To Keep and Bear Arms

By Garry Wills

WORKS DISCUSSED IN THIS ARTICLE

Second Amendment Symposium Issue
University of Tennessee—Knoxville College of Law, 378 pp., $7.00 (paper)

A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees
by Stephen P. Halbrook
Greenwood Press, 173 pp., $49.95

To Keep and Bear Arms: The Origins of an Anglo-American Right
by Joyce Lee Malcolm
Harvard University Press, 232 pp., $29.95

Guns, Crime, and Freedom
by Wayne LaPierre, foreword by Tom Clancy
HarperPerennial, 263 pp., $12.50 (paper)

An Argument, Shewing, that a Standing Army Is inconsistent with A Free Government, and absolutely
destructive to the Constitution of the English Monarchy
by John Trenchard
London

Over the last decade, an industrious band of lawyers, historians, and criminologists has created a vast outpouring of articles justifying individual gun ownership on the basis of the Second Amendment: "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."

This body of commentary, much of it published in refereed law journals, has changed attitudes toward the Second Amendment. The National Rifle Association's lobbyists distribute it to legislators. Journalists like Michael Kinsley and George Will disseminate this school's views. Members of it now claim, on the basis of their work's quantity and what they believe is its quality, that scholarship on this subject is now all theirs—so that even to hold an opposing view is enough to "discredit its supporters," according to the historian Joyce Lee Malcolm.[1]

The *Tennessee Law Review* devotes most of its Spring issue to a collection of articles by members of this school, including one that says its authors have created "the Standard Model" for interpreting the Second
Amendment. To this mood of self-congratulation can be added the fact that a majority of Americans tell pollsters that they believe the Second Amendment protects private ownership of guns. So the defenders of that position feel they hold both the scholarly high ground and the popular consensus. The five who constitute a kind of inner circle of Standard Modelers—Robert J. Cottrol, Stephen P. Halbrook, Don B. Kates, Joyce Lee Malcolm, and Robert E. Shalhope—recycle each other's arguments energetically. Three of the five write in the *Tennessee Law Review* issue, one of them (Malcolm) devoting her essay to the fourth (Cottrol), while the fifth (Shalhope) is frequently cited.

Then why is there such an air of grievance, of positive victimhood, in the writings of the "Standard Model" school? They talk of the little honor they are given, of the "mendacious" attitude of the legal establishment, of a rigidity that refuses to recognize their triumph. Don Kates (with co-authors) sputters in mixed metaphors of an opposition that "exists in a vacuum of lock-step orthodoxy almost hermetically sealed from the existence of contrary data and scholarship."[2] Randy E. Barnett, introducing the *Tennessee Law Review* symposium predicts dire things if people do not "accord some respect to those citizens (and academics) whose views it [the Standard Model Scholarship] supports."[3] Glenn Harlan Reynolds, in the article stating the Standard Model thesis, argues that militia extremism may be fueled by the Model's opponents, who are "treating the Constitution, too, as a preserve of the elite."[4]

Their own reciprocating nods and citations of approval are apparently not enough for these authors. Nor is popular support enough. They still talk like Rodney Dangerfield, getting no respect. They should ask themselves more penetratingly why this should be. Perhaps it is the quality of their arguments that makes them hard to take seriously.

Take the case of Stephen P. Halbrook, one of the central figures in this new literature. His imaginative manipulation of evidence runs to arguments like this, from his 1989 book, *A Right to Bear Arms*: the Second Amendment cannot be referring only to military weapons, since a Federal-period dictionary (Noah Webster's), under "bear," lists "to bear arms in a coat" as one usage, and only a handgun could be carried in a coat pocket.[5] Mr. Halbrook does not recognize the term "coat of arms," a decidedly military form of heraldry presided over by the College of Arms (by Mr. Halbrook's interpretative standards, a medical institution specializing in the brachium).

The quality of the school's arguments can be seen in the very article that proposes the "Standard Model" as the norm of scholarship in this area. Glenn Harlan Reynolds "proves" that the Second Amendment looked to private ownership of guns by quoting Patrick Henry, in these words (and these words only): "The great object is that every man be armed…. Everyone who is able may have a gun."[6]

That quotation comes from the debate over adopting the Constitution. It cannot, therefore, be concerned with the Second Amendment, which was not proposed until after the Constitution was in effect. Henry is not discussing the Amendment's text, which the Standard Model says looks to other weapons than those used by the militias (citizens' armies) of the states. Henry is talking precisely about the militia clause in the Constitution, which refers *only* to military weapons ("Congress shall have the power to provide for organizing, arming, and disciplining the militia," Article I, Section 8, Clause 16). Henry argues that federal arming of militias will either supplant or duplicate the states' arming of their own forces (the arrangement under the Articles of Confederation and in colonial times). He says that, in the case of duplication.

Our militia shall have two sets of arms, double sets of regimentals, &c.; and thus, at a very great cost, we shall be doubly armed. The great object is that every man [of the militia] be armed. But can the people afford to pay for double sets of arms, &c? Every one who is able may have a gun. But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia
completely armed, it is still far from being the case.[7]

The debate throughout is on ways to arm the militia. The "arms" referred to are cognate with "regimentals, etc." as military equipment. The attempts to get guns in every hand are the result of state laws for equipping the militia. Henry is saying that if the states could not do this heretofore, how is the federal government to do it?

Time after time, in dreary expectable ways, the quotes bandied about by Standard Model scholars turn out to be truncated, removed from context, twisted, or applied to a debate different from that over the Second Amendment. Those who would argue with them soon tire of the chase from one misquotation to another, and dismiss the whole exercise—causing the angry reaction from Standard Modelers that they are not taken seriously. The problem is that taking them seriously is precisely what undermines their claims.

Yet both the general public, which has a disposition to believe that the Second Amendment protects gun ownership, and the NRA lobby are bolstered in that view by the sheer mass of the articles now being ground out and published in journals. It is difficult to sort out all the extraneous, irrelevant, and partial material daily thrown into the debate. Even to make a beginning is difficult. One must separate what the Second Amendment says from a whole list of other matters not immediately at issue. Some argue, for instance, that there is a natural right to own guns (Blackstone is often quoted here) antecedent to the right protected by the amendment, or that such a right may be protected in other places (common law, state constitutions, statute, custom, etc.). All that could be true without affecting the original scope of the Second Amendment. One could argue for instance, that owners of property have a right to charge rental on it—but that is not the point at issue in the Third Amendment (against quartering federal troops on private property).

In order to make any progress at all, we must restrict ourselves to what, precisely, is covered by the Second Amendment. That is not hard to determine, once the irrelevant debris adrift around its every term has been cleared away. Each term exists in a discernible historic context, as does the sentence structure of the amendment.

That amendment, as Madison first moved it, read:

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. [8]

The whole sentence looks to military matters, the second clause giving the reason for the right's existence, and the third giving an exception to that right. The connection of the parts can be made obvious by using the same structure to describe other rights. One could say, for instance: "The right of free speech shall not be infringed; an open exchange of views giving the best security to intellectual liberty; but no person shall be free to commit libel." Every part is explained in relation to every other part. The third clause makes certain what Madison means in this place by "bear arms." He is not saying that Quakers, who oppose war, will not be allowed to use guns for hunting or sport.

Did the changes made to Madison's proposed amendment remove it from its original (solely military) context? Only two substitutions were made in the wording—"country" became "state" and "the best security of" became "necessary to." This latter change might demote the right to bear arms by comparison with other rights (perhaps, say, free speech is the very best security of freedom), but it does not alter the thing being discussed.[9] Beyond that, nothing was added to the text, so it could not be altered by addition. Was it altered by deletion? "Well armed and" was dropped, in drafting sessions that generally compressed the language, but "well regulated" includes "well armed" (see below, Number 3). Then the whole third clause was omitted—but for a reason that still dealt with the military consequences of the sentence.
Elbridge Gerry objected to the third clause on the grounds that rulers might *declare* some people "scrupulous" and then exclude them from service—as some tended to declare Quakers ineligible for office since they take no oaths; or as Catholics were once declared incapable, without scruple, of defending a Protestant government.[10] Gerry was clearly talking of public service, not whether Quakers should go hunting or target shooting. His objection resembles the one Samuel Johnson made to limiting militia service by the imposition of a religious oath.[11]

One transposition was made in Madison's sentence, but it *strengthened* the military context, as even the Standard Modeler, Joyce Lee Malcolm, admits.[12] The basis for the asserted right was put first, as is normal in legal documents. The preamble, the "whereas," the context-establishing clause—these set the frame for what 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." To use again the parallel sentence on free speech, transposition would produce: "An open exchange of views being necessary to the security of intellectual liberty, the right of free speech shall not be infringed." Such preceding declaration of intent is found, for example, in the Constitution's copyright clause (Article I, Section 8, Clause 8), where the simple listing of granted powers "to coin money…to declare war," etc., is varied by a prior statement of purpose: "to promote the progress of science and useful arts by securing for limited times to authors and inventors…" The prefixed words give the reason for, and scope of, what follows.

So nothing was added or changed that affected Madison's original subject matter. The things removed did not change the sentence's frame of reference. The transposition fixed the sentence even more precisely in a military context. How, then, did the ratification alter Madison's terms? The Standard Modelers draw on an argument made by Stephen Halbrook, an argument often cited by the NRA:

The Senate specifically rejected a proposal to add "for the common defense" after "to keep and bear arms," thereby precluding any construction that the right was restricted to militia purposes and to common defense against foreign aggression or domestic tyranny.[13]

His proof of deliberate preclusion is this passage in the Senate records: "It was moved, to insert the words, 'for the common defence,' but the motion was not successful." We are not told why the motion failed. We know the Senate was mainly compressing and combining the amendments, not adding to the language. There are several possible reasons for the action, all more plausible than Halbrook's suggestion that "for the common defense" would have *imported* a military sense that is lacking without it. The military sense is the obvious sense. It does not cease to become the obvious sense if something that might have been added *was* not added.

The obvious reason for excluding the term "common defense" is that it could make the amendment seem to support only joint action of the state militias acting in common (shared) defense under federal control. The Articles of Confederation had used "common defense" to mean just that, and the defenders of state militias would not want to restrict themselves to that alone.[14] The likelihood that this is the proper reason is strengthened when it is considered in relation to another change the drafters made in Madison's text, from "free country" to "free state." We are not expressly given the reason for that change, either; but most people (including Standard Modeler Malcolm) agree that the reason was to emphasize the state's separate militias, not the common defense of the country.[15] If that is the obvious reason there, it is also the obvious reason for omitting "common defense."

There are other possible (though less plausible) reasons for the omissions—e.g., to prevent tautology. What is neither warranted nor plausible is Halbrook's certitude that these words were omitted *deliberately* to *preclude* militia-language. The whole context of the amendment was always military. Halbrook cannot effect an alchemical change of substance by bringing two words, "common defense," near to, but not into, the
1. **Bear Arms.** To bear arms is, in itself, a military term. One does not bear arms against a rabbit. The phrase simply translates the Latin *arma ferre*. The infinitive *ferre*, to bear, comes from the verb *fero*. The plural noun *arma* explains the plural usage in English ("arms"). One does not "bear arm." Latin *arma* is, etymologically, war "equipment," and it has no singular forms. By legal and other channels, *arma ferre* entered deeply into the European language of war. To bear arms is such a synonym for waging war that Shakespeare can call a just war "just-borne arms" and a civil war "self-borne arms."

Even outside the phrase "bear arms," much of the noun's use alone echoes Latin phrases: to be under arms (*sub armis*), the call to arms (*ad arma*), to follow arms (*arma sequi*), to take arms (*arma capere*), to lay down arms (*arma ponere*). "Arms" is a profession that one brother chooses as another chooses law or the church. An issue undergoes the arbitrament of arms. In the singular, English "arm" often means a component of military force (the artillery arm, the cavalry arm).

Thus "arms" in English, as in Latin, is not restricted to the meaning "guns." The Romans had no guns; and they did not limit *arma* to projectile weapons (spears, arrows). It meant weaponry in general, everything from swords to siege instruments—but especially shields. That is why the heraldic use of "arms" in English (the very case Stephen Halbrook invokes) refers to shields "coated" (covered) with blazonry.

Of course, even the Latin *arma ferre* can be used figuratively, metaphorically, poetically (bear arms in Cupid's wars, animals bear arms in their fighting talons or tusks). But these are extensions of the basic meaning, and the Second Amendment is not a poetic text. It is a legal document, the kind in which *arma ferre* was most at home in its original sense; a text, moreover, with a preamble establishing a well-regulated militia as the context.

Standard Modelers try to get around this difficulty by seeking out every odd, loose, or idiosyncratic use of "bear arms" they can come up with—as if the legal tradition in which the Second Amendment stands must yield to marginal exceptions, in defiance of the solid body of central reference. Or they bring in any phrase that comes near "bear arms" without being that phrase. Stephen Halbrook cites a law concerning deer hunting that refers to "bearing of a gun" in the hunt. Not only is the context different from the amendment's, but "bearing of a gun" is not the canonical formulation with a plural noun. In Latin a hunter could be seen to carry a bow (*arcum ferre*) without that altering the military sense of *arma ferre*.

It is impossible to follow the gun people into every thicket of their linguistic wild-hare chase, but one passage must be considered since it comes up again and again in the new writings. Even the sensible essay in the *Tennessee Law Review* by Colonel Charles J. Dunlap, Jr., says that "the minority of the Pennsylvania state convention that voted to adopt the Constitution" put "killing game" among the objects of a "right to bear arms." That is now the customary way for the Standard Modelers to refer to the passage at issue: it is the position of "the minority" in the Pennsylvania ratifying convention. That makes it sound like the view of a considerable body of men (though not the majority). Dunlap took his information from an article written in a law journal by Robert Dowlut, the General Counsel of the National Rifle Association—an affiliation that helps explain the wide dissemination of this argument.

It is true that an omnium gatherum of arguments against the Constitution was hastily assembled and published five days after Pennsylvania's ratification of the Constitution. The author was probably the propagandist Samuel Bryan, not himself a delegate in the convention, but one who took what the minority delegates gave him, including a hastily scribbled last-minute set of objections raised by Robert Whitehill.

Whitehill is well described in his *Dictionary of American Biography* entry:
He was one of the small group which in this period fanned jealousies and suspicions of the Pennsylvania back country into an opposition which was probably the most vehement experienced by any state and nearly resulted in armed conflict... At no period of his official career did Whitehill reflect better his back-country views than as a member of the Pennsylvania convention to ratify the federal Constitution (1787). In the Assembly he sought a delay in the election of delegates... In the convention he resorted to every device to delay and defeat ratification. He insisted that there were inadequate safeguards against a tyranny and on the day of ratification attempted, without avail, to have fifteen articles incorporated as a bill of rights.

Whitehill brought his fifteen proposals into the convention, on the day scheduled for a final vote, in order to abort the process. He made them the basis of a motion to adjourn without voting. The record of the Convention describes the turmoil over this last-minute effort at obstruction:

Some confusion arose on these articles being presented to the chair, objections were made by the majority to their being officially read, and, at last, Mr. [James] Wilson desired that the intended motion might be reduced to writing in order to ascertain its nature and extent. Accordingly, Mr. Whitehill drew it up, and it was read from the chair... [22]

Whitehill's motion to adjourn was denied, the majority voted for the Constitution, and Whitehill's fifteen destructive proposals were never even debated by the convention. Some of Whitehill's fifteen points resembled other calls for a bill of rights, calls later answered in the first ten amendments; but others were merely frivolous, or were aimed at entirely gutting the draft Constitution. In the latter category was proposal fifteen, which began, "That the sovereignty, freedom, and independence of the several states shall be retained..." (exactly the state's position under the existing Articles).

Whitehill's objection to the militia clause of the Constitution was put in these words:

11. That the power of organizing, arming, and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remains with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state and for such length of time only as such state shall agree.[23]

This would not only have canceled the militia clause in the draft Constitution but would have repealed Articles VII and VIII of the Articles of Confederation. Not even Whitehill had any real hope of doing that. It is a measure of his desire to throw up any, even the wildest, objection to the Constitution that he could have drafted this proposal, one surely not backed by others in the minority.[24]

Following his throw-in-the-kitchen-sink approach, Whitehill introduced some language going back to English gaming laws and "enclosures," [25] as if hunting were in peril from the Constitution.

8. The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed...

It is in the context of these scattershot objections, hastily assembled to be purely destructive, that we should read the part of Whitehill's list that gun advocates like to quote as the "minority position":

7. That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game...

This sentence turns out to be redundant when he goes on, in Proposal 8, to protect a separate right to hunt. He begins a complex sentence with "right to bear arms" and then throws in everything he can think of—
illogically, since he is about to take up hunting in a different proposal. He has confused, in his haste, different things—war and killing game—under one head ("bear arms"). He is a desperate man by now, unable to make his own motion coherently enough for the convention to understand it, until he is forced to put it in writing.

It is a sign of the desperation of the Standard Modelers that they take these ill-conceived phrases of Whitehill as the deliberated position of a whole "minority," and want to make them the text that controls our interpretation of "bear arms" in the Second Amendment—a text which was still to be drafted, debated, and clarified in the entirely military context Madison would give it. Did even Whitehill mean what he was saying? Or, as in his attack on the Articles along with the Constitution, was he just babbling to head off the impending vote? This was not a serious proposal, and it was not treated seriously by the convention. That Bryan included it in his response to the act of ratification just shows that he needed to add quick bulk to a publication that is not itself well organized or particularly coherent, but repetitive, random, full of discordant elements.[26]

I must apologize for pursuing this one instance of the gun advocates' mode of argument. It shows how difficult it is to track down their many misrepresentations. They take an isolated odd usage by an idiosyncratic man in a moment of little reflection, misrepresent it as the considered position of a group, and pit it against the vast body of normal usage, as that is qualified by legal usage and military context. Yet this is the argument that many gun advocates consider their "clincher." Robert Whitehill did them a favor they repay by hiding his name and confusing the responsibility for his frantic "proposals."

An indirect argument is made by Joyce Lee Malcolm—that the Second Amendment refers to the private use of arms, since that is what is intended by the 1689 British Bill of Rights, Article 6: "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." But to have arms is not to "bear arms," and the British document lacks Madison's context-establishing language of a "well-regulated militia." Even if Malcolm's argument were true of seventeenth century England (I argue elsewhere that it is not), it is irrelevant to an amendment phrased like Madison's.[27]

2. To keep. Gun advocates read "to keep and bear" disjunctively, and think the verbs refer to entirely separate activities. "Keep," for them, means "possess personally at home"—a lot to load into one word.[28] To support this entirely fanciful construction, they have to neglect the vast literature on militias. It is precisely in that literature that to-keep-and-bear is a description of one connected process. To understand what "keep" means in a military context, we must recognize how the description of a local militia's function was always read in contrast to the role of a standing army. Armies, in the ideology of the time, should not be allowed to keep their equipment in readiness.

The constitutional ideology formulated in seventeenth-century England recognized that the realm's wealthy landowners and merchants were invited to share in the national government only or mainly when the king called parliaments into session, and he did that largely when he needed funds. One of the greatest urgencies for funds arose from war. If the king needed to raise and equip a new army for each war, he was dependent on the fresh revenues only a parliament could bring him in sufficient quantities. Thus it was to parliament's interest not to give any king the means to continue an army at his disposal. The more discontinuous his military efforts, the more was it necessary to call new parliaments, which could bargain for new powers of their own.

An army must be prevented from standing—from existing on a permanent basis. A pamphleteer against absolute monarchy wrote in 1675 that the king must not be allowed to "keep up a standing army."[29] In 1697, the great ideologue of the militia movement, John Trenchard, warned against any situation where "a standing army must be kept up to prey upon our entrails."[30] That applied not only to troops, standing in readiness but to "stands" (stores) of arms.
To preclude, so far as possible, the maintenance of extraordinary forces by the king, local rulers (the squirearchy) kept in readiness a force—a militia—to handle all normal peacekeeping activity. Royal forces; except for those abroad in the navy or guarding Channel forts, were to be disbanded after each specific campaign, their arsenals broken up. Those who could not be reabsorbed into the normal economy should go to the militias, according to Trenchard. These latter were to maintain arsenals and all the equipment needed for "trained bands" (the normal term for individual militia bodies). In fact, at a time when more men were likely to have crossbows than "firelocks," Trenchard advised that "a competent number of them [firelocks] be kept in every parish for the young men to exercise with on holidays." These would be used on a rotating basis, since Trenchard proposed that only a third of the militia should be exercised at one time.

The idea of militia "stands" in common depots or arsenals was not confined to England. In America, the Articles of Confederation required that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and equipage" (equipage being the etymological sense of arma). Thus it is as erroneous to suppose that "keep" means, of itself, "keep at home" as to think that "arms" means only guns. As Patrick Henry tells us, the militia's arms include "regimentals, etc."—the flags, ensigns, engineering tools, siege apparatus, and other "accoutrements" of war.

Some arms could be kept at home, of course. Some officers kept their most valuable piece of war equipment, a good cross-country horse, at home, where its upkeep was a daily matter of feeding and physical regimen. But military guns were not ideally kept at home. When militias were armed, it was, so far as possible, with guns of standard issue, interchangeable in parts, uniform in their shot, upkeep, and performance—the kind of "firelocks" Trenchard wanted kept "in every parish" (not every home). The contrast with armies was not to be in performance (Trenchard and others boasted of the high degree of efficient organization in militias). The contrast was in continuity. The militia was always at the ready, its arms "kept." Armies came and went—their "continuation" was what Trenchard attacked.

Trenchard talked of militia arms being lodged in the proper hands—neither in an army's, on the one side, nor in the lower orders, on the other (Trenchard's was a militia of property owners). In America, "deposition" of arms from the proper hands occurred, most famously, when the King's troops seized the militia's arsenals at Concord in the north and at Williamsburg in the south. That is where arms were kept, lodged, maintained.

To keep-and-bear arms was the distinguishing note of the militia's permanent readiness, as opposed to the army's duty of taking up and laying down ("deponing" is Trenchard's word) their arms in specific wars. The militia was maintained on a continuing basis, its arsenal kept up, its readiness expressed in the complex process specified by "keep-and-bear." To separate one term from this context and treat it as specifying a different right (of home possession) is to impart into the language something foreign to each term in itself, to the conjunction of terms, and to the entire context of Madison's sentence.

3. Well-regulated. One of the modern militia leaders who testified before Congress said, in answer to a question by Representative Patricia Schroeder about his insignia, that the militia movement is informal, spontaneous, and without fixed leadership. No eighteenth-century defender of the militias would have spoken that way. Sensitive to the charge that militias could be mobs, they always stressed that they were talking of a proper militia, a good militia, a correct militia, one well-trained, well-disciplined, well-regulated.

The use of the last term is especially significant, since the king's soldiers and sailors were called "regulars" in the eighteenth century. The militias, too, were "regular," existing under rules (regulae). They did not boast a lesser discipline, just a right to continual upkeep of themselves and their equipment. Adam Smith took
General discussion of regulation concentrated on three matters: composition of the bands, arming (which included financing) them, and disciplining them. These three concerns are reflected in the Constitution's militia clause, which speaks of a congressional power "to provide for organizing, arming, and disciplining the militia" (Article I, Section 8, Clause 16).

To organize a militia, the most basic question is: Who should belong to it? The answer, prompted by reliance of the militia ideology on classical republicanism, was "the people." Greece and Rome were military states in which each *civis* was a *miles*. But "the people" in seventeenth-century England had a meaning as narrow in military affairs as in all others. Few could vote in that era. Few held land. Few had patents or grants for commerce. Since one of the roles of the militia was to serve as a local police power (in conjunction with the constabulary of the parish), not just any transient, or guild member, or wage laborer automatically belonged to the militia. They were the ones being policed. A landholder could use his own "retainers" (equipping them out of his store) to serve under him, at war as in peace. Or he could buy the services of another if he wished to evade service. But in general the social structure of a very deferential society was reflected in the makeup of the militias, whose officer class was the ruling class. Suspect elements in society—Catholics, Jews, some members of dissenting sects—were kept at various times from access to military equipment. Traces of this attitude survived in the American colonies, where John Adams described the militia as led by "gentlemen whose *estates*, abilities and benevolence" made them obeyed. As we shall see, the meaning of "the people" is different at differing periods, but at no time preceding the passage of the Second Amendment could any man be considered a militia member just by picking up his gun and proclaiming himself one.

The arming of the militia was a delicate matter, since that meant financing it—its wages, supplies, equipment, training facilities. Royal money could not be accepted, since permanent militia costs would give the king a claim upon permanent revenues. The gentry could provide much of the cost, or parish authorities. The local residence of the bands made barracks unnecessary. Use of public facilities was not considered "quartering" when local authorities and residents were the users. The ideological furor against quartering troops had the same source as the support of militia. Since the king was denied the standing barracks of a standing army, he might maintain an army on the cheap, without having to call on parliament, if he used public buildings, landed estates, taverns and inns, and even some private homes to lodge his military men, horses, and arsenals. To this concern we owe the Third Amendment, which is as solely (and anachronistically) military in focus as is the Second Amendment. A fear of "taking the King's pence" lay behind the objections of Patrick Henry and others to federal financing of the militias. Yet that became the law of the land under the Constitution. All authorized militias under our government have been financed by the central government, which also establishes their code of discipline.

Discipline was the third item of concern for eighteenth-century defenders of militias. No one was a member of the militia who had not joined an authorized "trained band" and been trained. So important is proper training that we often find "well-regulated" followed by an epexegetic phrase, spelling out the meaning of the term: "a well regulated militia, trained to arms" was the form Elbridge Gerry preferred for the Second Amendment. More expansively the Virginia ratifying convention suggested "a well-regulated militia, composed of the body of the people trained to arms." In England, the need for a common discipline for militias was recognized, in order that the establishment of ranks, order, drill, maneuver, military obedience and punishment would be the same in neighboring counties, and even between the temporary army and the continuing militia (since some of the same men would go in or out of service in both). As early as Henry IV's time, an overall "commission of army," meant "to muster and array (or set in military order) the inhabitants of every district," was accepted.
In America, the Constitution gives the federal government the power and duty to "discipline" the state militias—i.e., set their order of military rank, procedure, drill, and punishment. The so-called militias that wear the private insignia of Representative Schroeder's interlocutor are not "well-regulated" in the constitutional sense. The only militia recognized by the Second Amendment is one "regulated" by the militia clauses of the Constitution—one organized, armed, and disciplined by the federal government. Though the state militias (the National Guard financed by Congress) are under the ordinary jurisdiction of the states' governors, the common discipline insures that the guard will be efficient if it is federalized (by a procedure also in the Constitution).

Only fantasts can think the self-styled militias of our day are acting under the mandate of, or even in accord with, the Second Amendment. Only madmen, one would think, can suppose that militias have a constitutional right to levy war against the United States, which is treason by constitutional definition (Article III, Section 3, Clause 1). Yet the body of writers who proclaim themselves at the scholarly center of the Second Amendment's interpretation say that a well-regulated body authorized by the government is intended to train itself for action against the government. The proclaimer of the Standard Model himself says that the National Guard cannot be the militia intended by the Second Amendment since that militia was meant to oppose the government, and the National Guard is required to swear an oath of loyalty to the government that funds and organizes it. [45]

The Standard Model finds, squirreled away in the Second Amendment, not only a private right to own guns for any purpose but a public right to oppose with arms the government of the United States. It grounds this claim in the right of insurrection, which clearly does exist whenever tyranny exists. Yet the right to overthrow government is not given by government. It arises when government no longer has authority. One cannot say one rebels by right of that nonexistent authority. Modern militias say the government itself instructs them to overthrow government—and wacky scholars endorse this view. They think the Constitution is so deranged a document that it brands as the greatest crime a war upon itself (in Article III: "Treason against the United States shall consist only in levying war against them...") and then instructs its citizens to take this up (in the Second Amendment). According to this doctrine, a well-regulated group is meant to overthrow its own regulator, and a soldier swearing to obey orders is disqualified for true militia virtue.

Gun advocates claim that a militia is meant to oppose (not assist) the standing army. But even in England the militia's role was not to fight the king's army. The point of the militias was to make it unnecessary to establish a standing army. That no longer applied when the Second Amendment was adopted, since the Constitution had already provided Congress the powers to "raise and support armies" (Article I, Section 8, Clause 12), to "provide and maintain a navy" (Clause 13), and "to make rules for the government and regulation of the land and naval forces" (Clause 14). The battle against a standing army was lost when the Constitution was ratified, and nothing in the Second Amendment as it was proposed and passed altered that. [46] Nor did it change the Constitution's provision for using militias "to suppress insurrections" (Clause 15), not to foment them.

Yet gun advocates continue to quote from the ratification debates as if those arguments applied to the interpretation of the Second Amendment. They were aimed at the military clauses in the proposed Constitution. Patrick Henry and others did not want the Constitution to pass precisely because it would set up a standing army—and it did.

One of the Standard Modelers' favorite quotations, meant to prove that the militia was designed to fight against, not for, the federal government, is James Madison's argument, in Federalist No. 46, that any foreseeable national army could not conquer a militia of "half a million citizens with arms in their hands." But Madison says this while making what he calls a "visionary supposition"—that the federal government has become a tyranny, overthrowing freedom.

That the people and the States should for a sufficient period of time elect an uninterrupted...
succession of men ready to betray both; that the traitors should throughout this period, uniformly and systematically preserve some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to every one more like the incoherent dreams of a delirious jealousy, or the misjudged exaggeration of a counterfeit zeal, than like the sober apprehensions of genuine patriotism.\[47\]

Madison says he will grant, *per impossible*, such a hypothesis in order to consider the result:

A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combination in short would result from an apprehension of the federal, as was produced by the dread of the foreign yoke…

Madison is describing the Revolution, when Committees of Correspondence, Minutemen, and other bodies of resistance to tyranny sprang into being. It is not the "well-regulated militia" under the Constitution that is being described, but the revolutionary effort of a people overthrowing any despotism that replaces the Constitution and makes it void. Tyrannicides do not take their warrant from the tyrant's writ. In Madison's dire hypothesis, all bets are off and the pre-government right of resistance replaces governmental regulations *including the Second Amendment*. He is not describing the militia as envisioned in the Second Amendment. To use his words as if they explained the amendment's proper functioning is absurd.

It is from such material that the Standard Model makes its case that militias are supposed to oppose the government that organizes, funds, and regulates them. They have been helped along by two frivolous but influential articles supposedly written "from the left," published in *The Yale Law Journal*. In 1989, Sanford Levinson found the idea of a right to revolution in the Second Amendment so "interesting" that it, along with other things in the text, could be "embarrassing" to liberals like himself.\[48\] One sign of this article's influence is that it dazzled the eminent constitutionalist George Will, whose praise for the article has been disseminated ever since by the National Rifle Association.\[49\]

In 1991, David L. Williams upped Sanford Levinson's bid, calling the Second Amendment not only "embarrassing" but "terrifying" because it imports republican resistance into a merely liberal document.\[50\] If no modern militia meets the standards of republican virtue, then the courts should try to enforce the Second Amendment by other "republican" steps—like universal service, broader distribution of property, and other things Professor Williams agrees with. Any document would be terrifying if it mandates whatever a professor has on his wish list.

Both Levinson and Williams quote indiscriminately from republican literature and the ratification debates as if the question of a standing army were still "up" when the amendment was framed and ratified. With scholars like these, the NRA hardly needs to hire its own propagandists. They all agree, for their own circuitous reasons, that Second Amendment militias are organized, funded, and regulated by the federal government so that they may take arms against the federal government. It sometimes seems as if our law journals were being composed by Lewis Carroll using various other pseudonyms.

4. *The people*. Gun advocates claim that the "right of the people" to keep and bear arms is distributive, the right of every individual taken singly. It has that sense in, for instance, the Fourth Amendment ("the right of the people to be secure in their persons"). But the militia as "the people" was always the *populus armatus*, in the corporate sense (one cannot be a one-person militia; one must be formed into groups). Thus Trenchard calls the militia "the people" even though as we have seen, the groups he thought of were far from universal.\[51\] The militia literature often refers to "the great body of the people" as forming the militia, and body
corpus is a necessarily corporate term. The great body means "the larger portion or sector of" (OED, "great," 8:c). This usage came from concepts like "sovereignty is in the people." This does not mean that every individual is his or her own sovereign. When the American people revolted against England, there were loyalists, hold-outs, pacifists who did not join the revolution. Yet Americans claimed that the "whole people" rose, as Madison wrote in the Federalist, since the connection with body makes "whole" retain its original, its etymological sense—wholesome, hale, sound (sanus). The whole people is the corpus sanum, what Madison calls "the people at large." Thus "the people" form militias though not every individual is included in them. The people as a popular body (corpus) was often contrasted with the rulers (senatus populusque), which is not a distributive sense (that would exclude senators from individual rights).

Gun advocates like to quote republican literature, based on classical history, to say that every citizen should be a soldier. That was true of Greece and Rome, where slaves gave citizens far greater freedom to be devoted to political and military life. But we should remember two things. Ancient citizens were not trained to be militiamen, a force supplementary to regular troops. Athenians were trained to be the regular troops (hoplites), as Romans were trained to be legionaries. And, second, initiation into citizenship was part of the same process that inducted one into religious duties to the state. No modern republic has contemplated such militarization and regimentation of political life, which is the very farthest thing from the individualism of those who would read the Second Amendment distributively. Political life was corporate life in antiquity.

A false universalism makes the Standard Modelers say that the militia mentioned in the Second Amendment is made up of the entire citizenry. Enrollment of a segment of the populace in the National Guard does not count, since that is what the British described negatively as a "select" militia. The attempt to raise a volunteer force for royal use across local lines was seen, in the seventeenth century, as a step toward assembling the elements of a standing army. But that does not mean that the ordinary local militia was ever universal. No locale could empty out its fields and shops to train all males of the appropriate age. The militia was in fact "select" in that it represented the local squirearchy and its dependents. The very operation of the militia depended on some people continuing their ordinary work—civil officials, food suppliers, sowers and harvesters, ostlers, blacksmiths, and the like. The very term "trained bands" means that the militia was not universal: only those with the time, opportunity, acceptance, and will to be exercised in training were actual "bandsmen," on whose discipline depended the effectiveness of the trained bands in precluding the need for a standing army. Any breakdown of order at the local level would destroy the argument that militias were a sufficient defense of the kingdom under ordinary circumstances.

It is true that Congress passed a militia law in 1792 providing that every able-bodied man should equip himself with a musket to serve in the militia—but it was a dead letter, since no organized training was provided for. This was like defining the jury pool as the citizenry at large without providing for voir dires, so that no jury panels could be formed. Not until Congress passed the Dick Act in 1903 was the overall organization of a trained militia (the Guard) put on a regular basis. The gun advocates' talk of a time when the militia of the United States was universal is not nostalgia for a past reality, but a present dream about a past dream. The militia actions of the nineteenth century were sporadic, "select," and largely ineffectual.

Adam Smith predicted in the eighteenth century, and Max Weber confirmed in this century, that modern principles of the division of labor, specialization of scientific warfare, and bureaucratization of responsibility would shift the functions of the eighteenth-century militia to professional armies and to local police forces, giving the state a "monopoly on force" as a matter of efficiency. George Washington, who had bitterly criticized the militias during the Revolution, tried to adhere to the Second Amendment by proposing what was known as the Knox Plan, for a small but well-trained militia. Congress, instead, gave him the Militia Act of 1792, which made of the militia a velleity.

Why, in fact, did Madison propose the Second Amendment? Not to prevent a standing army. That was
already established by Article I, and the amendment did not overthrow it. Not to organize the militia. That, too, was mandated by Article I. Even a Standard Modeler like Joyce Lee Malcolm treats the amendment as, constitutionally, a gesture: "A strong statement of preference for a militia must have seemed more tactful than an expression of distrust of the army."[57] Constitutional law normally enacts more than "a strong statement of preference."

Why, then, did Madison propose the Second Amendment? For the same reason that he proposed the Third, against quartering troops on the civilian population. That was a remnant of old royal attempts to create a standing army by requisition of civilian facilities. It had no real meaning in a government that is authorized to build barracks, forts, and camps. But it was part of the anti-royal rhetoric of freedom that had shown up, like the militia language, in state requests for amendments to the Constitution.

Madison knew that the best way to win acceptance of the new government was to accommodate its critics on the matter of a bill of rights. He had opposed that during the ratification debates, recognizing that people like Robert Whitehill and Patrick Henry were using the demand to kill the document, not to improve it. His assessment was confirmed when Anti-federalists like Henry and Whitehill changed their stance and opposed the amendments when Madison offered them. Henry thought that the amendments would "tend to injure rather than serve the cause of liberty" by lulling the suspicions of those who had demanded amendments in the first place... The Antifederalist strategy, it seems, was to reject the most popular of the amendments, thus making it necessary for Congress to take up the whole matter again. [58]

Henry feared that Madison was doing in the Antifederalists with sweet talk, and he was right. Madison confided to a friend: "It will kill the opposition everywhere."[59] Sweet-talking the militia was a small price to pay for such a coup—and it had as much impact on real life as the anti-quartering provisions that arose from the same motive. Thus he crafted an amendment that did not prevent the standing army (and was not meant to) but drew on popular terms that were used for that purpose in the past. His 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.

Against this body of evidence we have the linguistic tricks of the Standard Model which wrench terms from context and impose fanciful meanings on them. The Standard Model takes apart the joint phrasing of keep-and-bear arms to make "keep" mean only keep-in-the-home-for-private-use and "bear arms" mean carry-a-gun-in-the-hand. The ratification-debate attacks on the militia clause of the Constitution are illegitimately applied to the support of the later amendment. Madison is made to talk as if obliterating the government could be a way to obey the government. We are told that the Second Amendment is deliberately insurrectionary and proclaimed (in an absent-minded way) the right of armed rebellion as a method of regulating the military. We are told that arms, all the equipage of war, can be borne in a coat pocket. Heraldry is mixed with haberdashery, humbug with history, and scholarly looking footnotes with simple-minded literalism. By the methods used in the Standard Model, we could argue that a good eighteenth-century meaning for "quarter" shows that the Third Amendment was intended to prevent soldiers from having their limbs lopped off in private homes.

As I said at the beginning, my argument does not deny any private right to own and use firearms. Perhaps that can be defended on other grounds—natural law, common law, tradition, statute. It is certainly true that most people assumed such a right in the 1780s—so naturally, in fact, that the question was not "up" and calling for specific guarantees. All I maintain is that Madison did not address that question when drafting his amendment. When he excepted those with religious scruple, he made clear that "bear arms" meant wage war
—no Quaker was to be deprived of his hunting gun.

The recent effort to find a new meaning for the Second Amendment comes from the failure of appeals to other sources as a warrant for the omnipresence of guns of all types in private hands. Easy access to all these guns is hard to justify in pragmatic terms, as a matter of social policy. Mere common law or statute may yield to common sense and specific cultural needs. That is why the gun advocates appeal, above pragmatism and common sense, to a supposed sacred right enshrined in a document Americans revere. Those advocates love to quote Sanford Levinson, who compares the admitted "social costs" of adhering to gun rights with the social costs of observing the First Amendment. We have to put up with all kinds of bad talk in the name of free talk. So we must put up with our world-record rates of homicide, suicide, and accidental shootings because, whether we like it or not, the Constitution tells us to. Well, it doesn't.

Notes


[9] It was a commonplace that a proper militia was "the best security" to a state—meaning best physical guarantor of "national security." Adam Smith uses just those words in his Lectures on Jurisprudence (Oxford University Press, 1978), p. 543. But Madison broadened the issue by distinguishing a free country's protection.


Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (Harvard University Press, 1994), pp. 160–161: "The language had also been tightened by reversing the reference to the military and the right of the people to bear arms, perhaps intentionally putting more emphasis on the militia."


See Articles of Confederation, draft Articles X, XI, and XII, all of which used "common defence" for confederated action, and Articles VII and VIII as passed. See The Documentary History of the Ratification of the Constitution, edited by Merrill Jensen (State Historical Society of Wisconsin, 1976), Vol. 1, pp. 81, 89. Article VIII stated:

All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, are allowed by the united states in congress assembled, shall be defrayed out of a common treasury...according to such mode as the united states in congress assembled shall from time to time direct and appoint. [italics added]

Alexander Hamilton used "common defence" in the same way, in Federalist No. 25 (Jacob E. Cooke, editor, Wesleyan University Press, 1961, p. 158).

Malcolm, To Keep and Bear Arms, p. 160: "In keeping with state proposals, the word 'state' had been substituted for Madison's 'country.' 'State' was a more precise term and, since a state was a polity, it could refer either to one state or to the United States."

Though the Greek equivalent of arma has a singular (hoplon), meaning shield, the plural (hopla) refers to all kinds of military (including naval) equipment.

Shakespeare, King John 2.1.345, Richard II 2.3.80. In the last line the emphasis on native ("And fright our native peace with self-borne arms") shows that Berkeley is describing citizens who bear arms against themselves.

Halbrook, A Right To Bear Arms, p. 56.


That other members of the minority did not agree with Whitehill's desire to rescind the Articles is seen in the completely different treatment of the militia also contained in Bryan's hodgepodge "dissent." The treatment, on pp. 637–639 of the "Dissent," says nothing of service beyond state borders, or other powers granted in the Articles.


The signers of the dissent were agreeing with the things they had contributed to the whole, not with the parts in discord with their own contributions. (See footnote 24.)

Malcolm, To Keep and Bear Arms, Chapters 7 and 8. It should be observed that the British "complaint" is a gun-control measure, setting three restrictions on having arms—Protestantism, social condition, and the allowance of unspecified gun laws. Furthermore it is a grant ("may have") not a statement of antecedent right.

For the assumption that "keep" means "keep in the house" see Dowlut, "Federal and State Constitutional Guarantees to Arms," p. 69: "The bearing of arms in a public place is different from the keeping of arms in the home on account of the home's special zone of privacy." Private gun ownership is guaranteed, he claims, by the keeping of guns in the privacy zone. For keep as individual possession, see Robert E. Shalhope on "two distinct, yet related rights—the individual possession of arms and the need for a militia made up of ordinary citizens." "The Ideological Origins of the Second Amendment," Journal of American History (December 1982), pp. 599–614. Glenn R. Reynolds, one proponent of the Standard Model, quotes with approval the disjunction formulated by Donald B. Kates that "the term 'keep' refers to owning arms that kept in one's household; the term 'bear' refers to the bearing of arms while actually taking part in militia duties" ("A Critical Guide to the Second Amendment," p. 482).


Trenchard, An Argument, p. 21


Trenchard defends the "well-trained militia" against the arming of "an undisciplined mob" (An Argument,
A "continuation" of the army would make it an "establishment" (An Argument, p. 15).

Trenchard, An Argument, pp. 7, 10.


See Trenchard, An Argument, p. 22: "There can be no danger from an army where the nobility and the gentry of England are the commanders, and the body of it made up of the freeholders, their sons and servants…" Because the militia was an extension of the landed class's authority, it was a Tory enthusiasm, denounced as such by the Whig author, Sir John Hawkins, when he condemned his friend Samuel Johnson for "his invectives against a standing army." The Life of Samuel Johnson, LL.D., by Sir John Hawkins, Knt., edited by Bertram H. Davis (Macmillan, 1961), p. 45. Adam Smith said a laborer should not join the military since his "constant labour hurt the shape and rendered him less fit for military exercises… (We can know a tailor by his gait.)" See Lectures on Jurisprudence, p. 231.


See Schoener, 'No Standing Armies!', pp. 20–22.


Glenn Harlan Reynolds, "A Critical Guide to the Second Amendment," pp. 476–467: "The National Guard was never designed to resist a tyrannical government… And they are required to swear an oath of loyalty to the United States government, as well as to their states."

Of course, the original point of British resistance to standing armies was lost in America. The militias were parliament's tool to keep the king from having a regular revenue for standing forces. In America, the parliament (Congress) had established itself as the organizer and founder of the military forces, a point made both by Hamilton in The Federalist (Nos. 24, 26, 28) and Madison (Elliot, Debates in the Several State Conventions, Vol. 3, p. 383).


Ironically, the private militias of our day like to compare themselves with the Minutemen of the Revolutionary era—yet those were volunteer forces joined only by the ideologically compatible, something far closer to the "select militia" of the eighteenth century than is the contemporary National Guard. For the lack of universal service in colonial militias, see John Shy, *A People Numerous and Armed* (Oxford University Press, 1976), pp. 21–33.


Madison, *Papers*, Vol. 12, p. 347. Madison called the Bill of Rights "the nauseous project of amendments," which he considered unnecessary in a republic, but "not improper in itself," and useful for preempting a position it would be inconvenient to surrender to the Antifederalists (pp. 346–347). This is hardly the stubborn call to a last bastion of freedom that gun advocates find in the Second Amendment.