Part one of this article.

Part three of this article.

> murder itself." 92 U.S. 553, 554.
> *173 4th. It was held that the provision of the Fourteenth Amendment forbidding any State to deny to any person within its jurisdiction the equal protection of the laws, gave no greater power to Congress. 92 U.S. 555.
> 5th. It was held, in accordance with United States v. Reese, above cited, that the counts for conspiracy to prevent and hinder citizens of the African race in the free exercise and enjoyment of the right to vote at state elections, or to injure and oppress them for having voted at such election, not alleging that this was on account of their race, or color, or previous condition of servitude, could not be maintained; that court stating: "The right to vote in the States comes from the States; but the right of exemption from prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been." 92 U.S. 556
> Nothing else was decided in United States v. Cruikshank, except questions of the technical sufficiency of the indictment, having no bearing upon the larger questions. [FN310]

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

J. Presser v. Illinois

In the late 19th century, many state governments violently suppressed peaceful attempts by workingmen to exercise their economic and collective bargaining rights. In response to the violent state action, some workers created self-defense organizations. In response to the self-defense organizations, some state governments, such as Illinois's, enacted laws against armed public parades. [FN311]

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

The Supreme Court ruled against him unanimously. First, the Court held that the Illinois ban on armed parades "does not infringe the right of the people to keep and bear arms." [FN312] This holding was consistent with traditional common *174 law boundaries on the right to arms, which prohibited terrifyingly large assemblies of armed men. [FN313]

Further, the Second Amendment by its own force "is a limitation only upon the power of Congress and the National Government, and not upon that of the States." [FN314]

Did some other part of the Constitution make the Second Amendment enforceable against the states? The Court added that the Illinois law did not appear to interfere with any of the "privileges or immunities" of citizens of the United States. [FN315] Although the Court never actually used the words "Fourteenth Amendment," it is reasonable to read Presser as holding that the Fourteenth Amendment's Privileges and Immunities clause does not restrict state interference with keeping and bearing arms. This reading is consistent with all the other Fourteenth Amendment cases from the Supreme Court in the 1870s and 1880s, which consistently reject the proposition that any part of the Bill of Rights is among the "Privileges and Immunities" protected by the Fourteenth Amendment. [FN316]

As to whether the Second Amendment might be protected by another part of the Fourteenth Amendment--the clause forbidding states to deprive a person of life, liberty, or property without due process of law [FN317]--the Court had nothing to say. The theory that the Due Process clause of the Fourteenth Amendment might protect substantive constitutional rights had not yet been invented. Most of what the Waite Court had to say about Bill of Rights incorporation has long since been repudiated (although not always formally overruled) by subsequent courts, via the Due Process clause.

It is true that some modern lower courts cling to Presser and claim that Presser prevents them from addressing a litigant's claim that a state statute violates the Second Amendment. [FN318] It is hard to take such judicial arguments seriously. An 1886 decision about Privileges and Immunities is hardly binding precedent for 1990s Due Process. The dicta from the modern Supreme Court about the Second Amendment as a possible Fourteenth Amendment liberty interest is incompatible with the claim that Presser forecloses any possible theory of incorporating the Second Amendment. At most, Presser rejects Privileges and Immunities incorporation, but the case cannot be read to address a legal theory (Due Process incorporation) which did not exist at the time the case was decided.

*175 Interestingly, Presser does offer another theory on which the United States Constitution might restrict state anti-gun laws. Article I, section 8, clauses 15 and 16 give Congress various powers over the militia. [FN319] States may not interfere with these Congressional militia powers; so in dicta, the Presser Court stated that the states could not disarm the public so as to deprive the federal government of its militia:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military

force or reserve militia of the United States, and, in view of this prerogative of the general government. . .the States cannot, even laying the Constitutional provision in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect. [FN320] So according to Presser, the constitutional militia includes "all citizens capable of bearing arms." [FN321] But this statement is not directly about the Second Amendment; it is about Congressional powers to use the militia under Article I, section 8, clauses 15 and 16.

V. The Chase, Taney, and Marshall Courts

The majority of the Chase Court was just as hostile to a broad reading of the Fourteenth Amendment as was the Waite Court; unsurprisingly, the Chase Court rejected the idea that Congress could use the Fourteenth Amendment to legislate against private interference with First or Second Amendment rights. At the same time, the Chase Court described the First Amendment assembly right and the Second Amendment arms rights as fundamental human rights which pre-existed the Constitution.
*176

One of the most notable cases of the nineteenth century, Dred Scott, used the Second Amendment to support arguments about other subjects; the arguments recognized the Second Amendment right as an individual one.
And the very first Supreme Court opinion to mention the Second Amendment-- Justice Story's dissent in Houston v. Moore--is so obscure that even most Second Amendment specialists are unfamiliar with it. It is analogous to the Hamilton case, in that it uses the Second Amendment to underscore state militia powers.

A. United States v. Cruikshank

An important part of Congress's work during Reconstruction was the Enforcement Acts, which criminalized private conspiracies to violate civil rights. [FN322] Among the civil rights violations which especially concerned Congress was the disarmament of Freedmen by the Ku Klux Klan and similar gangs. [FN323]
After a rioting band of whites burned down a Louisiana courthouse which was occupied by group of armed blacks (following the disputed 1872 elections), the whites and their leader, Klansman William Cruikshank, were prosecuted under the Enforcement Acts. Cruikshank was convicted of conspiring to deprive the blacks of the rights they had been granted by the Constitution, including the right peaceably to assemble and the right to bear arms. [FN324]

In United States v. Cruikshank, the Supreme Court held the Enforcement Acts unconstitutional. The Fourteenth Amendment did give Congress the power to prevent interference with rights granted by the Constitution, said the Court. But the right to assemble and

the right to arms were not rights granted or created by the Constitution, because they were fundamental human rights that pre-existed the Constitution:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 211, "from those laws whose authority isacknowledged *177 by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. [FN325]
> A few pages later, the Court made the same point about the right to arms as a fundamental human right:
> The right. . . of bearing arms for a lawful purpose. . . is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence. The second amendment declares that it shall not be infringed; but this. . . means no more than it shall not be infringed by Congress. . . leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called . . .the "powers which relate to merely municipal legislation. . . ." [FN326]

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

Cruikshank has occasionally been cited (without explanation) for the proposition that the Second Amendment right belongs only to the state militias, although Cruikshank has nothing to say about states or militias. [FN327]
Cruikshank was also cited in dicta in later cases as supporting the theory that the Second Amendment and the rest of Bill of Rights are not enforceable against the states [FN328] (even though the facts of Cruikshank involve privateactors, *178 not state actors). That theory, obviously, has long since been abandoned by the Supreme Court. Among the earlier cases to reject non-incorporation was DeJonge v. Oregon, holding that the right peaceably to assemble (one of the two rights at issue in Cruikshank) was guaranteed by the 14th Amendment. [FN329]
And as discussed above, Cruikshank's dicta about the Fourteenth Amendment "Privileges and Immunities" is no more binding on modern courts than is Presser's statement on the same subject several years later.

B. Scott v. Sandford

Holding that a free black could not be an American citizen, [FN330] the Dred Scott majority opinion listed the unacceptable consequences of black citizenship: *179 Black citizens would have the right to enter any state, to stay there as long as they pleased, and within that state they could go where they wanted at any hour of the day or night, unless they committed some act for which a white person could be punished. [FN331] Further, black citizens would have "the right to. . .full liberty of speech in public and private upon all subjects which [a state's] own citizens might meet; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." [FN332]

Thus, Chief Justice Taney claimed that the "right to. . .keep and carry arms" (like "the right to. . .full liberty of speech," and like the right to interstate travel without molestation, and like the "the right to. . .hold public meetings on political affairs") was a right of American citizenship. The only logical source of these rights is the United States Constitution. While the right to travel is not textually stated in the Constitution, it has been found there by implication. [FN333] As for the rest of the rights mentioned by the Taney majority, they appear to be rephrasings of explicit rights contained in the Bill of Rights. Instead of "freedom of speech," Justice Taney discussed "liberty of speech"; instead of the right "peaceably to assemble", he discussed the right "to hold meetings", and instead of the right to "keep and bear arms," he discussed the right to "keep and carry arms." [FN334]

Although resolution of the citizenship issue was sufficient to end the Dred Scott case, the Taney majority decided to address what it considered to be an error in the opinion of the circuit court. Much more than the citizenship holding, the part of Dred Scott that created a firestorm of opposition among the northern white population was Dred Scott's conclusion that Congress had no power to outlaw slavery in a territory, as Congress had done in the 1820 Missouri Compromise, for the future Territory of Nebraska. [FN335] Chief Justice Taney's treatment of the question began with the universal assumption that the Bill of Rights constrained Congressional legislation in the territories.

> No one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the territory peaceably to assemble and to petition the government for redress of grievances. *180 Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against itself in a criminal proceeding. [FN336] From the universal assumption that Congress could not infringe the Bill of Rights in the territories, Taney concluded that Congress could not infringe the property rights of slave-owners by abolishing slavery in the territories. [FN337]

The Taney Court obviously considered the Second Amendment as one of the constitutional rights belonging to individual Americans. The Henigan "state's rights" Second Amendment could have no application in a territory, since a territorial government is by definition not a state government. And since Chief Justice Taney was discussing individual rights which Congress could not infringe, the only reasonable way to read the Chief Justice's reference to the Second Amendment is as a reference to an individual right. Nor can the opinion of Chief Justice Taney (which was shared by six members of the Court on the citizenship issue, and by five on the Territories issue) be dismissed as casual dicta. The Court knew that Dred Scott would be one the

most momentous cases ever decided, as the Court deliberately thrust itself in the raging national controversy over slavery. The case was argued in two different terms, and the Chief Justice's opinion began by noting that "the questions in controversy are of the highest importance." [FN338]

And unlike most Supreme Court cases, Dred Scott became widely known among the general population. The majority's statement listing the right to arms as one of several individual constitutional rights which Congress could not infringe was widely quoted during antebellum debates regarding Congressional power over slavery. [FN339]

Dred Scott's holding about black citizenship was overruled by the first sentence of the Fourteenth Amendment, which states that all persons born in the Untied States are citizens of the United States. [FN340] Dred Scott, which had exacerbated rather than cooled the North-South anger which eventually caused the Civil War, became so universally despised that many people forgot the details of what the case actually said. After the Spanish-American War, the United States acquired the new territories of Cuba, Puerto Rico, and the Philippines, and acquired Hawaii after that nation's government was overthrown in a coup orchestrated by American farming interests. Thus, the Supreme Court, in The Insular Cases, was forced to determine the constitutional *181 status of the new imperial territories. [FN341] In Downes v. Bidwell, the Court majority held that, despite the constitutional requirement that taxes imposed by Congress be uniform throughout the United States, Puerto Rico could be taxed at a different rate; Justice Henry Billings Brown's five-man majority explicitly worried that a contrary result would force the Bill of Rights to be applied in the new territories. Writing to Justice John Harlan to applaud Harlan's dissenting opinion, [FN342] a New York attorney exclaimed that the majority opinion was "the Dred Scott of Imperialism!" [FN343] But if the Insular Cases Court had followed Dred Scott, then Justice Harlan and the other three dissenters would have been in the majority; for Dred Scott stated that the Bill of Rights did apply in the territories.

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

C. Houston v. Moore

The very first case in which a Supreme Court opinion mentioned the Second Amendment was Houston v. Moore, an 1821 case so obscure that even modern scholars of the Second Amendment are often unaware of it. [FN344] Part of the reason is that, thanks to a small error, the case cannot be discovered via a Lexis or Westlaw search for "Second Amendment."

The Houston case grew out of a Pennsylvania man's refusal to appear for federal militia duty during the War of 1812. The failure to appear violated a federal statute, as well as a Pennsylvania statute that was a direct copy of the federal statute. When Mr. Houston was prosecuted and convicted in a Pennsylvania court martial for violating the Pennsylvania statute, his attorney argued that only the federal government, not Pennsylvania, had the authority to *182 bring a prosecution; the Pennsylvania statute was alleged to be a state infringement of the federal powers over the militia.

When the case reached the Supreme Court, both sides offered extensive arguments over Article I, section 8, clauses 15 and 16, in the Constitution, which grant Congress certain powers

over the militia. [FN345] Responding to Houston's argument that Congressional power over the national militia is plenary (and therefore Pennsylvania had no authority to punish someone for failing to perform federal militia service), the State of Pennsylvania lawyers retorted that Congressional power over the militia was concurrent with state power, not exclusive. [FN346] In support of this theory, they pointed to the Tenth Amendment, which reserves to states all powers not granted to the federal government. [FN347]

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

Justice Bushrod Washington delivered the opinion of the Court, holding that the Pennsylvania law was constitutional, because Congress had not forbidden the states to enact such laws enforcing the federal militia statute. [FN348] Moreover, because Houston had never showed up for the militia muster, he had never entered federal service; thus, Houston was still under the jurisdiction of the State of Pennsylvania. [FN349] Justice William Johnson concurred; he argued *183 that Houston could not be prosecuted for violating the federal law; accordingly, he could be prosecuted for violating the state law. [FN350]

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

Justice Joseph Story, a consistent supporter of federal government authority, dissented. [FN351] He argued that the Congressional legislation punishing militia resisters was exclusive, and left the states no room to act. [FN352]

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

> If, therefore, the present case turned upon the question, whether a state might organize, arm and discipline its own militia, in the absence of, or subordinate to, the regulations of congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of a like paramount authority to congress; and if not, then it is retained by the states. The fifth [sic] amendment to the constitution, declaring that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns, the reasoning already suggested. [FN353]

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

Justice Story's dissent is inconsistent with the Henigan/Bogus theory that Second Amendment somehow reduces Congress's militia powers. Immediately, after the Second Amendment hypothetical, Justice Story stated that if Congress actually did use its Article I powers over the militia, then Congressional power was exclusive. There could be no state control, "however small." [FN354] If federal militia powers, when exercised, are absolute, then the Henigan/Bogus theory that the Second Amendment limits federal militia powers is incorrect.

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

> The next amendment is, "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.
> The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights. [FN355]

The Justice's Second Amendment is obviously an individual right, intended to prevent the tyrannical tactic of "making it an offence to keep arms." The purpose of arms possession is to

facilitate a militia, and the purpose of the militia is to suppress disorder from below (in the form of riots) and from above (in the form of tyranny). In contrast to some twentieth century *185 commentators, [FN356] Justice Story shared the conventional wisdom of the nineteenth century [FN357]: removing a tyrannical government would not be "insurrection" but instead would be the restoration of constitutional law and order.

Conclusion

In addition to the oft-debated case of United States v. Miller, [FN358] the Supreme Court has mentioned or quoted the Second Amendment in thirty-seven opinions in thirty-five other cases, almost always in dicta. One of the opinions, Justice Douglas's dissent in Adams v. Williams, explicitly claims that the Second Amendment is not an individual right. [FN359] Three majority opinions of the Court (the 1980 Lewis case, [FN360] the 1934 Hamilton case, [FN361] and the 1929 Schwimmer case [FN362]), plus one appeal dismissal (Burton v. Sills, 1969 [FN363]), and one dissent (Douglas in Laird [FN364]) are consistent with either the individual rights or the states rights theory, although Lewis is better read as not supportive of an individual right, or not supportive of an individual right worthy of any serious protection. (And knowing of Justice Douglas's later dissent in Adams, his Laird dissent should not be construed as supportive of an individual right.) Spencer v. Kemna refers to right to bear arms as an individual right, but the opinion does not specifically mention the Second Amendment, and so the reference could, perhaps, be to the right established by state constitutions. [FN365]

Two other cases are complicated by off-the-bench statements of the Justices. The 1976 Moore v. East Cleveland plurality opinion supports the individual right, [FN366] but in 1989 the opinion's author, retired Justice Powell, told a television interviewer that there was no right to own a firearm. In an 1820 dissent, Justice Story pointed to the Second Amendment to make a point about state authority over the militia (although this would not necessarily be to the exclusion of an individual right). [FN367] Justice Story's later scholarly *186 commentaries on the Second Amendment only addressed the individual right, and did not investigate the Amendment as a basis of state authority. [FN368]

Concurring in Printz, Justice Thomas stated that United States v. Miller had not resolved the individual rights question; the tone of the concurrence suggested that Justice Thomas considered the Second Amendment to be an important individual right. [FN369]

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

Of course that fact that a right exists does not mean that every proposed gun control would violate that right; indeed, many of the opinions explicitly or implicitly endorse various controls, and, except for Justice Black, none of the authors of the opinions claim that the right is absolute. [FN370]

In the face of this Supreme Court record, is it accurate for gun control advocates to claim that the non-individual nature of the Second Amendment is "perhaps the most well-settled" point in all of American constitutional law? [FN371] The extravagant claim cannot survive a reading of what the Supreme Court has actually said about the Second Amendment. In the written opinions of the Justices of the United States Supreme Court, the Second Amendment does appear to be

reasonably well-settled--as an individual right. The argument that a particular Supreme Court opinion's language about the Second Amendment does not reflect what the author "really" thought about the Second Amendment cannot be used to ignore all these written opinions--unless we presume that Supreme Court Justices throughout the Republic's history have written things about the Second Amendment that they did not mean.

While the Warren Court and the Burger Court offered mixed records on the Second Amendment, the opinions from the Rehnquist Court (including from the Court's "liberals" Ginsburg and Stevens) are just as clear as were the opinions from the Supreme Court Justices of the nineteenth century: "the right of the people to keep and bear arms" is a right that belongs to individual American citizens. Although the boundaries of the Second Amendment have only partially been addressed by Supreme Court jurisprudence, the core of the *187 Second Amendment is clear: the Second Amendment--like the First, Third, Fourth, Fifth, Sixth, and Fourteenth Amendments--belongs to "the people", not the government.

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[FN1]. See, e.g., Sanford Lewinson, Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts, 1998 B.Y.U. Rev. 127.

[FN2]. United States v. Miller, 307 U.S. 174 (1939).

[FN3]. Dennis Henigan, The Right to Be Armed: A Constitutional Illusion, S.F. Barrister, Dec. 1989, P 19, available online at <http:// www.handguncontrol.org/legalaction/C2/c2rtarms.htm>. The late Dean Griswold of Harvard, who was a member of the board of Henigan's group, expressed a nearly identical thought: "that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law." Erwin N. Griswold, Phantom Second Amendment 'Rights', Wash. Post, Nov. 4, 1990, at C7

[FN4]. Dennis A. Henigan et al., Guns and the Constitution: The Myth of Second Amendment Protection for Firearms in America (1995); Keith A. Ehrman & Dennis A. Henigan, The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?, 15 U. Dayton L. Rev. 5 (1989); Dennis A. Henigan, Arms, Anarchy and the Second Amendment, 26 Val. U. L. Rev. 107 (1991) [[hereinafter Henigan, Arms, Anarchy]

[FN5]. Mark Polston, Obscuring the Second Amendment, 34 Virginia Resolves, No. 32 (Spring 1994), http:// www.handguncontrol.org/legalaction/dockets/A1/obscure.htm.

[FN6]. Carl T. Bogus, Race, Riots, and Guns, 66 S. Cal. L. Rev. 1365 (1993); Carl T. Bogus, The Hidden History of the Second Amendment, 31 U.C. Davis L. Rev. 309 (1998). For a response to the latter article, see David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU. L. Rev. 1359, 1515-29.
Some other scholarly sources rejecting individual rights are: Robert J. Spitzer, The Politics of Gun Control (1995); George Anastaplo, Amendments to the Constitution of the United States: A Commentary, 23 Loy. U. Chi. L.J. 631, 687-93 (1992); Michael A. Bellesiles, The Origins of Gun Culture in the United States, 1760-1865, 83 J. Am. Hist. 425 (1996); Lawrence Delbert Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. Am. Hist. 22 (1984); Samuel Fields, Guns, Crime and the Negligent Gun Owner, 10 N. Ky. L. Rev. 141 (1982); Andrew D. Herz, Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility, 75 B.U. L. Rev. 57 (1995); Michael J. Palmiotto, The Misconception of the American Citizen's Right to Keep and Bear Arms, 4 J. on Firearms & Pub. Pol'y 85 (1992); Warren Spannaus, State Firearms Regulation and the Second Amendment, 6 Hamline L. Rev. 383 (1983).

[FN7]. For an effort to trace the potential contours of a State's Rights Second Amendment, see Glenn Harlan Reynolds & Don B. Kates, The Second Amendment and States' Rights: A Thought Experiment, 36 Wm. & Mary L. Rev. 1737 (1995) (arguing that a State's Rights Second Amendment would give each state legislature the power to arm its militia as it saw best, and thus the power to negate--within the borders of that state--federal bans on particular types of weapons).

[FN8]. Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 463 (1995): Perhaps surprisingly, what distinguishes the Second Amendment scholarship from that relating to other constitutional rights, such as privacy or free speech, is that there appears to be far more agreement on the general outlines of Second Amendment theory than exists in those other areas. Indeed, there is sufficient consensus on many issues that one can properly speak of a "Standard Model" in Second Amendment theory, much as physicists and cosmologists speak of a "Standard Model" in terms of the creation and evolution of the Universe. In both cases, the agreement is not complete: within both Standard Models are parts that are subject to disagreement. But the overall framework for analysis, the questions regarded as being clearly resolved, and those regarded as still open, are all generally agreed upon. This is certainly the case with regard to Second Amendment scholarship.

[FN9]. See, e.g., Senate Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2d Sess., The Right To Keep and Bear Arms (Comm. Print 1982); Akhil Amar, The Bill of Rights (1998); Robert J. Cottrol, Introduction to 1 Gun Control and the Constitution: Sources and Explorations on the Second Amendment at ix (Robert J. Cottrol ed., 1993); Robert J. Cottrol & Raymond T. Diamond, Public Safety and the Right to Bear Arms, in The Bill of Rights in Modern America: After 200 Years 72 (David J. Bodenhamer & James W. Ely, Jr., eds., 1993); Robert J. Cottrol, Second Amendment, in The Oxford Companion to the Supreme Court of the United States 763 (Kermit L. Hall et al. eds., 1992); Clayton Cramer, For the Defense of Themselves and the State at xv (1994); 4 Encyclopedia of the American Constitution 1639-40 (Leonard W. Levy et al. eds., 1986); Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1876 (1989); Stephen Halbrook, Freedmen, the Fourteenth Amendment, and the Right to Bear Arms: 1866-1876 (1998); Stephen Halbrook, A Right To Bear Arms: State And Federal Bills Of Rights And Constitutional Guarantees (1989); Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (1984); Edward F. Leddy, Guns and Gun Conrtol, in Reader's Companion to American History 477-78 (Eric Foner & John A. Garraty eds., 1991); Leonard W. Levy, Original Intent and the Framers' Constitution 341 (1988); Leonard Levy, Origins of the Bill of Rights (1999); Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994); Laurence H. Tribe, I American Constitutional Law 894-903 (3d ed. 2000). Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1164 (1991); Randy E. Barnett & Don B. Kates, Under Fire: The New Consensus on the Second Amendment, 45 Emory L.J. 1139, 1141 (1996); Bernard J. Bordenet, The Right to Possess Arms: The Intent of the Framers of the Second Amendment, 21 U. West L.A. L. Rev. 1, 28 (1990); David I. Caplan, The Right of the Individual to Bear Arms: A Recent Judicial Trend, 1982 Det. C.L. Rev. 789, 790; David I. Caplan, The Right to Have Arms and Use Deadly Force Under the Second and Third Amendments, 2.1 J. on Firearms & Pub. Pol'y 165 (1990); Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro- Americanist Reconsideration, 80 Geo. L.J. 309 (1991); Brannon P. Denning, Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment, 26 Cumb. L. Rev. 961 (1995-96) [[hereinafter Denning, Simple Cite]; Brannon P. Denning, Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm", 21 Harv. J.L. & Pub. Pol'y 719 (1998); Anthony J. Dennis, Clearing the Smoke From the Right to Bear Arms and the Second Amendment, 29 Akron L. Rev. 57 (1995); Robert Dowlut, Federal and State Constitutional Guarantees to Arms, 15 U. Dayton L. Rev. 59 (1989); Robert Dowlut, The Current Relevancy of Keeping and Bearing Arms, 15 U. Balt. L.F. 32 (1984); Robert Dowlut, The Right to Arms: Does the Constitution or the Predilection of Judges Reign?, 36 Okla. L. Rev. 65 (1983); Robert Dowlut, The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots, 8 Stan. L. & Pol'y Rev. 25 (1997); Richard E. Gardiner, To Preserve Liberty--A Look at the Right to Keep and Bear Arms, 10 N. Ky. L. Rev. 63 (1982); Alan M. Gottlieb, Gun Ownership: A Constitutional Right, 10 N. Ky. L. Rev. 113 (1982); Stephen P. Halbrook, Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms, 62 Tenn. L. Rev. 597 (1995); Stephen Halbrook, The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, Last Holdout Against Application of the Bill of Rights to the States, 76 U. Det. Mercy L. Rev (no. 4, 1999, forthcoming); Stephen P. Halbrook, Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment, 15 U. Dayton L. Rev. 91 (1989); Stephen P. Halbrook, Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms":

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Rev. 1 (1990); James Gray Pope, Republican Moments: The Role of Direct Popular Power in the American Constitutional Order, 139 U. Pa. L. Rev. 287 (1990); L.A. Powe, Jr., Guns, Words, and Constitutional Interpretation, 38 Wm. & Mary L. Rev. 1311 (1997); Michael J. Quinlan, Is There a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just "Gun Shy" ?, 22 Cap. U. L. Rev. 641 (1993); Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461 (1995); Glenn Harlan Reynolds, The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought, 61 Tenn. L. Rev. 647 (1994) (discussing the Second Amendment as related to the Tennessee Constitution); Elaine Scarry, War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms, 139 U. Pa. L. Rev. 1257 (1991); J. Neil Schulman, The Text of the Second Amendment, 4 J. on Firearms & Pub. Pol'y 159 (1992); Robert E. 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Johnson, Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment, 24 Rutgers L.J. 1 (1992) (arguing that the Ninth Amendment supports an individual right to arms). For a list of all law review articles of firearms policy or the

Second Amendment, See David B. Kopel, Comprehensive Bibliography of the Second Amendment in Law Review, 11 J. Firearms & Pub. Pol. 5 (1999), http:// www.Saf.org/ALLLawReviews.htm.

[FN10]. The nineteenth century scholars were (in roughly chronological order): St. George Tucker; William Rawle; Joseph Story (see infra text at note 354); Henry St. George Tucker; Benjamin Oliver; James Bayard; Francis Lieber; Thomas Cooley (see note 25 infra); Joel Tiffany; Timothy Farrar; George W. Paschal; Joel Bishop; John Norton Pomeroy; Oliver Wendell Holmes, Jr.; Herbert Broom; Edward A. Hadley; Hermann von Holst; John Hare; George Ticknor Curtis; John C. Ordronaux; Samuel F. Miller; J.C. Bancroft Davis; Henry Campbell Black; George S. Boutwell; James Schouler; John Randolph Tucker; and William Draper Lewis. They are discussed in detail in David B. Kopel, The Second Amendment in the 19th Century, 1998 BYU. L. Rev. 1359.

[FN11]. Garry Wills, Why We Have No Right to Bear Arms, N.Y. Rev. Books, Sept. 21, 1995 at 62, 72.

[FN12]. See David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551 (1991); David C. Williams, The Militia Movement and Second Amendment Revolution: Conjuring with the People, 81 Cornell L. Rev. 879 (1996); David C. Williams, The Unitary Second Amendment, 73 N.Y.U. L. Rev. 822 (1998).

[FN13]. See, e.g., Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996) ("the Second Amendment is a right held by the states"); United States v. Nelson, 859 F.2d 1318, 1320 (8th Cir. 1988) ("Later cases have analyzed the Second Amendment purely in terms of protecting state militias, rather than individual rights."); Quilici v. Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (upholding city's ban on handguns; "the debate surrounding the adoption of the Second and Fourteenth Amendments...has no relevance to the resolution of the controversy before us"); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) ("it is clear that the Second Amendment guarantees a collective rather than an individual right"); Eckert v. Philadelphia, 477 F.2d 610 (3d Cir. 1973); United States v. Johnson, 441 F.2d 1134, 1136 (5th Cir. 1971) ("the Second Amendment only confers a collective right of keeping and bearing arms"); United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942) ("not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations"), rev'd on other grounds, 319 U.S. 463 (1943).

[FN14]. See, e.g, Runnebaum v. Nationsbank of Maryland, N.A., 123 F.3d 156 n. 8 (4th Cir. 1997) (en banc, plurality opinion) ("Neither gathering in a group nor carrying a firearm are one of the major life activities under the ADA [Americans with Disabilities Act], though individuals have the constitutional right to peaceably assemble, see U.S. Const. amend. I; and to 'keep and bear Arms,' U.S. Const. amend. II."); United States v. Atlas, 94 F.3d 447, 452 (8th Cir. 1996) (Arnold, C.J., dissenting) ("possession of a gun, in itself, is not a crime. [Indeed, though the right to bear arms is not absolute, it finds explicit protection in the Bill of Rights.]"); Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942) (federal law restricting gun possession by persons under indictment "undoubtedly curtails to some extent the right of individuals to keep and bear arms." Miller test rejected because it would prevent federal government from restricting possession of machine guns by "private persons."); United States v. Emerson, 46 F. Supp.2d 598 (N.D. Tex. 1999) (dismissing criminal prosecution of defendant for violation of 18 U.S.C. 922(g)(8) because the provision violates the Second Amendment; case presents the most thorough exposition of the competing views of the Second Amendment ever presented in a federal court decision); Zappa v. Cruz, 30 F. Supp. 2d 123, 138 (D. P.R. 1998):
These individual liberties, aside from abridging the governments' ability to impose upon individual citizens--e.g., by protecting freedom of religion, prohibiting the quartering of troops and the taking [of] property for public use without compensation, and guaranteeing due process of law--enhance the citizenry's ability to police the government--e.g., by protecting speech, press, the right to assemble, and the right to bear arms.
See also United States v. Gambill, 912 F. Supp. 287, 290 (S.D. Ohio 1996) ("an activity, such as keeping and bearing arms, that arguably implicates the Bill of Rights."); Gilbert Equipment Co. v. Higgins, 709 F. Supp. 1071, 1090 (S.D. Ala. 1989) (Second Amendment "guarantees to all Americans 'the right to keep and bear arms" ', but the right is not absolute and it does not include right to import arms), aff'd 894 F.2d 412 (11th Cir. 1990) (mem.).

[FN15]. See Denning, Simple Cite, supra note 9.

[FN16]. United States v. Miller, 26 F. Supp. 1002, 1003 (W.D. Ark, 1939) (sustaining demurrer to prosecution, because "The court is of the opinion that this section is invalid in that it violates the Second Amendment to the

Constitution of the United States providing, 'A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." ')

[FN17]. Since a federal statute had been found unconstitutional, the federal government was allowed to take the case directly to the Supreme Court, under the law of the time.

[FN18]. See L.A. Powe, Jr., Guns, Words, and Constitutional Interpretation, 38 Wm. & Mary L. Rev. 1311, 1331 (1997), supra note 10.

[FN19]. Miller, 307 U.S. at 177.

[FN20]. See, e.g., English v. State, 24 Tex. 394, 397 (1859); Cockrum v. State, 24 Tex. 394, 397 (1859). A typical formulation is found in the West Virginia case State v. Workman, which construed the Second Amendment to protect an individual's right to own:
the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets--arms to be used in defending the State and civil liberty--and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desparadoes, to the terror of the community and the injury of the State.
State v. Workman, 35 W. Va. 367, 372 (1891).

[FN21]. Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840).

[FN22]. Id. at 158.

[FN23]. Miller, 307 U.S. at 182.

[FN24]. Presser v. Illinois, 116 U.S. 252 (1886) (Second Amendment not violated by ban on armed parades; see infra) text at notes 310-20; Robertson v. Baldwin, 165 U.S. 275 (1897) (Second Amendment not violated by ban on carrying concealed weapons, see infra text at notes 290-96); Fife v. State, 31 Ark. 455 (Second Amendment does not apply to the states; state right to arms not violated by ban on brass knuckles); People v. Brown, 253 Mich. 537, 235 N.W. 245 (1931) (Michigan state constitution right to arms applies to all citizens, not just militiamen; right is not violated by ban on carrying blackjacks); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840) (Tennessee state constitution right to arms and U.S. Second Amendment right belong to individual citizens, but right includes only the types of arms useful for militia service); State v. Duke, 42 Tex. 455 (1874) (Second Amendment does not directly apply to the states; Texas constitution protects "arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State."); State v. Workman, supra note 20.

[FN25]. "Cooley's Constitutional Limitations, Vol. 1, p. 729":
Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms. A standing army is particularly obnoxious in any free government, and the jealousy of one has at times been demonstrated so strongly in England as almost to lead to the belief that a standing army recruited from among themselves was more dreaded as an instrument of oppression than a tyrannical king, or any foreign power. So impatient did the English people become of the very army which liberated them from the tyranny of James II, that they demanded its reduction, even before the liberation could be felt to be complete; and to this day, the British Parliament renders a standing army practically impossible by only passing a mutiny bill from session to session. The alternative to a standing army is "a well-regulated militia," but this cannot exist unless the people are trained to bear arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been little occasion to discuss that subject by the courts.
In a later treatise, Cooley elaborated on how the right to arms ensures the existence of the militia:
The Right is General.--It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated

altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.
Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 281-82 (Boston, Little, Brown 2d ed. 1891). The other scholar cited in the Miller footnote is "Story on The Constitution, 5th Ed., Vol. 2, p. 646":
The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.
And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed, without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.
For more on Justice Story, see text at notes 351 to 355, infra.

[FN26]. Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905) (right to arms in Kansas Bill of Rights is only an affirmance of the state government's supremacy over the militia; the Second Amendment means the same). Another cited case, Jeffers v. Fair, 33 Ga. 347 (1862), is a Confederate draft case.

[FN27]. Infra text at note 280.

[FN28]. One reason for the neglect of the cases may be mistaken claims that the cases do not exist. "Issue Brief", Handgun Control, Inc. website claims, "Since Miller, the Supreme Court has addressed the Second Amendment in two cases." Actually, there have been 19 such cases after Miller. The Second Amendment, http://www.handguncontrol.org/myth.htm.

[FN29]. That the Court has discussed the Second Amendment relatively rarely, compared to the First or Fourth Amendments, does not necessarily mean that the Second Amendment is unimportant. Until recent decades, there was almost no federal gun control to speak of (except for the 1934 National Firearms Act, which was upheld in Miller). That Congress hardly ever passed legislation which arguably infringed the Second Amendment (and which would generate a challenge invoking judicial review) is itself proof of the Second Amendment's influence. "A principle of law is not unimportant because we never hear of it; indeed we may say that the most efficient rules are those of which we hear least, they are so efficient that they are not broken." Frederic W. Maitland, The Constitutional History of England 481-82 (11th ed.) (Cambridge: Cambridge Univ. Pr., 1948).
Similarly, the Third Amendment has received little attention from the Court, but that is not because the Third Amendment can be violated with impunity; to the contrary, the Third Amendment has needed little discussion because it is has been universally respected, and, except in one case, never violated. Engblom v. Carey, 677 F. 2d 957 (2d Cir. 1982), on remand, 572 F. Supp. 44 (S.D. N.Y. 1983), aff'd. per curiam, 724 F.2d 28 (2d Cir. 1983).

[FN30]. Michael C. Dorf, Dicta and Article III, 142 U. Pa. L. Rev. 1997, 2050 (1994) ("All the words used by a court to explain its result contribute to its justification, and parsing the opinion into holding and dictum attributes a degree to precision to the enterprise of judicial decision-making that it lacks in actual practice.")

[FN31]. United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) ("These decisions do not justify today's decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum, and finally elevated to a decision.").

[FN32]. The technique of using broader context to understand isolated statements is not unique to analysis of Supreme Court cases. Biblical scholars, for example, often refer to many different parts of the Bible in order to explain a passage which is confusing or ambiguous in isolation.
Because this article is only about the Second Amendment, it does not analyze Supreme Court cases involving gun

control or the militia in which the Second Amendment was not mentioned

[FN33]. Handgun Control, Inc., The Second Amandment Myth & Meaning <http://www.handguncontrol.org/legalactiona/C2/C2amdbro.htm>:
How many times have you heard an opponent of gun control cite the "right to keep and bear arms" without mentioning the introductory phrase "A well regulated Militia, being necessary to the security of a free state..." ? In fact, some years ago, when the NRA placed the words of the Second Amendment near the front door of its national headquarters in Washington, D.C., it omitted that phrase entirely! The NRA's convenient editing is not surprising; the omitted phrase is the key to understanding that the Second Amendment guarantees only a limited right that is not violated by laws affecting the private ownership of firearms.

[FN34]. See Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. Rev. 793 (1998).

[FN35]. R.I. Const. art. I, § 20 (1842).

[FN36]. N.H. Const. pt. I, art. XXXVI (1784).

[FN37]. Volokh, supra note 35, at 810.

[FN38]. Spencer v. Kemna, 523 U.S. 1, 4 (1998).

[FN39]. Id. at 5.

[FN40]. Id. at 10.

[FN41]. Id. at 36. (Stevens, J., dissenting).

[FN42]. Id. (emphasis added). Numerous state and federal statutes outlaw firearms possession by persons convicted of felonies or certain misdemeanors. Generally speaking, the federal prohibitions are broader than their state counterparts.

[FN43]. Alabama: "That every citizen has a right to bear arms in defense of himself and the state." Ala. Const. art. 1, § 26.
Alaska: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Alaska Const. art. 1, § 19.
Arizona: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." Ariz. Const. art. II, § 26.
Arkansas: "The citizens of this State shall have the right to keep and bear arms for their common defense." Ark. Const. art. II, § 5.
Colorado: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." Colo. Const. art. II, § 13. Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." Conn. Const. art. I, § 15.
Florida: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Fla. Const. art. I, § 8.
Georgia: "The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." Ga. Const. art. I, § 1, para. 5.
Hawaii: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Hawaii Const. art. 1, § 15.
Idaho: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of

firearms, except those actually used in the commission of a felony." Idaho Const. art. 1, § 11.
Illinois: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Ill. Const. art. I, § 22.
Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State." Ind. Const. art. I, § 32.
Kansas: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." Kan. Const., Bill of Rights, § 4.
Kentucky: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:... Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." Ky. Const. § I, para. 7.
Louisiana: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." La. Const. art. 1, § 11.
Maine: "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned." Me. Const. art. I, § 16.
Massachusetts: "The people have a right to keep and bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it." Mass. Const. Pt. I, art. xvii.
Michigan: "Every person has a right to keep or bear arms for the defense of himself and the State." Mich. Const. art. I, § 6.
Mississippi: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." Miss. Const. art. III, § 12.
Missouri: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed Weapons." Mo. Const. art. 1, § 23.
Montana: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons." Mont. Const. art. II, § 12.
Nebraska: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Neb. Const. Art. I, § 1.
Nevada: "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." Nev. Const. art. 1, § 11(1).
New Hampshire: "All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the State." N.H. Const. Pt. I, art. 2a.
New Mexico: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons." N.M. Const. art. II, § 6. North Carolina: "A well regulated militia being necessary to be the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice." N.C. Const. art. I, § 30.
North Dakota: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed." N.D. Const. Art. I, § 1.
Ohio: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power."

Ohio Const. art. I, § 4.
Oklahoma: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons." Okla. Const. art. 11, § 26.
Oregon: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." Or. Const. art. I, § 27.
Pennsylvania: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." Pa. Const. art. I, § 21.
Rhode Island: "The right of the people to keep and bear arms shall not be infringed." R.I. Const. art. 1, § 22.
South Carolina: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law." S.C. CONST. art. I, § 20.
South Dakota: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. Const. art. VI, § 24. Tennessee: "That the citizens of this State have a right to keep and bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." Tenn. Const. art. I, § 26.
Texas: "Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." Tex. Const. art. 1, § 23.
Utah: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms." Utah Const. art. 1, § 6.
Vermont: "That the people have a right to bear arms for the defence of themselves and the State-and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power." Vt. Const. Ch. I, art. 16.
Virginia: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power." Va. Const. art. I, § 13.
Washington: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of Men." Wash. Const. art. I, § 24.
West Virginia: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. Va. Art. III, § 22.
Wisconsin: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Wis. Const. Art. I, § 25.
Wyoming: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." Wyo. Const. art. I, § 24.
In addition, New York State's Civil Right Law has a statutory provision which is a word for word copy of the Second Amendment. N.Y. Civ. Rights § 4.

[FN44]. See United States v. Thompson/Center Arms Co., 504 U.S. 505,526 (1992); Printz v. United States, 521 U.S. 898 (1997) (Stevens, J., dissenting); United States v. Lopez, 512 U.S. 1286 (1994) (Stevens, J., dissenting).

[FN45]. Contrast Justice Stevens' view with that of Justice Blackmun in the Lewis case, infra notes 94-113; the Blackmun opinion suggests that the right to arms is so unimportant that a person may be imprisoned for the exercise of that right after conviction of a crime--even if the conviction is concededly unconstitutional.

[FN46]. 18 U.S.C. § 924(c)(1).

[FN47]. United States v. Muscarello, 524 U.S. 125 (1998).

[FN48]. Justice Scalia has not written an opinion on the Second Amendment, but he has expressed his views out of

court:
So also, we value the right to bear arms less than did the Founders (who thought the right to self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may...like elimination of the right to bear arms; but let us not pretend that these are not reductions of rights.
Antonin Scalia, A Matter of Interpretation 43 (1997).

[FN49]. Muscarello, 524 U.S. at 139-50 (Ginsburg, J., dissenting).

[FN50]. Id. (footnotes omitted).

[FN51]. First: "[t]o support; to sustain; as, to bear a weight or burden" Second: "To carry; to convey; to support and remove from place to place" . 3:" [[t]o wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat." Noah Webster, An American Dictionary of the English Language (1828) (emphasis in originagl).

[FN52]. Volokh, supra note 35, at 810.

[FN53]. Id.

[FN54]. Garry Wills, Why We Have No Right to Bear Arms, N.Y. Rev. Books, Sept. 21, 1995, at 62.

[FN55]. Id.

[FN56]. Id. at 64.

[FN57]. During the Senate Judiciary Committee hearings on Ruth Bader Ginsburg's nomination to the Supreme Court, Senator Dianne Feinstein (a strong supporter of gun prohibition) asked Mrs. Ginsburg about the Second Amendment. Mrs. Ginsburg politely refused to say anything, except that the Amendment had not been incorporated.
Sen. Feinstein:
Let me begin with the Second Amendment. I first became concerned about what does the Second Amendment mean with respect to guns in 1962 [sic] when President Kennedy was assassinated...
Judge Ginsburg:
Senator Feinstein, I can say on the Second Amendment only what I said earlier, the one thing that the court has held, that it is not incorporated in the Bill of Rights [sic, 14th Amendment], it does not apply to the states. The last time the Supreme Court spoke to this question is in 1939. You summarized what that was and you also summarized the state of law in the lower courts. But this is a question that may well be before again, and all I can do is to acknowledge what I understand to be the current case law, that this is not incorporated in--that this is not one of the provisions binding on the states. The last time the Supreme Court spoke to it is in 1939, and because of where I sit, it would be inappropriate for me to say anything more than that. I would have to consider, as I've said many times today, the specific case, the briefs and the arguments that would be made, and it would be injudicious for me to say anything more with respect to the Second Amendment.
....
Sen. Feinstein:
[C]ould you talk at all about the methodology you might apply, what factors you might look at in discussing Second Amendment cases should Congress, say, pass a ban on assault weapons?
Judge Ginsburg:
I wish I could, Senator, but all I can tell you is that this is an amendment that has not been looked at the by the Supreme Court since 1939, and it-- apart from the specific context, I can't--I really can't expound on it. It's an area of law in which my court has had no business and one I had no acquaintance as a law teacher. So really feel that I'm not equipped beyond what I already told you, that it isn't an incorporated amendment. The Supreme Court has not dealt with it since 1939. And I would proceed with the care I would give to any serious constitutional question.
At Justice Breyer's confirmation hearing, Senator Feinstein raised similar issues. He answered:
As you recognize, Senator, the Second Amendment does--is in the Constitution. It provides a protection. As you also

have recognized, the Supreme Court law on the subject is very, very, very few cases. This really hasn't been gone into in any depth by the Supreme Court at all. Like you, I've never heard anyone even argue that there's some kind of constitutional right to have guns in a school. And I know that every day--not every day; I don't want to exaggerate--but every week or every month for the last 14 years I've sat on case after case in which Congress has legislated rules, regulations, restrictions of all kinds on weapons.
That is to say there are many, many circumstances in which carrying weapons of all kinds is punishable by very, very, very severe penalties. And Congress often--I mean by overwhelming majorities--has passed legislation imposing very severe additional penalties on people who commit all kinds of crimes with guns, even various people just possessing guns under certain circumstances.
And in all those 14 years, I've never heard anyone seriously argue that any of those was unconstitutional in a serious way. I shouldn't say never, because I don't remember every case in 14 years. So, obviously, it's fairly well conceded across the whole range of society, whatever their views about gun control legislatively and so forth that there's a very, very large area for government to act. At the same time, as you concede and others, there's some kind of protection given in the Second Amendment.
Now that's, it seems to me, where I have to stop, and the reason that I have to stop is we're in a void in terms of what the Supreme Court has said. There is legislation likely to pass or has recently passed that will be challenged, and therefore I, if I am on that Court, have to listen with an open mind to the arguments that are made in the particular context.
Sen. Feinstein:
Well, would you hold that the 1939 decision [Miller] is good law?
Justice Breyer:
I've not heard it argued that it's not, but I haven't reviewed the case and I don't know the argument that would really come up. I know that it's been fairly limited, what the Supreme Court has said. And I know that it's been fairly narrow. I also know that other people make an argument for a somewhat more expanded view. But nobody that I've heard makes the argument going into these areas where there is quite a lot of regulation already. I shouldn't really underline no one, because you can find, you know, people who make different arguments. But it seems there's a pretty broad consensus there. Sen. Feinstein:
Would you attach any significance to the framers of the Second Amendment, where it puts certain things in capital letters?
Justice Breyer:
I'm sure when you interpret this you do go back from the text to the history and try to get an idea of what they had in mind. And if there is a capital letter there, you ask why is there this capital letter there, somebody had an idea, and you read and try to figure out what the importance of that was viewed at the time and if that's changed over time. Sen. Judiciary Comm., Confirmation Hearing for Stephen Breyer, July 13, 1994, Federal News Service Lexis library.

[FN58]. Printz v. United States, 521 U.S. 898 (1997)

[FN59]. Id. at 937 (Thomas, J., concurring).

[FN60]. The Civil Rights Act of 1964 used the interstate commerce power to regulate parties to commercial transactions, such as hotel or restaurant guests and owners. But the Brady Act attempted to expand the interstate commerce power even further, by forcing third parties to become involved in the commercial transaction. The Brady Act commandeered local sheriffs and police to perform background checks on a commercial act--the retail sale of a handgun. It was as if the Civil Rights Act had compelled state and local government employees to serve as race sensitivity mediators in hotel and restaurants. It was one thing to use the interstate commerce power to regulate commerce. It is another thing use that power to force people who are stranger to the commercial transaction to get involved. See David B. Kopel, The Brady Bill Comes Due: The Printz Case and State Autonomy, Geo. Mason Univ. Civ. Rights L.J. 189 (1999).

[FN61]. Printz, 521 U.S. at 937-38 (Thomas, J., concurring).

[FN62]. Id.

[FN63]. In contrast to the suggestion that the Bill of Rights might "confer" the right to bear arms, the Supreme Court in the 1875 case of United States v. Cruikshank stated that the Second Amendment, like the First Amendment, does

not confer rights on anyone. Rather, those Amendments simply recognized and protected pre-existing human rights. See text at notes 321 to 328.

[FN64]. Printz, 521 U.S. at 938-39 (Thomas, J., concurring).

[FN65]. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

[FN66]. Printz, 521 U.S. at 938 (Thomas, J., concurring).

[FN67]. See Robertson v. Denver, 874 P.2d 325 (Colo. 1994); Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993). For a discussion of these cases, see David Kopel, Clayton Cramer & Scott Hattrup, A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts, 68 TEMP. L. REV. 1177 (1995).

[FN68]. Printz, 521 U.S. at 938-39 (Thomas, J., concurring).

[FN69]. Id.

[FN70]. Id. at 939 (citing 3 J. Story, Commentaries § 1890, p. 746 (1833)).

[FN71]. See United States v. Miller, 307 U.S. 174 (1939).

[FN72]. Printz, 521 U.S. at 939 (Thomas, J., concurring). See note 9 supra.

[FN73]. See Adamson v. California, 332 U.S. 46, 78 (Black, J., dissenting).

[FN74]. See Levinson, supra note 9.

[FN75]. Albright v. Oliver, 510 U.S. 266 (1994). The only evidence against the person falsely accused came from a paid informant who had provided false information more than 50 times before. Id. at 292 (Stevens, J., dissenting). For more on the degradation of law enforcement caused by over- reliance on informants, especially in drug and gun cases, see generally David B. Kopel and Paul H. Blackman, The Unwarranted Warrant: The Waco Warrant and the Decline of Law Enforcement, 18 Hamline J. Pub. L. & Pol 1 (1999).

[FN76]. Albright, 510 U.S. at 274-275.

[FN77]. Id. at 306-08 (Stevens, J., dissenting).

[FN78]. Id. at 307 (Stevens, J., dissenting) (footnote marker omitted) (emphasis added).

[FN79]. Poe v. Ullman, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting).

[FN80]. See discussions of Planned Parenthood v. Casey, infra text at notes 82-84; Moore v. East Cleveland, infra text at notes 115-36; Roe v. Wade, infra text at notes 146-53.

[FN81]. Infra note 180.

[FN82]. Planned Parenthood v. Casey, 505 U.S. 833, 848-49 (1992).

[FN83]. Id. at 841.

[FN84]. Infra at notes 200 to 204.

[FN85]. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

[FN86]. The evidence was some of Verdugo-Urquidez's personal papers. Under the original intent of the Fourth and

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

[FN87]. Verdugo-Urquidez, 494 U.S. at 265.

[FN88]. Verdugo is of course a Fourth Amendment case, not a Second Amendment case. But there is no reason to believe that the Court did not mean what it said about the Second Amendment in Verdugo.
Oddly, some of the same persons who want the public to ignore what the Supreme Court said about the Second Amendment in the Verdugo case instead want the public to rely on what a retired justice said about the Second Amendment in a forum with much less precedential value than a Supreme Court decision or a law journal: an article in Parade magazine.
While on the Supreme Court, Chief Justice Warren Burger never wrote a word about the Second Amendment. After retirement, he wrote an article for Parade magazine that is the only extended analysis by any Supreme Court Justice of why the Second Amendment does not guarantee an individual right. Warren Burger, The Right to Bear Arms, Parade, Jan. 14, 1990, at 4-6.
Chief Justice Burger argued that the Second Amendment is obsolete because we "need" a large standing army, rather than a well-armed citizenry. But the notion that constitutional rights can be discarded because someone thinks they are obsolete is anathema to a written Constitution. If a right is thought "obsolete," the proper approach is to amend the Constitution and remove it. After all, the Seventh Amendment guarantees a right to a jury trial in all cases involving more than twenty dollars. U.S. Const. amend. VII. In 1791, twenty dollars was a lot of money; today it is little more than pocket change. Nevertheless, courts must (and do) enforce the Seventh Amendment fully.
And while the Second Amendment certainly drew much of its original support from fear of standing armies, its language is not limited to that issue. "Legislation, both statutory and constitutional, is enacted,...from an experience of evils...its general language should not, therefore, be necessarily confined to the form that evil had heretofore taken...[A] principle to be vital must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910).
Yet after attacking the Second Amendment as obsolete, Chief Justice Burger's essay affirmed that "Americans have a right to defend their homes." If this right does not derive from the Second Amendment, does it come from the Ninth Amendment, as Nicholas Johnson has argued? See Nicholas Johnson, Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment, 24 RUTGERS L.J. 1, 49 (1992). The Burger essay does not say.
Next comes the real shocker: "Nor does anyone seriously question that the Constitution protects the right of hunters to own and keep sporting guns for hunting game any more than anyone would challenge the right to own and keep fishing rods and other equipment for fishing--or to own automobiles."
In a single sentence, the former Chief Justice asserts that three "Constitutional rights"--hunting, fishing, and buying cars--are so firmly guaranteed as to be beyond question. Yet no Supreme Court case has ever held any of these activities to be Constitutionally protected.
What part of the Constitution protects the right to fish? The 1776 Pennsylvania Constitution guaranteed a right to fish and hunt, and the minority report from the 1789 Pennsylvania ratifying convention made a similar call. Various common law sources (such as St. George Tucker's enormously influential American edition of Blackstone) likewise support hunting rights. 3 William Blackstone, Commentaries 414 n.3 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803). And some state Constitutions guarantee a right to arms for hunting, among other purposes. See, e.g,, the state constitutions of New Mexico, Nevada, West Virginia, and Wisconsin, supra note 43.
But the Supreme Court has never recognized such a right, and its lone decision on the subject is to the contrary. Patsone v. Pennsylvania, 232 U.S. 138 (1914) (ban on possession of hunting guns by aliens is legitimate, because the ban does not interfere with gun possession for self-defense; the Court did not discuss the Second Amendment). Similarly, the "right" to own automobiles could, arguably, be derived from the right to interstate travel but it is hardly a settled matter of law, despite what the Chief Justice seemed to say.
Chief Justice Burger contrasted "recreational hunting" guns with "Saturday Night Specials" and "machine guns," implying that the latter two are beyond the pale of the Constitution. Thus, according to the Parade essay, some unidentified part of the Constitution (but not the Second Amendment) guarantees a right to own guns for home

defense, a right to own hunting guns, a right to fishing equipment, and a right to buy automobiles. But the Constitution does not guarantee the right to own inexpensive handguns or machine guns.
Chief Justice Burger's "machine gun" comment was particularly odd in light of what he was pictured holding on the front cover of Parade: an assault weapon. The Chief Justice displayed his grandfather's rifled musket, with which his grandfather had killed or attempted to kill people during the Civil War. While the musket seems quaint and non-threatening today, it was a state of the art assault weapon in its time. Under the Miller test (arms suitable for militia use; see supra text at note 19), the nineteenth century rifled musket and the twentieth century machine gun would seem to be much closer to the core of the Second Amendment than would "recreational hunting guns."
After writing the Parade essay, Chief Justice Burger participated in an advertising campaign for Handgun Control, Inc., in which he called the NRA's view of the Second Amendment "a fraud." Given that the Chief Justice agreed with the NRA that the Constitution protects a right to own home defense guns and recreational sporting guns, and disagreed with the NRA about "Saturday Night Specials," the "fraud" rhetoric was rather extreme. Was it reasonable to call the NRA fraudulent for locating the right in the Second Amendment, as opposed to the other (unknown) part of the Constitution that the Chief Justice would prefer?

[FN89]. Verdugo-Urquidez, 494 U.S. at 282 (Brennan, J., dissenting).

[FN90]. Handgun Control explains Verdugo thusly:
But the issue of whether the right to bear arms is granted to "the people" only in connection with militia service is not even addressed in the Verdugo-Urquidez decision. At most, the decision implies that the Second Amendment right extends only to U.S. citizens; it does not address the precise scope of the right granted. In no way does the Court's ruling contradict the idea that the right of the people to bear arms is exercised only through membership in a "well regulated Militia."
Handgun Control, Exploding the NRA's Second Amendment Indeology: A Guide for Gun Control Advocates, http://www.handguncontrol.org/legalaction/C2/C2myth.htm. Here, Henigan is apparently adopting an alternative theory of the Second Amendment. Rather than the Second Amendment guaranteeing a right to state governments (as Henigan claimed in his law review articles), the Second Amendment is now a right that does belong to people (rather than to state governments), but this right only applies to people in a well-regulated militia. This is also the view of Herz. See generally Herz, supra note 6. But neither Henigan nor Herz explain what this right might mean. Does a National Guardsman have a legal cause of action when the federal government takes away his rifle? Even though the rifle is owned by the federal government? See 32 U.S.C. § 105(a)(1).
If a disarmed National Guardsman does not have a cause of action, then who else could exercise the Second Amendment right to be armed in "a well- regulated militia" ? The fundamental problem with Henigan's theories (and with those of his followers) is that the theories are not meant as an actual explanation of anything. They are meant to convince people that the Second Amendment places no restraint on gun control, but the theories are not meant to describe what the Second Amendment does protect.

[FN91]. United States v. Verdugo-Urquidez, 856 F. 2d 1214, 1239 (9th Cir. 1988) (Wallace, J., dissenting), rev'd 494 U.S. 259 (1990) ("Besides the fourth amendment, the name of 'the people' is specifically invoked in the first, second, ninth, and tenth amendment. Presumably, 'the people' identified in each amendment is coextensive with 'the people' cited in the other amendments.")

[FN92]. 494 U.S. 259 (1990).

[FN93]. Lewis v. United States, 445 U.S. 55 (1980).

[FN94]. 18 U.S.C. App. § 1202(a)(1).

[FN95]. Lewis, 445 U.S. at 57-58.

[FN96]. Id. (citing Gideon v. Wainright, 372 U.S. 335 (1963)).

[FN97]. Gideon v. Wainright, 372 U.S. 335, 345 (1963).

[FN98]. Lewis, 445 U.S. at 62-63 (citing 114 Cong. Rec. 14773 (1968)).

[FN99]. Id. at 62.

[FN100]. Powell v. Alabama, 287 U.S. 45 (1932).

[FN101]. Lewis, 445 U.S. at 69 (Brennan, J., dissenting).

[FN102]. Id. at 66.

[FN103]. Id. at 65-66, n. 8

[FN104]. Printz v. United States, 521 U.S. 898 (1997)

[FN105]. United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) (statutory interpretation case holding that a handgun and rifle kit was not subject to a National Firearms Act tax applicable to short rifles; that a buyer could illegally assemble certain parts to create a short rifle did not bring the lawful sale of rifle and handgun components within the terms of the tax statute).

[FN106]. Stephen Halbrook, Firearms Law Deskbook 1-11 to 1-12 (1999 ed.)

[FN107]. United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 363 F. Supp. 322, 323 (E.D. Wis. 1973).

[FN108]. Cody v. United States, 460 F.2d 34 (8th Cir. 1972).

[FN109]. As in this quote from Cody, the First Circuit's 1943 Cases decision is sometimes cited as a lower court following Miller. See Cases v. United States, 131 F.2d 916 (1st Cir. 1942). To the contrary, Cases limits Miller to its facts, and refuses to apply the Miller relationship-to-the- militia test. The Miller test, explained the Cases judges, would allow "private citizens" to possess machine guns and other destructive weapons. Cases upholds a federal gun control law while acknowledging that the law limits the exercise of Second Amendment rights.

[FN110]. Cody, 460 F.2d at 36.

[FN111]. Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

[FN112]. See. e.g., Miller, 307 U.S. at 178.

[FN113]. See, e.g., Cockrum v. State, 24 Tex. 394, 397 (1859).

[FN114]. Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840) (right to arms is for defense against tyranny, not for "private" defense; while "The citizens have the unqualified right to keep the weapon", the legislature can restrict the carrying of firearms) (emphasis in original).

[FN115]. Moore v. East Cleveland, 431 U.S. 494, 495-96 (1976).

[FN116]. Id. at 505-06.

[FN117]. Id. at 496-97.

[FN118]. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[FN119]. Albright v. Oliver, 510 U.S. 266, 306-08 (1994) (Stevens, J., dissenting).

[FN120]. Moore, 431 U.S. at 502.

[FN121]. Id. at 542 (White, J., dissenting).

[FN122]. 1 Wm. & Mary sess. 2, ch. 2 (1689); see also Malcolm, supra note 9.

[FN123]. Eugene Volokh, Sources on the Second Amendment and Rights to Keep and Bear Arms in State Constitutions, pt. I <http:// www.law.ucla.edu/faculty/volokh/ 2amteach/sources.htm#TOC1>; David Young, The Origin of the Second Amendment (1991).

[FN124]. See Young, supra note 123.

[FN125]. Buzzard v. State, 20 Ark. 106 (1842).

[FN126]. Kopel, The Second Amendment in the 19th Century, supra note 10.

[FN127]. Gary Kleck, Targeting Guns: Firearms and Their Control (1997).

[FN128]. The dominant line of traditional cases limits the scope of "arms" protected by the Second Amendment to arms which an individual could use in a militia; in the nineteenth century, rifles and swords were the paradigm of such weapons. Kopel, The Second Amendment in the 19th Century, supra note 10. A minority line of cases goes further, and protects weapons which could be useful for personal defense, even if not useful for militia service. See, e.g., State v. Kessler, 614 P.2d 94 (Or. 1980) (billy club); State v. Delgado, 692 P.2d 610 (Or. 1984) (switchblade knife).

[FN129]. In one state, Massachusetts, the highest court has construed the right as belonging to the state government, rather than to individuals. Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847 (1976). But see Commonwealth v. Murphy 166 Mass. 171, 44 N.E. 138 (1896). In Kansas, a 1905 case held that the right in the state constitution belonged to the state government, and not to the people. City of Salinas v. Blaksley, 72 Kan. 230, 83 P. 619 (1905) This holding was implicitly rejected in a later case. Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979).

[FN130]. John R. Lott, Jr., More guns, less crime: understanding crime and gun-control laws. (Univ. of Chicago Press, 1998).

[FN131]. Vermont and Idaho (outside Boise, where a permit is required and readily obtainable).

[FN132]. Akhil Amar, The Bill of Rights 77-78 (1998).

[FN133]. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

[FN134]. Moore, 431 U.S. at 502.

[FN135]. "With respect to handguns... it is not easy to understand why the Second Amendment, or the notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking numbers of murders in the United States." American Bar Association Speech, Toronto, Canada, Aug. 7, 1988.

[FN136]. The MacNeil/Lehrer NewsHour, Mar.16, 1989, trans. no. #3389, Lexis Transcripts library:
MR. LEHRER: Another issue that was before the court and is still before the nation as we go into a new year is the subject of gun control. You have said that the constitution does not guarantee the right to bear arms. Explain that.
JUSTICE POWELL: Have you read the second amendment?
MR. LEHRER: Well, I think I have but be my guest.
JUSTICE POWELL: Well, it talks about militia. In the days that the amendment was adopted in 1791, each state had an organized militia. The states distrusted the national government, didn't believe a national government had the authority or the ability to protect their liberties, so the militia was a very important factor to the states. This court decided a case that I haven't seen decided, I'm not a hundred percent sure, I think it was the United States against Miller decided back in the late 30's, in which the question involved a sawed off shot gun. I won't go into the details of the opinion, but in essence, there's language in that that suggests what I believe, and that is that the second amendment was never intended to apply to hand guns or, indeed to sporting rifles and shot guns. I've had a shot gun since I was 12 years old and I still occasionally like to shoot birds, but hand guns certainly were not even dreamed of in the sense that they now exist at the time the second amendment was adopted.

Actually, handguns had been invented and were well known by 1789. See Ian V. Hogg, The Illustrated Encylopedia of Firearms (1978). Handguns were common enough in the early sixteenth century so that proposed legislation as early as 1518 addressed them. Id. at 16-17. By the latter part of the 1500s, handguns had become standard cavalry weapons. Id. at 17. When the Second Amendment was ratified, state militia laws requiring most men to supply their own firearms required officers to supply their own pistols.

[FN137]. Adams v. Williams, 407 U.S. 143 (1972).

[FN138]. Id. at 144-45.

[FN139]. Id. at 149.

[FN140]. Id. at 149 (Douglas, J., dissenting).

[FN141]. Id. at 150-51. Justice Douglas was a newly-appointed member of the Court that decided Miller, but he did not participate in the case, having joined the Court after the case was argued. Justice Black (whose views on the Second Amendment are found infra at notes 179-82, 194-96, 221-28) did serve on the Miller Court, and joined in the unanimous decision.

[FN142]. Id. at 153 (Brennan, J., dissenting).

[FN143]. Id. at 151-52.

[FN144]. See Lott, supra note 130.

[FN145]. Adams, at 153 (Marshall, J., dissenting).

[FN146]. Roe v. Wade, 410 U.S. 113 (1973).

[FN147]. See, e.g., William Van Alstyne, Closing The Circle Of Constitutional Review from Griswold v. Connecticut To Roe v. Wade: An Outline Of A Decision Merely Overruling Roe, 1989 Duke L.J. 1677.

[FN148]. Roe, 410 U.S. at 167-68 (Stewart, J., concurring).

[FN149]. Poe v. Ullman, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting).

[FN150]. Id. at 167. Roe, 410 U.S. 113.

[FN151]. Planned Parenthood v. Casey, 505 U.S. 833, 848-49 (1992).

[FN152]. Moore v. East Cleveland, 431 U.S. 494, 502 (1976).

[FN153]. Albright v. Oliver, 510 U.S. 266 (1994); Moore, 410 U.S. at 542.

[FN154]. Roe v. Wade, 410 U.S. 113, 169 (1973).

[FN155]. Adams v. Williams, 407 U.S. 143 (1972).

[FN156]. Laird v. Tatum, 408 U.S. 1, 2-3 (1972).

[FN157]. Id. at 3.

[FN158]. Id. at 15-16.

[FN159]. Id.

[FN160]. Id. at 16-17 (Douglas, J., dissenting).

[FN161]. Id.

[FN162]. Id. at 17-18.

[FN163]. Earl Warren, The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181, 185 (1962).

[FN164]. Laird, 408 U.S. at 22-23, quoting Earl Warren, The Bill of Rights and the Military, supra note 163. (emphasis added).

[FN165]. For the best analysis of how Madison synthesized two different traditions in the Second Amendment (the republican militia theory in the purpose clause, and the human rights theory in the main clause), see Hardy, Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment, supra note 9.

[FN166]. Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934).

[FN167]. Burton v. Sills, 394 U.S. 812 (1969).

[FN168]. Burton v. Sills, 248 A.2d 521 (N.J. 1968).

[FN169]. Burton, 394 U.S. at 812.

[FN170]. Id.

[FN171]. Id. The decision was per curiam, with Justice Brennan not participating.

[FN172]. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

[FN173]. The New Jersey court in Burton could never be charged with excessive regard for individual rights, for the court wrote, "the common good takes precedence over private rights...Our basic freedoms may be curtailed if sufficient reason exists therefor. Only in a very limited sense is a person free to do as he pleases in our modern American society." Burton v. Sills, 240 A.2d 432, 434 (N.J. 1968). In contrast, the New Jersey Supreme Court in 1925 had recognized "The right of a citizen to bear arms," but had explained that the right "is not unrestricted." Hence, a law requiring a license to carry a concealed revolver was not unconstitutional. State v. Angelo, 3 N.J. Misc. 1014 (Sup. Ct. 1925). Since New Jersey is one of the few states without a state constitutional right to arms, the court's reference to the "right of the citizen" must have been a reference to the Second Amendment.

[FN174]. For Presser see infra text at notes 310-20.

[FN175]. Id.

[FN176]. Printz v. United States, 521 U.S. 898, 937 (1997) (Thomas, J., concurring).

[FN177]. Mandel, 432 U.S. at 176.

[FN178]. Presser v. Illinois, 116 U.S. 252 (1886).

[FN179]. Duncan v. Louisiana, 391 U.S. 145 (1968).

[FN180]. Adamson v. California, 332 U.S. 46, 68-78 (1947) (Black, J., dissenting).

[FN181]. Duncan, 391 U.S. at 164-65 (Black, J., concurring).

[FN182]. Id. at 166-67 (quoting Cong. Globe, 39th Cong., 1st Sess., at 2765-66 (1866)) (emphasis added).

[FN183]. Infra notes 194-97, 221-28.

[FN184]. Malloy v. Hogan, 378 U.S. 1 (1964).

[FN185]. Id. at 5 n. 2.

[FN186]. Id.

[FN187]. See United States v. Cruikshank, 92 U.S. 542, 551 (1875) (right to assemble); Prudential Ins. Co . v. Cheek, 259 U.S. 530, 543 (1922) (First Amendment); Weeks v. United States, 232 U.S. 383, 398 (1914) (Fourth Amendment); Hurtado v. California, 110 U.S. 516, 538 (1884) (Fifth Amendment requirement of grand jury indictments); Palko v. Connecticut, 302 U.S. 319, 328 (1937) (Fifth Amendment double jeopardy); Maxwell v. Dow, 176 U.S. 581, 595 (1900) (Sixth Amendment jury trial); Walker v. Sauvinet, 92 U.S. 90, 92 (1875) (Seventh Amendment jury trial); In re Kemmler, 136 U.S. 436 (1890) (Eighth Amendment cruel and unusual punishment, electrocution); McElvaine v. Brush, 142 U.S. 155 (1891); O'Neil v. Vermont, 144 U.S. 323, 332 (1892) (Eighth Amendment prohibition against cruel and unusual punishment). Except for Hurtardo and Walker, of these cases have been undone by later cases.

[FN188]. Konigsberg v. State Bar of California, 366 U.S. 36 (1961)

[FN189]. Id. at 57-58 (Black, J., dissenting).

[FN190]. Id. at 44.

[FN191]. See Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 433 (1985).

[FN192]. Konigsberg, 366 U.S. at 49-50.

[FN193]. Id. at 51.

[FN194]. Id. at 49-50 (emphasis added).

[FN195]. Hugo L. Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865 (1960).

[FN196]. Id. at 872.

[FN197]. Id. at 873.

[FN198]. Id. at 865.

[FN199]. Poe v. Ullman, 367 U.S. 497 (1961).

[FN200]. Id. at 542-43 (Harlan, J., dissenting) (emphasis added).

[FN201]. Albright v. Oliver, supra note 78; Planned Parenthood v. Casey, supra note 83; Moore v. East Cleveland, supra notes 120-21.

[FN202]. Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[FN203]. Nebbia v. New York, 291 U.S. 502 (1934).

[FN204]. Griswold v. Connecticut, 381 U.S. 479 (1965).

[FN205]. Poe, 367 U.S. at 541.

[FN206]. Id. at 516 (Douglas, J., dissenting):

When the Framers wrote the Bill of Rights they enshrined in the form of constitutional guarantees those rights--in part substantive, in part procedural--which experience indicated were indispensible to a free society....[T]he constitutional conception of "due process" must, in my view, include them all until and unless there are amendments that remove them. That has indeed been the view of a full court of nine Justices, though the members who make up that court unfortunately did not sit at the same time.
Justice Douglas's list of Justices who favored full incorporation of the Bill of Rights named Bradley, Swayne, Field, Clifford, the first Harlan, Brewer, Black, Murphy, Rutledge, and Douglas. Id. at 516 n.8.

[FN207]. Adams v. Williams, 407 U.S. 143, 149 (1972) (Douglas, J., dissenting).

[FN208]. Knapp v. Schweitzer, 357 U.S. 371 (1958).

[FN209]. Id. at 378-79.

[FN210]. Johnson v. Eisentrager, 339 U.S. 763 (1950).

[FN211]. Id. at 765-66.

[FN212]. Id. at 776.

[FN213]. Id. at 782.

[FN214]. Id.

[FN215]. The Fifth Amendment's prohibition on trial by court martial does not, by its own terms, apply to soldiers in the standing army (or to militiamen engaged in militia duty).

[FN216]. Id. at 784 (emphasis added).

[FN217]. The characters in the hypothetical are not militia members either. A militia is an organized force under government control. In contrast, "guerrilla fighters" or "were-wolves" are small groups or individuals functioning in enemy territory beyond the reach of any friendly government. The legal distinction was of great importance during World War II. Switzerland, for example, made extensive plans for its militia forces (consisting of almost the entire able-bodied adult male population) to resist a German invasion to the last man. But the Swiss government also warned its citizens not to engage in guerrilla warfare on their own; the militiamen fighting the Germans would be entitled to the protection of the rules of war and international conventions, but guerrillas would not. See Stephen Halbrook, Target Switzerland (1998). Having served as a judge of the Nuremburg Trials, Justice Jackson was presumably familiar with the distinctions in the international law of war between guerillas and soldiers/militia.

[FN218]. During the Civil War, in 1864, an Indiana man Lambdin P. Milligan was charged with aiding the southern rebellion against the national government. Although Indiana was under full union control, and courts in Indiana were functioning, Milligan was tried before a military court martial and sentenced to death. In 1866, a unanimous Supreme Court overturned Milligan's conviction, holding that martial law can only be applied in theaters of war, and not in areas where the civil courts were functioning. Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
The Court did not discuss the Second Amendment, but in argument to the Court, the Attorney General of the United States did. During the argument before the Court, Milligan's lawyers had claimed that Congress could never impose martial law. They pointed out that the Fourth Amendment (no searches without warrants), the Fifth Amendment (no criminal trials without due process), and the Sixth Amendment (criminal defendants always have a right to a jury trial) do not contain any exceptions for wartime.
The Attorney General, who was defending the legality of Milligan's having been sentenced to death by court martial, retorted that under conditions of war, the protections of the Bill of Rights do not apply. Thus, the federal government could disarm a rebel, without violating his Second Amendment right to keep and bear arms. The Attorney General urged the Court to construe the Second, Third, Fourth, Fifth and Sixth Amendments in pari materia:
After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the

President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration..... Much of the argument on the side of the petitioner will rest, perhaps, upon certain provisions not in the Constitution itself, and as originally made, but now seen in the Amendments made in 1789: the fourth, fifth, and sixth amendments. They may as well be here set out:

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

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

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

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

2. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

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

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

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

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

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

Id. at 29-33.

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

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

Field had made much of the fact that the Fifth Amendment's requirement that persons could only be tried if they had first been indicted by a grand jury had an explicit exception for military circumstances ("except in cases arising in

the land or naval forces, or in the militia when in actual service in time of war or public danger"). Field pointed out that Milligan (an Indiana civilian with Confederate sympathies) was obviously not within the terms of the exception. In response, the Attorney General turned the argument over to Benjamin Franklin Butler. A very successful lawyer, Butler had been one of the most prominent Union Generals during the Civil War; a few months after his Supreme Court argument, Butler would be elected to Congress from Massachusetts, and would become one of the leading Radical Republicans.

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

...the constitution provides that "no person" shall be deprived of liberty without due process of law. And yet, as we know, whole generations of people in this land--as many as four millions of them at one time--people described in the Constitution by this same word, "persons," have been till lately deprived of liberty ever since the adoption of the Constitution, without any process of law whatever.

The Constitution provides, also, that no "person's" right to bear arms shall be infringed; yet these same people, described elsewhere in the Constitutions as "persons," have been deprived of their arms whenever they had them." Id. at 178-79.

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

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

[FN219]. Adamson v. California, 332 U.S. 46, 48 (1947).

[FN220]. U.S. Const. amend. V.

[FN221]. Adamson, 332 U.S. at 58-59. (Adamson was overruled by the Supreme Court in the 1964 decision Malloy v. Hogan, infra note 183).

[FN222]. U.S. Const. amend. XIV.

[FN223]. Adamson, 332 U.S. at 70-71 (Black, J., dissenting).

[FN224]. Id. at 92-124.

[FN225]. Id. at 93 (citing Cong. Globe, 39th Cong., 1st Sess. (1865) 474).

[FN226]. Id. (citing Cong. Globe, 39th Cong., 1st Sess. (1865) 474).

[FN227]. Id. at 104-07 (emphasis added).

[FN228]. Id. at 119 (emphasis added).

[FN229]. Id. at 120.

[FN230]. Id. at 124 (Murphy, J., dissenting).

[FN231]. Supra note 228.

[FN232]. Id. at 73.

[FN233]. Id. at 74.

[FN234]. Id. at 76.

[FN235]. Id. at 77.

[FN236]. Stephen Halbrook cites the case, but for another point. See Stephen Halbrook, Firearms Law Deskbook, supra note 106, at 8-44 n.131.

[FN237]. Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934).

[FN238]. Id. at 250-51.

[FN239]. Id. at 260-61.

[FN240]. For a discussion of this point, see Glenn Harlan Reynolds & Don B. Kates, The Second Amendment and States' Rights: A Thought Experiment, supra note 7.

[FN241]. Hamilton, 293 U.S. at 260.

[FN242]. Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). See infra text at notes 343-53.

[FN243]. Id.

[FN244]. Id. at 16-17.

[FN245]. Dunne v. People, 94 Ill. 120 (1879).

[FN246]. The court was quoting language from Article I, Section 8 of the Constitution, which gives such authority to Congress. This grant is not inconsistent with pre-existent state authority, so long as the state authority is not used in conflict with the federal authority.

[FN247]. Dunne, 94 Ill. at 132-33.

[FN248]. Martin v. Mott, 25 U.S. 19 (1827).

[FN249]. Infra notes 343-53.

[FN250]. Infra notes 310-20.

[FN251]. Infra notes 251-56.

[FN252]. United States v. Schwimmer, 279 U.S. 644 (1929).

[FN253]. Id. at 652-53.

[FN254]. Id. at 650-52.

Part one of this article.

Part three of this article.