Before Bundy Ranch

What happens when constitutional vigilantes go mainstream.

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Constitutional vigilantism of the type on display at Bundy Ranch last week has been a recurrent feature on the margins of American political life. What is new—and dangerous—is that it has suddenly moved from the margins to the mainstream. And it comes with guns.

Last week a mob of [more than 1,000 armed protesters](http://www.reuters.com/article/2014/04/17/us-usa-ranchers-nevada-militia-insight-idUSBREA3G26620140417) forced the Bureau of Land Management to back down from enforcing federal grazing fees. The protesters came out in support of local rancher Cliven Bundy, who’s been letting his cattle graze on federal land in Nevada for more than 20 years without a permit. “We’re standing up for the Constitution,” [declared](http://foxnewsinsider.com/2014/04/11/nevada-rancher-fights-big-gov-protests-escalate-over-land-dispute) Bundy, to the delight of the television cameras. Bundy and his supporters have a simple constitutional worldview: They do not recognize the federal government’s constitutional authority to manage public lands within a state, and they believe the move against Bundy results from a corrupt political system determined to deprive the people of their rights. But instead of trying to convince a court to adopt their constitutional views or work through the political system, Bundy and his supporters have shown that they can enforce their interpretation of the Constitution by waving guns at federal officials.

On the surface, the dispute at Bundy Ranch focuses on a fairly esoteric constitutional question: whether the Property Clause of Article IV, which grants Congress “power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,” authorizes the federal government to own and manage the public lands within a state. The problem for Bundy and his supporters is that the Supreme Court answered that question in 1897, ruling in *Canfield v. United States* that the admission of a state does not deprive the federal government of power over public lands. Bundy’s supporters also challenge the federal government’s authority to restrict grazing to protect wildlife, but the court also rejected that argument in 1976, ruling in *Kleppe v. New Mexico*, that the BLM indeed may regulate grazing on the public lands to protect wild horses and burros. Armed with these and many other legal precedents, the BLM obtained a court order to stop Bundy from letting his cattle graze and ordering him to pay his unpaid bill or face seizure of his cattle.

Who decides what the Constitution means? The Supreme Court is often said to have exclusive authority to interpret the Constitution, but that position has never been universally accepted. President Lincoln, responding to the Supreme Court’s [*Dred Scott* decision](http://www.loc.gov/rr/program/bib/ourdocs/DredScott.html) in 1857, declared that “If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers.”

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Over the last decade, some liberal law professors, led by Stanford’s Larry Kramer and Harvard’s Mark Tushnet, have challenged the notion of judicial supremacy. In its place they advance a theory known as “popular constitutionalism,” in which “We the People,” not the courts, should be understood as the final arbiters of constitutional meaning. Critics of this theory ask how it could be put into practice, and what mechanisms the American people may use to interpret and enforce their Constitution. And along come the protesters at Bundy Ranch to offer the obvious answer. Through force. The protesters are popular constitutionalists with guns, seeking to advance their constitutional interpretations by threatening to shoot any BLM agents attempting to enforce the law as interpreted by the courts.

The Bundy Ranch protest certainly fits within a long constitutional history in which radical groups have sought to effectuate their dissident views of the Constitution through violence. The Ku Klux Klan is the prototypical constitutional vigilante group. Operating outside formal legal structures, the Klan always asserted it was acting to restore the true meaning of the Constitution, which, in the words of a 1925 Klan publication, “put into written form the immortal principles of liberty, popular government, and equal justice, which were the fruitage of Anglo-Saxon character.” The Klan understood itself to be the vigilant protector of white Protestant values embodied in the Constitution, when local law enforcement was unwilling to step up.

The closer historic precedent for the Bundy Ranch protesters is the Posse Comitatus movement, however, launched around 1970 by Christian Identity pastor William Gale, which turned the Klan philosophy of enforcing the Constitution through armed citizen groups against a new enemy: the federal government. Gale warned federal officials: “You’re either going to get back to the Constitution of the United States or officials are gonna hang by the neck until they’re dead.” Like many on the radical right, then and now, the Posse movement asserted that much of what the federal government does is tyrannical and unconstitutional—most especially income tax laws, gun control, the Federal Reserve system, and federal management of public lands. Like many on the radical right of today, the Posse movement advocated a local philosophy of government, in which the county is the authentic unit of government. In Posse philosophy, the county sheriff was seen as the nation’s highest law enforcement officer, and he owed a duty to protect the people from federal tyranny. If the sheriff refuses to do his duty, the movement proclaimed, the people themselves should form armed posses to arrest and hang any official who violates the Constitution.

The distinctive feature of the Posse movement was the call for armed groups of citizens to take the Constitution into their own hands and enforce it through force. Murder and violence were the inevitable result. Posse groups kidnapped federal officials, put them on trial through the Posse’s own “common law” courts, and imposed brutal punishments. In 1983 former Posse member Gordon Kahl shot and killed two U.S. marshals and injured two others attempting to serve him papers for tax evasion.

By the early 1990s, the Posse Comitatus movement had largely faded away in response to strong state and federal law enforcement, but the militia movement soon replaced it and offered a similar philosophy. Like the Posse movement, militia leaders argued that the nation must return to the true (in their view) meaning of the Constitution. Like the Posse movement, militia leaders pointed to a series of perceived federal abuses—gun restrictions, income taxes, the Federal Reserve, and public lands regulation—and called for the formation of armed citizen groups to restore the true meaning of the Constitution through armed resistance. The militia movement justified the threatened use of force by asserting the “insurrectionary theory” of the Second Amendment, which claims that the amendment enshrines the right to bear arms to empower the people to protect themselves against government tyranny, should it ever arise. Militia leaders declared that tyranny was here and the time for armed resistance had come.

The immense dangers posed by the militia philosophy became obvious with the bombing of the Murrah Federal Building in Oklahoma City in 1995. Although Timothy McVeigh and Terry Nichols were only loosely connected to the militia movement, the bombing demonstrated the catastrophic results of declaring the federal government to be the people’s enemy and calling on the people to rise up to enforce their own constitutional interpretations.

The militia movement, like the Posse movement before it, has largely faded from view, but the philosophy of armed resistance now finds a welcoming home in the Tea Party movement. Militia members form a significant constituency within the Tea Party. For instance, Oath Keepers claims to have enlisted 30,000 military and law enforcement personnel who have taken an oath to disobey a list of orders deemed unconstitutional. Oath Keepers members were out in force at Bundy Ranch. So were members of Richard Mack’s Constitutional Sheriffs and Peace Officers Association, an organization that advocates the old Posse philosophy that the county sheriff has a duty to repel federal officials whenever they encroach on county territory. Mack has said that he “prayed for the day that a sheriff in this country will arrest an IRS agent” for enforcing tax law. Cliven Bundy himself echoed the Posse in demanding that the local sheriff disarm the BLM and called on the protesters to rise up when the sheriff failed to do so.

The protesters at Bundy Ranch voice the same rhetoric of constitutional vigilantism honed by the Klan, the Posse, and the militias. What has changed is that this philosophy is no longer limited to the radical fringe but has become a respectable position offered up by mainstream political figures like Nevada Sen. Dean Heller, who called the protesters “patriots,” and by a stream of Fox News commentators like Sean Hannity and Andrew Napolitano, who called Bundy a hero for standing up to federal abuse.

Emboldened by their apparent victory at Bundy Ranch, the new constitutional vigilantes are asking where they can take the fight next. Cliven Bundy declared it a victory for “We the People.” But that can only be true if we want the Constitution to mean whatever an armed mob says it means.