

**IS THE RIGHT TO BEAR ARMS INDIVIDUAL,  
COLLECTIVE, INSURRECTIONIST OR ALL OF THE  
ABOVE?**

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*"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."*

*United States Constitution, Amendment II, 1791*

Two decades ago, a symposium on the Second Amendment would have been rare. After a flurry of debate surrounding the ratification of the entire Bill of Rights, the Second Amendment had remained in relative obscurity. However, with the intensification of efforts and counter-efforts on gun control legislation, the Second Amendment has become the subject of much debate. Many essays dealing with various aspects of the Second Amendment have been published in law reviews and other academic publications. One aspect of the Second Amendment that the commentators have concentrated upon in the historical context, the roots, the milieu from which the Amendment sprang. This current flurry of activity has been prompted, not so much by scholarly interest in pure history, but by partisan attack or support for gun control legislation. As Dr. Joyce Lee Malcolm, a Professor of History at Bentley College in Massachusetts and Director of the New England Heritage Center, points out, this controversy "has attracted belligerents rather than scholars" whose interest "has been to furnish ammunition for one point of view rather than to analyze and inform."<sup>1</sup>

So as Professor Carl T. Bogus has observed, the Second Amendment lives

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<sup>1</sup> Joyce Lee Malcolm Book Review: THAT EVERY MAN BE ARMED; THE EVOLUTION OF A CONSTITUTIONAL RIGHT, by Stephen P. Halbrook, 54 GEO. WASH. LAW REV. 452, January/March 1986.

two lives: one in the law and the other in politics, public policy, and popular culture.<sup>2</sup> For the last two decades or so, opponents of gun control legislation have postulated that the Second Amendment precludes legislative action on this subject because it creates an individual right to bear arms which cannot be restricted. Their opponents argue that the prefatory language in the amendment confines or limits the right to bear arms to the maintenance of a state regulated militias. In between those poles there are other views as well.

The objective of this essay is not to take sides by giving my conclusions of the Amendment's origins and intent, or whether it supports or inhibits gun control legislation. As a sitting judge, I am precluded from offering an opinion on such a matter which could come before my court. My objective here is simply to identify the trends among the commentators on the origins of the Second Amendment and to synthesize their theories, arguments, and in some instances, factual support.

One group of commentators have espoused the view that the Second Amendment protects both an individual and collective right of the people to bear arms to protect themselves and to act as a check upon governmental tyranny. This proposition has been styled the "Standard Model."<sup>3</sup> Eugene Volokh suggests on his essay, "The Commonplace Second Amendment," that the inclusion of provisions securing the right to bear arms in state constitutions demonstrates that "these provisions secure rights against the state governments."<sup>4</sup> If this is true, he argues, "they must recognize a right belonging to someone other than the state." Thus, Volokh concludes that the right to bear arms must have been viewed as an individual right by Americans of the Revolutionary generation.<sup>5</sup>

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<sup>2</sup> Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 1998.

<sup>3</sup> Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 451-512, 1995.

<sup>4</sup> *Id.* at 810.

<sup>5</sup> For dissent within the legal academy see Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995), and Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VALP. U. L. REV. 107 (1991). For an example of historical scholarship supportive of the individual rights position central to the Standard Model, see Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. of Am. Hist. 599 (1982); for a counter-argument that the amendment reflected a collective right rooted in civic republican ideals, see Lawrence Delbert Cross, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. of Am. Hist. 22 (1984); see also *The Right to Bear Arms: An Exchange*, 71 J. of Am. Hist. 587 (exchange between Shalhope and Cross).

A variation on the Standard Model is the Insurrectionist Rights Theory. One insurrectionist right theorist is Joyce Lee Malcolm, a professor of history at Bentley College in Massachusetts. In 1994, Malcolm published *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT*.<sup>6</sup> Malcolm believes that the right of the individual to keep and bear arms was part of English constitutional law for a hundred years before the Founders drafted the American Bill of Rights. The Second Amendment is, in Malcolm's words, "a legacy of the English Bill of Rights."<sup>7</sup>

Malcolm's thesis is that the Second Amendment was derived from the English Declaration of Rights, also known as the Bill of Rights, of 1689. With this, there is no quarrel. But Malcolm goes further. She argues that the Declaration of Rights granted an individual right, that is, that it gave individuals the right to keep and bear arms notwithstanding the enactment of any laws to the contrary. She also argues that the purpose of this right was to allow individuals "to have arms for self-defense and self-preservation." Malcolm contends that this "English influence on the Second Amendment is the missing ingredient that has hampered efforts to interpret its intent correctly."<sup>8</sup>

Dennis Henigan has co-written a book which espouses the theory that the Second Amendment creates a collective right.<sup>9</sup> According to Dennis Henigan, only a "well regulated" militia—which Henigan maintains is the modern National Guard—has the right to "keep and bear arms." Moreover, Henigan's theory of the Second Amendment locates the right with states, as opposed to individuals. Henigan interprets the "well regulated Militia" mentioned in the introductory clause of the Second Amendment as "federally regulated," or in his words, today's National Guard.<sup>10</sup> Conveniently, his interpretation has the practical effect of rendering the Second Amendment a nullity since, according to Henigan, the Supreme Court has held that the National Guard is the equivalent of the militia. Since "gun-control laws typically exempt the National Guard," Henigan argues, "the Second Amendment has been essentially irrelevant in

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<sup>6</sup> Joyce Lee Malcolm, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* xii (Harvard U. Press, 1994).

<sup>7</sup> Malcolm, *supra* note 6, at 162.

<sup>8</sup> *Id.*

<sup>9</sup> Dennis A. Henigan, E. Bruce Nicholson and David Hemenway, *GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA* (1995).

<sup>10</sup> Henigan et al, *supra* note 9, at 2.

terms of an actual constitutional barrier to gun-control laws. . . ."<sup>11</sup>

One of the early proponents of the Standard Model is Sanford Levinson. In his article *The Embarrassing Second Amendment*,<sup>12</sup> he argues that Amendment is part of a checking function designed to enable the people to resist government tyranny, by arms if necessary. This interpretation is premised on the assertion that a broad consensus existed in revolutionary times regarding the concept of the right to bear arms.<sup>13</sup>

For Standard Modelers, the checking function of the Second Amendment was intended by the framers to incorporate a right of revolution into the fabric of constitutionalism.<sup>14</sup> In his provocative article, "The Embarrassing Second Amendment," Sanford Levinson argues that the entire body of the people in arms, "or at least all of those treated as full citizens of the community," provided the ultimate constitutional check on government tyranny. Although colonials believed in a right of revolution. Such a right, however, was not a constitutional check, but a natural right that one could not exercise under a functional constitutional government. In short, the people had a right to abolish their government and resort to armed resistance in defense of their liberties when the constitutional structures of government ceased to function.<sup>15</sup>

The opposite view to the Standard Model is that the Second Amendment did not create an individual right to bear arms. Michael Bellesiles, Professor of History at Emory University in Atlanta, has exploded two myths about the use of firearms in colonial times: that firearms ownership was unregulated and nearly-universal. Through research on gun control legislation during colonial times he has shown that the early legislatures of Virginia and Connecticut intended gun ownership to be precisely constrained by law.<sup>16</sup> In Virginia, for example, the colonial legislature encouraged the ownership of guns by white

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<sup>11</sup> Henigan et al, *supra* note 9, at 2.

<sup>12</sup> Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

<sup>13</sup> See e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998).

<sup>14</sup> Reynolds, *supra* note 3, at 472.

<sup>15</sup> For debate over the Bill of Rights, see Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39 (1998).

<sup>16</sup> Michael A. Bellesiles, GUN LAWS IN EARLY AMERICA: THE REGULATION OF FIREARMS OWNERSHIP, 1607-1794 (16 L. & Hist. Rev. 567-89) 1998.

male property owners, and prohibited the same to slaves and indentured servants. In Connecticut, the assembly attempted to arm all able-bodied males, except Indians. During the Revolution the state government confiscated firearms held by loyalists. In Pennsylvania, shortly after adopting the constitution of 1776, which contains a provision guaranteeing the right of the people to bear arms "for the defense of themselves and the State," the Legislature enacted the Test Acts which contained a loyalty oath imposing many restrictions of the said right. The Test Acts barred citizens who refused to take the oath from bearing arms.<sup>17</sup> Thus, in Virginia, Connecticut and Pennsylvania, based gun regulation upon the concept of public safety, i.e. only loyal citizens should have the right to keep and bear arms. This was necessary.

Moreover, the first state constitutions of some states contained declarations of rights including the right to bear arms. Others did not. Of those that included a list of rights, some, such as Pennsylvania, shown the framers intent to establish both an individual and a collective right to bear arms.<sup>18</sup> Other states, like Massachusetts and North Carolina, failed to mention the individual right to bear arms explicitly, but did mention the collective right.<sup>19</sup>

As Professor Robert E. Shalhope has pointed out, "the idea of an unrestrained citizenry was anathema to the Founders; it was only through 'well regulated' militias that public safety could be ensured."<sup>20</sup> At the time of the writing of the Second Amendment every state in the union sought to limit the extent of that privilege to loyal citizens and experienced no hesitation whatsoever in disarming large numbers of inhabitants within its jurisdiction. Colonial legislatures concerned themselves with the production, use, and ownership of firearms.

Bellesiles explodes another myth, the near universal gun ownership during the colonial period.<sup>21</sup> Bellesiles discovered that only fourteen percent of probate inventories exhibited any type of gun within frontier households of norther

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<sup>17</sup> Saul Cornell, *COMMONPLACE OR ANACHRONISM: The Standard Model, The Second Amendment and the Problem of History in Contemporary Constitutional Theory* (Const. Comment) Summer 1999.

<sup>18</sup> PA. CONST. of 1776, Declaration Of Rights, art XIII.

<sup>19</sup> MASS. CONST., Declaration Of Rights at XVII; N.C. CONST. of 1776, Declaration of Rights, art XVII.

<sup>20</sup> Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic* (16 Const. Comment 269) Summer 1999.

<sup>21</sup> Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865* (J. Of Am. Hist. 425-55) 1996.

New England and western Pennsylvania. Beyond that, militia records indicated that weapons of any sort were far from universally owned. In fact, state governments had a difficult time mustering armed militiamen even as late as the Civil War.

Gary Wills, a Pulitzer Prize-Winning historian and adjunct professor at Northwestern University, in his essay *To Keep and Bear Arms*, (XLII N.Y. Rev. of Books 62-73) Sept 21, 1975 asserts that the Second Amendment included a purposeful preamble establishing a well regulated militia as the definitive purpose of the Amendment. Although most Americans “assumed such a right in the 1780s—so naturally, in fact, that the question was not ‘up’ and calling for specific guarantees” when the Second Amendment was framed.

Wills theorizes that James Madison did not address the issue of private rights when writing the Second Amendment. Instead, Madison meant only to finesse Antifederalist opposition to the Constitution by responding to their concern to protect and perpetuate their own state militias.<sup>22</sup> Consequently, Madison’s “sentence structure set as totally military a context for this amendment as for the Third. Every term in the Second Amendment, taken singly, has as its first and most obvious meaning a military meaning. Taken together, each strengthens the significance of all the others as part of a military rhetoric.”<sup>23</sup> “This view is challenged by the proponents of the Standard Model.”<sup>24</sup>

Robert B. Shalhope, Professor of History at the University of Oklahoma, takes a middle position. He maintains that the Second Amendment represented an attempt to meld two distinct but dynamically interrelated rights—the individual right to keep firearms in the home for personal use and the communal right to maintain state militias composed of these armed individuals to protect established authority.

The “people” of the separate states did indeed have a right to keep firearms in their homes for their own personal use, but the “people” in the early republic was a much less expansive term than it is today; it included only the those deemed “honest and Lawful Subjects” by their separate state governments. And these governments had not only the power but the responsibility to restrict the rights and privileges of citizenship— including the right to possess private arms—in order to promote the public good—the preeminent goal of republican government. This is, of course, not the same as claiming that citizens of these

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<sup>22</sup> Gary Wills, *To Keep and Bear Arms* (XLII N.Y. REV. OF BOOKS 62-73) Sept. 21, 1995.

<sup>23</sup> Wills, *supra* note 22, at 72.

<sup>24</sup> For a response to Wills, see *Letters by Sanford Levinson, David C. Williams, and Glenn Harlan Reynolds*, N.Y. REV. OF BOOKS 61 (Nov. 16, 1995).

states held their arms “in trust for the state.” They most decidedly did not.

Shalhope’s research has led him to conclude that two cultural impulses—republicanism (emphasis on community) and liberalism (emphasis upon individualism) coursed through the lives of late-eighteenth century Americans. At times the two seemed to run parallel to one another, at other times they melded into a nearly indistinguishable whole.

Louis A. Craco, Jr., former Chair of the Committee on Federal Legislation of the Association of the Bar of the City of New York, notes that while the image of a colonial soldier-citizen standing bravely against all oppressors with flintlock in hand may have a quaintly romantic appeal, it is illogical to assume that the framers intended to enshrine an individual right of armed revolution.<sup>25</sup> The text does not support this view. Moreover, the aim of the Constitution objective was to create government. It seems inconsistent to provide, in the same document, a legal means for that government’s armed destruction. Still other provisions of the same Constitution provide for the suppression of insurrection and the punishment of treason.

Scholars have noted that “the proposition that the Second Amendment does not guarantee each individual a right to keep and bear arms for private, non-militia purposes may be the most firmly established proposition in American constitutional law.” Specifically, scholars Ehrman & Henigan, discuss this in their article, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 DAYTON L. REV. 1 (1989). No federal court has every struck down any piece of gun control legislation on Second Amendment grounds.

The Supreme Court has decided only four cases involving the Second Amendment in 206 years. The Court’s most significant case, *United States v. Miller*,<sup>26</sup> was decided over fifty-five years ago. The Supreme Court’s first published reference to the Second Amendment is found in *Dred Scott v. Sandford*<sup>27</sup> where the Court held that African-Americans were not citizens of the United States and therefore, were not entitled to the privileges of citizenship. The Court’s opinion observes that if African-Americans were citizens they would have “the right . . . to keep and carry arms wherever they went.”<sup>28</sup>

Two decades later in *United States v. Cruikshank*,<sup>29</sup> the Court concluded

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<sup>25</sup> Louis A. Craco, Jr. *A Right to Bear Arms?*, 7 EXPERIENCE 6, 7 (Summer 1997).

<sup>26</sup> 307 U.S. 174 (1939).

<sup>27</sup> 60 U.S. 393 (1856).

<sup>28</sup> *Dred Scott*, 60 U.S. at 417.

<sup>29</sup> 92 U. S. 542 (1875).

that the right to keep and bear arms is not an individual right . . . “granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government.” Thus, the Second Amendment guaranteed to individual right to arms.

A decade later in *Presser v. Illinois*<sup>30</sup> the Court reaffirmed that the Second Amendment did not guarantee an individual right to keep and bear arms. However, the Court held that the Second Amendment was a prohibition on the states’ ability to ban firearms. The Supreme Court said “the states cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of its rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.”<sup>31</sup> Michael T. O’Donnell has concluded from this holding that, “a state could not disarm its citizens . . . because . . . they belong to the federal militia, and the states are prohibited from disarming the federal militia.”<sup>32</sup>

Fifty-five years later the Supreme Court decided *United States v. Miller*.<sup>33</sup> In *Miller*, a defendant had been convicted for interstate transportation of a sawed-off shotgun in violation of the National Firearms Act of 1934. The Court, after reviewing the history of the Second Amendment and the role of the militia in colonial times, rejected the Second Amendment attack on the conviction. The Court reasoned:

In the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument . . . With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

John C. Davenport observes that when mid-eighteenth-century American lawmaking bodies bought arms in England, they did not seek weapons useful for sport or hunting—for private or individual employment outside military

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<sup>30</sup> 116 U.S. 252 (1886).

<sup>31</sup> *Id.* at 265.

<sup>32</sup> Michael T. O’Donnell, Note: *The Second Amendment: A Study in Recent Trends* (25 U. RICH. L. REV. 501, 507 (1991)).

<sup>33</sup> 307 U.S. 174 (1939).



service—but rather standard military issues of the day, such as the British army “Brown Bess” equipped with bayonet.<sup>34</sup> Is it possible, then, that the Framers were most interested in citizens, possessing military style weapons, limited to military purposes, for employment only during their militia service?

The ratification fight of 1787-1788 in context with regard to the subsequent Second Amendment. The Anti-Federalists’ concern was with the states having to share control of their militias with the federal government and not—to any degree yet demonstrated—with protecting gun rights of their local citizens outside of their obligation to serve in their respective states’ well-regulated militias.

Having identified very broadly the different views on the historical context of the Second Amendment I will now associate each with a cultural icon. Sociologist James William Gibson tells us that American cultural mythology has always been torn between two images. The first is that of the soldier who defends the nation as part of an official force. The other is that of the warrior who acts alone.<sup>35</sup> The first figure was portrayed by actors such as Gary Cooper when playing the selfless soldier or the Western sheriff.<sup>36</sup> The second figure was represented by figures such as Daniel Boone and Davy Crockett who, as Gibson puts it, are “men of great bravery and virtue who live on the frontier and fight on behalf of civilization, but who themselves never desire to live in the domesticated interior of society.”<sup>37</sup> One is a loyal part of a community, the other is an independent entity. However, insurrectionist does not fit either image. Instead it is embodied by the truculent image of the Oklahoma City bombers.

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<sup>34</sup> John C. Davenport, *The Second Amendment, Original Intent, and Firearms Acquisition in Colonial America*, Unpublished Paper Given at the Omohundro Institute of Early American History and Culture’s Annual Colonial Conference, Boulder, CO. (June 1996).

<sup>35</sup> James William Gibson, *WARRIOR DREAMS: VIOLENCE AND MANHOOD IN POST-VIETNAM AMERICA* 17 (1995).

<sup>36</sup> Gibson, *supra* note 35, at 30-31.

<sup>37</sup> *Id.* at 390.