CENTER TO PREVENT HANDGUN VIOLENCE

SECOND AMENDMENT SYMPOSIUM

AFTER THE EMERSON DECISION
SETTING THE RECORD STRAIGHT
ON THE SECOND AMENDMENT

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P R O C E E D I N G S

MR. CLARK: Good morning. I am David Clark from Jackson, Mississippi. I am a past chair of the American Bar Association's Coordinating Committee on Gun Violence. And on behalf of the American Bar Association, which is one of the co-sponsors this morning, I want to welcome you to this symposium entitled, "After The Emerson Decision: Setting The Record Straight On The Second Amendment."

On April 7 of last year Judge Sam Cummings, a federal district judge in Dallas, Texas, became the first federal judge in over 60 years to overturn a gun control law on the grounds that the Second Amendment protects the individual right to own firearms.

The ruling in *U.S. vs. Emerson* not only appears clearly to conflict with lower courts' obligations to follow the lead of appellate courts, but also appears to be in direct conflict with long established U.S. Supreme Court precedent.

Unfortunately, the Emerson Decision has given life

to the gun lobby's long-time efforts to promote a theory that the Second Amendment guarantees a broad individual right to bear arms, a right that they say precludes the enactment of any gun control law.

There is, perhaps, no constitutional issue on which there is so much political rhetoric and such public misunderstanding as the Second Amendment. It has long been remarkable that the glib political use of Second Amendment claims is allowed, even accepted, in the face of, directly, the contrary law of the Second Amendment.

The ABA has been concerned about this since the mid 1960s, when the gun lobby claimed that the proposed legislation that eventually led to the 1968 Gun Control Law would violate the Second Amendment right to bear arms. Now, that was the law that, among other things, would outlaw sales of firearms to convicted felons and minors.

That very issue was ruled upon, by the way, in 1980 when the Supreme Court upheld the 1968 acts prohibition of

sales to felons citing the 1939 precedent requiring that there must be "some reasonable relationship to the maintenance of a militia" for there to be an issue as to the reach of the Second Amendment.

The ABA is committed to further and better understanding of the law of the Second Amendment, what our courts have ruled historically, and the application of Second Amendment jurisprudence to the issues Congress and legislatures now face. To that end we are very pleased today to join with the Center To Prevent Handgun Violence in bringing several of America's most acclaimed scholars to discuss their scholarship and the historical context in which the Second Amendment was crafted, including its relationship to English law as well as its bearing upon the Emerson Decision.

I am very pleased to introduce the moderator for this discussion, Dennis Henigan, who is primarily responsible for organizing this symposium. Dennis is director of the

Legal Action Project at the Center to Prevent Handgun Violence in Washington. The Legal Action Project is a national public interest law program which provides pro bono legal representation to victims of gun violence in lawsuits against the gun industry and also assists in the defense of reasonable gun laws when they are attacked in the courts.

Mr. Henigan also serves as general counsel of Handgun Control Inc., the largest citizens' organization working for stronger laws to reduce gun violence. Under Mr. Henigan's direction the Legal Action Project has filed a number of innovative lawsuits against the gun industry including the first case to impose liability on the gun maker for failing to personalize guns to prevent their use by children, and the first case brought by a city to recover the public costs of gun violence.

His work as a public interest lawyer was profiled in a May 17, 1999 issue of New Yorker magazine. Mr.Henigan formerly was a partner in the Washington, D.C. office of Foley

and Lardner where he practiced law for 11 years before taking his current position.

He has written and spoken extensively on liability and constitutional issues relating to firearms including testifying before several congressional committees. He is the author of two major Law Review articles on the Second Amendment one of which was cited and relied upon by a federal court of appeals in upholding the federal machine-gun law against Second Amendment attack. That was a decision by the 8th Circuit in *U.S. vs. Hale* in 1992.s

An interview with Mr. Henigan on guns and the judiciary appears in the book, Guns And The Constitution, The Myth Of Second Amendment Protection For Firearms In America, published in 1996. Mr. Henigan received his B.A. from Oberlin College and his law degree from the University of Virginia Law School.

Dennis.

MR. HENIGAN: Thank you, Dave.

I want to thank the American Bar Association, first of all, for its leadership in efforts to enhance public understanding of this most misrepresented of our provisions of the Bill of Rights. The ABA has just been a stalwart on this for so many years, and we are just deeply appreciative of their help in organizing this program as well.

Before I try to put this program in context with a few introductory remarks, I also want to recognize the incoming President of the Center To Prevent Handgun Violence and Handgun Control, Mike Barnes, who has been able to join us.

Thanks, Mike, for coming.

It's clear that a very persistent feature of the gun control debate in this country is the effort to give that debate a constitutional dimension. The rallying cry of the gun lobby's opposition to sensible gun laws is that they violate the Second Amendment's right to keep and bear arms.

According to the NRA the Second Amendment guarantees

an individual right to bear arms as broad as our First Amendment rights. In fact, Charlton Heston has said that the Second Amendment guarantees our most important freedom. He calls it America's first freedom, the first among equals in the Bill of Rights. And in an ironic twist two years ago, two years before Columbine, Charlton Heston gave a speech in this building to the National Press Club in which he pledged that the NRA would raise $100 million "to teach American kids what the right to keep and bear arms really means to their culture and their country."

The NRA's claim to know what the Second Amendment really means has encountered a nagging difficulty. Over and over again, as Dave told you, the NRA's position has been rejected by the nation's courts.

The federal judiciary, in fact, has reached a remarkable consensus on this issue that the Second Amendment concerns the bearing of arms only in connection with service in a state-organized militia, and that it has nothing to do

with possession of guns for personal purposes.

In fact, until recently, only one federal court had ever struck down a gun control law on Second Amendment grounds. And that court was reversed by the U.S. Supreme Court in its most extensive decision on the Second Amendment, the *U.S. vs. Miller* case in 1939, where the court stated that the obvious purpose of the amendment was "to assure the continuation and render possible the effectiveness of the state militia." And the court added it must be interpreted and applied with that end in view.

In over 35 decisions since Miller the lower federal courts have heeded the Supreme Court's command until last year. In a case called *U.S. vs. Emerson* a federal judge in Texas, Sam Cummings, struck down on Second Amendment grounds the federal statute barring possession of guns by persons who were under domestic restraining orders.

And the facts of the Emerson case are useful here because they really show what is at stake in the Second

Amendment debate. The subject of this restraining order, Dr. Timothy Joe Emerson, was indicted for illegally possessing two 9-millimeter pistols, a semi-auto M-1 carbine, a semi-auto SKS assault rifle with a bayonet attached, and a semi-auto M-13 assault rifle.

Dr. Emerson was involved in a heated divorce proceeding. And during an argument with his wife at his medical office he had pulled his Beretta pistol from his desk drawer, cocked it, and pointed it at his wife and young daughter. Fortunately, they left before any harm could be done. That same day Dr. Emerson told a co-worker that he "needed to get rid of his wife," that he had an assault weapon and just needed to get bullets.

Dr. Emerson was exactly the kind of person that Congress had in mind when it enacted this sensible statute barring possession of guns by persons under domestic restraining orders. But, nevertheless, Judge Cummings dismissed his indictment for illegal possession and declared

that law unconstitutional.

This case demonstrates the mischief that can be done by the individual rights view of the Second Amendment taken by the NRA. The Constitution in this case was held to block the enforcement of a sensible gun law against a very high risk gun owner.

Well, fortunately, every federal court that has considered Emerson since it came down, has rejected its reading of the Second Amendment. And those courts include the Federal Court for the Southern District of West Virginia, the 7th Circuit Court of Appeals, and the Federal Court for the Eastern District of Louisiana. All of them have rejected Emerson's view.

Judge Cummings' ruling in Emerson was largely based on his interpretation of the history of the Second Amendment. And the scholars who have joined us today will demonstrate that Judge Cummings had the history all wrong.

The Second Amendment actually does not present the

classic issue of whether in interpreting the Constitution the original intent of the framers should give way to changed contemporary circumstances. The historians joining us today will argue that history itself defeats the individual rights view of the Second Amendment. So, this is not a struggle between original intent and contemporary circumstances.

The Emerson Decision is now on appeal to the U.S. Court of Appeals for the 5th Circuit and the views of these scholars are also reflected in a friend-of-the-court brief filed in the 5th Circuit by over 50 law professors and historians urging reversal of Judge Cummings' decision.

Let me introduce our speakers. We are going to begin with Prof. Lois Schwoerer. Prof. Schwoerer is the Kaiser Professor of History Emeritus at the George Washington University here in Washington, D.C. She is a renowned expert on English history and has published numerous books and articles including two award-winning books of particular relevance to the Second Amendment: <u>No Standing Armies! The</u>

Antiarmy Ideology in 17th century England, and The Declaration Of Rights, 1689.

Among her many honors Dr. Schwoerer is an elected Fellow of the Royal Historical Society and a member of the Folger Shakespeare Library Steering Committee. Prof. Schwoerer will discuss what English history can teach us about the real meaning of the Second Amendment.

Dr. Schwoerer.

PROF. SCHWOERER: Thank you very much, Mr. Henigan.

Before I begin I want to apologize for my voice. But, perhaps, those of you who live in Washington will be sympathetic. I just have a touch of something that's been going around. And I also would like to say that I made a hand-out, and I was hoping that those of you in the audience would have a copy. And I don't know what happened to it. Oh, you do have it, okay. Well, that's fine.

Well, then, let me begin. My assignment this morning is to discuss the English background to the Second

Amendment of our Constitution. And my purpose is to set the record straight. Let me say the interest in the English background to the Second Amendment has not always been very intense. It has grown over the past 20 years or so as the debate about the Second Amendment intensified.

And so it was that in the 1970s and 1980s a number of articles appeared that analyzed the English background to the Second Amendment. But I think it's fair to say that by and large those articles attracted the attention of experts and were not well circulated to people who were just vaguely interested.

But, then, in 1994 Joyce Lee Malcolm, who is an American and a professor of English history, who teaches at Bentley College in Massachusetts, recast and enlarged her earlier articles into a book entitled To Keep And Bear Arms, The Origins Of An Anglo-American Right, which Harvard University Press published.

In this book Malcolm presented the idea that the old

medieval English duty to serve in the militia and in the posse comitatus, which was a body that saw to the safety of the individual community, a duty that was imposed at least theoretically on all males between the ages of 16 and 60, was transformed at the time of England's glorious revolution in 1688/89 into the right of the individual to keep and bear arms.

She maintained that Article VII of the Declaration of Rights 1689, which we know more familiarly as The Bill of Rights 1689, which was its statutory form, secured that right and bequeathed it to the American colonists.

Malcolm wrote, "The right of ordinary citizens to possess weapons [was] secured by Englishmen" and declared that in 1689 "the political nation claimed for all Protestants a right to have weapons." She went on to say that the Convention of 1689, which was the body that drew up the declaration, "came down squarely and exclusively in favor of an individual right to have arms for self defense."

Malcolm traced the fate of Article VII throughout the next centuries saying that many people wanted to reaffirm it but that it was "gently teased from public use." And, then, turning to colonial America, she declared that Article VII was a legacy that influenced the drafters of the Second Amendment who, however, broadened that legacy, sweeping aside all “limitations” and forbidding any “infringement” upon the right to possess arms.

Well, this very highly provocative and confidently stated thesis has provoked a lot of interest not just among people in universities, but people widely spread across this country. And it has encouraged very warm approval.

At the present time, to keep and bear arms plays an important role in discussions in the meaning of the Second Amendment. But what I want to do this morning is to contest this thesis, show why it is unacceptable, and correct Prof. Malcolm's reading of the evidence and her understanding of the nature of late 17th century England.

Now, to dissent from Prof. Malcolm's interpretation some might say is foolhardy; that the task is intimidating, even daunting. After all, Malcolm's book was enthusiastically received by American historians and legal commentators and the gun community. Lengthy reviews warmly praising the book poured from law journals, including those of the highest reputation.

Her argument has been described as irrefutable, her research in political and legal history as meticulous, her book as a foundational text of the standard models. Predictably, the National Rifle Association promoted the book, and reviews in its journals were especially enthusiastic.

Less predictably, and indeed rather surprisingly, the book found favor with the Bench. Supreme Court Justice Anthony Scalia described it as an excellent study. And Judge Sam Cummings of the 5th Circuit Court in Texas, now famous as we know, for his ruling in Emerson, cited Malcolm's book in asserting that the right to bear arms was a legacy of the

English Bill of Rights.

It has been noticed that no scholar has challenged Malcolm in print. That is, strictly speaking, not true. But it is true that of the formal published reviews only one -- that one by me -- expressed reservations about the thesis and the scholarship. And only two other historians have negatively criticized Malcolm's study in print.

In short, Malcolm's thesis has been widely accepted. And although not carefully examined in print, it enjoys the status of dogma respecting the English origins of the Second Amendment.

So, where shall I begin in my effort to present what I say is the correct interpretation of the English background of the Second Amendment? I will start with the evidence, that is, with Article VII of the Declaration of Rights, and will in the 20 minutes that I have say very little about anything else.

As one might expect, the Declaration of Rights and

Article VII took some days to draft. It began on January 29, 1689 when Anthony Cary, Lord Falkland, urged the House of Commons, not to think for a minute more about filling the throne until they had decided, "what power to give to the Crown and what not."

Following, then, a lengthy debate, the House concurred and appointed a 29-member committee, the Rights Committee, to prepare a report. In due course the committee presented its report entitled “The Heads of Grievances.” The report contained 28 heads, three of which are pertinent to our discussion.

Head No. 5 declared the acts concerning the militia are grievous to the subject. Head No. 6 declared that the raising or keeping of a standing army within this kingdom in time of peace, unless it be with the consent of Parliament, is against the law. And No. 7 declared, as you see on the handout, you see its very words, "It is necessary for the public safety that the subjects, which are Protestant, should

provide and keep arms for their common defense, and that arms which have been seized and taken from them be restored."

At this stage in the drafting process, as you observe, the right of all Protestants to have arms is claimed. As the negotiations proceeded the House of Lords insisted upon certain amendments. The Prince of Orange, who was to become William III, and his people expressed objections to any amendment that restricted his powers.

Under pressure to shorten the list the committee decided to separate all those heads into two categories. One category was a list of what they thought would be desirable but that required new law. The other category was a list of what they declared was old law — law that they were simply reaffirming.

The heading about the militia was dropped because there was no question that it required a lot of new legislation. The heading about standing armies, although it, too, really was new law, was kept in the category of old law.

The heading about the right to arms was revised. And although it, too, made new law, it was retained in the category of things reaffirming old law.

A further decision was made to organize the list into, on the one hand, grievances that they wanted to express against James II, the Catholic king, who had irritated them in so many different ways, and match those grievances with a parallel list of 13 alleged ancient rights. This was the form that the heads of grievances finally took in the Declaration of Rights.

And in its final form Article VII read, as you see, "The subjects which are Protestant, may have arms for their defense suitable to their condition and as allowed by law." It is plain that Article VII qualifies the right of the subject to have arms in three respects: religion, you have got to be Protestant. You certainly can't be Catholic, and you can't be anything else.

Socioeconomic status, suitable to their condition.

And law, according to law. Obviously, the language had traveled a long way from its first formulation. Obviously, Article VII was the result of negotiation and revision.

I want to examine each of the restrictions that the final form of the article places on the right of subjects to have arms. But before I do that I want to say something about what is meant by "arms for their defense." The word "arms" is not about duck hunting. The Oxford English Dictionary tells us that 17th century contemporaries used the word to mean "instruments including all kinds of things, including guns used in war" for defensive and offensive purposes.

If some other kind of weapon were intended, that word or words would have been used, I argue, because the drafters were heavily dominated by lawyers. And, as we know, lawyers are all very intelligent and very sensitive to the kinds of words that they use.

The point is that these men were guaranteeing a right to have arms for the subjects' defense. They were not

providing a constitutional guarantee that subjects might have a gun or whatever for the protection of themselves, their family, their community, or for hunting.

In the 17th century and earlier, in a predominantly rural society, in a society that had no police force, it was the usual practice for persons to have some kind of weapon for that purpose. A bow and arrow, a club, a gun, whatever.

Moreover, the old militia laws specified what weapons should be held according to social status. Militia service was not a right. It was a duty imposed on people as we have just seen. As we heard just a minute ago, the first draft of Article VII had referred to "common defense."

The words "common defense" implied a collective right. They evoke the idea that ran all through the 17th century, that a militia composed of Englishmen, composed of Protestant freeholders and officered by the local aristocracy, by the lord lieutenant and his deputy lord lieutenant, was "the common defense of the nation," the military instrument

that would provide for the public safety and serve as a counterweight to that hated, detested and feared standing army which, since 1661, had come into existence and was increased in number over the years.

Recall that Article V about the militia had been dropped because there was no time to craft legislation to reform it. The words "common defense" and even "for their defense alone" served as a lingering ghost of interest in the militia. The plural of the word "subjects" and the use of the words "their defense" may also signal that at first a collective right was intended.

But as the amendment process continued the word "common" was dropped leaving behind the words "for their defense," an even fainter ghost of interest in the militia.

I can't at this point take the time to explain why those words were dropped, but I will just say it's almost certain that it was because the Prince of Orange objected to them and their implications.

So, now, let me turn to the qualifiers. And the first one is religion, that subjects have got to be Protestant. Anyone familiar with the history of 16th and 17th century England would expect that members of the convention would limit such an extraordinary right, as the right of subjects to have guns for their defense, to Protestants.

The limitation reflected the fear and loathing of Roman Catholics that had grown and intensified in English society ever since the 16th century Protestant reformation. By the late 17th century anti-Catholic prejudice was deeply embedded in English culture. It was nourished in a variety of ways including the so-called Popish Plot of 1678/83, said to be aimed at elevating a Catholic to the English throne.

In addition, English Protestants were outraged that King Charles II, and in an effort to find money for his standing army, even more so the Catholic King James II, had tried to disarm the militia and had also disarmed Protestant gentlemen. At the same time James II had appointed Catholic

officers in his army and had armed his Catholic subjects.

As members of that Rights Committee testified in debate, several of them had had their guns confiscated and their houses searched. One of them in particular was so angry because the sword, he said, that Charles II had used to knight him, had been taken from him. He felt naked in public.

An early draft of Article VII spoke directly to this matter as we saw. It called for arms that had been seized and taken from Protestants to be restored. The point is that restricting the right to have arms to Protestants is a reflection of early modern English prejudice against Catholics.

The second and third qualifiers suitable to their condition, and is allowed by law, were added by the House of Lords when the document was sent up to their lordships. A 13-member committee recommended the changes which were adopted by both houses.

Prof. Malcolm confesses that she is at a loss to

explain this amendment but offered the explanation that Article VII really did declare a right that current law negated with the understanding in the minds of the drafters that future legislation would eliminate the discrepancy.

There is not one shred of evidence to support her interpretation. In my view these qualifiers may be explained by very short excursus into English social history. The amendments reflected the social and economic prejudices of upper class English society, members of which sat in the House of Lords and in the House of Commons of the convention.

The structure of English society, I want to remind you, was hierarchical and stratified, with a tiny minority at the top exercising enormous political, economic and social authority. It was a society based on inequality, one that recognized social gradations, and it was sensitive to title status, role and wealth.

The two qualifiers were introduced by the members of the House of Lords, and the House of Commons accepted them

without recorded dissent. The social standing of the peers is obvious. Perhaps we should remind ourselves that members of the House of Commons also enjoyed high, economic and social standing, too.

I had a little excursus about the leaders of that committee, but I will not take the time to tell you that because I will run overtime.

I just really wanted to say, too, that the possession of arms had always been associated with the subjects' military obligation, which itself had reflected socioeconomic status. If you look at the customs and laws governing the old militia and the feudal array you see that those laws reflected social values and fear of arming the lower classes.

Other laws, namely, the game laws, restricted the possession of weapons to the wealthy. Laws going all the way back to the 14th century, on through the most recent Game Act of 1671, were directed to that end of limiting the right of

gun ownership. The Game Act of 1671, which is very close to 1689 in time, was the most rigorous of all.

Among other highly restrictive measures the law specified that the right to have a gun was limited to persons having an income of 100 to 150 pounds per year. And I won't go into any of the further details, but I ask you to recognize that the multiplier is considered today to be between 15 and 20. So, if you multiply 100 by 15 you get an idea of how much money here is involved. And you can put that figure further into perspective by noting that the annual income for a laborer in this period ranged from 9 to 15 pounds.

The lords knew well the provisions of the Game Act. Three of the members of their Rights Committee had served on the committee to which the game bill was referred in 1671. The members of the House of Commons knew well what the Game Act provided. Four of the members on their Rights Committee had also been involved in the Game Act of 1671. It's entirely unlikely that these men were unaware of the significance of

the amendments.

Members of both houses had reason to want to preserve their hunting privileges and to fear the threat to their property and person from placing arms in the hands of all Protestants.

In sum, I maintain that Article VII was erected on prejudices: religious, social and economic. Reflecting social and economic snobbery, Article VII preserved the interest of the upper class Protestant landowner. It was class law. It was also a gun control measure aimed at keeping guns out of the hands of the socially and economically non-elite members of the society. It gives no right to all Protestants to possess guns. It gives that right to a few individual upper class Protestants. In effect, it armed 2 percent of the population.

Am I out of time?

MR. HENIGAN: There will be time for Q and A.

PROF. SCHWOERER: I have some other points to make

which I could make later, maybe?

MR. HENIGAN: Yes, during the question and answer.

PROF. SCHWOERER: Okay. Well, thank you very much, ladies and gentlemen.

MR. HENIGAN: Thank you very much, Prof. Schwoerer. Having followed this debate for some time Prof. Malcolm's book has gone out unchallenged way too long, and it's unchallenged no more. It's very refreshing.

Our next speaker is Prof. Don Higginbotham, who is the Dowd Professor of History at the University of North Carolina at Chapel Hill. He is an expert in the field of early American history and is the author of several books including George Washington and the American Military Tradition and War and Society in Early America: The Wider Dimensions of Conflict.

His many essays and articles include "The American Militia, A Traditional Institution With Revolutionary Responsibilities" and "The Federalized Militia Debate: A

Neglected Aspect Of Second Amendment Scholarship."

Most recently his essay, "The Second Amendment in Historical Context," was published in the recent edition of Constitutional Commentary which was dedicated to the historical analysis of the Second Amendment.

Prof. Higginbotham has received the National Historical Publications Award and is a past president of the Southern Historical Association and the Society for Historians Of The Early Republic.

Prof. Higginbotham, among other topics, is going to address the nature of this mysterious well-regulated militia that is referred to in the Second Amendment.

Prof. Higginbotham.

PROF. HIGGINBOTHAM: I couldn't help but be drawn to another man named Emerson, a Dr. Emerson, in thinking about the early remarks, the prefatory remarks here. The American historians, I trust, will remember that Dr. Emerson figured in the Dred Scott Decision. So, we have another Dr. Emerson who

is involved in judicial controversy.

Now, I would like to talk with you for a bit this morning about the context for the Second Amendment. That is to say, the subject as it looked to people during the American Revolution itself. It seemed to me a few years ago that something was missing from gun ownership and gun rights arguments in both the legal and the historical literature.

Perhaps, indeed, there were a number of things missing, but what interested me in pursuing was what Americans actually had to say about the control of the militia in the revolutionary era, especially at the time of the writing and ratification of the Constitution, and at the time the Bill of Rights was adopted.

Certainly a very radical shift took place from total state control of the militias to shared authority with the Federal government under the Constitution of 1787. This was a very traumatic change for many people. And Madison, whether he wanted to or not (I have a feeling he didn't really want

to) found it necessary to respond to this concern.

Now, when I began my research on this subject, I didn't have an agenda with regard to gun control or lack of gun control. My article in the William and Mary Quarterly is really the core of my research. It's called "The federalized militia debate; looking at it in a Second Amendment context."

It actually originated, and I'll say this for Michael's benefit since he is Canadian, when I was asked to give a paper at the University of Acadia in Nova Scotia -- a marvelous place on the Bay of Fundy where the tides are the largest in the world.

The theme of the conference was the use of the military in domestic peacekeeping in English-speaking countries. I dealt with the United States, and other people dealt with Canada, New Zealand, Australia, the U.K., and so forth. That's how I got into this. It wasn't really part of a big book.

So, what were Madison and the authors of the Second

Amendment responding to in terms of fears and addressing them? It was, simply, I think, the very sensitive issue of who controlled the state militias. It seems to me that the countless words that were hurled back and forth by the federalists and the anti-federalists in reacting to the Constitution, were about the matter of control, control of the militia.

I'll remind you what Article I, Section 8 of the Constitution has to say. The Congress has the power "to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasion."

Congress has the power "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." Now, that's the key militia language in the Constitution, in Article I, Section 8.

Briefly, in Article II and in Article IV there are other references directly or indirectly to the ability to

federalize the militia.

Now, to the anti-federalists there were two grim scenarios that might occur as the result of the militia language of the Constitution. The first was that the militia would be very much under the federal thumb, that it would actually be federalized most of the time. And in effect it would become -- those dreaded emotional words -- it would become a standing army.

And, you see, the government would get away with this because they wouldn't call it a standing army. They would say we are using the militia for all kinds of important business. So, sinister and nefarious things would take place here in terms of what would happen with this power to federalize the militia.

Now, the other scenario was really just the opposite, and some antis were honest enough to admit that they didn't know which one would occur, but surely one would take place. And that would be that the Federal government would

not exercise its responsibility with regard to training and disciplining the militia and acquiring arms for it. In other words, it would allow the militia to wither. It would become impotent.

And, then, if the Federal government wanted to engage in acts of tyranny, it would use the army and the people would be defenseless because the government would have allowed their militias to disintegrate. So, neither was a pleasing prospect but it seemed to the antis that at least one of these things would probably happen.

Now, if virtually all that was said involved control and treatment of the militia, that is, if that's about the only way in which it was discussed contextually in the state ratifying conventions, or to put it another way, expressions of the collective rights of citizens as members of the militia, it seems hard to make the Second Amendment more than what the antis were saying they were concerned about.

It is hard to make it into an individual right to

own guns for hunting or recreation or to protect oneself against a neighbor or against the central government.

Now, we have a very emotionally heated debate today about the Second Amendment, and we know it's about individual rights. At least those are the people who seem to be creating the heat. Notice I am not saying light as well, but just heat.

Now, the anti-federalists also were very emotional and very heated. But about something else. It was about taking away from the colonies and the states something that historically was theirs alone to control and alone was the guarantee of their protection of liberties against a central government. But it was an emotionally heated issue for the reason that I mentioned.

For colonial Americans their defenses historically over 150 years against the French and the Spanish and the Native Americans or Indians had simply been their militias. Rarely in the long history of the colonies had the British

government sent redcoats to the colonies for aggressive or defensive warfare to protect the colonies.

As a generalization we can say this hardly happened on an extensive scale: Only in the four imperial wars between 1688 and 1763. In fact, the only really sizable British contingent was in the French and Indian War (or the Seven Years' War) when there were 30,000 British soldiers in North America. It's interesting to note, and not well known, that of those 30,000, 10,000 were actually recruited in the colonies. Only 20,000 of those 30,000 actually came from Britain itself.

So, their whole colonial background, their tradition, was one of self-defense employing their own militias. Another thing it's important to mention about the significance of the militia: Remember we are talking about a period when there was little in the way of local effective law enforcement.

Police departments didn't exist. They didn't appear

in American cities in any meaningful sense until the time of the American Civil War. Law enforcement officials were sheriffs and assistant sheriffs and constables, and they were few in numbers. There were few jails. That's why often prisoners or debtors, if you look at an 18th century map, were confined to certain sections of the city. It was like someone being on parole because they just didn't have the jails and prisons in those days.

With regard to the militia's constabulary role, I think it's interesting here to relate this observation to Carl Bogus's recent article, which many of you know about, in the University of California Davis Law Review. He reminds us that an important function of the militia was to regulate and control the movements and the disciplining of slaves.

The militia usually made up the so-called slave patrol, both in the colonies and later in the southern states. Some of you recall that Bogus suggests, more than suggests, that the concern of southern anti-federalists was that a

federalized militia would leave them defenseless against their slaves in the event of slave revolt.

Now, local officials were very touchy about any efforts to control or regulate their militias. There was a great deal of friction in the colonial wars, particularly in the French and Indian War. One can look at George Washington, who wanted a British commission but at the same time was very critical of the arbitrary and imperious attitudes of British officers toward his men and other American militiamen.

It was by no means limited to Virginia. In Massachusetts the soldiers who were, of course, from a puritan culture, saw redcoats as depraved and immoral men, lower class, the sweepings of the gin mill. There was great friction between British soldiers in New England and the militia.

Now, this sensitivity with regard to regular troops did not disappear in the revolution. Indeed, at times the local officials’ and the militia's hostility toward

Washington's army was reminiscent of the attitude they had had toward the British troops.

Let me read you a quotation from Congressman Abraham Clark of New Jersey. And he said this in the midst of the Revolutionary War. If any state needed the support of Washington's army it was New Jersey, where an unusually high percentage of all revolutionary battles and skirmishes occurred because of the proximity of the British in New York City. The King's forces controlled New York City from 1776 until the end of the war.

But Abraham Clark said that for Congress or Washington to try to take over the New Jersey militia and send it out of the state without its consent would be to subvert all liberty. In fact, it would be tyranny. In other words, these revolutionaries weren't very radical. They sound quite conservative, don't they? They aren't really willing to pull out all the stops. Their ideology was getting in the way.

So, what happens during the revolution is a kind of

consensus about the militia breakdown. That is, the militia are virtuous people, they are the great palladium of liberty, they are the first line of defense. But time and again the militia had proved to be inadequate and disappointing, and local officials had stood in the way of Washington using the militia.

And, indeed, the weaknesses of the militia were further dramatized in 1786 and 1787 in Shays's Rebellion when part of the militia of Massachusetts went over and joined the rebels in acts against the government of the state of Massachusetts.

People with a nationalist orientation like Washington said the militia was running true to form. The states couldn't even control their own militias, much less could the Federal government or the Congress have a say in effectively using the militia. Shays's Rebellion, in terms of the militia contents of the Constitution, provides us a new wrinkle.

Prior to the writing of the Federal Constitution, people like Washington, who were militia reformers, wanted the government to be able to organize, train and discipline a fairly small percentage of the militia, particularly when it was called into federal service. And they wanted that right to call them into federal service, but only for one reason, to repel invasions.

Now, Washington and Knox, his War Secretary, never went beyond the idea of calling the militia to repel invasions. But, now, look what the Constitution adds. Not only can the Congress call out the militia to repel invasions, which is what Knox and Washington wanted to do, but the Constitution also says, "to execute the laws of the union and to suppress insurrections." Here is the impact of Shays's Rebellion.

I think this part terrified the anti-federalists, the states rights people, as much as anything else, if not more.

Let me just briefly make a few more observations. What did the anti-federalists say specifically about these provisions in the Constitution. What did they offer as an antidote to make the Constitution acceptable, at least in terms of the militia?

The way things stood, as Luther Martin of Maryland phrased it, the Constitution had given the last coup de grace to the state governments. What did they want to do? They wanted to restrict the amount -- if the militia was called into federal service -- of time it could be federalized and the percentage of the militia that could be federalized. They did not want the militia to be sent outside the state without the permission of the governor or the legislature of the state.

They desired conscientious objection to be recognized. They wished to modify what, seemingly, was the open-ended question in the Constitution of whether the militia could be put under martial law.

Now, what is interesting to me is when you look at the Second Amendment, none of the things, literally none of the things, that the anti-federalists talk about are in the Second Amendment.

One would think, then, that this would have been the exact moment for the anti-federalists to bring up the subject of an individual's right to his gun, apart from a militia obligation, and to make that very specific. And that, to me, is most interesting.

It is true that the federalists, in some of the later ratifying conventions, tended to talk in a conciliatory fashion in order to get the Constitution ratified. They made no promises, but they did agree to consider amendments in the first Federal Congress. They made no commitment in any state to any particular one, but they agreed to the drafting in what amounted to something like five or so states to recommendatory amendments.

All told, they came up with about 200. Therefore,

you can see why Madison and his colleagues in Congress discarded most of them. Since they had made no promises, really, and since this was a matter of such urgency, it is curious to me that they didn't include the individual gun rights thing, if indeed they saw that as a constitutional right that somehow should be in the Constitution or in a subsequent amendment or an article of the Bill of Rights.

Let me just make some closing observations, and there are other things I will come back to later with regard to the Second Amendment.

It's interesting that Madison himself opposed the Bill of Rights in 1787. It was a gradual conversion for him. And I am not saying it wasn't genuine, but it was a slow process. His original view was exactly like that of the man who later became his great adversary, Hamilton. That is to say, if you start enumerating rights, what's the problem? You are going to leave a lot of them out. You can't possibly know what they all are.

And interestingly enough, Georgia was one, maybe the only state, to reject all of the proposed Bill of Rights for what I think was a fairly sensible reason. They said, let's let this constitution work a while and then we will have a better idea of what we need in the way of amendments to protect us from our federal government.

Jefferson, who was very critical about part of the Constitution, especially the absence of a Bill of Rights, in numerous letters that he wrote makes no mention among the various amendments he proposed to anything relating to the militia.

Here is Madison who had no interest in a Bill of Rights, and here is Jefferson who says nothing on the question of the militia.

And then the final point I will make now: The Bill of Rights had a very difficult time in the first federal Congress. Madison initially, in the first session of the Congress, found most congressmen almost wholly uninterested in

the subject. He did something unusual -- he asked Washington for help.

President Washington agreed to make a public statement in support of a Bill of Rights. Washington, as president, had wanted to be a kind of patriot king and above the legislative battles. But he responded to Madison and did so.

Any number of scholars have said without Madison there would have been no Bill of Rights. That's probably an overstatement. But there probably would not have been one in the first year of Congress or maybe in the first Congress, a two-year period. And one can hardly say what the results in the long run would have been.

The most recent scholar to look into this and make the argument is actually a former graduate student of mine, and I am glad to say wrote his dissertation before I wrote my article since I didn't influence him here.

But Stewart Leibiger has recently published a book

with the University Press of Virginia called Founding Friendship. It's a study of the relationship between Washington and Madison. And Leibiger says that without Madison there would have been no Bill of Rights.

MR. HENIGAN: Our next speaker is Prof. Saul Cornell, who is associate professor in the Department of History at Ohio State University. His book, The Other Founders: Anti-Federalism and The Dissenting Tradition in America, was published in 1999. And his work, Whose Right To Bear Arms Did the Second Amendment Protect? in Bedford St. Martin's Press Historians At Work series will be released this year.

He has authored several articles including "Mere Parchment Barriers: Anti-Federalists, The Bill of Rights, and the Question of Rights Consciousness," and "Commonplace or Anachronism: The Standard Model, The Second Amendment, and The Problem Of History In Contemporary Constitutional Theory," also published in the recent edition of Constitutional

<u>Commentary</u>.

It is my pleasure to introduce Prof. Saul Cornell.

PROF. CORNELL: The debate about the Second Amendment has tended to be dominated by law professors. The reason I put up these two images, a militia man, and this original copy of the Bill of Rights, is to get us in the right mind-set because we are talking about a very, very different world, a world hundreds of years old, and a world that is fundamentally different than our own.

What I hope to convince you of by the end of this presentation is that we have almost inverted the meaning of the Second Amendment. Actually, our question, what kind of gun laws does the Second Amendment allow us, inverts what would have been the founding fathers' idea.

The founding fathers would have been shocked at the idea that the Bill of Rights prevented reasonable regulation of guns because these were people who kept track of who had guns, they kept track of what kind of order those guns were

in, and they were not above restricting access to guns to people who were perceived to be dangerous.

What I would like to do next is to review the decision by Judge Cummings and show you, what a good historian does, which is follow the footnote trail and show you how there are some very serious problems with this decision. And the problems all come from this recent Law_Review literature.

Here is the first selection from Emerson I have highlighted: "The individual rights theorists supporting what has become known in the academic literature as the Standard Model, argue that amendments protect an individual right coming from the concept of liberty and resist any attempt to circumscribe such a right."

Now, if you follow through the logic of the Emerson Decision it's very clear that the Emerson Decision depends on this Law Review literature. The Law Review literature is wrong and there is no foundation for the Emerson Decision. So, let's follow where Judge Cummings is getting some of the

stuff from.

This is another selection from Emerson where he quotes Joyce Lee [Malcolm] who is not an early American historian, she has never published in any of the major journals in early American history. She is an English historian. And she quotes from this interesting Pennsylvania document. This is a proposed amendment by the Pennsylvania Ratification Convention. It was not used by Madison. It was rejected.

And then she goes on to quote another amendment that actually was not used, another failed anti-federalist amendment. Now, what's so interesting about this is that the anti-federalists, for most of the last 50 years, have been the knuckleheads of American constitutional history. They have been called men of little faith, losers, paranoid. They were worried about the Pope becoming President, they were worried about all kinds of crazy things.

And, actually, the one thing that you don't find in

the anti-federalist literature, and I have read all of it, is any mention of this individual rights to guns. I mean that's just really astonishing. This is one of the very few times you get an Anti-Federalist even sounding as though they might be talking about an individual right.

And I want to suggest to you that people have misread this particular text. So, let's just read it together: "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; and no law shall be passed for disarming the people or any of them" -- and, of course, it's the next clause that's the key -- "unless for crimes committed or real danger of public injury from individuals."

Essentially, this one piece of anti-federalist writing which comes closest to articulating an individual right turns out to be the license for, as you will see in a moment, the most extensive gun control law ever enacted in American history. So, I'll show you what that is in just a

moment.

But, again, just to show you how crucial this anti-federalist text is, it appears everywhere. Here is the table of contents for the brief on the Second Amendment Foundation. And, again, here is the Pennsylvania minority and the Sam Adams proposal. You go along to the academics for the Second Amendment amicus brief in the Emerson case and the same texts are used.

But here they talk about the first Pennsylvania Constitution of 1776 adopted by a community in which Quaker sentiment had frequently prevented the formation of an official militia.

Of course, the people who wrote the Pennsylvania Constitution were vehemently anti-Quaker, so they have actually got it, once again, exactly wrong.

They go on to say that to prove that "bear arms" could have a non-military meaning they quote the Pennsylvania Constitution and once again this anti-federalist text.

Interestingly, they go on to attack this David Yasskey brief for quoting Anti-Federalists which is what they have done in their own brief.

In history we call that a contradiction. You can't quote anti-federalists' viewpoint and then attack the other side for quoting Anti-Federalists. But I am not a lawyer. Perhaps that's representing your client. It's probably why I sleep better at night as a historian than I would as a lawyer.

The next thing I am going to show you is another remarkable thing which is -- and here, of course, is my book [The Other Founders: Anti-Federalism and The Dissenting Tradition in America] And this political cartoon from the 1790s that I put in my book really shows you how well thought of the Anti-Federalists were. I mean it's a very unflattering portrait. These are not people you would trust your government with.

But what I want to suggest to you is that what's been going on in the Law Reviews, and has now been picked up

by this case, is a rewriting of our constitutional history from the perspective of the Anti-Federalists.

Now, it's good for my book. It's selling well. I mean personally I am benefiting from it, but -- and it's fascinating from an intellectual point of view to imagine what might have been had these people won. But the fact is they did lose, and the fact is that the first Congress contained fourteen Anti-Federalists in total, which is a small minority. Most of them were not the Anti-Federalists that tend to get quoted in the Standard Model literature.

Again, just to put this in perspective, here is a chart from an article I am working on which shows you the rise in the number of citations to anti-federalism in the Law Review literature. This is just astonishing.

I mean, these lawyers are just going out and, because these anti-federalist texts became easily available in a modern edition, they are quoting them whenever they can, not putting them in context. And there's a real problem.

So, let me move on to what the real problem is. First, let me move on to the issues in the Emerson case. What does it mean to say "a right of the people"? Basically, what has happened is every time these people see the right of the people they translate it as an individual right. And that is essentially anachronistic.

They didn't say individual. They said right of people. And there is a reason they said that. They also argue, using this Pennsylvania evidence, that bearing arms was not military. And I'll show you about this law, that has not been mentioned by any of these legal scholars, which shows what they really were thinking. So, we'll move on to that in just a moment.

I have actually gone back to the original document, which is something that law professors don't do. If it's not on Lexus/Nexus or not in a modern edition, it generally doesn't exist for most scholars.

Being a historian is dangerous. It hurts your eyes.

You have to study the microfilm. You have to look at all that dusty material. I have allergies. It's actually a hazardous business for someone with allergies.

Here is what they say: The people have a right to freedom of speech, and then you have the right of the people to bear arms. You see, it must be an individual right. Well, of course, what they don't ever quote to you is a provision that comes before this in the Pennsylvania Declaration of Right.

“The people of the state have the sole exclusive and inherent right of governing and regulating the internal police of the same.” If you try and substitute "individual right” in there it doesn't make any sense. That, obviously, is a collective right.

And when you put the provisions about arms and the provisions about speech in that context you see that in the 18th century, they were talking about something slightly different than we talk about. Which, again, is okay. We

shouldn't expect them to be modern civil libertarians. They were not ACLU members. We have to understand that when we try and put everything in context.

Well, let me move on to, I think, what is the real important thing. And it's at the cornerstone of the argument I am making in my constitutional commentary essay. By the way, one additional problem with the Standard Model is the claim that everyone is a member of the militia.

And here, again, people don't actually go back to the original documents often enough. It says the people shall be trained in armed force defense under such regulations and restrictions and exceptions as the general assembly shall by law pass.

So, basically -- and you put all these quotes in context -- it says the people shall be armed. And, basically, except for the people we don't want armed. There is always a long list of exceptions. Sometimes as much as two paragraphs long.

And I should say that they almost always refuse to allow college professors to carry arms. In Massachusetts professors and students of Harvard College are forbidden and the professors students of William and Mary. Having been a college professor I would say that's a good thing.

A PARTICIPANT: How about lawyers?

PROF. CORNELL: No. Okay. Here is the kicker. This is a law that none of the people who write about the Standard Model, including Joyce Lee Malcolm, have looked at. And it's a law for disarming persons. This is the Pennsylvania Test Act. What Pennsylvania did, the same people who wrote that dissent of the minority and wrote the Pennsylvania Constitution, enacted this law, which is the most sweeping gun control law in American history, it disarms -- estimates vary, but something like 40 percent of the adult white male population is disarmed by this act.

This act was in effect when the Constitution was debated. It was not repealed until after the Constitution of

the United States was adopted. And, basically, it makes clear that in Pennsylvania, these people understood the right to bear arms in a very, very different way than the NRA or the Standard Model suggests.

Now, I just want to show you one or two other things very quickly. By the way, I apologize for being a very fast-talking New Yorker. But this is Washington, so you probably are used to it.

Here is another one of my favorite laws also invisible in the Standard Model. They don't do real historical research. I don't pretend to be a constitutional law professor, but they really should stop pretending to be historians.

In fact, if you think about it, if I actually pretended to be a lawyer I would get thrown in jail. If you pretend to be a historian, you get on the network news, and maybe get an endowed chair at a law school, yeah, so -- (Laughter) -- it's very, very different. There is no justice.

So, anyway, here we go: The Massachusetts Act for the Prudent Storage of Gunpowder. This is a law that effectively makes it illegal in the city of Boston to have a loaded firearm. To have a loaded firearm in the city of Boston in the 1780s is against the law. The founding fathers were willing to ban loaded guns in the city of Boston. This is completely below the radar in the Standard Model and it's a real problem.

A PARTICIPANT: What year was that passed?

PROF. CORNELL: This was passed in 1786. Now, I just want to finish off by pointing out something that, really, I think the media needs to do a better job with, which is to realize that law professors are the only group in the academy who do not use blind peer review.

As journalists you can imagine what would it be like if you turned over your newspapers to second year journalism students, what kind of havoc that would produce. But this is the way it's done in law schools. There is no blind peer

review.

As Carl Bogus has demonstrated, much of the Standard Model literature has actually been funded by the gun lobby. The absence of blind peer review means that instead of things being screened they are recycled. And, in fact, in my Constitutional Commentary piece I suggest that a legal scholarship in the Second Amendment is like an elaborate check-kiting scheme because no one has ever checked the original footnotes. This is what you do in professional history journals. It goes out to experts in the field. There are no names on it and it is valued on the content.

DR. HIGGINBOTHAM: You might also point out that the editors of the major journals go themselves or send their graduate assistants to the sources to check the accuracy of the quotations.

PROF. CORNELL: That's right, that's right. Real history means getting into the archives and digging out some of the stuff instead of just looking at the same published

materials.

And if you look at legal scholarship materials they quote the same things. That would actually be grounds for not getting an article published in the history journal. If you don't produce any new research or come up with a radically new interpretation, it doesn't get published.

That's the opposite of what happens in the Law Review. If they publish it in Yale, then what happens is every law journal from Akron to William and Mary has to have an article on the same topic saying almost the same thing. It's just a very different scholarly publishing model.

So, let me just conclude -- and I don't like doing head counts, and I don't actually like counting noses. But here is a claim in the Academics for the Second Amendment brief that says, "Modern scholarship has established beyond any reasonable doubt the Second Amendment protects an individual right." Well, I am afraid that's just not true. That's just a lie. In history it would be a lie. I just

don't know what it would be in amicus brief.

There really is a spectrum of sentiment. There is the Standard Model position which had some support in law schools. Very few people in history believe it. I actually didn't want to do this but I thought since they did it, and they always do it, I had to do it. I actually counted how it's stacking up in the history profession. And here is what it looks like

Under the most generous terms, giving credit to people who don't go into the conferences that early American historians are tuned to go, and who don't publish in the William and Mary Quarterly, if you include those people -- I can only come up with three people who have said anything positive about the Standard Model, two people in the middle, and about 24 people who are some of the most eminent historians in the country, who have attacked it.

And last, but not least, I just want to show you that if you are interested in this, I just published this

book. It has articles by Don [Higginbotham], it has articles by Michael [Bellesiles], also an article by Gary Wills. And Ed M. Morgan is one of the most distinguished historians of the post-war period.

And if you are interested, this is really the place to go, I think, because this has what the historians are saying about it.

I have included some letters from law professors who protested about Gary Wills's famous New York review of books essay. I have included the one historian who has tried to make the sort of limited individual rights argument, Robert Shalhope, who incidentally contributed to our Constitutional Commentary forum, and probably had the harshest things to say about the Standard Model. And he really thought that they had abused his scholarship in putting together their work.

But, anyway, I don't want to go on too long. But I think it would probably be a good thing if every once in a while you heard a historian on NPR talking about what the

history actually said. So that's my little promotional. Thank you very much.

MR. HENIGAN: Thank you, Saul.

I want to formally apologize to this group for ever having gone to law school. (Laughter). I think the rest of the lawyers here should join me in that. I feel tarnished for life.

Our last speaker is Prof. Michael Bellesiles.

Michael, you have a tough act to follow.

Michael is professor of history at Emory University in Atlanta, Georgia. He is the author of the books, <u>Revolutionary Outlaws: Ethan Allen and the Struggle For Independence on the Early American Frontier</u> and the forthcoming <u>Arming America: The Origins of a National Gun Culture.</u>

He is the only person to ever win both of the top article prizes from the Organization of American Historians. He has authored numerous articles including "Gun Laws In Early

America, The Regulation Of Firearms Ownership 1607-1794" published in the Law and History Review; and "Suicide Pact, New Readings Of The Second Amendment," published in the aforementioned edition of Constitutional Commentary.

Prof. Michael Bellesiles.

PROF. BELLESILES: There are two reasons why you may want to ignore everything I am about to say. I will turn to the second reason later. But, first, history may be of no real significance. Akhil Amar has stated that the historical context of the Second Amendment is irrelevant to constitutional law, that history itself does not matter.

That is, of course, blasphemy to a historian. We tend to lose our sense of humor when people say things like that and we look very stern and we warn that the next stop is Holocaust denial. However, there is more subtlety, I think, to the denial of history's importance than just simply blasphemy.

The "Standard Model" interpretation of the Second

Amendment originally claimed deep historical roots for the individualist reading of the right to bear arms. Once historians entered the debate suddenly they are all converted to post-modernism and begin announcing that historical context is utterly irrelevant, and history is a cultural construct anyway.

Thus we get Charlton Heston calling for historians to stop wasting their time in the archives. And William Van Alstyne insisting that the image of the past is far more important than the reality, while many others suddenly say it is not the Second but the Fourteenth Amendment which really matters in this discussion.

So, forgive me, therefore, for beating a very dead horse. But historians are a suspicious lot and we find ourselves having to kill some horses over and over again. And I must also admit to a bias, a very strong bias, which is I hated law school. But I did attend.

The Standard Model traditionally has five arrows in

its quiver. Actually, five and a half. The sort of half arrow is that they are unanimous. I like the way Kates and Barnett put it in their notorious article in the Emory Law Review which is that there is “virtual unanimity.” I feel this is like all computer virtual constructs and has nothing to do with reality.

But I am going to put that one entirely aside because I think it's probably, again, getting a little bit heavy-handed. There are five arrows in this quiver: First, the British heritage of an individual right to gun ownership. Second, the American tradition of universal gun ownership. Third, the rhetoric of the constitutional period. Fourth, the exact wording of the Second Amendment. And, fifth, some quotations.

First, to go through these much too quickly, insisting on a British heritage of individual right to gun ownership borders on the bizarre. I think no one more than Prof. Schwoerer has destroyed this view and this vision. I

teach at Oxford every summer, and for the last four years, since I reviewed Prof. Malcolm's book, I have shared her argument with British historians of Great Britain. And they usually look at me very quizzically. A few have laughed outright. None of them can understand her argument about the British Bill of Rights. It just makes no sense. I think it's safe to say that anyone who reads the English Bill of Rights as imparting an individual right to own a gun needs a remedial reading course.

So, I'll move on to the second arrow which has been my area of research for the last ten years, which is the question of universal gun ownership in America.

Here we have, I think, one of the most powerful examples of image over reality in our history. It is no wonder that Prof. Van Alstyne argues that the image of the past is far more important than the reality. The image is clear.

That wonderful statue in Lexington, the Minute Man,

who is holding in his right hand a giant musket while in his left he has the plow. I come from an agricultural family. I don't imagine any of you have experienced plowing, but try plowing while holding a musket in one hand and plowing with the other. But be that as it may, it is a great image. And we all know what it means.

In 1775 the farmers of America rushed forth from their plows like modern Cincinnati, grabbed their Old Bess off the top of the mantle, and went out to kill redcoats. But in reality when the vast majority of Americans reached above the mantle there was usually nothing there. If there was anything there it was old and very rusted because these firearms, after all, were made primarily of iron.

The gun, by the way, that notorious Brown Bess, if they had it, had been supplied by the British Government. A little known fact but I think one of great importance, which I will return to, is that there were no gun manufacturers in what was to become the United States until 1794.

This information is not news. I think any military historian, Prof. Higginbotham stands out in this regard and will back me up, any military historian of the American Revolution knows that the majority of Americans who showed up for service during the Revolution, if it was for a day or for the duration of the war, came largely unarmed and that 85 percent of the firearms Americans used during the Revolution came from France and Netherlands. And most of the rest came from Great Britain. It was a revolution; they seized the arms from those they defeated.

The first historians of the Revolution, David Ramsay and Mercy Otis Warren, both report these facts that Americans were largely unarmed and turned to Europe for their firearms. Everyone who participated in the war knew it. From General Washington down to privates who kept diaries.

That knowledge drove many of the key figures who crafted the Constitution and the Bill of Rights and accounts for a number of very important decisions reached by the U.S.

Government in its first 50 years. Yet there has been a cognitive dissonance that reads that fact and then dismisses it immediately.

Now, I don't want to bore you with a bunch of statistics, though those boring statistics will be available to plug my book in Arming America, due out from Knopf, I hope, in the spring.

But let me lay out just a few key facts. The first is, again, that until the United States Government established Springfield Armory in 1794 there were no gun manufacturers in the United States. There were some gunsmiths. I have gone through every existing gunsmith's records that I can locate in any archive in the United States and they demonstrate convincingly that they repaired firearms and that their primary business was the making of axes and pots and plows. That's what they focused upon.

There was no one in America who could make the gun lock, the key component of any gun, at the time of the

American Revolution. They were all imported.

Second, I have looked at every possible source of information on gun ownership in America in the antebellum period. Production, military and militia and probate records, they all tell us roughly the same thing, that not many Americans owned guns. Probate records put gun ownership of any kind of gun, functional or not, at 14.7 percent of the adult white male property owners at the time that the Constitution passed.

Gun censuses were conducted. Most people don't know this, that the local governments and the Federal government conducted gun censuses. They literally sent the constable house to house, "Can I see your gun? What kind of guns do you have? What condition are they in?" There were no protests in the legislative records against these gun censuses except to insist that they weren't being conducted efficiently enough. That was the only nature of the protest.

As a consequence we have a pretty good idea of how

many guns there were in America given that, in those days, statistics were always questionable. There were enough guns in all of America to arm 45 percent of all those enlisted in the militia in 1790, which is 20 percent of the adult white males and 4.5 percent of the total population of the United States. By the way, that compares today with an estimate that there are enough guns in America to arm about 120 percent of the population.

The third point to make here is that the militia was a disaster. Anyone who has studied the militia in the antebellum period knows that it was a large joke. Most states passed laws making it illegal to mock the militia when they had their occasional musters. And these were necessary. Most militia musters abandoned shooting matches after their first try.

Whenever they had shooting matches it was subject to great humor because few people could hit the targets. The targets were usually at 20 feet and they were described

generally as the size of a barn door. And there was a great deal of trouble hitting them. Most newspaper accounts said the prize went to the person who came closest to the target.

And a fourth point is because of these realities, little supply, almost no production, and a paucity of interest on the part of the public in firearms, that the Federal government made repeated efforts to arm the militia. These efforts culminated in the 1808 Militia Act which appropriated $200,000 a year -- and I am quoting -- "for the purpose of providing arms and military equipment for the whole body of the militia of the United States either by purchase or manufacture."

In the congressional debates the reason given for the necessity of this act was the public’s refusal to arm itself. And even if they wanted to, there were not sufficient arms to purchase.

So there's an understanding on the part of Congress, right through the antebellum period, up to the Civil War, that

most people did not own guns and were not interested in owning firearms, which I think is a vital point.

The third arrow in the Standard Model’s quiver is rhetoric. Few subjects have been so well analyzed as the rhetoric of the constitutional period. Some of the best books in my field have been on the subject. Gordon Ward, Jack Rakove, Garry Wills, Pauline Maier, Lance Banning, Drew McCoy -- I could go on and on listing the works of this long and distinguished group of scholars.

I think it is safe to say that on one point they would agree: That the Federalists hoped to build a Federal government stronger than its predecessor, and that the Second Amendment -- again, Prof. Cornell has done a terrific job, I think, explaining this -- the Second Amendment must be placed within that historical context, the effort of this first government to survive.

That's what I meant by the title of my article in the Constitutional Commentary. They were not writing the

suicide pact. They were not writing a constitution which gave over to the body of the people an insurrectionary right, which is an important argument Sandy Levensen made in his key article so many years ago, the "Embarrassing Second Amendment," that the people have a right to individual firearms ownership so that they can, when necessary, overthrow the government.

This is, in the context of the origins of the American Republic, insane. But more importantly -- it is an error to think that the anti-federalists favored an individual right to gun ownership. And they were the losers. But I think what's even more important in all this is that there is a legislative track record here. There are statute laws, there are court decisions through the antebellum period which tells us precisely how the framers of the Constitution and their immediate successors thought of the right to bear arms and what its nature was.

James Madison himself, in presenting the Second

Amendment -- why isn't this quoted more often -- in presenting the Second Amendment to Congress, said that what he feared most were the common people, that what we need to do is strengthen the Federal government. That was his understanding of the Second Amendment. It was being introduced in this context.

To be very precise, he said, "The greatest danger to our republic lies not in the executive branch, but mainly in the body of the people operating by the majority against the minority." He then goes on to insist that the Second Amendment must be understood within the context of Article I, Section 8 of the Constitution, which gives the Federal government control over the militia. That's Madison. He wrote it. He must have known what he was talking about.

Let's give a few examples. In the 70 years immediately after ratification of the Second Amendment gun laws were passed in every state. Every state regulated gun ownership. They regulated the quality of firearms, the

quantity of munitions that could be produced, where they could be stored.

Boston was not alone in forbidding the carrying of or keeping a loaded firearm even in your own home. It was seen to be very unsafe. Most states had a Concealed Weapons Act, which are the opposite of our Concealed Weapons Acts.

I have a concealed weapons license in the state of Georgia because I received death threats a few years go, which allows me to carry the concealed firearm. Any citizen who has no felony convictions is entitled to this.

The Concealed Weapons Acts in the antebellum period were the complete opposite. No one, not even police officers, were allowed to carry concealed weapons in most states. Even the western territories in the years prior to the Civil War had Concealed Weapons Acts.

Police in Oklahoma were not allowed to carry guns under any circumstances except for when they were on duty in Oklahoma territory. In Washington territory they had laws,

like most territories, against the display of firearms. To even show one in public was illegal and was prosecuted. These laws were enforced. There are laws about the storage, the sale, and the maintenance of firearms.

And most importantly, of course, there were laws forbidding Catholics from carrying firearms. You have all heard of the Know Nothing Party; right? They won in lots of states. The first thing they did was disarm Catholic militias. There was no violent opposition to this disarming.

There were laws that clarified which religion and which races could own firearms. Black people, slave or free, in most states in the United States were not allowed to own guns. Individual right? Define "individual." If it includes every person living in the United States, it doesn't apply. Are we talking only about those people who have civic rights? Then why can't Catholics own guns? Or, more interestingly, why is there this hysteria over Derringers in the 1850s? There was once, as near as I can tell, one case of a woman

shooting her husband with a Derringer.

Many communities panicked and outlawed the ownership of small firearms by women because they imagined that women would start plugging away at their husbands left and right. You know, of course, that's why husbands should have a right to bear arms, to protect themselves.

Anyway, final point for the Standard Model. They have some quotes. And here I do want to show the difference between, perhaps, lawyers and historians. Sandy Levinson, in his landmark article, offers three quotations to back up the right to insurrection imbedded in the Second Amendment. That's it. Three pieces of evidence, three quotations.

One is by Thomas Cooley in his General Principles Of Constitutional Law, 1898. The second is a fellow named Theodore Schroeder -- I never heard of him -- published a book in 1969, but it was originally published in 1929. I checked. And neither of these was around when the Second Amendment was passed.

But his third quote is from someone who was around when the Second Amendment passed: Justice Joseph Story. He was 12 years old. In 1833 Justice Story wrote in the Commentaries On The Constitution Of The States, a four-volume work: "The right of the citizens to keep and bear arms is justly considered as the palladium of the liberties of a republic since it offers a strong moral check against the usurpation and arbitrary power of rulers."

Now, that's the quotation. An historian would want to do two things. One, look at the context. Read the next two sentences. Levinson didn't quote the next two sentences: "And yet though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised that among the American people there was a growing indifference to any system of militia discipline."

And, then, the other thing is -- and I apologize for running about one minute over -- who was Justice Story? What

were his general views? He was an extremely conservative man, understood to be such. Justice Story never belonged to a militia himself and never spoke otherwise about the militia.

You can go through his collected papers and letters. He never addressed the militia. And, most importantly, when Dorr’s Rebellion occurred in Rhode Island, which was a movement for universal male suffrage, Justice Story came out and said that it is treason to take up arms against one's government. Period. And he called for the president of the United States, at that time President Tyler, to disarm the people of Rhode Island.

So, in terms of, at least, this insurrectionary model, the one quotation from this period has no real meaning. Okay, so their argument falls apart. There is always that problem.

There is a second reason, though, why you might want to ignore what I have just told you. Obviously, I am not recommending that we pass laws disarming Catholics, since I am

a Catholic myself. Obviously, I am not saying that this is a pretty picture of gun laws in early America. And maybe in fact this is all irrelevant. Perhaps the original intention of the framers of the Constitution and the Bill of Rights should not enter into our civic deliberations.

After all, as Jack Rakove convincingly established, the original meaning of the framers was that future generations should not be guided by events and ideas in the late 18th century. But that is not to negate the value of historical knowledge.

I would like to offer the modest suggestion that the historical context of a constitutional amendment is highly relevant though not determinative of its meaning. And with no single issue is it more important to get the history

right than on the question of guns in American life. Thank you.

(The presentations were concluded.)

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