note 13), is clearly consistent with Beard's Economic History of the Constitution. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).



SCHOOL OF LAW

CASE WESTERN RESERVE
UNIVERSITY