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THE SUPREME COURT'S THIRTY-FIVE *OTHER* GUN CASES: WHAT THE SUPREME COURT HAS SAID ABOUT THE SECOND AMENDMENT

DAVID B. KOPEL*

Among legal scholars, it is undisputed that the Supreme Court has said almost nothing about the Second Amendment.[1] This article suggests that the Court has not been so silent as the conventional wisdom suggests. While the meaning of the Supreme Court's leading Second Amendment case, the 1939 *United States* v. *Miller*[2] decision remains hotly disputed, the dispute about whether the Second Amendment guarantees an individual right can be pretty well settled by looking at the thirty-five other Supreme Court cases which quote, cite, or discuss the Second Amendment. These cases suggest that the Justices of the Supreme Court do now and usually have regarded the Second Amendment "right of the people to keep and bear arms" as an individual right, rather than as a right of state governments.

Chief Justice Melville Fuller's Supreme Court (1888-1910) had the most cases involving the Second Amendment: eight. So far, the Rehnquist Court is in second place, with six. But Supreme Court opinions dealing with the Second Amendment come from almost every period in the Court's history, and almost all of them assume or are consistent with the proposition that the Second Amendment in an individual right.

Part I of this Article discusses the opinions from the Rehnquist Court. Part II looks at the Burger Court, and Part III at the Warren, Vinson, and Hughes Courts. Part IV groups together the cases from the Taft, Fuller, and Waite Courts, while Part V consolidates the Chase, Taney, and Marshall Courts.

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1. *See, e.g.*, Sanford Lewinson, Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts, 1998 B.Y.U. Rev. 127.

2. United States v. Miller, 307 U.S. 174 (1939).

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But first, let us quickly summarize what modern legal scholarship says about the Second Amendment, and why the Court's main Second Amendment decision—*United States v. Miller*—does not by itself settle the debate.

Dennis Henigan, lead attorney for Handgun Control, Inc., argues that the Supreme Court has said so little about the Second Amendment because the fact that the Second Amendment does not protect the right of ordinary Americans to own a gun is "perhaps the most well-settled point in American law."[3] Henigan argues that the Second Amendment was meant to restrict the Congressional powers over the militia granted to Congress in Article I of the Constitution—although Henigan does not specify what the restrictions are.[4] One of Henigan's staff criticizes the large number of American history textbooks which "contradict[] a nearly unanimous line of judicial decisions by suggesting the meaning of the Second Amendment was judicially unsettled."[5]

Similarly, Carl Bogus argues that the only purpose of the Second Amendment was to protect state's rights to use their militia to suppress slave insurrections—although Bogus too is vague about exactly how the Second Amendment allegedly restricted Congressional powers.[6] This article refers to

3. Dennis Henigan, *The Right to Be Armed: A Constitutional Illusion*, S.F. BARRISTER, Dec. 1989, ¶ 19, *available online at* <http://www.handguncontrol.org/legalaction/C2/c2rtarms.htm>. The late Dean Griswold of Harvard, who was a member of the board of Henigan's group, expressed a nearly identical thought: "that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law." Erwin N. Griswold, *Phantom Second Amendment 'Rights'*, WASH. POST, Nov. 4, 1990, at C7

4. DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1995); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991) [hereinafter Henigan, *Arms, Anarchy*]

5. Mark Polston, *Obscuring the Second Amendment*, 34 VIRGINIA RESOLVES, No. 32 (Spring 1994), http://www.handguncontrol.org/legalaction/dockets/A1/obscure.htm.

6. Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998). For a response to the latter article, *see* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU. L. REV. 1359, 1515-29.

Some other scholarly sources rejecting individual rights are: ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL (1995); George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 687-93 (1992); Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 J. AM. HIST. 425 (1996); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995); Michael J. Palmiotto, *The Misconception of the American Citizen's Right to Keep and Bear Arms*, 4 J. ON FIREARMS & PUB. POL'Y 85 (1992); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983).

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the State's Rights theory of the Second Amendment as the "Henigan/Bogus theory," in honor of its two major scholarly proponents.[7]

In contrast to the State's Rights theory is what has become known as the Standard Model.[8] Under the Standard Model, which is the consensus of most modern legal scholarship on the Second Amendment, the Amendment guarantees a right of individual Americans to own and carry guns.[9] This

7. For an effort to trace the potential contours of a State's Rights Second Amendment, see Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995) (arguing that a State's Rights Second Amendment would give each state legislature the power to arm its militia as it saw best, and thus the power to negate—within the borders of that state—federal bans on particular types of weapons).

8. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995):

> Perhaps surprisingly, what distinguishes the Second Amendment scholarship from that relating to other constitutional rights, such as privacy or free speech, is that there appears to be far more agreement on the general outlines of Second Amendment theory than exists in those other areas. Indeed, there is sufficient consensus on many issues that one can properly speak of a "Standard Model" in Second Amendment theory, much as physicists and cosmologists speak of a "Standard Model" in terms of the creation and evolution of the Universe. In both cases, the agreement is not complete: within both Standard Models are parts that are subject to disagreement. But the overall framework for analysis, the questions regarded as being clearly resolved, and those regarded as still open, are all generally agreed upon. This is certainly the case with regard to Second Amendment scholarship.

9. *See, e.g.*, SENATE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982); AKHIL AMAR, THE BILL OF RIGHTS (1998); Robert J. Cottrol, *Introduction* to 1 GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT at ix (Robert J. Cottrol ed., 1993); Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, *in* THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS 72 (David J. Bodenhamer & James W. Ely, Jr., eds., 1993); Robert J. Cottrol, *Second Amendment*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 763 (Kermit L. Hall et al. eds., 1992); CLAYTON CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE at xv (1994); 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1639-40 (Leonard W. Levy et al. eds., 1986); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1876 (1989); STEPHEN HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS: 1866-1876 (1998); STEPHEN HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Edward F. Leddy, *Guns and Gun Conrtol*, *in* READER'S COMPANION TO AMERICAN HISTORY 477-78 (Eric Foner & John A. Garraty eds., 1991); Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (1988); Leonard Levy, Origins of the Bill of Rights (1999); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); Laurence H. Tribe, I American Constitutional Law 894-903 (3d ed. 2000). Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*,

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45 EMORY L.J. 1139, 1141 (1996); Bernard J. Bordenet, *The Right to Possess Arms: The Intent of the Framers of the Second Amendment*, 21 U. WEST L.A. L. REV. 1, 28 (1990); David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789, 790; David I. Caplan, *The Right to Have Arms and Use Deadly Force Under the Second and Third Amendments*, 2.1 J. ON FIREARMS & PUB. POL'Y 165 (1990); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961 (1995-96) [hereinafter Denning, *Simple Cite*]; Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm"*, 21 HARV. J.L. & PUB. POL'Y 719 (1998); Anthony J. Dennis, *Clearing the Smoke From the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989); Robert Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L.F. 32 (1984); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 STAN. L. & POL'Y REV. 25 (1997); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. Ky. L. Rev. 63 (1982); Alan M. Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113 (1982); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995); Stephen Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, Last Holdout Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV (no. 4, 1999, forthcoming); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91 (1989); Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995); Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105 (1995); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151 (1986); Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms in the Early Republic*, *7* WM. & MARY BILL OF RTS. J. (1998); David G. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); David G. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987); Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97 (1997); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986); Don Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 7; David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438 (1997); Stephanie A. Levin, *Grassroots Voices: Local Action and National Military Policy*, 40 BUFF. L. REV. 321, 346-47 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POLITICS 157 (1999); Nelson Lund,

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modern Standard Model is similar to the position embraced by every known

The Past and Future of the Individual's Right to Arms, 31 GA. L. REV. 1 (1996); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781 (1997); Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991); Thomas M. Moncure, Jr., *Who is the Militia—The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1 (1990); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997); Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just "Gun Shy"?*, 22 CAP. U. L. REV. 641 (1993); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994) (discussing the Second Amendment as related to the Tennessee Constitution); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991); J. Neil Schulman, *The Text of the Second Amendment*, 4 J. ON FIREARMS & PUB. POL'Y 159 (1992); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125 (1996); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)); Brannon P. Denning, *Professional Discourse, The Second Amendment, and the "Talking Head Constitutionalism" Counterrevolution: A Review Essay*, 21 S. ILL. U. L.J. 227 (1997) (reviewing DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1996)); T. Markus Funk, *Is the True Meaning of the Second Amendment Really Such a Riddle? Tracing the Historical "Origins of an Anglo-American Right"*, 39 HOW. L.J. 411 (1995) (reviewing JOYCE LEE MALCOM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995) (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)); F. Smith Fussner, Book Review, 3 Const. Commentary 582 (1986) (reviewing STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984)); Joyce Lee Malcolm, Book Review, 54 GEO. WASH. L. REV. 452 (1986) (reviewing STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984)); *cf.* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992) (arguing that the Ninth Amendment supports an individual right to arms). For a list of all law review articles of firearms policy or the Second Amendment, See David B. Kopel, *Comprehensive Bibliography of the Second Amendment in Law Review*, 11 J. Firearms & Pub. Pol. 5 (1999), http://www.Saf.org/ALLLawReviews.htm.

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legal scholar in the nineteenth century who wrote about the Second Amendment: the Amendment guarantees an individual right, but is subject to various reasonable restrictions.[10]

Both the Standard Model and the State's Right theory claim that Supreme Court precedent, particularly the case of *United States* v. *Miller*, supports their position.

Two other scholarly theories about the Second Amendment are interesting, but their theories have little to do with Supreme Court precedent. Garry Wills argues that the Second Amendment has "no real meaning," and was merely a clever trick that James Madison played on the Anti-Federalists.[11] David Williams argues that the Second Amendment once guaranteed an individual right, but no longer does so because the American people are no longer virtuous and united, and hence are no longer "the people" referred to in the Second Amendment.[12] Neither the Wills Nihilism theory nor the Williams Character Decline theory make claims which depend on the Supreme Court for support, or which could be refuted by Supreme Court decisions.

Like the scholars, the lower federal courts are split on the issue, although their split is the opposite of the scholarly one: most federal courts which have stated a firm position have said that the Second Amendment is *not* an individual right.[13] The federal courts which follow the academic Standard

10. The nineteenth century scholars were (in roughly chronological order): St. George Tucker; William Rawle; Joseph Story (see *infra* text at note 354); Henry St. George Tucker; Benjamin Oliver; James Bayard; Francis Lieber; Thomas Cooley (see note 25 *infra*); Joel Tiffany; Timothy Farrar; George W. Paschal; Joel Bishop; John Norton Pomeroy; Oliver Wendell Holmes, Jr.; Herbert Broom; Edward A. Hadley; Hermann von Holst; John Hare; George Ticknor Curtis; John C. Ordronaux; Samuel F. Miller; J.C. Bancroft Davis; Henry Campbell Black; George S. Boutwell; James Schouler; John Randolph Tucker; and William Draper Lewis. They are discussed in detail in David B. Kopel, *The Second Amendment in the 19th Century*, 1998 BYU. L. REV. 1359.

11. Garry Wills, *Why We Have No Right to Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995 at 62, 72.

12. *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996); David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822 (1998).

13. *See, e.g.*, Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996) ("the Second Amendment is a right held by the states"); United States v. Nelson, 859 F.2d 1318, 1320 (8th Cir. 1988) ("Later cases have analyzed the Second Amendment purely in terms of protecting state militias, rather than individual rights."); Quilici v. Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (upholding city's ban on handguns; "the debate surrounding the adoption of the Second and Fourteenth Amendments. . .has no relevance to the resolution of the controversy before us"); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) ("it is clear that the Second Amendment guarantees a collective rather than an individual right"); Eckert v. Philadelphia, 477 F.2d 610 (3d Cir. 1973); United States v. Johnson, 441 F.2d 1134, 1136 (5th Cir. 1971) ("the Second Amendment only confers a collective right of keeping and bearing arms"); United States v. Tot, 131 F.2d 261, 266

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Model are in the minority, although the ranks of the minority have grown in recent years.[14] The courts on both sides, like the scholars, insist that they are following the Supreme Court.

One approach to untangling the conflict has been to see if the lower federal courts have actually been following *Miller*. In *Can the Simple Cite be Trusted?*, Brannon Denning makes a persuasive argument that some lower courts have cited *Miller* for propositions which cannot reasonably be said to flow from *Miller*.[15] But part of the problem with deciding whether the courts or the scholars are being faithful to *Miller* is that *Miller* is such an opaque opinion.

Miller grew out of a 1938 prosecution of two bootleggers (Jack Miller and Frank Layton) for violating the National Firearms Act by possessing a sawed-off shotgun without having paid the required federal tax. The federal district court dismissed the indictment on the grounds that the National Firearms Act violated the Second Amendment.[16] Freed, Miller and Layton promptly

(3d Cir. 1942) ("not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations"), *rev'd on other grounds*, 319 U.S. 463 (1943).

14. *See, e.g*, Runnebaum v. Nationsbank of Maryland, N.A., 123 F.3d 156 n. 8 (4th Cir. 1997) (en banc, plurality opinion) ("Neither gathering in a group nor carrying a firearm are one of the major life activities under the ADA [Americans with Disabilities Act], though individuals have the constitutional right to peaceably assemble, *see* U.S. CONST. amend. I; and to 'keep and bear Arms,' U.S. CONST. amend. II."); United States v. Atlas, 94 F.3d 447, 452 (8th Cir. 1996) (Arnold, C.J., dissenting) ("possession of a gun, in itself, is not a crime. [Indeed, though the right to bear arms is not absolute, it finds explicit protection in the Bill of Rights.]"); Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942) (federal law restricting gun possession by persons under indictment "undoubtedly curtails to some extent the right of individuals to keep and bear arms." *Miller* test rejected because it would prevent federal government from restricting possession of machine guns by "private persons."); United States v. Emerson, 46 F. Supp.2d 598 (N.D. Tex. 1999) (dismissing criminal prosecution of defendant for violation of 18 U.S.C. 922(g)(8) because the provision violates the Second Amendment; case presents the most thorough exposition of the competing views of the Second Amendment ever presented in a federal court decision); Zappa v. Cruz, 30 F. Supp. 2d 123, 138 (D. P.R. 1998):

> These individual liberties, aside from abridging the governments' ability to impose upon individual citizens—e.g., by protecting freedom of religion, prohibiting the quartering of troops and the taking [of] property for public use without compensation, and guaranteeing due process of law—enhance the citizenry's ability to police the government—e.g., by protecting speech, press, the right to assemble, and the right to bear arms.

See also United States v. Gambill, 912 F. Supp. 287, 290 (S.D. Ohio 1996) ("an activity, such as keeping and bearing arms, that arguably implicates the Bill of Rights."); Gilbert Equipment Co. v. Higgins, 709 F. Supp. 1071, 1090 (S.D. Ala. 1989) (Second Amendment "guarantees to all Americans 'the right to keep and bear arms'", but the right is not absolute and it does not include right to import arms), *aff'd* 894 F.2d 412 (11th Cir. 1990) (mem.).

15. *See* Denning, *Simple Cite*, *supra* note 9.

16. United States v. Miller, 26 F. Supp. 1002, 1003 (W.D. Ark, 1939) (sustaining demurrer to prosecution, because "The court is of the opinion that this section is invalid in that it violates the Second Amendment to the Constitution of the United States providing, 'A well regulated

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absconded, and thus only the government's side was heard when the case was argued before the Supreme Court.[17]

Unfortunately, *Miller* was written by Justice James McReynolds, arguably one of the worst Supreme Court Justices of the twentieth century.[18] The opinion nowhere explicitly says that the Second Amendment does (or does not guarantee) an individual right. The key paragraph of the opinion is this:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette* v. *State*, 2 Humphreys (Tenn.) 154, 158.[19]

This paragraph can plausibly be read to support either the Standard Model or the State's Rights theory. By the State's Right theory, the possession of a gun by any individual has no constitutional protection; the Second Amendment only applies to persons actively on duty in official state militias.

In contrast, the Standard Model reads the case as adopting the "civilized warfare" test of nineteenth century state Supreme Court cases: individuals have a right to own arms, but only the type of arms that are useful for militia service; for example, ownership of rifles is protected, but not ownership of Bowie knives (since Bowie knives were allegedly useful only for fights and brawls).[20] The case cited by the *Miller* Court, *Aymette v. State*[21], is plainly in the Standard Model, since it interprets the Tennessee Constitution's right to arms to protect an individual right to own firearms, but only firearms suitable

militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.'")

17. Since a federal statute had been found unconstitutional, the federal government was allowed to take the case directly to the Supreme Court, under the law of the time.

18. *See* L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1331 (1997), *supra* note 10.

19. *Miller*, 307 U.S. at 177.

20. *See, e.g.*, English v. State, 24 Tex. 394, 397 (1859); Cockrum v. State, 24 Tex. 394, 397 (1859). A typical formulation is found in the West Virginia case *State v. Workman*, which construed the Second Amendment to protect an individual's right to own:

> the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desparadoes, to the terror of the community and the injury of the State.

State v. Workman, 35 W. Va. 367, 372 (1891).

21. Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840).

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for militia use; in *dicta*, *Aymette* states that the Second Amendment has the same meaning.[22]

While scholars can contend for different meanings, it is true that, as a matter of pure linguistics, the *Miller* decision does not foreclose either the Standard Model or the State's Rights theory.

And what is one to make of the opinion's penultimate paragraph, stating, "In the margin some of the more important opinions and comments by writers are cited."[23] In the attached footnote, the opinion cites two prior U.S. Supreme Court opinions and six state court opinions, all of which treat the Second Amendment or its state analogue as an individual right, even as the opinions uphold particular gun controls.[24] The footnote likewise cites treatises by Justice Joseph Story and Thomas Cooley explicating the Second Amendment as an individual right.[25] But the same *Miller* footnote also cites a Kansas Supreme

22. *Id.* at 158.

23. *Miller*, 307 U.S. at 182.

24. Presser v. Illinois, 116 U.S. 252 (1886) (Second Amendment not violated by ban on armed parades; *see infra*) text at notes 310-20; Robertson v. Baldwin, 165 U.S. 275 (1897) (Second Amendment not violated by ban on carrying concealed weapons, *see infra* text at notes 290-96); Fife v. State, 31 Ark. 455 (Second Amendment does not apply to the states; state right to arms not violated by ban on brass knuckles); People v. Brown, 253 Mich. 537, 235 N.W. 245 (1931) (Michigan state constitution right to arms applies to all citizens, not just militiamen; right is not violated by ban on carrying blackjacks); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840) (Tennessee state constitution right to arms and U.S. Second Amendment right belong to individual citizens, but right includes only the types of arms useful for militia service); State v. Duke, 42 Tex. 455 (1874) (Second Amendment does not directly apply to the states; Texas constitution protects "arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State."); State v. Workman, *supra* note 20.

25. "COOLEY'S CONSTITUTIONAL LIMITATIONS, VOL. 1, p. 729":

> Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms. A standing army is particularly obnoxious in any free government, and the jealousy of one has at times been demonstrated so strongly in England as almost to lead to the belief that a standing army recruited from among themselves was more dreaded as an instrument of oppression than a tyrannical king, or any foreign power. So impatient did the English people become of the very army which liberated them from the tyranny of James II, that they demanded its reduction, even before the liberation could be felt to be complete; and to this day, the British Parliament renders a standing army practically impossible by only passing a mutiny bill from session to session. The alternative to a standing army is "a well-regulated militia," but this cannot exist unless the people are trained to bear arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been little occasion to discuss that subject by the courts.

In a later treatise, Cooley elaborated on how the right to arms ensures the existence of the militia:

> *The Right is General.* — It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military

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Court decision which is directly contrary; that case holds that the right to arms in Kansas belongs only to the state government, and in *dicta* makes the same claim about the Second Amendment.[26]

The *Miller* footnote begins with the phrase "Concerning the militia—" but several of the cases cited have nothing to do with the militia. For example, *Robertson* v. *Baldwin* (discussed *infra*) simply offers *dicta* that laws which forbid the carrying of concealed weapons by individuals do not violate the Second Amendment.[27]

If *Miller* were the only source of information about the Second Amendment, the individual right vs. government right argument might be impossible to resolve conclusively. Fortunately, the Supreme Court has addressed the Second Amendment in thirty-four other cases—although most of these cases appear to have escaped the attention of commentators on both sides

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> duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.

THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 281-82 (Boston, Little, Brown 2d ed. 1891).

The other scholar cited in the *Miller* footnote is "Story on The Constitution, 5th Ed., Vol. 2, p. 646":

> The right of the citizens to keep and bear arms has justly been 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; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.
>
> 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 is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed, without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.

For more on Justice Story, see text at notes 351 to 355, *infra*.

26. Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905) (right to arms in Kansas Bill of Rights is only an affirmance of the state government's supremacy over the militia; the Second Amendment means the same). Another cited case, Jeffers v. Fair, 33 Ga. 347 (1862), is a Confederate draft case.

27. *Infra* text at note 280.

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of the issue. This article ends the bipartisan scholarly neglect of the Supreme Court's writings on the Second Amendment.[28]

The neglected cases are not, of course, directly about the Second Amendment. Rather, they are about other issues, and the Second Amendment appears as part of an argument intended to make a point about something else.[29] Nevertheless, all the *dicta* may be revealing. If Henigan and Bogus are correct, then the *dicta* should treat the Second Amendment as a right which belongs to state governments, not to American citizens. And if the Standard Model is correct, then the Amendment should be treated as an individual right. Moreover, the line between *dicta* and *ratio decendi* is rarely firm,[30] and one day's dicta may become another day's holding.[31]

C.S. Lewis observed that proofs (or disproofs) of Christianity found in apologetic documents are sometimes less convincing than offhand remarks made in anthropology textbooks, or in other sources where Christianity is only treated incidentally. The Supreme Court cases in which the Supreme Court mentions the Second Amendment only in passing are similarly illuminating.[32]

28. One reason for the neglect of the cases may be mistaken claims that the cases do not exist. "Issue Brief", Handgun Control, Inc. website claims, "Since *Miller*, the Supreme Court has addressed the Second Amendment in two cases." Actually, there have been 19 such cases after *Miller*. *The Second Amendment*, http://www.handguncontrol.org/myth.htm.

29. That the Court has discussed the Second Amendment relatively rarely, compared to the First or Fourth Amendments, does not necessarily mean that the Second Amendment is unimportant. Until recent decades, there was almost no federal gun control to speak of (except for the 1934 National Firearms Act, which was upheld in *Miller*). That Congress hardly ever passed legislation which arguably infringed the Second Amendment (and which would generate a challenge invoking judicial review) is itself proof of the Second Amendment's influence. "A principle of law is not unimportant because we never hear of it; indeed we may say that the most efficient rules are those of which we hear least, they are so efficient that they are not broken." FREDERIC W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 481-82 (11th ed.) (Cambridge: Cambridge Univ. Pr., 1948).

Similarly, the Third Amendment has received little attention from the Court, but that is not because the Third Amendment can be violated with impunity; to the contrary, the Third Amendment has needed little discussion because it is has been universally respected, and, except in one case, never violated. Engblom v. Carey, 677 F. 2d 957 (2d Cir. 1982), *on remand*, 572 F. Supp. 44 (S.D. N.Y. 1983), *aff'd. per curiam*, 724 F.2d 28 (2d Cir. 1983).

30. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2050 (1994) ("All the words used by a court to explain its result contribute to its justification, and parsing the opinion into holding and dictum attributes a degree to precision to the enterprise of judicial decision-making that it lacks in actual practice.")

31. United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) ("These decisions do not justify today's decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum, and finally elevated to a decision.").

32. The technique of using broader context to understand isolated statements is not unique to analysis of Supreme Court cases. Biblical scholars, for example, often refer to many different parts of the Bible in order to explain a passage which is confusing or ambiguous in isolation.

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Before commencing with case-by-case analysis, let me present a chart which summarizes the various cases. The columns in chart are self-explanatory, but I will explain two of them anyway. A "yes" answer in the "Supportive of individual right in 2d Amendment?" column means only that the particular case provides support for the individual rights theory; although the part of the case addressing the Second Amendment might make sense only if the Second Amendment is considered an individual right, the case will not directly state that proposition. If the case is labeled "ambiguous," then the language of the case is consistent with both the Standard Model and with State's Rights.

The next column asks, "Main clause of 2d A. quoted without introductory clause?" The National Rifle Association and similar groups are frequently criticized for quoting the main clause of the Second Amendment ("the right of the people to keep and bear Arms, shall not be infringed") without quoting the introductory clause ("A well-regulated Militia, being necessary to the security of a free State").[33] The critics argue that the introductory, militia, clause controls the meaning of the main, right to arms, clause. They contend that to omit the introductory clause is to distort completely the Second Amendment's meaning. (And if, as these critics argue, the Second Amendment grants a right to state governments rather than to individuals, then omission of the introductory clause is indeed quite misleading.) On the other hand, if the Second Amendment is about a right of people (the main clause), and the introductory clause is useful only to resolve gray areas (such as what kind of arms people can own), then it is legitimate sometimes to quote the main clause only. As the chart shows, the Supreme Court has quoted the main clause alone much more often than the Supreme Court has quoted both clauses together.

This Supreme Court quoting pattern is consistent with the theory Eugene Volokh's article, *The Commonplace Second Amendment*, which argues that the Second Amendment follows a common pattern of constitutional drafting from the Early Republic: there is a "purpose clause," followed by a main clause.[34]

Because this article is only about the Second Amendment, it does not analyze Supreme Court cases involving gun control or the militia in which the Second Amendment was not mentioned

33. Handgun Control, Inc., *The Second Amandment Myth & Meaning <http://www.handgun control.org*/legalactiona/C2/C2amdbro.htm>:

> How many times have you heard an opponent of gun control cite the "right to keep and bear arms" without mentioning the introductory phrase "A well regulated Militia, being necessary to the security of a free state. . ."? In fact, some years ago, when the NRA placed the words of the Second Amendment near the front door of its national headquarters in Washington, D.C., it omitted that phrase entirely!
>
> The NRA's convenient editing is not surprising; the omitted phrase is the key to understanding that the Second Amendment guarantees only a limited right that is not violated by laws affecting the private ownership of firearms.

34. *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

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For example, Rhode Island's freedom of the press provision declared: "The liberty of the press being essential to the security of freedom in a state, any person may publish sentiments on any subject, being responsible for the abuse of that liberty."[35] This provision requires judges to protect every person's right to "publish sentiments on any subject"—even when the sentiments are not "essential to the security of freedom in a state," or when they are detrimental to freedom or security.

Similarly, the New Hampshire Constitution declared: "Economy being a most essential virtue in all states, especially in a young one; no pension shall be granted, but in consideration of actual services, and such pensions ought to be granted with great caution, by the legislature, and never for more than one year at a time."[36] This provision makes all pensions of longer than one year at a time void—even if the state is no longer "a young one" and no longer in need of economy. Volokh supplies dozens of similar examples from state constitutions.[37]

Of the twenty-nine U.S. Supreme Court opinions (including *Miller*) which have quoted the Second Amendment, twenty-three contain only a partial quote. This quoting pattern suggests that, generally speaking, Supreme Court justices have not considered the "purpose clause" at the beginning of the Second Amendment to be essential to the meaning of the main clause.

Case name and year.	*Main issue in case*	*Opinion by*	*Type of opinion*	*Supportive of individual right in 2d Amendment?*	*Main clause of 2d A. quoted without introductory clause?*	*Page of this article*
Spencer v. Kemna. 1998	Article III case or controversy.	Stevens	Dissent from denial of cert.	Yes, but could possibly be read as referring to rights under state constitutions	No quote.	16
Muscarello v. U.S. 1998	Fed stat. interp.	Ginsburg	Dissent	Yes.	Partial quote.	20
Printz v. U.S. 1997	Federalism	Thomas	Concur	Says that *Miller* did not decide the issue. Thomas appears to support individual right.	Full quote.	23
Albright v. Oliver. 1994	14th A. and § 1983	Stevens	Dissent	Yes.	Partial quote.	27
Planned Parenthood v. Casey. 1992.	14th A.	O'Connor	Majority	Yes.	Partial quote.	29

35. R.I. CONST. art. I, § 20 (1842).
36. N.H. CONST. pt. I, art. XXXVI (1784).
37. Volokh, *supra* note 35, at 810.

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U.S. v. Verdugo-Urquidez. 1990.	4th A. applied to foreign national.	Rehnquist	Majority	Yes.	Partial quote.	30
Lewis v. U.S. 1980.	Statutory interp. of Gun Control Act of 1968	Blackmun	Majority	Ambiguous, but probably not. If an individual right, less fundamental than some others.	Full quote.	33
Moore v. East Cleveland. 1976.	14th A.	Powell	Plurality	Yes. (But contrary opinion expressed by Justice Powell after retirement.)	Partial quote.	37
" "	" "	White	Dissent.	Yes.	Partial quote.	38
Adams v. Williams. 1972	4th A.	Douglas	Dissent	No.	Full quote.	41
Roe v. Wade. 1973	14th A.	Stewart	Concur	Yes.	Partial quote.	42
Laird v. Tatum. 1972.	Justiciability	Douglas	Dissent	Ambiguous.	Partial quote.	44
Burton v. Sills. 1969.	Challenge to state gun licensing law	Per curiam	Summary affirm.	Ambiguous.	No quote.	45
Duncan v. Louisiana. 1968.	Incorporation of 6th Amendment.	Black	Concur	Yes.	Partial quote.	47
Malloy v. Hogan. 1964.	Incorporation of 5th Amend.	Brennan	Majority	Yes.	No quote.	48
Konigsberg v. State Bar. 1961.	1st Amendment	Harlan	Majority	Yes.	Partial quote.	49
Poe v. Ullman. 1961.	14th Amendment	Harlan	Dissent	Yes	Partial quote.	50
" "	" "	Douglas	Dissent	Yes, but implicitly abandoned in *Adams*.	No quote.	52
Knapp v. Schweitzer. 1958.	Incorp. of 5th Amendment	Frankfurter	Majority	Yes	Partial quote.	52
Johnson v. Eisentrager. 1950.	5th A. applied to trial of enemy soldier.	Jackson	Majority	Yes	Partial quote.	53
Adamson v. Calif. 1947.	Incorp. of 5th Amendment	Black	Dissent	Yes	Partial quote.	57
Hamilton v. Regents. 1935.	Conscientious objector.	Butler	Majority	No, but not necessarily inconsistent with an individual right.	No quote.	60
U.S. v. Schwimmer. 1929.	Immigration laws	Butler	Majority	Ambiguous	Full quote.	63

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Stearns v. Wood. 1915.	Article III case or controversy.	McReynolds	Majority	Ambiguous, since court refuses to hear any of plaintiff's claims	No quote.	64
Twining v. N.J. 1908.	Incorp. of 5th A self-incrim.	Moody	Majority	Yes.	Partial quote	65
Trono v. U.S. 1905	5th A. in the Philippines.	Peckham	Majority	Yes.	Partial quote.	66
Kepner v. U.S. 1904.	" "	Day	Majority	Yes. Same as *Trono*.	Partial quote.	66
Maxwell v. Dow. 1899.	Incorp. of 5th A. jury trial	Peckham	Majority	Yes.	Partial quote.	66
Robertson v. Baldwin. 1897.	13th Amend.	Brown	Majority	Yes.	Partial quote.	68
Brown v. Walker. 1896.	5th Amend.	Field.	Dissent	Yes.	Partial quote.	68
Miller v. Texas. 1894.	14th Amendment	Brown	Majority	Yes.	Partial quote.	70
Logan v. U.S. 1892.	Cong. Power from 14th A.	Gray	Majority	Yes.	Partial quote.	73
Presser v. Illinois. 1886.	2d A.	Woods	Majority	Yes.	Full quote.	75
U.S. v. Cruikshank 1876.	Cong. Power under 14th Amendment	Waite	Majority	Yes. A basic human right which pre-exists the Constitution, and is guaranteed by the Constitution, exactly like the 1st A. right to assembly.	No quote.	78
Scott v. Sandford. 1857.	Citizenship; Cong. powers over territories.	Taney	Majority	Yes.	Partial quote.	80
Houston v. Moore. 1820.	State powers over militia.	Story	Dissent	Yes, but also supportive of a state's right. (A later treatise written by Story is for individual right only.)	No quote.	83

I. THE REHNQUIST COURT

Since William Rehnquist was appointed Chief Justice in 1986, six different opinions have addressed the Second Amendment. The authors of the opinions include the small left wing of the Court (Justices Stevens and Ginsburg), the Court's right wing (Justices Thomas and Rehnquist), and the Court's centrist Justice O'Connor. Every one of the opinions treats the Second Amendment as

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an individual right. Except for Justice Breyer, every sitting Supreme Court Justice has joined in at least one of these opinions—although this joinder does not prove that the joiner necessarily agreed with what the opinion said about the Second Amendment. Still, five of the current Justices have written an opinion in which the Second Amendment is considered an individual right, and three more Justices have joined such an opinion.

A. Spencer v. Kemna

After serving some time in state prison, Spencer was released on parole.[38] While free, he was accused but not convicted of rape, and his parole was revoked.[39] He argued that his parole revocation was unconstitutional.[40] But before his constitutional claim could be judicially resolved, his sentence ended, and he was released.[41] The majority of the Supreme Court held that since Spencer was out of prison, his claim was moot, and he had no right to pursue his constitutional lawsuit.

Justice Stevens, in dissent, argued that being found to have perpetrated a crime (such as the rape finding implicit in the revocation of Spencer's parole) has consequences besides prison:

> An official determination that a person has committed a crime may cause two different kinds of injury. It may result in tangible harms such as imprisonment, *loss of the right to vote or to bear arms*, and the risk of greater punishment if another crime is committed. It may also severely injure the person's reputation and good name.[42]

A person can only lose a right upon conviction of a crime if a person had the right before conviction. Hence, if an individual can lose his right "to bear arms," he must possess such a right. Justice Stevens did not specifically mention the Second Amendment, so it is possible that his reference to the right to bear arms was to a right created by state constitutions, rather than the federal one. (Forty-four states guarantee a right to arms in their state constitution.[43])

38. Spencer v. Kemna, 523 U.S. 1, 4 (1998).

39. *Id.* at 5.

40. *Id.* at 10.

41. *Id*. at 36. (Stevens, J., dissenting).

42. *Id*. (emphasis added). Numerous state and federal statutes outlaw firearms possession by persons convicted of felonies or certain misdemeanors. Generally speaking, the federal prohibitions are broader than their state counterparts.

43. Alabama: "That every citizen has a right to bear arms in defense of himself and the state." ALA. CONST. art. 1, § 26.

Alaska: "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." ALASKA CONST. art. 1, § 19.

Arizona: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing indi-

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viduals or corporations to organize, maintain, or employ an armed body of men." ARIZ. CONST. art. II, § 26.

Arkansas: "The citizens of this State shall have the right to keep and bear arms for their common defense." ARK. CONST. art. II, § 5.

Colorado: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." COLO. CONST. art. II, § 13.

Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." CONN. CONST. art. I, § 15.

Florida: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." FLA. CONST. art. I, § 8.

Georgia: "The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § 1, para. 5.

Hawaii: "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." HAWAII CONST. art. 1, § 15.

Idaho: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony." IDAHO CONST. art. 1, § 11.

Illinois: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." ILL. CONST. art. I, § 22.

Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State." IND. CONST. art. I, § 32.

Kansas: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." KAN. CONST., Bill of Rights, § 4.

Kentucky: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." KY. CONST. § I, para. 7.

Louisiana: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." LA. CONST. art. 1, § 11.

Maine: "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned." ME. CONST. art. I, § 16.

Massachusetts: "The people have a right to keep and bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it." MASS. CONST. Pt. I, art. xvii.

Michigan: "Every person has a right to keep or bear arms for the defense of himself and the State." MICH. CONST. art. I, § 6.

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Mississippi: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." MISS. CONST. art. III, § 12.

Missouri: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed Weapons." MO. CONST. art. 1, § 23.

Montana: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons." MONT. CONST. art. II, § 12.

Nebraska: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." NEB. CONST. Art. I, § 1.

Nevada: "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." NEV. CONST. art. 1, § 11(1).

New Hampshire: "All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the State." N.H. CONST. Pt. I, art. 2a.

New Mexico: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons." N.M. CONST. art. II, § 6.

North Carolina: "A well regulated militia being necessary to be the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice." N.C. CONST. art. I, § 30.

North Dakota: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed." N.D. CONST. Art. I, § 1.

Ohio: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.

Oklahoma: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons." OKLA. CONST. art. 11, § 26.

Oregon: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." OR. CONST. art. I, § 27.

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When particular gun control laws are before the Supreme Court for either statutory or constitutional interpretation, Justice Stevens is a reliable vote to uphold the law in question, often with language detailing the harm of gun

Pennsylvania: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." PA. CONST. art. I, § 21.

Rhode Island: "The right of the people to keep and bear arms shall not be infringed." R.I. CONST. art. 1, § 22.

South Carolina: "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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law." S.C. CONST. art. I, § 20.

South Dakota: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. CONST. art. VI, § 24.

Tennessee: "That the citizens of this State have a right to keep and bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." TENN. CONST. art. I, § 26.

Texas: "Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." TEX. CONST. art. 1, § 23.

Utah: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms." UTAH CONST. art. 1, § 6.

Vermont: "That the people have a right to bear arms for the defence of themselves and the State-and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power." VT. CONST. Ch. I, art. 16.

Virginia: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power." VA. CONST. art. I, § 13.

Washington: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of Men." WASH. CONST. art. I, § 24.

West Virginia: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. VA. Art. III, § 22.

Wisconsin: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. Art. I, § 25.

Wyoming: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." WYO. CONST. art. I, § 24.

In addition, New York State's Civil Right Law has a statutory provision which is a word for word copy of the Second Amendment. N.Y. CIV. RIGHTS § 4.

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violence.[44] It is notable, then, that Justice Stevens recognizes a right to bear arms as an important constitutional right, whose deprivation should not be shielded from judicial review.[45]

B. Muscarello v. United States

Federal law provides a five year mandatory sentence for anyone who "carries a firearm" during a drug trafficking crime.[46] Does the sentence enhancement apply when the gun is merely contained in an automobile in which a person commits a drug trafficking crime—such as when the gun is in the trunk? The Supreme Court majority said "yes."[47] In dissent, Justice Ginsburg—joined by Justices Rehnquist, Scalia[48], and Souter—argued that "carries a firearm" means to carry it so that it is ready to use.[49] In support for her view, Justice Ginsburg pointed to the Second Amendment "keep and bear arms" as an example of the ordinary meaning of carrying a firearm:

> It is uncontested that §924(c)(1) applies when the defendant bears a firearm, i.e. , carries the weapon on or about his person "for the purpose of being armed and ready for offensive or defensive action in case of a conflict." Black's Law Dictionary 214 (6th ed. 1990) (defining the phrase "carry arms or weapons"); see ante, at 5. The Court holds that, in addition, "carries a firearm," in the context of §924(c)(1), means personally transporting, possessing, or keeping a firearm in a vehicle, anyplace in a vehicle.
>
> Without doubt, "carries" is a word of many meanings, definable to mean or include carting about in a vehicle. But that encompassing definition is not a

44. *See* United States v. Thompson/Center Arms Co., 504 U.S. 505,526 (1992); Printz v. United States, 521 U.S. 898 (1997) (Stevens, J., dissenting); United States v. Lopez, 512 U.S. 1286 (1994) (Stevens, J., dissenting).

45. Contrast Justice Stevens' view with that of Justice Blackmun in the *Lewis* case, *infra* notes 94-113; the Blackmun opinion suggests that the right to arms is so unimportant that a person may be imprisoned for the exercise of that right after conviction of a crime—even if the conviction is concededly unconstitutional.

46. 18 U.S.C. § 924(c)(1).

47. United States v. Muscarello, 524 U.S. 125 (1998).

48. Justice Scalia has not written an opinion on the Second Amendment, but he has expressed his views out of court:

> So also, we value the right to bear arms less than did the Founders (who thought the right to self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may. . .like elimination of the right to bear arms; but let us not pretend that these are not reductions of rights.

ANTONIN SCALIA, A MATTER OF INTERPRETATION 43 (1997).

49. *Muscarello*, 524 U.S. at 139-50 (Ginsburg, J., dissenting).

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> ubiquitously necessary one. Nor, in my judgment, is it a proper construction of "carries" as the term appears in §924(c)(1). In line with Bailey and the principle of lenity the Court has long followed, I would confine "carries a firearm," for §924(c)(1) purposes, to the undoubted meaning of that expression in the relevant context. I would read the words to indicate not merely keeping arms on one's premises or in one's vehicle, but bearing them in such manner as to be ready for use as a weapon.
>
> . . .
>
> Unlike the Court, I do not think dictionaries, surveys of press reports, or the Bible tell us, dispositively, what "carries" means embedded in §924(c)(1). On definitions, "carry" in legal formulations could mean, inter alia, transport, possess, have in stock, prolong (carry over), be infectious, or wear or bear on one's person. At issue here is not "carries" at large but "carries a firearm." The Court's computer search of newspapers is revealing in this light. Carrying guns in a car showed up as the meaning "perhaps more than one third" of the time. Ante, at 4. One is left to wonder what meaning showed up some two thirds of the time. Surely a most familiar meaning is, as the Constitution's Second Amendment ("keep and bear Arms") (emphasis added) and Black's Law Dictionary, at 214, indicate: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."[50]

Perhaps no word in the Second Amendment is as hotly contested as the word "bear." The Standard Model scholars, following the usage of Webster's Dictionary,[51] the 1776 Pennsylvania Constitution,[52] and the 1787 call for a Bill of Rights from the dissenters at the Pennsylvania Ratification Convention read the word "bear" as including ordinary types of carrying.[53] Thus, a person carrying a gun for personal protection could be said to be bearing arms. If individuals can "bear arms," then the right to "bear arms" must belong to individuals.

In contrast, Garry Wills (who argues that the Second Amendment has "no real meaning"[54]) argues that "bear" has an exclusively military context.[55] It is impossible, he writes, to "bear arms" unless once is engaged in active militia

50. *Id.* (footnotes omitted).

51. First: "[t]o support; to sustain; as, to *bear* a weight or burden" Second: "To carry; to convey; to support and remove from place to place". 3:"[t]o wear; to bear as a mark of authority or distinction; as, to *bear* a sword, a badge, a name; to *bear* arms in a coat." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (emphasis in originagl).

52. Volokh, *supra* note 35, at 810.

53. *Id.*

54. Garry Wills, *Why We Have No Right to Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62.

55. *Id.*

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service. Hence, the right to "bear arms" does not refer to a right of individuals to carry guns.[56]

Justice Ginsburg's opinion plainly takes the former approach. She believes that "to bear arms" is to wear arms in an ordinary way.[57]

56. *Id.* at 64.

57. During the Senate Judiciary Committee hearings on Ruth Bader Ginsburg's nomination to the Supreme Court, Senator Dianne Feinstein (a strong supporter of gun prohibition) asked Mrs. Ginsburg about the Second Amendment. Mrs. Ginsburg politely refused to say anything, except that the Amendment had not been incorporated.

Sen. Feinstein:

> Let me begin with the Second Amendment. I first became concerned about what does the Second Amendment mean with respect to guns in 1962 [sic] when President Kennedy was assassinated. . .

Judge Ginsburg:

> Senator Feinstein, I can say on the Second Amendment only what I said earlier, the one thing that the court has held, that it is not incorporated in the Bill of Rights [sic, 14th Amendment], it does not apply to the states. The last time the Supreme Court spoke to this question is in 1939. You summarized what that was and you also summarized the state of law in the lower courts. But this is a question that may well be before again, and all I can do is to acknowledge what I understand to be the current case law, that this is not incorporated in—that this is not one of the provisions binding on the states. The last time the Supreme Court spoke to it is in 1939, and because of where I sit, it would be inappropriate for me to say anything more than that. I would have to consider, as I've said many times today, the specific case, the briefs and the arguments that would be made, and it would be injudicious for me to say anything more with respect to the Second Amendment.
>
> . . . .

Sen. Feinstein:

> [C]ould you talk at all about the methodology you might apply, what factors you might look at in discussing Second Amendment cases should Congress, say, pass a ban on assault weapons?

Judge Ginsburg:

> I wish I could, Senator, but all I can tell you is that this is an amendment that has not been looked at the by the Supreme Court since 1939, and it—apart from the specific context, I can't—I really can't expound on it. It's an area of law in which my court has had no business and one I had no acquaintance as a law teacher. So really feel that I'm not equipped beyond what I already told you, that it isn't an incorporated amendment. The Supreme Court has not dealt with it since 1939. And I would proceed with the care I would give to any serious constitutional question.

At Justice Breyer's confirmation hearing, Senator Feinstein raised similar issues. He answered:

> As you recognize, Senator, the Second Amendment does—is in the Constitution. It provides a protection. As you also have recognized, the Supreme Court law on the subject is very, very, very few cases. This really hasn't been gone into in any depth by the Supreme Court at all. Like you, I've never heard anyone even argue that there's some kind of constitutional right to have guns in a school. And I know that every day—not every day; I don't want to exaggerate—but every week or every month for the last 14 years I've sat on case after case in which Congress has legislated rules, regulations, restrictions of all kinds on weapons.

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C. Printz v. United States

In *Printz v. United States*, the Supreme Court voted 5 to 4 to declare part of the Brady Act unconstitutional, because the Act ordered state and local law enforcement officials to perform a federal background check on handgun buyers.[58] While the *Printz* decision was not a Second Amendment case, *Printz* did result in some Second Amendment language from Justice Clarence Thomas's concurring opinion.

Justice Thomas joined in Justice Scalia's five-person majority opinion, but he also wrote a separate concurring opinion—an opinion which shows that all

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> That is to say there are many, many circumstances in which carrying weapons of all kinds is punishable by very, very, very severe penalties. And Congress often—I mean by overwhelming majorities—has passed legislation imposing very severe additional penalties on people who commit all kinds of crimes with guns, even various people just possessing guns under certain circumstances.
>
> And in all those 14 years, I've never heard anyone seriously argue that any of those was unconstitutional in a serious way. I shouldn't say never, because I don't remember every case in 14 years.
>
> So, obviously, it's fairly well conceded across the whole range of society, whatever their views about gun control legislatively and so forth that there's a very, very large area for government to act. At the same time, as you concede and others, there's some kind of protection given in the Second Amendment.
>
> Now that's, it seems to me, where I have to stop, and the reason that I have to stop is we're in a void in terms of what the Supreme Court has said. There is legislation likely to pass or has recently passed that will be challenged, and therefore I, if I am on that Court, have to listen with an open mind to the arguments that are made in the particular context.

Sen. Feinstein:

> Well, would you hold that the 1939 decision [*Miller*] is good law?

Justice Breyer:

> I've not heard it argued that it's not, but I haven't reviewed the case and I don't know the argument that would really come up. I know that it's been fairly limited, what the Supreme Court has said. And I know that it's been fairly narrow. I also know that other people make an argument for a somewhat more expanded view. But nobody that I've heard makes the argument going into these areas where there is quite a lot of regulation already. I shouldn't really underline no one, because you can find, you know, people who make different arguments. But it seems there's a pretty broad consensus there.

Sen. Feinstein:

> Would you attach any significance to the framers of the Second Amendment, where it puts certain things in capital letters?

Justice Breyer:

> I'm sure when you interpret this you do go back from the text to the history and try to get an idea of what they had in mind. And if there is a capital letter there, you ask why is there this capital letter there, somebody had an idea, and you read and try to figure out what the importance of that was viewed at the time and if that's changed over time.

Sen. Judiciary Comm., Confirmation Hearing for Stephen Breyer, July 13, 1994, Federal News Service Lexis library.

58. Printz v. United States, 521 U.S. 898 (1997)

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the Second Amendment scholarship in the legal journals is starting to be noticed by the Court.

The Thomas concurrence began by saying that, even if the Brady Act did not intrude on state sovereignty, it would still be unconstitutional.[59] The law was enacted under the congressional power "to regulate commerce. . .among the several states."[60] But the Brady Act applies to commerce that is purely *intra*state—the sale of handgun by a gun store to a customer in the same state.[61] Justice Thomas suggested that although the interstate commerce clause has, in recent decades, been interpreted to extend to purely intrastate transactions, that interpretation is wrong.[62]

Even if the Brady Act were within the Congressional power over interstate commerce, Justice Thomas continued, the Act might violate the Second Amendment:

> . . . .Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. The First Amendment, for example, is fittingly celebrated for preventing Congress from "prohibiting the free exercise" of religion or "abridging the freedom of speech." The Second Amendment similarly appears to contain an express limitation on the government's authority. That Amendment provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. [n.1] If, however, the Second Amendment is read to confer[63] a *personal* right to "keep and bear

59. *Id.* at 937 (Thomas, J., concurring).

60. The Civil Rights Act of 1964 used the interstate commerce power to regulate parties to commercial transactions, such as hotel or restaurant guests and owners. But the Brady Act attempted to expand the interstate commerce power even further, by forcing third parties to become involved in the commercial transaction. The Brady Act commandeered local sheriffs and police to perform background checks on a commercial act—the retail sale of a handgun. It was as if the Civil Rights Act had compelled state and local government employees to serve as race sensitivity mediators in hotel and restaurants. It was one thing to use the interstate commerce power to regulate commerce. It is another thing use that power to force people who are stranger to the commercial transaction to get involved. *See* David B. Kopel, *The Brady Bill Comes Due: The Printz Case and State Autonomy*, GEO. MASON UNIV. CIV. RIGHTS L.J. 189 (1999).

61. *Printz*, 521 U.S. at 937-38 (Thomas, J., concurring).

62. *Id.*

63. In contrast to the suggestion that the Bill of Rights might "confer" the right to bear arms, the Supreme Court in the 1875 case of *United States v. Cruikshank* stated that the Second Amendment, like the First Amendment, does not confer rights on anyone. Rather, those Amendments simply *recognized* and protected pre-existing human rights. *See* text at notes 321 to 328.

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> arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. [n.2] As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." 3 J. Story, Commentaries §1890, p. 746 (1833). In the meantime, I join the Court's opinion striking down the challenged provisions of the Brady Act as inconsistent with the Tenth Amendment.[64]

There are several notable elements in the Thomas concurrence. First, Justice Thomas equates the Second Amendment with the First Amendment. This is consistent with the rule from the *Valley Forge* case that all parts of the Bill of Rights are on equal footing; none is preferred (or derogated).[65] He implicitly rejected second-class citizenship for the Second Amendment.

Justice Thomas then suggests that the Brady Act could be invalid under the Second Amendment.[66] Regarding right to bear arms provisions in state constitutions, some state courts have upheld various gun restrictions as long as all guns are not banned.[67] Justice Thomas plainly does not take such a weak position in defense of the Second Amendment.[68] His implication is that by requiring government permission and a week-long prior restraint on the right to buy a handgun, the Brady Act infringed the Second Amendment.

And of course by recognizing that handguns are a Second Amendment issue, Justice Thomas implicitly rejects the argument that the Second Amendment merely protects "sporting weapons" (usually defined as a subset of rifles and shotguns).[69]

Noting that the Second Amendment was not at issue in the case before the Court (the case was brought by sheriffs who did not want to be subject to federal commands, rather by gun buyers or gun dealers), Justice Thomas gently urges the rest of the Court to take up a Second Amendment case in the future. And he leaves no doubt about his personal view of the issue, as he quotes the 19th century legal scholar and Supreme Court Justice Joseph Story, who saw the right to bear arms "as the palladium of the liberties of a republic."[70]

64. *Printz*, 521 U.S. at 938-39 (Thomas, J., concurring).

65. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

66. *Printz*, 521 U.S. at 938 (Thomas, J., concurring).

67. *See* Robertson v. Denver, 874 P.2d 325 (Colo. 1994); Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993). For a discussion of these cases, see David Kopel, Clayton Cramer & Scott Hattrup, *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177 (1995).

68. *Printz*, 521 U.S. at 938-39 (Thomas, J., concurring).

69. *Id.*

70. *Id.* at 939 (citing 3 J. STORY, COMMENTARIES § 1890, p. 746 (1833)).

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There are two footnotes in the Second Amendment portion of the Thomas concurrence. In the first footnote, the Justice states that the Supreme Court has not construed the Second Amendment since the 1939 case *United States v. Miller* (which upheld the National Firearms Act's tax and registration requirement for short shotguns[71]). He added that the Supreme Court has never directly ruled on the individual rights issue.

> 1 Our most recent treatment of the Second Amendment occurred in *United States* v. *Miller*, 307 U.S. 174 (1939), in which we reversed the District Court's invalidation of the National Firearms Act, enacted in 1934. In *Miller*, we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense." *Id.*, at 178. The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.

The second footnote addressed the growing scholarship on the Second Amendment:

> 2 Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the "right to keep and bear arms" is, as the Amendment's text suggests, a personal right. See, *e.g.*, J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo American Right 162 (1994); S. Halbrook, That Every Man Be Armed, The Evolution of a Constitutional Right (1984); Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L. J. 1236 (1994); Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L. J. 1193 (1992); Cottrol & Diamond, The Second Amendment: Toward an Afro Americanist Reconsideration, 80 Geo. L. J. 309 (1991); Levinson, The Embarrassing Second Amendment, 99 Yale L. J. 637 (1989); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204 (1983). Other scholars, however, argue that the Second Amendment does not secure a personal right to keep or to bear arms. See, *e.g.*, Bogus, Race, Riots, and Guns, 66 S. Cal. L. Rev. 1365 (1993); Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L. J. 551 (1991); Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 Yale L. J. 661 (1989); Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. Am. Hist. 22 (1984). Although somewhat overlooked in our jurisprudence, the Amendment has certainly engendered considerable academic, as well as public, debate.

In the second footnote, Justice Thomas points out that the text of the Second Amendment (which refers to "the right of the people") suggests that the Second Amendment right belongs to individuals, not the government.

71. *See* United States v. Miller, 307 U.S. 174 (1939).

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As Justice Thomas notes, a large body of legal scholarship in the last fifteen years has examined the historical evidence, and found very strong proof that the Second Amendment guarantees an individual right.[72]

The Supreme Court does not always follow the viewpoint of the legal academy. But for most of this century, the Court has always been influenced by the academy's opinion. In the 1940s, for example, legal scholars paid almost no attention to the Second Amendment, and neither did the Supreme Court; in that decade, the Second Amendment was mentioned only once, and that mention was in a lone dissent.[73] But starting in the late 1970s, a Second Amendment revolution began to take place in legal scholarship. That an intellectual revolution was in progress became undeniable after the *Yale Law Journal* published Sanford Levinson's widely influential article *The Embarrassing Second Amendment* in 1989.[74] Since then, scholarly attention to the Second Amendment has grown even more rapidly. And more importantly, for purposes of this article, the Supreme Court Justices have raised the Second Amendment in six different cases in 1990-98. Six mentions in nine years hardly puts the Second Amendment on the same plane as the First Amendment; but six times in one decade is a rate six times higher than in the 1940s.

D. Albright v. Oliver

Albright involved a Section 1983 civil rights lawsuit growing out of a malicious decision to prosecute someone for conduct which was not crime under the relevant state law.[75] The issue before the Supreme Court was whether the prosecutor's action violated the defendant's Fourteenth Amendment Due Process rights. The majority said "no," in part because the claim (growing out of the victim's unlawful arrest) would be better presented as a Fourth Amendment claim.[76]

Justice Stevens dissented, and was joined by Justice Blackmun; part of the dissent quoted Justice Harlan's analysis of the meaning of the Fourteenth Amendment, and the Fourteenth Amendment's protection of the "right to keep and bear arms":

72. *Printz*, 521 U.S. at 939 (Thomas, J., concurring). See note 9 *supra*.

73. See Adamson v. California, 332 U.S. 46, 78 (Black, J., dissenting).

74. See Levinson, *supra* note 9.

75. Albright v. Oliver, 510 U.S. 266 (1994). The only evidence against the person falsely accused came from a paid informant who had provided false information more than 50 times before. *Id.* at 292 (Stevens, J., dissenting). For more on the degradation of law enforcement caused by over-reliance on informants, especially in drug and gun cases, *see generally* David B. Kopel and Paul H. Blackman, *The Unwarranted Warrant: The Waco Warrant and the Decline of Law Enforcement*, 18 HAMLINE J. PUB. L. & POL 1 (1999).

76. *Albright*, 510 U.S. at 274-275.

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> At bottom, the plurality opinion seems to rest on one fundamental misunderstanding: that the incorporation cases have somehow "substituted" the specific provisions of the Bill of Rights for the "more generalized language contained in the earlier cases construing the Fourteenth Amendment." Ante, at 7. In fact, the incorporation cases themselves rely on the very "generalized language" the Chief Justice would have them displacing. Those cases add to the liberty protected by the Due Process Clause most of the specific guarantees of the first eight Amendments, but they do not purport to take anything away; that a liberty interest is not the subject of an incorporated provision of the Bill of Rights does not remove it from the ambit of the Due Process Clause. I cannot improve on Justice Harlan's statement of this settled proposition:
>
> > "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, *367 U.S. 497, 543* (1961) (dissenting opinion).[77]
>
> I have no doubt that an official accusation of an infamous crime constitutes a deprivation of liberty worthy of constitutional protection. The Framers of the Bill of Rights so concluded, and there is no reason to believe that the sponsors of the Fourteenth Amendment held a different view. The Due Process Clause of that Amendment should therefore be construed to require a responsible determination of probable cause before such a deprivation is effected. [78]

In *Poe v. Ullman*, the second Justice Harlan construed the "liberty" protected by the Fourteenth Amendment.[79] Although Justice Harlan's words originally were written in dissent, they have been quoted in later cases as the opinion of the Court.[80] Fourteenth Amendment "liberty" of course belongs to individuals, not to state governments. The point of the Fourteenth Amendment was to protect individual liberty from state infringement.

This "liberty" is not limited to "the specific guarantees elsewhere provided in the Constitution" including "the right to keep and bear arms." These

77. *Id.* at 306-08 (Stevens, J., dissenting).

78. *Id.* at 307 (Stevens, J., dissenting) (footnote marker omitted) (emphasis added).

79. Poe v. Ullman, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting).

80. See discussions of Planned Parenthood v. Casey, *infra* text at notes 82-84; Moore v. East Cleveland, *infra* text at notes 115-36; Roe v. Wade, *infra* text at notes 146-53.

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individual rights in the Harlan list, like other individual rights in the Bill of Rights, *might* be included in the Fourteenth Amendment's protection of "liberty" against state action. The point made by Justice Harlan (and Justice Stevens, quoting Justice Harlan), is that Fourteenth Amendment "liberty" includes things which are not part of the Bill of Rights, and does not necessarily include every individual right which is in the Bill of Rights.

While the Harlan quote makes no direct claim about whether the individual Bill of Rights items should be incorporated in the Fourteenth Amendment, Justice Harlan was plainly saying that simply because an individual right is protected in the Bill of Rights does not mean that it is protected by the Fourteenth Amendment. (Justice Black's view was directly opposite.[81]) Therefore, although the Harlan quote is not dispositive, the quote could appropriately be used to argue against incorporating the Second Amendment into the Fourteenth.

At the same time, the quote obviously treats the Second Amendment as an individual right. That is why Justice Harlan used the Second Amendment (along with the religion, speech, press, freedom from unreasonable searches, and property) to make a point about what kind of individual rights are protected by the Fourteenth Amendment.

As we shall see below, Justice Harlan's words are the words about the Second Amendment which the Supreme Court has quoted most often.

E. Planned Parenthood v. Casey

Planned Parenthood was a challenge to a Pennsylvania law imposing various restrictions on abortion.[82] In discussing the scope of the Fourteenth Amendment, Justice Sandra Day O'Connor's opinion for the Court approvingly quoted Justice Harlan's earlier statement that "the right to keep and bear arms" is part of the "full scope of liberty" contained in the Bill of Rights, and made applicable to the state by the Fourteenth Amendment.[83] Although the *Planned Parenthood* decision was fractured, with various Justices joining only selected portions of each others' opinions, the portion where Justice O'Connor quoted Justice Harlan about the Fourteenth and Second Amendments was joined by four other Justices, and represented the official opinion of the Court.

Planned Parenthood is the second of the four Supreme Court opinions that quote the Harlan dissent in *Poe*. (The other two will be discussed *infra*.) Had the authors of those opinions chosen to delete the "right to keep and bear arms" words, by using ellipses, they certainly could have done so. As we shall see when we come to the original Harlan opinion in *Poe v. Ullman*, the full Harlan

81. *Infra* note 180.

82. Planned Parenthood v. Casey, 505 U.S. 833, 848-49 (1992).

83. *Id.* at 841.

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analysis of the scope of Fourteenth Amendment liberty includes important material which later Justices carefully avoided quoting.[84]

F. United States v. Verdugo-Urquidez

United States v. Verdugo-Urquidez[85] involved American drug agents' warrantless search of a Mexican's homes in Mexicali and San Felipe, Mexico. When Verdugo-Urquidez was prosecuted in a United States court for distribution of marijuana, his attorney argued that the evidence seized from his homes could not be used against him.[86] If the homes in question had been located in the United States and owned by an American, the exclusionary rule clearly would have forbade the introduction of the evidence. But did the U.S. Fourth Amendment protect Mexican citizens in Mexico?

Chief Justice Rehnquist's majority opinion said "no." Part of the Court's analysis investigated who are "the people" protected by the Fourth Amendment:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendment provide that certain rights and power are retained by and reserved to "the people." See also U.S. Const., Amdt. 1 ("Congress shall make no law. . .abridging. . .*the right of the people* peaceably to assemble")(emphasis added); Art I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the Several States*")(emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the People" protected by the Fourth Amendment, and by the First and Second Amendment, and to whom rights are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[87]

84. *Infra* at notes 200 to 204.

85. United States v. Verdugo-Urquidez , 494 U.S. 259 (1990).

86. The evidence was some of Verdugo-Urquidez's personal papers. Under the original intent of the Fourth and Fifth Amendments, the seizure of such papers would be seen as particularly inappropriate. The English government's use of diaries and other personal papers in prosecution of dissidents was widely regarded in America as one of the great outrages of British despotism. See AKHIL AMAR, THE BILL OF RIGHTS 65-67 (1998). Under *Boyd v.United States*, the Court affirmed that private papers could not be introduced against a defendant, because the use of such papers would violate the Fourth and Fifth Amendments. Boyd v. United States, 116 U.S. 616 (1886). Unfortunately, a later Supreme Court abandoned this rule; thus, Independent Counsel Kenneth Starr was well within the letter of the law when his staff subpoenaed and read the diaries of Monica Lewinsky and her friends.

87. *Verdugo-Urquidez*, 494 U.S. at 265.

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By implication therefore, if "the people" whose right to arms is protected by the Second Amendment are American people, then "the right of the people" in the Second Amendment does not mean "the right of the states."[88] To adopt

88. *Verdugo* is of course a Fourth Amendment case, not a Second Amendment case. But there is no reason to believe that the Court did not mean what it said about the Second Amendment in *Verdugo*.

Oddly, some of the same persons who want the public to ignore what the Supreme Court said about the Second Amendment in the *Verdugo* case instead want the public to rely on what a retired justice said about the Second Amendment in a forum with much less precedential value than a Supreme Court decision or a law journal: an article in *Parade* magazine.

While on the Supreme Court, Chief Justice Warren Burger never wrote a word about the Second Amendment. After retirement, he wrote an article for *Parade* magazine that is the only extended analysis by any Supreme Court Justice of why the Second Amendment does not guarantee an individual right. Warren Burger, *The Right to Bear Arms*, PARADE, Jan. 14, 1990, at 4-6.

Chief Justice Burger argued that the Second Amendment is obsolete because we "need" a large standing army, rather than a well-armed citizenry. But the notion that constitutional rights can be discarded because someone thinks they are obsolete is anathema to a written Constitution. If a right is thought "obsolete," the proper approach is to amend the Constitution and remove it. After all, the Seventh Amendment guarantees a right to a jury trial in all cases involving more than twenty dollars. U.S. CONST. amend. VII. In 1791, twenty dollars was a lot of money; today it is little more than pocket change. Nevertheless, courts must (and do) enforce the Seventh Amendment fully.

And while the Second Amendment certainly drew much of its original support from fear of standing armies, its language is not limited to that issue. "Legislation, both statutory and constitutional, is enacted,. . .from an experience of evils. . .its general language should not, therefore, be necessarily confined to the form that evil had heretofore taken. . .[A] principle to be vital must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910).

Yet after attacking the Second Amendment as obsolete, Chief Justice Burger's essay affirmed that "Americans have a right to defend their homes." If this right does not derive from the Second Amendment, does it come from the Ninth Amendment, as Nicholas Johnson has argued? *See* Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 49 (1992). The Burger essay does not say.

Next comes the real shocker: "Nor does anyone seriously question that the Constitution protects the right of hunters to own and keep sporting guns for hunting game any more than anyone would challenge the right to own and keep fishing rods and other equipment for fishing—or to own automobiles."

In a single sentence, the former Chief Justice asserts that three "Constitutional rights"—hunting, fishing, and buying cars—are so firmly guaranteed as to be beyond question. Yet no Supreme Court case has ever held any of these activities to be Constitutionally protected.

What part of the Constitution protects the right to fish? The 1776 Pennsylvania Constitution guaranteed a right to fish and hunt, and the minority report from the 1789 Pennsylvania ratifying convention made a similar call. Various common law sources (such as St. George Tucker's enormously influential American edition of Blackstone) likewise support hunting rights. 3 WILLIAM BLACKSTONE, COMMENTARIES 414 n.3 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803). And some state Constitutions guarantee a right to arms for hunting, among other purposes. *See, e.g.,* the state constitutions of New Mexico, Nevada, West Virginia, and Wisconsin, *supra* note 43.

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the Henigan/Bogus theory, and find that the Second Amendment "right of the people" belongs to state governments would require a rejection of *Verdugo's* explication of who are "the people" of the Second Amendment and the rest of the Constitution.

The dissent by Justice Brennan would have given "the people" a broader reading: "'The People' are 'the governed.'"[89] The dissent's reading is likewise consistent only with the Standard Model, and not with the State's Rights view. If "the people" of the Second Amendment are "the governed," then the "right of the people" must belong to people who are governed, and not to governments.[90]

But the Supreme Court has never recognized such a right, and its lone decision on the subject is to the contrary. Patsone v. Pennsylvania, 232 U.S. 138 (1914) (ban on possession of hunting guns by aliens is legitimate, because the ban does not interfere with gun possession for self-defense; the Court did not discuss the Second Amendment).

Similarly, the "right" to own automobiles could, arguably, be derived from the right to interstate travel but it is hardly a settled matter of law, despite what the Chief Justice seemed to say.

Chief Justice Burger contrasted "recreational hunting" guns with "Saturday Night Specials" and "machine guns," implying that the latter two are beyond the pale of the Constitution. Thus, according to the *Parade* essay, some unidentified part of the Constitution (but not the Second Amendment) guarantees a right to own guns for home defense, a right to own hunting guns, a right to fishing equipment, and a right to buy automobiles. But the Constitution does not guarantee the right to own inexpensive handguns or machine guns.

Chief Justice Burger's "machine gun" comment was particularly odd in light of what he was pictured holding on the front cover of *Parade*: an assault weapon. The Chief Justice displayed his grandfather's rifled musket, with which his grandfather had killed or attempted to kill people during the Civil War. While the musket seems quaint and non-threatening today, it was a state of the art assault weapon in its time. Under the *Miller* test (arms suitable for militia use; see *supra* text at note 19), the nineteenth century rifled musket and the twentieth century machine gun would seem to be much closer to the core of the Second Amendment than would "recreational hunting guns."

After writing the *Parade* essay, Chief Justice Burger participated in an advertising campaign for Handgun Control, Inc., in which he called the NRA's view of the Second Amendment "a fraud." Given that the Chief Justice *agreed* with the NRA that the Constitution protects a right to own home defense guns and recreational sporting guns, and disagreed with the NRA about "Saturday Night Specials," the "fraud" rhetoric was rather extreme. Was it reasonable to call the NRA fraudulent for locating the right in the Second Amendment, as opposed to the other (unknown) part of the Constitution that the Chief Justice would prefer?

89. *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J., dissenting).

90. Handgun Control explains *Verdugo* thusly:

> But the issue of whether the right to bear arms is granted to "the people" only in connection with militia service is not even addressed in the *Verdugo-Urquidez* decision. At most, the decision implies that the Second Amendment right extends only to U.S. citizens; it does not address the precise scope of the right granted. In no way does the Court's ruling contradict the idea that the right of the people to bear arms is exercised only through membership in a "well regulated Militia."

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Interestingly, the majority opinion's analysis of "the people" protected by the Bill of Rights was an elaboration of a point made by the dissenting opinion from the Ninth Circuit Court of Appeals, when the majority had held that Mr. Verdugo was entitled to Fourth Amendment protections.[91] When the *Verdugo* case went to the Supreme Court, the Solicitor General's office quoted from Ninth Circuit's dissent, but used ellipses to remove the dissent's reference to the Second Amendment.[92] The Supreme Court majority, of course, put the Second Amendment back in.

II. THE BURGER COURT

The Second Amendment record of the Burger Court is more complex than that of the Rehnquist Court. The Rehnquist Court *dicta* about the Second Amendment points exclusively to the Second Amendment as an individual right. Indeed, except for Justice Thomas's observation that *Miller* did not resolve the individual rights issue, nothing in the Rehnquist Court's record contains even a hint that the Second Amendment might not be an individual right. In contrast, the Burger Court's *dicta* are not so consistent.

A. Lewis v. United States

The one Supreme Court majority opinion which is fully consistent with the Henigan/Bogus state's rights theory is *Lewis* v. *United States*.[93] Interestingly, the same advocates who dismiss *Verdugo* because it was not a Second Amendment case rely heavily on *Lewis* even though it too is not a Second

Handgun Control, *Exploding the NRA's Second Amendment Indeology: A Guide for Gun Control Advocates*, http://www.handguncontrol.org/legalaction/C2/C2myth.htm. Here, Henigan is apparently adopting an alternative theory of the Second Amendment. Rather than the Second Amendment guaranteeing a right to state governments (as Henigan claimed in his law review articles), the Second Amendment is now a right that does belong to people (rather than to state governments), but this right only applies to people in a well-regulated militia. This is also the view of Herz. *See generally* Herz, *supra* note 6. But neither Henigan nor Herz explain what this right might mean. Does a National Guardsman have a legal cause of action when the federal government takes away his rifle? Even though the rifle is owned by the federal government? *See* 32 U.S.C. § 105(a)(1).

If a disarmed National Guardsman does not have a cause of action, then who else could exercise the Second Amendment right to be armed in "a well-regulated militia"? The fundamental problem with Henigan's theories (and with those of his followers) is that the theories are not meant as an actual explanation of anything. They are meant to convince people that the Second Amendment places no restraint on gun control, but the theories are not meant to describe what the Second Amendment *does* protect.

91. United States v. Verdugo-Urquidez, 856 F. 2d 1214, 1239 (9th Cir. 1988) (Wallace, J., dissenting), *rev'd* 494 U.S. 259 (1990) ("Besides the fourth amendment, the name of 'the people' is specifically invoked in the first, second, ninth, and tenth amendment. Presumably, 'the people' identified in each amendment is coextensive with 'the people' cited in the other amendments.")

92. 494 U.S. 259 (1990).

93. Lewis v. United States, 445 U.S. 55 (1980).

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Amendment case. The issue in *Lewis* was primarily statutory interpretation, and secondarily the Sixth Amendment. A federal statute imposes severe penalties on persons who possess a firearm after conviction for a felony.[94] In 1961, Lewis had been convicted of burglary in Florida[95]; since Lewis was not provided with counsel, his conviction was invalid under the rule of *Gideon* v. *Wainright*.[96] The question for the Court was whether Congress, in enacting the 1968 law barring gun possession by a person who "has been convicted by a court of the United States or of a State. . .of a felony," meant to include persons whose convictions had been rendered invalid by the 1963 *Gideon* case. Writing for a six-justice majority, Justice Blackmun held that the statutory language did apply to person with convictions invalid under *Gideon*.[97]

Given the non-existent legislative history on the point, Justice Blackmun was forced to be rather aggressive in his reading of Congressional intent. For example, Senator Russell Long, the chief sponsor of the Gun Control Act of 1968, had explained that "every citizen could possess a gun until the commission of his first felony. Upon his conviction, however, Title VII would deny. . .the right to possess a firearm. . . ."[98] This supposedly showed Congressional intent to disarm people like Lewis, since the Senator had "stressed conviction, not a 'valid' conviction."[99] By this reasoning, the Gun Control Act of 1968 would likewise apply to Scottsboro Boys; they had been tortured into confessing a crime which they did not commit, but they did indeed have a "conviction" for murder, even if not "a valid conviction."[100] Justice Brennan's dissent pointed out that the majority's reasoning would impose the Gun Control Act even on people whose convictions had been overturned by an appellate court.[101]

Did the Gun Control Act (as interpreted by the Court) violate equal protection?

> Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit possession of a firearm. See, e.g., United States v. Ransom, 515 F.2d 885, 891-892 (CA5 1975), cert. Denied, 424 U.S. 944 (1976). This Court has repeatedly recognized that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm. See Richardson v. Ramirez, 418 U.S. 24 (1974)(disenfranchisement); De Veau v. Braisted, 363 U.S. 144, 363 U.S. 144 (1960)(proscription against

94. 18 U.S.C. App. § 1202(a)(1).
95. *Lewis*, 445 U.S. at 57-58.
96. *Id.* (citing Gideon v. Wainright, 372 U.S. 335 (1963)).
97. Gideon v. Wainright, 372 U.S. 335, 345 (1963).
98. *Lewis*, 445 U.S. at 62-63 (citing 114 CONG. REC. 14773 (1968)).
99. *Id.* at 62.
100. Powell v. Alabama, 287 U.S. 45 (1932).
101. *Lewis*, 445 U.S. at 69 (Brennan, J., dissenting).

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> holding office in a waterfront labor organization); Hawker v. New York, 170 U.S. 189 (1898)(prohibition against the practice of medicine).[102]

From this, it is reasonable to infer that possession of a firearm is a "right," but a right which is far less "fundamental" than voting, serving as an officer in a union, or practicing medicine. As to whether possessing a firearm is a constitutional right, the opinion does not say. But the opinion could certainly be cited for support that arms possession is not "fundamental" enough to be protected by the Fourteenth Amendment's due process clause.

In a footnote of the section supporting the rationality of a statute disarming convicted felons, Justice Blackmun wrote:

> These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See United States v. Miller, 307 U.S. 174, 178 (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well-regulated militia"); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F. 2d 1288, 1290, n. 5 (CA7 1974); United States v. Johnson, 497 F.2d 548 (CA4 1974); Cody v. United States, 460 F.2d 34 (CA8), cert. denied, 409 U.S. 1010 (1972)(the latter three cases holding, respectively, that 1202(a)(1), 922(g), and 922(a)(6) do not violate the Second Amendment).[103]

Attorney Stephen Halbrook (the successful plaintiffs' attorney in the Supreme Court gun cases of Printz v. United States[104], and United States v. Thompson/Center[105]) reads *Lewis* as reflecting the principle that since a legislature may deprive a felon "of other civil liberties, and may even deprive a felon of life itself—felons have no fundamental right to keep and bear arms."[106]

As a matter of formal linguistics, Halbrook's reading of *Lewis* is not impermissible. But it is also possible to read the *Lewis* opinion as saying, in effect, "since no-one has a right to have a gun, a law against felons owning guns does not infringe on Constitutional rights."

What of the three Court of Appeals cases cited by Justice Blackmun?

102. *Id.* at 66.

103. *Id.* at 65-66, n. 8

104. Printz v. United States, 521 U.S. 898 (1997)

105. United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) (statutory interpretation case holding that a handgun and rifle kit was not subject to a National Firearms Act tax applicable to short rifles; that a buyer could illegally assemble certain parts to create a short rifle did not bring the lawful sale of rifle and handgun components within the terms of the tax statute).

106. STEPHEN HALBROOK, FIREARMS LAW DESKBOOK 1-11 to 1-12 (1999 ed.)

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The *Three Winchester 30-30 Caliber Lever Action Carbines* case upholds the forfeiture of guns possessed by a convicted felon. The footnote cited by the Supreme Court states:

Apparently at the district court level the defendant argued that 18 U.S.C. App. § 1202 was invalid as an "infringement of the second amendment's protection of the right to bear arms, the first amendment's prohibition of bills of attainder and ex post facto laws, and the fourteenth amendment's due process clause." These arguments were appropriately rejected. [citations omitted][107]

The *Cody*[108] case upheld the conviction of a felon who falsified a federal gun registration form and falsely claimed that he had no felony conviction. Regarding Cody's Second Amendment claim, the Eighth Circuit stated:

> It has been settled that the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms. The Second Amendment's guarantee extends only to use or possession which "has some reasonable relationship to the preservation or efficiency of a well regulated militia." Id [Miller]. At 178, 59 S. Ct. at 818. See United States v. Synnes, 438 F.2d 764, 772 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009, 92 S. Ct. 687, 30 L. Ed. 2d 657 (1972); Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942), cert. denied sub nom., Velazquez v. United States, 319 U.S. 770, 63 S. Ct. 1431, 87 L. Ed. 1718 (1943).[109] We find no evidence that the prohibition of § 922(a) (6) obstructs the maintenance of a well regulated militia.[110]

In *Johnson*, the Fourth Circuit upheld the Gun Control Act as applied to a convicted felon who transported a firearm in interstate commerce.[111] Regarding Johnson's Second Amendment claim, the Circuit wrote that "The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'"[112]

Now a "collective right" can be read two ways: it can be like "collective property" in a Communist property; since it belongs to all the people collectively, it belongs only to the government. Alternatively, a "collective right" to arms can be a right of all the people to have a militia, and for this

107. United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 363 F. Supp. 322, 323 (E.D. Wis. 1973).

108. Cody v. United States, 460 F.2d 34 (8th Cir. 1972).

109. As in this quote from *Cody*, the First Circuit's 1943 *Cases* decision is sometimes cited as a lower court following *Miller*. *See* Cases v. United States, 131 F.2d 916 (1st Cir. 1942). To the contrary, *Cases* limits *Miller* to its facts, and refuses to apply the *Miller* relationship-to-the-militia test. The *Miller* test, explained the *Cases* judges, would allow "private citizens" to possess machine guns and other destructive weapons. *Cases* upholds a federal gun control law while acknowledging that the law limits the exercise of Second Amendment rights.

110. *Cody*, 460 F.2d at 36.

111. Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

112. *See. e.g.*, *Miller*, 307 U.S. at 178.

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purpose, each person has a right to possess arms for militia purposes (but not to possess arms for other purposes, such as self-defense).[113] Indeed, this is the approach taken by *Aymette*, the Tennessee Supreme Court case which is the sole citation for the rule of decision in *Miller*; *Aymette* states that the Second Amendment protects individual possession of militia-type arms, so that those individuals may collectively exercise their rights in a militia.[114]

Neither *Lewis* nor its three cited Court of Appeals cases claim that the Second Amendment right belongs to state governments. And none of them goes so far as to claim that law-abiding American citizens have no Second Amendment right to possess arms. But *Lewis* and its cited cases, especially *Johnson*, certainly come close to that proposition. Although Halbrook's reading of *Lewis* is not formally wrong, the spirit of *Lewis* has little in common with the Standard Model of the Second Amendment.

If *Lewis* were the Supreme Court's last word on the Second Amendment, the Standard Model, no matter how accurate in its assessment of original intent, would seem on shaky ground as a description of contemporary Supreme Court doctrine. But *Lewis*, while not ancient, is no longer contemporary. As discussed above, six subsequent Supreme Court cases have addressed the Second Amendment as an individual right. Only two justices from the *Lewis* majority remain on the Court, and both of those justices (Rehnquist and Stevens) have written 1990s opinions which regard the Second Amendment as an individual right.

The Rehnquist cases suggest that it is unlikely that the current Court would read *Lewis*'s hostile but ambiguous language as negating an individual right.

B. Moore v. East Cleveland

Not only do the Rehnquist cases impede any effort to read *Lewis* as the definitive state's right case, so does a case decided four years before *Lewis*. The *Moore* v. *East Cleveland* litigation arose out of a zoning regulation which made it illegal for extended families to live together.[115] The plurality opinion by Justice Powell found in the Fourteenth Amendment a general protection for families to make their own living arrangements.[116] Thus, the East Cleveland law, which, for example, forbade two minor cousins to live with their grandmother, [117] was unconstitutional.

113. *See, e.g.*, Cockrum v. State, 24 Tex. 394, 397 (1859).

114. Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840) (right to arms is for defense against tyranny, not for "private" defense; while "The citizens have the unqualified right to *keep* the weapon", the legislature can restrict the carrying of firearms) (emphasis in original).

115. Moore v. East Cleveland, 431 U.S. 494, 495-96 (1976).

116. *Id.* at 505-06.

117. *Id.* at 496-97.

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In discussing the boundaries of the Fourteenth Amendment, the Powell plurality opinion for the Court quoted from Justice Harlan's dissent in *Poe v. Ullman*. This was the same language that was later quoted by Justice O'Connor's majority opinion in *Planned Parenthood* v. *Casey*,[118] and by Justice Stevens' dissent in *Albright v. Oliver*[119]:

> But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.
>
> Understanding those reasons requires careful attention to this Court's function under the Due Process clause. Mr. Justice Harlan described it eloquently:
>
> > Due process cannot be reduced to any formula; its content cannot be determined by reference to any code. . .The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . .
> >
> > [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints" Poe v. Ullman, *supra*, at 542-543 (dissenting opinion).[120]

In dissent, Justice White also quoted from Justice Harlan's words in *Poe*. While Justice White included the language about the Second Amendment, he did not include the preceding paragraph about tradition.[121]

Since the Fourteenth Amendment belongs exclusively to individuals, and not to state governments, the only possible reading of *Moore* v. *East Cleveland* is that the Second Amendment protects an individual right.

The "tradition" paragraph from Justice Harlan, quoted by Justice Powell, strengthens an argument for incorporating the Second Amendment. The right to arms had roots as one of the "rights of Englishmen" recognized by the English 1689 Bill of Rights,[122] and was adopted in nine of the first fifteen

118. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
119. Albright v. Oliver, 510 U.S. 266, 306-08 (1994) (Stevens, J., dissenting).
120. *Moore*, 431 U.S. at 502.
121. *Id.* at 542 (White, J., dissenting).
122. 1 Wm. & Mary sess. 2, ch. 2 (1689); see also MALCOLM, *supra* note 9.

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states' constitutions.[123] When the Constitution was proposed, five state ratifying conventions called for a right to arms—more than for any other single right that became part of the Bill of Rights.[124] With the exception of a single concurring opinion by an Arkansas judge in 1842,[125] *every* known judicial opinion and scholarly commentary from the nineteenth century treated the Second Amendment as an individual right.[126]

Justice Harlan's "tradition is a living thing" analysis also looks at whether the right in question is supported by modern "tradition." The right to arms fares well under this analysis too. Between a third and a half of all American households choose to own firearms,[127] and many others own other types of "arms" (such as edged weapons) which might fall within the scope of protected "arms."[128] Today, forty-four state constitutions guarantee a right to arms[129]; in 15 states in the last three decades, voters have added or strengthened an arms right to their state constitution, always by a very large majority.[130] Twenty years ago, only a few states allowed ordinary citizens to obtain a permit carry a concealed handgun for protection; now twenty-nine states have "shall issue" laws, and two states require no permit at all.[131]

Contrast all the "traditional" support for the right to arms with the absence of such support for the Fifth Amendment's guarantee against the taking of property without due process and just compensation. No state ratifying convention had demanded such a clause, and no such right was recognized in

123. EUGENE VOLOKH, SOURCES ON THE SECOND AMENDMENT AND RIGHTS TO KEEP AND BEAR ARMS IN STATE CONSTITUTIONS, pt. I <*http://www.law.ucla.edu/faculty/volokh/ 2amteach/ sources.htm#TOC1*>; DAVID YOUNG, THE ORIGIN OF THE SECOND AMENDMENT (1991).

124. See YOUNG, *supra* note 123.

125. Buzzard v. State, 20 Ark. 106 (1842).

126. Kopel, *The Second Amendment in the 19th Century*, *supra* note 10.

127. GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL (1997).

128. The dominant line of traditional cases limits the scope of "arms" protected by the Second Amendment to arms which an individual could use in a militia; in the nineteenth century, rifles and swords were the paradigm of such weapons. Kopel, *The Second Amendment in the 19th Century*, *supra* note 10. A minority line of cases goes further, and protects weapons which could be useful for personal defense, even if not useful for militia service. *See, e.g.*, State v. Kessler, 614 P.2d 94 (Or. 1980) (billy club); State v. Delgado, 692 P.2d 610 (Or. 1984) (switchblade knife).

129. In one state, Massachusetts, the highest court has construed the right as belonging to the state government, rather than to individuals. Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847 (1976). But see Commonwealth v. Murphy 166 Mass. 171, 44 N.E. 138 (1896). In Kansas, a 1905 case held that the right in the state constitution belonged to the state government, and not to the people. City of Salinas v. Blaksley, 72 Kan. 230, 83 P. 619 (1905) This holding was implicitly rejected in a later case. Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979).

130. JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS. (Univ. of Chicago Press, 1998).

131. Vermont and Idaho (outside Boise, where a permit is required and readily obtainable).

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the English Bill of Rights.[132] If the just compensation is "traditional" enough to have been incorporated, as it has been,[133] the argument for incorporating the Second Amendment is all the stronger.

But while the Harlan language quoted in *East Cleveland* has favorable implications for Second Amendment incorporation, *East Cleveland* does not itself perform the incorporation.[134]

And while *East Cleveland*'s implication for the Second Amendment as an individual right seems clear enough under its own terms, Justice Powell's personal views appear to have changed after 1976. After retiring from the Court, in 1988 he gave a speech to the American Bar Association in which he said that the Constitution should not be construed to guarantee a right to own handguns[135]; this speech was not necessarily inconsistent with *East Cleveland*, since a Second Amendment right to arms might exclude some types of arms. But in 1993, Justice Powell went even further, suggesting in a television interview that the Constitution should not be read to as guaranteeing a right to own even sporting guns.[136]

132. AKHIL AMAR, THE BILL OF RIGHTS 77-78 (1998).

133. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

134. *Moore*, 431 U.S. at 502.

135. "With respect to handguns . . . it is not easy to understand why the Second Amendment, or the notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking numbers of murders in the United States." American Bar Association Speech, Toronto, Canada, Aug. 7, 1988.

136. The MacNeil/Lehrer NewsHour, Mar.16, 1989, trans. no. #3389, Lexis Transcripts library:

> MR. LEHRER: Another issue that was before the court and is still before the nation as we go into a new year is the subject of gun control. You have said that the constitution does not guarantee the right to bear arms. Explain that.
>
> JUSTICE POWELL: Have you read the second amendment?
>
> MR. LEHRER: Well, I think I have but be my guest.
>
> JUSTICE POWELL: Well, it talks about militia. In the days that the amendment was adopted in 1791, each state had an organized militia. The states distrusted the national government, didn't believe a national government had the authority or the ability to protect their liberties, so the militia was a very important factor to the states. This court decided a case that I haven't seen decided, I'm not a hundred percent sure, I think it was the United States against Miller decided back in the late 30's, in which the question involved a sawed off shot gun. I won't go into the details of the opinion, but in essence, there's language in that that suggests what I believe, and that is that the second amendment was never intended to apply to hand guns or, indeed to sporting rifles and shot guns. I've had a shot gun since I was 12 years old and I still occasionally like to shoot birds, but hand guns certainly were not even dreamed of in the sense that they now exist at the time the second amendment was adopted.

Actually, handguns had been invented and were well known by 1789. *See* IAN V. HOGG, THE ILLUSTRATED ENCYLOPEDIA OF FIREARMS (1978). Handguns were common enough in the early sixteenth century so that proposed legislation as early as 1518 addressed them. *Id.* at 16-17. By the latter part of the 1500s, handguns had become standard cavalry weapons. *Id.* at 17. When

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Whatever the evolution of Justice Powell's thoughts about gun rights, the only words he ever put in the United States Reports treat the Second Amendment as an individual right.

C. Adams v. Williams

The only written opinion from a Supreme Court Justice which plainly rejects an individual right came from Justice Douglas, dissenting in the 1972 case of *Adams* v. *Williams*.[137] Acting on a tip, a police officer stopped a motorist for questioning, and then grabbed a revolver hidden in the driver's waistband.[138] The Supreme Court majority upheld the officer's actions as a reasonable effort to protect his safety.[139]

Justice Douglas, a strong defender of the Fourth Amendment right to be free from unreasonable searches, dissented.[140] After discussing Fourth Amendment issues, Justice Douglas then editorialized in favor of handgun control and prohibition, and asserted that the Second Amendment posed no barrier to severe gun laws:

> The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which 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."
>
> There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.
>
> The leading case is United States v. Miller, 307 U.S. 174, upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence that a sawed-off shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia." Id., at 178. The Second Amendment, it was held, "must be interpreted and applied" with the view of maintaining a "militia."
>
> > "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the

the Second Amendment was ratified, state militia laws requiring most men to supply their own firearms required officers to supply their own pistols.

137. Adams v. Williams, 407 U.S. 143 (1972).

138. *Id.* at 144-45.

139. *Id.* at 149.

140. *Id.* at 149 (Douglas, J., dissenting).

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> consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia - civilians primarily, soldiers on occasion." Id., at 178-179.
>
> Critics say that proposals like this water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia. But if watering-down is the mood of the day, I would prefer to water down the Second rather than the Fourth Amendment. I share with Judge Friendly a concern that the easy extension of Terry v. Ohio, 392 U.S. 1, to "possessory offenses" is a serious intrusion on Fourth Amendment safeguards. "If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows 'that criminal activity may be afoot.'" 436 F.2d, at 39, quoting Terry v. Ohio, supra, at 30.[141]

Justice Douglas's statement is a clear affirmation of the anti-individual interpretation of the Second Amendment which is espoused by the anti-gun lobbies. Since Justice Douglas was writing in dissent, his opinion creates no legal precedent. Nevertheless, the opinion is emblematic of the belief of some civil libertarians that the move to "water down" the Fourth Amendment can be forestalled by watering down the Second Amendment.

Justice Brennan did not join the Douglas dissent, but instead wrote his own. Justice Brennan presciently noted that the Court's loose standard for "stop and frisk" would become a tool for police officers to search people at will, with officer safety often serving as a mere pretext.[142] (*Adams* v. *Williams* is one of the key cases opening the door to the broad variety of warrantless searches which are now allowed.) Justice Brennan also noted the illogic of allowing stop-and-frisk for guns in a state which allows citizens to carry concealed handguns.[143] (Connecticut was one of the first states to adopt "shall issue" laws for concealed handgun permits; now, thirty-one states have such laws.[144])

Justice Marshall's dissent made a similar point, noting that after the officer discovered the gun, he immediately arrested Williams, without asking if Williams had a permit.[145]

D. Roe v. Wade

141. *Id.* at 150-51. Justice Douglas was a newly-appointed member of the Court that decided *Miller*, but he did not participate in the case, having joined the Court after the case was argued. Justice Black (whose views on the Second Amendment are found *infra* at notes 179-82, 194-96, 221-28) did serve on the Miller Court, and joined in the unanimous decision.

142. *Id.* at 153 (Brennan, J., dissenting).

143. *Id.* at 151-52.

144. See Lott, *supra* note 130.

145. *Adams*, at 153 (Marshall, J., dissenting).

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The year after Justice Douglas took a clear stand against individual Second Amendment rights in *Adams*, Justice Stewart authored an opinion in the opposite direction.

The majority opinion in *Roe v. Wade*,[146] written by Justice Harry Blackmun, has been justly criticized for having no connection with the text of the Constitution, and only a tenuous connection with the prior precedents of the Supreme Court.[147] Justice Potter Stewart, perhaps recognizing the weakness of the Blackmun opinion, authored a concurring opinion coming to the same result as Justice Blackmun, but attempting to ground the result more firmly in precedent.[148] As part of the analysis arguing that the right to abortion was part of the "liberty" protected by the Fourteenth Amendment, Justice Stewart quoted Justice Harlan's dissenting opinion in *Poe v. Ullman*[149], which had listed the right to keep and bear arms as among the liberties guaranteed by the Fourteenth Amendment:

> As Mr. Justice Harlan once wrote: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, 367 U.S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (dissenting opinion).[150]

Thus, the Harlan dissenting language about the Second Amendment, from *Poe v. Ullman*, has been quoted in one majority opinion (*Planned Parenthood v. Casey*[151]), one plurality opinion (*Moore v. East Cleveland*[152]), two dissents

146. Roe v. Wade, 410 U.S. 113 (1973).

147. *See, e.g.*, William Van Alstyne, *Closing The Circle Of Constitutional Review from* Griswold v. Connecticut *To* Roe v. Wade: *An Outline Of A Decision Merely Overruling* Roe, 1989 DUKE L.J. 1677.

148. Roe, 410 U.S. at 167-68 (Stewart, J., concurring).

149. Poe v. Ullman, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting).

150. *Id.* at 167. Roe, 410 U.S. 113.

151. Planned Parenthood v. Casey, 505 U.S. 833, 848-49 (1992).

152. Moore v. East Cleveland, 431 U.S. 494, 502 (1976).

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(*Albright v. Oliver* and *Moore v. East*[153]), and one concurrence (*Roe v. Wade*[154]). In contrast, the Douglas dissenting language about the Second Amendment, from *Adams v. Williams*,[155] has never been quoted in an opinion by any Justice.

E. Laird v. Tatum

During the Cold War and the Vietnam War, the United States Army illegally spied on American anti-war critics.[156] When the Army's conduct was to discovered, a group of individuals who had been spied upon brought suit in federal court.[157] In a sharply divided five-four decision, the Supreme Court majority held that the suit was not justiciable.[158] The plaintiffs could not show that they had been harmed by the Army, or that there was a realistic prospect of future harm, and hence there was no genuine controversy for a federal court to hear.[159] Justice Douglas (joined by Justice Marshal) penned a fiery dissent, invoking the long struggle to free civil life from military domination.[160]

Justice Douglas began by examining the power which the Constitution grants Congress over the standing army and over the militia.[161] Since Congress is not granted any power to use the army or militia for domestic surveillance, it necessarily follows that the army has no power on its own to begin a program of domestic surveillance.[162]

Moving onto a broader discussion of the dangers of military dictatorship, Justice Douglas quoted an article which Chief Justice Earl Warren had written in the *New York University Law Review*, which mentioned the Second Amendment as one of the safeguards intended to protect America from rule by a standing army.[163]

> As Chief Justice Warren has observed, the safeguards in the main body of the Constitution did not satisfy the people on their fear and concern of military dominance:
>
> > "They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any house

153. Albright v. Oliver, 510 U.S. 266 (1994); Moore, 410 U.S. at 542.
154. Roe v. Wade, 410 U.S. 113, 169 (1973).
155. Adams v. Williams, 407 U.S. 143 (1972).
156. Laird v. Tatum, 408 U.S. 1, 2-3 (1972).
157. *Id.* at 3.
158. *Id.* at 15-16.
159. *Id.*
160. *Id.* at 16-17 (Douglas, J., dissenting).
161. *Id.*
162. *Id.* at 17-18.
163. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 185 (1962).

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> in time of peace without the consent of the owner. Other Amendments guarantee the right of the people to assemble, to be secure in their homes against unreasonable searches and seizures, and in criminal cases to be accorded a speedy and public trial by an impartial jury after indictment in the district and state wherein the crime was committed. The only exceptions made to these civilian trial procedures are for cases arising in the land and naval forces. Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe that our Founders' determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights."[164]

The Earl Warren law review language is, on its face, consistent with individual rights. He listed the right to arms among other individual rights, and he treated the Second Amendment's subordinate clause (about the importance of well-regulated militia) as protecting something distinct from the Second Amendment's main clause (the right of the people to keep and bear arms).[165]

But based on Justice Douglas's dissent the same year in *Adams*, we cannot ascribe to Justice Douglas the full implication of what Chief Justice Warren wrote in the *N.Y.U. Law Review*. And while Chief Justice Warren's *N.Y.U.* article is interesting, Chief Justice Warren never wrote anything about the Second Amendment in a Supreme Court opinion.

III. THE WARREN, VINSON, AND HUGHES COURTS

During the tenure of Chief Justices Earl Warren (1953-69) and Fred Vinson (1946-53), opinions in nine cases addressed the Second Amendment. Seven of those opinions (majority opinions by Justices Brennan, Frankfurter, Harlan, and Jackson; a concurrence by Justice Black; and dissents by Justices Black and Harlan) recognized an individual right in the Second Amendment. The eighth case, an "appeal dismissed" contained no explanation, and thus was consistent with both the Standard Model individual right and the Henigan/Bogus state's right. The earliest case in this period was a 1934 decision that used the Second Amendment to support a state's right to control its militia.[166]

A. Burton v. Sills

164. *Laird*, 408 U.S. at 22-23, *quoting* Earl Warren, *The Bill of Rights and the Military*, *supra* note 163. (emphasis added).

165. For the best analysis of how Madison synthesized two different traditions in the Second Amendment (the republican militia theory in the purpose clause, and the human rights theory in the main clause), *see* Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, *supra* note 9.

166. Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934).

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Burton v. *Sills* involved a challenge to the then-new gun licensing law in New Jersey.[167] The law did not ban any guns, but established a licensing system intended to screen out people with serious criminal convictions, substance abusers, and the like. After the New Jersey Supreme Court rejected a Second Amendment challenge to the law[168], the plaintiffs asked the Supreme Court to review the case; the request came in the form of an "appeal," rather than a petition for a writ of certiorari.[169]

The United States Supreme Court declined to hear the case.[170] Since the case had come by appeal, rather than petition for a writ, the Court wrote the standard phrase used at the time in denying an appeal: "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."[171]

The Supreme Court has explained that dismissals such as the one in *Burton* have some value in guiding lower courts:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. After *Salera*, for example, other courts were not free to conclude that the Pennsylvania provision invalidated was nevertheless constitutional. Summary actions, however, including *Salera*, should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.[172]

Thus, following the appeal dismissal in *Burton* v. *Sills*, a lower federal court could not conclude that the New Jersey gun licensing law violated the Second Amendment.

The appeal dismissal does *not* necessarily endorse the reasoning of the state court against which the appeal was taken. (The New Jersey Supreme Court had said that the Second Amendment is not an individual right.[173])

167. Burton v. Sills, 394 U.S. 812 (1969).

168. Burton v. Sills, 248 A.2d 521 (N.J. 1968).

169. *Burton*, 394 U.S. at 812.

170. *Id.*

171. *Id.* The decision was per curiam, with Justice Brennan not participating.

172. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

173. The New Jersey court in *Burton* could never be charged with excessive regard for individual rights, for the court wrote, "the common good takes precedence over private rights. . .Our basic freedoms may be curtailed if sufficient reason exists therefor. Only in a very limited sense is a person free to do as he pleases in our modern American society." Burton v. Sills, 240 A.2d 432, 434 (N.J. 1968). In contrast, the New Jersey Supreme Court in 1925 had recognized "The right of a citizen to bear arms," but had explained that the right "is not unrestricted." Hence, a law requiring a license to carry a concealed revolver was not unconstitutional. State v. Angelo, 3 N.J. Misc. 1014 (Sup. Ct. 1925). Since New Jersey is one of

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The plaintiffs in *Burton* had conceded that prior Supreme Court cases (particularly the 1886 *Presser* case) had said that the Second Amendment limits only the federal government, and not state governments.[174] The plaintiffs invited the courts to use the *Burton* case as an opportunity to reverse prior precedent.[175] The appeal dismissal in *Burton* may be read as the Court's declining the invitation to re-open the issue decided by *Presser*.

Justice Thomas's concurrence in *Printz*,[176] suggesting that the Brady Act waiting period may violate the Second Amendment, implies he would not read *Burton* as asserting that a New Jersey-style gun licensing system would be constitutional if enacted by the Congress. Reading *Burton* as an authorization for sweeping *federal* gun licensing would be inconsistent with the Supreme Court's teaching that appeal dismissals "should not be understood as breaking new ground."[177]

Given the plaintiffs' requested grounds for Supreme Court review (to overturn *Presser*) it is logical to view *Burton* as a re-affirmance of *Presser*.[178]

On the other hand, since *Burton* contains no explicit reasoning, the case is not directly contradictory to the Henigan/Bogus theory.

B. Duncan v. Louisiana

In this case, the Supreme Court incorporated the Sixth Amendment right to jury trial, as part of the Fourteenth Amendment's "due process" guarantee.[179] Justice Black, joined by Justice Douglas, concurred, and restated his argument from *Adamson v. California*[180] (*infra*) that the Fourteenth Amendment's "privileges and immunities" clause should be read to include everything in the first eight Amendments.[181] He quoted a statement made on the Senate floor by Senator Jacob Howard, one of the lead sponsors of the Fourteenth Amendment:

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. . .To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added *the personal rights guaranteed and secured by the first eight amendments of the Constitution*; such as the freedom of speech and of the press; the right of the

the few states without a state constitutional right to arms, the court's reference to the "right of the citizen" must have been a reference to the Second Amendment.

174. For *Presser* see *infra* text at notes 310-20.

175. *Id.*

176. Printz v. United States, 521 U.S. 898, 937 (1997) (Thomas, J., concurring).

177. *Mandel*, 432 U.S. at 176.

178. Presser v. Illinois, 116 U.S. 252 (1886).

179. Duncan v. Louisiana, 391 U.S. 145 (1968).

180. Adamson v. California, 332 U.S. 46, 68-78 (1947) (Black, J., dissenting).

181. *Duncan*, 391 U.S. at 164-65 (Black, J., concurring).

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> people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people*; the right to keep and bear arms*; the right to be exempted from the quartering of soldiers in a house without consent of the owner. . . .[182]

Justice Black's use in *Duncan* of the quote describing "the right to keep and bear arms" as one of "the personal rights guaranteed and secured by the first eight amendments" is fully consistent with his writing on the bench and in legal scholarship that the Second Amendment right to arms was one of the individual rights which the Fourteenth Amendment (properly interpreted) makes into a limit on state action.[183]

C. Malloy v. Hogan

This 1964 case used the Fourteenth Amendment's due process clause to incorporate the Fifth Amendment's privilege against self-incrimination.[184] Discussing the history of Fourteenth Amendment jurisprudence, Justice Brennan listed various "Decisions that particular guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment."[185] Among these were "Presser v. Illinois, 116 U.S. 252, 265 (Second Amendment),"[186] along with various other cases, almost of which had been, or would be, repudiated by later decisions on incorporation.[187]

As discussed above, any discussion of the Second Amendment as something which *could* be incorporated, even if no incorporation has been performed, necessarily presumes that the Second Amendment is an individual right. Justice Brennan's explication of *Presser* as a case which rejects privileges and immunities incorporation is of some significance as a modern interpretation of *Presser*, since, as we shall discuss *infra*, the years after the

182. *Id.* at 166-67 (quoting CONG. GLOBE, 39th Cong., 1st Sess., at 2765-66 (1866)) (emphasis added).

183. *Infra* notes 194-97, 221-28.

184. Malloy v. Hogan, 378 U.S. 1 (1964).

185. *Id.* at 5 n. 2.

186. *Id.*

187. *See* United States v. Cruikshank, 92 U.S. 542, 551 (1875) (right to assemble); Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922) (First Amendment); Weeks v. United States, 232 U.S. 383, 398 (1914) (Fourth Amendment); Hurtado v. California, 110 U.S. 516, 538 (1884) (Fifth Amendment requirement of grand jury indictments); Palko v. Connecticut, 302 U.S. 319, 328 (1937) (Fifth Amendment double jeopardy); Maxwell v. Dow, 176 U.S. 581, 595 (1900) (Sixth Amendment jury trial); Walker v. Sauvinet, 92 U.S. 90, 92 (1875) (Seventh Amendment jury trial); In re Kemmler, 136 U.S. 436 (1890) (Eighth Amendment cruel and unusual punishment, electrocution) *;* McElvaine v. Brush, 142 U.S. 155 (1891)*;* O'Neil v. Vermont, 144 U.S. 323, 332 (1892) (Eighth Amendment prohibition against cruel and unusual punishment). Except for *Hurtardo* and *Walker*, of these cases have been undone by later cases.

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1886 *Presser* decision generated a variety of opinions about whether *Presser* actually had rejected incorporation.

D. Konigsberg v. State Bar of California

In *Konigsberg*, the Court majority upheld the state of California's refusal to admit to the practice of law an applicant who refused answer questions about his beliefs regarding communism.[188] In dissent, Justice Black argued that First Amendment rights were absolute and that the inquiry into the prospective lawyer's political beliefs was therefore a violation of the First Amendment.[189]

Justice Harlan's majority opinion rejected Justice Black's standard of constitutional absolutism.[190] The Harlan majority opinion is one of the classic examples of the "balancing" methodology of jurisprudence.[191] Justice Harlan pointed to libel laws as laws which restrict speech, but which do not infringe the First Amendment.[192] Similarly, he pointed to the Supreme Court's ruling in *United States* v. *Miller* as an example of a law which restricted the absolute exercise of rights, but which had been held not to be unconstitutional.[193] Justice Harlan thereby treated the First and Second Amendment as constitutionally identical: guaranteeing an individual right, but not an absolute right.

> n. 10. That view, which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: "Congress shall make no law . . . abridging the freedom speech, or of the press; or the right of the people peaceably to assemble . . . ." But as Mr. Justice Holmes once said: "[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." Gompers v. United States, 233 U.S. 604, 610. In this connection also *compare the equally unqualified command of the Second Amendment: "the right of the people to keep and bear arms shall not be infringed."* And see United States v. Miller, 307 U.S. 174.[194]

The year before Justice Black's absolutist interpretative model was rejected by the majority of the Court, Justice Black had detailed the absolutist

188. Konigsberg v. State Bar of California, 366 U.S. 36 (1961)
189. *Id.* at 57-58 (Black, J., dissenting).
190. *Id.* at 44.
191. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 433 (1985).
192. *Konigsberg*, 366 U.S. at 49-50.
193. *Id.* at 51.
194. *Id.* at 49-50 (emphasis added).

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theory in the first annual James Madison lecture at the New York University School of Law.[195] Discussing each part of the Bill of Rights, Justice Black explained how each guarantee was unequivocal and absolute. For example, under the Sixth Amendment, a defendant had a "definite and absolute" right to confront the witnesses against him.[196] Regarding the Second Amendment, Justice Black explained:

> Amendment Two provides that:
>
> 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.
>
> Although the Supreme Court has held this Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute.[197]

Did Justice Black mean that individuals have an absolute right to possess militia-type arms, or did Justice Black mean that state governments have an absolute right to arm the state militias as the state governments see fit? His view is particularly important, because he served on the Court that decided *Miller*, and he joined in the Court's unanimous opinion.

Throughout the New York University speech, Justice Black referred exclusively to individual rights, and never to state's rights. For example, he began his speech by explaining "I prefer to think of our Bill of Rights as including all provisions of the original Constitution and Amendments that protect individual liberty. . ."[198] If Justice Black thought that the Second Amendment protected state power, rather than individual liberty, he would not have included the Second Amendment in his litany of "absolute" guarantees in the Bill of Rights. In the discussion of *Adamson* v. *California*, *infra*, we will see "definite and absolute" proof that Justice Black considered the Second Amendment an individual right.

E. Poe v. Ullman

In the 1961 case *Poe* v. *Ullman*, the Court considered whether married persons had a right to use contraceptives.[199] The majority said "no," but the second Justice Harlan, in a dissent (which gained ascendancy a few years later in *Griswold* v. *Connecticut*), wrote that the Fourteenth Amendment did guarantee a right of privacy. In developing a theory of exactly what the Fourteenth Amendment due process clause did protect, Justice Harlan wrote that the clause was not limited exclusively to "the precise terms of *the specific*

195. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).
196. *Id.* at 872.
197. *Id.* at 873.
198. *Id*. at 865.
199. Poe v. Ullman, 367 U.S. 497 (1961).

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guarantees elsewhere provided in the Constitution," such as "the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures."[200]

It is impossible to read Justice Harlan's words as anything other than a recognition that the Second Amendment protects the right of individual Americans to possess firearms. The due process clause of the Fourteenth Amendment, obviously, protects a right of individuals *against* governments; it does not protect governments, nor is it some kind of "collective" right. It is also notable that Justice Harlan felt no need to defend or elaborate his position that the Second Amendment guaranteed an individual right. Despite the Henigan claim that the non-individual nature of the Second Amendment is "well-settled," it was unremarkable to Justice Harlan that the Second Amendment guaranteed the right of individual people to keep and bear arms.

Like the Brandeis and Holmes dissents in the early free speech cases, the Harlan dissent in *Poe* today seems to be a correct statement of the law.

Some parts of the Harlan dissent, however, have not been quoted by future courts. For example, even though later opinions have quoted approvingly the Harlan language that the Fourteenth Amendment forbids "all substantial arbitrary impositions,"[201] those quotations omit the list of cases that Justice Harlan cited for the proposition. That list included *Allgeyer* v. *Louisiana*[202] and *Nebbia* v. *New York*,[203] both of which used the Fourteenth Amendment in defense of economic liberty. But Justice Harlan was certainly right that modern use of the Fourteenth Amendment to protect non-enumerated rights has its roots in the liberty of contract due process cases from the turn of the century. Although it is not currently respectable to say so in a Supreme Court opinion, cases such as *Allgeyer* and its progeny have as much a logical claim to be part of the Fourteenth Amendment as do *Griswold*[204] and its progeny; both lines of cases protect personal freedom from "substantial arbitrary impositions."

But the fact that *Allgeyer* and *Nebbia* end up trimmed in later quotations of Justice Harlan's words shows that the Justices who used the quote later (Stevens, O'Connor, Powell, and Stewart) were not just quoting without thought; they knew how to excise parts of Harlan's language that they did not agree with, such as the references to economic liberty. That economic liberty was excised, while the Second Amendment stayed in, may, therefore, be plausibly considered as the writer's decision.

200. *Id.* at 542-43 (Harlan, J., dissenting) (emphasis added).

201. Albright v. Oliver, *supra* note 78; Planned Parenthood v. Casey, *supra* note 83; Moore v. East Cleveland, *supra* notes 120-21.

202. Allgeyer v. Louisiana, 165 U.S. 578 (1897).

203. Nebbia v. New York, 291 U.S. 502 (1934).

204. Griswold v. Connecticut, 381 U.S. 479 (1965).

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Also unquoted by later Courts has been Justice Harlan's statement, "Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights."[205] In support of this proposition, he cited, *inter alia*, *Presser* v. *Illinois*, a nineteenth century case which will be discussed *infra*.

Interestingly, Justice Douglas wrote his own dissent, in which he stated that the Fourteenth Amendment must protect "all" the Bill of Rights.[206] This implies that the Second Amendment is an individual right, if it can be protected by the Fourteenth Amendment. But Justice Douglas later rejected this view, in his *Adams* v. *Williams* dissent.[207]

F. Knapp v. Schweitzer

Knapp involved the applicability of the Fifth Amendment's self-incrimination clause to the states.[208] Justice Frankfurter's majority opinion refused to enforce the clause against the states. In support of his position, the Justice reeled off a list of nineteenth century cases, including *Cruikshank* (discussed *infra*) which he cited for the proposition that it was well-settled almost all of the individual rights guarantees in the Bill of Rights were not applicable to the states:

> n. 5. By 1900 the applicability of the Bill of Rights to the States had been rejected in cases involving claims based on virtually every provision in the first eight Articles of Amendment. See, e. g., Article I: Permoli v. Municipality No. 1, 3 How. 589, 609 (free exercise of religion); United States v. Cruikshank, 92 U.S. 542, 552 (right to assemble and petition the Government); Article II: United States v. Cruikshank, supra, at 553 (right to keep and bear arms); Article IV: Smith v. Maryland, 18 How. 71, 76 (no warrant except on probable cause); Spies v. Illinois, 123 U.S. 131, 166 (security against unreasonable searches and seizures); Article V: Barron v. Baltimore, note 2, supra, at 247 (taking without just compensation); Fox v. Ohio, 5 How. 410, 434 (former jeopardy); Twitchell v. Pennsylvania, 7 Wall. 321, 325-327 (deprivation of life without due process of law); Spies v. Illinois, supra, at 166 (compulsory self-

205. *Poe*, 367 U.S. at 541.

206. *Id.* at 516 (Douglas, J., dissenting):

> When the Framers wrote the Bill of Rights they enshrined in the form of constitutional guarantees those rights—in part substantive, in part procedural—which experience indicated were indispensible to a free society. . . .[T]he constitutional conception of "due process" must, in my view, include them all until and unless there are amendments that remove them. That has indeed been the view of a full court of nine Justices, though the members who make up that court unfortunately did not sit at the same time.

Justice Douglas's list of Justices who favored full incorporation of the Bill of Rights named Bradley, Swayne, Field, Clifford, the first Harlan, Brewer, Black, Murphy, Rutledge, and Douglas. *Id.* at 516 n.8.

207. Adams v. Williams, 407 U.S. 143, 149 (1972) (Douglas, J., dissenting).

208. Knapp v. Schweitzer, 357 U.S. 371 (1958).

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> incrimination); Eilenbecker v. Plymouth County, 134 U.S. 31, 34-35 (presentment or indictment by grand jury); Article VI: Twitchell v. Pennsylvania, supra, at 325-327 (right to be informed of nature and cause of accusation); Spies v. Illinois, supra, at 166 (speedy and public trial by impartial jury); In re Sawyer, 124 U.S. 200, 219 (compulsory process); Eilenbecker v. Plymouth County, supra, at 34-35 (confrontation of witnesses); Article VII: Livingston's Lessee v. Moore, 7 Pet. 469, 551-552 (right of jury trial in civil cases); Justices v. Murray, 9 Wall. 274, 278 (re-examination of facts tried by jury); Article VIII: Pervear v. Massachusetts, 5 Wall. 475, 479-480 (excessive fines, cruel and unusual punishments).[209]

Here again, the Court majority treated the Second Amendment right to arms as simply one of the many individual rights guarantees contained in the Bill of Rights.

G. Johnson v. Eisentrager

After the surrender of Germany during World War II, some German soldiers in China aided the Japanese army, in the months that Japan continued to fight alone.[210] The American army captured them, and tried them by court-martial in China as war criminals.[211] The Germans argued that the trial violated their Fifth Amendment rights, and pointed out that the Fifth Amendment is not by its terms limited to American citizens.[212]

Justice Jackson's majority opinion held that Germans had no Fifth Amendment rights.[213] He pointed out that if Germans could invoke the Fifth Amendment, they could invoke the rest of the Bill of Rights.[214] This would lead to the absurd result of American soldiers, in obedience to the Second Amendment, being forbidden to disarm the enemy:

> If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it,[215] the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "were-wolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, *right to bear arms as in the Second*, security against "unreasonable" searches and seizures as in

209. *Id.* at 378-79.

210. Johnson v. Eisentrager, 339 U.S. 763 (1950).

211. *Id.* at 765-66.

212. *Id.* at 776.

213. *Id.* at 782.

214. *Id.*

215. The Fifth Amendment's prohibition on trial by court martial does not, by its own terms, apply to soldiers in the standing army (or to militiamen engaged in militia duty).

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> the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.[216]

The "irreconcilable enemy elements, guerrilla fighters, and 'were-wolves'" in Justice Jackson's hypothetical are obviously not American state governments. Instead they are individuals and as individuals would have Second Amendment rights, if the Second Amendment were to apply to non-Americans.[217] Interestingly, Justice Jackson's reasoning echoed an argument made in *Ex Parte Milligan* by the Attorney General: the Fifth Amendment must contain implicit exceptions, which allow trial of civilians under martial law; the whole Bill of Rights contains implicit exceptions, for without such exceptions, it would be a violation of the Second Amendment to disarm rebels, and the former slave states' forbidding the slaves to own guns would likewise have been unconstitutional.[218]

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216. *Id.* at 784 (emphasis added).

217. The characters in the hypothetical are not militia members either. A militia is an organized force under government control. In contrast, "guerrilla fighters" or "were-wolves" are small groups or individuals functioning in enemy territory beyond the reach of any friendly government. The legal distinction was of great importance during World War II. Switzerland, for example, made extensive plans for its militia forces (consisting of almost the entire able-bodied adult male population) to resist a German invasion to the last man. But the Swiss government also warned its citizens *not* to engage in guerrilla warfare on their own; the militiamen fighting the Germans would be entitled to the protection of the rules of war and international conventions, but guerrillas would not. *See* STEPHEN HALBROOK, TARGET SWITZERLAND (1998). Having served as a judge of the Nuremburg Trials, Justice Jackson was presumably familiar with the distinctions in the international law of war between guerillas and soldiers/militia.

218. During the Civil War, in 1864, an Indiana man Lambdin P. Milligan was charged with aiding the southern rebellion against the national government. Although Indiana was under full union control, and courts in Indiana were functioning, Milligan was tried before a military court martial and sentenced to death. In 1866, a unanimous Supreme Court overturned Milligan's conviction, holding that martial law can only be applied in theaters of war, and not in areas where the civil courts were functioning. Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

The Court did not discuss the Second Amendment, but in argument to the Court, the Attorney General of the United States did. During the argument before the Court, Milligan's lawyers had claimed that Congress could never impose martial law. They pointed out that the Fourth Amendment (no searches without warrants), the Fifth Amendment (no criminal trials without due process), and the Sixth Amendment (criminal defendants always have a right to a jury trial) do not contain any exceptions for wartime.

The Attorney General, who was defending the legality of Milligan's having been sentenced to death by court martial, retorted that under conditions of war, the protections of the Bill of Rights do not apply. Thus, the federal government could disarm a rebel, without violating his Second Amendment right to keep and bear arms. The Attorney General urged the Court to construe the Second, Third, Fourth, Fifth and Sixth Amendments *in pari materia*:

> After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration. . . . .
>
> Much of the argument on the side of the petitioner will rest, perhaps, upon certain

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provisions not in the Constitution itself, and as originally made, but now seen in the Amendments made in 1789: the fourth, fifth, and sixth amendments. They may as well be here set out:

4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

5. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

6. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

In addition to these, there are two preceding amendments which we may also mention, to wit: the second and third. They are thus:

2. 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.

3. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

It will be argued that the fourth, fifth, and sixth articles, as above given, are restraints upon the war-making power; but we deny this. All these amendments are in pari materia, and if either is a restraint upon the President in carrying on war, in favor of the citizen, it is difficult to see why all of them are not. Yet will it be argued that the fifth article would be violated in "depriving if life, liberty, or property, without due process of law," armed rebels marching to attack the capital? Or that the fourth would be violated by searching and seizing the papers and houses of persons in open insurrection and war against the government? It cannot properly be so argued, any more than it could be that it was intended by the second article (declaring that "the right of the people to keep and bear arms shall not be infringed") to hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them.

These, in truth, are all peace provisions of the Constitution and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law.

By the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President; and after discussion, and after the attention of the country was called to the subject, no other limitation by subsequent amendment has been made, except by the Third Article, which prescribes that "no soldier shall be quartered in any house in time of peace without consent of the owner, or in time of war, except in a manner prescribed by law."

This, then, is the only expressed constitutional restraint upon the President as to the manner of carrying on war. There would seem to be no implied one; on the contrary, while carefully providing for the privilege of the writ of habeas corpus in time of peace, the Constitution takes it for granted that it will be suspended "in case of rebellion or

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invasion (i. e., in time of war), when the public safety requires it."

Id. at 29-33.

Thus, the Attorney General explained, the Second Amendment belongs to individuals, but if a Confederate rebel were disarmed, his Second Amendment right would not be violated, since the Second Amendment would not apply to him—even though the Second Amendment has no explicit exception for wartime. Likewise, if Congress declared martial law in a region, a civilian would be subjected to a court martial, rather than trial by jury, even though the Sixth Amendment (which guarantees jury trials) has no explicit exception for wartime. The Attorney General plainly saw the Second Amendment as guaranteeing an individual right.

The United States government also made another argument showing that the Second Amendment belongs to individuals. On behalf of Milligan, attorney David Dudley Field had presented a passionate and superb argument, explaining that the ultimate issue at bar was the supremacy of the civil power over the military, a principle at the very heart of Anglo-American liberty and republican government.

Field had made much of the fact that the Fifth Amendment's requirement that persons could only be tried if they had first been indicted by a grand jury had an explicit exception for military circumstances ("except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger"). Field pointed out that Milligan (an Indiana civilian with Confederate sympathies) was obviously not within the terms of the exception.

In response, the Attorney General turned the argument over to Benjamin Franklin Butler. A very successful lawyer, Butler had been one of the most prominent Union Generals during the Civil War; a few months after his Supreme Court argument, Butler would be elected to Congress from Massachusetts, and would become one of the leading Radical Republicans.

Butler told the Supreme Court that the whole Bill of Rights contained implicit exceptions which were not stated in the text. For example, despite the literal language of the Fifth Amendment and the Second Amendment, slaves in antebellum America had been deprived of liberty without due process and had been forbidden to possess arms:

> . . .the constitution provides that "no person" shall be deprived of liberty without due process of law. And yet, as we know, whole generations of people in this land—as many as four millions of them at one time—people described in the Constitution by this same word, "persons," have been till lately deprived of liberty ever since the adoption of the Constitution, without any process of law whatever.
>
> The Constitution provides, also, that no "person's" right to bear arms shall be infringed; yet these same people, described elsewhere in the Constitutions as "persons," have been deprived of their arms whenever they had them."

Id. at 178-79.

Butler's point, presented on behalf of the Attorney General, was that the right to arms and the right not to be deprived of liberty without due process were individual rights guaranteed to all "persons." Yet despite the literal guarantee to all "persons," slaves had been deprived of their liberty without a fair trial, and had not been allowed to own or carry guns. Thus, there must an implicit "slavery exception" in the Second Amendment and the Fifth Amendment. And if there could be an unstated "slavery exception," there could also be an unstated "in time of war" exception.

Butler's argument is totally incompatible with the claim that the Second Amendment right does not belong to individuals. According to Henigan and Bogus, the Second Amendment can only be violated when the federal government interferes with state militias. But there were no federal laws forbidding states to enroll slaves in the state militias. (The federal Militia Act of 1792 enrolled whites only, but the Act did not prevent the states from structuring their own militias as they saw fit.) Although there were no federal law interfering with state militias, there

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H. Adamson v. California

In the *Adamson* case, the defendant was convicted after a trial in a California state court; California law allowed the judge to instruct the jury that the jury could draw adverse inferences from a defendant's failure to testify.[219] This jury instruction was plainly inconsistent with established Fifth Amendment doctrine;[220] but did the Fifth Amendment apply in state courts, or only in federal courts?

The *Adamson* majority held that the Fifth Amendment's protection against compelled self-incrimination was *not* made enforceable in state courts by the Fourteenth Amendment's command that states not deprive a person of life, liberty, or property without "due process of law."[221]

In dissent, Justice Black (joined by Justice Douglas) argued that the Fourteenth Amendment made *all* of the Bill of Rights enforceable against the states, via the Amendment's mandate: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[222] Listing a series of 19th century cases in which the Supreme Court had refused to make certain individual rights from the Bill of Rights enforceable against the states (including *Presser*, involving the right to keep and bear arms), Justice Black argued that the Court's prior cases had not been so explicit as to foreclose the current Court from considering the issue:

> Later, but prior to the *Twining* case, this Court decided that the following were not "privileges or immunities" of national citizenship, so as to make them immune against state invasion: the Eighth Amendment's prohibition against cruel and unusual punishment, In re Kemmler, 136 U.S. 436; the Seventh Amendment's guarantee of a jury trial in civil cases, Walker v. Sauvinet, 92 U.S. 90; the Second Amendment's 'right of the people to keep and bear arms. . .,' Presser v. Illinois, 116 U.S. 252, 584; the Fifth and Sixth Amendments' requirements for indictment in capital or other infamous crimes, and for trial by jury in criminal prosecutions, Maxwell v. Dow, 176 U.S. 581. While it can be argued that these cases implied that no one of the provisions of the Bill of Rights was made applicable to the states as attributes of national citizenship, no one of them expressly so decided. In fact, the Court in Maxwell v. Dow, supra, 176 U.S. at pages 597, 598, 20 S.Ct. at page 455, concluded no more than that 'the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments

were state laws forbidding individual blacks to possess arms. So Butler's argument assumed that the Second Amendment right to arms inhered in individuals (including slaves, if the Amendment were read literally, with no implied exception for slavery).

219. Adamson v. California, 332 U.S. 46, 48 (1947).

220. U.S. CONST. amend. V.

221. *Adamson*, 332 U.S. at 58-59. (*Adamson* was overruled by the Supreme Court in the 1964 decision *Malloy v. Hogan*, *infra* note 183).

222. U.S. CONST. amend. XIV.

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> to the Federal Constitution against the powers of the Federal government.' Cf. Palko v. Connecticut, 302 U.S. 319, 329, 153. [223]

Thus, Justice Black put the Second Amendment in the same boat as Amendments Five, Six, Seven, and Eight: individual rights which prior Courts had declined to enforce against the states, but which the present Court still had the choice to incorporate.

In a lengthy Appendix, Justice Black set forth the history of the creation of the Fourteenth Amendment, quoting at length from congressional proponents of the Amendment, who indicated that the Amendment was intended to make all of the rights in the first eight amendments of the Bill of Rights enforceable against the states.[224] This view, held by Justice Black and many of the backers of the Fourteenth Amendment, is of course inconsistent with the idea that the Second Amendment guarantees only a right of state governments. The point of the Fourteenth Amendment is to make individual rights enforceable against state governments.

First, the Appendix set forth the background to the Fourteenth Amendment. Congress had enacted the Civil Rights Bill in response to problems in states such as Mississippi, where, Senator Trumball (Chairman of the Senate Judiciary Committee) explained, there was a statute to "prohibit any negro or mulatto from having firearms. . ."[225] When the Civil Rights Bill went to the House, Rep. Raymond, who opposed the Bill "conceded that it would guarantee to the negro 'the right of free passage. . .He has a defined status. . . .a right to defend himself. . .to bear arms. . . .to testify in the Federal courts."[226]

Then,

> On May 23, 1866, Senator Howard introduced the proposed amendment to the Senate in the absence of Senator Fessenden who was sick. Senator Howard prefaced his remarks by stating:
>
> "I. . .present to the Senate. . .the views and the motives [of the Reconstruction Committee]. . . .One result of their investigation has been the joint resolution for the amendment of the Constitution of the United States now under consideration. . . .
>
> "The first section of the amendment. . .submitted for the consideration of the two Houses, relates to the privileges and immunities of citizens of the several States, and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States. . . .
>
> . . .

223. *Adamson*, 332 U.S. at 70-71 (Black, J., dissenting).
224. *Id.* at 92-124.
225. *Id.* at 93 (citing Cong. Globe, 39th Cong., 1st Sess. (1865) 474).
226. *Id.* (citing Cong. Globe, 39th Cong., 1st Sess. (1865) 474).

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> "Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added *the personal rights guarantied and secured by the first eight amendments of the Constitution*; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms*; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.[227]

Later in the Appendix, Justice Black quoted Rep. Dawes's statement that by the Constitution the American citizen

> "secured the free exercise of his religious belief, and freedom of speech and of the press. *Then again he had secured to him the right to keep and bear arms in his defense*. Then, after that, his home was secured in time of peace from the presence of a soldier. . . ."[228]
>
> . . . .
>
> "It is all these, Mr. Speaker, which are comprehended in the words 'American citizen,' and it is to protect and to secure him in these rights, privileges, and immunities this bill is before the House. And the question to be settled is, whether by the Constitution, in which these provisions are inserted, there is also power to guard, protect, and enforce these rights of the citizens; whether they are more, indeed, than a mere declaration of rights, carrying with it no power of enforcement. . . ." Cong.Globe, 42d Cong., 1st Sess. Part I (1871) 475, 476.[229]

Also dissenting, Justice Murphy wrote "that the specific guarantees of the Bill of Rights should be carried over intact into the first Section of the Fourteenth Amendment."[230] The Second Amendment implications of his statement are the same as for Justice Black's longer exposition, although Justice Murphy did not enumerate the Second Amendment, or any other right.

Senator Howard, quoted by Justice Black, listed the individual right to arms in its natural order among the other individual rights listed in the Bill of

227. *Id.* at 104-07 (emphasis added).
228. *Id.* at 119 (emphasis added).
229. *Id.* at 120.
230. *Id.* at 124 (Murphy, J., dissenting).

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Rights.[231] The Henigan/Bogus state's right theory, however, requires us to believe that when Congress sent the Bill of Rights to the states, Congress first listed four individual rights (in the First Amendment), then created a state's right (in the Second Amendment), and then reverted to a litany of individual rights (Amendments Three through Eight).[232] Finally, Congress explicitly guaranteed a state's right in the Tenth Amendment.[233] While Congress used "the people" to refer to people in the First, Fourth, and Ninth Amendments, Congress used "the people" to mean "state governments" in the Second Amendment.[234] Finally, even though Congress had used "the people" in the Second Amendment to mean "the states," Congress in the Tenth Amendment explicitly distinguished "the people" from "the states," reserving powers "to the States respectively, or to the people."[235]

Which reading is more sensible: The Black/Howard/Dawes reading, under which "the people" means the same thing throughout the Bill of Rights, and which makes all of the first eight amendments into a straightforward list of individual rights, or the Henigan/Bogus theory, which requires that "the people" change meanings repeatedly, and which inserts a state's right in the middle of a litany of individual rights?

H. Hamilton v. Regents

This case has been almost entirely overlooked by Second Amendment scholarship.[236] *Hamilton's* obscurity is especially surprising, since it is the one Supreme Court case which actually uses the Second Amendment in the way that we would expect the Amendment to be used if it were a state's right: to bolster state authority over the militia.

Two University of California students, the sons of pacifist ministers, sued to obtain an exemption from participation in the University of California's mandatory military training program.[237] The two students did not contest the state of California's authority to force them to participate in state militia exercises, but they argued, in part, that the university's training program was so closely connected with the U.S. War Department as to not really be a militia program.[238] A unanimous Court disagreed, and stated that California's acceptance of federal assistance in militia training did not transform the

231. *Supra* note 228.

232. *Id.* at 73.

233. *Id.* at 74.

234. *Id.* at 76.

235. *Id.* at 77.

236. Stephen Halbrook cites the case, but for another point. *See* STEPHEN HALBROOK, FIREARMS LAW DESKBOOK, *supra* note 106, at 8-44 n.131.

237. Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934).

238. *Id.* at 250-51.

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training program into an arm of the standing army. States had the authority to made their own judgements about training:

> So long as [the state's] action is within retained powers and not inconsistent with any exertion of the authority of the national government, and transgresses no right safeguarded to the citizen by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends. Second Amendment. Houston v. Moore, 5 Wheat. 1, 16-17, Dunne v. People, (1879) 94 Ill. 120, 129. 1 Kent's Commentaries 265, 389. *Cf.* Presser v. Illinois, 116 U.S. 252.[239]

Thus, the Court used the Second Amendment to support of a point about a state government's power over its militia.

This usage was not consistent with a meaningful state's right theory. A state's right Second Amendment, to have any legal content, would have to give the state some exemption from the exercise of federal powers.[240] But the Court wrote that the state's discretion in militia training must be "not inconsistent with any exertion of the authority of the national government."[241]

Another way to read *Hamilton*'s Second Amendment citation would be as a reminder of the expectation by all the Founders that states would supervise the militia. This reminder would be consistent with the state's rights theory and with the standard model.

The authorities cited along with "Second Amendment" by the *Hamilton* Court do not support a reading of the Second Amendment as guaranteeing a state's right, but instead support an individual right.

Houston v. Moore (to be discussed in more detail below), involved the state of Pennsylvania's authority to punish a man for evading service in the federal militia, which had been called to fight the war of 1812.[242] The report of the attorneys' arguments, on both sides, shows that the Second Amendment was not raised as an issue.[243] The *Houston* pages which were cited by the *Hamilton* Court contain the statement, spanning the two pages, that "[A]s state militia, the power of the state governments to legislate on the same subjects [organizing, arming, disciplining, training, and officering the militia], having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the states, subordinate nevertheless to the paramount law of the general government, operating on the same subject."[244] In other words, state militia powers were inherent in the

239. *Id.* at 260-61.

240. For a discussion of this point, *see* Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, *supra* note 7.

241. Hamilton, 293 U.S. at 260.

242. Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). See *infra* text at notes 343-53.

243. *Id.*

244. *Id.* at 16-17.

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nature of state sovereignty, and continue to exist except to the extent limited by Congress under its Constitutional militia powers.

In *Dunne v. People*, the Illinois Supreme Court affirmed the centrality of state power over the militia, citing the Tenth Amendment and the *Houston v. Moore* precedent.[245] The *Dunne* court also explained how a state's constitutional duty to operate a militia was complemented by the right of the state's citizens to have arms:

> "A well regulated militia being necessary to the security of a free State," the States, by an amendment to the constitution, have imposed a restriction that Congress shall not infringe the right of the "people to keep and bear arms." The chief executive officer of the State is given power by the constitution to call out the militia "to execute the laws, suppress insurrection and repel invasion."[246] This would be a mere barren grant of power unless the State had power to organize its own militia for its own purposes. Unorganized, the militia would be of no practical aid to the executive in maintaining order and in protecting life and property within the limits of the State. These are duties that devolve on the State, and unless these rights are secured to the citizen, of what worth is the State government?[247]

The cited pages of Kent's Commentaries discuss state versus federal powers over the militia. Chancellor Kent uses *Martin v. Mott*[248] to show that a President's decision that there is a need to call out the militia is final. *Houston v. Moore*[249] (state authority to prosecute a person for refusing a federal militia call) is used to show that if the federal government neglects its constitutional duty to organize, arm, and discipline the militia, the states have the inherent authority to do so. The Second Amendment was not used by Kent or by Kent's cited cases to support his propositions.

Presser v. Illinois will be discussed below; the case affirmed a state's authority to make a gun control law (a ban on armed parades in public) which contained an exemption for the state's organized militia.[250]

Later in the opinion, the *Hamilton* Court quoted *United States v. Schwimmer*, a 1929 decision which held that an immigrant pacifist's refusal to bear arms in the army or in the Second Amendment's well-regulated militia proved that the immigrant was not fit for citizenship.[251]

245. Dunne v. People, 94 Ill. 120 (1879).

246. The court was quoting language from Article I, Section 8 of the Constitution, which gives such authority to Congress. This grant is not inconsistent with pre-existent state authority, so long as the state authority is not used in conflict with the federal authority.

247. *Dunne*, 94 Ill. at 132-33.

248. Martin v. Mott, 25 U.S. 19 (1827).

249. *Infra* notes 343-53.

250. *Infra* notes 310-20.

251. *Infra* notes 251-56.

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IV. THE TAFT, FULLER, AND WAITE COURTS

Between the end of Reconstruction and the New Deal, there were eleven opinions (all but one a majority opinion) touching on the Second Amendment. Most involved the scope of the "privileges and immunities" which the Fourteenth Amendment protected from state interference. Nine of the opinions (including the one dissent) treated the Second Amendment as an individual right, while the tenth was ambiguous, and the eleventh refused to address any of a plaintiff's arguments (of which the Second Amendment was one) because of a lack of injury and hence a lack of standing.

A. United States v. Schwimmer

A divided Supreme Court held that a female pacifist who wished to become a United States citizen could be denied citizenship because of her energetic advocacy of pacifism.[252] The Court majority found the promotion of pacifism inconsistent with good citizenship because it dissuaded people from performing their civic duties, including the duty to bear arms in a well regulated militia.[253] Since it is agreed by Standard Modelers and their critics alike that the federal and state governments have the authority to compel citizens to perform militia service, the *Schwimmer* opinion does not help resolve the individual rights controversy:

> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.
>
> The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming, and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several states when called into the service of the United States; it declares that, 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. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws, by armed citizens. This court, in the Selective Draft Law Cases, *245 U.S. 366*, page 378, 38 S. Ct. 159, 161 (62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856), speaking through Chief Justice White, said that "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. . . ."

252. United States v. Schwimmer, 279 U.S. 644 (1929).
253. *Id.* at 652-53.

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> Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. . . .The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. . .her objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms.[254]

Schwimmer illustrates two points about which the Standard Model authors agree with Bogus and Henigan: first, the phrase "bear arms" in the Second Amendment can have militia service connotations. The Standard Modelers (and Justice Ginsburg)[255], however, disagree with Bogus and Henigan's claim that "bear arms" always has a militia/military meaning, and never any other. Second, *Schwimmer* illustrates that bearing arms can be a duty of citizenship which the government can impose on the citizen. While opponents of the standard model use this fact to argue that the Second Amendment is about a duty, and not about an individual right,[256] the Standard Model professors respond by pointing to jury service, to show that an individual constitutional right (the right to be eligible for jury service[257]) can also be a duty.

B. Stearns v. Wood

This case came to the Court after World War I had broken out in Europe.[258] The U.S. War Department had sent "Circular 8" to the various National Guards, putting restrictions on promotion. Plaintiff Stearns, a Major in the Ohio National Guard, was thereby deprived of any opportunity to win promotion above the rank of Lieutenant Colonel.[259] Stearns argued that Circular 8 violated the Preamble to the Constitution, Article One's specification of Congressional powers over the militia, Article One's grant of army powers to the Congress, Article Two's making the President the Commander in Chief of the militia when called into federal service, the Second Amendment, and the Tenth Amendment.[260]

Writing for a unanimous Court, Justice McReynolds contemptuously dismissed Stearns' claim without reaching the merits.[261] Since Stearns' present

254. *Id.* at 650-52.

255. United States v. Muscarello, 524 U.S. 125 (1998) (Ginsburg, J., dissenting), *supra* text at note 57.

256. *See, e.g.*, sources cited at *supra* note 6.

257. *See, e.g.*, Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, *supra* note 8.

258. Stearns v. Wood, 236 U.S. 75 (1915).

259. *Id.* at 76. Colonel would be the next rank up.

260. *Id.* at 78.

261. *Id.*

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rank of Major was undisturbed, there was no genuine controversy for the Court to consider, and the Court would not render advisory opinions.[262]

Even though the Court never reached the merits of the Second Amendment argument, it is possible to draw some inferences simply from the fact that the Second Amendment argument was made in the case. First of all, Major Stearns' argument shows that using the Second Amendment to criticize federal control of the National Guard was not an absurd argument—or at least no more absurd than using the Preamble to the Constitution for the same purpose. And after the 1905 Kansas Supreme Court case *Salina v. Blaksley* ruled that the Kansas constitution's right to arms (and, by analogy, the U.S. Second Amendment) protected the state government, and not the citizen of Kansas,[263] Stearns' attorney's argument did have some foundation in case law.

C. Twining v. New Jersey

In *Twining*, the Supreme Court (with the first Harlan in dissent) refused to make the Fifth Amendment self-incrimination guarantee in the Bill of Rights applicable to state trials, via the Fourteenth Amendment.[264] In support of this result, the majority listed other individual rights which had not been made enforceable against the states, under the Privileges and Immunities clause:

> The right to trial by jury in civil cases, guaranteed by the Seventh Amendment (Walker v. Sauvinet, 92 U.S. 90), and the right to bear arms guaranteed by the Second Amendment (Presser v. Illinois, 116 U.S. 252) have been distinctly held not to be privileges and immunities of citizens of the United States guaranteed by the Fourteenth Amendment against abridgement by the States, and in effect the same decision was made in respect of the guarantee against prosecution, except by indictment of a grand jury, contained in the Fifth Amendment (Hurtado v. California, 110 U.S. 516), and in respect to the right to be confronted with witnesses, contained in the Sixth Amendment. West v. Louisiana, 194 U.S. 258. In Maxwell v. Dow, supra. . .it was held that indictment, made indispensable by the Fifth Amendment, and the trial by jury guaranteed by the Sixth Amendment, were not privileges and immunities of citizens of the United States.[265]

The Second Amendment here appears—along with Seventh Amendment civil juries, Sixth Amendment confrontation, and Fifth Amendment grand juries—as a right of individuals, but a right only enforceable against the federal government. As we shall see below, the exact meaning of the 1886 *Presser* case was subject to dispute; some argued that the case simply upheld a particular gun control as not being in violation of the Second Amendment,

262. *Id.*

263. Salina v. Blaksley, 83 P. 619 (Kan. 1905).

264. Twining v. New Jersey, 211 U.S. 78 (1908)(*overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

265. *Id.* at 98-99.

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while others argued that *Presser* held that the Second Amendment was not one of the "Privileges and Immunities" which the Fourteenth Amendment protects against state action. *Twining* clearly takes the latter view.

D. Maxwell v. Dow

Maxwell was the majority's decision (again, over Harlan's dissent) not to make the right to a jury in a criminal case into one of the Privileges or Immunities protected by the Fourteenth Amendment.[266] Regarding the Second Amendment and *Presser*, the Court wrote:

> In Presser v. Illinois, 116 U.S. 252, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of the Congress and the National Government, and not of the States. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the National Government, the States could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.[267]

The *Maxwell* description of *Presser* was somewhat narrower than *Twining's* description. *Maxwell* used *Presser* only to show that the Second Amendment does not in itself apply to the states; *Twining* used *Presser* to show that the Fourteenth Amendment privileges and immunities clause did not make the Second Amendment indirectly applicable to the states.

E. Trono v. United States, and *Kepner v. United States*

After the United States won the Spanish-American War, the Philippines were ceded to the United States. American control was successfully imposed only after several years of hard warfare suppressed Filipinos fighting for independence.[268] Congress in 1902 enacted legislation imposing most, but not all of the Bill of Rights on the Territorial Government of the Philippines. The 1905 *Trono*[269] case and the 1904 *Kepner*[270] case both grew out of criminal prosecutions in the Philippines in which the defendant claimed his rights had been violated.

In *Trono*, at the beginning of the Justice Peckham's majority opinion, the Congressional act imposing the Bill of Rights was summarized:

266. Maxwell v. Dow, 176 U.S. 581 (1899).

267. *Id.* at 597.

268. The war led to the development of the Colt .45 self-loading pistols, since smaller pistol rounds often had insufficient stopping power against the Filipino warriors.

269. Trono v. United States, 199 U.S. 521 (1905).

270. Kepner v. United States, 195 U.S. 100 (1904).

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> The whole language [of the Act] is substantially taken from the Bill of Rights set forth in the amendments to the Constitution of the United States, omitting the provisions in regard to the right of trial by jury and the right of the people to bear arms, and containing the prohibition of the 13th Amendment, and also prohibiting the passage of bills of attainder and ex post facto laws.[271]

As with other cases, the "right of the people" to arms is listed in a litany of other rights which are universally acknowledged to be individual rights, not state's rights.[272]

It could be argued that the Second Amendment was omitted from the Congressional Act because the Amendment *is* a state's right, and there was no point in putting a state's right item into laws governing a territory. Indeed, the omission of the Tenth Amendment from the Congressional 1902 Act is perfectly explicable on the grounds that the Tenth Amendment protects federalism, but does not control a territorial or state government's dealings with its citizens.[273]

And thus, when the Supreme Court listed the individual rights which were not included in the 1902 Act, the Court did not note the omission of the Tenth Amendment; there was no possibility that Congress could have included the Tenth Amendment, since it would have no application to the territorial government's actions against the Filipino people.[274]

In contrast, the Court did note the omission of "the right of trial by jury and the right of the people to bear arms."[275] The logical implication, then, is that jury trial and the right to arms (unlike the Tenth Amendment) are individual rights which Congress *could* have required the Territorial Government to respect in the Philippines.[276]

The 1904 *United States v. Kepner* case involved a similar issue. [277] There, the Court described the 1902 Act in more detail. The description of items omitted from the Act was nearly identical to the *Trono* language.[278]

271. *Trono*, 199 U.S. at 528.

272. *Id.*

273. 32 Stat. 691 (1902).

274. Trono, 199 U.S. at 528.

275. *Id.*

276. *See id.*

277. *Kepner*, 195 U.S. at 123-24.

278. *Id.* They are the familiar language of the Bill of Rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving the right of trial by jury and the right of the people to bear arms, and adding the prohibition of the 13th Amendment against slavery or involuntary servitude except as punishment for crime, and that of Article I, Section 9, to the passage of bills of attainder and ex post facto laws.

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F. Robertson v. Baldwin

In 1897, the Court refused to apply the Thirteenth Amendment to merchant seamen who had jumped ship, been caught, and been impressed back into maritime service without due process.[279] The Court explained that Thirteenth Amendment's ban on involuntary servitude, even though absolute on its face, contained various implicit exceptions.[280] In support of the finding of an exception to the Thirteenth Amendment, the Court argued that the Bill of Rights also contained unstated exceptions:

> The law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by law prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or the verdict was set aside upon the defendant's motion. . . .[281]

Likewise, the self-incrimination clause did not bar a person from being compelled to testify against himself if he were immune from prosecution; and the confrontation clause did not bar the admission of dying declarations.[282]

In 1897, state laws which barred individuals from carrying concealed weapons were common, and usually upheld by state supreme courts[283]; the laws did not forbid state militias from carrying concealed weapons. The prohibitions on concealed carry are the exceptions that prove the rule. Only if the Second Amendment is an individual right does the Court's invocation of a concealed carry exception make any sense.

279. Robertson v. Baldwin, 165 U.S. 275, 277 (1897).

280. *Id.* at 281.

281. *Id.* at 281-82.

282. *Id.* at 282.

283. *See, e.g.*, State v. Workman, 35 W. Va. 367 (1891). *See generally*, Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 9; Cramer, For the Defense of Themselves and the State, *supra* note 9.

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G. Brown v. Walker

When a witness before an Interstate Commerce Commission investigation invoked the Fifth Amendment to refuse to answer questions under oath, the majority of the Supreme Court ruled against his invocation of the privilege against self-incrimination.[284] The majority pointed out that a Congressional statute protected the witness from any criminal prosecution growing out of the testimony. [285]

Dissenting, Justice Stephen Field (perhaps the strongest civil liberties advocate on the Court during the nineteenth century) contended that the "infamy and disgrace" which might result from the testimony was justification enough not to testify, even if there could be no criminal prosecution.[286] Justice Field's opinion carefully analyzed English and early American precedent, reflecting Field's vivid appreciation of the long Anglo-American struggle for liberty against arbitrary government.[287] Law and order was less important than Constitutional law, he continued, for the claim that "the proof of offenses like those prescribed by the interstate commerce act will be difficult and probably impossible, ought not to have a feather's weight against the abuses which would follow necessarily the enforcement of incriminating testimony."[288] All Constitutional rights ought to be liberally construed, for:

> As said by counsel for the appellant: "The freedom of thought, of speech, and of the press; *the right to bear arms*; exemption from military dictation; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment,—are, together with exemption from self-crimination, *the essential and inseparable features of English liberty*. Each one of these features had been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the constitution, and the contests were fresh in the memories and traditions of the people at that time."[289]

This is just the opposite of Dennis Henigan's assertion that the Second Amendment is written so as to be less fundamental than the first.[290] Justice Field's paragraph is not a list of state powers, it is a list of personal rights won

284. Brown v. Walker, 161 U.S. 591 (1896).

285. The *Presser* case, discussed *infra* at notes 310-20, appears in the Justice Brown's majority opinion, as part of a string cite for the proposition, "the first eight amendments are limitations only upon the powers of congress and the federal courts, and are not applicable to the several states, except so far as the fourteenth amendment may have made them applicable." *Id.* at 606.

286. *Id.* at 631 (Field, J., dissenting).

287. *Id.* at 632.

288. *Id.* at 635.

289. *Id.* (em phases added).

290. Henigan, Guns and the Constitution, *supra* note 4.

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at great cost—rights which may never be trumped by the legislature's perceived needs of the moment.

H. Miller v. Texas

Franklin P. Miller was a white man in Dallas who fell in love with a woman whom local newspapers would later call "a greasy negress." In response to a rumor that Miller was carrying a handgun without a license, a gang of Dallas police officers, after some hard drinking at a local tavern, invaded Miller's store with guns drawn. A shoot-out ensued, and the evidence was conflicting as to who fired first, and whether Miller realized that the invaders were police officers. But Miller was stone cold sober, and the police gang was not; thus, Miller killed one of the intruders during the shoot-out, although the gang's superior numbers resulted in Miller's capture.

During Miller's murder trial, the prosecutor asserted to the jury that Miller had been carrying a gun illegally. Upon conviction of murdering the police officer, Miller appealed to various courts, and lost every time.

Appealing to the Supreme Court in 1894, Miller alleged violations of his Second Amendment, Fourth Amendment, Fifth Amendment, and Fourteenth Amendment rights.[291] Regarding the Second Amendment, Miller claimed that it negated the Texas statute against concealed carrying of a weapon.[292]

A unanimous Court rejected Miller's contentions: A "state law forbidding the carrying of dangerous weapons on the person. . . does not abridge the privileges or immunities of citizens of the United States."[293] This statement about concealed weapons laws was consistent with what the Court would say about such laws three years later, in the *Robertson* case.[294]

Moreover, the Second Amendment, like the rest of the Bill of Rights, only operated directly on the federal government, and not on the states: "the restrictions of these amendments [Second, Fourth, and Fifth] operate only upon the Federal power."[295]

But did the Fourteenth Amendment makes the Second, Fourth, and Fifth Amendments applicable to the states? Here, the *Miller* Court was agnostic: "If the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to the citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court."[296]

Just eight years before, in *Presser* the Court had said that the Second Amendment does not apply directly to the states; *Miller* reaffirmed this part of

291. Miller v. Texas, 153 U.S. 535 (1894).
292. *Id.* at 538.
293. *Id.* at 539.
294. *Robertson*, 165 U.S. at 281-82, *supra* text at notes 280-82.
295. *Id.* at 538.
296. *Id.*

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the *Presser*. Another part of *Presser* had implied that the right to arms was not one of the "privileges or immunities" of American citizenship, although the *Presser* Court did not explicitly mention the Fourteenth Amendment.

In *Miller* v. *Texas*, the Court suggested that Miller might have had a Fourteenth Amendment argument, if he had raised the issue properly at trial.[297] If *Presser* foreclosed any possibility that Second Amendment rights could be enforced via the Fourteenth Amendment, then the *Miller* Court's statement would make no sense. Was *Miller* an early hint that the Fourteenth Amendment's due process clause might protect substantive elements of the Bill of Rights? Three years later, the Court used the Fourteenth Amendment's due process clause for the first time to apply part of the Bill of Rights against a state.[298]

A decade after *Miller*, *Twining* in 1908 did claim that *Presser* stood for the Second Amendment not being a Fourteenth Amendment privilege or immunity. But between *Presser* in 1886 and *Twining* in 1908, other readings were permissible. Not only does *Miller* in 1894 appear to invite such readings, but so does the 1887 case *Spies* v. *Illinois*, which involved the murder prosecutions arising out of the Haymarket Riot.[299] John Randolph Tucker represented the defendants. Tucker, an eminent Congressman, author of an important treatise on constitutional law, a future President of the American Bar Association, and a leading law professor at Washington and Lee[300]—argued that the whole Bill of Rights was enforceable against the states, including the right to arms.[301]

297. *Miller*, 153 U.S. at 538.

298. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897) (takings clause).

299. Spies v. Illinois, 123 U.S. 131 (1887). *See generally* PAUL AVRICH, THE HAYMARKET TRAGEDY (1986).

300. JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES (Fred B. Rothman & Co. 1981) (1899); William G. Bean, *John Randolph Tucker*, in THE DICTIONARY OF AMERICAN BIOGRAPHY (CD-Rom ed. 1997).

301.

> I hold the privilege and immunity of a citizen of the United States to be such as have their recognition in or guaranty from the Constitution of the United States. Take then the declared object of the Preamble, "to secure the blessings of liberty to ourselves and our posterity," we ordain this Constitution—that is, we grant powers, declare rights, and create a Union of States. See the provisions as to personal liberty in the States guarded by provision as to ex post facto laws, &c.; as to contract rights—against States' power to impair them, and as to legal tender; the security for habeas corpus; the limits imposed on Federal power in the Amendments and in the original Constitution as to trial by jury, &c.; the Declaration of Rights—the privilege of freedom of speech and press—of peaceable assemblages of the people—of keeping and bearing arms—of immunity from search and seizure—immunity from self-accusation, from second trial—and privilege of trial by due process of law. In these last we find the privileges and immunities secured to the citizen by the Constitution. It may have been that the States did not secure them to all men. It is true that they did not. Being secured by the Constitution of the United States to all, when

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Tucker argued that all "these ten Amendments" were "privileges and immunities of citizens of the United States, which the Fourteenth Amendment forbids every State to abridge," and cited *Cruikshank* in support.[302] As for *Presser*, that case "did not decide that the right to keep and bear arms was not a privilege of a citizen of the United States which a State might therefore abridge, but that a State could under its police power forbid organizations of armed men, dangerous to the public peace."[303]

Chief Justice Waite's majority opinion in *Spies* cited *Cruikshank* and *Presser* (along with many other cases) only for the proposition that the first ten Amendments do not apply directly to the states.[304] (An 1890 opinion, *Eilenbecker*, again cited *Cruikshank* and *Presser* as holding that the Bill of Rights does not apply directly to the states.[305]) The *Spies*' defendants' substantive claims (relating to the criminal procedure and jury portions of the Bill of Rights) were rejected as either incorrect (e.g., the jury was not biased) or as not properly raised at trial, and thus not appropriate for appeal.[306]

Tucker's reading of *Presser* is not the only possible one, but Tucker—one of the most distinguished lawyers of his time—was far too competent to make an argument in a capital case before the Supreme Court that was contrary to Supreme Court precedent from only a year before. It may be permissible to read *Presser* the same way that John Randolph Tucker did (as upholding a particular gun control law), or as *Spies*, *Maxwell*, and *Eilenbecker* did (as

> they were not, and were not required to be, secured by every State, they are, as said in the Slaughter-House Cases, privileges and immunities of citizens of the United States.
>
> The position I take is this: Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.

302. *Id.*

303. *Id.*

304. *Spies*, 123 U.S. at 166.

305. Eilenbecker v. District Court of Plymouth County, 134 U.S. 131 (1890):

> The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States. Livingston v. Moore, 7 Pet. 469; The Justices v. Murray, 9 Wall. 274; Edwards v. Elliott, 21 Wall. 532; United States v. Cruikshank, 92 U.S. 542; Walker v. Sauvinet, 92 U.S. 90; Fox v. Ohio, 5 How. 410; Holmes v. Jennison, 14 Pet. 540; Presser v. Illinois, 116 U.S. 252.

306. *Spies*, 123 U.S. at 168.

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stating that the Second Amendment does not by its own power apply to the states), or as *Twining* and *Malloy v. Hogan* did (as rejecting incorporation of the Second Amendment via the Privileges and Immunities clause). We will get to *Presser* soon, so that the reader can supply her own interpretations.[307]

Whatever *Miller v. Texas* implies about the Fourteenth Amendment, its Second Amendment lessons are easy. First, the Amendment does not directly limit the states. Second, the Amendment protects an individual right. Miller was a private citizen, and never claimed any right as a member of the Texas Militia. But according to the Court, Miller's problem was the Second Amendment was raised against the wrong government (Texas, rather than the federal government), and at the wrong time (on appeal, rather than at trial). If the Henigan/Bogus state's right theory were correct, then the Court should have rejected Miller's Second Amendment claim because Miller was an individual rather than the government of Texas. Instead, the Court treated the Second Amendment exactly like the Fourth and the Fifth, which were also at issue: all three amendments protected individual rights, but only against the federal government; while the Fourteenth Amendment might, arguably, make these rights enforceable against the states, Miller's failure to raise the issue at trial precluded further inquiry.

I. Logan v. United States

This case arose out of a prosecution under the Enforcement Act, a Congressional statute outlawing private conspiracies against the exercise of civil rights.[308] The Enforcement Act was also as issue in *Cruikshank, infra.* In *Logan*, a mob had kidnapped a group of prisoners who were being held in the custody of federal law enforcement.[309] The issue before the Court was whether the prisoners, by action of the mob, had been deprived of any of their federal civil rights.

Logan affirmed *Cruikshank's* position that the First and Second Amendments recognize preexisting fundamental human rights, rather than creating new rights. The First Amendment right of assembly and the Second

307. During the nineteenth century, the official Supreme Court reports included summaries of counsels' arguments. Besides Tucker's argument in *Spies*, there are two other nineteenth century cases which record use by counsel of the Second Amendment; both uses were by the Attorney General's office, and both regarded the Second Amendment as an individual right. In the argument for *In re Rapier*, Assistant Attorney General Maury defended a federal ban on the mailing of lottery tickets: "Freedom of the press, like freedom of speech, and 'the right to keep and bear arms,' admits of and requires regulation, which is the law of liberty that prevents these rights from running into license." In re Rapier, 143 U.S. 110, 131 (1892). The other argument came from the Attorney General in *Ex Parte Milligan*. Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866); *supra* note 217.

308. Logan v. United States, 144 U.S. 263, 281-82 (1892).

309. *Id.* at 285-86.

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Amendment right to arms are construed *in pari materia*, suggesting that they both protect individual rights:

> In U. S. v. Cruikshank, *92 U.S. 542*, as the same term, in which also the opinion was delivered by the chief justice, the indictment was on section 6 of the enforcement act of 1870, (re-enacted in Rev. St. 5508, under which the present conviction was had,) and the points adjudged on the construction of the constitution and the extent of the powers of congress were as follows:
>
> (1) It was held that the first amendment of the constitution, by which it was ordained that congress should make no law abridging the right of the people peaceably to assemble and to petition the government for redress of grievances, did not grant to the people the right peaceably to assemble for lawful purposes, but recognized that right as already existing, and did not guaranty its continuance except as against acts of congress; and therefore the general right was not a right secured by the constitution of the United States. But the court added: "The right of the people peaceably to assemble for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guarantied by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs, and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the cause would have been within the statute, and within the scope of the sovereignty of the United States." 92 U.S. 552, 553.
>
> (2) It was held that the second amendment of the constitution, declaring that "the right of the people to keep and bear arms shall not be infringed," was equally limited in its scope. 92 U.S. 553.
>
> (3) It was held that a conspiracy of individuals to injure, oppress, and intimidate citizens of the United States, with intent to deprive them of life and liberty without due process of law, did not come within the statute, nor under the power of congress, because the rights of life and liberty were not granted by the constitution, but were natural and inalienable rights of man; and that the fourteenth amendment of the constitution, declaring that no state shall deprive any person of life, liberty, or property, without due process of law, added nothing to the rights of one citizen as against another, but simply furnished an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. It was of these fundamental rights of life and liberty, not created by or dependent on the constitution, that the court said: "Sovereignty, for this purpose, rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment or murder itself." 92 U.S. 553, 554.

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> 4th. It was held that the provision of the Fourteenth Amendment forbidding any State to deny to any person within its jurisdiction the equal protection of the laws, gave no greater power to Congress. 92 U.S. 555.
>
> 5th. It was held, in accordance with United States v. Reese, above cited, that the counts for conspiracy to prevent and hinder citizens of the African race in the free exercise and enjoyment of the right to vote at state elections, or to injure and oppress them for having voted at such election, not alleging that this was on account of their race, or color, or previous condition of servitude, could not be maintained; that court stating: "The right to vote in the States comes from the States; but the right of exemption from prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been." 92 U.S. 556
>
> Nothing else was decided in United States v. Cruikshank, except questions of the technical sufficiency of the indictment, having no bearing upon the larger questions.[310]

Thus, to the *Logan* Court, the First Amendment right to assemble and the Second Amendment right to arms are identical: both are individual rights; both pre-exist the Constitution; both are protected by the Constitution, rather than created by the Constitution; both rights are protected only against government interference, not against the interference of private conspirators.

J. Presser v. Illinois

In the late 19th century, many state governments violently suppressed peaceful attempts by workingmen to exercise their economic and collective bargaining rights. In response to the violent state action, some workers created self-defense organizations. In response to the self-defense organizations, some state governments, such as Illinois's, enacted laws against armed public parades.[311]

Defying the Illinois Statue, a self-defense organization composed of German working-class immigrants defied the law, and held a parade in which one of the leaders carried an unloaded rifle. At trial, the leader—Herman Presser—argued that the Illinois law violated the Second Amendment.

The Supreme Court ruled against him unanimously. First, the Court held that the Illinois ban on armed parades "does not infringe the right of the people to keep and bear arms."[312] This holding was consistent with traditional

310. *Id.* at 286-88.

311. *See* Levinson, *supra* note 9; Stephen Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, Last Holdout Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. (1999, forthcoming).

312. Presser v. Illinois, 116 U.S. 252, 265 (1886).

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common law boundaries on the right to arms, which prohibited terrifyingly large assemblies of armed men.[313]

Further, the Second Amendment by its own force "is a limitation only upon the power of Congress and the National Government, and not upon that of the States."[314]

Did some other part of the Constitution make the Second Amendment enforceable against the states? The Court added that the Illinois law did not appear to interfere with any of the "privileges or immunities" of citizens of the United States.[315] Although the Court never actually used the words "Fourteenth Amendment," it is reasonable to read *Presser* as holding that the Fourteenth Amendment's Privileges and Immunities clause does not restrict state interference with keeping and bearing arms. This reading is consistent with all the other Fourteenth Amendment cases from the Supreme Court in the 1870s and 1880s, which consistently reject the proposition that any part of the Bill of Rights is among the "Privileges and Immunities" protected by the Fourteenth Amendment.[316]

As to whether the Second Amendment might be protected by another part of the Fourteenth Amendment—the clause forbidding states to deprive a person of life, liberty, or property without due process of law[317]—the Court had nothing to say. The theory that the Due Process clause of the Fourteenth Amendment might protect substantive constitutional rights had not yet been invented. Most of what the Waite Court had to say about Bill of Rights incorporation has long since been repudiated (although not always formally overruled) by subsequent courts, via the Due Process clause.

It is true that some modern lower courts cling to *Presser* and claim that *Presser* prevents them from addressing a litigant's claim that a state statute violates the Second Amendment.[318] It is hard to take such judicial arguments seriously. An 1886 decision about Privileges and Immunities is hardly binding precedent for 1990s Due Process. The *dicta* from the modern Supreme Court about the Second Amendment as a possible Fourteenth Amendment liberty interest is incompatible with the claim that *Presser* forecloses any possible theory of incorporating the Second Amendment. At most, *Presser* rejects Privileges and Immunities incorporation, but the case cannot be read to address a legal theory (Due Process incorporation) which did not exist at the time the case was decided.

313. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 126 (Garland Publ. 1978) (1716) (A Justice of the Peace may require surety from persons who "go about with unusual Weapons or Attendants, to the Terror of the People.")

314. *Presser*, 116 U.S. at 265.

315. *Id.* at 266.

316. *Id.*

317. U.S. Const., amend. XIV, § 1.

318. *E.g.*, Fresno Rifle Club v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992).

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Interestingly, *Presser* does offer another theory on which the United States Constitution might restrict state anti-gun laws. Article I, section 8, clauses 15 and 16 give Congress various powers over the militia.[319] States may not interfere with these Congressional militia powers; so in *dicta*, the *Presser* Court stated that the states could not disarm the public so as to deprive the federal government of its militia:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States, and, in view of this prerogative of the general government. . .the States cannot, even laying the Constitutional provision in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.[320]

So according to *Presser*, the constitutional militia includes "all citizens capable of bearing arms."[321] But this statement is not directly about the Second Amendment; it is about Congressional powers to use the militia under Article I, section 8, clauses 15 and 16.

V. THE CHASE, TANEY, AND MARSHALL COURTS

The majority of the Chase Court was just as hostile to a broad reading of the Fourteenth Amendment as was the Waite Court; unsurprisingly, the Chase Court rejected the idea that Congress could use the Fourteenth Amendment to legislate against private interference with First or Second Amendment rights. At the same time, the Chase Court described the First Amendment assembly right and the Second Amendment arms rights as fundamental human rights which pre-existed the Constitution.

319. *Id.* at 265.

320. *Id.* at 265-66.

321. *Id.* For the subsequent interpretation of *Presser*, see Malloy v. Hogan, *supra* note 184 (Second Amendment is not a Fourteenth Amendment Privilege or Immunity); Poe v. Ullman, *supra* note 204 (Harlan, J., dissenting) (Fourteenth Amendment liberty is not co-extensive with Bill of Rights); Adamson v. California, *supra* note 222 (Black, J., dissenting) (Second Amendment not directly applicable against states); Twining v. New Jersey, *supra* note 264 (Second Amendment not a Fourteenth Amendment Privilege or Immunity); Maxwell v. Dow, *supra* note 266 (Second Amendment not directly applicable to states); Brown v. Walker, *supra* note 284 (same); Miller v. Texas, *supra* notes 291-96 (Second Amendment not directly applicable, not a Privilege or Immunity) but enforcement against states via Fourteenth Amendment is an open question; Spies v. Illinois, *supra* note 303 (Second Amendment not directly applicable against states); Eilenbecker, *supra* note 304 (same).

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One of the most notable cases of the nineteenth century, *Dred Scott*, used the Second Amendment to support arguments about other subjects; the arguments recognized the Second Amendment right as an individual one.

And the very first Supreme Court opinion to mention the Second Amendment—Justice Story's dissent in *Houston* v. *Moore*—is so obscure that even most Second Amendment specialists are unfamiliar with it. It is analogous to the *Hamilton* case, in that it uses the Second Amendment to underscore state militia powers.

A. United States v. Cruikshank

An important part of Congress's work during Reconstruction was the Enforcement Acts, which criminalized private conspiracies to violate civil rights. [322] Among the civil rights violations which especially concerned Congress was the disarmament of Freedmen by the Ku Klux Klan and similar gangs.[323]

After a rioting band of whites burned down a Louisiana courthouse which was occupied by group of armed blacks (following the disputed 1872 elections), the whites and their leader, Klansman William Cruikshank, were prosecuted under the Enforcement Acts. Cruikshank was convicted of conspiring to deprive the blacks of the rights they had been granted by the Constitution, including the right peaceably to assemble and the right to bear arms.[324]

In *United States* v. *Cruikshank*, the Supreme Court held the Enforcement Acts unconstitutional. The Fourteenth Amendment did give Congress the power to prevent interference with rights granted by the Constitution, said the Court. But the right to assemble and the right to arms were not rights granted or created by the Constitution, because they were fundamental human rights that pre-existed the Constitution:

> The right of the people peaceably to assemble for lawful purposes *existed long before* the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 211, "from those laws whose authority is

322. 16 Stat. 140 § 6 (1870); 18 U.S.C. §§ 241, 242: "That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another. . .or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege secured or granted him by the Constitution or laws of the United States. . . ."

323. STEPHEN HALBROOK, FREEDMEN, FIREARMS, AND THE FOURTEENTH AMENDMENT (1998); ERIC FONER, RECONSTRUCTION 258-59 (1988); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment* , 103 Yale L.J. 57 (1993).

324. GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 125-29 (Athens Univ. of Georgia Pr., 1984).

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> acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.[325]

A few pages later, the Court made the same point about the right to arms as a fundamental human right:

> The right. . . of bearing arms for a lawful purpose. . . is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence. The second amendment declares that it shall not be infringed; but this. . . means no more than it shall not be infringed by Congress. . . leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called . . .the "powers which relate to merely municipal legislation. . . ."[326]

According to *Cruikshank*, the individual's right to arms is protected by the Second Amendment, but not created by it, because the right derives from natural law. The Court's statement that the freedmen must "look for their protection against any violation by their fellow citizens of the rights" that the Second Amendment recognizes is comprehensible only under the individual rights view. If individuals have a right to own a gun, then individuals can ask local governments to protect them against "fellow citizens" who attempt to disarm them. In contrast, if the Second Amendment right belongs to the state governments as protection against federal interference, then mere "fellow citizens" could not infringe that right by disarming mere individuals.

Cruikshank has occasionally been cited (without explanation) for the proposition that the Second Amendment right belongs only to the state militias, although *Cruikshank* has nothing to say about states or militias.[327]

Cruikshank was also cited in *dicta* in later cases as supporting the theory that the Second Amendment and the rest of Bill of Rights are not enforceable against the states[328] (even though the facts of *Cruikshank* involve private

325. United States v. Cruikshank, 92 U.S. 542, 551 (1875) (emphasis added).

326. *Id.* at 553 *quoting* New York v. Miln, 36 U.S. (11 Pet.) 125, 139 (1837). *Cf.* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92, 13 Am. Dec. 251, 253 ("The right [to arms in the Kentucky Constitution] existed at the adoption of the constitution; it had no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but the liberty of the citizens to bear arms.").

327. "The Second Amendment protects only the right of the states to maintain and equip a militia and does not guarantee individuals the right to bear arms; *United States* v. *Cruikshank* (1875)." C. HERMAN PRITCHETT, THE AMERICAN CONSTITUTION 397 n. 1 (2d ed. McGraw-Hill, 1968).

328. Malloy v. Hogan, *supra* note 186; Knapp v. Schweitzer, *supra* note 208. For different interpretations of *Cruiksbank*, see Spies v. Illinois, *supra* note 303 (Second Amendment not directly applicable to states); Eilenbecker, *supra* note 304 (same); Logon v. United States, *supra* note 309 (First Amendment assembly right and Second Amendment arms right are similar; Bill of Rights protects neither against private interference).

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actors, not state actors). That theory, obviously, has long since been abandoned by the Supreme Court. Among the earlier cases to reject non-incorporation was *DeJonge* v. *Oregon*, holding that the right peaceably to assemble (one of the two rights at issue in *Cruikshank*) was guaranteed by the 14th Amendment.[329] And as discussed above, *Cruikshank's* dicta about the Fourteenth Amendment "Privileges and Immunities" is no more binding on modern courts than is *Presser's* statement on the same subject several years later.

B. Scott v. Sandford

Holding that a free black could not be an American citizen,[330] the *Dred Scott* majority opinion listed the unacceptable consequences of black

329. DeJonge v. Oregon, 299 U.S. 353 (1937).

330. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). Among Chief Justice Taney's proofs that free blacks were not citizens was the fact that blacks were often excluded from militia service. The Taney opinion explained that the parties to the original American social compact were only those "who, at that time [American independence], were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms." *Id*. at 407. The new nation's federal militia law of 1792 had enrolled only free white males in the militia of the United States, and blacks had been excluded from the New Hampshire militia. *Id*. at 420. These facts suggested to Chief Justice Taney that free blacks were not recognized as citizens, since they were not in the militia.

Justice Curtis retorted by pointing to the language of the 1792 Militia Act, which enrolled "every free, able-bodied, white male citizen." Justice Curtis pointed out the implication of the language that "citizens" included people who were not able-bodied, were not male, or were not white; otherwise, there would have been no need to limit militia membership of able-bodied white males. *Id.* at 442 (Curtis, J., dissenting). But Justice Curtis's argument had one problem: the use of the word "free" in the Militia Act. It was undisputed that slaves were not citizens, since they were deprived of all rights of citizenship. The Militia Act enrolled only "free, able-bodied, white male citizens." If we follow Justice Curtis's logic to conclude that the Militia Act proves that non-whites could be citizens, then the same logic would show that unfree persons could be citizens.

The stronger part of the Curtis dissent was his evidence showing that many of the thirteen original states did recognize blacks as citizens. The Taney majority never directly addressed this part of the Curtis argument, except by listing various disabilities (such as prohibitions on racial intermarriage, or bans on operating schools for blacks) which even anti-slavery states like Massachusetts and Connecticut imposed on free blacks. Thus, in a bizarre way, the Taney majority (despite its pro-slavery taint) pre-figures twentieth century Supreme Court jurisprudence that there can be no second-class citizens in the United States. The Curtis opinion argues that various civil disabilities (including exclusion from the militia) are consistent with citizenship. For the Taney majority, citizenship is all or nothing; exclusion from education, from intermarriage with whites, or from the militia are all incompatible with citizenship. Thus, once a constitutional amendment conclusively declared that blacks are citizens, the logic of the *Dred Scott* majority leads to the results in Brown v. Board, 349 U.S. 294 (1955) (racial discrimination in schooling is incompatible with citizenship rights); Loving v. Virginia, 388 U.S. 1 (1967) (laws against intermarriage are incompatible with citizenship rights); and Bell v. Maryland, 378 U.S. 226, 260 (1964) (segregation in restaurants and lunch counters "is a badge of second-class

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citizenship: Black citizens would have the right to enter any state, to stay there as long as they pleased, and within that state they could go where they wanted at any hour of the day or night, unless they committed some act for which a white person could be punished.[331] Further, black citizens would have "the right to. . .full liberty of speech in public and private upon all subjects which [a state's] own citizens might meet; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."[332]

Thus, Chief Justice Taney claimed that the "right to. . .keep and carry arms" (like "the right to. . .full liberty of speech," and like the right to interstate travel without molestation, and like the "the right to. . .hold public meetings on political affairs") was a right of American citizenship. The only logical source of these rights is the United States Constitution. While the right to travel is not textually stated in the Constitution, it has been found there by implication.[333] As for the rest of the rights mentioned by the Taney majority, they appear to be rephrasings of explicit rights contained in the Bill of Rights. Instead of "freedom of speech," Justice Taney discussed "liberty of speech"; instead of the right "peaceably to assemble", he discussed the right "to hold meetings", and instead of the right to "keep and bear arms," he discussed the right to "keep and carry arms."[334]

Although resolution of the citizenship issue was sufficient to end the *Dred Scott* case, the Taney majority decided to address what it considered to be an error in the opinion of the circuit court. Much more than the citizenship holding, the part of *Dred Scott* that created a firestorm of opposition among the northern white population was *Dred Scott's* conclusion that Congress had no power to outlaw slavery in a territory, as Congress had done in the 1820 Missouri Compromise, for the future Territory of Nebraska.[335] Chief Justice Taney's treatment of the question began with the universal assumption that the Bill of Rights constrained Congressional legislation in the territories.

> No one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the territory peaceably to assemble and to petition the government for redress of grievances.

citizenship."); *Id* at 288 (Douglas, J., concurring) ("The Thirteenth, Fourteenth, and Fifteenth Amendments do not permit Negroes to be considered as second-class citizens in any aspect of our public life."). In contrast, the Curtis dissent (while laudably humane in its anti-slavery sentiments) allows for second-class citizenship on the basis of race.

331. *Id.* at 417.

332. *Id*.

333. *See, e.g.*, Edwards v. California, 314 U.S. 160, 168 (1994) (Douglas, J., concurring); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

334. *Scott*, 60 U.S. at 417.

335. Act of Mar. 6, 1820, ch. 22, 8, 3 Stat. 545, 548.

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> Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against itself in a criminal proceeding.[336]

From the universal assumption that Congress could not infringe the Bill of Rights in the territories, Taney concluded that Congress could not infringe the property rights of slave-owners by abolishing slavery in the territories.[337]

The Taney Court obviously considered the Second Amendment as one of the constitutional rights belonging to individual Americans. The Henigan "state's rights" Second Amendment could have no application in a territory, since a territorial government is by definition not a state government. And since Chief Justice Taney was discussing individual rights which Congress could not infringe, the only reasonable way to read the Chief Justice's reference to the Second Amendment is as a reference to an individual right. Nor can the opinion of Chief Justice Taney (which was shared by six members of the Court on the citizenship issue, and by five on the Territories issue) be dismissed as casual dicta. The Court knew that *Dred Scott* would be one the most momentous cases ever decided, as the Court deliberately thrust itself in the raging national controversy over slavery. The case was argued in two different terms, and the Chief Justice's opinion began by noting that "the questions in controversy are of the highest importance."[338]

And unlike most Supreme Court cases, *Dred Scott* became widely known among the general population. The majority's statement listing the right to arms as one of several individual constitutional rights which Congress could not infringe was widely quoted during antebellum debates regarding Congressional power over slavery.[339]

Dred Scott's holding about black citizenship was overruled by the first sentence of the Fourteenth Amendment, which states that all persons born in the Untied States are citizens of the United States.[340] *Dred Scott*, which had exacerbated rather than cooled the North-South anger which eventually caused the Civil War, became so universally despised that many people forgot the details of what the case actually said. After the Spanish-American War, the United States acquired the new territories of Cuba, Puerto Rico, and the Philippines, and acquired Hawaii after that nation's government was overthrown in a coup orchestrated by American farming interests. Thus, the Supreme Court, in *The Insular Cases*, was forced to determine the

336. *Scott*, 60 U.S. at 450.

337. *Id.* at 450-51.

338. *Id.* at 399.

339. *See, e.g.*, Stephen Douglas, *The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories*, HARPER'S (Sept. 1859) 519, 530.

340. U.S. Const., amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the Untied States and of the State wherein they reside.")

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constitutional status of the new imperial territories.[341] In *Downes* v. *Bidwell*, the Court majority held that, despite the constitutional requirement that taxes imposed by Congress be uniform throughout the United States, Puerto Rico could be taxed at a different rate; Justice Henry Billings Brown's five-man majority explicitly worried that a contrary result would force the Bill of Rights to be applied in the new territories. Writing to Justice John Harlan to applaud Harlan's dissenting opinion,[342] a New York attorney exclaimed that the majority opinion was "the *Dred Scott* of Imperialism!"[343] But if the *Insular Cases* Court had followed *Dred Scott*, then Justice Harlan and the other three dissenters would have been in the majority; for *Dred Scott* stated that the Bill of Rights did apply in the territories.

Although the citizenship holding in *Dred Scott* was so controversial that it was repudiated by a constitutional amendment, the case's treatment of the Second Amendment as an individual right was not; in each of the six times that the Court addressed the Second Amendment in the rest of the nineteenth century, the Court always treated the Second Amendment as an individual right.

C. Houston v. Moore

The very first case in which a Supreme Court opinion mentioned the Second Amendment was *Houston v. Moore*, an 1821 case so obscure that even modern scholars of the Second Amendment are often unaware of it.[344] Part of the reason is that, thanks to a small error, the case cannot be discovered via a Lexis or Westlaw search for "Second Amendment."

The *Houston* case grew out of a Pennsylvania man's refusal to appear for federal militia duty during the War of 1812. The failure to appear violated a federal statute, as well as a Pennsylvania statute that was a direct copy of the federal statute. When Mr. Houston was prosecuted and convicted in a Pennsylvania court martial for violating the Pennsylvania statute, his attorney argued that only the federal government, not Pennsylvania, had the authority to

341. Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903) (Sixth Amendment requirement for unanimous jury not applicable in territory of Hawaii; only "fundamental" constitutional rights apply in the territories); De Lima v. Bidwell 182 U.S. 1 (1901) (Puerto Rican goods imported to the states are not subject to the tariff applicable to foreign imports); Dooley v. United States, 182 U.S. 222 (1901) (goods transported from the states to Puerto Rico not subject to tariff applicable to foreign imports to Puerto Rico); Downes v. Bidwell, 182 U.S. 244 (1901) (In taxing imports from Puerto Rico to the states, Congress need not obey the constitutional requirement that taxes imposed by Congress be uniform throughout the United States).

342. *Downes*, 182 U.S. at 379 (Harlan, J., dissenting).

343. Richard Warren Barkley, letter of May 28, 1901, to John Marshall Harlan, *quoted in* TINSLEY E. YARBOROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 197 (1995)

344. Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

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bring a prosecution; the Pennsylvania statute was alleged to be a state infringement of the federal powers over the militia.

When the case reached the Supreme Court, both sides offered extensive arguments over Article I, section 8, clauses 15 and 16, in the Constitution, which grant Congress certain powers over the militia. [345] Responding to Houston's argument that Congressional power over the national militia is plenary (and therefore Pennsylvania had no authority to punish someone for failing to perform federal militia service), the State of Pennsylvania lawyers retorted that Congressional power over the militia was concurrent with state power, not exclusive.[346] In support of this theory, they pointed to the Tenth Amendment, which reserves to states all powers not granted to the federal government.[347]

If, as Henigan, Bogus, and some other modern writers claim, the only purpose of the Second Amendment were to guard state government control over the militia, then the Second Amendment ought to have been the heart of the State of Pennsylvania's argument. But instead, Pennsylvania resorted to the Tenth Amendment to make the "state's right" argument. There are two possibilities to explain the State of Pennsylvania's lawyering. First, the Pennsylvania attorneys committed malpractice, by failing to cite the Constitutional provision that was directly on point (the Second Amendment's supposed guarantee of state government control of the militia). Instead, the Pennsylvania lawyers cited a Constitutional provision which made the state's right argument only in a general sense, rather than in relation to the militia. The other possibility is that the State of Pennsylvania lawyers were competent, and they relied on the Tenth Amendment, rather than the Second, because the Tenth guarantees state's rights, and the Second guarantees an individual right.

Justice Bushrod Washington delivered the opinion of the Court, holding that the Pennsylvania law was constitutional, because Congress had not forbidden the states to enact such laws enforcing the federal militia statute.[348] Moreover, because Houston had never showed up for the militia muster, he had never entered federal service; thus, Houston was still under the jurisdiction of the State of Pennsylvania.[349] Justice William Johnson concurred; he argued

345. "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." "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, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

346. *Houston*, 18 U.S. at 6.

347. U.S. CONST. amend. X.

348. *Houston*, 18 U.S.at 46-47.

349. *Id.*

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that Houston could not be prosecuted for violating the federal law; accordingly, he could be prosecuted for violating the state law.[350]

The Washington and Johnson opinions, therefore, upheld a state's authority over militiaman Houston. Like the attorneys on both sides of the case, neither Justice Washington nor Justice Johnson suggested that the Second Amendment had anything to do with the case.

Justice Joseph Story, a consistent supporter of federal government authority, dissented.[351] He argued that the Congressional legislation punishing militia resisters was exclusive, and left the states no room to act.[352]

Deep in the lengthy dissent, Justice Story raised a hypothetical: What if Congress had not used its militia powers? If Congress were inert, and ignored the militia, could the states act? "Yes," he answered:

> If, therefore, the present case turned upon the question, whether a state might organize, arm and discipline its own militia, in the absence of, or subordinate to, the regulations of congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of a like paramount authority to congress; and if not, then it is retained by the states. The fifth [sic] amendment to the constitution, declaring that "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," may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns, the reasoning already suggested.[353]

After acknowledging that the Second Amendment (mislabeled the "fifth" amendment in a typo) was probably irrelevant, Justice Story suggested that to the extent the Second Amendment did matter, it supported his position.

Justice Story's dissent is inconsistent with the Henigan/Bogus theory that Second Amendment somehow reduces Congress's militia powers. Immediately, after the Second Amendment hypothetical, Justice Story stated that if Congress actually did use its Article I powers over the militia, then Congressional power was exclusive. There could be no state control, "however small."[354] If federal militia powers, when exercised, are absolute, then the Henigan/Bogus theory that the Second Amendment limits federal militia powers is incorrect.

350. *Id.*

351. This was the only time that Justice Story dissented from a constitutional decision in which Chief Justice Marshall was in the majority. JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 311 n. 161 (2d ed. 1990).

352. *Houston*, 18 U.S. at 46-47.

353. *Id.* at 47-48 (Story, J., dissenting)..

354. The Supreme Court decided one other militia case during this period. Writing for a unanimous Court, Justice Story held that the President's determination of the need for a militia call-out was not subject to judicial review. *See* Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

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The Story dissent in *Houston* does not address the issue of individual Second Amendment rights. Justice Story laid out a fuller explication of the Second Amendment in his *Commentaries on the Constitution of the United States*, and his *Familiar Exposition of the Constitution of the United States*. The *Familiar Exposition* has the longest analysis of the Second Amendment:

> The next amendment is, "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." One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.
>
> The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been 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; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. 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 is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.[355]

The Justice's Second Amendment is obviously an individual right, intended to prevent the tyrannical tactic of "making it an offence to keep arms." The purpose of arms possession is to facilitate a militia, and the purpose of the militia is to suppress disorder from below (in the form of riots) and from above (in the form of tyranny). In contrast to some twentieth century

355. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264-65 (1842) For more on Justice Story's thoughts about the Second Amendment, *see* Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 4, at 119-20.

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commentators,[356] Justice Story shared the conventional wisdom of the nineteenth century[357]: removing a tyrannical government would not be "insurrection" but instead would be the restoration of constitutional law and order.

CONCLUSION

In addition to the oft-debated case of *United States* v. *Miller*,[358] the Supreme Court has mentioned or quoted the Second Amendment in thirty-seven opinions in thirty-five other cases, almost always in *dicta*. One of the opinions, Justice Douglas's dissent in *Adams v. Williams*, explicitly claims that the Second Amendment is not an individual right.[359] Three majority opinions of the Court (the 1980 *Lewis* case,[360] the 1934 *Hamilton* case,[361] and the 1929 *Schwimmer* case[362]), plus one appeal dismissal (*Burton v. Sills*, 1969[363]), and one dissent (Douglas in *Laird*[364]) are consistent with either the individual rights or the states rights theory, although *Lewis* is better read as not supportive of an individual right, or not supportive of an individual right worthy of any serious protection. (And knowing of Justice Douglas's later dissent in *Adams*, his *Laird* dissent should not be construed as supportive of an individual right.) *Spencer v. Kemna* refers to right to bear arms as an individual right, but the opinion does not specifically mention the Second Amendment, and so the reference could, perhaps, be to the right established by state constitutions.[365]

Two other cases are complicated by off-the-bench statements of the Justices. The 1976 *Moore v. East Cleveland* plurality opinion supports the individual right,[366] but in 1989 the opinion's author, retired Justice Powell, told a television interviewer that there was no right to own a firearm. In an 1820 dissent, Justice Story pointed to the Second Amendment to make a point about state authority over the militia (although this would not necessarily be to the exclusion of an individual right).[367] Justice Story's later scholarly

356. *See, e.g.*, Henigan, *Arms, Anarchy*, *supra* note 5.

357. *See* Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 7, at 1388-97.

358. United States v. Miller, 307 U.S. 174 (1939), *supra* notes 16-27.

359. Adams v. Williams, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting), *supra* note 141.

360. Lewis v. United States, 445 U.S. 55, 65-66 (1980), *supra* note 103.

361. Hamilton v. Regents of the Univ. of California, 293 U.S. 245, 260-61 (1934), *supra* note 238.

362. United States v. Schwimmer, 279 U.S. 644, 650-52 (1929), *supra* note 253.

363. Burton v. Sills, 394 U.S. 812 (1969), *supra* note 170.

364. Laird v. Tatum, 408 U.S. 1, 22-23 (1972), *supra* note 163.

365. Spencer v. Kemna, 523 U.S. 1, 36 (1998) (Stevens, J., dissenting), *supra* note 42.

366. Moore v. East Cleveland, 431 U.S. 494, 502 (1976), *supra* note 120.

367. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 47-48 (1820) (Story, J., dissenting), *supra* note 352.

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commentaries on the Second Amendment only addressed the individual right, and did not investigate the Amendment as a basis of state authority.[368]

Concurring in *Printz*, Justice Thomas stated that *United States v. Miller* had not resolved the individual rights question; the tone of the concurrence suggested that Justice Thomas considered the Second Amendment to be an important individual right.[369]

Twenty-eight opinions remain, including nineteen majority opinions. Each of these opinions treats the Second Amendment a right of individual American citizens. Of these twenty-eight opinions, five come from the present Rehnquist Court, and on the Rehnquist Court there has been no disagreement that the Second Amendment is an individual right.

Of course that fact that a right exists does not mean that every proposed gun control would violate that right; indeed, many of the opinions explicitly or implicitly endorse various controls, and, except for Justice Black, none of the authors of the opinions claim that the right is absolute.[370]

In the face of this Supreme Court record, is it accurate for gun control advocates to claim that the non-individual nature of the Second Amendment is "perhaps the most well-settled" point in all of American constitutional law?[371] The extravagant claim cannot survive a reading of what the Supreme Court has actually said about the Second Amendment. In the written opinions of the Justices of the United States Supreme Court, the Second Amendment does appear to be reasonably well-settled—as an individual right. The argument that a particular Supreme Court opinion's language about the Second Amendment does not reflect what the author "really" thought about the Second Amendment cannot be used to ignore all these written opinions—unless we presume that Supreme Court Justices throughout the Republic's history have written things about the Second Amendment that they did not mean.

While the Warren Court and the Burger Court offered mixed records on the Second Amendment, the opinions from the Rehnquist Court (including from the Court's "liberals" Ginsburg and Stevens) are just as clear as were the opinions from the Supreme Court Justices of the nineteenth century: "the right of the people to keep and bear arms" is a right that belongs to individual American citizens. Although the boundaries of the Second Amendment have only partially been addressed by Supreme Court jurisprudence, the core of the

368. *See* STORY, *supra* note 354.

369. Printz v. United States, 521 U.S. 898, 938-39 (1997) (Thomas, J., concurring), *supra* note 64.

370. Justice Black did view the entire Bill of Rights as absolute within it terms. He explicitly so stated with regard to the Second Amendment in his James Madison lecture at New York University. It might be reasonable to read Justice Black's Supreme Court opinions which mention the Second Amendment as reflecting his absolutist view. See *supra* text at notes 179-82, 194-96, 221-34.

371. *Supra* note 3.

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Second Amendment is clear: the Second Amendment—like the First, Third, Fourth, Fifth, Sixth, and Fourteenth Amendments—belongs to "the people", not the government.

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