

Guns In America and Originalism

Reflecting on the subject of guns I have been trying to determine in my mind when the nature of owning one changed from a tool for hunting to a symbol of angry, resentful manhood. My earliest memory of a gun was walking with my father and brothers through the stubble in the grain field behind the barn and flushing up the china pheasants so Dad could shoot a couple for Sunday dinner. As a teenager I owned several guns and we were careful in handling the guns and always checked the chamber and magazine when first picking up the gun to insure it wasn't loaded. Most of the year the guns sat in a gun rack in the basement and were infrequently handled. I don't ever remember my two older brothers and I touching the guns when Mom and Dad were away from the Ranch; it just was not a point of interest to us, nor were we enthralled by the presence of guns.

Never in my years of growing up did I witness someone walking around town with a handgun. Handguns were considered pretty worthless compared to rifles and shotguns. The idea of owning a handgun as a sign of manhood would have made a lot of old farmers and cowboys laugh. A couple of years ago while having breakfast in Joseph I witnessed an arrogant display of gun ownership. A local man came into the restaurant with a small party and sat at a nearby table. He had on his hip a large Glock semi-automatic handgun in a short holster. He proceeded to regale his friends in a loud voice about the politics of the right to bear arms and the Second Amendment. It was obvious he was putting on a show for the rest of us. He wanted the rest of us to feel uncomfortable and intimidated.

I understand that the Wallowa County Sheriff has recently refused to enforce Initiative Measure 114 changing Oregon's gun laws. The sheriff stated "I cannot enforce gun laws that I believe to be unconstitutional...", meaning a violation of the Second Amendment. The Second Amendment was written by James Madison, fourth President of the country, and accepted by Congress in 1789 after extensive debate about what it should contain. The current Supreme Court is composed of several members who believe their interpretation of the doctrine called *Originalism* is the correct one regarding the Second Amendment. Justices Alito, Thomas, and Barret have stated that they believe the Constitution can only be interpreted on the basis of the "*original meaning*" in the lives of those who adopted it in 1788 and the Bill of Rights in 1791. By their interpretation individual citizens are empowered to own any weapon (gun) they so choose and there are to be no restrictions on a person's behavior while carrying a gun (except while in the act of committing a crime).

Most legal scholars now, and in the past 150 years, believe this view is simply not supported by the *Original* facts of history. Within the context of 18th Century America

the main fear in 1788 was that the Federal government would use its standing army to support a new king like figure and force his will upon the states. They were also fearful of armed rebellions like Shay's Rebellion in 1786-87 wherein individuals formed an armed mob and attempted to seize a federal armory. To deal with both of these potential threats the Amendment included the wording "*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.*" Every word in this sentence and the order of the words was intensively debated before approval. The phrase "well regulated Militia" was taken out of the end of the sentence and put first to emphasize the importance of the militia as an authorized legal entity of the states (13 colonies, now states) and that it was controlled (regulated), and not a mob of individuals (Washington D.C. on January 6th). Both Militia and State are capitalized seemingly to emphasize that these are not generic terms but refer to existing government militias in the 13 states. The phrase "right of the people" refers to citizens in a broad context, just like the rest of the Constitution does, and it is not referring to "individuals" or "persons". Most legal writers throughout the 20th century believed this wording referred to state's rights, not individual rights. The Second Amendment's purpose was to protect the rights of states to arm militias and was not concerned with individuals.

Notice that nothing is said about individuals owning a flintlock musket which everyone had for hunting and personal defensive protection. This was not a right addressed by the framers of the Constitution. Scholars have noted that administration of this right was left up to the individual states to regulate (Initiative Measure 114). When we define the words in the Amendment in the context of a country fresh out of a war of independence from a king, the meaning becomes evident. They were not referring to Glock's, AR-15's and 30 round magazines owned by individuals, but rather were protecting the rights of state militias to deal with an autocratic king.

So now we have a sheriff who believes in his mind that he wears the black robes of a legal scholar and a sitting judge. He can interpret constitutional law as it suits his personal beliefs and to heck with history and those pesky voters. He does not have to wait for the rule of law and legal process to work its way through the courts. Perhaps we should get rid of that silly Supreme Court, it would save a lot of time and money. We can just have sheriffs decide for us voters.

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