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Panelist (Symposium: The Second Amendment)

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PANELIST

*David Yassky**

I am glad to be here on this very distinguished panel. Let me just start out by saying the Second Amendment is a very important topic particularly right now. Let me give you a little sense of what's at stake. One of the earlier speakers said that fifteen years ago a symposium on the Second Amendment just wouldn't have happened—which is true. The subject was all but ignored. The courts have been pretty consistent as you've heard from a number of folks in articulating what others call for convenience a state's rights view. The essence of the "states' rights" view is that the only purpose of the Second Amendment is to protect the state militia. That is the conventional view of the Amendment and for a long time nobody challenged it. Until along came a number of scholars including some of the folks here. You really are in the presence of some extremely influential scholars. The books of both Stephen Halbrook and Professor Malcolm have been quite extraordinary influential in bringing to light a movement for a broader, stronger, more robust reading of the Second Amendment. Indeed, as academics, they have had success in altering the wider perception of the material they study beyond what an academic could hope for. Their work and the work of other who agree with them has recently borne fruit in an actual court opinion, a District Court case in Texas called *United States v. Emerson*. Federal law says that if somebody got a restraining order against you, you can't purchase a firearm or possess a firearm. A district court judge in Texas threw out that law using the Second Amendment. I think that is an indication that now this is an area, which is in dispute and I think it will go to the courts to resettle what many thought had already been settled.

I give tremendous credit to work of Professor Malcolm and Stephen Halbrook. Their historical scholarship has really taught us a great deal. But in the end, I disagree with the legal conclusions that they draw and other folks draw from it. I think the courts have been right in their states rights view of the amendment and let me tell you why. Let me say at the outset that my perspective on this is coming from an original intent perspective. I think we must decide constitutional cases on the basis of the intention of the founders. That's not the only perspective out there. It may not be a perspective that many other people in the room share. I think if you have a "living Constitution" perspective on any of the various constitutional theories that don't rely too heavily on

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original intent, then we have a different discussion. Maybe the discussion is about what's good policy and what isn't. But, I'm going to focus here on the original intent perspective and try to engage the revisionist movement on its own terms.

To understand the Second Amendment and what the Founders who wrote it were trying to do, you have to understand the conceptual framework that they were working in. And that conceptual framework is based on two concepts regarding the military: the concept of the army and the concept of the militia.

The Second Amendment is about how the military power of the United States should be organized. It grew out of one of the most pretentious issues faced by the Philadelphia Convention, which was: what military power should they give this new Federal Government? They're sitting down to write the Constitution, and one of the three or four most important, most contentious issues they face is, should the Federal Government have an army?

Under the Articles of Confederation, there was no Federal Army. If the congress wanted to field armed forces under the Articles, they had to call on the states for requisitions. That was a model that some delegates to the Philadelphia Convention wanted to keep. They didn't want a Federal Army. Why? It starts with, as I say, the concept of army and militia. To the founders, these were two very different things.

Mr. Halbrook spoke very eloquently and importantly about looking at text throughout the Constitution to see how the words are used. If one looks at the words used in the Constitution, you see there is militia used a few different places; yet then there is army and troops used in other places. These are very different concepts.

The army was a group of paid professional soldiers in the employ of the chief executive—the King in Britain, or the President in America. That's an army.

A citizen militia consists of ordinary people trained in the use of arms and available to be called by the state in the case of an emergency. An army is full-time professional soldiers, while a militia is ordinary citizens. That difference may have enormous sociological implications for what these two types of institutions look like. The army was typically, as one writer of the times put it, the dregs of society: people who could do nothing but enlist with the sovereign and earn some money that way. The militia was supposed to be a broad cross-section of regular people.

Akhil Amar puts it this way: "Army enlistees were full-time shouldered men who had sold themselves into virtual bondage to the government. The dregs of society: men without land, homes, families or principals as compared to the militia which was a randomly conscripted cross-section of all citizens capable of bearing arms, serving along side their family, friends, neighbors, classmates, and fellow parishioners."

Now the founders sat down and they are very self-conscious about this.

They questioned whether this new government should rely on the militia to defend the country, or an army, or both. That was the key question. George Mason frames it exactly that way in the Constitutional Convention: We have either an army or a militia or both. Each opinion had pluses and minuses.

A lot of the Convention delegates wanted just to rely on the militia. They didn't want to have an army. Why? Several reasons. An army posed a threat of tyranny. The notion is if the President has at his disposal a standing army, he is going to use it. He is going to attempt to use it to crush opposition and make himself into a dictator. That's one.

The second reason, which is less obvious but just as important, was that an army would be too easy to use. The notion is if a President has a bunch of soldiers standing around that he is paying, he's going to use them. He's going to fight wars. He's going to put the nation at military risk. He's going to go off on all sorts of foreign adventures that will bankrupt the country. The founders were keenly aware of ancient history: the Greeks, the Romans and what brought down those empires. They thought, in part, that they got carried away with military adventurism and spent all their treasure in pursuit of empire and glory. They wanted to avoid that.

A militia in contrast to an army would be very difficult to use. First, the government can call regular people from their lives only in a real emergency, otherwise the people will resist. Second, calling forth the militia required the cooperation of the state governments. The way a President or Congress, under the Articles of Confederation, would call on the militia was to ask the states to send their requisitions of troops. That gives the state governments and the governors an opportunity to resist. In other words, the President says I need soldiers to go fight the War of 1812 in Canada and you Massachusetts, you New Hampshire, send me your militia. The governors might say no, I'm not going to do that. As in fact they did in the War of 1812.

The notion was that the militia would be much harder to use and that's why it was a good thing. So there were many founders who wanted only the militia. On the other hand, many of the members of the Philadelphia Convention had fought in the Revolutionary War and they knew that a militia just wasn't good enough to defend the country. George Washington himself said "to rely on the militia is to rest upon a broken staff." These are not professional soldiers. These are regular people. They are fumbling, they don't know what they are doing. They are as likely to shoot each other as they are to shoot the enemy. If you want to protect yourself, and we are going to need to do that, we will get in a war with the European power sooner or later, we need a professional army.

What the founders did was compromise these two perspectives into a quite ingenious and carefully crafted balance. They agreed to give the Federal government the authority to raise an army—that's right in Article 1, Section 8, Congress can "raise Armies"—but at the same time, they tried to do every-

thing possible to discourage the Federal government from using this power excessively. They gave Congress authority to call forth the militia in the case of an emergency—that is also Article 1, Section 8. They gave Congress authority to provide for the training and disciplining of the militia so that Congress would assure itself that the militia is in good shape if they need to be called upon. The hope was that Congress would not feel the need to create a standing army. That's the compromise the Founders came to and just like so many of their other compromises, the idea was to create a balance of powers.

In the ratifying conventions, as you probably know, there was a lot of opposition to the proposed constitution. And one of the main arguments against the Constitution in the ratifying conventions had to do with these military provisions. All the anti-federalists, the Patrick Henrys, the George Masons, stood up and said that the Federal Government has the right to create a standing army and we are going to have a dictatorship as sure as night follows day.

This was a major problem for the Federalists. In many of the state conventions, opposition to the Constitution was serious enough that they were at risk of losing the ratification vote. Military provisions and a standing army was one of the big issues.

The deal that the Federalists made to seal the ratification of the Constitution, the promise they made to the swing voters, was that the federalists would adopt a Bill of Rights after ratification. And one of the key provisions in the Bill of Rights was the Second Amendment, which was designed explicitly to address the standing army problem. The essence of the Anti-Federalist argument was that the Federal government would somehow render the militia useless and instead create a standing army. In response to that fear, the Federalists and the anti-Federalists agreed to a Bill of Rights and included the Second Amendment, which was designed to protect the militia.

Let me just detour for a second into the textural argument because one of the main obstacles a lot of people face in making this history usable is the text of the Amendment. When you read it you say, a well regulated militia being necessary to secure a free state, fine you got that. But then it says the right of the people to keep and bear arms shall not be infringed. I think a lot of people can't get past that language: "bear" means carry, "arms" means guns, and this seems to be a plain right to carry a gun around.

But that is not what "bear Arms" meant to the people who wrote the Constitution. The phrase "bear Arms" was well understood to mean "use weapons for military purpose." I have a lot of quotes but I won't bore you with them so I'll just read you some of them.

The best example is the first draft of the Second Amendment. James Madison drafted the Bill of Rights and proposed it in Congress. I'll read to you his first draft of the Second Amendment. "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of

bearing arms shall be compelled to render military service in person.” No person religiously scrupulous of bearing arms shall be compelled. Now it is clear that this is a conscientious objector provision. The notion was that the Quakers shouldn’t be forced to serve in the militia and it’s clear that he is using bearing arms to mean serve in the military.

Now that clause was deleted because Congress felt it shouldn’t be the Federal Government who decided who was a conscientious objector. They didn’t want to make that a constitutional matter. They wanted to leave it up to the states to decide who were the conscientious objectors. But, it is clear that Madison used the term bearing arms to mean serve in the military and there’s no reason why he would use the same phrase ten words earlier to mean something broader. So don’t think that the “plain text” of the Amendment is somehow inconsistent with the militia-focused view. Don’t make the mistake of thinking that the only possible reading of the text is that it creates an “individual right.”

Let me focus a little more for a minute on that term—“individual rights.” The debate that Mr. Halbrook and Professors Malcolm and Barnett have framed is one between what they call an individual right and on the other side a collective right or states right. I have to be clear though on what exactly we mean by those terms.

One possibility is that an “individual right” is a right that an individual can walk into court and insist upon—as opposed to a right that only a state can vindicate in court. If that is what Mr. Halbrook and Professors Malcolm and Barnett mean by an “individual right,” then they are obviously correct that the Second Amendment creates an individual right. If that is their argument, they are basically making a point about standing, and as Judge Bissell so penetratingly pointed out, of course an individual has standing to raise Second Amendment claims in court.

But that doesn’t make the Second Amendment an “individual rights” provision in any real sense. Look at the Tenth Amendment. In *United States v. Lopez*, the Supreme Court said that Alfonso Lopez could not be convicted under the Gun Free School Zones Act because the statute violated basic federalism principles, including the enumeration of powers and the Tenth Amendment.

Now obviously Lopez in that case had standing to raise this constitutional claim. That doesn’t make the Tenth Amendment an individual right in any real sense, or mean that the enumeration of powers is a kind of individual right. Clearly, individuals have the ability in courts to raise structural principles of constitutional law when it benefits them in their cases. The real question isn’t who can raise the issue in court, the real question is what is the scope of the right? I assume that Mr. Halbrook and Professors Malcolm and Barnett intend to be answering that question. But it is still not clear to me what their answer is. I see two possibilities.

First, they may be claiming that the Second Amendment entitles Americans

to possess a gun for any reason that they want to—hunting, recreation, self-defense. If that's what they mean by individual right, then that has no support in history. That notion of an individual right may be attractive philosophically, but it is not an implementation of the Founders' intent.

The second possibility is that they read the Second Amendment as guaranteeing an armed citizenry that states can draw upon, thereby protecting the rights of individuals to possess guns to the extent necessary for the states to draw upon them as part of the militia. If that is their view, I think we're getting closer to something that is plausible. So let me take that argument on.

Mr. Halbrook and Professor Malcolm talk in their books about the unorganized militia of the Founders' time consisting of all the citizens being armed so the state could draw them forward. The problem for us as constitutional lawyers is that this is not true anymore. There is no longer any such thing as an unorganized militia in any meaningful way. Yes, there are 250 million or 270 million American citizens, but that's not what the Founders meant by unorganized militia. They meant citizens who routinely participated in militia training and were genuinely available to be called forward. In the Founders day, that included most everybody. As Judge Rodriguez suggested, there is some recent historical scholarship by Michael Bellesiles and others who question whether everybody really did participate in the militia. However, let us assume that militia service was universal in the founders' day. Everybody served in the militia. That's not true anymore. So now we are confronted with a question that just wasn't a question for the founders. And that question is: does the Second Amendment protect gun ownership by people who don't serve in the militia?

The founders didn't have to distinguish between giving everybody the right to have a gun, period, and giving everybody the right to have a gun so they could serve in the militia, because for them that was one and the same thing. If everybody is in the militia, then they don't have to answer that question. We do have to answer that question because now we don't have universal militia service like the Founders did. Put that way, I would suggest that this is kind of a familiar problem of interpretation.

I analogize it to *Brown v. Board of Education*. Think about *Brown v. Board of Education*, and the desegregation of public schools. The argument is that the people who wrote and ratified the Fourteenth Amendment believed segregated schools were just fine. They all had segregated schools in their states. None of the members of Congress, who participated in the drafting of the Fourteenth Amendment, or any of the state legislators who ratified it thought that it meant that schools could not be segregated. They did believe that they were putting into the Constitution a principal of equality. Fast forward to 1956. Now we've got a problem because the specific thing that the people who wrote the Fourteenth Amendment had in mind by equality is no longer what we understand as equality. Today, the principal of equality is utterly inconsistent

with segregated schools.

Typically, when we have that kind of a conflict, the specific picture that the Founders had in mind gives way to the broader principal. That's what the Court did in *Brown* and I believe that's what we do, and what we should do, with the Second Amendment. The Founders had a notion of protecting the states' militia which they saw as distinct from the army and as being composed of basically all citizens. That is no longer what we understand by the militia. So just as the specific picture of desegregated schools gives way to the broader principal of equality, the specific picture of everybody out there with a gun or with a rifle over the mantle piece gives way to the more general principal of state militia being protected. That's my perspective on this. Thank you for your patience.