

TOWARD AN ANNOTATED BIBLIOGRAPHY OF THE SECOND AMENDMENT

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This article summarizes the treatment of the Second Amendment in law journals in the last decade, and offers the author's analysis of the merits of some of the more important articles. Don B. Kates and Gary Kleck are the authors of "The Great American Gun Debate" (Pacific Research Institute, 1997), from which this article is partly adapted. Links to full-text version of many of the articles discussed below can be found at the following site <http://www.primenet.com/~mfuller/legal/>

1. SUMMARY OF THE LITERATURE

Of the more than sixty law review articles treating the Second Amendment that have appeared since 1980, only a handful argue that the Amendment is a right pertaining to state militias rather than to individuals. The few articles taking this position generally appear in minor law journals and are authored by officers or lobbyists for anti-gun groups. (See section 3 below.)

The individual right literature so completely dominates the scholarship in this field that even vehemently anti-gun academics now recognize the individual right view as the "standard model" among scholars writing on the Amendment. [The term "standard model" was first used by a proponent of the individual right view, Glenn H. Reynolds professor of constitutional law at the University of Tennessee, surveying the scholarly literature in "A Critical Guide to the Second Amendment," 62 *Tenn. L. Rev.* 461 (1995). For its acceptance by vehement opponents, see Herz (below) and Garry Wills, "To Keep and Bear Arms," *New York Review Of Books*, September 21, 1995.]

Unlike articles promoting the states' right view, articles endorsing the standard model are authored by preeminent constitutional scholars, *regardless of their attitude toward firearms*, and appear in top journals. Authors include luminaries of liberal constitutionalism such as former ACLU national board member Duke University Law School professor of constitutional law William Van Alstyne. Equally liberal and prestigious are Akhil Amar (professor of constitutional law at Yale) and Sanford Levinson (professor of constitutional law at the University of Texas)—men who have never owned a gun or even fired one.

Levinson's study of the Amendment forced him to admit that it precludes his desire to ban firearms ["The Embarrassing Second Amendment", 99 *Yale L. J.* 637 (1989)]. It even caused him to begin questioning the wisdom of that desire. He also speculates that the reason comparatively few constitutional law professors study the Second Amendment is that they fear such study will have the same effects on them.

Prof. Amar's article discussing collective aspects of the Bill of Rights ["The Bill of Rights as a Constitution", 100 *Yale L. J.* 1131 (1990)], recognizes that the Second Amendment has both individual and collective aspects. But in finding that the Amendment has collective aspects he emphatically does not suggest that the text of the Amendment precludes individuals from enforcing it on behalf of the whole populace collectively. The Second Amendment is no less enforceable by individuals than such other collective rights as the First Amendment's right to assemble (also phrased as a "right of the people"), the Sixth Amendment right to jury trial and the Fifteenth and Nineteenth Amendment rights to vote without discrimination on the basis of race or sex.

In a later work, Amar asserts that as the Second Amendment operates to preclude federal gun bans, state bans are precluded by Fourteenth Amendment. In this respect Amar stresses the changing motive for guaranteeing the right to arms: The Second Amendment's original immediate purpose in 1791 was to deter tyranny by the federal government; but the Fourteenth

Amendment was enacted after the Civil War. The authors of that Amendment were focussed on assuring that blacks and Southern Unionists could not be disarmed and made helpless against the KKK. Akhil Amar, “The Bill of Rights and the Fourteenth Amendment”, 101 *Yale L. J.* 1193 (1992).

Prof. Van Alstyne’s “The Second Amendment and the Personal Right to Arms”, 43 *Duke L. J.* 1236 (1994) closely parses the Amendment’s text, and shows that the language necessarily supports the standard model interpretation. A former member of the ACLU national board, he compares the NRA with the ACLU (both groups being dedicated to taking constitutional rights seriously and opposed by those who refuse to honor rights they dislike).

Harvard law professor Alan Dershowitz (a colleague of Van Alstyne on the ACLU national board) personally loathes guns, and urges that the Second Amendment be repealed. But he chides:

Foolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it’s not an individual right or that it’s too much of a safety hazard They’re courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don’t like.

2. PURPOSE OF THE SECOND AMENDMENT

Opponents of the individual right view tend to see the Amendment’s purpose as allowing the armed people to overthrow a tyrannical government. While that is not wholly wrong, it makes the tail wag the dog. As documented in my article “The Second Amendment and the Ideology of Self-Protection” 9 *Constitutional Commentary* 87 (1992), the Amendment can only be understood in light of the Founders’ attitude toward self-defense. Following Locke, Montesquieu and Blackstone, the Founders deemed self-defense the cardinal natural right and saw it as encompassing the concomitantly

inalienable right of possessing personal arms for defense of self, home and family.

The Founders were entirely unconscious of the distinction we tend to make between crime in general and the crimes committed by governments. The Founders' reading of history, and their own experience with the searches carried out by British soldiers in the colonies before the Revolution, had acquainted them with the whole spectrum of political crime. That spectrum runs from assassination, rape, and robbery perpetrated against political dissenters all the way up to genocide. The Amendment was intended to allow individuals to defend against the "wicked Magistrate" and his "crew of Lewd Villains" (quoting Algernon Sidney), and the Amendment assures that the whole citizenry may defend itself collectively against whole armies of villains.

In the ultimate extreme, self-defense includes overthrowing tyrants. But the Founders believed that the existence of an armed populace will generally avert the necessity of actual resistance or revolution, by deterring government and rulers from their inherent tendency to tyrannize and oppress.

Finally, the Founders believed (as Professor Shalhope puts it) "that the perpetuation of a republican spirit and character in [a free] society depended upon the freeman's possession of arms as well as his ability and willingness to defend both himself and his society."

3. ANTI-SECOND AMENDMENT LAW REVIEW ARTICLES

Standing head and shoulders above all other challenges to the standard model are two articles by Indiana University law professor David Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment", 101 *Yale L.J.* 551 (1991) and "The Militia Movement and Second Amendment Revolution: Conjuring with the People," 81 *Cornell L. Rev.* 879 (1996). Insofar as the standard model relies on the ideology of civic republicanism (see Shalhope, below), Williams seeks to turn the republicanism upside down; he argues that the Amendment only guaranteed an armed citizenry in earlier eras

when Americans were universally armed: Thus, while the Amendment is an individual right it is inapplicable to present-day America in which only one half of households are armed.

According to Williams, the Amendment's purpose was to insure that all segments of the populace would be equal in power to each other. Cryptically asserting that John Locke's influence on the Founders has been exaggerated, Williams summarily dismisses the additional and alternative ideology (set out in section 2 above) that the Founders deemed the right to arms integral to the cardinal right of self-defense. Williams fails to address the fact that the inalienable natural right to possess arms for self-defense was championed by Montesquieu and Blackstone—the two theorists most widely read in 18th Century America.

More typical of attacks on the standard model view are Dennis Henigan, "Arms, Anarchy and the Second Amendment", 26 *Valparaiso U. L. Rev.* 107 (1991) and Keith Ehrman & Dennis Henigan, "The Second Amendment in the 20th Century: Have You Seen Your Militia Lately", 15 *U. Dayton L. Rev.* 5 (1989). Dennis Henigan is Director of the Legal Action Project at the Center to Prevent Handgun Violence in Washington, D.C. (The research arm of Handgun Control, Inc.) Henigan sees the standard model (individual right) theory of the Amendment as based on assuring that citizens will have arms in order to overthrow the federal government. From this limited and distorted vision (see section 2 above) of what the standard model position entails, Henigan argues that it is absurd to suggest the U.S., or any government would actually write such a right into its Bill of Rights.

Yet Henigan's own theory of the Amendment is just as insurrectionary. He argues that the Amendment's purpose was to assure that the states would always have the power to resist an oppressive federal government.

Other attacks on the individual right position are similar, and often derivative of Henigan's. They include: Richard M. Aborn, "The Battle Over the Brady Bill and the Future of Gun Control Advocacy" 22 *Fordham Urban L. J.* (1995) (by then-president

of Handgun Control, Inc.); Student Comment: "Ending the Other Arms Race: An Argument for a Ban on Assault Weapons", 10 *Yale L. & Policy Rev.* 488 (1992); Sam Fields, "Guns, Crime and the Negligent Gun Owner", 10 *N. Ky. L. Rev.* 141 (1982) (by non-lawyer lobbyist for the National Coalition to Ban Handguns); Warren Spannaus, State Firearms Regulation and the Second Amendment, 6 *Hamline L. Rev.* 383 (1983) (by anti-gun politician).

Four other articles are worthy of special note: Carl Bogus, "Race, Riots and Guns", 66 *U.S.C.L. Rev.* 1365 (1993). The author was at the time a member of the board of the Center to Prevent Handgun Violence. It is not clear that this article really qualifies as a treatment of the Second Amendment. It consists merely in a multiplicity of conclusory denials that the Amendment protects individual gun ownership, intermixed with an argument that the Amendment's real purpose was to guarantee the ability of white slaveholders to keep control over their slaves. Even the slave-control motive is true, Bogus does not explain why and how that purpose contradicts the fact that the Amendment is a right of individuals.

In Donald Beschle's "Reconsidering the Second Amendment: Constitutional Protection for a Right of Security", 9 *Hamline L. Rev.* 69 (1986), the author, a law professor, concedes the Amendment does guarantee a right of personal security, but argues that that can constitutionally be implemented by banning and confiscating all guns.

A student Note, "The Second Amendment: A Study of Recent Judicial Trends", 25 *Richm. L. Rev.* 501 (1991), suggests that, whatever the actual intent of the Amendment, the lower federal courts have refused to enforce it to invalidate gun control laws.

One of the most vitriolic articles ever published on the Second Amendment is Andrew D. Herz's "Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibilities, 75 *Boston U. L. Rev.* 57 (1995). This article by a lawyer who has founded his own anti-gun group focuses on lower federal court decisions; on this and many other points, the

article is heavily derivative of Henigan. The article's only significant addition to the debate are its scurrilous attacks on the character and motives of Professors Amar, Levinson and Van Alstyne, etc., claiming they are minions of the gun lobby. (For the falsity of this, see section 1 above.) Herz offers crucial assertions without footnotes or with misleading ones. For an exhaustive refutation see "Under Fire: The New Consensus on the Second Amendment," by Boston University law professor Randy E. Barnett and me in *Emory L. J.*, 1997.

4. HISTORICAL ARTICLES

The literature is broadly divisible into historical versus philosophical versus legal treatments (though many articles reach all three categories).

Regarding pre-nineteenth century history, the definitive treatment is *To Keep And Bear Arms: The Origins Of An Anglo-American Right* (Harvard U. Press, 1994) by Prof. Joyce Lee Malcolm, an historian whose specialty is 17th-18th Century English and American history. The research for this work was supported not by the gun lobby, but by the American Bar Foundation, the National Endowment for the Humanities and Harvard Law School.

Malcolm's research "demolishes the notion that the framers envisioned the right to keep arms only in the context of organized militia bodies," observed a review by Vanderbilt University legal historian James E. Ely, Jr., *52 William. & Mary Q.* (3rd Series) 212 (1995). Ely, by the way, has never owned a firearm and has no association with the gun lobby

English scholars agree with Ely's assessment. See, for example, political scientist David Wootton's review, "Disarming the English" in the *London Times Review of Books*, July 21, 1994; and historian F. Paul Smoler's review in the August 7, 1994 *London Observer*.

Enthusiastic American reviews of Malcolm's book include: Robert J. Cottrol and Raymond T. Diamond, "'The Fifth Auxiliary Right'", 104 *Yale L. J.* 995 (1994); David B. Kopel,

“It Isn’t About Duck Hunting: The British Origins of the Right to Arms”, 93 *Mich. L. Rev.* 1333 (1995); Jeremy Rabkin [Cornell U. professor of political science], “Constitutional Firepower: New Light on the Meaning of the Second Amendment,” 86 *J. Crim. L. & Criminol.* 231 (1995); and T. Markus Funk, “Is the True Meaning of the Second Amendment Really Such A Riddle?” 39 *Howard L. J.* 411 (1995). See also the review in the *Washington Times*, May 8, 1994 by American historian Richard Maxwell Brown, whose disdain for guns and the gun culture is strongly expressed in his book *No Duty To Retreat: Violence And Values In American History And Society* (Oxford, Oxford U. Press, 1991).

5. PHILOSOPHICAL ARTICLES

Malcolm focuses on pre-nineteenth century English and American history and common law with only cursory references to the philosophical background or to developments after the eighteenth century. For the philosophical background see two works by the intellectual historian Robert Shalhope, “The Armed Citizen in the Early Republic”, 49 *Law & Contemp. Probs.* 125 (1986) and “The Ideological Origins of the Second Amendment”, 69 *J. Am. Hist.* 599 (1981). His concern is primarily with the philosophy of “civic republicanism” and the Florentine-Atlantic schools of thought.

A broader treatment that includes ancient Roman and Greek philosophy, and emphasizes the ideology of self-defense no less than “civic republicanism”, is “*That Every Man Be Armed*”: *The Evolution of a Constitutional Right* (U. N.M. Press, 1984, reprinted by Independent Institute, Oakland, Calif.) by the philosophy professor turned lawyer Stephen Halbrook. A further virtue of this book, and his subsequent book, *A Right To Bear Arms: State And Federal Bill Of Rights And Constitutional Guarantees* (Greenwood, 1989) is extensive coverage of relevant legal and historical events since the eighteenth century.

Other treatments of philosophical aspects are Elaine Scarry [Harvard U. professor of English], “War and the Social

Contract: The Right to Bear Arms”, 139 *U. Pa. L. Rev.* 1257 (1991) and James Gray Pope [Rutgers U. professor of law], “Republican Moments: The Role of Direct Popular Power in the American Constitutional Order,” 139 *U. Pa. L. Rev.* 287 (1991).

The most comprehensive law review treatment is my “Handgun Prohibition and the Original Meaning of the Second Amendment”, 82 *Mich. L. Rev.* 203 (1983). It should be supplemented by reading my “The Second Amendment and the Ideology of Self-Protection” 9 *Constitutional Commentary* 87 (1992) (discussed in section 2 above) and my debate with Prof. Halbrook over what kinds of gun controls the Amendment protects: Halbrook, “What the Framers Intended: A Linguistic Interpretation of the Second Amendment”, 49 *Law & Contemp. Probs.* 153 (1986) versus Kates, “The Second Amendment: A Dialogue”, 49 *Law & Contemp. Probs.* 143 (1986). Halbrook and I agree that the Amendment guarantees an individual right to keep ordinary small arms, and that the right does not extend to serious criminals; but we disagree as to registration and licensing of firearms and as to the extent to which the carrying of arms can be regulated (though not totally prohibited).

Professor Nelson Lund dismisses the concepts championed by both of us as being too narrowly historical. Nelson Lund, “The Past and Future of the Individual’s Right to Arms,” 31 *Georgia Law Review* 1 (1997).

Lund’s is one of several very recent articles which analyze the relevant evidence, and Van Alstyne’s, Amar’s etc., commentary on the Amendment more from the perspective of current modalities of constitutional interpretation than in purely historical terms. All these very recent analyses reach the same general standard model conclusions. As University of Texas Law Professor Scot Powe puts it, “Like all other constitutional law scholars who have taken the time to analyze the Second Amendment, I join them in reluctantly singing the Monkees’ refrain: ‘I’m a believer’” L.A. Scot Powe, Jr., “Guns, Words and Interpretation,” 38 *Wm. & M. L. Rev.* (1997). A First Amendment scholar, Powe rigorously applies standards from the First Amendment area to the Second.

Two articles to the same effect from the liberal, African American constitutional scholar Nicholas J. Johnson [Fordham U. professor of law], are "Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory and the Second, Ninth and Tenth Amendments," 57 *Ohio St. L. J.* 1556 (1996) and "Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Aborn," 22 *Fordham Urban L. J.* 441 (1995). See also Thomas McAfee & Michael J. Quinlan "Bringing Forward The Right to Keep and Bear Arms: Do Text, History or Precedent Stand in the Way?," 75 *U. N.C. L. Rev.* (forthcoming, 1997); David Vandercoy [Valpariso U. professor of law], "The History of the Second Amendment", 28 *Valparaiso L. Rev.* 1006 (1994).

6. SPECIAL TOPICS

Several specialized works deserve discussion:

Inge Anna Larish, "Why Annie Can't Get a Gun: A Feminist Appraisal of the Second Amendment", 1996 *U. Ill. Law F.* 467 concludes that it is desirable for women to have the option to choose to own a firearm for protection, a choice which is guaranteed them by the Second Amendment.

Brannon Denning, "Can the Simple Cite Be Trusted: Lower Court Interpretations of *United States v. Miller* and the Second Amendment," 26 *Cumberland L. Rev.* 961 (1996). Denning argues that, though many lower federal court opinions approve the states' right position, those opinions are based on a misunderstanding of the Supreme Court's ruling in *United States v. Miller*.

Stephen P. Halbrook, "Congress Interprets the Second Amendment: Declarations by A Co-Equal Branch on the Individual Right to Keep and Bear Arms," 62 *Tenn. U. L. Rev.* 597 (1995) cites three instances of Congress officially recognizing the Second Amendment as an individual constitutional right. As a co-equal branch of government, Congress' pronouncements on the subject are entitled to great weight.

Glenn H. Reynolds & Don B. Kates, “The Second Amendment and States’ Rights: A Thought Experiment”, 36 *Wm. & Mary L. Rev.* 1737 (1995) takes the states’ right theory of the Amendment seriously—something the theory’s proponents have never done. Based on the proponents’ claim that the Amendment was intended to give the state militias military parity with the U.S. military, it follows that the Amendment: repeals the provisions of the original Constitution barring the states from having warships, raising troops in time of peace or issuing letters or marque and reprisal; entitles the state to manufacture atomic weapons, notwithstanding any contrary federal law; and empowers state to authorize their citizens (i.e., its “unorganized militia”) to possess fully automatic weapons or any other kind of weapon, notwithstanding any contrary federal law. (Note that the individual right position does not entail a citizen right to possess anything beyond small arms, for the individual right position sees the Amendment’s central purpose as allowing for individual self-defense and not as expressing hostility toward the military-militia provisions of the original Constitution).

For another examination of the states’ rights view, see Gregory Lee Shelton, “In Search of the Lost Amendment: Challenging Federal Firearms Regulation Through Utilization of the State’s Right Interpretation of the Second Amendment,” 1995 *Florida State U. L. Rev.*

T. Markus Funk, “Gun Control and Economic Discrimination: The Melting-Point Case-in-Point”, 85 *J. Crim. & Criminol.* 764 (1995) addresses “Saturday Night Special” laws, and concludes that they are criminologically useless (criminals do not desire cheap guns and have the money to buy better; only the law abiding poor will be disarmed by the SNS approach) and that such statutes violate the Fourteenth Amendment guarantee of equal protection of the law as well as the Second Amendment.

One of Funk’s points is that, historically, SNS laws have covertly aimed at disarming blacks, a point which two black legal historians have addressed about gun control in general.

Robert J. Cottrol and Raymond T. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration", 80 *Georgetown L.J.* 309 (1990) and "'Never Intended to be Applied to the White Population': Firearms Regulation and Racial Disparity, The Redeemed South's Legacy to a National Jurisprudence?", 70 *Chicago-Kent L. Rev.* 1307 (1995).

Prof. Cottrol has also written the entry on the Second Amendment in the *Oxford Companion To The United States Supreme Court* (Oxford U. Press, 1992) and edited a three volume documentary history of the Amendment: Robert J. Cottrol, *Gun Control And The Constitution* (Garland, 1993).

7. OTHER ARTICLES

Besides the articles and books discussed above, analysis of the Second Amendment may be found, among other places, in:

McAfee and Quinlan, "Bringing Forward the Right to Keep and Bear Arms: Do Text, History or Precedent Stand in the Way?" 75 *N.C.L. Rev.* (1997); David B. Kopel and Christopher C. Little, "Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition," 56 *Maryland L. Rev.* 101(1997); Scott Bursor, "Toward a Functional Framework for Interpreting the Second Amendment," 74 *Texas Law Review* 1125 (1996); Kevin D. Szepanski, "Searching for the Plain Meaning of the Second Amendment," 44 *Buff. L. Rev.* 197 (1996); Anthony Dennis, "Clearing the Smoke from the Right to Bear Arms and the Second Amendment", 29 *Akron Law Review* 57 (1995); Quinlan, "Is There a Neutral Justification for Refusing to Implement the Second Amendment or Is the Supreme Court Just 'Gun Shy'?" 22 *Capital U. L. Rev.* 641 (1993); Martire, "In Defense of the Second Amendment: Constitutional and Historical Perspectives," 21 *Lincoln L. Rev.* 23 (1993); Stephen P. Halbrook, "The Right of the People or the Power of the State: Bearing Arms, Arming Militaries, and the Second Amendment," 26 *Val. U. L. Rev.* 131 (1991); Stephen Halbrook, "Encroachments of the Crown on the Liberty of the

Subject: Pre-Revolutionary Origins of the Second Amendment,” 15 *Dayton L. Rev.* 91 (1989); Leonard Levy, *Original Intent and the Framers' Constitution* (1988); David Hardy, “The Second Amendment and the Historiography of the Bill of Rights,” 4 *J.L. & Pol’y* 1 (1987); Nelson Lund, “The Second Amendment, Political Liberty and the Right to Self-Preservation,” 39 *Ala. L. Rev.* 103 (1987); *Encyclopedia of the American Constitution*, vol. 4 (Karst & Levi eds., 1986); David Hardy, “Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment,” 9 *Harv. J.L. & Pub. Pol’y* 559 (1986).

The above articles all argue for the individual rights position. The following articles argue to the contrary: Michael A. Bellesîles, “The Origins of Gun Culture in the United States,” 83 *Journal of American History* 425 (1996); Anastaplo, “Amendments to the Constitution of the United States: A Commentary,” 23 *Loyola-Chicago L.J.* 631 (1992).