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THE SECOND AMENDMENT IN HISTORICAL CONTEXT

*Don Higginbotham**

A reading of Saul Cornell's essay brings several things to mind. First, there has been a torrential outpouring of writings on Second Amendment issues for quite some years. I initially became aware of this development sometime in the mid-1980s, but I only sensed that it was about to reach flood-tide proportions with a 1989 issue of the *Dayton Law Review*. It would be interesting to know just how many pieces in law reviews alone, to say nothing of books and op-ed newspaper pieces, have appeared in the last decade. Certainly part of the explanation for what has taken place has to do with hotly debated gun control issues. Even so, the reasons why passions run so high among academics is itself puzzling, especially in view of the fact that the United States Supreme Court has handed down only three direct opinions on the Second Amendment, the last one coming in 1939. Only the Third Amendment, forbidding the billeting of soldiers in private homes, has had less judicial attention than the Second. In any event, it is easier to fathom the motivations of the National Rifle Association and Brady legislation supporters than it is the dozens of those who reside in the halls of ivy. To further complicate matters, one finds both liberals and conservatives on each side of the debate.

Second, the vast preponderance of these writings have been by members of the legal fraternity. Their approach has on the whole been narrowly legalistic, and they have borrowed very heavily from each other, recycling the same body of information. That information often refers to the generalizations and conclusions of their lawyer colleagues at other institutions. When they have gone to original sources, as some surely have, they have drawn the great weight of their argument from charters, constitutions, and other formal parchments, as well as debates and interpretations in the writings of the leading lights of the Revolu-

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tionary generation—radicals and conservatives of 1776, Federalists and Anti-Federalists of the late 1780s, Hamiltonians and Jeffersonians of the Early Republic, and jurists of the following century. Perhaps none of the efforts of this Standard Model school of scholarship has received as much national attention as the special issue of the *Tennessee Law Review* that appeared in 1995, generating responses in such highly visible outlets as the *New York Review of Books* and the *Chronicle of Higher Education*.

If one encounters disappointingly little difference of opinion in this voluminous literature—what is surely now the Standard Model's fundamental testament—we do occasionally see a fresh approach from the lawyerly venue. One of the most provocative and worthy of consideration and further research is Carl T. Bogus's *The Hidden History of the Second Amendment*.¹ The author contends that influential Southerners feared that a federalized militia might well leave their region without adequate means to police the slave community and might provide slaves with an incentive to revolt. One reason, at least, for the Second Amendment was to address those concerns: the states would control their militias most of the time, and they would retain their authority to provide arms for their state militias if Congress failed to provide them with sufficient weapons. "In effect, the Second Amendment supplemented the slavery compromise made at the Constitutional Convention in Philadelphia and obliquely codified in other constitutional provisions."² If the pro-slavery motive is as powerful as Bogus contends, it may make Standard Modelers a bit uncomfortable and deprive them of some of the high ground they have sought to occupy. Although Bogus's thesis will doubtless be controversial, it is timely and valuable for two reasons: it will stimulate more research on the subject, and it contextualizes the question of origins and motivation by looking at the social order at the time Congress passed the Bill of Rights. Critics of the Standard Model approach will assuredly go along with one assertion of Bogus, which is that the evidence on the origins "of the Second Amendment strongly supports the collective rights position."³

Context, of course, is the major theme of Cornell's essay, and it is the most important point he could possibly make in

1. Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 311-408 (1998).

2. *Id.* at 321.

3. *Id.* at 408.

urging us to get Second Amendment studies back on the historical track. I myself attempted to do just that in *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*.⁴ Militia discussions and debates in Congress during the War of Independence, in the postwar Confederation years, during the writing and ratification of the Constitution, in the First Federal Congress, and into the Jeffersonian period always revolved around issues of militia control and organization—or, to put it in terms used in our present-day literature, involved collective rights (not individual rights) and how they should be implemented in legal and constitutional terms. If people believed passionately in gun ownership as an individual right, they rarely said so. In fact, I put out a request to nearly a thousand early American scholars on the Omohundro Institute of Early History and Culture's NET, asking for citations to speeches and writings mentioning specifically the belief that individual gun ownership was—or should be—a protected right in any of the great charters of the period. The responses contained nothing other than the handful of references I already had collected.

Cornell may well deliver the most devastating blow yet to the Standard Modelers' view of the Founding era because he successfully challenges them concerning Pennsylvania, the state where one finds the most evidence of claims for gun ownership as an individual right, which was often linked with opposition to ever accepting the Constitution without a bill of rights. Here the Standard Modelers have often gone to the fullest available sources, especially the Documentary History of the Ratification of the Constitution. But have they interpreted the evidence correctly? Cornell demonstrates that they have not. Although the Pennsylvania state constitution of 1776 declares that "the people have a right to bear arms" both "for the defense of themselves and the State," the Revolutionary government's Test Acts, hardly limited to the Loyalists, gave authorities wide latitude to curtail liberties, including the confiscation of arms. These Acts, which may have affected close to forty percent of the population, remained on the books until 1789, stoutly defended by political elements that would lead the Anti-Federalist forces. Indeed, at the time of the Carlisle Riots and the Whiskey Rebellion substantial voices from the elite ranks of Anti-Federalism supported disarming their former Anti-Federalist allies.⁵ The whiskey re-

4. Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 *Wm. & Mary Q.* 39-58 (1998).

5. Although she failed to show the full complexities of Anti-Federalist thought,

bels themselves did not justify taking up their muskets on the basis of the Second Amendment “but instead framed their actions in terms of a natural, not a constitutional, right of revolution.”⁶ On gun ownership, Anti-Federalists were not cut from the same cloth, a truism for other issues as well. Cornell, the preeminent authority on Pennsylvania Anti-Federalism, will not be easily dismissed.

Still another area of investigation needs additional work, although Michael Bellesiles has already contributed two path-breaking articles.⁷ The question he asks is what we learn in terms of Second Amendment issues from looking at weapons ownership and laws about guns during the colonial and Revolutionary years. The subject is exceedingly relevant since at least one Standard Modeler contention is that, regardless of the slim evidence for outright claims to gun ownership as an individual right, that right is a part of our common law tradition inherited from the Glorious Revolution of 1688 and the English Declaration of Rights that followed it. The elaboration is as follows: the idea was in the air on the western shores of the Atlantic before the American Revolution. Moreover, some rights that are so universal need not always be anchored in charters or other legal documents. And it is simply impossible to enumerate every right that people believe they possess.⁸

Although one cannot categorically say that this common-law interpretation is wrong—one cannot prove or disprove anything without factual information—it is now easy to demonstrate that American legislatures before the adoption of the Constitution had established their own tradition of firearms regulation. From the earliest days, as has long been known, the assemblies created militias and required citizens to own guns in order to perform militia service. But only now are we learning how much legislation was needed. Countless Americans did not own arms

Cecelia M. Kenyon some years ago pointed out that within Anti-Federalism there was considerable anti-democratic, even reactionary, thinking. *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 *Wm. & Mary Q.* 3-43 (1955).

6. Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 *Const. Comm.* 221 (1999).

7. Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 *J. of Am. Hist.* 425, 428-41 (1996) and *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 *L. & Hist. Rev.* 567-89 (1998).

8. It is contended that this “English influence on the Second Amendment is the missing ingredient that has hampered efforts to interpret its intent correctly.” Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* xii (Harvard U. Press, 1994).

and many who possessed them turned out for militia service with weapons so rusted or antiquated that they were worthless. It took legislative efforts to arm those who were to be a part of the militia and to disarm those socially undesirable persons such as Catholics, white servants, and Africans (both slaves and free blacks) who might somehow acquire weapons.

A young scholar whose work is still in progress 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 service—but rather standard military issues of the day, such as the British army “Brown Bess” equipped with bayonet.⁹ 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? And if so, what are the ramifications for today’s gun regulation debates?

Colonial governments regulated various areas of life. Given deep-seated beliefs about the corporate nature of society and mercantile practices, provincial lawmakers would have considered nineteenth-century liberalism or laissez-faire notions unthinkable. Hence, it is hardly surprising that fresh scholarship reveals how extensively colonial legislatures concerned themselves with the production, use, and ownership of firearms. An iron law of political behavior, if such exists, is that legislative bodies do not voluntarily relinquish power; that, to the contrary, they seek to increase it at every opportunity. No better example is to be found than in the story of the growing influence and authority of the American representative assemblies in the half century before the American Revolution—growing to the extent that they described themselves as little parliaments and came to extend their jurisdiction into matters not even claimed by the British House of Commons.¹⁰ Therefore, it is beyond belief that during the Revolution and later the state legislatures would have renounced their right to control weapons in any area of American life. James Madison and Thomas Jefferson expressed a

9. 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).

10. Leonard W. Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783* (Yale U. Press, 1930); Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies 1689-1776* (U. of North Carolina Press, 1963).

widely held view that the Revolutionary legislatures interpreted their powers very broadly—too broadly at times—even to the point of encroaching on the authority of Congress under the Articles of Confederation.¹¹ All this casts light on why even the prominent Pennsylvania Anti-Federalists in Cornell's essay had no sympathy for the Carlisle and whiskey rebels, who, without the approval of the state, took up arms and engaged in violence. Cornell's study, along with my own work and that of Carl Bogus and Michael Bellesiles, puts the federalized militia controversy at the time of 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.

11. Madison's now-classic criticisms appear in William T. Hutchinson, et al., eds., *Vices of the Political System of the United States*, in 12 *The Papers of James Madison*, 345-57 (U. of Chicago Press, 1962).