

Guns, Laws, Men: Some Constitutional Dilemmas

Delivered before the University Club of Claremont

By

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Chairman, Dr. John B. Rae

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INTRODUCTION:

One of the assignments I had at Harvey Mudd College was to be Chairman of the Department of Humanities and Social Sciences. I made a lot of mistakes along the way. But I'd like to think that there were some things that I did right. And one of those, most definitely, was to recommend the appointment of Dr. William Barclay Allen to be a member of the Harvey Mudd College faculty.

Bill Allen was born in Florida. He's a PK (preacher's kid). Some time along the way he realized his error and moved to California. He has a bachelor's degree from Pepperdine, doctor's degree from the Claremont Graduate School. In preparation for this event, I looked up his record in our department files and simply thought, "I can't possibly do all this; there wouldn't be time left for Bill to speak." Just to itemize a few: he's a member of the National Council on the Humanities, which supervises the work of the National Endowment for the Humanities. He is a consultant on the Liberty Fund bicentennial project, which is planning celebration of the bicentennial of the Constitution. He has taught at the University de Rouen in France. And he regularly is a visiting lecturer at St. John's College (that's the one where they read great books, not the one where they play basketball, or have basketball played for them). He has been very active in the affairs of the Claremont community, including being president of the school board. He also finds time to teach Sunday School, and he plays a mean recorder.

WILLIAM ALLEN:

Thank you very much, and thanks particularly to John Rae for that fine introduction. I have been grateful to John ever since I returned to Claremont to assume the position at Harvey Mudd College. It was not just a matter of coming home; it was a matter of undertaking a career among especially congenial people. And nothing contributes so much to living life well than being able to live life with people who are congenial, as John Rae has been for me.

Thank you Mr. President. Thank you University Club members for inviting me. I begin at the beginning, expressing deep gratitude for your inviting me to share my reflections with you. I'm also grateful because you invited me to do so in the month in which you celebrate the birthdays of March. I line up with the gentlemen at that table, and with John Rae, as being one of those on the front end of that birth-month. Astrology being serious or not, I am a Pisces.

I'm also happy that you have asked me here because the University Club is an august forum, the intelligence and dignity of which is somewhat imposing and especially for the humble

son of a Baptist preacher from the south. I have long admired you and your work. But, above all, I admire your commitment to the works of the mind—the life of reflection as a worthy vocation. You honor me in this invitation beyond any claim that I can raise on my own behalf.

I see from reading your announcements that you have very recently been engaged in a reconsideration of your own constitution, with regard to the particular question of how you define the standards of membership within the organization. I think it quite remarkable, really, how far we Americans carry ideas of constitutionalism. We actually live by constitutions even in the most ordinary aspects of our lives. We must surely conceive that we have inherited that characteristic from the English ancestry of this country. It appears to me, however, that we owe it far more to the example of American constitutionalism in our lives. That living force is something more than just an inheritance from Great Britain. It rules us in a far different spirit than the English constitution rules the British. The most signal aspect of this difference may be captured in a simple reflection. English constitutionalism, we may say, is almost completely captured in a single word. That word: “prescription.” American constitutionalism, by contrast, is most fully conveyed by the word, “consent.” The difference is profound. In our case there is such heavy emphasis upon continued deliberation by the people themselves, as the basis of their consent, that the value of prescription is outweighed by the recognition that our Constitution maintains its authority over our souls by our deliberate recourse to it and by our own practical adoption of it, as the rule of our lives, within each generation.

That is why I love to see discussions such as that you have had. It signals the seriousness of the American intention to search for a rule of right by which to govern our lives. Take the question of whether you rightfully extend membership in the club to men alone. That very question is reflected in our contemporary understanding of the claims of our Constitution of constitutions. It has become a question of great moment how far the American Constitution, as originally conceived, comprehended the two great divisions of humanity within its terms. Accordingly, you are acting out on a particular scale the concerns we have about the correct expression of the common good within this country.

Consider the debates over the meaning of the axiom in the Declaration of Independence’s far-reaching exordium, that “all men are created equal.” Many there are who have argued to us that that language represents hostility to women. But did you know that Thomas Jefferson’s draft of the Declaration only mentioned the word, “men,” three times, including that just indicated? It was also mentioned in the passage which declares that, “to secure these rights, governments are instituted among men.” Some take that as confirmation that women were regarded as political nullities by the founders. The last mention of “men” occurs in the passage that was excised by the Continental Congress. In it Jefferson charged George III with “waging cruel war against human nature by keeping open a market where MEN should be bought and sold.” We see readily that Jefferson has to be considered not only hostile to women but also singularly stupid, if we are to take the language concerning “men” as exclusive of “women.” For who does not know that men and women were equally traded on the auction blocks of slavery in the United States? This reflection leads us to conclude that the contemporary attachment to mere words in these matters, conceals an unfortunate narrowing of our understanding about the human things. The real question is not whether the word “men” in every signification excludes women, but rather how far do the claims of nature and of nature’s God assimilate men and women to a single standard of performance and activity.

Here I must make a confession, for I am one of those persons who at one time imagined that women were only men capable of bearing children. It's clear now, from the claims of women themselves, that this is a title they do not wish to adopt. They seem rather to prefer that we regard them as equal in their difference and not fundamentally the same. That in some measure raises the kinds of questions with which you now wrestle. What does it mean to treat women as the same? What does it mean to treat them as other? To turn that into a constitutional question seems to depend far more on our understanding of the responsibilities we all incur as a result of acknowledging that all men are created equal – the responsibilities we all incur under the rule of natural right. What duties do we, men and women, owe to others as a consequence of these principles? Are these duties greater than the ones enumerated in the terms of the Declaration of Independence? Here we have the kind of question that makes American constitutionalism distinct in the world. Once we can be clear about the obligations of that constitutionalism upon the choices we all must make every day, we may presume that in other areas we are free to exercise choices informed by other principles like personal preferences, convenience, and the idea of what is good in itself. American constitutionalism is predicated on the notion that there is a sphere of human life which is beyond the reach of law and in which sphere we carry on the various activities of human life answerable not merely to legal standards but to standards of propriety and excellence.

Now we often find that persons become impatient about deciding questions of propriety and excellence on grounds of reason and/or revelation. Such a proceeding requires that we recur to no other authority than rational persuasion in dealing with our fellows. The more urgently some sense the necessity of a course of action, the more impatiently they reach for the authority of law in order that we may all conform to what they regard as necessary. It is the beauty of American law, however, that it proposes to us that we should govern ourselves. By the rules that we arrive at through rational persuasion, without calling the force of the state to conform others to them, we provide for those dimensions of life which make it possible for us to say that we live well or ill.

The impatient are those who think the good life is too precious a commodity to leave to the free action of men. You can see this clearly at work in the much disputed case of the Second Amendment to the Constitution the one which reads as follows: "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." Today we tend to read this language under the urgent impression of violence, at least within our society. We talk of gun control not as a constitutional conundrum but as a matter of social policy.

Those who defend the right of gun ownership remind our fellows that constitutional right cannot be sacrificed for the aims of social policy. While those who defend the necessity of gun control urge that we not sacrifice social life itself for the sake of spurious claims of right. Who is right in this dispute?

In the first case, let me say that we are really dealing with two questions here and not just one. We have the historical question of just what the framers intended in the Second Amendment. Then we have the question of present policy, of just what means are available to us to eliminate the ravages of widespread, criminal gun usage in our society. As to the historical question, we can arrive at a final answer, despite the apparently unavailing efforts of the disputants. The policy question, on the other hand, is a contingent matter, subject to the varying

conditions which affect the means required to achieve the ends of policy. On this occasion I will focus most on the question of broad principles, leaving particular policy choices to flow from them later.

Taking the first problem, for the moment, allow me to read to you the language from an 1871 debate on a rather different policy matter, in order to demonstrate the historical understanding of the Second Amendment. The passage I shall read comes from a report in a House of Representatives' debate over Reconstruction legislation.

Section 8 is intended to enforce the well-known constitutional provision, guaranteeing the right in the citizen to keep and bear arms, and provides that whoever shall take away by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same. This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the south where the sheriff of the county had preceded them and taken away the arms of their victims. This was especially noticeable in Union County, where all the Negro population were disarmed by the sheriff only a few months ago, under the order of a judge, who resigned lest he should be impeached by the legislature. The sheriff, having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated them.

Now, this account of the circumstances under which the Second Amendment was used in order to offer a relevant and necessary protection of the rights of citizens, echoes quite well the historical understanding in England and America of the right to bear arms.

The discussion is really quite long, in which one seeks to uncover the historical dimensions of the problem. We do not have to recreate that here this afternoon. But we can recall to our minds the period of the Glorious Revolution in England a period which follows the only sustained attempt to produce the control of weaponry among the English citizens. And that was under the law of 1671, the law of Charles and James, which sought to disarm the population at precisely the moment when the monarch thought himself at the greatest exposure before his fellow citizens and therefore sought to defend himself. By 1688 the English had written into their constitution the right to keep and bear arms, for all Protestants, it must be said. And, of course, it remained essentially a right for Protestants under the English constitution through the eighteenth century.

Now, historically, that right as it developed in England began as a two-fold right, a collective right and an individual right. The collective right has to do with the role of the militia in the society. That is, it was not only a right but an obligation, a duty, to bear arms and to be ready to defend the collective security and liberty of the state. That collective right soon, though indeed over some process of development, comes to be seen as an individual right—namely, the one I just referred to, the right of Protestants to keep and bear arms to defend themselves against the arbitrary authority of the state or those acting under the color of the state (which is the much more serious dimension of the question).

When the United States Constitution was adopted and the Bill of Rights added, it is especially this individual right retaining vaguely the collective right that came to be written into American law. So the question for us, today, it seems to me and once we have settled the question of historical intent, is whether in fact that right is still obligatory whether it is necessary, or whether it has not outlived its usefulness.

That brings us to the policy question I mentioned before. I said that it was contingent, depending on varying circumstances and not on abstract questions of right. Let me place it in a personal context for a moment. I do not own a gun. I have never owned a gun. I am not particularly fond of them and have never used them save for the brief time when I was being trained by my country for its defense. During that period I discovered that I was, indeed, an expert marksman. Nevertheless, I have not used a gun since I was “liberated,” if I may say, and I have no particular desire to use one, whether for purposes of hunting or otherwise. I wonder, however, when I read the debates of 1871, to what extent I must cite the protection of that right as allowing me now the freedom not to own a gun.

Let me state that with somewhat less obscurity. To what degree does my freedom not to own a gun depend upon the American Constitution’s guarantee of the right of people to have weapons to defend themselves? To what degree am I free now to ignore possession of weapons, because there existed a government which, in 1871 and thereafter, went to the defense of a people’s right to hold such weapons and to defend themselves against the clearly arbitrary and unwarranted actions of individuals acting under the color of law?

I suspect that there is a connection. I suspect that my fathers gained, under the authority of the American Constitution, the kind of freedom that makes possible that life in which I am able to eschew the ownership of weapons. Consequently, the question at a policy level must now be twofold rather than single. It is not only the question of how we are to eliminate violence in the society, but also how are we to retain that very precious freedom not to possess and own guns which is another way of saying, how to produce a peaceful and stable society.

I do not attempt to answer the policy question today. We know that there are many things that can be done to mitigate the role and presence of weapons in the commission of crimes. These may be called gun control; that’s a matter of no consequence to me. One of the things that one does not find in the historical record, for example, is that the registration of weapons was ever prohibited in the language that you see in the Second Amendment. There is no incompatibility between registering weapons and guaranteeing the right to keep and bear arms. Indeed, under the original English form, all the weapons were registered, because otherwise the society was unable to know how to summon the militia, where to find the necessary strength in order to defend the society.

So, I can distinguish those questions, and I leave it to you and others to reflect on what can be done in the presence of guaranteeing the right to keep and bear arms, to minimize the use of arms in criminal activity. But there is a further relation between my two questions, the historical question and the policy question, which is not unlike the relationship between the question of law (that we spoke of at the beginning) and the question of those choices human beings make in order to live well. We say, in the United States, that our objective is to govern ourselves. We give ourselves laws, not to determine what we are to do, but to make us free to do what we will. Similarly, we have seen in the historical examples I have used that the guarantee of a right to defend oneself has an ultimate consequence, which is not necessarily the

consequence of possessing weapons but the consequence of living stable and peacefully. So we have laws and we have guns primarily, apparently, so that men may be able to live and act freely, without a prior dependence on either laws or guns. We have laws and guns as guarantors of certain basic conditions of human life, but not as the primary means of our undertaking the activities, those moral and practical activities, which are necessary to make our living good.

In that sense, the relation between the historical question and the policy question seem to me to be highly dependent on the question of the meaning and the value of a free constitution. As we engage in constitutional deliberation, as we recommit ourselves in each generation to uphold the rule of freedom through the instrumentality of a free constitution, we willingly accept certain fundamental conditions of that life. Far more important than these basic conditions, however, are the expectations of the way of life that will result. Will those decisions we are now free to make be made with an eye to what is good? Will those decisions consult propriety and excellence, as I phrased it earlier. The justification for a way of life which guarantees to us the opportunity to govern ourselves, the justification for assuring to human beings the opportunity to defend themselves, protecting them against unwarrantable violence the justification in each case has to be the expectation of a better way of life, of our capacity acting individually and collectively to assure a decent way of life for our fellow citizens.

Keeping that in mind, then, let me suggest that these questions, the questions of guns, laws, men, these constitutional dilemmas are not so much transient dilemmas nor the kinds of questions that we can pretend to answer for all humankind forever. They are the permanent concerns of free people in every generation. They are the concerns we undertake not under an apocalyptic spell with the notion that we somehow will settle once and for all the important human questions. They are rather the questions, to the degree that they are to live well, men must always wrestle with. They are, in fine, the kinds of questions which distinguish the life we live, whether in our particular circumstances or in this country at large. They distinguish us from those forms of life that we all agree to call unfree.