

## IS THERE A NEUTRAL JUSTIFICATION FOR REFUSING TO IMPLEMENT THE SECOND AMENDMENT OR IS THE SUPREME COURT JUST "GUN SHY"?

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INTRODUCTION

*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*<sup>1</sup>

*[These words] reflect traditional English attitudes toward these three distinct, but intertwined, issues: the right of the individual to protect his life, the challenge to government of an armed citizenry, and the preference for a militia over a standing army. The framers' attempt to address all three in a single declarative sentence has contributed mightily to the subsequent confusion over the proper interpretation of the Second Amendment.*<sup>2</sup>

The Second Amendment to the United States Constitution, the "terrifying,"<sup>3</sup> "embarrassing,"<sup>4</sup> and "lost"<sup>5</sup> amendment, stands as the Rodney Dangerfield among the Bill of Rights. This simple twenty-seven word sentence cannot get any respect. It is ignored and disregarded by the American Bar Association, the American Civil Liberties Union, and the legal academy. For the most part, the legal community has down-played the Second Amendment by endorsing the view that the amendment protects only the right of states to maintain militias free from federal (pg.643) disarmament.<sup>6</sup> This view, to which both the ABA<sup>7</sup> and the ACLU<sup>8</sup> subscribe is known as the collective/state's right interpretation. Others, however, suggest an individual right interpretation, which views the amendment as guaranteeing the right of individual citizens to keep and bear arms.<sup>9</sup>

As constitutional law scholar Sanford Levinson notes, "the Second Amendment is not at the forefront of constitutional discussion, at least as registered in ... law reviews, casebooks and other

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<sup>1</sup> U.S. CONST. amend. II.

<sup>2</sup> Joyce L. Malcolm, Book Review, 54 GEO. WASH L. REV. 452, 455 (1986) (reviewing STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984)).

<sup>3</sup> David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

<sup>4</sup> Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989) (The Second Amendment may be "profoundly embarrassing" to those who support prohibitory firearms regulations and yet "view themselves as committed to zealous adherence to the Bill of Rights.").

<sup>5</sup> Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554 (1965).

<sup>6</sup> See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 299 n.6 (2d ed. 1988); 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); Peter B. Feller & Karl L. Gotting, *The Second Amendment, A Second Look*, 61 NW. U. L. REV. 46 (1966); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971).

<sup>7</sup> See AMERICAN BAR ASSOCIATION, POLICY BOOK (1975), cited in Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 207 n.14 (1983); L. Stanley Chauvin Jr., *Time to Assault Assault Weapons*, A.B.A. J., May 1990, at 8 (opining that the Second Amendment does not confer an individual right, but rather "relates merely, solely, totally and only to the unhampered regulation of a state militia.").

<sup>8</sup> See Levinson, *supra* note 4, at 644 n.40.

<sup>9</sup> See *infra* note 27.

scholarly legal publications."<sup>10</sup> Echoing Levinson's observation is the assertion that "liberals have been guilty of result-oriented work as well. One particularly clear example is in the way that liberal scholars have ignored or wished away the Second Amendment without very much effort at rigor or consistency."<sup>11</sup> Yale Law School Professor Akhil Amar has likewise observed that "[i]n a typical law school curriculum," the Second Amendment is ignored; and when it comes to legal scholarship, the amendment is "generally ignored by main-stream constitutional (pg.644) theorists."<sup>12</sup> Although the collective right interpretation has achieved a surprising level of respectability among academicians,<sup>13</sup> not all in the legal community view the Second Amendment in purely collectivist terms as is evinced by the recent formation of Academics For Second Amendment.<sup>14</sup>

In many parts of the United States, law-abiding citizens find it increasingly difficult to obtain firearms. Four states<sup>15</sup> and thirty cities<sup>16</sup> have banned so called "assault weapons."<sup>17</sup> Residents of six Chicago-area cities,<sup>18</sup> Friendship Heights, Maryland,<sup>19</sup> Washington, D.C.,<sup>20</sup> and New York City<sup>21</sup> are prohibited from owning handguns. In addition to the 20,000 gun laws currently on the books, a myriad of new firearms restrictions are proposed at the local, state, and federal levels each

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<sup>10</sup> Levinson, *supra* note 4, at 639-40 (footnotes omitted). Perhaps the "best explanation," according to Levinson,

for the absence of the Second Amendment from the legal consciousness of the elite bar, including ... the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.

*Id.* at 642 (footnote omitted).

<sup>11</sup> Glenn H. Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1109 n.199 (1990).

<sup>12</sup> Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131-32 (1991).

<sup>13</sup> See *An Open Letter on the Second Amendment*, NAT'L L.J., Mar. 15, 1993 (advertisement sponsored by Academics for the Second Amendment, a group of 46 named professors of history, law, and political science supporting the individual right interpretation of the Second Amendment).

<sup>14</sup> *Id.*

<sup>15</sup> See CAL. PENAL CODE § 12275-90 (West 1992); 1993 Conn. Legis. Serv. 93-306 (West); HAW. REV. STAT. § 134 (1992); N.J. REV. STAT. § 2C:39-5 (West Supp. 1991).

<sup>16</sup> See Richard Tapscott, *Schaefer Lobbies Governors for U.S. Ban on Assault Weapons*, WASH. POST, Aug. 18, 1991, at A8 (listing the cities that have banned assault weapons).

<sup>17</sup> For a review of such legislation, see Eric C. Morgan, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 AM. J. CRIM. L. 143 (1990); ERIC C. MORGAN & DAVID KOPEL, *THE ASSAULT WEAPON PANIC: "POLITICAL CORRECTNESS" TAKES AIM AT THE CONSTITUTION* (1991).

<sup>18</sup> John Lucadamo, *North Shore Towns Take Lead in Handgun Fight*, CHI. TRIB., Apr. 9, 1989, at C3.

<sup>19</sup> *Id.*

<sup>20</sup> D.C. CODE ANN. § 62301-80 (1991).

<sup>21</sup> Although New York City does not have a total ban on the ownership of handguns, its extremely stringent system of issuing handgun permits has resulted in a *de facto* ban. See Don B. Kates, Jr., *Handgun Banning In Light of the Prohibition Experience*, in FIREARMS AND VIOLENCE 139, 154 (1984); Don B. Kates, Jr., *The Battle Over Gun Control*, PUB. INTEREST, Summer 1986. Only the social elite, entertainers, and the politically connected are allowed to possess a New York City handgun permit. *Id.* Among the privileged few are *New York Times'* publisher Arthur O. Sulzberger; Nelson, David, Winthrop, Laurence, and John Rockefeller; former New York City Mayor John Lindsay; billionaire Donald Trump; political commentator William Buckley; entrepreneur Lyman Bloomingdale; and the husband of pop-psychologist Joyce Brothers. *Id.*

(pg.645) year.<sup>22</sup> In 1993 alone, more than twenty-five "gun control" bills have been filed in Congress.<sup>23</sup> An equal or greater number of similar bills are usually pending in various state and local legislative bodies. The cumulative impact of enacting just the proposed federal legislation would be to legislate and tax individual firearms ownership out of existence. These (pg.646) efforts to eradicate private gun ownership—a constitutionally protected activity that has existed in America for nearly 400 years—will eventually require the United States Supreme Court to interpret the Second Amendment and perhaps incorporate it into the Fourteenth Amendment.

This article proceeds from the premise that the Second Amendment guarantees an individual right to keep and bear arms.<sup>24</sup> A tremendous amount of scholarship carefully scrutinizing the historical, political, philosophical, and common law background surrounding the Second Amendment makes it unnecessary to re-examine it anew in this article. Therefore, this article examines events occurring after the framing of the Second Amendment in 1791.<sup>25</sup> Part I explores the nineteenth century history relating to the Second Amendment and shows that courts and

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<sup>22</sup> The value of additional firearms restrictions is highly suspect. A good deal of modern research has called into question the conventional wisdom concerning the supposed merits of further "gun control" measures. See, e.g., DON B. KATES, JR., GUNS, MURDERS, AND THE CONSTITUTION: A REALISTIC ASSESSMENT OF GUN CONTROL (1990); GARY KLECK, POINT BLANK: GUNS & VIOLENCE IN AMERICA (1991); JAMES WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA (1983); Bruce L. Benson, *Guns for Protection and Other Private Sector Responses to the Fear of Rising Crime*, in FIREARMS AND VIOLENCE, *supra* note 21, at 329; Don B. Kates, Jr., *The Value of Civilian Handgun Possession As A Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 1 (1991); Edward F. Leddy, *The Ownership and Carrying of Personal Firearms and Reduction of Crime Victimization*, in THE GUN CULTURE AND ITS ENEMIES 25 (1990); Joseph P. Magaddino & Marshall H. Medoff, *An Empirical Analysis of Federal and State Firearms Control Laws*, in FIREARMS AND VIOLENCE, *supra* note 21, at 225; Lance K. Stell, *Guns, Politics and Reason*, 9 J. AM. CULTURE 71 (1986).

<sup>23</sup> See, e.g., H.R. 277, 103d Cong., 1st Sess. (1993) (adding a seven day waiting period on handgun purchases); H.R. 544, 103d Cong., 1st Sess. (1993) (prohibiting the transfer of more than two handguns to any one person within 30 days); H.R. 661, 103d Cong., 1st Sess. (1993) (imposition of strict liability on manufacturers, dealers, and sellers of handguns and "assault weapons"); H.R. 737, 103d Cong., 1st Sess. (1993) (limiting handgun ownership to those with "demonstrated knowledge and skill" in the safe use, maintenance, and storage of handguns); H.R. 893, 1472, 1568, 1571, 1706, 103d Cong., 1st Sess. (1993) (ban on "assault weapons"); H.R. 1025, 103d Cong., 1st Sess. (1993) (waiting period for handgun purchases and creation of a national instant background check system for firearm transfers); H.R. 1501, 103d Cong., 1st Sess. (1993) (handgun ban); H.R. 1616, 103d Cong., 1st Sess. (1993) (mandatory handgun registration); H.R. 1734, 103d Cong., 1st Sess. (1993) (ban on "nonsporting handguns"); H.R. 2276, 103d Cong., 1st Sess. (1993) (tax increase on handguns and "assault weapons" and an increase in the federal firearms license fee); S. 108, 103d Cong., 1st Sess. (1993) (ban on imported "assault weapons"); S. 109, 103d Cong., 1st Sess. (1993) (record keeping requirements for ammunition); S. 178, 103d Cong., 1st Sess. (1993) (ban on .25, .32, and 9mm ammunition); S. 179, 103d Cong., 1st Sess. (1993) (1000% tax on .25, .32, and 9mm ammunition); S. 376 (prohibiting the transfer of more than two handguns to any one person in a 30 day period); S. 414, 103d Cong., 1st Sess. (1993) (5 day waiting period for handgun purchases); S. 639, 653 ("assault weapons" ban); S. 868, 103d Cong., 1st Sess. (1993) (tax increase on handguns and "assault weapons" and an increase in the fee for a federal firearms license). Senator Bill Bradley (D-NJ) recently called for a 25% sales tax on guns and a \$2,500 fee for a federal firearms license. See Judi Hasson, *First Lady Takes On Critics In Last Day On the Hill*, USA TODAY, Oct. 1, 1993, at 5A.

<sup>24</sup> For books and articles supporting the individual right interpretation of the Second Amendment, see, e.g., STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHT AND CONSTITUTIONAL GUARANTEES (1989); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984) [*hereinafter* HALBROOK, THAT EVERY MAN BE ARMED]; David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); Stuart R. Hays, *The Right To Bear Arms, A Study In Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

<sup>25</sup> The first eight amendments comprising the Bill of Rights "were submitted to the States by the first Congress in response to expressions of *concern for guarantees of individual liberty* that had been raised during the debates on the ratification of the Constitution." 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.2, at 345 (2d ed. 1992) (emphasis added).

commentators uniformly viewed the Second Amendment as guaranteeing an individual right. Part II briefly analyzes the Reconstruction Congress' efforts to ensure to African-Americans the Second Amendment right to keep and bear arms. Part III examines the incorporation of the Bill of Rights and documents the plight of the Second Amendment in the pre-Fourteenth Amendment Due Process Clause Incorporation Era. Part IV discusses the twentieth century federal judicial interpretation of the Second Amendment and shows that the Supreme Court's failure to construe the amendment has allowed the lower federal courts to read the Second Amendment out of the Bill of Rights. Part V details the Supreme Court's inconsistent treatment of the Second Amendment and (pg.647) demonstrates that the Court has ignored normal rules of interpretation and construction.

## I. NINETEENTH CENTURY INTERPRETATION OF THE SECOND AMENDMENT

### A. *Antebellum Commentators*

Influential antebellum commentators, such as St. George Tucker,<sup>26</sup> William Rawle,<sup>27</sup> Henry St. George Tucker,<sup>28</sup> and United States Supreme Court Justice Joseph Story,<sup>29</sup> were "unanimous in the view of the right to keep and bear arms as an individual liberty which existed for a variety of purposes, from defense against foreign or domestic oppression to personal self-defense."<sup>30</sup> An examination of these commentators' writings shows that they viewed the Second Amendment as securing an individual right to keep and bear arms. St. George Tucker,<sup>31</sup> a professor of law at William and Mary, a contemporary of the founding fathers, and a judge who served on three different courts, published his edition of *Blackstone's Commentaries* in 1803.<sup>32</sup> The first book in this five volume (pg.648) set dealt with "the rights of persons." In chapter one, which concerned "the absolute rights of individuals,"<sup>33</sup> Tucker declares that the fifth right of the English subject "is that

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<sup>26</sup> ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAW OF THE FEDERAL GOVERNMENT (1803).

<sup>27</sup> WILLIAM RAWLE, A VIEW OF THE CONSTITUTION (2d. ed. 1829).

<sup>28</sup> HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA (1831).

<sup>29</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (1833).

<sup>30</sup> HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 24, at 93; see *id.* at 89-93 for a discussion of these commentators; see also Kates, *supra* note 24, at 241-43.

<sup>31</sup> St. George Tucker came to Virginia in 1772 to study law under George Wythe. W. HAMILTON BRYSON, LEGAL EDUCATION IN VIRGINIA: 1779-1979, at 657 (1982). Tucker, a lawyer and a politician, was appointed to the position of state district court judge because "[h]is recognition as a legal scholar was widespread and his connection with the college strong." *Id.* at 661. Similarly, as "a close student of the evolution of both state and federal government," Tucker was "in a particularly good position to follow the formation of the federal government because of his attendance at the Annapolis Convention and his friendship with many of those who participated in the framing of the federal Constitution." *Id.* at 670. Tucker's brother, Thomas Tudor Tucker, and his "good friend," John Page, were both elected to the House of Representatives in 1789—the year that the Bill of Rights was introduced in Congress. *Id.* Because of "frequent correspondence with both," Tucker was "able to stay informed of the important political debates of the day." In 1813, Tucker was appointed by President James Madison to the United States District Court for Virginia, where he served until 1825.

<sup>32</sup> This work remained a standard text for both law students and lawyers for close to three decades. See BRYSON, *supra* note 31, at 680-82.

<sup>33</sup> 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAW OF THE FEDERAL GOVERNMENT 121 (1803).

of having arms for their defence suitable to their condition and degree ...."<sup>34</sup> In a footnote, Tucker distinguished the right of the people to keep and bear arms under the Second Amendment from its antecedent English counterpart. Unlike the English version, the Second Amendment contains no qualification as to "condition or degree, as is the case in the British government."<sup>35</sup> Tucker further asserted that,

[The Second Amendment] may be considered as the true palladium of liberty.... The right of self-defence is the first law of nature; in most governments *it has been the study of rulers to confine this right within the narrowest limits possible*. Whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.<sup>36</sup>

William Rawle released the second edition of his constitutional commentaries in 1829, in which he wrote:

In the second article, it is declared, that *a well regulated militia is necessary to the security of a free state*; a proposition from which few will dissent ... while peace prevails, ... the militia form[s] the palladium of the country. They are ready to repel (pg.649) invasion, to suppress insurrection, and preserve the good order and peace of government.

....

The corollary, from the first position, is that *the right of the people to keep and bear arms shall not be infringed*. The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give congress a power to disarm the people.

....

In England, a country which boasts so much of its freedom, the right [to bear arms] ... is cautiously described to be that of bearing arms for their defense, "suitable to their conditions, and as allowed by law." An arbitrary code for the preservation of

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<sup>34</sup> *Id.* at 143.

<sup>35</sup> *Id.* at 143 n.40. Tucker drew on this distinction in the appendix:

In England, the people have been disarmed, generally, under the specious pretext of preserving the game; a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems to counteract this policy: but the right of bearing arms is confined to Protestants, and the words suitable to their condition and degree, have been interpreted to authorise [sic] the prohibition of keeping a gun ... [by] any farmer, or inferior tradesman .... So that not one man in five hundred can keep a gun in his house without being subject to a penalty.

*Id.* at 300 (appendix).

<sup>36</sup> *Id.* (emphasis added).

game in that country has long disgraced them. A very small proportion of the people being permitted to kill it, though for their own subsistence; a gun or other instrument, used for that purpose by an unqualified person, may be seized and forfeited. Blackstone, in whom we regret that we cannot always trace the expanded principles of rational liberty, observes ... that the prevention of popular insurrections and resistance to government by disarming the people, is oftener meant than avowed, by the makers of forest and game laws.<sup>37</sup>

Rawle's analysis is persuasive and insightful because he recognizes that the first part of the Second Amendment is declaratory in nature<sup>38</sup> (pg.650) and that the second part of the amendment is a corollary of the first proposition. Furthermore, the right of the people to keep and bear arms is a general prohibition denying Congress the power to disarm the *people*. If, as state's right advocates maintain, the Second Amendment was designed to prevent Congress from disarming state *militias*, why does Rawle assert that Congress lacks the power to disarm the *people* rather than state militias? Lastly, Rawle, like St. George Tucker and Henry St. George Tucker,<sup>39</sup> notes the disgraceful evisceration of the right to keep and bear arms in England, which unlike the American version, is cautiously described as being limited to their conditions, and as allowed by law.

In 1831, Henry St. George Tucker,<sup>40</sup> son of St. George Tucker, published his *Commentaries On the Laws of Virginia*, in which he made the following assertion:

To secure their enjoyment, however, certain protections or barriers have been erected which serve to maintain inviolate the three primary rights of personal security, personal liberty, and private property. These may in America be said to be:

1. The bill of rights and written constitutions ...
2. The right of bearing arms—which with us is not limited and restrained by an arbitrary system of game laws as in England; *but is particularly enjoyed by every citizen*, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation.<sup>41</sup> (pg.651)

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<sup>37</sup> RAWLE, *supra* note 27, at 125-26.

<sup>38</sup> The belief that a self-armed citizen militia is necessary to the security of a free State represents a declaration of classic Revolutionary Era political philosophy whose roots extend back to ancient Greece and Rome and the Enlightenment. See HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 24, at 7-35 (covering Aristotle, Plato, Cicero, John Locke, Niccolo Machiavelli, Jean-Jacques Rousseau, Charles Montesquieu, Adam Smith, and others); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 601-05 (1982) (surveying pre-Revolutionary Republican and Libertarian theory); Robert E. Shalhope, *The Armed Citizen In The Early Republic*, 49 LAW & CONTEMP. PROBS. 126-33 (1986) (same); 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1639 (1986) (political philosophers from "Cicero to John Locke and Jean-Jacques Rosseau ... held arms possession to be symbolic of personal freedom and vital to the virtuous, self-reliant citizenry (defending itself from encroachments by outlaws, tyrants, and foreign invaders alike) that they deemed indispensable to popular government.").

<sup>39</sup> See *infra* note 44.

<sup>40</sup> Henry St. George Tucker, like his father, also had a very distinguished career. Henry was a lawyer, a politician who served in both houses of the Virginia legislature and in the U.S. House of Representatives, a jurist who sat on both the chancery court and the Virginia Court of Appeals, and a law professor. President Jackson offered Henry the position of United States Attorney General, but Henry declined the offer. See BRYSON, *supra* note 31, at 603-13.

<sup>41</sup> HENRY ST. GEORGE TUCKER, *supra* note 28, at 43 (emphasis added). Although Henry's *Commentaries* focused on Virginia law, this particular section is more broadly addressed to the protections or barriers which have been erected in America.

Joseph Story<sup>42</sup> also viewed the Second Amendment as guaranteeing an individual right, the importance of which "will scarcely be doubted by any persons, who have duly reflected upon the subject."<sup>43</sup> For Story, it was clear that,

[t]he militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers .... *The right of 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.<sup>44</sup>

Noticeably absent from these commentators' Second Amendment analyses is any discussion suggesting that they viewed the right to keep and bear arms in anything but individual terms. At no point in these commentaries do the writers condition the right to keep and bear arms on a state's right to maintain a militia. Instead, the commentators state that the people's right to keep and bear arms renders possible a self-armed citizen militia, which constitutes the "palladium of liberty" and serves as the ultimate check against domestic tyranny and foreign invasion. If these learned commentators had erred in their writings on the Second Amendment, certainly someone would have stepped forward to correct them.<sup>45</sup> (pg.652)

## B. *Antebellum Judicial Construction*

### 1. *State cases*

A handful of state and federal cases decided before the Civil War reflect the understanding that the Second Amendment provided an individual right to keep and bear arms. The earliest judicial pronouncement on the right to keep and bear arms in the United States is the Kentucky case of *Bliss*

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<sup>42</sup> Before his appointment to the United States Supreme Court at the age of 32, Joseph Story had a prominent career as a lawyer and politician. See 3 WILLIAM D. LEWIS, GREAT AMERICAN LAWYERS 134-38 (1908). While serving as a Supreme Court Justice (1811-45), Story also began teaching law at Harvard in 1829 and, from 1832 to 1845, authored 10 legal treatises. *Id.* at 167-72. By any measure, Story was one of the true legal giants of his day.

<sup>43</sup> JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746 (1833). The value of Story's Commentaries as a major constitutional law treatise is confirmed by the fact that it has been cited 92 times in Supreme Court majority opinions, concurrences, and dissents (Westlaw search conducted September 20, 1993).

<sup>44</sup> *Id.* (emphasis added).

<sup>45</sup> See Kates, *supra* note 24, at 242-43:

Literally hundreds of those who had served in Congress or state legislatures during the enactment of the Bill of Rights were still alive at [the] time [these commentaries were published]. Many of them, including Madison himself, were still living ... when Rawle's and Story's commentaries were published. Those commentaries remained the standard nineteenth-century reference works on the Constitution at least until Cooley appeared. If these commentaries were erroneously presenting as an individual right of the people what was intended to be only a collective right of the states, surely one or more former legislators would have remonstrated the authors or publishers and, if correction was not forthcoming, publicly clarified for the record.

*Id.* (citations omitted).



*v. Commonwealth*.<sup>46</sup> This case called upon the court to construe that state's constitutional provision regarding the right to keep and bear arms.<sup>47</sup> Bliss had been convicted for having carried a sword cane in violation of a state statute prohibiting the carrying of concealed weapons. Bliss appealed to the Kentucky Court of Appeals arguing that the law violated his right to keep and bear arms. The court reversed his conviction and held the law unconstitutional.<sup>48</sup>

Although *Bliss* did not directly involve the Second Amendment, its analysis of the right to keep and bear arms is both insightful and instructive. The *Bliss* court made an important historical observation when it noted that the right to keep and bear arms "existed at the adoption of the constitution"<sup>49</sup> and at that time it had "no limits short of the moral power of the citizens to exercise it."<sup>50</sup> Not only did the court give the right to bear arms a broad, absolutist construction, it did so in the context of reversing a private citizen's conviction for carrying a concealed weapon. Like the Second Amendment, the Kentucky Constitution constitutionalized right belonging to individuals.<sup>(pg.653)</sup>

The most extensive antebellum judicial consideration of the Second Amendment came from the Supreme Court of Georgia in *Nunn v. Georgia*.<sup>51</sup> There, the court reversed a conviction obtained under an 1837 statute prohibiting the carrying of deadly weapons, holding that the legislature could not prohibit individuals from exercising this right.<sup>52</sup> Noting a split of authority over whether prohibitions against the carrying of concealed weapons were permissible under state constitutional provisions securing the right to keep and bear arms,<sup>53</sup> the *Nunn* court sharply criticizing those decisions upholding statutes prohibiting the carrying of concealed weapons.<sup>54</sup> The court then discussed the Second Amendment, which,

in declaring that the right of the people to keep and bear arms, should not be infringed, only reiterated a truth announced a century before, in the [1689 English

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<sup>46</sup> 12 Ky. (2 Litt.) 90 (1822).

<sup>47</sup> Specifically, the state constitution provided: "That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned." KY. CONST. of 1799, art. X, § 23.

<sup>48</sup> *Bliss*, 12 Ky. (2 Litt.) at 93-94. The court reasoned that because "in principle, there is no difference between a law prohibiting the wearing of concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise." *Id.* at 92.

<sup>49</sup> *Id.* at 92. The right to bear arms language of the 1799 Kentucky Constitution was carried over from the 1792 Kentucky Constitution verbatim.

<sup>50</sup> *Id.*

<sup>51</sup> 1 Ga. 243 (1846).

<sup>52</sup> *Id.* at 247.

<sup>53</sup> *See id.* at 247-49 (*citing* *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (holding statute prohibiting the carrying of concealed weapons violative of the state constitution); *State v. Reid*, 1 Ala. 612 (1840) (concluding statute prohibiting the carrying of concealed weapons not violative of the state constitution); *State v. Mitchell*, 3 Blackf. 229 (1833) (same)).

<sup>54</sup> *See id.* at 249. In particular, the court made the following observations:

It is true, that these adjudications are all made on clauses in the State Constitutions; but these instruments confer no *new rights* on the people which did not belong to them before. When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country?

*Id.*

Bill of Rights], "to extend and secure the rights and liberties of English subjects"—whether living 3,000 or 300 miles from the royal palace.<sup>55</sup>

Despite the United States Supreme Court's decision holding that the Bill of Rights operated only against the federal government,<sup>56</sup> the court in *Nunn* considered the Second Amendment binding upon the states. The judges noted that they did not believe that, "because the people withheld this arbitrary power of disfranchisement from Congress, they (pg.654) ever intended to confer it on the local legislatures. This right is too dear to be confined to a republican legislature."<sup>57</sup>

Perhaps the most important aspect of the court's opinion is its observation that nothing in the language of the Second Amendment "restricts its meaning"<sup>58</sup> and that the right to keep and bear arms is not any less "comprehensive or valuable" than other individual rights contained in the First, Fourth, Fifth, and Sixth Amendments.<sup>59</sup> The court continued by noting that,

[t]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree .... Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, reestablished by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Carta!* And Lexington [and] Concord ... plead eloquently for this interpretation! And the acquisition of Texas may be considered the full fruits of this great constitutional right.<sup>60</sup>

The court concluded by invoking the Second Amendment to void the statute in so far as it prohibited bearing arms openly.<sup>61</sup> As for prohibiting the "secret" carrying of arms, the court partially upheld the statute because it did not impair the citizen's natural right of self-defense, or his constitutional right to keep and bear arms.<sup>62</sup>

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<sup>55</sup> *Id.* The court further stated that the Second Amendment, like its English equivalent in the Bill of Rights of 1689, shares a common motive in that "the free enjoyment" of the right to keep and bear arms renders possible a self-armed citizen militia. *Id.* at 249-50; *see supra* note 51.

<sup>56</sup> *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>57</sup> *Nunn*, 1 Ga. at 250.

<sup>58</sup> *Id.* at 250. This observation runs directly contrary to those who assert that the Second Amendment's guarantee of "the right of the people to keep and bear Arms" is restricted by the amendment's "purposive preamble" or "qualifying phrase" of "well regulated Militia." *See, e.g.,* TRIBE, *supra* note 6, at 299 n.6; *cf. Gerard V. Bradley, The Bill of Rights and Originalism*, 1992 U. ILL. L. REV. 417, 434 (1992) (concluding the first clause of the Second Amendment, like the Preamble, is mere exhortatory or precatory language).

<sup>59</sup> *Id.* at 251.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Two additional state supreme court decisions addressing the scope of the Second Amendment merit consideration. In *State v. Chandler*,<sup>63</sup> the (pg.655) Supreme Court of Louisiana, commenting on the Second Amendment, stated that it is "calculated to incite men to a manly and noble defence of *themselves*, if necessary, *and* of their country ...."<sup>64</sup> And, in *Cockrum v. State*,<sup>65</sup> the Supreme Court of Texas stated that the object of the Second Amendment was to perpetuate free government, and "is based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed."<sup>66</sup>

## 2. *Federal cases*

Riding circuit in 1833, Associate Justice Henry Baldwin charged the jury in a suit seeking recovery of damages for trespass *vi et armis* and false imprisonment.<sup>67</sup> Justice Baldwin's jury charge in this case provides further insight into early eighteenth century understanding of the Second Amendment. After listing three rights protected under the Pennsylvania Constitution, the Privileges and Immunities Clause,<sup>68</sup> the Contracts Clause,<sup>69</sup> the *second* part of the Second Amendment,<sup>70</sup> and the Fifth Amendment Due Process Clause of the United States Constitution, Justice Baldwin stated that "in addition to these rights, Mr. Johnson had one other important [right]."<sup>71</sup> It is clear from Justice Baldwin's charge that the plaintiff, Caleb Johnson, was not engaged in any militia activities, yet had a Second Amendment right to keep and bear arms. If the Second Amendment was intended to confer merely a "collective right" on states, (pg.656) why does Justice Baldwin list the amendment as a right belonging to Caleb Johnson (an individual), as opposed to the state militia?

The only pre-Civil War United States Supreme Court case to deal with the Second Amendment was the infamous *Dred Scott v. Sandford*,<sup>72</sup> in which the Court held unconstitutional the Missouri Compromise. *Dred Scott* represents a particularly important decision because it is the Supreme Court's first discussion of the Second Amendment. After examining the history of slavery, the Court held that the framers could not have intended to give African-Americans the rights and privileges enjoyed by whites because to do so would entitle African-Americans to "the full liberty of speech in public and in private upon all subjects upon which ... [white] citizens might speak; to

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<sup>63</sup> 5 La. Ann. 489 (1850).

<sup>64</sup> *Id.* at 490 (emphasis added).

<sup>65</sup> 24 Tex. 394 (1859).

<sup>66</sup> *Id.* at 401.

<sup>67</sup> *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7416). In this case, Caleb Johnson and some friends, all residents of New Jersey, entered Pennsylvania to recover Johnson's runaway slave, who was working for a Pennsylvania resident. After gaining custody of the slave, Johnson and his friends were assaulted by a local mob, which was headed by the slave's Pennsylvania employer. The mob and two local judges then unlawfully detained Johnson for several days until he posted bond on a kidnapping charge. Johnson was eventually acquitted of the kidnapping charge. He then sued those responsible for his unlawful detention. *Id.* at 841-42.

<sup>68</sup> U.S. CONST. art. IV, § 2.

<sup>69</sup> U.S. CONST. art. I, §10.

<sup>70</sup> This Clause reads "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. For whatever reason, Justice Baldwin omitted the first part of the Second Amendment. One plausible reason for doing so is that Justice Baldwin may have considered the first part of the Second Amendment simply declaratory in nature, as did William Rawle, *see supra* note 27 and accompanying text, and thus thought it necessary to quote only the substantive right embodied in the amendment.

<sup>71</sup> *Johnson*, 13 F. Cas. at 850.

<sup>72</sup> 60 U.S. (19 How.) 393 (1857).

hold public meetings upon political affairs, and to keep and carry arms wherever they went."<sup>73</sup> Furthermore, because the powers of the Government and the rights and liberties of each citizen are plainly defined by the Constitution,<sup>74</sup> the Federal Government cannot exercise any power beyond the scope of that instrument. Nor may the government properly deny any right which the document has reserved.<sup>75</sup> In listing a few constitutional provisions to illustrate this proposition, the Court stated that,

no one, we presume, will contend that Congress can make any law ... 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 ... peaceably to assemble, and to petition the Government for the redress of grievances.

...

... *Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.*<sup>76</sup>

From this passage, the Court's position on the Second Amendment becomes unmistakably clear. The Court grouped the right to keep and bear arms with other rights belonging to individuals and listed rights from the First, Second, Fifth, and Sixth Amendments as examples of rights protected by the Constitution. Moreover, any language qualifying or confining the applicability of the right to keep and bear arms to state (pg.657) militias is completely absent. If the Second Amendment only protected the right of states to maintain militias, the Court would not have included the Second Amendment, in two separate discussions, among other individual rights. Although in this case the Court's discussion of the Second Amendment is dicta, it is nonetheless important because it stands as the High Court's first comments on the subject. From these words, it is clear that the Court unequivocally considered the right to keep and bear arms to be a personal right.

### C. *State Judicial Construction of the Second Amendment in the Post-Civil War Period*

Only two cases decided in this period, one from the Supreme Court of Tennessee in 1871, and one from the Supreme Court of North Carolina in 1921, contain any extended treatment of the Second Amendment. In *Andrews v. State*,<sup>77</sup> the Supreme Court of Tennessee found that the Second Amendment and its state equivalent essentially spoke to the same rights, both of which had been provided for similar reasons.<sup>78</sup> The state (pg.658) attorney general argued that the right to keep and bear

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<sup>73</sup> *Id.* at 417.

<sup>74</sup> *Id.* at 449.

<sup>75</sup> *Id.* at 449-50.

<sup>76</sup> *Id.* at 450 (emphasis added).

<sup>77</sup> 50 Tenn. 165 (3 Heisk) (1871).

<sup>78</sup> *Id.* at 177. The court then delineated the nature of the right of keeping arms as follows:

[The right] necessarily involv[es] the right to *purchase* and *use* them in such a way as is *usual*, or to keep them for the *ordinary purposes* to which they are adapted; and as they are able to be kept, evidently with a view that

arms was political in nature and did not afford to citizens a civil right.<sup>79</sup> The court rejected this argument and held that the attorney general had failed to properly distinguish

between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; *but the right to keep them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.*<sup>80</sup>

Lastly, the court quoted from Story's *Commentaries On The Constitution*, noting that, "[t]he passage from Story, shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights."<sup>81</sup>

The Supreme Court of North Carolina in *State v. Kerner*<sup>82</sup> characterized the right to keep and bear arms as "a sacred right based upon the experience of the ages," the purpose of which was to ensure "that the people may be accustomed to bear arms and ready to use them for the protection of their liberties or their country when occasion serves."<sup>83</sup> The court's most lucid observations came from its exploration into the historical underpinnings of the right to keep and bear arms:

[I]n the past this privilege was guaranteed for the sacred purpose of enabling the people to protect themselves against invasions of their liberties. Had not the people of the Colonies been accustomed to bear arms, and acquire effective skill in their use, the scene at Lexington in 1775 would have had a different result, and when "the

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the *citizens* making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, [so] they may ... more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use, in order to attain to this efficiency. The right and use are guaranteed to the *citizen*, to be exercised and enjoyed in time of peace ... *as a right, to be maintained in all its fullness.*

... [Furthermore, this right] necessarily involves the right to ... keep them in a state of efficiency for use, and to purchase and provide ammunition ... and to keep them in repair. *And clearly for this purpose, a man would have the right to carry them to and from his home ....*

....

... [Lastly,] it must be held, that the right to keep arms involves ... the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country ....

*Id.* at 178 (emphasis added).

<sup>79</sup> *Id.* at 182.

<sup>80</sup> *Id.* (emphasis altered).

<sup>81</sup> *Id.* at 183-84.

<sup>82</sup> 107 S.E. 222 (N.C. 1921).

<sup>83</sup> *Id.* at 223. The court also construed the words "pistol" and "arms," and held that pistols are "properly included within the word 'arms,' and that the right to bear such arms cannot be infringed. The historical use of pistols as 'arms' of offense and defense is beyond controversy." *Id.* at 224. Among the other kinds of arms entitled to constitutional protection are "the rifle, the musket, the shotgun, and the pistol ...." *Id.*

embattled farmers fired the shot that was heard around the world," it would have been in vain. Had not the common people, the rank and file, those who "bore the burden of (pg.659) the battle" during our great Revolution, been accustomed to the use of arms, the victories for liberty would not have been won and American independence would have been an impossibility.<sup>84</sup>

## II. RECONSTRUCTION AND THE FOURTEENTH AMENDMENT

After the Civil War, a number of Southern states passed laws that sought to limit the rights of newly freed slaves. These "black codes" were nothing more than reincarnations of the former slave codes. The killings, hangings, beatings, and the denials of civil rights (including the right to keep and bear arms) committed by racist elements to keep newly freed black citizens shackled to their former slave status demanded federal intervention.<sup>85</sup> As a result of these oppressive state laws and civil rights violations, Congress passed the Civil Rights Act<sup>86</sup> and the (pg.660) Freedman's Bureau Act in 1866<sup>87</sup> to secure the federal constitutional rights of African-Americans.

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<sup>84</sup> *Id.*

<sup>85</sup> For an analysis of the Reconstruction Era, see W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1962); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869* (1990); DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* (1993).

<sup>86</sup> Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866). This Act provided in relevant part:

[C]itizens of the United States ... of every race and color, without regard to any previous condition of slavery or involuntary servitude ... shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens ....

*Id.* § 1. In his persuasive article, Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193 (1992), the author shows that the Civil Rights Act of 1866 had as one of its concerns the right to keep and bear arms:

In the thirty-ninth Congress, Senator Lyman Trumbull introduced the Civil Rights Act by saying it would protect the rights to teach, preach, and possess firearms—rights of course declared in the first two federal amendments. [CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866)]; *see also id.* at 478, 1266 (remarks of Sen. Willard Saulsbury and Rep. Henry Raymond, (noting that Act encompassed right to bear arms). Trumbull's House counterpart, James Wilson, spoke even more expansively, declaring that the Act would protect 'the great fundamental rights embraced in the bill of rights.' *Id.* at 1294.

*Id.* at 1245 n.228; *see also* *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 596 (1871) (Bradley, J., dissenting) (stating that the Civil Rights Act of 1866 was designed to abolish laws forbidding African-Americans from, *inter alia*, traveling, "having firearms, ... exercising the functions of a minister of the gospel ... [learning] to read and write ... [or being subjected to] cruel and ignominious punishments not imposed upon white persons").

<sup>87</sup> Act of July 16, 1866, ch. 200, 14 Stat. 173 (1866). This Act provided in pertinent part:

[that the rights of contract, property, use of the judicial process] and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and [property,] *including the constitutional right to bear arms*, shall be secured to and enjoyed by all citizens ... without respect to race or color ....

*Id.* §14 (emphasis added).

Akhil Amar also illuminates the "Civil Rights Act's Siamese twin, the Freedman's Bureau Act." These two bills, notes Amar, which were "[i]nitially introduced as a single act," and later split, "were understood as *in pari materia*." Amar, *supra* note 86, at 1245 n.228. The last part of the Freedman's Bureau Act quoted above dealing with the "constitutional right to bear arms," was

In 1868, the Fourteenth Amendment<sup>88</sup> became part of the United States Constitution. The disarming of African-American citizens and the (pg.661) interrelation of the Second Amendment's right to keep and bear arms with the Fourteenth Amendment has been cogently documented by a number of scholars, and, therefore, needs no further elaboration here.<sup>89</sup> In the words of Senator Jacob M. Howard (R-MI), one of the Fourteenth Amendment's major proponents, convincing proof can be found that the framers of the Fourteenth Amendment deemed the Second Amendment as safeguarding an individual right. In his famous speech cataloguing the personal rights that fell under the protection of the Fourteenth Amendment, Senator Howard gave express mention of the right to keep and bear arms.<sup>90</sup> (pg.662)

Apparently, several commentators in the Reconstruction Congress considered the Second Amendment's right to keep and bear arms an individual right. Indeed, Representative Roswell Hart of New York, defined a republican form of government as one whose citizens:

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"understood as declaratory, simply clarifying what was already implicit." *Id.* (citing HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 17 (1908)). Amar draws this conclusion:

All of this suggests that the Second Amendment right to bear arms—and presumably all other rights and freedoms in the Bill of Rights—were encompassed by both the Freedman's Bureau Act and its companion Civil Rights Act. Of course, adoption of both Acts presupposed congressional power to impose the general requirements of the Bill of Rights on states. Bingham, relying on *Barron*, denied that Congress had such power, and therefore argued that a constitutional amendment was required to validate the Civil Rights Act. CONG. GLOBE, 39th Cong., 1st Sess. 1291-93 (1866).

*Id.*

<sup>88</sup> U.S. CONST. amend. XIV, §1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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*E.g.*, HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 24, at 107-53; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991):

[T]he right of the black population to possess weapons was not merely of symbolic and theoretical importance; it was vital ... as ... a means of preventing virtual reenslavement of those formerly held in bondage. Faced with a hostile and recalcitrant white South determined to preserve the antebellum social order by legal and extra-legal means, northern Republicans were particularly alarmed at provisions of the black codes that effectively preserved the right to keep and bear arms for former Confederates while disarming blacks, the one group in the South with clear unionist sympathies.

*Id.* at 345 (citations omitted); *see also* Stephen P. Halbrook, *The Jurisprudence Of The Second And Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1, 18-33 (1981); Stefan B. Tahmassebi, *Gun Control And Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67 (1991).

<sup>90</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (In this speech, Senator Howard stated that to the Fourteenth Amendment privileges and immunities "should be added the personal rights guaranteed by the first eight amendments of the Constitution," including the right to bear arms.). The "great object of the first section of this amendment," revealed Senator Howard, is "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766. During the "entire Senate debate on the Fourteenth Amendment, running from May 23 to June 8, *not a single senator* challenged Senator Howard's declaration that Section 1 made the first eight amendments enforceable against the states." IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 337 (1965) (original emphasis altered). Nor did a single senator challenge Howard's inclusion of the Second Amendment's right to keep and bear arms among other personal rights of the people.

shall be entitled to all privileges and immunities of other citizens;" where "no law shall be made prohibiting the free exercise of religion;" where "the right of the people to keep and bear arms shall not be infringed;" where "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 where "no person shall be deprived of life, liberty, or property without due process of law."<sup>91</sup>

Recalcitrant southern states continued to oppress the former slaves by every means and methods imaginable. Representative Sidney Clarke of Kansas pointed to a January 4, 1866 Alabama statute which made it unlawful for anyone of color to own or carry a firearm.<sup>92</sup> Angered by that incident and by the fact that ex-confederate Mississippi rebels had confiscated the private arms of former African-American Union soldiers and appropriated them for their own use,<sup>93</sup> Clarke argued against re-admittance of Mississippi to the Congress on the basis of that state's violation of the Second Amendment.<sup>(pg.663)</sup>

### III. INCORPORATION

#### A. *From Barron to Slaughter House: Sowing the Seeds of Anti-Incorporation Precedent*

Early in this nation's history, the Supreme Court unanimously held that the Bill of Rights was not applicable to the states, but stood solely as a limit on the federal government.<sup>94</sup> From 1833 to 1894, the Court reaffirmed *Barron* in a series of cases involving the First, Second, and Fourth through Eighth Amendments.<sup>95</sup> From the date the Fourteenth Amendment passed, however, the issue

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<sup>91</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866).

<sup>92</sup> *Id.* at 1838.

<sup>93</sup> *Id.* 1838-39. After noting that Mississippi's Adjunct General had issued an order "for the disarming of the freedmen," Representative Clarke strongly denounced those actions:

Nearly all ... able-bodied colored men who could reach [Union] lines enlisted under the old flag. Many of these brave defenders of the nation paid for the arms with which they went to battle. And I regret, sir, that justice compels me to say, to the disgrace of the Federal Government, that the 'reconstructed' State authorities of Mississippi were allowed to rob and disarm our veteran [African-American] soldiers and arm the rebels fresh from the field of treasonable strife. Sir, the disarmed [African-American] loyalists of Alabama, Mississippi, and Louisiana are powerless to-day, and oppressed by the pardoned and encouraged rebels of those States. They appeal to the American Congress for protection.

*Id.* at 1839.

<sup>94</sup> *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>95</sup> *See* *Livingston v. Moore*, 32 U.S. (7 Pet.) 469 (1833) (Fourth and Seventh Amendments); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 555, 582, 587 (1840) (opinion of Thompson G. Barbour, J.) (Fifth Amendment Due Process Clause); *Permoli v. New Orleans*, 44 U.S. (3 How.) 589, 609 (1845) (First Amendment Free Exercise Clause); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434-35 (1847) (Fifth Amendment Double Jeopardy Clause); *Town of East Hartford v. Hartford Bridge Co.*, 51 U.S. (10 How.) 511, 539 (1850) (Fifth Amendment Just Compensation Clause); *The Volant*, 59 U.S. (18 How.) 71, 72, 76 (1855) (Fourth Amendment); *Withers v. Buckley*, 61 U.S. (20 How.) 84, 89-91 (1857) (Fifth Amendment Just Compensation Clause); *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475, 476, 479-80 (1866) (Eighth Amendment); *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321, 325-26 (1868) (Fifth Amendment Due Process Clause and Sixth Amendment); *Edwards v. Elliot*, 88 U.S. (21 Wall.) 532, 557 (1874) (Seventh Amendment); *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1875) (First Amendment Assembly Clause and Second Amendment); *Kelly v. City of Pittsburgh*, 104 U.S. 78, 79 (1881) (Fifth Amendment Just Compensation Clause); *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886) (Second Amendment); *Miller v. Texas*, 153 U.S. 535 (1894) (Second and Fourth Amendments).



of whether that amendment incorporated the Bill of Rights and thus applied to the states would become one of the most debated and profound issues in constitutional law.<sup>96</sup> Only two possible vehicles for incorporating the Bill of Rights existed, namely the Privileges and Immunities Clause<sup>97</sup> and the Due Process Clause.<sup>98</sup> (pg.664)

In the *Slaughter House Cases*,<sup>99</sup> the Court declined to incorporate the Bill of Rights through the Privileges and Immunities Clause, and instead interpreted the Clause so narrowly as to essentially render it a dead letter. By giving the Privileges and Immunities Clause such a restrictive interpretation, the Court eliminated "the provision which was both historically and logically the one most likely to have been intended to include within its protections the guarantees of the Bill of Rights."<sup>100</sup> As a result of *Slaughter House*, litigants were continually forced to argue that the Bill of Rights applied to the states directly or through the Fourteenth Amendment's Due Process Clause. The Court regularly dismissed the argument that the Bill of Rights applied directly to the states by merely citing to *Barron*.<sup>101</sup> The Court also continually rebuffed assertions that the liberties accorded under the Bill of Rights could apply to the states via the Fourteenth Amendment.<sup>102</sup> The Court reaffirmed the *Slaughter House* holding as late as the twentieth century.<sup>103</sup> (pg.665)

## B. *The Court's Trilogy of Second Amendment Cases: Locking the Right to Keep and Bear Arms Into the Pre-Incorporation Era*

In *United States v. Cruikshank*,<sup>104</sup> three people had been convicted under the Enforcement Act of 1870<sup>105</sup> for banding together to "hinder and prevent" two African-Americans from, inter alia,

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<sup>96</sup> Several commentators have provided extensive analysis of the incorporation issue; see e.g., RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989); MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1987); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); William W. Crosskey & Charles Fairman, "Legislative History," *And The Constitutional Limitations On State Authority*, 22 U. CHI. L. REV. 1 (1954).

<sup>97</sup> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ...." U.S. CONST. amend. XIV, § 1. One of the first cases to interpret this language was *United States v. Hall*, 26 F. 79, (C.C.S.D. Ala. 1871). In upholding the Enforcement Act of 1870 as a valid exercise of Congress' power to legislate under Section Five of the Fourteenth Amendment, Judge (later Supreme Court Justice) William Woods held with respect to the Privileges and Immunities Clause that the "rights enumerated in the *first eight articles* of amendment to the Constitution of the United States, are the privileges and immunities of citizens of the United States." *Id.* at 82 (emphasis added).

<sup>98</sup> Nor shall any State deprive any person of life, liberty, or property, without due process of law ...." U.S. CONST. amend. XIV, § 1.

<sup>99</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>100</sup> 2 ROTUNDA & NOWAK, *supra* note 25, § 15.6, at 419.

<sup>101</sup> See cases cited *supra* note 95.

<sup>102</sup> Amar, *supra* note 86, at 1259.

<sup>103</sup> See *Twining v. New Jersey*, 211 U.S. 78 (1908) (holding the Fifth Amendment Self-Incrimination Clause not applicable to the states under the Fourteenth Amendment Privileges and Immunities Clause or Due Process Clause); *Maxwell v. Dow*, 176 U.S. 58 (1900) (concluding that the Fifth Amendment Grand Jury Clause and Sixth Amendment Jury Trial Clause are not binding on the states via the Fourteenth Amendment Privileges and Immunities Clause).

<sup>104</sup> 92 U.S. 542 (1876).

<sup>105</sup> Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870). In relevant part, the Act provides that if

two or more persons shall band together or conspire ... with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment

exercising their First Amendment right of peaceful assembly and their Second Amendment right to keep and bear arms.<sup>106</sup> In affirming the lower court, the Court explicitly relied on *Barron* and its progeny in holding that the First Amendment, like the other amendments, applied exclusively to the national government and was in no way intended to limit the states' rights.<sup>107</sup> After noting that this construction of the First Amendment was well settled, the Court dealt a similar blow to the Second Amendment:

[The Second Amendment] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation ... of the rights it recognizes, to what is called [a state's police powers].<sup>108</sup> (pg.666)

At first blush, a reading of the "not a right granted by the Constitution" language appears to say more than it actually does. A careful reading of the *Cruikshank* decision confirms that this passage should be read in a rather limited context. Initially, the Court confronted the issue of whether the rights of assembly contained in the First Amendment and the right to keep and bear arms contained in the Second Amendment were rights granted or protected by the Constitution. In a somewhat fragmented fashion, the Court resolved that issue as follows. First, the Court correctly noted that the right of assembly, like other rights in the Bill of Rights, existed prior to the adoption of the Constitution, and as a result, did not represent a right granted to the people by the Constitution. In other words, the right was not created by the First Amendment.<sup>109</sup> Turning to the Second Amendment, the Court noted that the right to keep and bear arms was not a guarantee granted by the Constitution.<sup>110</sup> The Court thus reiterated a basic truth: the Bill of Rights did not grant or create any rights that did not previously exist prior to its framing.<sup>111</sup> By asserting that the right to keep and bear arms predated the Constitution, the Court appeared to adopt the same natural rights position as it had taken with the Assembly Clause.<sup>112</sup>

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of any right or privilege granted or secured to him by the Constitution or laws of the United States ... [they] shall be guilty of a felony.

*Id.* § 6.

<sup>106</sup> *Cruikshank*, 92 U.S. at 544.

<sup>107</sup> *Id.* at 552. To convict the defendants under the Enforcement Act for violating the rights of peaceful assembly and petition, the United States would have to allege and prove that the defendants intended to prevent the two African-Americans from exercising their rights against the federal government. *Id.* at 552-53.

<sup>108</sup> *Id.* at 553.

<sup>109</sup> *Id.* at 551-52.

<sup>110</sup> *Id.* at 553.

<sup>111</sup> See *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) ("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.").

<sup>112</sup> *Cruikshank*, 92 U.S. at 551 (noting that the right of assembly "derives its source ... from those laws whose authority is acknowledged by civilized man throughout the world ... [and] is found wherever civilization exists.") (internal citation omitted).

The last two points to be made of the Court's brief Second Amendment analysis are important ones. First, the defendants had been indicted and convicted of intending to hinder and prevent two African-Americans (private citizens) from exercising their right to keep and bear arms for a lawful purpose.<sup>113</sup> Aside from the obvious individual sense in which the Court considers the right to keep and bear arms, nothing in the record indicates that the two African-Americans were in any way associated with a militia. Nor is there a single militia reference in the Court's opinion. If the purpose of the Second Amendment was to confer a "collective right" on states to maintain militias, the Court could have simply rejected any claim to an individual right in the Second Amendment on those grounds. Second, the Court's holding that the Second Amendment, like the First (pg.667) Amendment, did not apply to the states clearly does nothing more than reaffirm *Barron* and its progeny. Properly viewed in that context, *Cruikshank* is just another link in the *Barron* chain.

The Court's refusal to apply a Bill of Rights provision to the states continued into the 1880's with *Presser v. Illinois*.<sup>114</sup> After leading approximately four-hundred armed members of a paramilitary Organization<sup>115</sup> down the streets of Chicago, Herman Presser was convicted under an Illinois statute prohibiting bodies of men, other than the state militia or federal troops, from associating as a military organization, drilling, or parading with arms without obtaining a license from the governor.<sup>116</sup> In upholding the law, the Court held that the sections only forbade the men to associate together as military organizations without first obtaining a license, and as such did not infringe their rights.<sup>117</sup> Relying on *Cruikshank* and citing to *Barron*, the Court stated that the Second Amendment did not prohibit the legislation in question because that amendment limited only the power of Congress and the National government, and did not apply to the states.<sup>118</sup> The Court observed the following:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from (pg.668) keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the

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<sup>113</sup> *Id.* at 545.

<sup>114</sup> 116 U.S. 252 (1886). *Presser* is often erroneously cited or misapplied in support of the proposition that it is the conclusive answer on the incorporation of the Second Amendment. *See, e.g.*, Michael K. Beard & Kristin M. Rand, *The Handgun Battle*, 20 BILL OF RTS J. 13 (1987) (Beard is the executive director of the National Coalition to Ban Handguns and Rand is an attorney with the group). Labeling the individual right position a myth, and asserting *ipse dixit* the truth of the collective/state's right position, the authors cite *Presser* as settling the issue of the Second Amendment's applicability to the states. The authors' reliance on *Presser* fails to take into account that in 1886, *Barron* was still good law and incorporation was nearly 40 years down the road. These points were glossed over without mention.

<sup>115</sup> *Id.* at 254. That organization, the "*Lehr und Wehr Verein*," was a corporation whose members were instructed in "military and gymnastic exercises." *Id.*

<sup>116</sup> *Id.* at 253. It is important to note that this statute in no way prohibited the civilian acquisition of firearms. The statute merely imposed a licensure requirement on those who wished to associate with a paramilitary organization; it did not require anyone to obtain a license in order to purchase a firearm.

<sup>117</sup> *Id.* at 264-65.

<sup>118</sup> *Id.* at 265.

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.<sup>119</sup>

Six years after *Presser*, the Court decided *Miller v. Texas*.<sup>120</sup> *Miller* involved a Texas statute that forbade the carrying of weapons and authorized the warrantless arrest of anyone violating the law. At issue was whether the statute violated the Second and Fourth Amendments of the United States Constitution. Relying once again on *Barron*, as well as *Cruikshank*, the Court in *Miller* held that the Second and Fourth Amendments were limitations only upon the federal government.<sup>121</sup>

The century old *Miller* decision remains important today. It is the last case involving a challenge to a state or local firearms statute to have reached the Supreme Court. Seventy-five years passed before the Court was presented with and declined its first opportunity to address the (pg.669) Second Amendment's incorporation via the Fourteenth Amendment.<sup>122</sup> Nearly a century after *Miller*, the Court has refused to consider the issue.<sup>123</sup> Thus, *Cruikshank*, *Presser*, and *Miller* effectively locked the Second Amendment into a pre-Fourteenth Amendment Due Process Clause incorporation era.<sup>124</sup> Like a woolly mammoth entombed in a glacier, the Second Amendment remains frozen in time.

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<sup>119</sup> *Id.* at 265-66.

<sup>120</sup> 153 U.S. 535 (1894). Although *Miller* is the last 19th century Supreme Court case directly involving the Second Amendment, the Court's 1897 decision in *Robertson v. Baldwin*, 165 U.S. 275 (1897), contains some very illuminating dictum concerning the amendment:

From time immemorial [the rights embodied in the Bill of Rights have] been subject to certain well-recognized exceptions arising from the necessities of the case .... Thus, the freedom of speech and of the press (art. 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 (art. 2) is not infringed by laws 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.

*Id.* at 281-82 (emphasis added).

To this author's knowledge, no law prohibiting the carrying of concealed weapons had ever been directed against militia members. Rather, such laws were designed to penalize the conduct of private citizens. And if the right is not infringed by laws governing private citizens, then by logical implication, the right must run to the individual private citizen and not the militia member. Given this obvious context, it cannot be seriously argued that the Court considered the right to keep and bear arms to be anything other than an individual right. It is also noteworthy that the Court once again grouped the Second Amendment along with other guarantees of individual liberty in a discussion concerning the nature of these rights.

<sup>121</sup> *Miller*, 153 U.S. at 538 (citations omitted).

<sup>122</sup> *Burton v. Sills*, 248 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812 (1969).

<sup>123</sup> The specific question of whether the Second Amendment had been incorporated by the Fourteenth Amendment and made applicable to the states was not raised in *Cruikshank*, *Presser* or *Miller*.

<sup>124</sup> Aside from the Court's *Barron* and *Slaughter House* decisions, a third reason for the Court's "failure to closely analyze the incorporation issue" before 1927 may be that "there was simply no need to do so. Because of the Court's expansive reading of the [Fourteenth Amendment] due process clause, the justices were able to protect any form of individual freedom or natural law rights without resorting to a specific textual basis in the Constitution or the Bill of Rights." 2 ROTUNDA & NOWAK, *supra* note 25, § 15.6, at 419. *See, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state law prohibiting private schools violative of the Fourteenth Amendment Due Process Clause); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law prohibiting the teaching of foreign languages in private or public schools to children below the eighth grade violates the Fourteenth Amendment Due Process Clause); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (Fourteenth Amendment Due Process clause secures the right to just compensation when a state "takes" private property). As a result of this approach, "there was no clear focusing on whether specific provisions of the Bill of Rights were 'incorporated' into the due process clause of the fourteenth amendment." 2 ROTUNDA & NOWAK, *supra* note 25, at 419.

C. *Fourteenth Amendment Due Process Clause Incorporation: The Second Amendment Misses the Bus*

The first true Due Process Clause incorporation decision came in *Gitlow v. New York*<sup>125</sup> some thirty-one years after *Miller*. In *Gitlow*, the Court assumed that the First Amendment freedoms of free speech and press were among the "fundamental personal rights and 'liberties' protected" by the Fourteenth Amendment Due Process Clause against state impairment.<sup>126</sup> Even arch-conservative Robert Bork acknowledged that although the "controversy over the legitimacy of incorporation continues," it is settled "as a matter of judicial practice."<sup>127</sup> Given the (pg.670) reality of incorporation, the debate over its appropriateness is nothing more than academic.<sup>128</sup>

From 1927 to 1949, the Court began using the Fourteenth Amendment Due Process Clause to selectively incorporate all the First Amendment guarantees,<sup>129</sup> the Fourth Amendment,<sup>130</sup> and the Sixth Amendment's right to a public trial.<sup>131</sup> Twelve years later, in 1961, the Court resumed its process of selective incorporation by making applicable to the states the judicially created exclusionary rule,<sup>132</sup> the Eighth Amendment's Cruel and Unusual Punishment Clause,<sup>133</sup> the Fifth Amendment's guarantee against self-incrimination,<sup>134</sup> and double jeopardy,<sup>135</sup> the remainder of the then unincorporated Sixth Amendment,<sup>136</sup> and by implication, the Eighth Amendment Excessive Bail Clause.<sup>137</sup> Thus far, the Second Amendment, Third Amendment,<sup>138</sup> Fifth Amendment Grand Jury

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<sup>125</sup> 268 U.S. 652 (1925).

<sup>126</sup> *Id.* at 666.

<sup>127</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA* 94 (1990).

<sup>128</sup> See sources cited *supra* note 96.

<sup>129</sup> *Fiske v. Kansas*, 274 U.S. 380 (1927) (speech); *Stromberg v. California*, 283 U.S. 359 (1931) (speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (press); *DeJong v. Oregon*, 299 U.S. 353 (1937) (assembly and petition); *Hague v. CIO*, 307 U.S. 496 (1939) (petition); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Board Of Education*, 330 U.S. 1 (1947) (Establishment Clause).

<sup>130</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>131</sup> *In re Oliver*, 333 U.S. 257 (1948).

<sup>132</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>133</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>134</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>135</sup> *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>136</sup> *Irvin v. Dowd*, 366 U.S. 717 (1961) (impartial jury); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (counsel); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation of opposing witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial).

<sup>137</sup> See 2 ROTUNDA & NOWAK, *supra* note 25, § 15.6, at 425-26 n.38 (citing *Schlib v. Kuebel*, 404 U.S. 357, 365 (1971)).

<sup>138</sup> The Third Amendment has never been interpreted by the Supreme Court. However, the United States Court of Appeals for the Second Circuit has held that the Third Amendment is incorporated into the Fourteenth Amendment and therefore applicable to the states. See *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982).

Clause,<sup>139</sup> Seventh Amendment,<sup>140</sup> Eighth Amendment Excessive (pg.671) Fines Clause,<sup>141</sup> Ninth Amendment, and Tenth Amendment<sup>142</sup> stand as the only provisions of the Bill of Rights not incorporated into the Fourteenth Amendment.

Once this list is parsed down and analyzed, it is evident that the Court has one piece of unfinished business: to incorporate the Second Amendment. So far, the Court has declined to address the issue, although it has addressed the incorporation debate for many of the other Bill of Rights provisions.<sup>143</sup> There is no reason to believe that the Court would not incorporate the Third Amendment if presented with the opportunity to do so.<sup>144</sup> As recently as the early 1970's, the Court declined to incorporate the Jury Clauses of the Fifth and Seventh Amendments. The Eighth Amendment Excessive Fines Clause for all practical purposes does apply to the states. The Ninth and Tenth Amendments, which are not specific guarantees of individual liberty, by their own terms "seem inapplicable to the states."<sup>145</sup> As a result, the Second Amendment remains the last Bill of Rights provision deserving of and requiring incorporation through the Due Process Clause.(pg.672)

#### D. *Standards Of Incorporation*

The Supreme Court has developed tests for determining whether a Bill of Rights provision should be incorporated into the Fourteenth Amendment and made binding on the states.<sup>146</sup> Generally speaking, the Court has enunciated three such tests. Justice Cardozo articulated the first two tests in *Palko v. Connecticut*.<sup>147</sup> Under Cardozo's first test, the Court asks whether a Bill of Rights provision is implicit in the concept of ordered liberty; if so, the provision is then absorbed into the Fourteenth Amendment.<sup>148</sup> Cardozo's second test, calls for the Court to ask whether the right is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>149</sup> By the end of the 1960's, the Court had reformulated its incorporation test to ask whether a right is

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<sup>139</sup> The Court has consistently refused to incorporate the Fifth Amendment Grand Jury Clause. *See* *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *Beck v. Washington*, 369 U.S. 541, 545 (1962); *Gaines v. Washington*, 277 U.S. 81 (1928); *Lem Woon v. Oregon*, 229 U.S. 586 (1913); *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>140</sup> Like the Fifth Amendment Grand Jury Clause, the Court has also consistently declined to incorporate the Seventh Amendment. *See* *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), *aff'd*, 409 U.S. 943 (1972); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

<sup>141</sup> ROTUNDA & NOWAK, *supra* note 25, § 14.2, at 349. In all likelihood, this clause has not been incorporated because the Court has already addressed the issue of excessive fines under the Fourteenth Amendment Equal Protection Clause. *See* *Tate v. Short*, 401 U.S. 395 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1983).

<sup>142</sup> The Tenth Amendment "by its own terms" does not apply to the states. 2 ROTUNDA & NOWAK, *supra* note 25, § 15.6, at 426.

<sup>143</sup> The Court has on several occasions had the opportunity to settle the issue. *See* *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983); *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969).

<sup>144</sup> The Supreme Court has never rendered a decision on the Third Amendment. *See* *Levinson*, *supra* note 4, at 641.

<sup>145</sup> ROTUNDA & NOWAK, *supra* note 25, § 14.2, at 347.

<sup>146</sup> The Court has repeatedly rejected incorporating the Bill of Rights *en masse*. *Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>147</sup> 302 U.S. 319 (1937).

<sup>148</sup> *Id.* at 324-26.

<sup>149</sup> *Id.* at 325 (citations omitted).

"fundamental to the American scheme of justice."<sup>150</sup> The Court has looked at various factors in considering the relationship between the Bill of Rights and the Fourteenth Amendment, including "the language of the amendment and the intent of its framers"<sup>151</sup> and the "broad protection of individual liberties against state systems too often willing to sacrifice those liberties."<sup>152</sup>

In determining whether a right is fundamental and thus deserving of incorporation, the Court looks to see if the right is rooted in Anglo-American common law and the extent to which the founders valued the right. This often has involved tracing the development of a particular right from its English origins to its subsequent evolution in America.<sup>153</sup> Of the twenty-six rights contained in the Bill of Rights, the right to keep and bear arms is one of only seven guarantees that can be traced to a (pg.673) seminal English common law document.<sup>154</sup> It also appeared in approximately half of the early state bills of rights and was among the amendments proposed by three state ratifying conventions and by Madison himself.<sup>155</sup>

By far the most important factor is whether a right is present within the Bill of Rights. "[T]hat presence reflects a substantial body of opinion that viewed that right as essential to a common law system."<sup>156</sup> Similarly, the presence of a particular right in the state bills of rights also should be given considerable weight. For example, in *Duncan v. Louisiana*,<sup>157</sup> the Court emphasized the fact that the right to a jury trial was guaranteed in both the original state constitutions and in the constitutions of every state that had entered the Union after the framing of the federal Constitution.<sup>158</sup> Similarly, the right to keep and bear arms was guaranteed in the early state constitutions<sup>159</sup> and in practically every state constitution written prior to the Civil War.<sup>160</sup> This right is currently found in forty-three state constitutions.<sup>161</sup> The same weight (pg.674) accorded state jury trial provisions in

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<sup>150</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); In other words, the Court will enforce "values which ... hav[e] a special importance in the development of individual liberty in American society, whether or not the value [is] one that [is] theoretically necessary in any system of democratic government." 2 ROTUNDA & NOWAK, *supra* note 25, § 15.6, at 423. For a comprehensive review of the Supreme Court's selective incorporation jurisprudence, see Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982).

<sup>151</sup> Israel, *supra* note 150, at 336.

<sup>152</sup> *Id.*

<sup>153</sup> See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968); *Washington v. Texas*, 388 U.S. 14, 19-23 (1967); *Klopper v. North Carolina*, 386 U.S. 213, 223-26 (1967).

<sup>154</sup> Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 252 (1992). Four rights (seizure, due process, jury trial, and fines) can be traced to the Magna Carta; two rights (petition and arms) can be traced to the 1689 English Bill of Rights; and one right (quartering soldiers) can be traced to the 1628 English Petition of Rights. *Id.* at 253.

<sup>155</sup> *Id.* at 255.

<sup>156</sup> WAYNE R. LA FAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 2.5, at 84 (1984).

<sup>157</sup> 391 U.S. 145 (1968).

<sup>158</sup> *Id.* at 153.

<sup>159</sup> See Stephen P. Halbrook, *The Right to Keep and Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, Massachusetts*, 10 VT. L. REV. 255, 255-58 (1985).

<sup>160</sup> E.g., ALA. CONST. art. I, § 23 (1819); ARK. CONST. art. III, § 21 (1836); CONN. CONST. art. I, § 17 (1818); FLA. CONST. art. I, § 21 (1838); IND. CONST. art. I, § 16 (1819); MICH. CONST. art. I, § 13 (1835); MISS. CONST. art. I, § 23 (1817); MO. CONST. art. XIII, § 3 (1820); OHIO CONST. art. VIII, § 20 (1802); OR. CONST. art. I, § 28 (1857); PA. CONST. art. IX, § 21 (1790); R.I. CONST. art. I, § 22 (1842); TENN. CONST. art. XI, § 26 (1796); TEX. CONST. art. I, § 13 (1845); VT. CONST. ch. I, art. 16 (1793).

<sup>161</sup> ALA. CONST. art. I, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. 2, § 26; ARK. CONST. art. II, § 5; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; GA. CONST. art. I, § I, art. VIII; HAW. CONST. art. I, § 15; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; IND. CONST. art. I, § 32; KAN. BILL OF RIGHTS § 4; KY. BILL OF RIGHTS, § I, ch. 7; LA. CONST. art. I, § 11; ME. CONST. art. I, § 16; Mass. Decl. of Rights, pt. 1, art. XVII; MICH. CONST. art. I,

*Duncan* should likewise be accorded to state provisions concerning the right to keep and bear arms. Certainly, one strains to understand how the right to keep and bear arms cannot be considered a fundamental right when it appears in the 1689 English Bill of Rights, state declarations of rights, the Second Amendment, and most state constitutions.

As has been demonstrated above, the right to keep and bear arms as embodied in the Second Amendment satisfies the Court's incorporation criterion. The bulk of modern scholarship clearly documents the historical, philosophical, and common law roots of the constitutional right to keep and bear arms.<sup>162</sup> Additionally, practical experience and logic militate in favor of a presumption that the founders valued the right to keep and bear arms for a number of reasons. First, the founding fathers had been exposed to firearms all their lives.<sup>163</sup> In addition, they lived during a time of near universal firearms ownership for militia purposes, hunting, recreation, and self-defense.<sup>164</sup> Our founders witnessed the attempted confiscation of private arms by the British<sup>165</sup> and were cognizant of the role that private arms played in defeating the British. Finally, the founders had made explicit endorsements of the value of private firearms ownership.<sup>166</sup> (pg.675)

#### E. *Justice Hugo Black's Adamson Dissent Comes to Fruition with the Court's Failure to Incorporate the Second Amendment*

In his dissent, Justice Black in *Adamson v. California*<sup>167</sup> feared the consequences that might result if the Court chose a selective incorporation process over one that would incorporate en masse the first eight amendments of the Bill of Rights.

[T]he people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights ... in interpreting and enforcing that Bill

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§ 6; MISS. CONST. art. 3, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I § 1; NEV. CONST. art. 1, § II, ch. 1; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art II, § 6; N.C. CONST. art. I, § 30; N.D. CONST. art. I, § I; OHIO CONST. art. I, § 4; OKLA. CONST. art. 2, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; R.I. CONST. art. I, § 22; S.C. CONST. art. I, § 26; S.D. CONST. art. VI, § 24; TENN. CONST. art. 26; TEX. CONST. art. I, § 3; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. 16; VA. CONST. art. I, §13; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22; WYO. CONST. art. I, § 24.

<sup>162</sup> See *supra* note 24.

<sup>163</sup> Thomas Jefferson, James Madison, and George Washington—three of the most important founding fathers—were all gun owners. See Ashley Halsey, Jr., *George Washington's Favorite Guns*, AM. RIFLEMAN, Feb. 1968, at 23; Ashley Halsey, Jr., *Jefferson's Beloved Guns*, AM. RIFLEMAN, Nov. 1969, at 17; Leonid Tarassuk & R.L. Wilson, *Gun Collecting's Stately Pedigree*, AM. RIFLEMAN, July 1981, at 22.

<sup>164</sup> See Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992).

<sup>165</sup> See 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, 96-119 (1989). The most infamous occurred when the British confiscated 3500 privately owned arms—1,778 muskets, 973 bayonets, 634 pistols, and 38 blunderbusses. See RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON AND OF THE BATTLES OF LEXINGTON, CONCORD AND BUNKER HILL 95 (6th ed. 1903). On July 6, 1775, the Continental Congress specifically listed this grievance, among others, in the DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775), reprinted in 1 HENRY S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 92, 94 (9th ed. 1973).

<sup>166</sup> See Alan M. Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113, 123-25 (1982).

<sup>167</sup> 332 U.S. 46 (1947).



of Rights .... I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.<sup>168</sup>

Justice Black correctly perceived that some provisions might be left unincorporated as a byproduct of the selective incorporation process. Unfortunately, history has proven him right.

Given the reality of incorporation and the fact that most of the first eight amendments have been incorporated, the Second Amendment should not remain in a state of suspended animation. The Court did not hesitate to overrule pre-incorporation precedent when it was confronted with incorporating other Bill of Rights provisions.<sup>169</sup> It should do the (pg.676) same with the Second Amendment. The holding in *Cruikshank* that the First Amendment right of assembly does not apply to the states is no longer valid.<sup>170</sup> The holding in *Miller* that the Fourth Amendment does not apply to the states too is invalid.<sup>171</sup> Yet, *Cruikshank* and *Miller* remain in full force as applied to the Second Amendment. The Court has incorporated most of the Bill of Rights, save a few clauses which it has *explicitly* declined to incorporate. The Court, however, has neither incorporated nor explicitly declined to incorporate the Second Amendment. In fact, the Court has passed several opportunities to address the arguments in favor of the Second Amendment's incorporation.<sup>172</sup> Akhil Amar captured the Court's Second Amendment inaction best when he stated that by "refusing to discuss openly" why the right to keep and bear arms is somehow not "fundamental enough to justify incorporation, the Justices have seemed to plead no contest to the critics' charge that selective incorporation was unprincipled."<sup>173</sup> If Justice Black were alive today, he would likely point to the Court's treatment of the Second Amendment and say "I told you so."<sup>(pg.677)</sup>

#### IV. TWENTIETH CENTURY INTERPRETATION OF THE SECOND AMENDMENT

##### A. *The Supreme Court*

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<sup>168</sup> *Id.* at 89 (1947) (Black, J., dissenting).

<sup>169</sup> See *Benton v. Maryland*, 395 U.S. 784, 794 (1969), *overruling* *Palko v. Connecticut*, 302 U.S. 319 (1937) (double jeopardy); *Pointer v. Texas*, 380 U.S. 400, 406 (1965), *overruling* *West v. Louisiana*, 194 U.S. 258 (1904) (right to confront opposing witnesses); *Malloy v. Hogan*, 378 U.S. 1, 2-3 (1964), *overruling* *Twining v. New Jersey*, 211 U.S. 78 (1908) and *Adamson v. California*, 332 U.S. 46 (1947) (self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963), *overruling* *Betts v. Brady*, 316 U.S. 455 (1942) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643, 653-56 (1961), *overruling* *Wolf v. Colorado*, 338 U.S. 25 (1949) (judicially created exclusionary rule); *Gitlow v. New York*, 268 U.S. 652, 666 (1925), *overruling* *Prudential Insurance Co. v. Cheek*, 259 U.S. 530 (1922) (freedom of speech). "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

<sup>170</sup> See *DeJong v. Oregon*, 299 U.S. 353 (1937).

<sup>171</sup> See *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>172</sup> See *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1983), *cert. denied*, 464 U.S. 863 (1982); *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969).

<sup>173</sup> Amar, *supra* note 86, at 1264.

The Supreme Court has only once in the twentieth century addressed the scope of the Second Amendment.<sup>174</sup> That occasion came in *United States v. Miller*.<sup>175</sup> The case began when Jack Miller and Frank Layton were indicted under the National Firearms Act ("NFA")<sup>176</sup> for transporting an unregistered shotgun having a barrel less than eighteen inches without the required stamp-affixed order.<sup>177</sup> The district court quashed the indictment and held the NFA unconstitutional as violative of the Second Amendment.<sup>178</sup> Although the United States appealed to the Supreme Court, no appearance (brief or oral argument) was made on behalf of Miller and Layton.<sup>179</sup> The Supreme Court reversed the district court and upheld the National Firearms Act against Second Amendment challenge. At the outset, the Court drew the following conclusions:

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" ... 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 (pg.678) 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.<sup>180</sup>

By so premising its holding, the *Miller* decision is diminished as a case establishing a collective right reading in two respects. First, the case can plausibly be viewed as one in which the Court was unwilling to take judicial notice. Second, if evidence had been introduced to prove the utility of short-barreled shotguns as militia equipment, the Court's reasoning arguably suggests that such firearms would enjoy Second Amendment protection. Because the defendants were private citizens and not members of a state militia, the Court's holding might be read as implicitly recognizing the Second Amendment guarantee as an individual right. In other words, the Court's analysis suggests that had evidence been introduced that short-barreled shotguns have military value, the constitutional right to possess them would run to the defendants as private individuals who were unaffiliated with any militia.

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<sup>174</sup> A concise explanation for the lack of Second Amendment cases is provided in Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987). As Lund observes, "[u]ntil the twentieth century, the Supreme Court had few occasions to give serious attention to the Second Amendment. The federal government did not regulate firearms, the Bill of Rights had not yet been applied to the states, and the Court only occasionally mentioned the Second Amendment." *Id.* at 108 (footnote omitted).

<sup>175</sup> 307 U.S. 174 (1939). *Miller* is also the only case to directly interpret the Second Amendment.

<sup>176</sup> National Firearms Act of June 26, 1934, ch. 757, 48 Stat. 1236 (codified at 26 U.S.C. § 5801 (1988)).

<sup>177</sup> *Miller*, 307 U.S. at 175.

<sup>178</sup> 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).

<sup>179</sup> *Miller*, 307 U.S. at 175. The United States was represented by the Solicitor General, two Assistant Attorney Generals, and six other attorneys. Because there was no appearance by Miller or Layton, the Court only heard the arguments put forth by the United States. Justice Powell noted that the case deserves "somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 709 n.6 (Powell, J., concurring), *overruling* *Monroe v. Pape*, 365 U.S. 167 (1961).

<sup>180</sup> *Miller*, 307 U.S. at 178. This absence of evidence is hardly surprising in light of the fact that the appellees made no appearance. The use of cartridge-loaded short barreled shotguns by the military, law enforcement, and citizens dates back to the late 1800's and early 1900's. See Art Black, *From Trenches to Squad Cars*, *Amer. Rifleman*, June 1982, at 30; Kevin E. Steele, *Shooting America's Military Shotguns*, *Guns & Ammo*, Jan. 1991, at 50.

After reviewing the Militia Clauses contained in Article I, the Court stated that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."<sup>181</sup> This passage is particularly important because the Court acknowledged that the amendment contains two separate and distinct constituent parts: a declaration and a guarantee.<sup>182</sup>

The declaration component of the Second Amendment is a classic statement of Revolutionary Era political philosophy.<sup>183</sup> The Framers' strong distrust of standing armies lies in contra-distinction with their belief in a militia "composed of the Body of the people, trained to arms (pg.679) [as] the proper natural and safe Defence of a free state."<sup>184</sup> The *Miller* Court itself recognized this proposition when it observed that "[t]he sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured through Militia—civilians primarily, soldiers on occasion."<sup>185</sup> The *Miller* Court then stated:

[T]he debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators[] ... show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense[] ... [and] ordinarily when called for service these men were *expected to appear bearing arms supplied by themselves* ....<sup>186</sup>

After citing some of the relevant historical materials concerning the militia, the Court concluded by reversing the lower court and remanding the case for further proceedings. The *Miller* opinion, a scant eight pages, contains little analysis and is mostly devoted to reproducing the NFA and quoting at length from historical sources. In fact, once the opinion is whittled down by disregarding the heading, statement of facts, the reproduction of the NFA, and the lengthy quotations, the *Miller* decision in terms of actual analysis is a mere three to four pages. This skimpy fifty year-old opinion hardly provides sufficient guidance on the meaning of the Second Amendment<sup>187</sup> and has left more questions open than it resolved.(pg.680)

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<sup>181</sup> *Id.* at 178.

<sup>182</sup> The declaration that "[a] well regulated Militia, being necessary to the security of a free State," is often relied on, usually to the exclusion of the second half of the Second Amendment. Those many critics maintain that the first part of the amendment constitutes qualifying language or a limitation upon the second half of the amendment, which provides that "the right of the people to keep and bear arms shall not be infringed." See *TRIBE*, *supra* note 6.

<sup>183</sup> See *supra* note 38.

<sup>184</sup> ROBERT RUTLAND, *THE PAPERS OF GEORGE MASON 1070-71* (1970); see also *LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN XVIII*, at 123-24 (Bennett ed. 1978) ("A militia, when properly formed, are in fact the people themselves.") (A militia includes "all men capable of bearing arms"); Lawrence Lessig, *Fidelity In Translation*, 71 *TEX. L. REV.* 1165, 1205 (1993) ("[W]hen the [second] amendment was written, 'militia' referred to every able bodied male ....").

<sup>185</sup> *Miller*, 307 U.S. at 179.

<sup>186</sup> *Id.* (emphasis added).

<sup>187</sup> Dennis A. Henigan, the Director of the "Legal Action Project" at the "Center To Prevent Handgun Violence," feels that "[f]urther guidance [on the Second Amendment] from the high court is simply not needed." Dennis A. Henigan, *It's Time to Shoot Down NRA's Constitutional Myth*, *CONN. L. TRIB.*, Apr. 29, 1991, at 18. What Mr. Henigan more likely (and truthfully) means is that, from his group's perspective, further Second Amendment clarification is simply not desired or wanted. As long as the Court remains silent, the *status quo* (i.e., the lower federal courts' collective/state's right construction of the Second Amendment) is preserved.

Since *Miller*, the Court and individual justices have only infrequently touched upon the Second Amendment. For instance, Justice Harlan in his famous *Poe v. Ullman*<sup>188</sup> dissent declared that the full scope of the liberties provided under the guarantees of the Due Process Clause are not expressly found in the terms of other constitutional provisions.<sup>189</sup>

Justice Harlan included the Second Amendment along with the First and Fourth Amendments as examples of "precise terms" contained in "specific guarantees" of the Constitution. This suggests that he viewed the right to keep and bear arms as an individual right. A few justices later evoked this notion in the context of privacy. Justice Stewart, for instance, in his *Roe v. Wade* concurrence,<sup>190</sup> quoted Harlan's dissent as did Justice Powell in the majority opinion in *Moore v. East Cleveland*.<sup>191</sup> Arguably, both Stewart and Powell at least implicitly endorsed Harlan's classification of the Second Amendment as among those dealing with individual rights. In *Akron v. Akron Center For Reproductive Health*,<sup>192</sup> the majority cited Harlan's *Poe* dissent, as did the majority in *Planned Parenthood v. Casey*.<sup>193</sup> In his 1962 law review article entitled *The Bill of Rights and the Military*<sup>194</sup> Chief Justice Earl Warren described the Second Amendment as both authorizing and guaranteeing to the people an individual right to keep and bear arms. Justice William O. Douglas noted that "[t]he closest the Framers came to the affirmative side of liberty was in 'the right of the people to bear arms.' Yet this too has been greatly modified by judicial construction."<sup>195</sup>

The most significant post-*Miller* development came in *United States v. Verdugo-Urquidez*.<sup>196</sup> There, the Court was called upon to construe the term "the people" as it appears in the Second Amendment. After rejecting the ACLU's assertion that the Framers used "the people" as a (pg.681) way of avoiding an "awkward rhetorical redundancy," the Court stated that the phrase

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 Amendments provide that certain rights and powers 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).<sup>197</sup>

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<sup>188</sup> 367 U.S. 497 (1961).

<sup>189</sup> *Id.* at 522 (Harlan, J., dissenting).

<sup>190</sup> 410 U.S. 113, 169 (1973) (Stewart, J., concurring).

<sup>191</sup> 431 U.S. 494, 502 (1977).

<sup>192</sup> 462 U.S. 416, 427 (1983).

<sup>193</sup> 112 S. Ct. 2791, 2805 (1992).

<sup>194</sup> Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

<sup>195</sup> William O. Douglas, *The Bill of Rights Is Not Enough*, 38 N.Y.U. L. REV. 207, 233 (1963) (emphasis added). Whatever Douglas may have meant by this statement is negated by his later actions in calling for a "watering down" of the Second Amendment in *Adams v. Williams*, 407 U.S. 143, 151 (1972) (Douglas, J., joined by Marshall, J., dissenting).

<sup>196</sup> 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply to searches and seizures by United States agents of property owned by nonresident aliens located in foreign countries).

<sup>197</sup> *Id.* at 265 (first emphasis added).

The Court further elaborated by stating that "the people" "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."<sup>198</sup> The Court's opinion implicitly rejects the militia-centric view of the Second Amendment. If the Court truly endorsed such a view, it should have added some qualifying language to limit its view to the militia. Whether *Verdugo-Urquidez* signals a willingness to correctly recognize the Second Amendment as protecting the right of individuals to keep and bear arms remains to be seen.

Interestingly, in *Perpich v. Department of Defense*,<sup>199</sup> a case in which the Governor of Minnesota challenged federal law prohibiting state governors from withholding their consent to the federal government's sending of state national guard units on training exercises outside the United States, a unanimous Court made no mention whatsoever of the Second Amendment. This seems odd considering that if the Second Amendment was concerned with protecting state militias, surely the Court (or an individual justice) would have broached the subject.<sup>(pg.682)</sup>

## B. *Misinterpretation of the Second Amendment by the Lower Federal Courts*

Ambiguity and a lack of guidance by the Court have allowed the courts of appeals to shape the Second Amendment into the generalized proposition that it only protects the right to maintain militias.<sup>200</sup> Starting in the 1940's, the lower federal courts began a process of analyzing the amendment strictly in terms of protecting state militias, ignoring its application to individual rights.<sup>201</sup> Decisions in other circuits, including *United States v. Tot*<sup>202</sup> and *Cases v. United States*,<sup>203</sup> form the wellhead of this illegitimate line of cases.

### 1. *United States v. Tot*

In 1942, three years after *Miller*, the Third Circuit Court of Appeals in *Tot v. United States* upheld the defendant's conviction under the Federal Firearms Act ("FFA")<sup>204</sup> for receiving a firearm after having been previously convicted of a violent crime. To support its conclusion that the Second Amendment "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia[s],"<sup>205</sup> the court relied on three historical sources, three law review articles, and *The Federalist*. Although the *Tot* court may have thought it abundantly clear based on these sources that the Second Amendment merely guarantees a state's right to maintain a militia, a

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<sup>198</sup> *Id.*

<sup>199</sup> 496 U.S. 334 (1990).

<sup>200</sup> One commentator has recently (and accurately) termed the federal court's adoption of a state's right view of the Second Amendment as a "fiction." See Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent is There an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407, 1457 (1992). Two federal court of appeals judges have adopted an individual right interpretation of the Second Amendment. See *United States v. Hale*, 978 F.2d 1016, 1021 (8th Cir. 1992) (Beam, J., concurring specially); *United States v. Breier*, 827 F.2d 1366 (9th Cir. 1987) (Noonan, J., dissenting).

<sup>201</sup> *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988).

<sup>202</sup> 131 F.2d 261 (3d Cir. 1942), *rev 'd on other grounds*, 319 U.S. 463 (1943).

<sup>203</sup> 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom. Velazquez v. United States*, 319 U.S. 770 (1943).

<sup>204</sup> 15 U.S.C. § 902(f) (1938) (repealed 1968).

<sup>205</sup> *Tot*, 131 F.2d at 266.

"thorough review of each of these references, not one of which gives any historical support to the claimed denial of individual rights, produces the impression that the writer of the *Tot* opinion falls below the undergraduate level in scholarly standards."<sup>206</sup> (pg.683)

An actual examination of the three historical sources characterized by the court as "contemporaneous"<sup>207</sup> with the proposal and adoption of the Second Amendment reveals that they are neither contemporaneous nor supportive of the court's conclusion that the Second Amendment applies only to state militias. The first historical source, Luther Martin's 1787 letter to the Maryland Legislature,<sup>208</sup> relates to Martin's concern with the Militia Clauses of Article I and not the Second Amendment, which was not proposed until 1789. The second historical source, William Lenoir's statement to the 1788 North Carolina Convention,<sup>209</sup> merely expresses apprehension over the power of Congress to disarm the militia or use it to enforce oppressive laws. The third historical source, Roger Sherman of Connecticut at the 1787 Federal Convention, in addition to predating the Second Amendment by two years, states nothing more than "Mr. Sherman took notice that the states might want their militia for defence against invasions and insurrections, and for enforcing obedience to their laws."<sup>210</sup>

The "learned writers" cited by the court<sup>211</sup> were merely three law review writers who managed to publish brief articles on the subject during this century.<sup>212</sup> None of the law review articles cited by the court contain any discussion relating to the debate surrounding the adoption of the Second Amendment. Moreover, these articles are absolutely devoid of any analysis of the Framers' original intent.

To further support its view that the Second Amendment protects only state militias against encroachment by the federal government, the court (without discussion) relies on excerpts from *The Federalist*.<sup>213</sup> These *Federalist* sections do not support the court's conclusion. In *The Federalist No. 46*, after discussing the dangers of a standing army, Madison stated:

To these [soldiers of a standing army] would be opposed a militia amounting to near half a million ... *citizens with arms in their hands* ... fighting for *their* common liberties .... Besides the advantage of being armed, which the *Americans possess* over the (pg.684) *people* of almost every other nation ... the governments [of Europe] are afraid to trust the *people* with arms.<sup>214</sup>

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<sup>206</sup> HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 24, at 189.

<sup>207</sup> *Tot*, 131 F.2d at 266.

<sup>208</sup> 1 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 371 (1845).

<sup>209</sup> *Id.* at 203.

<sup>210</sup> *Id.* at 445.

<sup>211</sup> The court cited to the following authors: Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915); Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138 (1928); George I. Haight, *The Right to Keep and Bear Arms*, 2 BILL OF RTS. REV. 31 (1941).

<sup>212</sup> HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 24, at 190.

<sup>213</sup> THE FEDERALIST Nos. 24-29 (Alexander Hamilton), No. 46 (James Madison).

<sup>214</sup> 10 THE PAPERS OF JAMES MADISON 443 (R. Rutland ed. 1977) (emphasis added).

Finally, by analogy to the Statute of Northampton<sup>215</sup> and laws prohibiting minors or the mentally ill from possessing firearms, the *Tot* court reasoned that the FFA was a reasonable exercise of Congressional power.<sup>216</sup> Few, if any, would argue that Congress acted unreasonably in prohibiting those previously convicted of a violent crime from possessing firearms. Recognizing the strength of this argument, the court in *Tot* stated that it is on this 'broader ground ... [that] we should prefer to rest the matter.'<sup>217</sup> Because those convicted of felonies forfeit many of their constitutional and civil rights, a strong argument can be made that *Tot's* holding is limited to the rule that felons have no constitutional right to possess firearms.

Careful analysis of the historical sources, the unimpressive level of scholarship in the short law review articles, and the court's own lackluster opinion demonstrates that *Tot* and "the later lower federal court decisions [relying on it] constitute a house of cards with no valid foundation."<sup>218</sup>

## 2. Cases v. United States

*Cases v. United States*<sup>219</sup> involved a conviction obtained under the FFA for possession of a firearm by a convicted felon. In upholding the FFA against Second Amendment attack, the court denied that the right to keep and bear arms was a right conferred upon the people by the Constitution.<sup>220</sup> The court overlooked the fact that the right to keep and bear arms, like other liberties contained in the Bill of Rights, not only antedates the Constitution, but also was neither granted, created, nor conferred upon the people by it. Instead, the Bill of Rights enshrined previously existing rights belonging to the people.<sup>221</sup> Following a review of *Miller*, the court recognized that,<sup>(pg.685)</sup>

[U]nder the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.<sup>222</sup>

Despite accurately stating the *Miller* holding, the *Cases* court felt that it was not intended to be a generally applicable rule. If it were, *Miller* "would seem to be already outdated ... because of the well known fact that in the so called 'Commando Units' some sort of military use seems to have been found for almost any modern lethal weapon."<sup>223</sup> Thus, under *Miller*, the federal government could only regulate weapons such as a "flintlock musket" or a "matchlock harquebus."<sup>224</sup>

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<sup>215</sup> 2 Edw. 3, ch. 3 (1328) (forbidding the use of a firearm to terrify the King's subjects).

<sup>216</sup> *Tot*, 131 F.2d at 266.

<sup>217</sup> *Id.*

<sup>218</sup> HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 24, at 191.

<sup>219</sup> 131 F.2d 916 (1st Cir. 1942).

<sup>220</sup> *Id.* at 921 (emphasis added) (*citing* United States v. Cruikshank, 92 U.S. (2 Otto) 542, 553 (1875); Presser v. Illinois, 116 U.S. 252, 265 (1886)).

<sup>221</sup> See *supra* notes 109-112 and accompanying text.

<sup>222</sup> *Cases*, 131 F.2d at 922.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

The *Cases* court took additional objection to the rule of *Miller* because under its rationale, "the Second Amendment would prevent Congress from regulating the private possession or use of distinctly military weapons, such as machine guns or anti-aircraft guns."<sup>225</sup> Unable to formulate a general test to determine the limits of the Second Amendment,<sup>226</sup> *Cases* opted for a case-by-case standard of adjudication. Turning to the facts of the case, the court found that the appellant, who had shot someone in a bar, engaged in a personal frolic, and that the FAA, as applied to him, did not conflict with the Second Amendment.<sup>227</sup>

The Second Amendment holding in *Cases*, like that in *Tot*, may properly be viewed as nothing more than dicta. Both decisions unnecessarily reached the Second Amendment issue when the courts could have rested the decisions on Congress' ability under the commerce power to prohibit felons from owning firearms. In any event, neither case should have any bearing as to whether law-abiding citizens enjoy Second Amendment protection because the specific rule in each case is that felons may be denied access to firearms.<sup>(pg.686)</sup>

### 3. *The 1970's*

Passage of the Omnibus Crime Control and Safe Streets Act of 1968 ("OCCSSA")<sup>228</sup> spawned a second generation of challenges, usually by felons, to federal gun control legislation. As a result, the courts of appeals continued the process of reading the Second Amendment out of the Bill of Rights. In *United States v. Synnes*,<sup>229</sup> for example, the Eighth Circuit affirmed a conviction under the OCCSSA, which made it illegal for a felon to possess a firearm. Relying on *Miller* and its progeny, the court reaffirmed the rule that felons have no constitutional right to possess firearms. Other circuits quickly fell into step with *Synnes* in upholding various federal firearms laws against Second Amendment attack.<sup>230</sup> By the end of the decade, the collective/state right theory had become entrenched. Not a single circuit bothered to scrutinize the Second Amendment's history or the Framers' intent. Instead, prior decisions from other circuits were taken at face value and treated as the Gospel Truth.

### 4. *The 1980's*

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 923.

<sup>228</sup> Pub. L. 90-351, 82 Stat. 197 (1968).

<sup>229</sup> 438 F.2d 764 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972).

<sup>230</sup> *See, e.g.*, *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977) (unregistered machine gun), *cert. denied*, 435 U.S. 926 (1978); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976) (unregistered machine gun), *cert. denied*, 426 U.S. 948 (1976); *United States v. Birmley*, 529 F.2d 103 (6th Cir. 1976) (unregistered firearms); *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974) (convicted felon); *Cody v. United States*, 460 F.2d 34 (8th Cir. 1972) (false statement made by felon on a federal firearms form), *cert. denied*, 409 U.S. 1010 (1972); *United States v. Williams*, 446 F.2d 486 (5th Cir. 1971) (unregistered sawed-off shotgun); *United States v. McCutcheon*, 446 F.2d 133 (7th Cir. 1971) (unregistered sawed-off shotgun); *United States v. Lauchli*, 444 F.2d 1037 (7th Cir. 1971) (dealing firearms without a license, dealing firearms without registering with the IRS, possession of firearms not bearing serial numbers), *cert. denied*, 404 U.S. 868 (1971); *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971) (convicted felon).



When Morton Grove, Illinois enacted an ordinance banning handguns in 1981<sup>231</sup> the Second Amendment was again thrust into the arena of constitutional debate. In *Quilici v. Village of Morton Grove*,<sup>232</sup> the Seventh Circuit upheld the ordinance.<sup>233</sup> Initially, the court rejected the (pg.687) appellant's argument that *Presser* had been effectively overruled by later United States Supreme Court cases that had incorporated most of the Bill of Rights.<sup>234</sup> Based on this, the court in *Quilici* inferred that the Supreme Court would not decide *Presser* differently today.<sup>235</sup> To support this assertion, the *Quilici* court concluded that the Supreme Court's continual reliance on *Presser* led to the conclusion that the case is still good law.<sup>236</sup> However, the court's mistaken reliance on *Malloy* as proof that the Supreme Court considers *Presser* to be good law, or that the Supreme Court would hold the same way today, is flatly wrong. The *Malloy* footnote relied upon by the majority opinion in *Quilici* offers no such support.<sup>237</sup> Furthermore, as the lone dissenter in *Quilici* eloquently argued that the ordinance violated the right to privacy.<sup>238</sup> (pg.688)

## 5. The 1990's

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<sup>231</sup> Morton Grove, Ill., Ordinance No. 81-11 (June 8, 1981).

<sup>232</sup> 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

<sup>233</sup> Seven weeks prior to oral argument, Judge Bauer's personal bias surfaced when he "unequivocally expressed on a public television program his strongly held belief that an ordinance banning the possession of firearms would not violate the Second Amendment." Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 70 n.77 (1989) (citation omitted). Judge Bauer's out of court comment on a pending case raises questions of ethical integrity. See A.B.A. Code of Judicial Conduct Canon 2A (1990) (a judge is to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); A.B.A. Code of Judicial Conduct Canon 3A(9) (1990) (a "judge should abstain from public comment about a pending or impending proceeding in any court ....").

<sup>234</sup> *Quilici*, 695 F.2d at 269-70.

<sup>235</sup> *Id.* at 270.

<sup>236</sup> *Id.* (erroneously citing to *Malloy v. Hogan*, 378 U.S. 1, 4 n.2 (1964)).

<sup>237</sup> If anything, the *Malloy* footnote demonstrates the weakness in the *Quilici* court's reasoning. The footnote merely string cites eleven pre-Fourteenth Amendment Due process Clause incorporation cases. At no point does the Supreme Court say anything regarding the continuing vitality of the *Presser* decision. Interestingly, eight of the eleven decisions string cited in the footnote have been overruled or partly overruled, see *Malloy*, 378 U.S. 1, 4 n.2 (citing *United States v. Cruikshank*, 92 U.S. 542 (1876) (First Amendment right of assembly); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1923); *Weeks v. United States*, 232 U.S. 383 (1914); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Maxwell v. Dow*, 176 U.S. 581 (1900) (Sixth Amendment Jury Trial Clause); *In re Kemmler*, 136 U.S. 46 (1890); *McElvaine v. Brush*, 142 U.S. 155 (1891); *O'Neil v. Vermont*, 144 U.S. 323 (1892)), two decisions have been explicitly reaffirmed, see *Malloy*, 378 U.S. at 4 n.2 (citing *Hurtado v. California*, 110 U.S. 516 (1884); *Walker v. Sauvinet*, 92 U.S. 90 (1875)), and only one decision has neither been overruled nor reaffirmed in the post Due Process Clause incorporation era, see *Malloy*, 378 U.S. at 4 n.2 (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).

<sup>238</sup> Judge Coffey asserted:

the right to privacy is one of the most cherished rights an American citizen has ... [it] sets America apart from totalitarian states in which the interests of the state prevail over individual rights. A fundamental part of our concept of ordered liberty is the right to protect one's home and family against dangerous intrusions .... Morton Grove, acting like the omniscient and paternalistic "Big Brother" in George Orwell's novel, "1984," cannot, in the name of public welfare, dictate to its residents that they may not possess a handgun in the privacy of their home. To [do] so ... prevents a person from protecting his home and family, endangers law-abiding citizens and renders meaningless the Supreme Court's teaching that a "man's home is his castle."

*Quilici*, 695 F.2d at 280 (Coffey, J., dissenting).

In *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*,<sup>239</sup> the Ninth Circuit Court of Appeals upheld California's Roberti-Roos Assault Weapons Control Act of 1989<sup>240</sup> ("AWCA") against Second Amendment challenge. Constrained by *Cruikshank* and *Presser*, the Ninth Circuit declined to analyze the scope of the Second Amendment "whatever [its] scope," the Second Amendment can be asserted only against the federal government and "it is for the Supreme Court not us, to revisit the reach of the Second Amendment."<sup>241</sup> The court by stating that "[u]ntil such time as *Cruikshank* and *Presser* are overturned, the Second Amendment limits only federal action."<sup>242</sup>

## 6. *The Present Outlook*

A chain is only as strong as its weakest link. Without a doubt, the *Tot* and *Cases* links in the lower federal courts' chain of Second Amendment decisions are defective links that are unsupported by the weight of later cases. Neither the *Tot* court nor the *Cases* court considered the Framers' original intent. This is likely due to the binding force of the Supreme Court's *Miller* decision, which contained very little original-intent analysis. It is fair to say that *Miller* gave short shrift to the historical background of the Second Amendment. Today, however, a large body of scholarly literature illuminates that background.<sup>243</sup> Unfortunately, the literature has largely been ignored because the courts of appeals can avoid having to confront it by quickly citing to *Miller* and its progeny to dispose of a case. Not a single lower federal court has even attempted to confront the considerable historical evidence supporting an individual right interpretation of the Second Amendment.<sup>(pg.689)</sup>

## V. INTERPRETING THE CONSTITUTION

### A. *Judicial Review and Rules Of Construction*

The Supreme Court's persistent refusal to accept a Second Amendment case<sup>244</sup> represents a head-in-the-sand approach to constitutional adjudication. Not only is it "emphatically the province and duty" of the Supreme Court "to say what the law is,"<sup>245</sup> but the Court is the "ultimate interpreter of the Constitution."<sup>246</sup> As such, the "overriding responsibility of [the Supreme Court] is to the Constitution of the United States, *no matter how late it may be that a violation of the Constitution*

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<sup>239</sup> 965 F.2d 723 (9th Cir. 1992).

<sup>240</sup> Cal. Penal Code §§ 12275-12290 (West 1989).

<sup>241</sup> *Van De Kamp*, 965 F.2d at 730.

<sup>242</sup> *Id.* at 731.

<sup>243</sup> See sources cited *supra* note 24.

<sup>244</sup> See *e.g.*, *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993); *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991); *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987), *cert. denied*, 484 U.S. 868 (1987); *Masters v. State*, 685 S.W.2d 654 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 853 (1985); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Warrin*, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); *Cody v. United States*, 460 F.2d 34 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1972); *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969).

<sup>245</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>246</sup> *Baker v. Carr*, 369 U.S. 186, 211 (1962); see also *Powell v. McCormack*, 395 U.S. 486, 521 (1969).

*is found to exist.*"<sup>247</sup> The United States Constitution was not designed to provide merely for the exigencies of a few years. Clearly, it was intended to endure through out the ages.<sup>248</sup>

If and when the Court confronts the Second Amendment, it should follow its established rules of constitutional construction. One such rule is that "ordinarily words in [a Constitution] do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies."<sup>249</sup> Further, no court is authorized "to construe any clause of the Constitution [so] as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them."<sup>250</sup>

As Justice Holmes once said, "a page of history is worth a volume of logic."<sup>251</sup> That famous axiom strongly applies in connection with the Second Amendment. The Supreme Court would do well to remember "[i]t is never to be forgotten, that, in the construction of the language of the (pg.690) Constitution ... we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."<sup>252</sup> Likewise, "[t]he safe way [in reading a constitutional amendment] is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen."<sup>253</sup> The historical basis of the Second Amendment is clear and the Court has a duty to examine its historical roots.<sup>254</sup> The common law right to keep and bear arms for self-defense is equally clear and the Court has a duty to examine the common law as it relates to the Second Amendment.<sup>255</sup>

## B. *Precedent and Stare Decisis*

"For almost 100 years, federal courts followed the holding of *Swift v. Tyson* and developed an elaborate body of federal common law in areas such as torts, as well as contracts and commercial

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<sup>247</sup> *Chessman v. Teets*, 354 U.S. 156, 165 (1957) (emphasis added).

<sup>248</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 326 (1816).

<sup>249</sup> *In re Strauss*, 197 U.S. 324, 330 (1905).

<sup>250</sup> *Prigg v. Pennsylvania*, 41 U.S. (16 Peters) 539, 612 (1842).

<sup>251</sup> *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

<sup>252</sup> *Ex parte Bain*, 121 U.S. 1, 12 (1887).

<sup>253</sup> *Maxwell v. Dow*, 176 U.S. 581, 602 (1900).

<sup>254</sup> *See Missouri v. Illinois*, 180 U.S. 208, 219 (1901) ("When called upon to construe and apply a provision of the Constitution of the United States, we must look, not merely to its language, but to its historical origin ...."); *Knowlton v. Moore*, 178 U.S. 41, 95 (1900) ("The necessities which gave birth to the Constitution [and] the controversies which preceded its formation ... may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning."); *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 558 (1895) ("We are at liberty to refer to the historical circumstances attending the framing and adoption of the [C]onstitution as well as the entire frame and scheme of the instrument ...."), *overruled by South Carolina v. Baker*, 485 U.S. 505 (1988); *Mattox v. United States*, 156 U.S. 237, 243 (1895) ("We are bound to interpret the [C]onstitution in light of the law as it existed at the time it was adopted."); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution we must look to the history of the times, and examine the state of things existing when it was framed and adopted ....").

<sup>255</sup> *Ex parte Grossman*, 267 U.S. 87, 108 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law ...."); *Kansas v. Colorado*, 206 U.S. 46, 94 (1907) (The "common law throws light on the meaning and scope of the Constitution ....").

law."<sup>256</sup> By overruling *Swift v. Tyson*<sup>257</sup> in *Erie Railroad Co. v. Tompkins*<sup>258</sup> the Court erased nearly a century of federal common law as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to (pg.691) correct."<sup>259</sup> In the context of the Second Amendment, the Court should likewise not hesitate to overrule the erroneous line of cases fabricated by the lower federal courts. As one commentator stated, the "Second Amendment need not be rendered moribund because some courts have ignored its command and the political and social ideas that prevailed at the time of its framing."<sup>260</sup>

The Supreme Court has the power and duty to overrule a prior decision because *stare decisis* is not a mechanical formula.<sup>261</sup> When it comes to constitutional law, the Court is less constrained by *stare decisis* than it is in other areas of the law.<sup>262</sup> Moreover, "adherence to prior decisions in constitutional adjudication is not a blind or inflexible rule."<sup>263</sup> In just the last twenty years, the Court has overruled, in whole or in part, thirty-five previous constitutional decisions.<sup>264</sup>

Depending on how the Court reads its Second Amendment jurisprudence, it has one of three options. First, the Court could read its prior decisions as supporting the collective right interpretation of the Second Amendment, although this would be a strained and unwarranted reading.<sup>265</sup> If it does, those decisions should be overruled as contrary to the Framers' original intent. Second, the Court could properly recognize that its cases are ambiguous and unclear. This would allow the Court to wipe the slate clean and examine the Second Amendment. Once it does so, the Court should conclude that the Second Amendment protects an individual right to keep and bear arms.<sup>266</sup> Third, the Court could continue (pg.692) on its present course and do nothing. However, hiding behind a scant handful of old nineteenth century pre-incorporation era decisions, *United States v. Miller*, and the doctrine of *stare decisis*, will not provide an escape hatch with which the Court can honestly avoid interpreting the Second Amendment.

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<sup>256</sup> ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 261 (1989).

<sup>257</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>258</sup> 304 U.S. 64 (1938).

<sup>259</sup> *Id.* at 79 (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

<sup>260</sup> Robert Dowd, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 71 (1989).

<sup>261</sup> *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). See generally Michael J. Gerhardt, *The Role of Precedent in Constitutional Decision making and Theory*, 60 GEO. WASH. L. REV. 68 (1991) (probing the dynamics of precedent in constitutional adjudication).

<sup>262</sup> *Harmelin v. Michigan*, 111 S. Ct. 2680, 2686 (1991); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

<sup>263</sup> *United States v. Barnett*, 376 U.S. 681, 699 (1964).

<sup>264</sup> *Payne v. Tennessee*, 111 S. Ct. 2597, 2610 n.1 (1991) (listing 33 cases). In *Payne*, the Court overruled two additional cases, *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989), bringing to 35 the number of constitutional decisions that have been overruled in whole or in part since 1971.

<sup>265</sup> To reach this result would be a serious misreading of the Court's Second Amendment case law. "The Supreme Court has not determined, at least not with clarity, whether the amendment protects only a right of state governments ... or a right of individuals ...." 2 ROTUNDA & NOWAK, *supra* note 25, § 14.2, at 347 n.4.

<sup>266</sup> Even absent the Second Amendment, there is still the natural and common law rights of armed self-defense, see HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 24, at 37-54; Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992); Joyce L. Malcom, *The Right of the People To Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983). For a discussion of The Ninth Amendment, see Nicholas J. Johnson, *Beyond the Second Amendment*, 24 RUTGERS L.J. 1 (1992), for the right to privacy, see *Quilici v. Village of Morton Grove*, 695 F.2d 261, 278-80 (1982) (Coffey, J., dissenting). However, the court need look no further than the Second Amendment to find the right to keep and bear arms.

## CONCLUSION

"It is the duty of the courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachments thereon."<sup>267</sup> Because the test for determining fundamental rights is whether the right is "explicitly or implicitly guaranteed by the Constitution,"<sup>268</sup> the Supreme Court shirks its responsibility to the Constitution by turning a blind eye to the judicial repeal of the right to keep and bear arms. There is no excuse for the Court's failure to address the Second Amendment. After all, it is a member of the Bill of Rights family, and it deserves better treatment. Denial of *certiorari* in the next Second Amendment case would constitute the Court's imprimatur for reading the Second Amendment out of the Bill of Rights. The evisceration of the Second Amendment through judicial indifference would be a deep constitutional wound and a blight on the Court's prestige and legitimacy. Whether the Court will have the fortitude and resolve to interpret the Second Amendment as guaranteeing an individual right to keep and bear arms remains to be seen.

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<sup>267</sup> *Boyd v. United States*, 116 U.S. 616, 635 (1886); *see also* *Gulf Co. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897).

<sup>268</sup> *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).