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## The Second Amendment and Other Federal Constitutional Rights of the Private Militia

Edward R. Becker

*Circuit Judge, United States Court of Appeals, Third Circuit*

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## SYMPOSIUM ADDRESS

### THE SECOND AMENDMENT AND OTHER FEDERAL CONSTITUTIONAL RIGHTS OF THE PRIVATE MILITIA\*

**The Honorable Edward R. Becker\*\***

It is a great pleasure to be with you in Missoula and to participate in the James R. Browning Symposium, named in honor of a distinguished Montana judge who is also, I am pleased to say, my good friend. Though I come from almost a continent away, my roots lie in the same spirit of dialogue and inquiry that is reflected by this program. I will address the subject of the Second Amendment and other federal constitutional rights of the private, or citizen militia.

I note at the outset that my views are not informed by past experience with private militias. My court, which hears appeals from federal trial courts in Pennsylvania, New Jersey, Delaware, and the United States Virgin Islands, has never had a case involving citizen militias, though there are some citizen militias in Pennsylvania and we may soon get one. Not only do I not belong to a militia, but I do not own a firearm and have not handled one since I was a teenager at a summer camp. In addition, I live in one of America's large eastern cities where a gun is viewed not as a vehicle for self-protection or a symbol of personal freedom, but rather as an object of sheer terror.

The putative rights of gun owners and militia members are understandably a matter of widespread personal disagreement

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\*\* Circuit Judge, United States Court of Appeals, Third Circuit, 1982-date; B.A., University of Pennsylvania, 1954; LL.B., Yale Law School, 1957; Judge, United States District Court for the Eastern District of Pennsylvania, 1970-82.

among Americans of intelligence and good will. That fact alone counsels that we approach the subject with great circumspection. However, there are far greater reasons for caution.

What struck me as I reviewed the case law and the literature on militias, and considered the multifaceted aspects and ramifications of the subject, is how enormously complex this area of the law can be. Indeed, I do not recall having encountered a subject whose legal history is so venerable, rich, and interesting, and yet whose crosscurrents are so sharp. There are, in fact, few areas of American constitutional law that are so obscure and little understood and on which the United States Supreme Court has given so little guidance. As Professor Van Alstyne observed, "the useful case law of the Second Amendment . . . is mostly just missing in action."<sup>1</sup>

Holmes said that a page of history is worth a volume of logic, and so I will begin with some history, albeit, given our time constraints, a capsule (or whirlwind) history. Before launching into this history, I should note that a citizen militia is also, in the philosophical literature, an ancient political ideal. It is what is known in political theory as a renaissance republican ideal, i.e., an appropriate way of defending a free republic, the most prominent and effective exponent of which, you may be surprised to learn, was Machiavelli. I will speak a good deal about this important aspect of the matter later, but let me return to history, as opposed to theory.

That history lies primarily in England, where the roots of the citizen militia are so ancient that they go back to seventh century England. At the very least, the citizen militia, as an institution with a legal identity of its own, existed for several centuries prior to the Norman Conquest.

The militia's history traverses the centuries of Saxon and Norman rule into the Middle Ages and thence into the region of the Tudor monarchs and beyond. The militia reflected a wide variety of arrangements, but it was largely used in the service of the monarch, for whom it usually played the role of a standby professional army. Under the Tudor monarchs, the militia reached its prime. It was well-organized and required drills, inspections, and target practice. Moreover, throughout a period of several centuries, citizens were encouraged to own and be proficient in the use of arms, so that there was a tradition of univer-

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1. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1239 (1994).

sal participation in the defense of the monarchy. The 1285 statute of Winchester, for example, required anyone who could afford them to keep bows and arrows. Not until the sixteenth century was the policy to restrict weapon ownership to the wealthier classes.

There were, of course, times when the local militia was independent of, and exercised a moderating influence on, monarchical rule, such as in the famous Wat Taylor revolt of 1381. The very presence of the militia was a moderating influence on the monarchy, particularly as Parliament began to develop its influence and powers.

The decline of the militia was a long time in coming, but it began in force toward the end of the seventeenth century due to two factors: the ascendancy of Parliament, which was interested in checking monarchical power; and the acceptance of a standing army, which had become a necessity to the conduct of warfare. Doctrinally, there was also a complementary and related development—the emergence of a “justice theory” of individual rights informed by certain amendments initiated in the House of Lords, which included the notion of an individual’s right to arms, separate and apart from the militia. Despite these countervailing strains, the dominant theme throughout most of the history of the militia in England was the notion that it was an appropriate way of defending the state.

In isolated colonial America, however, conditions were different. The colonies lacked the need for a military force for external engagements, and their economy could not support a standing army. The militia was received in colonies with enthusiasm, and it soon came to play a role not only as a means for colonial governments to enforce their decisions, but as a popular check on the excesses of royal authority, first in Virginia in Bacon’s Rebellion in the seventeenth century and later just prior to the American Revolution. Patrick Henry’s “give me liberty” speech was an adjunct to his resolution in favor of a well-regulated militia. The minutemen of Massachusetts were, of course, a militia.

The militia was viewed by George Mason and others, at least in theory, as comprising the whole people of the United States, or at least all males of arms-bearing age. At the same time there developed a strong colonial resentment to a standing army, which was conceived of as dangerous to liberty. So said the Pennsylvania Declaration of Rights of 1776, and so suggested the proposals for the Virginia Constitution. Madison’s draft recognized a well-regulated militia as the proper natural defense of

a free state. In contrast, Jefferson's Virginia draft contained no mention of a militia, but instead included an individual right to arms (albeit only for "freemen") out of concern that over-regulation of the militia by the state might endanger individual liberties. To Montesquieu and Jefferson, both advocates of the enlightenment theory of political democracy, the right to bear arms was a symbol of freedom.

Madison's proposal was adopted in Virginia. Pennsylvania followed Jefferson, and the other states were philosophically divided. After the revolution, however, the need for national security and the poor performance of the militias during the war led to increased support for a standing army. The debate continued through the Constitutional Convention with the Federalists and Anti-Federalists taking the expected sides. The Federalists responded to Anti-Federalist arguments against granting Congress broad powers to create a federal standing army by claiming that the militias could counter the influence of the army. Some Anti-Federalists, however, even feared that the federal government would disarm the militias.

Then came the dialogue between these two factions over the need for a Bill of Rights, and ultimately the Bill of Rights itself. What ultimately emerged was a (typically American) compromise, which included both a provision for a right to bear arms and for a militia.

For our purposes today, the key point is that, notwithstanding the Jeffersonian theory about the right to bear arms, all militia proposals during the history of the colonies and the early Republic were linked to the notion that the militia was the best security for a free state. The Second Amendment was in accord. Its text reads: "A well regulated Militia, *being necessary to the security of a free State*, the right of the people to keep and bear Arms, shall not be infringed."<sup>2</sup>

So then, rather than enhancing the case for the protection of private militias, the Second Amendment was drafted to provide for a militia that could protect the new state. My point is underscored by the fact that, when reviewing the history of the American militias during the first two decades of the Republic, what is most dramatic is that the ancient concept of the militia, and any semblance of the notion that it would be an instrument of revolutionary republicanism, quickly disappeared. The needs of the new nation foreclosed it. Requests for legislation to organize

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2. U.S. CONST. amend. II (emphasis added).

citizen militias declined, while efforts to build a standing army increased. The language Madison chose was sufficient to satisfy both the supporters of the well-regulated militia ideal and the advocates of the Jeffersonian enlightenment theory. Concomitantly, it also was sufficiently flexible to permit the nation to meet its changing military needs.

While the military activity of the citizen-soldier, as a militia member is sometimes called, is part-time today just as it was in the time of the minutemen of Lexington and Concord, the nature of the state militia is different. It is only a fraction of the population, and a highly structured one at that—typically a state national guard unit. Moreover, the history of federal legislation pertaining to militias, which, after the Dick Act of 1903 became known collectively as the National Guard, is one of increasing federal control, funding, and training with requirements for periodic service. Nothing controversial there. So isn't it odd that suddenly, in the late 1990s, a time fairly said to be eons and light years (in terms of technology and social development) from the time I have described when a citizen's militia played a significant societal role, we suddenly are called upon to interpret this virtually forgotten clause in the constitution because of the rise of private (as opposed to state) militias? I note in this regard that the first extensive examination of the militia clauses was not undertaken until 1940.<sup>3</sup>

Turning to the jurisprudence in this area, there is but one case of real importance: *United States v. Miller*,<sup>4</sup> which the Supreme Court decided in 1939. Miller was charged with transporting in interstate commerce a shotgun having a barrel less than eighteen inches long without having registered it as was required by the National Firearms Act of 1934. The Court rejected the argument that the Act violated the Second Amendment, noting that the purpose of the Second Amendment was to make possible the continuation of the militias that were authorized by Article I, Section 8, paragraph 16, in order to serve the state. The Court noted that in most states the members of the militia were expected to supply for themselves arms of the kind *in common use at the time*. The Court held that the Second Amendment protects the right to bear only those arms that bear a "reasonable relationship to the preservation or efficiency of a well regu-

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3. Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

4. 307 U.S. 174 (1939).

lated militia"<sup>5</sup> and that a shotgun did not fit that description.

Fairly read, *Miller* cannot mean that only ancient weapons are protected, or that all weapons useful to a militia would be protected. But whatever else it means, *Miller* does make clear that what the Second Amendment protects is state militias. Although the meaning of the term "well regulated," as it relates to militia, has not been judicially fleshed out, the Court's use of this term surely implies that militias are to be governed by state governments alone and that they are not private, unorganized groups. Put differently, "militia" does not mean just any group that chooses to call itself a militia. Conversely, it seems clear that private militias are not "well regulated," and that the Second Amendment's general protection of the right to possess arms extends only to weapons that bear a reasonable relation to carrying out the responsibilities of the state-regulated militias.

In the only case that I know of in which it was argued that the Second Amendment protected private militias, *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*,<sup>6</sup> the court relied on *Miller* and soundly rejected its contention. More specifically, the court rejected the defendants' claim that their Second Amendment rights had been violated by a Texas law prohibiting private militias, explaining that the Second Amendment prohibits only interference with the bearing of weapons that would affect the state-organized militia. The court stated: "By its express language, that Amendment prohibits only such infringement on the bearing of weapons as would interfere with 'the preservation or efficiency of a well regulated militia,' organized by the State."<sup>7</sup> It also concluded that "the Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies."<sup>8</sup>

There is, I should also note, more general jurisprudence in support of that proposition, including that in Montana's own Ninth Circuit. In *Hickman v. Block*,<sup>9</sup> the court held that "the Second Amendment is a right held by the states and does not protect the possession of a weapon by a private citizen."<sup>10</sup>

Now I must concede that the doctrinal history of the militia,

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5. *Miller*, 307 U.S. at 178.

6. 543 F. Supp. 198 (S.D. Tex. 1982).

7. *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 210 (quoting *United States v. Miller*, 307 U.S. at 178).

8. *Id.*

9. 81 F.3d 98 (9th Cir. 1996).

10. *Hickman*, 81 F.3d at 101.

which can be traced to renaissance notions of the elitist republican state, contains theoretical support for protection of private militias. In republican thinking, the militia was a creature of the state apparatus; the state had organized it, trained it, and mobilized it against foreign invasion or domestic insurrection. On the other hand, it was composed of all of the citizens, deriving its legitimacy from them and being virtually synonymous with them.

Under this taxonomy, the militia was a forum in which state and society were intertwined, a combination that offered some advantages for ensuring the survival of a republican state. The militia, constituted as an instrument of the state, could restrain any movement toward domestic insurrection. But if the state became despotic, then the militia, now constituted as "the people," could resist it. Indeed, in theory, the line between state and people disappeared in the militia, in that the militia members were both rulers and ruled.

Through the militia ideal, republicanism offers practical guidance on how to ensure civic virtue in the form of disinterested self-sacrifice amongst a nonvirtuous, self-interested populace. Although this militia ideal seems totally utopian in its notion that politics may be redemptive, that ideal is the exemplar of the main theme of republicanism—empowering citizens to pursue the common good.

So much for theory. Turning to my ultimate theme, the fact is that, in light of the history I have described, the notion that private militias, such as the ones that you know so much about here in Montana, and the ones that the nation learned about in the wake of Ruby Ridge and the Oklahoma City tragedy, are protected by the Second Amendment is quite farfetched. There are a few strains in the history of militias that suggest that militias are necessary to stifle an oppressive sovereign. I have mentioned the Wat Tyler Revolt, and could add the Shays' and Whiskey Rebellions, though such characterizations of those rebellions may be open to question. They are, however, only a few snippets. The essential function of the militia through English and American history was to serve the state while permitting private citizens to participate in government. Hence, no fair or serious appraisal of the history of the militia can lead to the conclusion that private militias are protected by the Constitution.

Indeed, I submit that the notion that in this age of powerful plastic explosives and small tactical nuclear weapons, where the threat of terrorism strikes fear into the heart of everyone who



occupies a federal building or flies in an airplane, the Second Amendment protects private militias, many of whose members are bitter, violent extremists, haters of government, and minorities, is not only contrary to history but also quite frightening. Small wonder that one of the leading scholarly pieces on the militia, which acknowledges the theoretical history I just described, is entitled "*Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment.*"<sup>11</sup>

At bottom, the arguments undergirding the claim of Second Amendment protection for the private militia make no sense today. The notion that the militia must be a counterweight to a standing army in the age of missiles and satellites is fantastic. Technological progress will only accelerate, so that that situation will never change. Moreover, the notion that a citizen militia is a necessary vehicle for citizen participation in government rings hollow in an age of broadly participatory democracy. Whatever one's approach to statutory construction, the history of the militia and of the drafting of the Second Amendment make clear that the interpretation I have advanced, that private militias possess no Second Amendment protection, is the sounder one. In my view, not even the originalists can seriously argue otherwise.

Now I stated at the outset that the subject was extraordinarily complicated, yet I have made it seem quite simple. However, the subject is complicated because just as the whole may be said to be equal the sum of its parts, the rights of the militia are advanced not just in the corporate sense, but also in the individual sense in terms of the personal rights of individual militia members to bear arms. And there's the rub, because these considerations take us well beyond the history and meaning of the Second Amendment into the domain of the First and Fourteenth Amendments.

The First Amendment is implicated because individual militia members advance both free speech and associational rights in connection with their common cause. A specific application arises in the context of the numerous state statutes proscribing paramilitary training by private militias. Most private militias are political factions comprised of individuals bound together by their distrust of government and their desires first, to associate and second, to discuss and improve government by speaking out. The First Amendment is clearly implicated here. Of course there

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11. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

is a difference between speech and association on the one hand, and conduct such as paramilitary training on the other, but oftentimes in the law distinctions get blurred.

The recent burgeoning of federal gun control legislation has highlighted the potential role of the Second Amendment with respect to the individual right, as opposed to the right of militias, to bear arms. The recent cases involve Second Amendment challenges to legislative bans on certain weapons (such as semiautomatic assault weapons), license requirements, aspects of felon in possession laws, and waiting requirements such as in the Brady Act. While the Supreme Court has never drawn clear lines in this area, the emerging case law, which there is not time for me to survey, makes clear that the right of individuals to bear arms under the Second Amendment is not obsolete. Indeed, some advocates of gun control have argued that it may be necessary to repeal the Second Amendment to effect their aims.

The engagement of the Fourteenth Amendment here is fascinating, and it is implicated because of its singular history. It is clear that a number of the prominent proponents of the amendment explicitly demanded that states not be allowed to infringe the individual rights of all citizens to bear arms. Some of these men were not only Jeffersonian democrats, but abolitionists, who believed that the rebellious states had violated the Second Amendment by denying blacks the right to bear arms.

Indeed, two prominent figures in framing the Fourteenth Amendment, its drafter, Senator Bingham, and its presenter on behalf of the joint committee formed to decide whether the southern states should be readmitted to the Union, Senator Howard, believed that the Amendment would prevent state governments from infringing the right to bear arms. It is significant that Senator Howard believed that the right to keep and bear arms must be included in the "privileges and immunities" of citizens. In fact, Justice Taney in the *Dred Scott* decision recognized this possibility by arguing that one reason that freed blacks could not become citizens of the United States was that, if they were, they would be able to keep and carry arms wherever they went.

While the Fourteenth Amendment debates are interesting, their significance to the right to bear arms is far from clear. The statements made by the Republican supporters of the Amendment arguably lend considerable credence to the arguments of opponents of federal gun control measures who claim that the Second Amendment has a strong individual rights com-

ponent. On the other hand, the Reconstruction period debates have had little effect on the state of the law today. The Second Amendment has never been incorporated against the states by the Supreme Court, and the *Slaughterhouse Cases* eviscerated any argument under the privileges and immunities clause that states cannot restrict the individuals right to bear arms. However, like the other issues I have discussed, this issue is far from an "open and shut" case. Some scholars, noting the interesting debates in the Reconstruction Congress, have suggested that the Second Amendment should be incorporated against the states. For example, Professor Akhil Amar, in his argument for "refined incorporation," has suggested that the Second Amendment should be incorporated to the extent that the Amendment guarantees a privilege or immunity of individual citizens rather than a right of the state or the public at large.<sup>12</sup>

Neither the viability of putative Second Amendment protections in the context of gun control laws, whether stemming from the Fourteenth Amendment, from the Second Amendment itself, or from speech or associational rights conferred by the First Amendment, justify the position that the activities of the militia *qua* militia are entitled to federal constitutional protection. On the other hand, we must be cautious and acknowledge that our system of government is far from perfect: that it is susceptible to excess from time to time, particularly in response to media-fanned political passion, and that we cannot foresee the shape of our government in relation to society (and the individual) 100 or 200 years from now.

In the face of that acknowledgment, the argument for Second Amendment protection of private militias derived from the republican (or neo-republican) ideal, cannot be regarded as quixotic. Indeed, the republican notion that the means of force could be vested in those who would express universal good, so as to resist tyranny, is an appealing ideal, and so the theoretical argument is also not without emotional appeal.

However, the republican ideal is a construct only. It has never really existed in the 1,200 year history of the militia. There is at least no modern analogue for the universal militia, neither gun owners who have broadly disparate interests, nor the National Guard. It is nigh impossible to identify a common interest among a heterogenous citizenry. The right to arms may

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12. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193 (1992).

be a reflection of the deep commitment to republican politics in a liberal state, but if those politics are an ideal, they are undermined by the complexities of the distribution of power among government and infinitely conflicting private interests. Holmes also taught us that experience, not logic, is the life of the law. So then, history trumps.

Theory, however, always injects a note of caution. Thus, the lesson of all this is, I submit, that we judges (and you lawyers) must be very cautious in dealing with Second Amendment issues, and careful how we write when dealing with militia-related Second Amendment claims. I have argued, I hope convincingly, that there is no constitutional right protecting the activities of the militia *qua* militia. I also believe that paramilitary training is not protected by the Second Amendment right to a well-regulated militia: the state has not conferred this status on paramilitary groups, and their possession of arms is, therefore, not reasonably related to the maintenance of a well-regulated militia.

In litigating and deciding such matters we must apply the narrowest construction so as to avoid a constitutional thicket. The legal landscape in this area is like an underground network of utility services in a large city; the conduits for the First, Second, and Fourteenth Amendments all interface, and we must operate with a scalpel, not a backhoe. For example, anti-paramilitary organization laws (in contrast to anti-paramilitary training laws) may not violate Second Amendment rights, but they may violate First Amendment rights to speech and association, and one issue often segues into another. If we write carelessly, we may use a cannon to kill small game, and damage the fabric of the Constitution in the process, thereby tying our hands in dealing with unforeseen future cases. Drawing careful lines is, of course, something that lawyers and especially judges are used to doing. We should remember it here.

Thank you for the opportunity to be with you in Montana and to participate in this important program.

