SYMPOSIUM ISSUE

ARTICLES

The Second Amendment Today: Historical & Contemporary Perspectives on the Constitutionality of Firearms Regulation.................................................................Kenneth D. Katkin 643

"Don't Know Much About History" The Current Crisis in Second Amendment Scholarship.................................Saul Cornell 657

The Freedmen's Bureau Act and the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment.................................Stephen P. Halbrook 683

The Embarrassing Interpretation of the Second Amendment.................................................................Mathew S. Nosanchuk 705

The Second Amendment and the U.S. Court of Appeals.................................................................Richard E. Gardiner 805

What State Constitutions Teach About the Second Amendment.................................................................David B. Kopel 827

NOTES


The Three R's: Reading, Writing, and Rifles? How the Kentucky Supreme Court Lessened Penalties for Students who Bring Guns to School in Darden v. Commonwealth.................................................................Jennifer J. Mabry 879
In its entirety, the Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Along with the other provisions of the Bill of Rights, the Second Amendment is part of the written Constitution that establishes the basic framework for our system of government. And like many other provisions of the Bill of Rights, the Second Amendment articulates a broad statement of principle that is open to more than one reasonable interpretation. Indeed, at present, there appears to be no general consensus about the nature of the right that the Second Amendment actually protects. Instead, there are two separate and competing primary schools of thought.

For more than a century, most courts\(^2\) and some commentators\(^3\) have

---

1 U.S. Const. amend. II.
2 The "collective rights" view has long prevailed at the United States Supreme Court and the lower federal courts. See, e.g., Lewis v. United States, 445 U.S. 55, 65 n.10 (1980) ("the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'" (quoting United States v. Miller, 307 U.S. 174, 178 (1939)); see also infra notes 6-8, (discussing federal circuit court cases in the twentieth century). The first judicial appearance of the "collective rights" view has been traced to the decision of the Arkansas Supreme Court in State v. Buzzard, 4 Ark. 18, 24-25 (1842), which derived its view from the premise "that the militia, without arms, however well disposed, might be unable to resist, successfully, the efforts of those who should conspire to overthrow the established institutions of the country, or subjugate their common liberties..." Id. Accordingly, the Buzzard court concluded that "for this purpose only, it is conceived that the right to keep and bear arms was retained, and the power which, without such reservation, would have been vested in the government, to prohibit, by law, their keeping and bearing arms for any purpose whatever, was so far limited or withdrawn... that the people designed and expected to accomplish this object, by the adoption of the article under consideration, which would forever invest them with a legal right to keep and bear arms for that purpose; but it surely was not designed to operate as an immunity to those, who should so keep or bear their arms as to injure or endanger the private rights of others, or in any manner prejudice the common interests of society." Id. (emphasis added). For commentary which traces the judicial origin of the "collective rights" view to the Buzzard case, see David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. Rev. 1359, 1422-24 (1998).
3 For early commentary discussing the "collective rights" view, see Daniel J. McKenna, The Right to Keep and Bear Arms, 12 Marq. L. Rev. 138 (1928); Lucilius A. Emery, The Constitutional Right to Keep and Bear Arms, 28 Harv. L. Rev. 473, 476 (1915) ("The single individual or the
adopted what is sometimes called the "collective rights" interpretation of the Amendment. They seek to derive the Second Amendment's guiding principle from its opening phrase: "A well regulated Militia, being necessary to the security of a free State. . . ."4 Focusing on these words, these courts and commentators believe that the Second Amendment's animating principle is to protect the authority of the States to maintain formal, organized militia units—which today are called the National Guard.5 Thus, under this interpretation, the Second Amendment prohibits the federal government from disarming the State governments, but does not prohibit the federal government from enacting targeted gun control measures that do not impair the ability of the States to maintain well-regulated militias.6 Nor, under this view, would the Second Amendment in any way prohibit elected State governments from "well-regulating," or even disarming, their own citizens.7

On the other hand, also for more than a century, a handful of courts8 and

unorganized crowd, in carrying weapons, is not spoken of or thought of as 'bearing arms.'"). For modern commentary endorsing the "collective rights" view, see Symposium on the Second Amendment: Fresh Looks, 76 CHI.-KENT. L. REV. No. 1 (2000) (containing ten articles embracing the "collective rights" perspective); David C. Williams, The Militia Movement and Second Amendment Revolution: Conjuring With the People, 81 CORNELL L. REV. 879 (1996); Wendy Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 YALE L.J. 661 (1989); Peter B. Feller & Karl L. Gotting, The Second Amendment: A Second Look, 61. NW. U. L. REV. 46 (1966). For a compendium summarizing the conclusions of 164 law review articles that take a position on whether the Second Amendment protects an "individual" or a "collective" right, see Robert J. Spitzer, Lost and Found: Researching The Second Amendment, 76 CHI.-KENT L. REV. 349 (2000).

4 U.S. CONST. amend. II.

5 See, e.g., United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942) ("It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power."); rev'd on other grounds, 319 U.S. 463 (1943).

6 See, e.g., United States v. Haney, 264 F.3d 1161, 1164-66 (10th Cir. 2001) (holding that "a federal criminal gun-control law does not violate the Second Amendment unless it impairs the state's ability to maintain a well-regulated militia. This is simply a straightforward reading of the text of the Second Amendment. This reading is also consistent with the overwhelming weight of authority from the other circuits.") (citing United States v. Napier, 233 F.3d 394, 402 (6th Cir. 2000); Gillespie v. City of Indianapolis, 185 F.3d 693, 711 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000); United States v. Wright, 117 F.3d 1265, 1272-74 (11th Cir. 1997), amended on other grounds by 133 F.3d 1412 (11th Cir.1998); United States v. Rybar, 103 F.3d 273, 286 (3d Cir.1996); United States v. Hale, 978 F.2d 1016, 1019-20 (8th Cir. 1992)).

7 See, e.g., Presser v. Illinois, 116 U.S. 252, 265 (1886) ("The Second Amendment declares that [the right to keep and bear arms] shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government . . . .") (quoting United States v. Cruikshank, 92 U.S. (2 Otto) 542, 553 (1875)). See also, e.g., Fresno Rifle and Pistol Club v. Van de Kamp, 965 F.2d 723, 731 (9th Cir. 1992) ("Until such time as Cruikshank and Presser are overturned, the Second Amendment limits only federal action . . . ."); accord Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983); United States v. Johnson, 497 F.2d 548 (4th Cir. 1974).

8 The "individual rights" interpretation of the Second Amendment was adopted by some courts as early as Nunn v. State, 1 Ga. 243 (1846). In Nunn, the Georgia Supreme Court struck down a Georgia statute prohibiting the sale or possession of certain types of knives and firearms, on the
an increasing number of commentators have sought to derive the Second Amendment’s guiding principle from the closing phrase of the Amendment: “the right of the people to keep and bear Arms, shall not be infringed.” Focusing on these words, these courts and commentators have adopted what is sometimes called the “individual rights” interpretation, under which the Second Amendment prohibits both the federal government and the states from adopting or enforcing legislation that unduly infringes on the right of individuals to own, possess, or transport firearms.

There are several reasons why it has been difficult to settle the question of which of these two versions of the Second Amendment is more faithful to our Constitution. At the heart of this difficulty is not only the opacity of the language itself, but also the fact that the Second Amendment, like the rest of the Bill of Rights, was enacted in 1791, in a world that was very different from our own. 


10 U.S. CONST. amend. II.

11 Because of the undesirably anachronistic results that originalist constitutional interpretation is capable of yielding, at least one commentator has argued that the Second Amendment should not today be interpreted to protect a judicially enforceable individual right to keep and bear arms, even though “it is impossible to deny that the Founders intended the Second Amendment to constrain federal regulation of firearms to at least some degree [and that] [m]odern doctrine reduces the Amendment to a virtual nullity.” David Yassky, The Second Amendment, Structure, History, and Constitutional Change, 99 Mich. L. Rev. 588, 593 (2000). In reaching this conclusion, Professor Yassky credits the research of modern proponents of the “individual rights” model of interpretation by “reminding us how greatly the world in which the Second Amendment was adopted differed from our own.” Id. at 597. See also Saul Cornell, Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory, 16 CONST. COMMENTARY 221 (1999) (expanding on this theme).
First, it was a world in which the doctrine of judicial review, under which courts strike down unconstitutional statutes, had not yet been definitively established. Thus, the Constitution's Framers themselves may not have felt it necessary to figure out precisely what they meant by "the right to bear arms." Instead, they may have thought that this was a question for future legislators to decide for themselves, guided by the general principle articulated in the text. In this regard, it is interesting to note that just seven years after drafting the First Amendment, the same generation of lawmakers also enacted the Alien and Sedition Acts, which made it a federal felony to criticize government policy. Judged by today's standards, the Alien and Sedition Acts would appear to be as straightforward a violation of the First Amendment as could possibly be hypothesized. And while some of our founding fathers—including Vice President Thomas Jefferson—argued in 1798 that the Acts were unconstitutional, not even Jefferson suggested that a court could simply invalidate the Acts for that reason alone. Accordingly, it is not at all clear that the Framers would have

---

12 In The Federalist Papers, Alexander Hamilton argued that the doctrine of judicial review was necessary to ensure that Congress did not arrogate to itself power in excess of its constitutional limitations. See The Federalist No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."). Nonetheless, the text of the Constitution does not clearly provide for judicial review, and Hamilton's argument in Federalist No. 78 was not adopted until by any court prior to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). For an argument that the decision in Marbury was far from inevitable, see generally William W. Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1. See also Leonard W. Levy, Judicial Review, History, and Democracy: An Introduction, in Judicial Review and the Supreme Court 1, 10 (1967) (noting that judicial review in 1787 "was nowhere established, indeed . . . it seemed novel, controversial, and an encroachment on legislative authority").

13 See The Naturalization Act, 1 Stat. 566 (1798); The Alien Act, 1 Stat. 570 (1798); The Alien Enemies Act, 1 Stat. 577 (1798); The Sedition Act, 1 Stat. 596 (1798) (all making it a federal criminal offense to criticize the federal government).

14 See New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. . . . Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: 'I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.' The invalidity of the Act has also been assumed by Justices of this Court. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.") (internal citations omitted).

15 While Vice President, Thomas Jefferson is said to have proclaimed that under the First Amendment: "libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That therefore the [Sedition Act], which does abridge the freedom of the press, is not law, but is altogether void, and of no force." Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 157 (1973) (Douglas, J., concurring) (quoting 4 J. Elliot's Debates on the Federal Constitution 541 (1876)). See also Johnson v. Eisentrager, 339 U.S. 763, 774 n.6 (1950) (noting that "the Alien and Sedition Acts [were] vigorously attacked in Congress and by the Virginia and Kentucky Resolutions as unconstitutional.").
expected the Second Amendment's protections to be self-executing through judicial enforcement, even if they did conceive of the nature of the Amendment as sounding in "individual rights."  

Another crucial difference between the world of the Framers and our world concerns the question of "incorporation," i.e., whether the Second Amendment binds State governments at all. The world of the Framers was one in which none of the Bill of Rights was thought to bind the States in any way. Rather, the Amendments were directed at constraining Congress; the Bill was enacted primarily to satisfy the concerns of the anti-federalists that the newly created federal government would threaten individual liberties. Today, the lion's share of the gun control legislation that is said to offend the Second Amendment has been enacted by state and local governments. Yet, it was only the enactment of the Fourteenth Amendment following the Civil War, that laid the doctrinal foundation for requiring State governments to respect any of the rights set forth in the Bill of Rights. And it was not until the twentieth century that federal courts actually began protecting individual citizens against State or local interference with enumerated constitutional rights.

Finally, both the power and the societal role of firearms themselves have changed dramatically since the Founding era. Recently, a prize-winning historian has made the well-publicized, and perhaps counterintuitive claim, that firearms were virtually unknown to our nation's founding generation. While the validity of this claim on closer examination appears questionable, it is

---

16 Cf. Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) ("Ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship.").

17 See Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833) (holding that the Bill of Rights "is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.").

18 See id. at 250 (explaining the historical context that lead to the ratification of the Bill of Rights).


21 See Michael A. Bellesiles, Arming America: The Origins of a National Gun Cult (2000). For criticisms of Arming America, see Gloria L. Main, Many Things Forgotten: The Use of Probate Records in Arming America, 59 WM. & MARY Q. 211 (Jan. 2002); Ira D. Gruber, Of Arms
nonetheless true that firearms today are less expensive, more reliable, easier to conceal, and have the potential to cause far more physical and societal harm than the Framers could ever have imagined.\textsuperscript{23} An individual with a modern firearm is far more dangerous than a colonist with a musket.

At the same time, ironically, the converse appears true. Private firearms today are in all likelihood entirely ineffective for achieving what our founding fathers must have seen as one of their primary political purposes in enacting the Second Amendment: To enable the collective citizenry to overthrow the government, should it become tyrannical.\textsuperscript{24} In 1791, this nation’s founders likely imagined an agrarian United States, populated and protected by armed citizen-militias, ready as they had been two decades earlier to rise up en masse against governmental tyranny, and fully capable of providing a political counterweight against a limited federal government with no standing army.\textsuperscript{25}

In recent days however, we have all marveled at the impressive displays of overwhelming military power exercised by the United States armed forces in Afghanistan, and around the world. The notion that an armed citizen-militia could today somehow overpower our nation’s virtually invulnerable professional fighting forces, no longer rings true.\textsuperscript{26} For better or worse, in today’s world, we

\textsuperscript{23} In 1999, 28,874 Americans died by gunfire. United States Centers For Disease Control, 49 National Vital Statistics Report No. 8, at 68 (Sept. 21, 2001), available at <http://www.cdc.gov/nchs/fastats/pdf/nvsr49_8tb17.pdf>. Of these deaths, 16,599 were classified as suicides, 10,828 as homicides, and 824 as accidental discharges. Id. In addition, 299 firearms deaths in 1999 were attributable to non-accidental shootings by law enforcement officers. Id. The intent underlying the final 324 gunfire deaths in 1999 remains undetermined. Id.

\textsuperscript{24} On the “insurrectionary theory” of the Second Amendment, see, e.g., Brent J. McIntosh, The Revolutionary Second Amendment, 51 ALA. L. REV. 673, 674 (2000) (“The right to bear arms, subsequently enshrined in the Bill of Rights, was intended to check potential abuses by a tyrannical government armed with such a standing army.”); Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 TENN. L. REV. 443, 472 (1995) (noting that The Declaration of Independence and several state constitutions written before United States Constitution contain “insurrectionist” language guaranteeing right of citizens to overthrow tyrannical government).

\textsuperscript{25} See, e.g., 3 Joseph Story, Commentaries on the Constitution of the United States § 1890 (1833) (the Second Amendment is “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 . . . enable the people to resist and triumph over them.”).

\textsuperscript{26} See, e.g., Calvin Massey, Guns, Extremists, and the Constitution, 57 WASH. & LEE L. REV. 1095, 1123 (2000) (If “[t]he Second Amendment was intended, at least in part, to insure that a large, relatively unselect body of the polity possess arms and hold them . . . [as] a means to resist tyranny from within or without, [then] . . . the Second Amendment has failed to vindicate this purpose. The standing army is a fixture and has been for a very long time. . . . Almost nobody believes that the citizenry is constitutionally entitled to resist governmental tyranny by force of arms. The insurrectionist view of the arms right receives little support and we may safely discount it.”). Cf. Charles Dunlop, Jr., Revolt of the Masses: Armed Citizens and the Insurrectionary Theory of the Second Amendment, 62 TENN. L. REV. 643, 644-45 (1995) (examining “insurrectionary theory” and whether the “Second Amendment still represents a legally valid and militarily sound means to resist tyranny”).
Americans have no choice but to rely on our political institutions, rather than on any paramilitary "right of popular revolution," to maintain our cherished foundational principles of democracy and popular sovereignty.\(^{27}\)

For all of these reasons, the Founders' Constitution speaks obliquely—rather than directly—to the issues raised by today's heated debates over gun control, i.e., carriage of concealed weapons, and manufacturers' civil liability for injuries caused by misused firearms. Because the Second Amendment necessarily reflects various eighteenth century political, legal, and factual assumptions that no longer pertain, it is not susceptible to literalist interpretation, in which its text is stripped from its context.\(^{28}\) Whatever the Amendment's words may sound like to modern ears, those words could not have been understood by their ratifiers in 1791 to create a judicially enforceable individual right to bear arms that could be invoked as a shield against regulation by the federal, state, or local governments.\(^{29}\)

However, the impossibility of dogmatic literalist interpretation, does not by any means imply that the Second Amendment is devoid of content. Rather, the Second Amendment can reasonably and coherently be interpreted to protect some version of a judicially enforceable individual right to bear arms.\(^{30}\)

I earlier mentioned that the Framers probably did not generally contemplate judicial enforcement of any of the substantive rights enumerated in the Bill of Rights.\(^{31}\) For that reason, as I mentioned, the Alien and Sedition Acts of 1798 were never held unconstitutional by any of the numerous federal judges who entered convictions for violations of those acts.\(^{32}\) But of course, judicial review was later established in the watershed case of *Marbury v. Madison*,\(^{33}\) and

\(^{27}\) See Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 674-75 (2000) ("Consistent with the intention of the Second Amendment as a right of revolution, there was a time during the first American century when an armed citizenry could have overthrown the government, standing army and all. . . . As the twenty-first century begins, however, . . . [t]he federal government can now muster war-waging capabilities that, though they might be used only at a terrible cost in American lives, could not be overcome by even the most determined of popular uprisings. With modern weaponry and the diminished interest of American civilians in things martial, gone is the era when a concerted popular effort could have deterred even the most destructive resistance of the government to its own overthrow."). (footnotes omitted).

\(^{28}\) See Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1244 (1998) (noting that "wrenching [constitutional] text entirely out of context severs any connection to the democratically authorized acts of higher lawmaking that makes us care about constitutional text in the first place.").

\(^{29}\) See Saul Cornell, "Don't Know Much About History": The Current Crisis in Second Amendment Scholarship, 29 N. KY. L. REV. 665 (2002) (discussing the meaning of the Second Amendment in the context of late 18th century political and legal theory).

\(^{30}\) See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 900 (3d ed. 2000) (noting that changed circumstances do not mean "that the Second Amendment may properly be deemed wholly irrelevant today or that it may plausibly be construed to do no more than protect state defense forces against outright abolition by Congress. Although the factual predicates assumed by the framers of the Second Amendment no longer obtain, the same could be said with respect to other constitutional provisions.").

\(^{31}\) See supra note 12 and accompanying text.

\(^{32}\) See supra notes 13-16 and accompanying text.

\(^{33}\) 5 U.S. (1 Cranch) 137 (1803).
remains the defining characteristic of American constitutionalism today. Regardless of what the framers may have expected, it is now universally accepted that federal judges are empowered to protect and enforce many of the substantive rights enumerated in the text of the Bill of Rights. Given that reality, it is not clear why the right to bear arms, stated in the text of the Constitution, should remain dependent entirely on legislative protection, while other enumerated rights (such as the freedom of speech or the free exercise of religion) are now susceptible of protection by any of the three branches of government.

Similarly, I mentioned earlier that under the Framers' constitution, the Bill of Rights was in no way applicable to the States. But of course, the Civil War was waged, the Fourteenth Amendment was enacted, and by now, most of the individual rights enumerated in the Bill of Rights in order to limit the federal government, have been “incorporated” through the Fourteenth Amendment to place substantive limits on State power.

The Second Amendment has not, at least not to this point, been incorporated so as to bind States. It is not alone in this regard. Rather, the Second Amendment shares that distinction with the Fifth Amendment right to grand jury indictment and the Seventh Amendment right to civil jury trial, both of which are also not binding on States today.

---

34 See supra notes 17-18 and accompanying text.
35 See supra notes 19-20 and accompanying text.
36 See, e.g., Presser v. Illinois, 116 U.S. 252, 265 (1886) ("The Second Amendment declares that [the right to keep and bear arms] shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government . . . .") (quoting United States v. Cruikshank, 92 U.S. (2 Otto) 542, 553 (1875)). See, e.g., Fresno Rifle and Pistol Club v. Van de Kamp, 965 F.2d 723, 731 (9th Cir. 1992) ("Until such time as Cruikshank and Presser are overturned, the Second Amendment limits only federal action . . . "); accord Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983); United States v. Johnson, 497 F.2d 548 (4th Cir. 1974).
37 See Hurtado v. California, 110 U.S. 516, 538 (1884) (declining to "incorporate" right to grand jury indictment). The Hurtado court’s refusal to require State courts to initiate criminal proceedings via grand jury indictments remains good law today. See, e.g., Alexander v. Louisiana, 405 U.S. 625, 633 (1972) ("the Court has never held that federal concepts of a 'grand jury,' binding on the federal courts under the Fifth Amendment, are obligatory for the States"); accord Reed v. Ross, 468 U.S. 1, 16 n.11 (1984).
38 See Walker v. Sauvinet, 92 U.S. (2 Otto) 90, 92-93 (1875) ("A trial by jury in suits at common law pending in the State courts is not . . . a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendments to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury."). Walker has never been overruled. See e.g., Stein v. New York, 346 U.S. 156, 179 (1953); Alexander v. Virginia, 413 U.S. 836 (1973) (per curiam).
39 Although the Supreme Court has never had occasion to determine whether or not the Third Amendment right against the quartering of soldiers is applicable against the States, one lower court has held that it is. See Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982) (holding that "the Third Amendment is incorporated into the Fourteenth Amendment for application to the states"), aff'd after remand, 724 F.2d 28 (2d Cir. 1983). In addition, it was not until 2001 that the Supreme Court first "incorporated" the Eighth Amendment’s protection against Excessive Fines as binding on State governments. See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-34 (2001) (holding that "the Due Process Clause of the Fourteenth Amendment to the Federal
Nonetheless, there is good reason to believe that the Radical Republicans who drafted the Fourteenth Amendment, may well have counted the right to bear arms among those fundamental "privileges and immunities of citizens of the United States" which they sought to protect against State interference via the Fourteenth Amendment. Incorporation of the Second Amendment would have provided obvious benefits to the newly freed slaves in the South, by authorizing them to remain armed when the Union armies pulled out, and to mount resistance against governmental tyranny. In this light, "[t]he obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception."  

Finally, I referred earlier to the changes that have occurred since 1791, in both the power of firearms, and the relative power of the United States Army. In so doing, I mentioned that the primary original purpose for the Second Amendment may have been to enable the People collectively to exercise a "right of popular revolution" in the event that the government became tyrannical, and that this purpose may be wholly obsolete today. However, even if the "right of popular revolution" is obsolete (and some would say it is not), it cannot be ignored that the Second Amendment does not use the words, "right to wage a revolution." Rather, the Amendment expressly guarantees the "right of the people to keep and bear Arms."  

I cautioned against a dogmatic literalism that distorts meaning by severing text from its original context. However, it would be equally (if not...
more) erroneous to elevate context to such a stature that the text itself is ignored.\textsuperscript{48} Importantly, the Second Amendment’s text does not limit the exercise of the people’s “right to bear arms” only for certain purposes, even for the purpose of maintaining a “well regulated militia,” which is recited in the first clause of the Amendment.\textsuperscript{49} If the words “freedom of speech” in the First Amendment can today be construed literally (but against the Framers’ probable expectations) to protect internet pornography\textsuperscript{50} and cigarette advertising,\textsuperscript{51} it is not clear why the Second Amendment cannot be construed literally, to protect, say, an individual’s right to personal self-defense.\textsuperscript{52}

But then again, there are limits to how literally any of the Constitution’s enumerated rights have ever been construed. None of them are absolute. Even while the “freedom of speech” guaranteed by the First Amendment has been held to protect nude dancing,\textsuperscript{53} cross burning,\textsuperscript{54} and the right of a political action committee to make unlimited independent expenditures in support of a political candidate,\textsuperscript{55} it has still never been held to protect perjury, fraud, defamation, filing false income tax forms, or falsely shouting “fire” in a crowded theater—though all of those activities also involve “speech.”\textsuperscript{56} Similarly, the constitutional

\textsuperscript{48} See Laurence Tribe, supra note 30, at 900.


\textsuperscript{50} See Reno v. ACLU, 521 U.S. 844 (1997).


\textsuperscript{52} See Nelson Lund, The Second Amendment, Political Liberty, and the Right to Self-Preservation, 39 ALA. L. REV. 103, 104 (1987) (arguing that “[t]he claim to the tools needed for exercising one’s lawful right to protect himself (and perhaps especially herself) from criminal violence should be given at least as respectful a hearing as the First Amendment claims of Nazis and pornographers or the Fourth Amendment claims of confessed murderers.”). Cf. Robert E. Shalhope, The Ideological Origins of the Second Amendment, 69 J. AM. HIST. 599, 614 (1982) (arguing that the Second Amendment was originally understood to guarantee individuals the right “to possess arms for their own personal defense.”).


\textsuperscript{56} See Konigsberg v. State Bar of California, 366 U.S. 36, 49-50 & n.10 (1961) (rejecting the view that the freedom of speech protected by the First Amendment is an “absolute,” on ground that such view “cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like. . . .”); see also Schenck v. United States, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a
guarantee of "free exercise of religion" has been held to protect ritual animal slaughter, but not to protect the ritual smoking of peyote, or other illegal intoxicants. It has long been accepted that "the Constitution is not a suicide pact," and this principle has limited the scope and nature of every constitutional right. So even if the "individual rights" model were to gain universal acceptance, it still would not follow that the scope of the individual right to bear arms would be absolute. Just as other individual constitutional rights articulated in the Bill of Rights are not absolute, but rather only constrain unreasonable governmental infringement, it is perfectly coherent to envision some limited, but nonetheless individual right.

Ordinarily, debates over the proper interpretation of legal texts take place primarily in the courts, with debates over the proper interpretation of the Constitution often being resolved by the United States Supreme Court. Interestingly however, the United States Supreme Court has not granted review in any Second Amendment case since 1939, and only a handful of Second Amendment cases have ever produced published opinions from the federal courts of appeals. On the other hand, scholarship on the Second Amendment has been prolific during the past decade, and was instrumental in persuading the United

59 See Olsen v. Drug Enforcement Admin., 878 F.2d 1438 (D.C. Cir. 1989), cert. denied, 495 U.S. 906 (1990) (In an opinion by then-Judge Ruth Bader Ginsburg, the D.C. Circuit held that the Free Exercise Clause did not entitle Ethiopian Zion Coptic Church members to use marijuana).
60 The phrase appears to have originated in Justice Jackson's dissent in Terminiello v. City of Chicago, 337 U.S. 1 (1949), in which the majority overturned on Free Speech grounds the misdemeanor conviction of a fascist speaker who had attempted to incite an unruly but sympathetic mob to commit acts of anti-Semitic violence. Dissenting from this holding, Justice Jackson warned that "[t]here is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact. Id. at 37 (Jackson, J., dissenting). Subsequently, Justice Jackson's Terminiello dissent became accepted as orthodoxy by majorities of the Court. See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("while the Constitution protects against invasions of individual rights, it is not a suicide pact."), quoted in Haig v. Agee, 453 U.S. 280, 309-10 (1981); and Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964).
61 Cf. Konigsberg v. State Bar of California, 366 U.S. 30, 49-50 & n.10 (1961) (noting that the seemingly "absolute" language of the First Amendment has never been thought to convey an unabridgeable individual right of free speech, just as "the equally unqualified command of the Second Amendment" has never been thought to convey an uninfringeable individual right to keep and bear arms) (citing United States v. Miller, 307 U.S. 174 (1939)).
62 The last such case was United States v. Miller, 307 U.S. 174 (1939). More recently, Justice Thomas has commented that the Supreme Court "has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment." Printz v. United States, 521 U.S. 898, 938 & n.1 (1997) (Thomas, J., concurring) (noting that the Court's most recent treatment of the Second Amendment occurred in Miller).
63 See Richard Gardiner, The Second Amendment and the U.S. Courts of Appeals, 29 N. KY. L. REV 823 (2002) (surveying all Second Amendment cases decided in federal circuit courts in the twentieth century, and suggesting that, contrary to conventional wisdom, such cases can be read to recognize the existence of a constitutional right of individuals to keep and bear arms).
States Court of Appeals for the Fifth Circuit recently to issue the first federal appellate decision ever to fully endorse the “individual rights” model.64

While courts have largely continued to avoid entering the debate over the proper meaning of the Second Amendment, elected officials have become increasingly involved. At present, pending before the United States House of Representatives is a Resolution declaring: “That it is the sense of the Congress that the Constitution provides that all individual citizens have the right to keep and bear arms, which right supersedes the power and authority of any government.”65 While this United States House Resolution has not yet been brought to the floor of Congress for a vote, our Kentucky Congressional delegation has already received its marching orders from the home front. On Monday, Feb 11, 2002, the Kentucky House of Representatives by an overwhelming 89-7 vote adopted a non-binding Resolution supporting and urging the passage of the pending United States House Resolution,66 and directing

64 See United States v. Emerson, 270 F.3d 203, 218-72 (5th Cir. 2001) (dicta) (endorsing “individual rights” model, but nonetheless sustaining constitutionality of federal statute prohibiting a person subject to a restraining order from carrying a firearm). See also Printz v. United States, 521 U.S. 898, 938-39 n.2 (1997) (Thomas, J., concurring) (noting that the Second Amendment “has certainly engendered considerable academic, as well as public, debate,” and citing eleven leading scholarly works on the meaning of the Amendment published during the 1980s and 1990s).


66 See H.R. 43 § I (Ky. 2002) (adopted in Ky. House Feb. 11, 2002) (visited Mar. 19, 2002) <http://www.lrc.state.ky.us/record/02rs/HC43.htm>, (“Be it resolved . . . [t]hat the House of Representatives of the General Assembly of the Commonwealth of Kentucky, the Senate concurring therein, supports and urges the passage of H. R. Con. Res. 119 which states ‘That it is the sense of the Congress that the Constitution provides that all individual citizens have the right to keep and bear arms, which right supersedes the power and authority of any government.’”).
that copies of the Kentucky Resolution be sent to each member of the Kentucky delegation to the Congress of the United States.67

With these remarks, I have attempted to paint in broad strokes a picture of why the Second Amendment poses difficult interpretive problems, and to rough out some of the primary notions that have been articulated by each side in the ongoing debate. In today’s exciting program, our six distinguished speakers will fill in some of the details. These are some of the nation’s leading experts on the history and interpretation of the Second Amendment, and it is an honor for the Chase College of Law to have each of them with us today.

67 Id. § 2.
"DON'T KNOW MUCH ABOUT HISTORY"
THE CURRENT CRISIS IN SECOND AMENDMENT SCHOLARSHIP

by Saul Cornell*

I. INTRODUCTION

Second Amendment scholarship is in the midst of a crisis. The two dominant interpretations of the Second Amendment, the individual rights and collective rights models, no longer seem capable of accounting for the complexity of the historical evidence about the meaning of the right to bear arms. To explain the historical meaning of the Second Amendment a new more sophisticated paradigm is required. Before sketching what a new paradigm for the Second Amendment might resemble, it is worth taking some time to explore how we arrived at the current crisis.

Sanford Levinson's provocative think piece The Embarrassing Second Amendment, inaugurated a new era in Second Amendment scholarship. Prior to Levinson's entry into the debate, Second Amendment scholarship was a marginal topic among serious legal academics. Writing about the Second Amendment before Levinson was dominated by activists, not scholars. In the two decades since Levinson's article first appeared, the subject of the Second Amendment has attracted considerable attention within the legal academy, with law reviews from Akron to Yale rushing to publish scholarship on this once neglected topic. Much, but certainly not all, of this literature supported the individual rights point

* Associate Professor of History, Ohio State University and Fellow Center for Law, Social Science, and Public Policy, Moritz College of Law, Ohio State University. The author would like to thank Robert Churchill, Martin Flaherty and David Williams for reading an earlier version of this essay and the other participants in this symposium for fostering a lively debate on this important issue.

1 See generally SAUL CORNELL ED., WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? (2000) (introducing historical studies related to the Second Amendment's origin and meaning).

2 Id.

3 Second Amendment scholarship is a classic example of Thomas Kuhn's theory of paradigm change. See generally THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962) (explaining the historical evolution of science in terms of shifting models or paradigms).


6 The two most influential activist authors were STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED (1984) and Don B. Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204 (1983).

of view. According to Robert Spitzer, between 1912 and 1959 there were 11 articles published in law journals all supporting the militia interpretation. Between 1959 and 1989 there were 36 articles favoring the militia interpretation and 30 articles supporting the individual rights view. Individual rights scholarship overtook collective rights scholarship in the decade after Levinson’s pivotal article. If one applies a one scholar one vote rule, the difference between the two camps evaporates. Together Halbrook and Kates account for at least dozen articles in this period. See Robert J. Spitzer, Lost and Found: Researching the Second Amendment, 76 CHI.-KENT L. REV. 349 (2000).

The literature challenging originalism is enormous. For a particularly forceful statement, see Mark Tushnet, Interdisciplinary Legal Scholarship: The Case of History in Law, 71 CHI.-KENT L. REV. 914 (1996). As Tushnet notes, “there are of course standard objections to originalism, the most potent of which is that it is, quite literally, irrational.” Id. at 914. For discussions of the problems with Second Amendment originalism, see Michael C. Dorf, What Does the Second Amendment Mean Today, 76 CHI.-KENT L. REV. 291 (2000) and Daniel Farber, Disarmed by Time: The Second Amendment and the Failure of Originalism, 76 CHI.-KENT L. REV. 167 (2000). A detailed philosophical discussion of originalism may be found in Keith E. Whittington, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999), which provides little historical guidance on this issue of how one should weight different intents. For a useful sampling of other writings on this topic, see Jack N. Rakove, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (1990). For a critique of law office history, see Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, SUP. CT. REV. 119 (1965). On originalism as a form of “forensic history,” see John P. Reid, Law and History, 27 LOY. L.A. L. REV. 193 (1993). On the need for legal scholarship to remain current with historical scholarship, see Martin S. Flaherty, History Lite in Modern American Constitutionalism, 95 COLUM. L. REV. 523 (1995). On the notion of standards for Originalists, see H. Jefferson Powell, Rules for Originalists, 73 VA. L. REV. 659 (1987).


In addition to the essays of Dorf and Farber cited above, one would include the following other examples of writing opposing the Standard Model: Carl T. Bogus, The Hidden History of the Second Amendment, 31 U.C. DAVIS L. REV. 309 (1998); Stephen J. Heyman, Natural Rights and the Second Amendment, 76 CHI.-KENT L. REV. 237 (2000); H. Richard Uviller & William G. Merkel, The Second Amendment in Context: The Case of the Vanishing Predicate, 76 CHI.-KENT L. REV. 403 (2000). If one also includes the 52 signatories to the Historians and Lawyers amicus brief in U.S. v. Emerson, the notion of a consensus seems even more problematic. Among the prominent legal scholars who signed the brief were: Bruce Ackerman, Jack Balkin, Erwin Chemerinsky, Norman Dorsen, and Frank Michaelman. Among the historians signing the brief were: Joyce
Much of the recent scholarship on the Second Amendment has attacked the Standard Model and defended the collective rights interpretation. Even within the ranks of supporters of the individual rights view there now appears to be a serious division between ideologues who have refused to engage recent scholarship challenging their views and those scholars who have responded to recent writing in a thoughtful manner, recasting the individual rights interpretation in ways more compatible with recent historical scholarship.

Although there are historians and lawyers on both sides of this issue, there is a clear disciplinary division in the debate. Although a number of legal scholars have been won over to the individual rights view, most early American historians reject this interpretation. Perhaps the most vociferous critic of the new scholarship is Robert Shalhope, a scholar whose work is often cited by proponents of the Standard Model. In Shalhope's view the writers associated with the Standard Model have distorted the past to suit their policy goals. Standard Modelers, Shalhope observed, "displayed little if any interest in the political culture that spawned the Second Amendment; those that did displayed an appalling ignorance of this intellectual climate. The result was, of course, an incredibly anachronistic presentation of the Second Amendment." While Shalhope's most recent writing on the Second Amendment continues to argue that the Amendment was an individual right, he argues that such a right was far more limited in nature than the expansive right championed by Standard Modelers.

The stakes in the current debate over the meaning of the Second Amendment extend far beyond the halls of the academy. Although the collective rights view enshrined in United States v. Miller continues to be the controlling precedent, the recent decision in United States v. Emerson demonstrates the importance of academic scholarship on the Second Amendment. Although judges are usually shy about using law review literature

14 See id.
16 See Bogus, supra note 4.
17 See Shalhope, supra note 15.
18 Id. at 281.
19 Id.
20 Id.
21 See United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).
22 The controlling case for interpreting the Second Amendment remains United States v. Miller, 307 U.S. 174 (1939), which has generally been interpreted to endorse the view that the Amendment only protects the right of the militia to bear arms. For efforts to reinterpret Miller by individual rights theorists, see Eugene Volokh, et al., The Second Amendment as a Teaching Tool in
as the primary basis for rendering their decisions, *Emerson* is a sobering reminder of the potential for legal scholarship to influence the course of public policy and jurisprudence." In the view of Judge Alex Kosinski, that decision was based "almost exclusively" on law review articles. While Judge Cummings' reliance on problematic law office history was bad enough, the Appeals Court decision in *Emerson* represented an even more disturbing lack of historical sophistication. Two of the judges held that the Second Amendment protected an individual right, but concluded that the federal gun law prohibiting individuals under a domestic violence restraining order from being in possession of a firearm was not a violation of Emerson's Second Amendment rights. Had the judges made such an argument in philosophical terms, their decision would have been novel, but entirely logical. Rather than follow this more honest path, the judges cloaked their decision in a set of historical arguments that more closely resembled an alternative history science fiction fantasy than an accurate rendering of the past. The majority decision of the Appeals Court made little use of the academic law review literature and instead quoted extensively from a remarkable text supplied to the court by the Second Amendment Foundation, *The Origin of the Second Amendment*, a self-published collection of primary sources from the Founding era culled together by a park ranger and gun enthusiast from Michigan.

Before offering some insight into what a new paradigm for the Second Amendment might resemble, it is important to expose some of the historical errors that have by dint of frequent repetition come to be regarded as historical truth in this contentious debate.

---


23 See United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).


25 See United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

26 *Id.*

27 For a useful introduction to the genre of alternative history science fiction, see Karen Hellekson, *Toward a Taxonomy of the Alternate History Genre*, 41 EXTRAPOLATION 248 (2000).


II. STANDARD MODEL, STANDARD ERRORS
“A RIGHT OF THE PEOPLE”

The first problematic assertion of the Standard Model is that the phrase “right of the people” was synonymous with individual rights in the Founding era. 30 This view is concisely stated by Glenn Harlan Reynolds, who argues that “The text’s support is seen as straightforward: the language used, after all, is ‘right of the people,’ a term that appears in other parts of the Bill of Rights that are universally interpreted as protecting individual rights. Thus, any argument that the right protected is not one enforceable by individuals is undermined by the text.” 31 Had Reynolds taken the time to immerse himself in the constitutional texts and language of the period, he would have encountered many examples in which the phrase “right of the people” did not mean an individual right. Consider the language of the Pennsylvania Constitution which asserts “the people of this state have the sole, exclusive, and inherent right of governing and regulating the internal police of the same.” 32 Here is one obvious example of how the phrase “right of the people” was used to protect a collective, not individual, right. Additional evidence for such a reading of the phrase “right of the people” may be found in the work of Richard Primus and Jack Rakove. 33 Primus correctly observes that the Founding generation held that “some rights were held to belong to ‘the people as a collective body rather than to people as individuals.” 34

Reynolds is not the only gun rights advocate to approach the phrase “right of the people” in an anachronistic fashion. 35 The prolific gun rights advocate Don Kates adopts a similar ahistorical reading of the Bill of Rights. 36 According to Kates, the claim that the phrase “right of the people” does not mean an individual right requires that the “following set of propositions must be accepted: (1) when the first Congress drafted the Bill of Rights it used ‘right of the people’ in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states.” 37 Upon closer historical examination even this apparent truism appears to be false. “Assembly,” Primus

31 Reynolds, supra note 10.
32 PA. CONST. of 1776, Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania, § III.
33 See RICHARD A. PRIMUS, The AMERICAN LANGUAGE OF RIGHTS 86-87 (1999); see also Rakove, supra note 29.
34 See PRIMUS, supra note 33, at 86-87.
36 Kates, supra note 35, at 218.
37 Id.
reminds us, is an "activity of the people plural." Similarly, the right to keep and bear arms was a right of the people in their collective capacity.

Individual rights theorists are probably correct to stress that the traditional formulation of the collective rights argument as a right of the states is misleading. A right of the people is not identical to a right of the states. A more accurate way to paraphrase the right protected by the original Second Amendment might be to describe it as a right of the people acting through their state governments to form well-regulated militias.

III. "A WELL REGULATED MILITIA"

Glenn Reynolds asserts that a well-regulated militia was "one that was well-trained and equipped; not one that was 'well-regulated' in the modern sense of being subjected to numerous government prohibitions and restrictions." Reynolds' claim about the meaning of this disputed term also rests on a false universalism and mythical consensus that never existed in the Founding era. To find evidence contradicting his assertion, one need only examine the relevant clause of the Articles of Confederation: "Every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage." Contrary to Reynolds' claim, well-regulated and disciplined were not always synonymous. Nelson Lund shares Reynolds' mistaken view about the meaning of the term "well-regulated." Thus, Lund writes that this term "does not imply heavy regulation, or more regulation. When one thinks about it, one should easily recognize what would have been much more immediately apparent to any eighteenth-century reader: that something can only be well-regulated when it is not overly regulated or inappropriately regulated." Here again, Lund has smuggled in a false notion of consensus that few serious historians of the Founding era would accept. It is interesting that Lund would

38 PRIMUS, supra note 33.
40 See Levinson, supra note 35 and Kates, supra note 35.
41 On this point, the explicit argument of the text and the implicit understandings of Federalists and Anti-federalists may have diverged.
42 Reynolds, supra note 10, at 474.
43 ARTICLES OF CONFEDERATION, at http://www.yale.edu/lawweb/avalon/artconf.htm (last visited June 5, 2002).
46 Id.
47 For a useful overview of recent historical scholarship on the Revolutionary era that stresses ideological diversity, see LINDA K. KERBER, The Revolutionary Generation: Ideology, Politics, and
invoke the notion of how a typical 18th century reader would have understood this phrase. The subject of reconstructing the distinctive patterns of eighteenth century readers has attracted considerable scholarly attention from serious historians and literary scholars. Unfortunately, Lund has not immersed himself in recent scholarship in either history or literary studies. His facile and anachronistic reading ignores the important insights to be gained from the innovative body of scholarship on early American reading practices. Instead, Lund simply reads his own ideological preferences into the Second Amendment, conflating the ideas of today's Federalist Society, with the ideology of the Federalists who crafted the Second Amendment in the first Congress.

Another problem with the simplistic formulation of the concept of regulation favored by Reynolds and Lund is that it does not explain how discipline could be achieved without extensive regulation. Had either scholar taken the time to explore the laws governing the militia, they would have realized that government enjoyed a wide latitude to legislate on matters relating to arms. Government had a right to inspect weapons in one's home or alternatively to require individuals to turn in their government issued weapons for inspection at government arsenals. Indeed, Lund has articulated an amusing Goldilocks's principle regarding the meaning of the term "well-regulated." According to Lund, the Founders intended this phrase to mean not over-regulated, not under-regulated, but just the right amount of regulation. Such a claim is hard to reconcile with Hamilton's discussion of the militia in Federalist #29: "To acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people." Hamilton went on to note that given popular aversion to the rigors of military discipline, the Federal government would be well advised to abandon the general militia and instead form a select militia. Essentially, Hamilton did not think it possible to have too much regulation. The danger posed by overly severe military

---

48 For an overview of recent historical work on reader response and its relevance to constitutional history, see Saul Cornell, The Other Founders: Anti-Federalism and the Dissenting Tradition in America 1788-1828 (1999).
49 Id.
51 See Reynolds, supra note 10, and Lund, supra note 45.
53 Id.
54 See Lund, supra note 45.
55 Id.
57 Id.
58 Id.
discipline was not something most Federalists feared, but rather was a concern of the Anti-Federalists. This fear was captured by an Old Whig who warned that, "They can subject all the militia to strict military laws, and punish the disobedient with death, or otherwise, as they shall think right: by which they can march the militia back and forward from one end of the continent to the other, at their discretion; these powers, if they should ever fall into bad hands, may be abused to the worst purposes." 59

Another meaning of "well-regulated" that neither Reynolds nor Lund pays much attention to is suggested by the actions of the insurgents in Shays’s rebellion who called themselves Regulators.60 Although the rogue militia units that supported Shays believed themselves to be regulated, they shared little with the well-regulated militia that the Founders idealized.61 A careful exegesis of the historical meanings attached to the term "well-regulated" suggests that the Standard Model’s efforts to define it exclusively in terms of a mild form of military discipline rests on a highly selective reading of the evidence.62

IV. CONGRESSIONAL DEBATES AND COUNTER-FACTUAL SPECULATIONS

Substantial attention has been devoted to the changes that Madison’s original language regarding the right to bear arms underwent in Congress.63 The Standard Model’s treatment of this evidence is also marred by a selective use of evidence and questionable anachronistic readings of texts. Madison’s original suggestion that the right to bear arms be placed in the body of the Constitution in Article I, Section 9 has been invoked by several supporters of the Standard Model as definitive proof of the individual rights character of this right.64 In the view of Glenn Reynolds, "If he had thought the Second Amendment would alter the military and/or militia provisions of the Constitution he would have interlineated it in Article I, Section 8, near or after clauses 15 and 16. Instead, he planned to insert the right to arms with freedom of religion, the press and other personal rights in Section 9 following the rights against bills of attainder and ex post facto laws."65 This view is endorsed by L.A. Powe, who asserts that this decision is clear proof that Madison understood this provision to be an individual right.66 "If the collective rights theory were correct," Powe asserts, "then
Madison should have placed his ‘Second Amendment’ either in Article I Section 8, with the militia clauses, or in Article IV, Section 4, the Guarantee Clause.  

Once again supporters of the Standard Model fail to adequately contextualize the text they quote. Madison’s decision to place the right to bear arms in Article I, Section 9, followed the common practice in virtually all of the individual state constitutions of separating the statement of the right to bear arms from the organization of the militia. The original placement of the right to bear arms does little to clarify whether he thought this was an individual or a collective right. Supporters of the Standard Model have ignored a much more important piece of evidence about how Madison understood the connection between the right to bear arms and other fundamental rights. Madison originally proposed an amendment that read: “No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.” It is important to recall that in 1788-89 Madison viewed the individual states, not the federal government, as the greatest threat to liberty. In a letter to Jefferson describing his views about the efficacy of a written bill of rights, Madison reminded Jefferson that “repeated violations of these parchment barriers have been committed by overbearing majorities in every State.” “There is,” Madison warned, “more danger for those powers being abused by the State Governments than by the Government of the United States.” If Madison’s primary concern was protecting an individual right to bear arms, then the right should have been listed as one of those fundamental rights that the states could not violate. Given the penchant of Standard Modelers to pose counter-factual questions, one wonders why they have not asked this one. Such a fear, it is worth noting, was not an abstract concern. States such as Pennsylvania had disarmed their citizens during the Confederation period. If Madison were concerned about an individual right to bear arms similar in nature to freedom of the press, then one must ponder why he omitted such a right from his proposal. Once again, the use of counter-factual speculation by Standard Modelers only cuts in one direction—in support of an individual right.

It is important for scholars to acknowledge the limits of the documentary record available to us. This fact casts doubt on Nelson Lund’s claims about congressional intent in revising Madison’s original language.

68 Id.
69 Virginia Declaration of Rights, Massachusetts, and Pennsylvania Constitutions are all available at the Yale Law School’s Avalon project, http://www.yale.com (last visited June 5, 2002).
73 Id. at 173.
74 See Cornell, supra note 29.
75 Id.
All the major changes made during the congressional process increased the clarity with which the Second Amendment protects an individual right, not a right of the states to maintain military organizations. The conscientious objector clause was dropped. The reference to a “well armed militia” was eliminated. The description of the militia as an entity “composed of the body of the people” was omitted. Each of these phrases could have suggested that the right to keep and bear arms was somehow restricted to the context of military service. Although Madison meant to imply no such thing, the fact that each of these potentially misleading phrases was deliberately removed from the text confirms that Congress knew exactly what it was doing when it proposed for ratification the unambiguous text that is now part of the Constitution. 76

While Congress may have known exactly what it was doing, it is impossible for Lund or any other modern scholar to make a similar claim. Records for the Senate’s deliberations do not exist. Unless Lund has conducted a seance or studied past life regression with actress Shirley McLaine, his claims are speculative at best. Upon closer examination his interpretation is worse than speculative; it is profoundly ahistorical. Lund assumes that the First Congress shared with modern scholarship a dichotomous view of the meaning of the right to bear arms, as either an individual right or a collective right. 77 Rather than prove this claim, Lund simply assumes it to be true. Such an argument is entirely circular. Consider the deletion of the phrase describing the militia as “composed of the body of the people.” Individual rights theorists argue that the deletion of this phrase was merely stylistic. 78 Everyone assumed that such a militia would be drawn from the entire population. 79 An alternative and more plausible reading has been suggested by Jack Rakove, who has argued that this change actually strengthened the power of Congress to define who the militia would be in the future. 80 A similar counter-factual sleight of hand is evident in the following comments by Joyce Lee Malcolm: “Had the right to be armed an exclusively, or even primarily, collective aspect Senators would have approved the amendment to add ‘for the common defense.’ Congress had the opportunity to incorporate into the language of the amendment the meanings the collectivist school has tried so hard to read into it.” 81 It is not collective rights theorists, but Malcolm, who has read back contemporary concerns into the eighteenth century texts. Nor is it surprising that Malcolm, a specialist on 17th century English history, would fail to adequately situate this debate within its late 19th century

76 Lund, supra note 45, at 181-82.
77 Id.
78 See Malcolm, supra note 11.
79 Id.
80 See Rakove, supra note 29.
81 Malcolm, supra note 11.
American context. A much more plausible reading of this change is suggested by the work of Don Higginbotham, the leading military historian of the Revolutionary era. Higginbotham demonstrates convincingly that the main issue for both Federalists and Anti-Federalists in the Second Amendment debate was not individual rights, but federalism. It was the allocation of military power in the new republic that was at the core of the debate over the militia. To declare that the militia was to be used for the common defense would have troubled Virginia Anti-Federalists who would have wanted to preserve the ability of their state to use the militia to put down rebellion, a particularly troubling prospect to southerners fearful of the danger posed by the threat of slave insurrections.

Lund's claims about the significance of the Congressional debate over the conscientious objector provision also distorts the historical record by wrenching the debate out of context. Rather than support the Standard Model's contention that Congress sought to clarify the individual rights nature of the text, the deletion of the conscientious objector clause suggests just the opposite. Gerry objected to the way in which the clause about conscientious objection status might allow the new government to disarm the militia of the states: "I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms." Although Gerry might have used this occasion to express concern that an individual right to own guns was in danger, he showed no interest in this issue. His concern was focused squarely on the threat to the militia. "Whenever government means to invade the rights and liberties of the people, they always attempt to destroy the militia." Rather than support the Standard Model's claim, Gerry's exclusive focus on the potential of the conscientious objector clause to be used to destroy the militia provides strong evidence that the primary issue under consideration was the militia. Given the Standard Modelers' fondness for counter factual


84 Id.

85 See Bogus, supra note 13, at 407.

86 Id. at 357.

87 See Lund, supra note 45.

88 Heyman, supra note 13, at 275.

89 Creating the Bill of Rights 182 (Charlene Bickford et al., eds., 1991).


91 Id.

92 Id.

93 Id.
questions, one wonders why they did not pose the following one: why didn't Gerry make at least passing mention of the potential for the conscientious objector exclusion to provide a pretext to deprive individuals of a right to own weapons for personal defense? 94 Appealing as counter-factual speculations may be, they are notoriously difficult to evaluate and provide an exceedingly weak foundation for constitutional arguments. 95 Jefferson Powell's wise caution that "Arguments from silence are unreliable and often completely ahistorical," has been violated repeatedly by supporters of the Standard Model. 96 In most cases we simply do not know why an author opted to make one claim and not another. 97 At the very minimum, one would expect those choosing to dabble in counter-factual speculation to do so in an even-handed and balanced fashion. 98 Had supporters of the Standard Model approached their subject with greater scholarly rigor, they might have posed at least some of the sorts of counter-factual questions that point toward the collective rights understanding of the Amendment. 99 In every instance Standard Modelers have used counter-factual speculation to cloak the obvious fact that there are relatively few examples of anyone discussing the right to bear arms as an individual right in the 18th century. 100

V. "PRIVATE ARMS"

Another favorite text of Standard Modelers is a hastily assembled newspaper essay defending the Bill of Rights prepared by Federalist Tench Coxe. 101 The gun rights advocate Stephen Halbrook claims that Coxe's essay was widely reprinted and, moreover, he argues that a search of the literature of the time reveals that no writer disputed or contradicted Coxe's analysis. 102 Actually, if one scans Halbrook's notes, it appears that Coxe's essay appeared a total of three times. 103 In 1790 there were 84 newspapers in America, which means that Coxe's essay was ignored by more than 95% of the press. 104 It is hard to see how this sort of evidence could prove that Coxe's essay was representative of widely held views or that it reached a particularly wide audience. Nor can one infer much from the fact that no one bothered to refute Coxe. The absence of a

94 See CREATING THE BILL OF RIGHTS, supra note 89, at 182.
95 See Powell, supra note 9, at 671.
96 Id.
97 Id. at 672.
98 Id.
99 See CREATING THE BILL OF RIGHTS, supra note 89, at 182.
100 See Dorf, supra note 9.
102 Id.
103 Id.
104 Information on early American newspapers can be found in THE ATLAS OF EARLY AMERICAN HISTORY (Lester Cappon ed., 1978).
rebuttal might just as easily signify indifference as acceptance. The most reasonable conclusion to draw is that Coxe's essay was simply not very influential.\textsuperscript{105} Additional support for the idea that this essay was not intended to be a definitive commentary on the meaning of the Bill of Rights is provided by a letter Coxe wrote to Madison describing his effort.\textsuperscript{106} In a letter to Madison, Coxe described his effort in the following way: "I have therefore taken an hour from my present engagement" and "thrown together a few remarks upon the first part of the Resolutions."\textsuperscript{107} Given Coxe's own description of his remarks as "thrown together," it is difficult to understand the importance that has been assigned to them by Standard Modelers.\textsuperscript{108} In his essay Coxe does affirm "the right of the people to keep and bear their private arms."\textsuperscript{109} While it is possible to read this statement as an expression of an individual rights point of view, Coxe's invocation of the right of the people within the context of resisting tyranny is more plausibly read as a reiteration of the necessity of a citizen militia composed of the sturdy yeomanry than it is of some sort of expansive individual right comparable to freedom of speech.\textsuperscript{110} Eighteenth century members of the militia were expected, and in many instances, required, to provide their own weapons.\textsuperscript{111} Individual ownership of weapons within the context of militia service is not the same thing as an individual right to own weapons for personal defense.\textsuperscript{112} Still, individual rights theorists and some revisionist statements of the collective rights thesis have correctly drawn attention to the fact that the Founders expected that a large segment of the population would bear arms as part of the militia.\textsuperscript{113} Of course, as Carl Bogus and others have argued, the text of the Constitution gives Congress the power to decide who is part of the well-regulated militia protected by the Second Amendment.\textsuperscript{114} Ultimately it is up to Congress to decide who may bear arms as part of the well-regulated militia.

When Coxe's remarks are set within the context of his general discussion

\textsuperscript{105} Joyce Lee Malcolm also mistakenly interprets the absence of a rebuttal as a sign of broad acceptance. See Malcolm, supra note 11.

\textsuperscript{106} See \textit{CREATING THE BILL OF RIGHTS}, supra note 89.

\textsuperscript{107} \textit{Id.} at 252-53.

\textsuperscript{108} Coxe's essay is central to the arguments of Halbrook and Kopel, supra note 101, and Kates, supra note 6, at 224.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} See Williams, infra note 114.


\textsuperscript{112} For a critique of the Standard Model's reading of Coxe's statement, see GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 214-15, 257 (1999).

\textsuperscript{113} See, e.g., David Yassky, Symposium: The Second Amendment, Panelist, 10 SEtON HALL CONST. L. J. 821, 822 (2000).

\textsuperscript{114} See Bogus, supra note 4. The revisionist view of the collective rights view, described by individual rights theorists as the sophisticated version (which presumably exists in contrast to an unsophisticated version—although I am unaware of anyone claiming to be a supporter of the unsophisticated collective rights view), is best represented by David C. Williams, \textit{Civic Republicanism and the Citizen Militia}, 101 YALE L.J. 551 (1991), and David C. Williams, \textit{The Unitary Second Amendment}, 73 N.Y.U. L. REV. 822 (1998). The power of Congress to decide the composition of the militia is discussed in Bogus, supra note 13.
of the Bill of Rights, the individual rights gloss of his text seems even more problematic. A careful reading of Coxe's essay reveals an understanding of the Bill of Rights that is far more republican than liberal in spirit. Coxe explicitly described "the republican spirit" of Madison's draft of the Bill of Rights. While defending "the creed of liberty," Coxe underscored that government existed to pursue the public good. Interestingly, in discussing the core freedoms that would eventually constitute the First Amendment, Coxe chose to describe them as "political rights," not individual or personal rights. Although Coxe's republican language is not incompatible with liberal ideas about individual rights, it certainly does not bear the weight placed upon it by supporters of the Standard Model.

IV. A RIGHT TO BEAR QUILLS, OR KILL BEARS: THE CURIOUS CASE OF PENNSYLVANIA

One of the most remarkable features of recent writing about the Second Amendment is the degree to which supporters of the individual rights view have drawn on evidence from Pennsylvania to support their claims. When properly contextualized, the texts most often cited to prove the existence of an expansive individual right actually demonstrate quite the opposite: the example of Pennsylvania provides proof of an expansive conception of the right of the state to regulate and limit access to firearms. Shortly after adopting their state constitution, which affirmed that "the people have a right to bear arms for the defense of themselves and the state," Pennsylvanians passed a series of Test Acts which imposed severe penalties on citizens who refused to take an oath of allegiance to the state. Individuals who refused to take the oath were disarmed.

The Pennsylvania Constitution did affirm, "That every member of society hath a right to be protected in the enjoyment of liberty and property, and therefore is bound to contribute his proportion toward the expense of protection,

116 Id.
117 Id.
118 [Tench Coxe] A Pennsylvanian, "Remarks on the First Part of the Amendments ..." New York Packet, June 23, 1789. Robert Shalhope, supra note 15, wisely cautions against the dangers of over-stating the corporate nature of republicanism. By contrast, the Standard Model's reading of Coxe over-emphasizes the liberal individualist character of this text.
119 Among the essays that draw heavily on Pennsylvania to support the individual rights view are: David T. Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J.L. & POL'Y 1 (1987); Reynolds, supra note 10, at 63; Thomas Macafee & Michael J. Quinlan, Bringing Forward the Right to Keep and Bear Arms, 75 N.C. L. REV. 781 (1997), and Nelson Lund, The Past and Future of the Individuals Right to Bear Arms, 31 GA. L. REV. 1 (1997).
120 See Cornell, supra note 29, at 246.
121 Id. at 228.
122 For information on the Test Act, see Cornell, supra note 29, at 246.
and yield his personal service when necessary, or an equivalent thereto." The text then goes on to declare that "nor can any man who is consciously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good." While such a view might seem illogical to modern gun rights advocates, it makes perfect sense given the limited view of self defense under 18th century law. It is important to recall that in the eighteenth-century the notion of self defense did not entitle citizens to use deadly force against attackers in most cases. One was required to retreat to the wall before one might kill an attacker. Standard Model scholarship has smuggled a modern conception of the right of self defense, further obscuring the original meaning of the right to bear arms.

The Pennsylvanians who drafted the Test Act did not accept similar limits on freedom of press or freedom of religion. While there was a broad consensus that prior restraint of the press was unacceptable, prior restraints on gun ownership, including large scale disarmament of parts of the civilian population, presented no constitutional problem to Pennsylvanians. The Constitutionalist party that framed the Pennsylvania constitution and passed the Test Act accepted that the state could disarm peaceful citizens when the good of the community required such action. Such actions were compatible with the notion of self defense expressed in the state constitution. Contrary to the claims of Standard Modelers, Pennsylvania's Constitutionalists recognized a fundamental difference between guns and words. Prior restraints on gun ownership were not unconstitutional.

It is interesting to note that the Test Acts stripped citizens of the right to sit on juries. As historian Douglas Arnold noted, the act was also more than a war time emergency measure, but rather an effort by Pennsylvania's Constitutionalist party to restrictively define citizenship to those capable of displaying the requisite virtue. In the case of Pennsylvania, the right to bear arms was neither an individual right nor a collective right in the sense with which

123 P.A. CONSTITUTION of 1776, Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania § III.
124 Id.
126 Id. at 3-5.
127 For a discussion of this, see Heyman, supra note 13.
128 See Cornell, supra note 29, at 230.
129 Id. It is important to distinguish between political speech and other forms of speech. Pennsylvanians accorded political speech enormous latitude while restricting other forms of speech such as artistic speech in ways that might include forms of prior restraint.
130 For more on the political struggle over the Test Acts, see DOUGLAS M. ARNOLD, A REPUBLICAN REVOLUTION: IDEOLOGY AND POLITICS IN PENNSYLVANIA 1776-1790 (1989).
131 Compare BROWN, supra note 125, with ARNOLD, supra note 130.
132 See Cornell, supra note 29, at 229.
133 Id.
134 See ARNOLD, supra note 130, at 108.
135 Id.
these terms are most often used in modern constitutional debate over the meaning of the Second Amendment. It would be more accurate to describe it as a civic right, one that was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner. Freedom of religion or freedom of the press were genuinely rights of individuals and were treated differently than were civic rights such as militia service, or the right to sit on juries. The Test Acts stripped citizens of certain civic rights, but did not deprive them of fundamental individual rights. Pennsylvania Anti-Federalists, the group who supported the Test Acts, accepted a level of gun regulation that far exceeds anything modern gun control groups have advocated. The actions of Pennsylvania Anti-Federalists serve as an important reminder about the dangers of treating the Founding generation as though they were modern civil libertarians or the forebearers of today's gun rights activists. It also provides an additional cautionary reminder for those who would endorse a narrow originalist approach to constitutional interpretation. Although the irony would not be appreciated by many modern gun rights advocates, the proposals of modern gun control advocates, registration, mandatory safety training, and bans on specific classes of weapons pale in comparison to the large scale efforts to disarm the civilian population endorsed by Pennsylvanians. Indeed, the comprehensive hand gun bans advocated by the most ardent gun control activists seem tame by comparison, since they would not prohibit most long guns. Nor would such proposals require a political litmus to own weapons, something which Pennsylvanians accepted as a legitimate exercise of the state's police powers. The history of gun laws enacted by the Founding generation offers important insights into how the right to bear arms was understood at the time the Second Amendment was ratified. The notion that guns could not be extensively regulated turns out to be a modern myth, one that has been aggressively spread by supporters of the Standard Model. Thus, Robert Cottrol confidently declares that "for much of American History there were few regulations concerning firearms ownership." Such a view is contradicted by the work of William Novak who has convincingly demonstrated that state and local governments used their police powers extensively to regulate the storage of arms

---

136 For a modern discussion claiming that both the individual right and collective right approaches are inadequate, see David Yassky, The Second Amendment: Structure, History, and Constitutional Change, 99 Mich. L. Rev. 588 (2000).
137 See Arnold, supra note 130.
138 Id.
139 Id.
140 Id.
141 Id.
142 Id.
144 Id.
145 See Cornell, supra note 29, at 229.
147 Id.
and gunpowder. The laws enacted by individual state governments regulating gun ownership and storage, including compulsory militia musters, and periodic gun censuses, make the comparison with other individual rights such as freedom of conscience or freedom of the press seem far fetched. Government not only regulated guns and ammunition; it kept close tabs on who had guns and the condition of those weapons. The state also retained the right to compel citizens to submit to formal arms training and exclude individuals and groups from service in the militia when individuals or groups were viewed as a threat to society.

Standard Modelers have often invoked Pennsylvania’s Anti-Federalist Minority to prove that the right to bear arms was intended to be an individual right. In a foundational text for the Standard Model, gun rights proponent Don Kates declares that “the individual right nature of the Pennsylvania right to arms proposal is unmistakable.” The relevant amendment proposed by Pennsylvanians reads as follows:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purposes of killing game; and no law should be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.

This provision has also been used to prove that the phrase “bear arms” did not have an exclusively military connotation. In the view of Nelson Lund, “Contrary to a popular misconception, the military connotations frequently associated with the term ‘bear arms’ do not mean that the term invariably implies a military context. This was made perfectly clear in one of the earliest proposals for a bill of rights, which was drafted by the Anti-Federalist minority at the Pennsylvania ratifying convention.” The “popular misconception” Professor Lund alludes to is Garry Wills’s discussion of the military connotation of the term “bear arms.” Rather than survey 18th century legal usage in a systematic

149 Id. On the regulation of the militia, see Mark Pitcavage, An Equitable Burden: The Decline of the State Militias, 1783-1858 (Ph.D. dissertation, Ohio State University, 1995).
150 Id.
151 See Cornell, supra note 29, at 230.
152 See, e.g., Kates, supra note 6, at 222.
153 Id.
155 See Lund, supra note 45, at 168-69.
156 Id.
157 See Garry Wills, To Keep and Bear Arms, N.Y. Rev. of Books (Sept. 21, 1995) (book review).
fashion, Lund’s argument relies on the isolated example of the Dissent of the Minority. The use of phrase in this document, which as Wills notes was hastily assembled, hardly challenges the notion that standard usage carried with it a clear military meaning.

The Dissent of the Minority does present a different challenge to the collective rights thesis. At least in Pennsylvania, there appears to have been a recognition of a right to hunt. Recognizing this type of individual right does not mean that the right was understood to be somehow comparable to the right of free speech. The provision affirming a right to hunt proposed in the Dissent acknowledged that this right might be limited as to time and place. Hunting was obviously subject to extensive regulation, including some types of prior restraints, restrictions that would never have been permissible for speech.

Another problem with the Standard Model is the claim that the term defense of “themselves” was synonymous with an individual right. It is important to recall that there were no organized police forces in eighteenth-century America and that the militia was often called on to serve as an agent of law enforcement. The Test Act empowered the militia to disarm citizens who refused to take the loyalty oath. Thus, in addition to serving as a military force, the militia in Pennsylvania also functioned as a police force. Given this fact, it is far from obvious that the meaning of the phrase “defense of themselves” should be interpreted as a statement of individual rights.

The affirmation of the right to hunt, a provision not emulated by any other state ratification convention, does suggest a nonmilitary context for the right to keep arms. The Dissent of the Minority fused two separate rights protected by their state constitution—a right to bear arms and a right to hunt bears. Neither right was an expansive individual right comparable to freedom of conscience or freedom of the press. Wills may be correct that the conjunction of these two different rights was accidental, a product of haste and

See also Lund, supra note 45. Lund also confuses the phrase bear a gun with bearing arms.

158 See Lund, supra note 45.
159 According to legal scholar David Yassky, congressional documents from the Founding era use this term in a military context on thirty other occasions. Supporters of the opposing view that bearing arms did not have a military meaning have only adduced the one example of the Dissent of the Minority to prove their case that the term did not have an exclusively military connotation. See Yassky, supra note 136. For a similar conclusion, see Doff, supra note 9, at 315.

160 See Yassky, supra note 136.
161 See Cornell, supra note 29.
162 See Cornell, supra note 29, at 229.
163 Id.
164 See Cornell, supra note 29, at 230.
165 See Wills, supra note 157, at 66.
167 Id. at 253.
168 Id.
169 See Cornell, supra note 29.
170 See ARNOLD, supra note 130, at 109.
171 See Cornell, supra note 29, at 230.
172 Id.
poor drafting. Still, once published, this mistake established the possibility of re-conceptualizing the meaning of bearing arms, a process that did occur slowly over the subsequent decades.

V. FROM BEARING ARMS TO HUNTING BEARS: THE CHANGING MEANING OF THE RIGHT TO BEAR ARMS

“For the historian,” the eminent scholar Herbert Butterfield noted, “the only absolute is change.” Writing about the Second Amendment has presented a static image of the Amendment. The notion that the Second Amendment, in contrast to virtually every other feature of American constitutional life, remained fixed and unchanging over the course of American history seems patently absurd. Yet, this is precisely how legal scholarship on the Second Amendment has portrayed the meaning of the right to bear arms. There is considerable evidence that this was not the case. Within two decades of the adoption of the Second Amendment, the meaning of the right to bear arms underwent some remarkable changes in state constitutional law.

Contrary to the myth of an unchanging constitutional right, a profound transformation in the history of the right to bear arms occurred in the early Jacksonian era when several state constitutions abandoned the distinctive eighteenth-century language protecting “the right of the people to keep and bear arms in defense of themselves,” and adopted the more unambiguously individual right, that “every citizen has a right to bear arms, in defense of himself and the
The shift in constitutional discourse evidenced in state constitutions written after the War of 1812 is profound. Consider the following state constitutional provisions pertaining to the right to keep and bear arms enacted between 1776 and 1820:

1776 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; 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.

1780 Massachusetts: The people have a right to keep and to bear arms for the common defence. And as, in time 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.

1792 Kentucky: That the right of the citizens to bear arms in defense of themselves and the State shall not be questioned.

1817 Mississippi: Every citizen has a right to bear arms, in defence of himself and the State.

1819 Maine: Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.

1820 Missouri: That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned.

There was no uniform pattern of constitutional change across America in the period between 1776 and 1820. While the 1817 Mississippi state constitutional convention adopted a more liberal individualistic language, the Maine and Missouri Constitutions chose the older, more republican, formulation which clearly persisted well into the nineteenth century.

---

182 For an argument that the War of 1812 marked a watershed in the evolution of the transition from republicanism to liberalism, see Steven Watts, The Republic Reborn: War and the Making of Liberal America 1790-1820 (1987). The literature on the debates over the relative importance of republican and liberal ideas in American life is enormous.
183 For a complete list of state provisions on the right to bear arms, see Eugene Volokh, State Constitutional Right to Keep and Bear Arms Provisions, at http://www.law.ucla.edu/faculty/volokh/2amteach/sources.htm (last visited June 5, 2002).
184 See id.
185 Id.
Constitution is fascinating because it asserted that the right to assemble was designed to promote the common good, an explicitly republican formulation, and it directly juxtaposed the right of assembly with the right to keep and bear arms.\textsuperscript{186}

The clear change in the language of state constitution provisions regarding the right to bear arms eluded the Fifth Circuit Court’s majority opinion in \textit{Emerson}.\textsuperscript{187} The court’s confusion over the facts and basic chronology of the history of the right to bear arms is embarrassing:

However, there are numerous instances of the phrase “bear arms” being used to describe a civilian’s carrying of arms. Early constitutional provisions or declarations of rights in at least some ten different states speak of the right of the “people” [or “citizen” or “citizens”] “to bear arms in defense of themselves [or “himself”] and the state,” or equivalent words, thus indisputably reflecting that under common usage “bear arms” was in no sense restricted to bearing arms in military service.\textsuperscript{188}

Actually, there is almost no evidence from the 18\textsuperscript{th} century to prove that the phrase “bear arms” was used in a non-military context. The only example to actually support the Court’s claim, the Dissent of the Minority, hardly supports the individual rights interpretation advanced by the Court.\textsuperscript{189} The majority opinion of the Fifth Circuit conflated the language used by the 18\textsuperscript{th} century with the new language adopted in the 19\textsuperscript{th} century.\textsuperscript{190} It is difficult to know if the Fifth Circuit’s decision is based on profound ignorance of history, or on deliberate misrepresentation motivated by the judges’ ideological preferences. In either case, the decision in \textit{Emerson} represents a new nadir in the use and abuse of history by federal courts.

The meaning of the right to bear arms under state constitution law clearly changed during the first few decades of the nineteenth century, and this change itself provides one of the most serious challenges to both the individual and collective rights paradigms.\textsuperscript{191} Individual rights supporters conveniently elide this change, while supporters of the collective rights view simply ignore the change all together.\textsuperscript{192} Appreciating the changing meaning of the right to bear arms is an important first step toward fashioning a new paradigm for understanding the Second Amendment.\textsuperscript{193}

\textsuperscript{186} See United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} For a static and somewhat anachronistic discussion of state constitutional provisions on the right to bear arms, see Eugene Volokh, \textit{supra} note 183. The important shift between the Eighteenth and Nineteenth century in the language of state constitutional provisions regarding the right to bear arms is elided in Massey, \textit{supra} note 15. This error was reproduced in the decision of the U.S. Court of Appeals for the Fifth Circuit in \textit{Emerson}, 270 F.3d 203 (5th Cir. 2001).
\textsuperscript{192} Id.
VI. NEITHER INDIVIDUAL NOR COLLECTIVE: A NEW PARADIGM FOR THE SECOND AMENDMENT

In another foundational text for the Standard Model, activist Stephen Halbrook sets up a sharp dichotomy between a collective/states rights interpretation and the individual rights view:

In recent years it has been suggested that the Second Amendment protects the ‘collective’ right of states to maintain militias, while it does not protect the right of ‘the people’ to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.194

It is difficult to reconcile this claim with the early American historian Don Higginbotham’s assertion that “if people believed passionately in gun ownership as an individual right, they rarely said so.”195 Higginbotham concludes that such claims amount to little more than a handful of references.196 How can these two contradictory claims be reconciled? It is important to look closely at Halbrook’s language, which sets modern legal terminology, collective rights, against the eighteenth-century terminology, “rights of the people.”197 Halbrook’s argument rests on a serious anachronism. The right to bear arms was usually defined as a right of the people during the Founding era.198 The key question for historians is how that term should be translated into modern parlance. Was such a right an individual right, a collective right, or something in between? The time has probably come to abandon both the collective and individual rights models and create a new translation for this phrase that more accurately captures the dominant understanding (or understandings) of this term during the Founding generation.199

---

194 Halbrook, supra note 6, at 83. A similar claim has been repeated by Halbrook in an essay he co-authored, see Halbrook and Kopel, supra note 101.
195 Don Higginbotham, The Second Amendment in Historical Context, 16 CONST. COMMENTARY 263, 265 (1999). The few examples from the 18th century that suggest a more individualistic reading are largely drawn from texts such as failed amendments or pamphlets and newspaper essays by dissenting groups such as Pennsylvania’s Anti-Federalist Minority. On this point, see Rakove, supra note 29. While completely dismissing such voices seems problematic, it seems even more questionable to take them as dispositive.
196 See id.
197 Compare Halbrook, supra note 6, at 83, with Higginbotham, supra note 195, at 265.
198 See Halbrook, supra note 6, at 83.
199 The notion of translation has become a hot topic in constitutional interpretation. See Lawrence Lessig, Fidelity and Constraint, 65 FORDHAM L. REV. 1365 (1997); see also Steven G. Calabresi, The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation, 65 FORDHAM L. REV. 1435 (1997), and Sanford Levinson, Translation: Who Needs it?, 65 FORDHAM L. REV. 1457 (1997). My use of the term here is slightly different. Translation here is not normative, but hermeneutic. Before we decide if it is the job of judges to translate the text of
Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as a civic right. Such a right was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner. Freedom of religion, freedom of the press, trial by jury were genuinely rights belonging to individuals and were treated differently than were civic rights such as militia service, or the right to sit on juries. The distinction between an individual right and a civic right is important and has been obscured by recent scholarship. The important differences between these two types of rights is evident in the Pennsylvania Test Acts which stripped citizens of certain civic rights, such as the right to bear arms or sit on juries, but did not deprive them of fundamental individual rights such as the right of freedom of conscience or the right to publish their sentiments on public matters.

A useful model for approaching the constitutional thought of the Founding Era has been elaborated by the political scientist Rogers M. Smith, who has identified three different conceptions of citizenship and rights in the Founding era. According to Smith, three discursive traditions dominated early American constitutional thought. A liberal individualist idea that each person enjoyed basic rights existed along side a republican conception of citizenship that held that only those capable of displaying the requisite civic virtue were entitled to the full panoply of rights. Finally, Smith argues that the Founding generation also held an ascriptive theory of citizenship that restricted the full enjoyment of rights to persons based on race, gender, and in some cases, ethnic identity. The Second Amendment owed far more to the republican and ascriptive understanding of rights than it did to a liberal individualistic conception of rights which was relatively weak at the Founding. Of course, gun rights advocates might reasonably claim that, given that the dominant trend in modern American constitutional law is toward a more liberal and less republican and ascriptive conception of rights, we should rethink the issue of gun rights in terms of the modern rights revolution wrought in the last few decades. Arguing that we ought to reinterpret the Second Amendment in more

the Constitution, we have to have a reasonable translation. To understand the meaning of 18th century terms we must find a language to describe them that does not distort their meaning. The phrase "right of the people" fits neither our notion of an individual right nor our idea of a collective right. In this sense the term civic right is preferable as an approximation of what the 18th century meant by a right of the people.

200 See discussion infra p. 680.
201 id.
202 See ARNOLD, supra note 130.
203 For a discussion of the Test Acts, see Cornell, supra note 29, at 229.
204 Id.
206 id. at 2-3.
207 id. at 36.
208 id. at 153.
209 id. at 147-49.
210 Id.
libertarian terms is quite different than insisting that such a meaning was always part of the Second Amendment. Rather than argue in the historically naive originalist terms that have dominated writing about the Second Amendment, it would be more intellectually and politically honest to argue that it is time to include gun owners among the groups whose rights have been expanded in the wake of the rights revolution.  

Although gun rights advocates have sought to wrap themselves in the Second Amendment, the original understanding of the Second Amendment is actually inimical to much that they hold dear. Ironically, a restoration of the original meaning of the Second Amendment might be their worst nightmare. Consider the evidence from Pennsylvania whose state constitution and Anti-Federalists writings are among the most frequently cited texts by Standard Modelers. The Anti-Federalists who authored the Dissent of the Minority and supported the Test Acts accepted a level of gun regulation that far exceeds anything modern gun control groups have advocated.

VII. CONCLUSION

The notion that the right to bear arms is a civic, not an individual right, suggests that courts need to find a new set of analytical tools to evaluate gun laws. The notion of strict scrutiny makes little sense for a civic right. Exactly what sort of laws and what standards of constitutional scrutiny would be appropriate for a civic right ought to serve as a spur to some creative constitutional theorizing. Viewing the Second Amendment as a civic right would not give the state a completely unfettered hand in enacting any gun law it wants. One might argue that under such a conception the nightmare scenario so often conjured up by gun rights advocates would be averted; complete unilateral domestic disarmament would be beyond the power of government. Perhaps if robbed of the potent rhetoric that casts every effort at gun control as the first step in a nefarious gun grabbing prohibitionist agenda, more effective legislation could be enacted. Treating guns like words, as some Standard Modelers suggest, makes little constitutional sense. While some modern law professors have trouble telling the difference between guns and words, the same was not the case for the Founders. Appreciating the wisdom of the Founders in this regard need not mean we ought to slavishly follow their example as part of some ahistorical and static originalist vision of the Constitution. To find a constitutional solution to the problem posed by guns in our society, we will need to move beyond the legacy bequeathed to us by the Founders who inhabited a world far different from our own.

211 Of course, the rights revolution is not without critics. See Mary Ann Glendon, Rights Talk (1991).
212 See Cornell, supra note 29.
213 Id.
214 See Cornell, supra note 29, at 229.
215 See Arnold, supra note 130.
Converts to the gun rights cause have invoked the authority of the sixties band The Monkees, proclaiming “I’m A Believer” and accepting the truth of the Standard Model’s individual rights view of the Second Amendment. A better musical choice and a more accurate description of recent scholarship is provided by Sam Cooke’s old standard, “Wonderful World.” Unfortunately, Second Amendment scholars “Don’t Know Much About History.”

In his influential and provocative article, The Embarrassing Second Amendment, Sanford Levinson took legal scholars to task for ignoring the topic of the Second Amendment. Since the publication of Levinson’s essay, there has been an explosion of interest in this once neglected part of the Bill of Rights. If there is a cause for embarrassment now it is not from neglect, but rather from the opposite-- too much scholarship with too little historical grounding. The historical foundation for much of this new scholarship rests not on solid and well researched history, but rather on little more than the intellectual equivalent of smoke and mirrors. The creation of a Standard Model was an artifact of the idiosyncratic structure of legal publication, not a reflection of genuine consensus among scholars knowledgeable about the history of the Second Amendment. No similar consensus existed among historians working in the period and it is noteworthy that all of the experts in early American history who have entered this debate, even the one historian most closely associated with an individual rights view of the amendment, have attacked the Standard Model. One can hope that a new, more sophisticated and historically grounded interpretation of the Second Amendment may emerge as this debate moves forward.

216 See Powe, supra note 67, at 1401.
217 See Levinson, supra note 4, at 639.
218 See Spitzer supra note 8.
219 See Cornell, supra note 29.
220 Id. This charge would also include the work of Michael A. Bellesiles whose book ARMING AMERICA: THE ORIGINS OF NATIONAL GUN CULTURE (2000) has been effectively discredited. For a discussion of the flaws in ARMING AMERICA see Historians and Guns, 59 WM & MARY Q. 203, 203-240 (2002).
221 On this point, see Spitzer, supra note 8.
222 See Shalhope, supra note 15. For additional evidence of historical opposition to the Standard Model, see the discussion in supra note 13.
I. INTRODUCTION

Does the Fourteenth Amendment to the United States Constitution incorporate the Second Amendment, so as to protect the right of the people to keep and bear arms from State infringement? This author has sought to address that issue comprehensively in his book Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876. This article addresses the most telling and dramatic but most neglected single item of evidence of the Framers' intent concerning that issue. It is well established that the Fourteenth Amendment protects the rights to personal security and personal liberty from State violation.

---


1 The Fourteenth Amendment provides in pertinent part:

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

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

2 The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.


The same two-thirds of Congress that proposed the Fourteenth Amendment to the United States Constitution in 1866 also enacted the Freedmen’s Bureau Act, which declared protection for the “full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and...estate...including the constitutional right to bear arms....”\(^5\) The significance of this declaration to support incorporation of the Second Amendment into the Fourteenth Amendment has been recognized, albeit in passing, in at least three important general studies on the Fourteenth Amendment.\(^6\) However, the declaration is not acknowledged or mentioned in any law review article or other publication which argues against Fourteenth Amendment protection for Second Amendment rights.

The story begins at the dawn of Reconstruction. On January 5, 1866, Senator Lyman Trumbull introduced S. 60, the Freedmen’s Bureau Bill, and S. 61, the Civil Rights Bill.\(^7\) These bills would become of unprecedented importance in regard both to the passage of the Fourteenth Amendment and to recognition of the right to keep and bear arms.

Senator Charles Sumner exemplified the need for congressional action in a presentation to Congress of a memorial from the Colored Citizens of the State of South Carolina, which was assembled in convention. The memorial urged Congress to protect the lives, liberty, and personal rights of the freedmen. Sumner paraphrased as follows:

They also ask that government in that State shall be founded on the consent of the governed, and insist that that can be done only where equal suffrage is allowed....They ask also that they should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press.\(^8\)


\(^7\) CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866).

\(^8\) Id. at 337. The freedmen’s resolution stated:

We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed--and the Constitution is the Supreme law of the land—that the late efforts of the Legislature of this State to pass an act to deprive us of arms be forbidden, as a plain violation of the Constitution...

2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840-1865 302 (Philip S. Foner & George E. Walker eds., 1980).
On January 30, the House took up consideration of the Freedmen's Bureau Bill. Thomas Eliot, Chairman of the Select Committee on Freedmen, reported a committee substitute. As an example of the newly-enacted Black Codes the bill was designed to nullify, Eliot quoted the ordinance of Opelousas, Louisiana, which required freedmen to have a pass, prohibited their residence in the town, prohibited their religious and other meetings, and infringed their right to keep and bear arms:

No freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer, in writing, and approved by the mayor or president of the board of police. Anyone thus offending shall forfeit his weapons, and shall be imprisoned and made to work five days on the public streets, or pay a fine of five dollars in lieu of said work.

Nathaniel P. Banks, a former governor of Massachusetts and Union general, gave notice that he would offer an amendment to the bill so that it would explicitly protect for everyone the civil rights belonging to white persons, "including the constitutional right to bear arms, the right to make and enforce contracts, to sue...." Banks offered the italicized phrase.

As instructed by the Select Committee on the Freedmen's Bureau, Chairman Eliot on February 5 offered a substitute for S. 60. Changes included the following:

The next amendment is in the seventh section, in the eleventh line, after the word "estate," by inserting the words "including the constitutional right to bear arms," so that it will read, "to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms."

Arguing for adoption of the Freedmen's Bureau Bill, Eliot quoted from a report by Brevet Major General Fisk to General Howard, Commissioner of the Freedmen's Bureau, which outlined the following circumstances in Kentucky: "The civil law prohibits the colored man from bearing arms; returned soldiers are, by the civil officers, dispossessed of their arms and fined for violation of the law." As the report of the Commissioner concluded: "Thus, the right of the

---

9 CONG. GLOBE, 39th Cong., 1st Sess. 512 (1866).
10 Id.
11 Id. at 517.
12 Id. at 585 (emphasis added).
13 Id. at 654.
14 Id.
15 CONG. GLOBE, 39th Cong., 1st Sess. 657 (1866).
people to keep and bear arms as provided in the Constitution is infringed . . ."  

The Freedmen's Bureau Bill, including the new language which listed "the constitutional right to bear arms" as a "civil right," passed the House by a resounding vote of 136 to 33. Senator Trumbull informed the Senate that he was instructed by the Committee on the Judiciary to recommend that the Senate concur in the House amendments. Trumbull noted:

There is also a slight amendment in the seventh section, thirteenth line. That is the section which declares that negroes and mulattoes shall have the same civil rights as white persons, and have the same security of person and estate. The House have inserted these words, "including the constitutional right of bearing arms." I think that does not alter the meaning.

Thus, the author of the Freedmen's Bureau and Civil Rights Bills verified that the common language of both bills protected the constitutional right to bear arms, regardless of whether those terms explicitly appeared.

The Senate then concurred in S. 60 as amended without a recorded vote. Unrelated Senate amendments were approved by the House the next day. Congress had at last passed the Freedmen's Bureau Bill.

As passed, the Freedmen's Bureau Bill provided in § 7 that, in areas where ordinary judicial proceedings were interrupted by the rebellion, the President shall extend military protection to persons whose rights are violated. The contours of rights violations were described by the bill in part as follows:

wherein, in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms, are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude....

Meanwhile, the Congress was moving toward the protection of such rights in the Constitution itself. On February 13, it was reported in both houses

---

17 CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).
18 Id. at 688.
19 Id. at 742.
20 Id. at 743 (emphasis added).
21 Id. at 748.
22 Id. at 775.
23 CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (emphasis added).
of Congress that the Joint Committee of Fifteen on Reconstruction had recommended adoption of a constitutional amendment to read as follows:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property.\textsuperscript{24}

This appears to be the first reported draft of what would become § 1 of the Fourteenth Amendment.

Representative William Lawrence discussed the need to protect freedmen, quoting General D. E. Sickles' General Order No. 1 for the Department of South Carolina.\textsuperscript{25} That order declared:

I. To the end that civil rights and immunities may be enjoyed...the following regulations are established for the government of all concerned in this department: ....

XVI. The constitutional rights of all loyal and well disposed inhabitants to bear arms will not be infringed....

Ex-Confederates were allowed the same right after taking the Amnesty oath or the Oath of Allegiance.\textsuperscript{26}

This "most remarkable order," repeatedly printed in the headlines of the \textit{Loyal Georgian},\textsuperscript{27} a prominent black newspaper, was thought to have been "issued with the knowledge and approbation of the President if not by his direction."\textsuperscript{28} The first issue to print the order included the following editorial:

Editor Loyal Georgian:

Have colored persons a right to own and carry fire arms?
A Colored Citizen

Almost every day we are asked questions similar to the above. We answer \textit{certainly} you have the \textit{same} right to own and carry arms that other citizens have. You are not only free but citizens of the United States and as such entitled to the same privileges granted to other citizens by the Constitution....

Article II, of the amendments to the Constitution of the United States, gives the people the right to bear arms, and states that this right shall not be infringed. Any person, white or black,

\textsuperscript{24} \textit{Id.} at 806, 813.
\textsuperscript{25} \textit{Id.} at 908.
\textsuperscript{26} \textit{Id.} at 908-09.
\textsuperscript{27} \textit{The Loyal Georgian}, Feb. 3, 1866, at 1.
\textsuperscript{28} \textit{Id.} at 2.
may be disarmed if convicted of making an improper or
dangerous use of weapons, but no military or civil officer has the
right or authority to disarm any class of people, thereby placing
them at the mercy of others. All men, without distinction of
color, have the right to keep and bear arms to defend their
homes, families or themselves. 29

The last paragraph above, taken from a Freedmen's Bureau circular, was printed
numerous times in *The Loyal Georgian.* 30

By now members of Congress were startled to learn that President
Andrew Johnson had vetoed the Freedmen's Bureau Bill. 31 However, his
objections did not include the provision which included protection for "the
constitutional right to bear arms." 32

Lyman Trumbull expressed great surprise at the veto, pointing out that
the bill's purpose was to protect constitutional rights. 33 Trumbull again detailed
the oppression of the freedmen, quoting the letter from Colonel Thomas in
Vicksburg, Mississippi, that "nearly all the dissatisfaction that now exists among
the freedmen is caused by the abusive conduct of this [State] militia," which
typically would "hang some freedman or search negro houses for arms." 34

The proponents of S. 60 sought to override the veto, but it failed by a
vote of 30 to 18, just 2 votes shy of the necessary two-thirds. 35 This defeat
mooted any need for a House override vote. The veto, the first break between
President Johnson and the Congress, began a saga that would culminate in the
unsuccessful impeachment of the President. 36

Meanwhile the proposed Fourteenth Amendment and the Civil Rights
Bill continued to be debated. A significant debate in the House on S. 61 took
place on March 1. 37 Representative James Wilson, Chairman of the Judiciary
Committee, explained the background to the bill's phraseology "civil rights and
immunities" and "full and equal benefit of all laws and proceedings for the
security of person and property..." 38 Quoting Kent's *Commentaries*, Wilson
explained: "I understand civil rights to be simply the absolute rights of
individuals, such as—'The right of personal security, the right of personal liberty,
and the right to acquire and enjoy property.'" 39 Wilson added that "we are
reducing to statute form the spirit of the Constitution," a clear reference to the
Bill of Rights. Referring to "the great fundamental civil rights," Wilson pointed out:

29 Id. at 3.
3, 1866.
31 CONG. GLOBE, 39th Cong., 1st Sess. 916 (1866).
32 Id. at 916-917.
33 Id. at 936.
34 Id. at 941.
35 Id. at 943.
37 CONG. GLOBE, 39th Cong., 1st Sess 1115 (1866).
38 Id. at 1117.
39 Id.
40 Id.
Blackstone classifies them under three articles, as follows:

1. The right of personal security; which, he says, "Consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."

2. The right of personal liberty; and this, he says, "Consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."

3. The right of personal property; which he defines to be, "The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the law of the land."41

To protect "the principal absolute rights which appertain to every Englishman," Blackstone further explained that there are "auxiliary" rights to "maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."42 Blackstone included among these rights "that of having arms for their defense suitable to their condition and degree, and such as are allowed by law," which made possible "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."43 Together with justice in the courts and the right of petition, "the right of having and using arms for self-preservation and defense" were available to preserve the rights to life, liberty, and property.44

The Freedmen's Bureau Bill likewise declared that the rights of personal security and personal liberty included what Blackstone referred to as "the right of having and using arms for self-preservation and defense."45 Senator Wilson had the Second Amendment partly in mind when he stated that every right enumerated in the federal Constitution is "embodied in one of the rights I have mentioned, or results as an incident necessary to complete defense and enjoyment of the specific right."46

On March 7, Representative Elliot reintroduced the Freedmen's Bureau Bill.47 This version had a more refined formulation of the rights of personal security and personal liberty than the Civil Rights Bill as well as explicit

41 Id. at 1118.
42 1 WILiAM BLACKSTONE, COMMENTARIES 140-41 (St. Geo. Tucker ed. 1803).
43 Id. at 143-44.
44 Id.
45 Id.
46 CONG. GLOBE, 39th Cong., 1st Sess. 1118-19 (1866).
47 Id. at 1238.
recognition of “the constitutional right to bear arms.”

In debate on the Civil Rights Bill, John Bingham quoted its provisions, including the protection for “full and equal benefit of all laws and proceedings for the security of person and property,” and reiterated his support for “amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.” He explained that “the seventh and eighth sections of the Freedmen’s Bureau bill enumerate the same rights and all the rights and privileges that are enumerated in the first section of this [the Civil Rights] bill...” Bingham then quoted the seventh section of the Freedmen’s Bureau Bill, which provided that all persons shall “have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms.”

Bingham wished to “arm Congress with the power to...punish all violations by State officers of the bill of rights....” In drafting the first section of the Fourteenth Amendment, Bingham clearly sought to protect these rights.

The Civil Rights Bill passed both houses, but on March 27 President Johnson surprised everyone by vetoing it. In the override debate in the Senate, Lyman Trumbull argued that every citizen has “inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill....” Trumbull quoted from Kent’s Commentaries as follows:

The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country to be natural, inherent, and inalienable.

Again, these were the same rights generally recited in the Civil Rights Bill and explicitly expounded by the Freedmen’s Bureau Bill as including the right to bear arms.

On April 6, the Senate voted to override President Johnson’s veto of the Civil Rights Bill. An editorial in the New York Evening Post on the vote referred to “the mischiefs for which the Civil Rights bill seeks to provide a remedy...that there will be no obstruction to the acquirement of real estate by colored men, no attempts to prevent their holding public assemblies, freely

---

48 Id. at 3412.
49 Id. at 1291.
50 Id.
51 Id. at 1292.
52 CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).
53 Id.
54 Id. at 606, 1367. This cite reflects the passage in the Senate and House, respectively.
55 Id. at 1679.
56 Id. at 1757.
57 Id.
58 CONG. GLOBE, 39th Cong., 1st Sess. 1809 (1866).
discussing the question of their own disabilities, keeping fire-arms...."59

On April 9, after both houses had mustered the requisite two-thirds vote to override President Johnson’s veto, the Civil Rights Act of 1866 became law.60 As enacted, § 1 provided:

[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens....61

Virtually the same language survives today as 42 U.S.C. § 1981.

Meanwhile, the proposed Fourteenth Amendment passed the House.62 Soon thereafter, Representative Eliot, on behalf of the Select Committee on Freedmen’s Affairs, reported the second Freedmen’s Bureau Bill, 63 which would become H.R. 613. As before, the new bill recognized “the constitutional right to bear arms.”64 John Bingham, author of § 1 of the Fourteenth Amendment, was a member of the select committee that drafted this bill.

On May 23, on behalf of the Joint Committee on Reconstruction, Jacob Howard introduced the proposed Fourteenth Amendment in the Senate.65 Senator Howard referred to “the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press ... the right to keep and to bear arms....”66 Howard averred: “The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”67

In the ensuing debate, no one questioned Howard’s premise that the Amendment made the first eight amendments applicable to the states. Howard explained that Congress could enforce the Bill of Rights through the Enforcement Clause, “a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees....”68 Howard added: “It [the amendment] will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which

59 The Civil Rights Bill in the Senate, N.Y. EVENING POST, Apr. 7, 1866, at 2.
60 CONG. GLOBE, 39th Cong., 1st Sess. 1861 (1866).
61 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (emphasis added).
62 CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).
63 Id. at 2743.
64 Id. at 3412.
65 Id. at 2765.
66 Id.
67 Id. at 2766.
68 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).
pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction.\(^69\)

That same day, the House was debating the second Freedmen’s Bureau Bill,\(^70\) § 8 of which protected “the constitutional right to bear arms.”\(^71\) Representative Eliot observed that § 8 “simply embodies the provisions of the civil rights bill, and gives to the President authority, through the Secretary of War, to extend military protection to secure those rights until the civil courts are in operation.”\(^72\)

Eliot cited Freedmen’s Bureau reports, such as that of General Fisk, who wrote of 25,000 discharged Union soldiers who were freedmen returning to their homes:

Their arms are taken from them by the civil authorities and confiscated for the benefit of the Commonwealth. The Union soldier is fined for bearing arms. Thus the right of the people to keep and bear arms as provided in the Constitution is infringed, and the Government for whose protection and preservation these soldiers have fought is denounced as meddlesome and despotic when through its agents it undertakes to protect its citizens in a constitutional right.\(^73\)

Fisk added that the freedmen “are defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders.”\(^74\)

The Fourteenth Amendment and the second Freedmen’s Bureau Bill, H.R. 613, continued to be debated in the Senate and House respectively for several days. On May 29, the House passed H.R. 613 by a vote of 96 to 32, with 55 abstaining.\(^75\) The House immediately proceeded to consideration of the proposed constitutional amendment.\(^76\)

After further debate, the Fourteenth Amendment passed the Senate by a vote of 33 to 11,\(^77\) or 75% of the votes, far more than the necessary two-thirds for a constitutional amendment. On June 13, the House passed the proposed Fourteenth Amendment as amended by the Senate by a vote of 120 to 32,\(^78\) a margin of 79%, again far more than the necessary two-thirds.

Another pertinent bill was H.R. No. 543, which required the Southern States to ratify the Fourteenth Amendment. Representative George W. Julian argued the necessity of that bill to remedy the following:

\(^{69}\) Id.
\(^{70}\) Id. at 2772-80.
\(^{71}\) Id. at 3412.
\(^{72}\) Id. at 2773.
\(^{73}\) Id. at 2774.
\(^{74}\) CONG. GLOBE, 39th Cong., 1st Sess. 2775 (1866).
\(^{75}\) Id. at 2878.
\(^{76}\) Id.
\(^{77}\) Id. at 3042.
\(^{78}\) Id. at 3149.
Although the civil rights bill is now the law ... [it] is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments; and a black man convicted of an offense who fails immediately to pay his fine is whipped....Cunning legislative devices are being invented in most of the States to restore slavery in fact. 79

This again shows the common objective of the Civil Rights Act and the Freedmen’s Bureau Bill to protect the right to keep and bear arms, and the need for the Fourteenth Amendment to provide a constitutional foundation.

On June 26, the Senate took up H.R. 613, the second Freedmen’s Bureau Bill. Unrelated amendments resulted in § 8, which recited “the constitutional right to bear arms,” being renumbered as § 14.80 Senator Thomas Hendricks moved to strike out the section because “[t]he same matters are found in the civil rights bill substantially that are found in this section.”81 Hendricks’ proposal was rejected.82

Senator Trumbull replied that, while the two bills protected the same rights, the Civil Rights Act would apply in regions where the civil tribunals were in operation, while the Freedmen’s Bureau Bill would apply in regions where the civil authority was not restored.83 The bill then passed without a roll-call vote.84

The bill went to a conference committee, was reported, and the Senate concurred.85 A motion to table in the House was rejected by a vote of 25 to 102.86 Because the report was then agreed to without another roll call vote, the recorded procedural vote represented yet another landslide vote in favor of passage of the bill.

As expected, President Johnson vetoed the second Freedmen’s Bureau Bill.87 The House overrode the veto by a vote of 104 to 33, or 76%.88 The Senate then overrode the veto by a vote of 33 to 12, or 73%.89

As finally passed into law on July 16, 1866, the Freedmen’s Bureau Act extended the Bureau’s existence for two more years.90 The full text of § 14 of the Act declared:

---

79 Id. at 3210.
80 CONG. GLOBE, 39th Cong., 1st Sess. 3412 (1866).
81 Id.
82 Id.
83 Id.
84 Id.
85 Id. at 3524.
86 CONG. GLOBE, 39th Cong., 1st Sess. 3562 (1866).
87 Id. at 3849.
88 Id. at 3850.
89 Id. at 3842.
That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in the Congress of the United States, the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery. And whenever in either of said States or districts the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and until such State shall have been restored in its constitutional relations to the government, and shall be duly represented in the Congress of the United States, the President shall, through the commissioner and the officers of the bureau, and under such rules and regulations as the President, through the Secretary of War, shall prescribe, extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights, and no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable by law for the like offence [sic]. But the jurisdiction conferred by this section upon the officers of the bureau shall not exist in any State where the ordinary course of judicial proceedings has not been interrupted by the rebellion, and shall cease in every State when the courts of the State and the United States are not disturbed in the peaceable course of justice, and after such State shall be fully restored in its constitutional relations to the government, and shall be duly represented in the Congress of the United States.91

With the enactment of the Freedmen's Bureau Act, the civil rights revolution in the 39th Congress was won. The Fourteenth Amendment was proposed by Congress to the States, and the ratification process was the next step. The following summarizes the roll-call voting behavior of Congressmen concerning the Freedmen's Bureau Act and the Fourteenth Amendment. Every Senator who voted for the Fourteenth Amendment also voted for the Freedmen's

91 Id. at 176-77 (emphasis added).
Bureau Bills, S. 60 and H.R. 613, and thus for recognition of the constitutional right to bear arms as embodied in the rights of "personal liberty" and "personal security." The only recorded Senate vote on S. 60, the first Freedmen's Bureau Bill, as amended to include recognition of the right to bear arms, was the 30 to 18 veto override vote of February 20, just two votes shy of the necessary two-thirds. On June 8, the Senate passed the proposed Fourteenth Amendment by a vote of 33-11. H.R. 613, the second Freedmen's Bureau Bill, then passed the Senate by voice vote on June 26. On July 16, the Senate overrode the President's veto of H.R. 613 by a vote of 33 to 12 (73%).

An analysis of the roll call votes reveals that all 33 senators who voted for the Fourteenth Amendment also voted for either S. 60 or H.R. 613. Of the 33 senators who voted for the Fourteenth Amendment, 28 (85%) voted for both S. 60 and H.R. 613. The eleven senators who voted against the Fourteenth Amendment also voted against either S. 60 or H.R. 613, or both.

Members of the House cast recorded votes overwhelmingly in favor of the Freedmen's Bureau Bills and in favor of the Fourteenth Amendment on two occasions. On February 6, a day after inserting the right to bear arms into the bill, the House passed S. 60 by a vote of 136 to 33. Because the Senate failed to muster the necessary two-thirds to override the President's veto, the House had no override vote. The proposed Fourteenth Amendment passed the House on May 10 by a vote of 128-37, and again, with the Senate amendments, on June 13 by a vote of 120-32. The House passed H.R. 613 on May 29 by a 96-32 margin, and then on July 16 overrode the President's veto by a vote of 104-33.
The overwhelming majority of House members voted in the affirmative on all five recorded votes—once on S. 60, twice on the proposed Fourteenth Amendment, and twice on H.R. 613. Some voted only once on the proposed Fourteenth Amendment, or once or twice on the Freedmen's Bureau Bills. A total of 140 representatives voted at least once in favor of the proposed Fourteenth Amendment, and every one of the 140 voted at least once in favor of one of the Freedmen's Bureau Bills. Of the 140 representatives who voted for the proposed Fourteenth Amendment, a total of 120 (86%) voted for both S. 60 and H.R. 613.

Accordingly, the same two-thirds-plus members of Congress who voted for the proposed Fourteenth Amendment also voted for the proposition contained in both Freedmen's Bureau bills that the constitutional right to bear arms is included in the rights of personal liberty and personal security. No other guarantee in the Bill of Rights was the subject of this formal approval by the same Congress that passed the Fourteenth Amendment.

The framers intended the Fourteenth Amendment to guarantee the right to keep and bear arms as a right and attribute of citizenship upon which no state government could infringe. The passage of the Fourteenth Amendment accomplished the goal that each State must respect all the guarantees (or at least all the substantive, non-procedural guarantees) contained in the Bill of Rights.

The following years of Reconstruction were filled with countless other events, debates, reports, and developments further demonstrating the intent that the Fourteenth Amendment would protect the individual right to keep and bear arms. Congress would abolish the Southern State militias, in part because they violated the right of freedmen to keep arms. Congress would also enact the Civil Rights Act of 1871, today's 42 U.S.C. § 1983, the effect of which, argued Rep. Whitthorne, was that if a policeman seized a firearm, "the officer may be sued, because the right to bear arms is secured by the Constitution." In 1867, Congress required by law that the constitutions of the reconstructed Southern States conform to the U.S. Constitution, including the Fourteenth Amendment, even though it was not yet fully ratified. In response thereof, the Southern States adopted new constitutions and laws reflecting the understanding of the Fourteenth Amendment as incorporating Bill of Rights guarantees. The following analyzes this phenomenon as exemplified by the State of Georgia.

The Georgia Constitution of 1868 included the following provisions replicating the language of the Fourteenth Amendment and requiring the

---

103 CONG. GLOBE, 39th Cong., 1st Sess. 3850 (1866). Colleagues excused 13 absentees who would have voted for the bill but were absent because of "indisposition." Id. at 3850-51.
104 Eleven members who voted for either S. 60 or H.R. 613 but not both were not present for the vote on the other. Nine members voted yes on S. 60 and no on H.R. 613, no on H.R. 613 but yes on the H.R. 613 override, or otherwise voted inconsistently. Three members voted both for and against the Fourteenth Amendment on two occasions. These aberrations are statistically insignificant.
105 See HALBROOK, FREEDMEN, supra note 3, at 68-69.
106 See id. at 125 (citing CONG. GLOBE, 42d Cong., 1st Sess. 337 (1871)).
legislature to enforce "the rights, privileges, and immunities guaranteed" in that constitution:

Section 2. All persons born or naturalized in the United States, and resident in this State, are hereby declared citizens of this State, and no laws shall be made or enforced which shall abridge the privileges or immunities of citizens of the United States, or of this State, or deny to any person within its jurisdiction the equal protection of its laws. And it shall be the duty of the General Assembly, by appropriate legislation, to protect every person in the due enjoyment of the rights, privileges, and immunities guaranteed in this section.

Section 3. No person shall be deprived of life, liberty, or property, except by due process of law.\(^{108}\)

The 1868 Constitution also provided for rights recognized in the federal Bill of Rights, including the following rendition of the Second Amendment: "A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne."\(^{109}\) When proposed in convention, the last part read, "borne by private persons."\(^{110}\) Deletion of this phrase made clear that the legislature could prescribe how officials, as well as private persons, may bear arms.

Although Georgia’s antebellum Constitution had no right-to-bear-arms provision, the Georgia Supreme Court had held in 1846 that "the language of the second amendment is broad enough to embrace both Federal and State governments."\(^{111}\) The court declared a state statute banning breast pistols violative of the Second Amendment, explaining: "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such as are used by the militia, shall not be infringed...."\(^{112}\) However, a later decision held that "[f]ree persons of color have never been recognized here as citizens [of Georgia]" and hence "are not entitled to bear arms [sic]."\(^{113}\) In any event, adoption of the language of the Second Amendment in 1868 reflected adherence both to the Fourteenth Amendment as well as to the original federal Bill of Rights.\(^{114}\)

As noted above, Article I, section 2 of the 1868 Constitution required the


\(^{109}\) Id. at § 14.


\(^{111}\) Nunn v. State, 1 Ga. 243, 250 (1846). This precedent was reaffirmed in Hill v. State, 53 Ga. 473, 476 (1874); Strickland v. State, 137 Ga. 1, 8, 72 S.E. 260, 267 (1911).

\(^{112}\) Nunn, 1 Ga. at 251.

\(^{113}\) Cooper v. Savannah, 4 Ga. 68, 72 (1848).

\(^{114}\) Indeed, the 1865 Constitution adopted language identical to the Second Amendment. Ga. Const. art. I, § 4 (1865).
legislature “to protect every person in the due enjoyment of the rights, privileges, and immunities guaranteed in this section.” The Georgia Code of 1868 did just that in part as follows: “Among the rights of citizens are the enjoyment of personal security, of personal liberty, private property, and the disposition thereof, the elective franchise, the right to hold office, to appeal to the Courts, to testify as a witness, to perform any civil function, and to keep and bear arms.”1115

The source of this phraseology is clear—the reference to “rights, privileges, and immunities” derives from the Fourteenth Amendment, and in turn the rendition of Blackstone by the Freedmen’s Bureau Act was reflected in the reference to the rights of “personal security, personal liberty, and private property,” including the right “to keep and bear arms.” Also included, as noted, were the rights to participate in civic and judicial matters.

The Georgia Code reprinted an article on “Persons of Color” which was now rendered obsolete by the Fourteenth Amendment and the above provisions of the 1868 Constitution. Although stopping short of declaring such persons entitled to all the rights of citizenship, one provision had almost identical language as the federal Civil Rights Act of 1866 and the corresponding version of S. 60, the Freedmen’s Bureau Bill as originally introduced.1116 The Georgia provision stated that persons of color “shall have the right to make and enforce contracts, to sue and be sued, to be parties and give evidence, to inherit, to purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate...”1117 It bears repeating that the first Freedmen’s Bureau Bill provided for the right “to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms.”1118

Reflecting these constitutional values, there was only a single law on the books restricting the possession in any form of arms, which provided that “[a]ny person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol (except horseman’s pistols),” or certain edged

1115 GA CODE § 1648 (1867). This was known as “Irwin’s Code.” Despite the printed reference to 1867, this edition was actually printed in 1868 since it reprints the Fourteenth Amendment and its adoption date in 1868 as well as the Georgia Constitution of 1868. See id. app. at 1075. The current Code of Georgia, § 1-2-6(a), continues to bear the influence of the language of the Freedmen’s Bureau Act:

The rights of citizens include, without limitation, the following:

(1) The right of personal security;
(2) The right of personal liberty;
(3) The right of private property and the disposition thereof...
(9) The right to keep and bear arms.

GA. CONST. ANN. § 1-2-6(a) (2001).

1116 Civil Rights Act, ch. 31, 14 Stat. 27 (1866); BENJAMIN KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 87 (1914) (S. 60 as introduced).

1117 GA. CODE § 1662 (1867) (referencing Acts of 1865-6, p. 239). Apparently to indicate that this provision was obsolete, it was in brackets. An annotation to the article “Of Persons of Color” in a later edition stated: “Sections 1662...superseded by Constitution of 1868, Article I, section 2.” GA. CODE art III (2d ed., J.W. Burke 1873).

1118 CONG. GLOBE, 39th Cong., 1st Sess. 654 (1866).
weapons, was guilty of a misdemeanor. The reference to "any person" meant that persons of color were not subject to any further special restrictions. The exemption for carrying horseman's pistols concealed reflected the deference toward the bearing of arms which could have uses for the militia or for self defense.

Despite the civil rights gains on paper, controversy ensued. A “memorial of a convention of the colored citizens of Georgia” which was raised in Congress appealed to the provision of the Georgia Code referencing the rights to personal security, to hold office, and to bear arms, to protest the expulsion of blacks from the State legislature. Because of the Civil Rights Act of 1866 and the Fourteenth Amendment, the memorial reasoned, “we became citizens of the State of Georgia, and as such entitled to the same ‘rights,’ privileges, and immunities belonging to other citizens…”

This issue was resolved by an opinion of the Georgia Supreme Court upholding the right of blacks to hold office. The opinion referred to the above provision as “a clear, definite specification of certain rights, which belong to citizens as such…” Predictably, a dissenting opinion declared: “Persons of color were not in the contemplation or purview of the law-makers when they declared and defined the rights of citizens in the Code with respect to holding office, and to keep and bear arms, as therein expressed.” The dissent relied in part on the concept of “citizenship” set forth in the Dred Scott decision, which the Fourteenth Amendment and the 1868 Constitution had overruled.

In any event, the above experience exemplifies the understanding of the obligation of the Southern States to adopt constitutions and laws consistent with the Fourteenth Amendment. The rights, privileges, and immunities the State of Georgia proceeded to protect included the right of “personal security,” including “the right to keep and bear arms.”

In response to violence by the Ku Klux Klan which was invariably associated with attempts to disarm freedmen, Congress enacted the Enforcement

---

120 CONG. GLOBE, 40th Cong., 3d Sess. 3 (1868) (memorial presented by Senator Wilson).
121 Id.
123 Id. at 262; see also id. at 271.
124 Id. at 279 (Warner, J., dissenting); see also id. at 278-79.
125 Id. at 276 (quoting Scott v. Sanford, 60 U.S. 393, 422 (1857)). In Scott, Chief Justice Taney argued that blacks could not be considered citizens because they would then have the rights of citizens:

For if they [African Americans] were . . . entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race . . . the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.

Scott, 60 U.S. at 416-17.
Act of 1870, which criminalized civil rights violations by private parties. United States attorneys aggressively prosecuted Klansmen for various criminal offenses under the Act, at times alleging violation of the rights to assemble, to keep and bear arms, and against unreasonable searches. These efforts ended with the Supreme Court's decision in United States v. Cruikshank, which held that private individuals, unlike the States, cannot violate Bill of Rights guarantees (the First and Second Amendments in that case), and hence persons cannot be prosecuted for such conduct under the federal Enforcement Act.

Two post-Reconstruction decisions by the Supreme Court briefly addressed the Second Amendment. Presser v. Illinois held that requiring a permit for an armed march in a city did not violate the rights to associate or to bear arms, and that in any event the First and Second Amendments did not apply to the States. However, Presser did not consider whether the Fourteenth Amendment protects those rights by incorporating the Second Amendment, an issue not raised by the parties.

Miller v. Texas rejected direct application of the Second and Fourth Amendments to the States, but refused to consider whether those amendments were incorporated into the Fourteenth Amendment:

> And if the fourteenth amendment limited the power of the states as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court...A privilege or immunity under the constitution of the United States cannot be set up here...when suggested for the first time in a petition for rehearing after judgment.

Had the issue been decided previously, the Court would have so stated rather than refusing to consider what was an open question but which had not been raised below. To date, the Supreme Court has not resolved that issue.

In the twentieth century, the Court held most Bill of Rights guarantees applicable to the States through the due process clause of the Fourteenth Amendment, but has been silent on whether the Second Amendment is included. However, Planned Parenthood v. Casey discussed the broad

---

127 See HALBROOK, FREEDMEN, supra note 3, at chs. 5, 6.
130 The tumultuous background to this case originating in labor struggles is detailed in Stephen Halbrook, The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States, 76 U. DET. MERCY L. REV. 943 (1999).
132 See HALBROOK, FREEDMEN, supra note 3, at 185-88.
parameters of the Fourteenth Amendment’s due process clause, noting that “all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” The Court recognized that the Fourteenth Amendment extends its protection to, but is not limited by, the specific guarantees expressed in the Bill of Rights, adding:

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. . . . As the second Justice Harlan recognized:

"[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution...[such as] the freedom of speech, press, and religion; the right to keep and bear arms.... It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints...."

The Supreme Court has recognized the common origins and purposes of the Freedmen's Bureau and Civil Rights Acts of 1866 and the Fourteenth Amendment. Noting that “the Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act,” Justice Thurgood Marshall concluded that the rights set forth in the Freedmen’s Bureau Act were dispositive of Congress’ intent in the Fourteenth Amendment. The Court has held that the Fourteenth Amendment protects from State infringement the “indefeasible right of personal security, personal liberty and private property” – the very rights the Fourteenth Amendment’s framers declared, in the Freedmen’s Bureau Act, included the right to bear arms.

No reported judicial decision at any level reflects knowledge of the declaration of the Freedmen’s Bureau Act about personal security and the right to bear arms and the relation thereof to the Fourteenth Amendment. In upholding

134 Id. at 841 (citation omitted).
California's prohibition on possession of certain semiautomatic rifles (pejoratively characterized as "assault weapons"), the U.S. Court of Appeals for the Ninth Circuit rejected incorporation of the Second Amendment into the Fourteenth, refusing to consider what it referred to as "remarks of various legislators during passage of the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1866, and the Civil Rights Act of 1871." The court was fully aware from the appellants' briefs of the existence of the Freedmen's Bureau Act, but chose to acknowledge only "remarks" of legislators rather than an enactment passed by over two thirds of the members of Congress. Similarly, the court held that the Supreme Court's Presser decision held that the Second Amendment did not apply to the States, ignoring -- as Miller v. Texas made painfully clear -- that the Supreme Court had never even considered whether the Fourteenth Amendment incorporated the Second Amendment.

The same law was later upheld by the California Supreme Court against an equal protection challenge. The concurring opinion by Justice Brown states: "After the Civil War a series of enactments, culminating with the Fourteenth Amendment, acknowledged the correlation between self-defense, citizenship, and freedom." The language of the Freedmen's Bureau Act about the right to bear arms is quoted -- for the first time in American judicial history.

There is a growing judicial recognition of the Second Amendment as establishing a fundamental, individual right. Justice Thomas has written: "Marshaling an impressive array of historical evidence, a growing body of

138 Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 730 (9th Cir. 1992); See also Quilici v. Village of Morton Grove, 695 F.2d 261, 270 n.8 (7th Cir. 1982), ("the debate surrounding the adoption of the second and fourteenth amendments... has no relevance on the resolution of the controversy before us"; local handgun ban upheld) cert. denied, 464 U.S. 863 (1983). This rejection of the usual rule that the intent of the framers governs construction of the Constitution's provisions suggests that the framers' intent was adverse to the result the court wished to reach.

139 Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 730 (9th Cir. 1992).

140 Id.


142 Id. at 505-06 (quoting Freedmen's Bureau Act, ch. 200, 14 Stat. 176, § 14 (1866) and endorsing related analysis in Stephen Halbrook, Second Class Citizenship and the Second Amendment in the District of Columbia, 5 GEO. MASON U. CIV. RTS. L.J. 105, 141-150 (1995)). In response to the argument that the right to bear arms is outweighed by the right to be "safe," Justice Brown wrote:

I suspect the freedmen of the Reconstruction Era would vehemently disagree. So would the Armenians facing the Ottoman Turks in 1915, the embattled Jews of the Warsaw Ghetto in 1943, and the victims of Pol Pot's killing fields. The media keep the horrific visions of gun violence ever before our eyes. These acts of individual madness are undeniably tragic and totally unacceptable in a civilized society. But there are other horrific visions--the victims of which number in the millions--perpetrated by governments against unarmed populations.

The framers could have had no conception of the massive scale on which government-sanctioned murder would be committed in the 20th century, but they had a keen appreciation of the peril of being defenseless. That wariness is reflected in the Constitution.

scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.” In United States v. Emerson (2001), the U.S. Court of Appeals for the Fifth Circuit held that “the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons..., regardless of whether the particular individual is then actually a member of a militia.”

Appreciation of the character of the right to keep and bear arms as a personal liberty rather than some elusive, collective State “right” requires the incorporation of this right into the Fourteenth Amendment. No Bill of Rights guarantees were endorsed by the same two thirds of Congress that proposed the Fourteenth Amendment except for the right to bear arms in the Freedmen’s Bureau Act. The framers of that amendment understood from hard experience that the rights to personal security and personal liberty are inseparable from the rights to self defense and to keep and bear arms.

If firearms ownership by ordinary citizens seems reprehensible by pacifists and prohibitionists today, one can imagine how possession of firearms by newly-freed slaves appeared to their former masters and to Klansmen during Reconstruction. To say the least, incorporation of the Second Amendment into the Fourteenth has historically been and remains on the cutting edge of whether civil and constitutional rights are taken seriously.

---


144 United States v. Emerson, 270 F.3d 203; 264 (5th Cir. 2001).
THE EMBARRASSING INTERPRETATION OF THE SECOND AMENDMENT

by Mathew S. Nosanchuk

“What I am trying to clarify here is that I believe that there are constitutional inhibitions on the rights of citizens to bear certain kinds of arms, and some of those I would think good judgment, some of those I would think bad judgment, but as Attorney General, it is not my judgment to make that kind of call. My judgment, my responsibility is to uphold the acts of the legislative branch of this government in that arena, and I would do so and continue to do so in regard to the cases that now exist and further enactments of the Congress.”

1 With apologies to Sanford Levinson, whose article, The Embarrassing Second Amendment, 99 YALE L.J. 637 (1989), raised the profile of the Second Amendment debate by moving it onto the pages of one of the nation’s premier law reviews. More important, Levinson, a constitutional law scholar, is a self-described ACLU member and New Deal Democrat who has been critical of gun control legislation because he believes that the Democratic Party needs gun owners in its coalition. Sanford Levinson, Second to None?, TEX. OBSERVER 14, Jan. 18, 2002, at 14, 15 (reviewing THE SECOND AMENDMENT IN LAW AND HISTORY (Carl T. Bogus ed., 2000)), available at http://www.texasobserver.org/showTOC.asp?IssueID=50 (last visited May 2, 2002) (on file with author). His Yale Law Journal article suggests the existence of a double standard on the part of many of his like-minded colleagues in the academy who “view themselves as committed to zealous adherence to the Bill of Rights” when it comes to the First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments, but, due to their support for firearms regulation as a political issue, recognize only a narrow, textual reading in the case of the Second Amendment. Levinson, The Embarrassing Second Amendment, supra, at 642. According to Levinson, his colleagues’ inconsistency renders the Second Amendment “embarrassing.” Id.

Litigation Director and Legislative Counsel, the Violence Policy Center, Washington, D.C. A.B. 1987, Stanford University; J.D. 1990, Stanford Law School. I am grateful to David Barron, Carl Bogus, Saul Cornell, Mariano-Florentino Cuellar, Michael Dorf, Andrew Frey, Daniel Halberstam, Andrew Nicely, Kristen Rand, Richard Schragger, Robert Spitzer, and Josh Sugarmann for helpful comments and conversations. In addition, Benjamin J. Goldman and Bryan Dempsey provided excellent research assistance. I am indebted to my colleagues at the Violence Policy Center (VPC) for their support and encouragement. They have set high standards for quality analysis and research and elevated the level of debate and understanding on issues of firearm violence. Portions of this article are derived from VIOLENCE POLICY CENTER, SHOT FULL OF HOLES: DECONSTRUCTING JOHN ASHCROFT’S SECOND AMENDMENT (2001), which I authored, and that material is reprinted with permission of the VPC. This Article is not a publication of the VPC, and the views expressed herein are mine. Also, in the interest of full disclosure, from 1997-2000, I worked on firearm policy issues in the United States Department of Justice as Senior Counsel in the Office of Policy Development. The change in policy regarding the Second Amendment described in this article occurred after I left the Department in March 2000. This article is dedicated to my son, Seth Levin Nosanchuk, age 5, who tells his friends at school that his Dad works to “keep kids safe from guns.”
—John Ashcroft, at his confirmation hearing for attorney general, responding to a question from Senator Dianne Feinstein (D-CA).

“If he [the President] is asking me for legal advice, I will provide him with my best judgment. It will not be results-oriented. It will be law-oriented.”

—John Ashcroft, at his confirmation hearing for attorney general, responding to a question from Senator Charles Schumer (D-NY).

“Frankly, I didn’t see what I was doing as reversing the Clinton administration. I saw what I was doing as restoring the Constitution.”

—Attorney General John Ashcroft, at a weekly luncheon of conservative movement leaders, explaining his letter to the National Rifle Association regarding the Second Amendment.

I. INTRODUCTION

There have been two interrelated and problematic developments in the ongoing debate over the meaning of the Second Amendment of the United States Constitution. Pared down to its essence, this debate pits those who believe that the Second Amendment protects an expansive, fundamental individual right to keep and bear arms for personal use akin to other individual constitutional rights, such as the right to free speech or free exercise of religion, against those who maintain that the Second Amendment secures only a limited right of the people—individually or collectively—to be armed as part of an organized and well-regulated State militia.

In practical terms, these opposing positions on the Second Amendment have had the greatest effect on public debate when government officials have urged the adoption of new laws to combat gun violence, prevent gun death and

---


3 Id. at 149.

4 Ellen Nakashima, Conservatives Twist At Unexpected Turn, WASH. POST, May 24, 2001, at C1.

5 The Second Amendment provides in full: “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.” U.S. CONST. amend. II.

6 In 1999 (the most recent data available), 28,874 Americans were killed with guns, an estimated 20,000 from handguns alone. See Donna L. Hoyert, Ph.D., et al., Deaths: Final Data for 1999, 49 NATIONAL VITAL STATISTICS REPORT 68 (September 21, 2001).
injury,\textsuperscript{7} or limit the widespread availability of specific classes of firearms.\textsuperscript{8} Until recently, however, the debate did not immediately or concretely affect the implementation and enforcement of specific gun regulations once laws were passed. To the contrary, this debate has proliferated primarily on the pages of law reviews, in hortatory declarations by members of Congress, political candidates and public officials, and in public discourse.\textsuperscript{9} Often the Second Amendment is invoked in opposition to gun control or as a means of winning the support of the gun lobby.\textsuperscript{10} However, law enforcement agencies, chief among them the United States Department of Justice, as well as every level of the judiciary—from state trial courts to the United States Supreme Court—long have weighed in on the other side of the debate, interpreting the Second Amendment narrowly and opposing efforts to create an individual right to acquire and possess firearms for private use.\textsuperscript{11}

Until now. On May 17, 2001, Attorney General John Ashcroft sent a two-page letter to the National Rifle Association of America’s (NRA) chief lobbyist, James Jay Baker, on official Department of Justice stationery proclaiming a 180-degree shift in the Department’s position regarding the Second

---

\textsuperscript{7} The majority of gun deaths in America are suicides (16,599), followed by homicides (10,828), and unintentional shootings (824). Id. at 29-30.

\textsuperscript{8} Of an estimated 192 million guns in American hands, far and away, most are rifles and shotguns (70 million and 49 million, respectively) and the rest are handguns (65 million). Nearly two thirds of homes in the United States are gun-free, and three quarters of American adults do not own a gun. Philip J. Cook and Jens Ludwig, Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use 9, 12-14 (1996). The rate of firearms death in the United States (14.24 per 100,000) is eight times greater than the combined rate for 25 other highly industrialized nations (1.76 per 100,000). EG Krug, KE Powell, LL Dahlberg, Firearm-related deaths in the United States and 35 other high- and upper-middle-income countries, 27 Int’l J. Epidemiology 214, 216, 218 (1998).

\textsuperscript{9} See Paul Brest, Sanford Levinson, J.M. Balkin & Akhil Reed Amar, Processes of Constitutional Decisionmaking: Cases and Materials 413 n.26 (4th ed. 2000) (noting that “[a]lthough the modern Supreme Court has kept remarkably quiet, the Second Amendment’s words and meaning are fiercely debated elsewhere—in the media, in town halls, in state legislatures, in Congress, and even in living rooms.”)

\textsuperscript{10} For example, the National Rifle Association of America (NRA) calls the Second Amendment its “client” and strives to embed an expansive individual right to keep and bear arms as widely and deeply as it can in the annals of American constitutional law and political discourse. See Statement by NRA Chief Lobbyist, James J. Baker, On the Decision by the 5th Circuit Court of Appeals, NRA Institute for Legislative Action (October 17, 2001), at http://www.nraila.org/NewsCenter.asp?FormMode=Detail&ID=1083&l=View (last visited Apr. 24, 2002) (on file with author). Indeed, the NRA deliberately cites only the second half of the Second Amendment in its materials, because the first half—discussing the militia—undermines the claim that the Second Amendment should be read to protect an expansive individual right. For example, the homepage of the NRA’s website displays only the second half of the Second Amendment, “the right of the people to keep and bear Arms, shall not be infringed,” as part of a design and logo at the top of the homepage. National Rifle Association, at http://www.nra.org, (last visited Apr. 24, 2002) (on file with author). Similarly the NRA’s former headquarters in Washington, D.C., featured only the second half of the Second Amendment in raised metal letters outside the front entrance to the building.

\textsuperscript{11} See discussion in Parts III.A. and IV infra.
Amendment. The timing of Attorney General Ashcroft's Letter (the "Ashcroft Letter" or "Letter") coincided with the NRA's annual meeting of members, where Baker touted the Letter as evidence that "[i]n John Ashcroft, we have an Attorney General who agrees with us.' In his Letter, Attorney General Ashcroft described his position on the Second Amendment—interpreting it explicitly to protect an expansive individual right to privately possess firearms—that contradicts longstanding legal precedent, historical evidence, and established policy of the Department of Justice.

Six months later, a second anomalous shoe dropped. On October 16, 2001, the United States Court of Appeals for the Fifth Circuit issued its long-awaited opinion in United States v. Emerson, reversing a trial judge's unprecedented holding that the federal protective order gun ban, 18 U.S.C. § 922(g)(8), violated the Second Amendment. The federal trial judge, Judge Sam Cummings, had invalidated the ban as facially unconstitutional. The court of appeals unanimously rejected Emerson's claim that he had a Second Amendment right to possess a firearm even though he was subject to a qualifying protective order. Judge William Garwood, who authored the majority opinion

---


13 James Jay Baker, Remarks at the Annual Meeting of Members, National Rifle Association 6 (May 19, 2001) (on file with author). Attorney General Ashcroft holds a life membership in the NRA, an affiliation he has declined to relinquish as Attorney General. When he ran unsuccessfully for re-election to a second term in the U.S. Senate in 2000, the NRA spent $499,766 in support of Ashcroft's candidacy. See Information on Candidates Supported by NRA Political Victory Fund, Reports of the Federal Election Commission, at http://www.fec.gov (last visited Apr. 24, 2002) (on file with author). After then-President-elect Bush nominated Ashcroft to be the Attorney General, the NRA's Institute for Legislative Action, according to its own website, "made it clear on Capitol Hill that a vote against Ashcroft's confirmation would be seen as an anti-gun vote and would be communicated to NRA members as such." NRA Institute for Legislative Action, HCI Attacks John Ashcroft With Lies, at http://www.nraila.org/Articles.asp?FormMode=Detail&ID=3 (last visited Apr. 22, 2002) (on file with author).


15 United States v. Emerson, 270 F.3d 203 (5th Cir.), reh'g and reh'g en banc denied, 281 F.3d 1281 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).

16 Under the protective order gun ban, 18 U.S.C. § 922(g)(8), a person is prohibited from possessing or acquiring a firearm if the order restrains the person from "harassing, stalking, or threatening an intimate partner or child of that person or the person's intimate partner," and the restraining order:

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and
(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or, threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.


18 Id. at 611.

19 Timothy Joe Emerson had brandished a Beretta nine millimeter pistol at his estranged wife and
in *Emerson*, rejected the Second Amendment claim in the case before the court. Moreover, over the strong objections of a concurring judge, Judge Garwood went out of his way to declare that the Second Amendment protects a fundamental individual right to keep and bear arms for private purposes, and his opinion included voluminous dicta supporting his conclusion.\(^{20}\)

One might ask whether it actually matters if the Ashcroft Letter and the *Emerson* opinion articulate an interpretation of the Second Amendment heretofore dismissed by the Justice Department and the courts. Neither expressly invalidates any existing firearm regulation. Given that both the Letter and *Emerson* appeared within the past year, one can only begin to answer the question. This Article examines the Ashcroft Letter as an exercise in lawmaking both from the point of view of substance and process.\(^{21}\) In the case of a policy shift on an issue of constitutional law that departs from an agency’s consistent, entrenched position, it is just as important to examine how the particular decision is reached as it is to evaluate the merits of the decision itself.\(^{22}\) Such an examination provides the means to evaluate the legitimacy of the Letter as a basis for a shift in policy and executive branch constitutional interpretation. Unlike a regulation, a normative policy shift in constitutional interpretation as represented by the Letter is not tethered to the strictures of the Administrative Procedure Act, which requires that an executive agency follow requirements for notice and public comment.\(^{23}\) Moreover, the executive branch, and especially the daughter when they came to his office to collect an insurance payment. *Emerson*, 270 F.3d at 273 (Parker, J., concurring). At the time, he was under a protective order that had duly been issued by a Texas state court following a hearing that Emerson attended. Emerson is charged with violating federal law because he possessed a firearm while he was subject to a qualifying domestic violence restraining order. *Id.* at 211-212. His pistol was part of a small “military-style” arsenal that included a second Beretta pistol, a semi-automatic M-1 carbine, an SKS assault rifle with bayonet, and a semi-automatic M-14 assault rifle. *Id.* at 273 (Parker, J., concurring).

20 *Emerson*, 270 F.3d at 218-260.

21 See Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). In this seminal article, Judge Linde, a constitutional scholar and former justice on the Oregon Supreme Court, emphasized the importance of a “legitimate law-making process” in administrative decision-making. Under what Linde termed the “instrumentalist hypothesis”:

A rational policy must be one that is designed to move events toward some goal. At a minimum, therefore, it requires three elements: some knowledge of present conditions; the identification of a preferred future, or a goal; and a belief that the proposed action will contribute to achieving the desired goal, a belief that is sometimes called the instrumental hypothesis.

See *id.* at 223.

22 See *id.*

23 Administrative Procedure Act, 5 U.S.C. § 553 (2002). Thus, it is not the type of decision that would be entitled to *Chevron* deference, named for the two-part test enunciated by the Supreme Court in *Chevron v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 842-843 (1984) (citations omitted), under which administrative agency actions taken pursuant to the agency’s delegated statutory authority are reviewed under a two-step test that looks first to whether Congress has directly spoken to the precise question at issue and if not, whether the agency’s action is based on a permissible construction of the statute. If the court answers the latter question affirmatively, then it will defer to the agency’s interpretation unless arbitrary and capricious. *Id.* at 842-843.
Department of Justice, frequently articulate policy positions in the context of litigation, and the weight that a court ascribes to a particular policy position may turn on a variety of factors such as the legal authority for the position, the nexus between the policy that the executive branch advances and the underlying legal authority, the agency’s expertise and historical position on the issue, or the process by which the agency reaches a new policy determination.  

It is unusual for a policy shift by the Justice Department—especially one of this magnitude—to be articulated in a letter, particularly one addressed to an outside interest group. Thus, the form of the policy shift itself raises serious questions about its legitimacy, especially because of the dramatic departure from past policy articulated in the correspondence and the fact that the Letter flatly contradicted the Department’s concurrent position in pending litigation.

This dissonance between the Letter and the Department’s longstanding policy and litigation positions, the substantive flaws in the Letter, and the process by which the Letter was produced suggest that Attorney General Ashcroft was acting to legitimize a pro-gun canon when he wrote to the NRA, not institutionalizing the policy agenda of the President through legitimate means.

Part II of the Article scrutinizes the historical sources on which the Ashcroft Letter relies to describe what he terms the Founders’ “original intent.” Part III exposes the Letter’s flawed reading of judicial precedents on the Second Amendment, the Letter’s complete omission of any discussion of the controlling precedent, the Supreme Court’s 1939 decision in United States v. Miller, and addresses the question whether the constitutional interpretations of the judicial and legislative branches bind the Attorney General’s official constitutional pronouncements. Part IV reveals the manner in which Attorney General Ashcroft attempts, through revisionist history, to overcome the Justice Department’s historic opposition to the expansive individual rights reading of the Second Amendment, the process by which the Letter was produced, and the as-yet unresolved conflict with pending litigation that the Letter has created. Part V discusses sources cited in the Ashcroft Letter in an attempt to legitimize the individual rights position as the self-proclaimed conventional wisdom. Part VI discusses the implications of the Letter and the Second Amendment interpretation it advocates by focusing on the treatment of the Second Amendment issue in the Emerson decision, illustrates the difficulty of identifying the appropriate constitutional test to be applied in Second Amendment litigation in the wake of Emerson and the Letter, and concludes that a rational basis analysis is the appropriate standard of review. It also describes how the Letter has become further entrenched in Justice Department legal policy via

\[24\] See Michael Herz, Imposing Unified Executive Branch Interpretation, 15 CARDOZO L. REV. 219, 258 (1993) (describing one model for judicial deference to agency rulemaking that recognizes the agency’s expertise, its proximity to the drafting process, and its insight into the underlying purpose of the rule).


\[26\] The NRA highlighted the Ashcroft Letter in its magazine, AMERICA’S 1ST FREEDOM, placing a portrait of Ashcroft and an excerpt from the Letter on the cover of its July 2001 issue. James O.E. Norell, In Step with the Founding Fathers, AMERICA’S 1ST FREEDOM, July 2001, at 35.

pronouncements confirming the new view of the Second Amendment in a Memorandum by the Attorney General to United States Attorneys and two briefs filed by Solicitor General Theodore Olson in the United States Supreme Court.

Unlike the Ashcroft Letter, which draws a sharp distinction between an individual versus a collective right in order to shift the Department from its historic adherence to the latter position, this Article avoids that terminology to get at the heart of the debate. Labeling the right as an individual or collective right begs the question. What the Justice Department and the courts consistently have maintained is that the right to keep and bear arms does not expand to cover private ownership of firearms independent from any connection to participation in a militia. This has variously been described as a collective right, a limited individual right, or a state’s right. The Ashcroft Letter defends an expansive, fundamental, and personal individual right, one that is wholly untethered to the notion of an armed militia explicitly identified in the text of the Second Amendment. By relying on the individual versus collective shorthand, the Ashcroft Letter fails to grapple with the longstanding policy of the Department of Justice and judicial precedents, as well as constitutional debates, all of which describe the right protected by the Second Amendment as inextricably linked to the right of state militias to be armed—what can be termed the “militia-based” view. Instead, the Letter can be, and has been, read as shifting the weight of the Justice Department behind the gun lobby’s insistence that the Second Amendment right is individual and fundamental, thus influencing how the Department may choose to interpret existing gun regulations and react to new proposals.

This examination demonstrates that the Ashcroft Letter fails on both substantive and procedural grounds, and epitomizes some of the most problematic features of the expansive individual rights approach to the Second Amendment. In an effort to create a self-fulfilling prophecy regarding its prevalence, adherents of the expansive individual rights view of the Second Amendment have dubbed it the “Standard Model” borrowing a term used by

---

28 Judge Robert M. Parker, the concurring judge in Emerson in the Fifth Circuit, recognized that the intellectual jousting over whether the label “individual” or “collective” applies to the right protected under the Second Amendment fails to advance the inquiry, stating: “The debate . . . over the nature of the right is misplaced. In the final analysis, whether the right to keep and bear arms is collective or individual is of no legal consequence. It is, as duly noted by the majority opinion, a right subject to reasonable regulation.” United States v. Emerson, 270 F.3d 203, 273 (5th Cir.) (Parker, J., concurring), reh’g and reh’g en banc denied, 281 F.3d 1281 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002). Equally important, it is a right that is inextricably connected to the state’s ability to maintain an organized, disciplined, and armed militia.

29 See infra Parts III.A. & IV.A.


physicists to describe recent areas of research on the structure of the universe.\textsuperscript{33} By presenting the expansive individual rights argument as the accepted scholarly and legal orthodoxy,\textsuperscript{34} the "Standard Modelers" appropriation of the label is intended to describe a paradigm shift in scholarly views on the Second Amendment. However, historian Saul Cornell has aptly described this approach, noting that, unlike a true paradigm shift, "recent writing on the Second Amendment more closely resembles the intellectual equivalent of a check kiting scheme than it does solidly researched history."\textsuperscript{35} The hallmarks of the approach all are present in the Ashcroft Letter—replacing deliberative lawmaking with tautology; mining historical materials for out-of-context quotations; imputing meaning into judicial decisions that simply cannot be supported by the courts' reasoning or holding; and ascribing positions to historical figures that are completely unsupportable.\textsuperscript{36} By importing this approach into legal policymaking, Attorney General Ashcroft has encouraged disregard for settled precedents as

\begin{footnotesize}
\begin{itemize}
  \item[34] Cornell, Commonplace or Anachronism, supra note 33, at 223.
  \item[35] \textit{Id.} Although the historical and legal evidence rebuts the claim that the Standard Model is either "standard" or a "model" for scholarly inquiry, and some scholars decline to use the term, e.g., Rakove, The Second Amendment, supra note 33, at 103 n.1, this Article nonetheless will refer to it as the "Standard Model" and to its adherents as "Standard Modelers."
  \item[36] In his careful examination of the historical claims proffered by supporters of an expansive individual right, Rakove identifies common flaws in this approach:

\begin{quote}
If Americans had indeed been concerned with the impact of the Constitution on this right, and addressed the subject directly, the proponents of the individual rights theory would not have to recycle the same handful of references... or to rip promising snippets of quotations from the texts and speeches in which they are embedded. Because the private ownership and use of weapons were not at issue in the late 1780s, we are compelled to draw inferences from observations that turn out, in most cases, to be concerned with the militia and its public functions, not with the individual ownership and use of firearms.
\end{quote}

Rakove, The Second Amendment, supra note 33, at 109-110.
\end{itemize}
\end{footnotesize}
laid down by the Supreme Court and promoted a freewheeling, politically-motivated—and embarrassing—approach to constitutional interpretation.

II. MINING HISTORY FOR SECOND AMENDMENT NUGGETS:
IT ONLY LOOKS LIKE GOLD

By circumventing and ignoring the established policymaking processes within the Department of Justice, Attorney General Ashcroft granted himself free rein to present several highlights from the individual rights canon. He seeks to legitimate his reading of the Second Amendment by claiming to have the Founding Fathers in his own corner. Attorney General Ashcroft positions himself as an originalist, believing that the Founders’ understanding of constitutional provisions determines how they should be interpreted today. The Ashcroft Letter identifies four of them in support of his contention that his view of the text of the Second Amendment “comports with the all but unanimous understanding of the Founding Fathers,” citing to James Madison, Alexander Hamilton, Thomas Jefferson, and George Mason. However, this conclusion rests upon an extremely creative and non-contextual reading of the writings by the Founders that he cites. It is mystifying how Attorney General Ashcroft can claim that these statements, even if they did support his assertions in substance (which they do not), reflect the understanding of the Founders regarding the Second Amendment. Not one of the statements he cites was made in connection with the debates over the ratification of the Bill of Rights and the Second Amendment in 1791. Rather, every single statement was made at least two years earlier—and in one case at least 15 years earlier—in connection with either the ratification debate on the Federal Constitution or a state’s constitution. Moreover, even if these statements were probative of the meaning of provisions of the Bill of Rights, the Letter presumes that they should be accorded substantial weight in deriving the contemporary meaning of the Second Amendment. This presumption flows from the esteem in which the Founders are held in the contemporary political debate over the Second Amendment.

A. James Madison

Ashcroft cites Federalist 46, written by James Madison under the pen-name “Publius,” which discusses the relative powers of the federal and state governments, and does not directly address individual rights. It concerns itself with the subject of an armed citizenry only in conjunction with the possible need to protect the political power of the states from the reach of the federal government. Federalist 46 states:

38 Id.
39 Id.
40 See id.
41 THE FEDERALIST NO. 46 (James Madison).
Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls, or one twenty-fifth part of the number able to bear arms. This proportion would not yield in the United States an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprizes of ambition, more insurmountable than any which a simple government of any form can admit of.

According to Madison, the people are to be armed so that they can form a state-regulated militia in order to defend the political powers enjoyed by the states as a check on any national standing army that may be formed. Federalist 46 is silent on whether the people should have the right to own weapons for individual self-protection, whether they should be able to conceal weapons on their person, or even whether they should be permitted to store them in their homes.

Madison's essay continues by stating that the right to bear arms exists in relation to service in a militia that is formed to represent the will of local governments. According to Federalist 46:

Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone,
they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force; and of officers appointed out of the militia . . . it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it.45

Madison states that arming and training the people to defend their government cannot be accomplished solely by a militia that is undisciplined and unconnected to any local government entity, and it is the existence of the subordinate entities which provides the best defense against tyranny.46 In his view, the militia acts as a check on the standing army, and his conception of the militia does not correlate with the notion of an expansive individual right.47 For Madison, the militia fights for “common” liberties; it is “united”; and its activities are “conducted by governments.”48 In an oft-misunderstood passage, Madison goes on to suggest that in Europe, the people are not trusted with arms, and the kingdoms are defended by standing armies.49 For Madison, even if the European peoples were armed, this would not guarantee them the ability to win their freedom.50 On the contrary, it is the “advantages of local governments chosen by themselves,” who “collect the national will and direct the national force” under the leadership of “officers appointed out of the militia” that would empower revolutionaries in Europe who seek to overthrow the tyrannical thrones.51 Madison believes that the structure of federalism created by the Constitution, not an expansive individual right to bear arms, provides a check against tyranny.52 Nowhere does this essay discuss arming people for individual self-defense: Madison limits his remarks to the discussion of arming people so that they may defend the governments of their respective states.53

B. Alexander Hamilton

Attorney General Ashcroft also cites Federalist 29, which was written by Alexander Hamilton, also under the penname “Publius.”54 Like Federalist 46, this essay does not discuss the right to bear arms for individual self-protection or as a check against tyranny. Instead, Federalist 29 offers a justification for the existence and regulation of state militias, as provided for in Article I, Section 8 of

45 Id. at 115 (emphasis added).
46 Id.
47 Id.
48 Id. at 114.
49 Id. at 115.
50 Id.
51 Id.
52 Id.
53 Id.
54 The Federalist No. 29 (Alexander Hamilton).
the Constitution.\textsuperscript{55} \textit{Federalist 29} is wholly an argument regarding the necessity and feasibility of disciplining the militia to become a useful military force,\textsuperscript{56} written by an individual notable for his support of a strong, centralized national government.\textsuperscript{57} Hamilton summarizes the general argument of \textit{Federalist 29}:

It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert; an advantage of peculiar moment in the operations of the army; And it would fit them much sooner to acquire the degree of proficiency in military functions, which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority. It is therefore with the most evident propriety that the plan of the Convention proposes to empower the union “to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.”\textsuperscript{58}

Thus, the right of a citizen to be part of the militia carries with it substantial responsibilities.\textsuperscript{59} In order to bear arms in the militia, citizens, referred to by Hamilton in the plural as “they,” must submit to rigorous military training and discipline, as required by Congress.\textsuperscript{60} Hamilton does suggest in \textit{Federalist 29} that the militia should be formed from the general population, which would extend his earlier reasoning to mean that large parts of the population should undergo strict training in military tactics.\textsuperscript{61} They would be trained to act in “concert” and the militia would be subject to regulation by the federal government. \textit{Federalist 29}’s vision of the bearing of arms arose wholly within the context of militia membership, carrying with it responsibilities and restrictions.\textsuperscript{62} If anything, this essay highlights the importance of the first clause of the Second Amendment—“A well regulated militia, being necessary to the

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} See \textsc{The Federalist} No. 1, at 174-175 (Alexander Hamilton), republished in Alexander Hamilton: \textsc{Writings} (Joanne B. Freeman ed., 2001) (previewing the essays that will comprise \textsc{The Federalist} and noting that he will discuss, inter alia, “[t]he necessity of a government at least equally energetic with the one proposed” and the “advantages” of a national government).
\textsuperscript{58} The \textsc{Federalist} No. 29, at 284 (Alexander Hamilton) republished in Alexander Hamilton: \textsc{Writings}, supra note 57.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
security of a free State,"—making it indispensable in understanding the overall meaning and purpose of the provision. To cite Federalist 29 as support for the proposition that the Founding Fathers endorsed an expansive individual right to bear arms misinterprets and distorts the document. Madison and Hamilton each defend the idea of an armed citizenry who will be organized and regulated by government, not an atomized group of individual citizens acting under their own authority. The Founders would have viewed the latter as their nightmare scenario, for they viewed such a citizenry as mob rule.

C. Thomas Jefferson

After misrepresenting Madison and Hamilton, the Ashcroft Letter quotes Thomas Jefferson: "No free man shall ever be debarred the use of arms." Unlike The Federalist Papers, which were written following the drafting of the Constitution in 1787 to support the document's ratification, Jefferson's statement was written during consideration of the proposed constitution for the Commonwealth of Virginia in 1776. It was not written in connection with the ratification of the United States Constitution or the Bill of Rights. Moreover, Jefferson's private thoughts—expressed in an unpublished letter written at least 15 years before the ratification of the Bill of Rights and that failed to influence the actual document ratified by Virginia—seem a weak foundation on which to build a revisionist history.

Jefferson's seemingly broad statement suggests a way that the Founders could have described the right to bear arms in more expansive terms. They did not choose to. In addition, the use of the term "freeman" recognizes that in...
slave-owning colonies, slave owners needed arms to subjugate and control the slave population.\textsuperscript{71} To the extent that Jefferson's quote reflects this concern, it hardly serves to bolster any claim that he sought to protect a value that informs any contemporary understanding of what the Second Amendment protects. In sum, Madison's and Hamilton's writings in \textit{The Federalist Papers} reinforce the view that the contemporaneous thinking around the Constitution envisioned a right to bear arms that was related exclusively to the maintenance of state militias as permitted by Congress, and that the Second Amendment was the product of that thinking.\textsuperscript{72}

D. George Mason

Attorney General Ashcroft next invokes George Mason, and ascribes to him the following statement, supposedly made at Virginia's U.S. Constitution ratification convention in 1788:

\begin{quote}
I ask, sir, what is the militia? It is the whole people . . . To disarm the people is the best and most effectual way to enslave them.\textsuperscript{73}
\end{quote}

This quote is misleading on many levels. While the quote appears to have been derived from spoken comments that Mason made at the Virginia ratifying convention, the words that Attorney General Ashcroft attributes to him do not in fact represent a direct quotation.\textsuperscript{74} Ashcroft misquotes Mason, presumably in order to make Mason's words more suited to the Attorney General's ends.\textsuperscript{75} Also, by employing an ellipsis to denote omitted text, Attorney General Ashcroft leads the reader mistakenly to believe that he is quoting the relevant parts of a single discussion.\textsuperscript{76} In fact, the quote is cobbled together from two different days of the Virginia convention's debate on the Federal...
Constitution.\textsuperscript{77} Even more misleading, the statement making up the second half of the quote ("to disarm the people. . . .") was actually made two days before the statement making up the first half of the quote (". . . what is the militia? . . . ").\textsuperscript{78}

Moreover, as the Virginia debates appear in The Documentary History of the Ratification of the Constitution, the ellipsis replaces 41 pages of debate.\textsuperscript{79} To string together these two disparate comments with nothing more than an ellipsis, after reversing the order in which they appeared, creates the impression that Mason was stating something completely different from what he actually said. Such a practice, effectively rewriting history to suit political objectives, is worse than "law office" history. It is wanton falsification of the historical record.\textsuperscript{80}

In order to understand what Mason was actually saying, these two separate statements must be examined individually and in their respective places in the ratification debate.

The context of the first half of the quote Attorney General Ashcroft attributes to Mason at the Virginia ratification debates offers considerable insight into how Mason might have understood a guarantee like the one embodied in the Second Amendment. Mason made the statement in connection with the Virginia Convention's debate over the provision in the federal Constitution authorizing Congress to place limitations on state militias. Mason stated:

\begin{quote}
I ask who are the militia? They consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people.\textsuperscript{81}
\end{quote}

Mason did identify the militia with the whole body of the people, differentiating it from "public officers," perhaps referring to certain elected or appointed officials, but he saw that the ratification of the Constitution could change the composition of the militia.\textsuperscript{82} Though he does not explicitly mention at this point why he believes that the Constitution would have this effect, there can be little doubt that Mason's cause for concern is the militia clause in Article 1, Section 8, of the U.S. Constitution, which gives Congress the power "to provide for organizing, arming and disciplining the militia."\textsuperscript{83} Mason apparently

\begin{footnotes}
\item[77] VIRGINIA RATIFICATION DEBATES, \textit{supra} note 74, at 1271, 1312.
\item[78] Id.
\item[79] Id.
\item[80] Attorney General Ashcroft is not the first proponent of the expansive individual rights view to misquote Mason. Rakove notes that the Standard Modelers favor the Mason quote as a "succinct endorsement of the equation permanently identifying the militia with the people." Rakove, \textit{The Second Amendment, supra} note 33, at 136.
\item[81] VIRGINIA RATIFICATION DEBATES, \textit{supra} note 74, at 1312.
\item[82] See id.
\item[83] U.S. CONST. art. 1, § 8, cl. 16.
\end{footnotes}
feared that the powers granted to Congress in Article 1, Section 8, would result in
the transformation of the formerly universal militia into a body comprised of
people from only certain segments of society.\textsuperscript{84} Despite his apparent
understanding of the militia as comprising all classes,\textsuperscript{85} Mason recognized that
the Constitution gives Congress the ability to change the composition of that
body, as established by Article I, Section 8.\textsuperscript{86} Nothing in Mason’s statement
suggests that he believed that the Second Amendment somehow supplanted or
emasculated Article I, Section 8.\textsuperscript{87} In fact, by excluding “public officers” from
his definition, he suggests that the militia is something less than the “whole”
people, and his statement can be read to support a view that he was not talking
about individuals.\textsuperscript{88} Moreover, Attorney General Ashcroft quotes from a
discussion that has no bearing upon an individual right to bear arms, and the first
half of the quote the Attorney General attributes to Mason simply reaffirms that
the Constitution grants Congress the power to define the composition of the
militia.\textsuperscript{89}

Attorney General Ashcroft derives the second half of the quote that he
attributes to Mason from comments Mason made two days before he uttered the
first half of the quote.\textsuperscript{90} Here, Mason approached the militia question from a
slightly different perspective. Mason stated:

An instance within the memory of some of this House will show
us how our militia may be destroyed. Forty years ago, when the
resolution of enslaving America was formed in Great Britain, the
British Parliament was advised by an artful man, who was
governor of Pennsylvania, to disarm the people; that it was the
best and most effectual way to enslave them; but that they should
not do it openly, but to weaken them, and let them sink
gradually, by totally disusing and neglecting the militia. (Here
Mr. Mason quoted sundry passages to this effect.) This was a
most iniquitous project. Why should we not provide against the
danger of having our militia, our real and natural strength,
destroyed? The general government ought, at the same time, to
have some such power. But we need not give them power to
abolish our militia. If they neglect to arm them, and prescribe
proper discipline, they will be of no use. . . . I wish that, in case

\textsuperscript{84} \textit{Virginia Ratification Debates}, supra note 74, at 1312.
\textsuperscript{85} \textit{But see} Rakove, \textit{The Second Amendment}, supra note 33, at 133 (asserting that in Hamilton’s
view, “the only good militia was a select militia”); Wills, \textit{To Keep and Bear Arms, reprinted in
Whose Right to Bear Arms Did the Second Amendment Protect?}, supra note 33, at 81
(disputing the Standard Modelers’ claim that the militia was universal: “A false universalism
makes the Standard Modelers say that the militia mentioned in the Second Amendment is made up
of the entire citizenry. . . . The militia was in fact ‘select’ in that it represented the local squierarchy
and its dependents.”).
\textsuperscript{86} \textit{Virginia Ratification Debates}, supra note 74, at 1312.
\textsuperscript{87} \textit{See id.}
\textsuperscript{88} \textit{See id.}
\textsuperscript{89} \textit{See id.} at 1271.
\textsuperscript{90} Id.
the general government should neglect to arm and discipline the militia, that there should be an express declaration that the state governments might arm and discipline them.91

Again, the Ashcroft Letter misreads Mason. Mason was expressing a concern about the regulation of the militia, suggesting that if Congress abdicated its responsibility to arm and discipline the militia, states should be able to do so to ensure that the militia continues to exist.92 Instead of examining the militia from the vantage point of the people who comprise it, Mason here discussed the manner in which the militia should be provided with arms and disciplined.93 And, contrary to the manner in which Attorney General Ashcroft appears to read this statement, Mason took the position that a national government should have the power to disarm the people under some circumstances, so long as that effort does not completely inhibit the ability of the people to effectively form up as the militia.94 He refers elsewhere in his statement to the “unskillful and unarmed” “yeomanry” that is not part of the disciplined militia, which suggests that Mason understood that the general population would be unarmed, while the militia would be armed.95

E. Samuel Adams

Finally, toward the end of the Letter, Attorney General Ashcroft quotes another supposed champion of the expansive individual rights view, Samuel Adams.96 The Letter claims that he explained at the Massachusetts ratifying convention that the proposed Constitution should “never [be] construed... to prevent the people of the United States who are peaceable citizens, from keeping their own arms.”97

Ashcroft quotes Adams in a footnote immediately following a statement that the Second Amendment right to keep and bear arms, as Attorney General Ashcroft understands it, can only be abridged if the government can show that it has a compelling state interest.98 Relying on Adams, the Ashcroft Letter seeks to advance an interpretation of the Second Amendment that would evaluate challenges to gun regulations based on the most rigorous standard in constitutional law, potentially leading to the invalidation of existing laws that supposedly encroach upon the “fundamental” gun rights of “law-abiding” Americans.99

91 Id. (brackets in original) (emphasis added).
92 See id.
93 See id.
94 See id.
95 See id.
96 See Ashcroft Letter at 2 n.1, reprinted in app. A infra p. 800.
97 Id.
98 Id. (emphasis added).
99 Id. See discussion of the applicable constitutional test infra Part VI.B.
Though Samuel Adams probably was the source of this statement, this language does not appear on page 675—the cited page—or, to the author’s knowledge, on any other page of the Bernard Schwartz compendium that Attorney General Ashcroft cites.\textsuperscript{100} Page 675 does refer to amendments to the Federal Constitution that Adams proposed at the Massachusetts ratifying convention, of which one was reportedly a right to keep and bear arms, but these proposed amendments, which were not approved by the convention, are not discussed with any specificity in the Schwartz book.\textsuperscript{101} To actually find the language that Attorney General Ashcroft attributes to Adams, one has to look at the record of proceedings for the ratifying convention in Massachusetts.

The quoted language appears in the entry of February 6, 1788 for the official journal of the convention and is presented in the passive voice without any mention of, or attribution to, Adams:

\begin{quote}
A motion was made and seconded, that the report of the Committee made on Monday last be amended so far as to add the following, to the first article therein mentioned, viz. "And that the said Constitution be never construed to authorize Congress, to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defense of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers, or possessions." And the question being put, was determined in the negative.\textsuperscript{102}
\end{quote}

Although there is no explicit indication in the Convention Journal as to who moved to have this article included, it in fact was Adams.\textsuperscript{103} However, the journal does not indicate whether any single convention participant offered any particular amendments or made statements in support of the amendments.\textsuperscript{104} The Ashcroft Letter creates the impression that Samuel Adams believed in an individual right to bear arms free of government restrictions, but even if Adams held this view, the amendment he introduced at the Massachusetts convention lost.\textsuperscript{105} In the effort to cull whatever support they can from any and all materials related, no matter how tangentially or tenuously, to the ratification of the Constitution and Bill of Rights, the Standard Modelers frequently cite defeated

\textsuperscript{100} See 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971).
\textsuperscript{101} See id.
\textsuperscript{102} RATIFICATION OF THE CONSTITUTION BY THE STATES (MASSACHUSETTS), in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1453 (John P. Kaminski & Gaspare J. Saladino eds., 2000) (citation omitted) [hereinafter MASSACHUSETTS RATIFICATION DEBATES].
\textsuperscript{103} Id. at n.1.
\textsuperscript{104} Id.
\textsuperscript{105} See id. at 1460.
proposals as proof of their position.106 Their argument appears to be that amendments that lost are entitled to the same weight as those that were adopted. This is, to say the least, a strange and counterintuitive approach to divining legislative intent. Generally, if an amendment loses or language is stricken, the logical inference to be drawn is that the legislative body rejected the position advanced by the amendment.107

Thus, the actual texts that Attorney General Ashcroft cites fail to support his claim that the Founders had an “all but unanimous” view mirroring his own.108 In his critique of the Standard Model, Garry Wills identified a recurring pattern in the treatment of eighteenth-century quotations: “Time after time, in dreary expectable ways, the quotes bandied about by Standard Model scholars turn out to be truncated, removed from context, twisted, or applied to a debate different from that over the Second Amendment.”109

Wills could have been writing about the Ashcroft Letter, which turns history on its head by suggesting that the Founders were focused on preserving individual gun ownership when their core concern was with how to make sure that America would continue to have an armed militia.110 As Jack Rakove notes, there was reason for the Founders to be concerned:

In the decade after 1776, the crucible of experience led those most likely to be Federalists to be openly skeptical of the received wisdom about the militia. The image of a citizen militia as a “bulwark” of liberty retained a modicum of ideological allure, but not enough to offset the realization that an effective militia was one that would have to be organized, armed, and disciplined from the top down. . . . If the states were left responsible for maintaining the militia, Federalists believed, they

---

106 See Cornell, Commonplace or Anachronism, supra note 33, at 231-235 (discussing the misplaced reliance placed by the Standard Modelers on the anti-Federalist Dissent of the Minority to the Pennsylvania Constitution and pointing out not only that the dissenters’ view was rejected, but also that it too underscored an understanding by the Pennsylvania anti-Federalists of states’ rights and the ability of the state government to impose serious restraints on gun ownership).

107 Rakove makes the same point in discussing the probative value of the rejected proposals of the Pennsylvania Dissent of the Minority to an understanding of the Second Amendment:

These statements [the Pennsylvania Dissenters’ two proposals on the right to bear arms] appear to be by far the strongest affirmations of a belief in a private right to own and use arms to be rendered immune to federal regulation; they also appear to be the only statements to frame and affirm the right in this way; and they therefore are vulnerable to the charge, among others, that these resolutions are the exceptions that prove a different rule.

Rakove, The Second Amendment, supra note 33, at 135.


109 Garry Wills, To Keep and Bear Arms, supra note 33, at 62, reprinted in WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT?, supra note 33, at 67.

110 Rakove, The Second Amendment, supra note 33, at 139-140.
would not provide the resources required to maintain readiness. And these resources extended to the provision of firearms.¹¹¹

When statements by Hamilton, Madison, Mason, and Adams are properly contextualized, they support Rakove’s and Wills’ contention that the issue on the table was public defense. There are other statements by the Founders from the period that further undermine the Ashcroft Letter’s dubious claim of a widespread consensus that the Second Amendment stood for an individual right to own guns for private purposes.¹¹² The great fear of the Founders was that the militia would continue to languish—unfit, undisciplined, and unprepared for service.¹¹³ This was the real threat to disarmament that lay at the root of the Founders’ vision of the Second Amendment. As Rakove emphasizes, it shares little in common with the anachronistic misunderstanding of the Second Amendment at the heart of the Ashcroft Letter:

It comes as something of a revelation to a modern reader to realize that when the ratifiers of the Constitution occasionally contemplated how the militia might be disarmed, they did not envision jack-booted federal thugs confiscating weapons from hardy householders, but rather worried that the federal government would decline to provide either the states or the militia with the weapons they would not obtain on their own.¹¹⁴

Although private ownership of firearms was a component of that objective, it was part of a public obligation that carried with it responsibilities and required a scheme of registration to maintain. For example, Hamilton addressed private possession of arms in a 1791 report on manufactured goods which included a discussion of how duties should be calculated for firearms:

There appears to be an improvidence, in leaving these essential instruments of national defense to the casual speculations of individual adventure; a resource which can less be relied upon, in this case than in most others; the articles in question not being objects of ordinary and indispensable private consumption or use.¹¹⁵

Regulating the firearms that would be made available to the well-regulated militia was inextricable from the Founders’ vision of an armed militia. This vision depended on the ability of the government to muster its citizens and therefore keep accurate records of who had weapons. The Ashcroft Letter

¹¹² Rakove, The Second Amendment, supra note 33, at 96-97.
¹¹³ Id. at 96, quoting Madison.
ignores this vital context, providing yet another example of the “silent avoidance” of the issue by the Standard Modelers.\textsuperscript{116}

III. JUDICIAL PRECEDENT ON THE SECOND AMENDMENT: DOES IT MATTER?

A. Judicial Recognition of the Second Amendment’s Limited Scope

Attorney General Ashcroft asserts: “[L]et me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms.”\textsuperscript{117} With the notable exception of the Emerson decision,\textsuperscript{118} every court to have considered whether the Second Amendment protects an expansive individual right unequivocally has concluded otherwise. The Supreme Court in United States v. Miller\textsuperscript{119} and every federal court of appeals, with the exception of the Federal Circuit, has relied on Miller in upholding the limited, or militia-based, interpretation of the Second Amendment against Second Amendment challenges urging the adoption of the expansive individual rights view.\textsuperscript{120} Since the Ashcroft Letter presents a highly

\textsuperscript{116} See Rakove, Words, Deeds, and Guns, supra note 111, at 209.
\textsuperscript{117} See Ashcroft Letter at 1, reprinted in app. A infra p. 799.
\textsuperscript{118} United States v. Emerson, 270 F.3d 203 (5th Cir.), reh’g and reh’g en banc denied, 281 F.3d 1281 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).
\textsuperscript{119} United States v. Miller, 307 U.S. 174, 178 (1939) (explaining that “obvious purpose” of the Second Amendment was to “assure the continuation and render possible the effectiveness of such [militia] forces”).
\textsuperscript{120} See, e.g., Gardner v. Vespia, 252 F.3d 500, 503 (1st Cir. 2001) (citing Miller to support conclusion that denial of a firearm “did not violate any constitutional right to own that firearm”); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984) (holding that, under Miller, there is no constitutional right to possess weapons that are unrelated to the preservation of a state militia); United States v. Graves, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (observing that, after the “controlling” interpretation of the Second Amendment in Miller, courts had “narrowly constr[ed] [it] to guarantee the right to bear arms as a member of a militia”); Love v. Peppersack, 47 F.3d 120, 124 (4th Cir. 1995) (observing that, since Miller, “the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right”); United States v. Johnson, 441 F.2d 1134, 1136 (5th Cir. 1971) (citing Miller for the proposition that the Second Amendment only extends to the possession or use of weapons that bear a “reasonable relationship” to the preservation of a state militia); United States v. Haney, 264 F.3d 1161, 1164-1165 (10th Cir. 2001) (under “holding” in Miller, federal gun control laws do not “violate the Second Amendment unless
selective and misleading view of precedent, a discussion of the actual precedents and what they say is in order. Once the precedents are understood correctly, there is a corollary issue, one that has generated disagreement among scholars: namely, whether the Attorney General is bound by the interpretations by the courts—and especially the Supreme Court—of the Constitution.121

The Supreme Court, for almost 200 years, has been recognized as having the last word as to what the Constitution means.122 Despite the primacy of the Supreme Court’s decisions on matters of constitutional interpretation, Attorney General Ashcroft neglects any mention of the Court’s 1939 ruling in Miller in his Letter.123 That decision never has been reversed or narrowed by the Supreme Court, and it remains the highest judicial authority on the scope of the Second Amendment. In upholding the constitutionality of the National Firearms Act of 1934—arguably among the most restrictive pieces of federal gun control legislation ever enacted—the Court stated:

The Constitution as originally adopted granted to the Congress power—“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”

With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and

---

[they] impair[] the state’s ability to maintain a well-regulated militia”), cert. denied, 122 S. Ct. 2362 (2002); United States v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997) (holding, under Miller, that the Second Amendment “was intended to protect only the use or possession of weapons that is reasonably related to a militia actively maintained and trained by the states”), on rehearing, aff’d in part and vacated in part on other grounds, 133 F.3d 1412, cert. denied, 525 U.S. 894 (1998); Fraternal Order of Police v. United States, 173 F.3d 898, 906 (D.C. Cir.) (applying Miller to uphold applicability of Gun Control Act prohibition to law enforcement because it has no “material impact on the militia”), cert. denied, 528 U.S. 928 (1999).

121 See discussion infra Part III.B.


So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. In connection with the unwillingness of southern Governors to follow the Court’s 1954 school desegregation decision in Brown v. Board of Education, 347 U.S. 483 (1954), the Supreme Court forcefully reaffirmed Marbury in Cooper v. Aaron: “It follows [from Marbury v. Madison] that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land.” 358 U.S. 1, 18 (1958).

123 Miller, 307 U.S. at 174.
The Court's analysis tracks both clauses of the Second Amendment to conclude that the right that the Second Amendment secures is the right to bear arms in connection with service in a state-regulated military organization. 125 Miller holds that such a right is not legitimately transformed into a right of any individual to acquire and possess weapons. 126 The right of the people to arm themselves in connection with organizing for the common defense, under state control, is a far cry from a right to unfettered firearm possession for personal defense or other use. In the days before the existence of a national standing army, local militias provided for the common defense of communities, and the Second Amendment guaranteed militias the right to organize and arm themselves to protect their individual states. 127 The amendment was designed as a limitation on Congress' power over the militia as provided for by Article I, Section 8, of the Constitution. 128 In the view of the Founders, Congress' power over the militia, if left unchecked, had the potential to emasculate the militia. 129

The Supreme Court alone has the final, official word on how constitutional provisions apply in individual cases. 130 In Miller, the Supreme Court

---

124 Id. at 178 (emphasis added).
125 Id.
126 Id.
127 See Finkelman, supra note 72, at 233-234.
128 The relevant portions of Article I, Section 8 empower Congress:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

129 See Finkelman, supra note 72, at 233.
130 See Cooper v. Aaron, 358 U.S. 1, 17 (1958) (rejecting position of state officials opposed to implementing school desegregation that they are not obligated to follow the Supreme Court's mandate). The statement that the Supreme Court determines how constitutional provisions apply in individual cases reads Cooper narrowly. The decision often is cited for the much broader proposition that the Supreme Court is the all-purpose ultimate arbiter of constitutional meaning. But that reading has become increasingly debatable. Larry Kramer's HARVARD LAW REVIEW Foreword for the 2000 Supreme Court Term, identifies "a world of difference between having the last word and having the only word: between judicial supremacy and judicial sovereignty." Larry Kramer, The Supreme Court 2000 Term: Foreword: We the Court, 115 HARV. L. REV. 4, 12 (2001). Kramer takes issue with the fact that "[t]he Rehnquist Court no longer views itself as first among equals but has instead staked its claim to being the only institution empowered to speak with authority when it comes to the meaning of the Constitution," id. at 13. In Kramer's view, this all-powerful self-image stems from the Justices' "fundamental misunderstanding of constitutional history" combined with its "displeasure" with the actions of Congress, id. at 14. The "capstone of
Court reconciled restrictive gun control legislation with the language and principles of the Constitution, and the decision remains in force. Thus, if the Supreme Court has declared that the Second Amendment is only to be interpreted in light of its purpose to maintain the militia, anyone applying that amendment, especially the Attorney General of the United States—who is an officer of the Court and the nation’s chief law enforcement officer—has a strong incentive to confine his interpretation of the constitutional text in his official capacity to one that is consistent with the Court’s unambiguous reading of the provision. At the very least, the Attorney General should have acknowledged the existence of Miller in his Letter and explained why he believes it does not serve as the governing precedent regarding the meaning of the Second Amendment, justifying a decision not to follow Miller contrary to the settled understanding of the decision within the Justice Department. Even if Attorney General Ashcroft concluded, as have other commentators, that Miller is ambiguous or unclear, it remains the only twentieth-century Supreme Court decision addressing the meaning of the Second Amendment squarely in the context of modern-day gun control laws. Thus, the Attorney General should not have skipped over the decision as though it never existed.

Nor does the passage of time in any way diminish the continuing force of the Miller decision. Courts have cited and continue to cite Miller as binding the Rehnquist Court’s campaign to control all things constitutional” was the Supreme Court’s “notorious” decision in Bush v. Gore, 531 U.S. 98 (2000), see Kramer, We the Court, supra at 14, 152-157. 131 Miller, 307 U.S. at 174.

132 Scholars on both sides of the Second Amendment debate have suggested that Miller is ambiguous. On the expansive individual rights side, see, e.g., David B. Kopel, The Sounds of the Supremes, 18 ST. LOUIS U. PUB. L. REV. 203, 214 (1999) (describing Miller as “a good starting point for all kinds of theories, but it is hardly a conclusive, clear endorsement of any theory”). On the side of those who take the narrow, militia-based view, see, e.g., Michael C. Dorf, What Does the Second Amendment Mean Today?, 76 CHI.-KENT L. REV. 291, 296-297 (2000), reprinted in THE SECOND AMENDMENT IN LAW AND HISTORY, supra note 33, at 247, 249-251 (acknowledging plausible alternative readings of Miller).

133 In recent decisions concerning challenges to federal gun regulations, the Supreme Court uniformly has decided the cases on grounds other than the Second Amendment, mentioning the provision in passing or not at all. See, e.g., Lewis v. United States, 445 U.S. 55, 65 (1980) (upholding ban on possession of firearms by felons against Due Process Clause challenge); Printz v. United States, 521 U.S. 898 (1997) (invalidating a provision in the Brady Law on Tenth Amendment grounds). In cases raising Second Amendment challenges, such as the challenge to the Morton Grove, Illinois handgun ban, the Supreme Court denied review altogether. See, e.g., Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983). Finally, the Supreme Court has denied many more certiorari petitions raising Second Amendment challenges to federal gun regulations without even calling for a response from the United States. See, e.g., United States v. Hancock, 231 F.3d 557 (9th Cir. 2000), cert. denied, 532 U.S. 989 (2001); United States v. Wright, 133 F.3d 1412 (11th Cir. 1998), cert. denied, 522 U.S. 1007 (1997); United States v. Oakes, 564 F.2d 384 (10th Cir. 1977), cert. denied, 435 U.S. 926 (1978).

134 See Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992), in which the Supreme Court declined to overrule Roe v. Wade, 410 U.S. 113 (1973), the controversial abortion decision, and in so doing, carefully reviewed the criteria favoring stare decisis. The Court’s per curiam opinion concluded that despite subsequent decisions questioning Roe, the Court found “Roe’s underpinnings unweakened in any way affecting its central holding.” Casey, 505 U.S. at 860 (per curiam). In the abortion context, this proposition is debatable given the Supreme Court’s
authority for the proposition that there is no expansive, personal, or fundamental individual right to acquire or possess firearms under the Second Amendment.\textsuperscript{135} Moreover, the fact that the decision has not been weakened only makes it more unlikely that the Supreme Court would alter the understanding of the Second Amendment it describes in \textit{Miller}.\textsuperscript{136} In \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{137} the Court, invoking the writings of renowned jurist Justice Benjamin Cardozo, offers a comprehensive rationale for its unwillingness to overturn past decisions:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.\textsuperscript{138}

In order to provide continuity in the legal system, the Court will not overturn its past decisions unless the changing legal landscape renders them flatly unworkable.\textsuperscript{139} The opinion in \textit{Miller} is entirely consistent with the language of the Second Amendment. There are no Supreme Court opinions that undermine \textit{Miller}'s holding. And the decision upheld what, to this very day, remains among the strictest federal gun laws on the books.\textsuperscript{140} Hence, there is no legal justification for the Court to change its interpretation of the Second Amendment and no basis in judicial precedent for Attorney General Ashcroft to conclude that the Second Amendment means something entirely different.

While the Ashcroft Letter omits any mention of \textit{Miller}, a case directly involving a Second Amendment claim, it does rely on several other decisions to

\textsuperscript{135} See cases cited supra note 120.
\textsuperscript{136} See \textit{Casey}, 505 U.S. at 860.
\textsuperscript{137} \textit{Casey}, 505 U.S. at 833.
\textsuperscript{138} \textit{Id.} at 854 (citing Benjamin Cardozo, \textit{THE NATURE OF THE JUDICIAL PROCESS} 149 (1921); Lewis Powell, \textit{Stare Decisis and Judicial Restraint}, 1991 J. SUP. CT. HIST. 13, 16).
\textsuperscript{139} \textit{Id.} See also Richard H. Fallon, Jr., \textit{Stare Decisis and the Constitution: An Essay on Constitutional Methodology}, 76 N.Y.U. L. REV. 570, 585 (2001) (arguing, in defense of constitutional stare decisis, that "a good legal system requires reasonable stability; that while decisions that are severely misguided or dysfunctional surely should be overruled, continuity is presumptively desirable with respect to the rest").
support its conclusion, including a modern-day Supreme Court decision that contains only a fleeting mention of the Second Amendment, *United States v. Verdugo-Urquidez*.

Like the First and Fourth Amendments, the Second Amendment protects the rights of "the people," which the Supreme Court has noted is a term of art that should be interpreted consistently throughout the Bill of Rights.

*Verdugo-Urquidez* does not turn on an interpretation of the Second Amendment. In fact, the decision barely mentions it. The case concerned the claim by individuals who were not U.S. citizens that the Fourth Amendment protected them from unreasonable searches and seizures by U.S. government employees acting outside the country. The Supreme Court disagreed, holding that non-citizens are not among the "people" who can claim the protection of the Fourth Amendment. After identifying various places in the Constitution where the words "the people" appear, including the Second Amendment, the Court concludes that "the people" does not include non-citizens:

While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Attorney General Ashcroft appears to adopt the Standard Modelers' more expansive interpretation of this abbreviated discussion. Because "the people" appears in the First, Second, and Fourth Amendments—the argument goes—the words must operate the same way in each provision so as to confer an individual right of comparable dimension. However, this overlooks the Court's reference to two other amendments that use the words "the people," the Ninth and Tenth Amendments, neither of which has been interpreted to protect an expansive individual right. In addition, this reading of the decision assumes that a word that appears in one constitutional provision carries an identical meaning in a separate provision, an assumption which, as Jack Rakove has noted, "though not unreasonable, is itself an arbitrary one." Even those who approach

---

142 See Ashcroft Letter at 1, reprinted in app. A infra p. 799.
143 *Verdugo-Urquidez*, 494 U.S. at 261.
144 *Id.* at 266.
145 *Id.* at 265 (citing United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904)).
146 See Ashcroft Letter at 1, reprinted in app. A infra p. 799.
147 *Verdugo-Urquidez*, 494 U.S. at 265.
148 Rakove, *The Second Amendment*, supra note 33, at 113. Rakove observes that the recurrence of a particular word does not mean that the Founders intended the word to carry the same meaning throughout:
the text from a rigorous originalist perspective must recognize that the term “the people” was not necessarily understood to be a synonym for “each individual” during the Founding period. Although the Constitution was drafted in one place, the Framers, ratifiers, and the people of the Founding era were not of a single mind. The Constitution is not a seamless document containing words whose meaning and scope were agreed upon in advance. Finally, in contrast to the Fifth and Sixth Amendments which refer to “person” in the singular, Verdugo-Urquidez refers to “the people” in the plural noting that “the people” is “a class of persons” and the word “class” is more suggestive of a group than it is of an individual. In the end, Verdugo-Urquidez answers the question, “who are the people?” not “what are the rights of the people?” To claim that Verdugo-Urquidez says anything about whether the Second Amendment protects either the right of “the people” to bear arms in military service under state regulation or an individual right of “the people” to bear arms independent of the militia, completely misrepresents the limited scope of the Court’s decision. Nonetheless, the case continues to serve as a cornerstone of the Standard Modelers’ canon.

The Ashcroft Letter also attempts to garner further support for the individual rights position in cases decided well before Miller: “In early decisions, the United States Supreme Court routinely indicated that the right protected by the Second Amendment applied to individuals.” In fact, not one of the cases cited by the Attorney General establishes that the Second Amendment protects an expansive individual right of the kind he advocates—i.e., the possession of guns absent any connection to a state militia.

The meaning of a provision cannot be ascertained by staring at it long enough, or by juxtaposing it with other relevant clauses, but must instead be derived from usage, or elaborated in terms of some contemporary context of thought and debate, thus requiring the intrepid interpreter to initiate an inquiry into sources extrinsic to the text.

Id. at 119 n.38 ("One does not have to read very far in the Constitution to learn that the House of Representatives will be 'chosen by ... the People of the several States,' but that this people actually consists of a rather smaller set of 'Electors' ... [I]t is not frivolous to suggest that the single word people has different valences in different provisions of the Bill of Rights.").

See Cornell, Commonplace or Anachronism, supra note 33, at 224 (noting the flaw in the Standard Model which assumes "a common set of terms implied a deeper consensus on what those terms meant").

Id.

Verdugo-Urquidez, 494 U.S. at 265-266.

Id.

See, e.g., Todd Barnet, Gun “Control” Laws Violate the Second Amendment and May Lead to Higher Crime Rates, 63 Mo. L. Rev. 155, 175 (1998) (asserting that the Supreme Court repeatedly has noted that it views the Second Amendment as protecting an individual right because “the people” means “individual citizens,” and Verdugo-Urquidez “confirmed that position in dicta,” as well as “impl[y]ing] the Court’s view that the Second Amendment guarantees a fundamental right”).

See Ashcroft Letter at 1, reprinted in app. A infra p. 799.
The first case cited by Attorney General Ashcroft, *Logan v. United States*, defines the scope of a federal prisoner’s constitutional right to be protected from physical violence while in the custody of the United States Marshal. In fact, the page Attorney General Ashcroft cites is not actually a page from the Court’s opinion. It is a page from the lengthy summary that appears before the beginning of the Court’s opinion in *Logan*, and it contains no discussion of the Second Amendment. It is quite possible that the Attorney General intended to cite to text appearing 10 pages later, where the Court referred to a discussion of the first two amendments in an earlier case:

1st. It was held that the First Amendment of the Constitution, by which it was ordained that Congress should make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances, did not grant to the people the right peaceably to assemble for lawful purposes, but recognized that right as already existing, and did not guarantee its continuance except as against acts of Congress; and therefore the general right was not a right secured by the Constitution of the United States. But the court added: “The right of the people peaceably to assemble for the purposes of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States.”

2d. It was held that the Second Amendment of the Constitution, declaring that “the right of the people to keep and bear arms shall not be infringed,” was equally limited in its scope.

The extent of this case’s treatment of the Second Amendment is limited to a restatement of the latter portion of that amendment’s text, as part of a series of examples of cases interpreting various provisions in the Bill of Rights that constrain government action in some fashion. In addition, the decision refers to the First Amendment right of “the people” to assemble. As historian Jack

---

156 *Logan v. United States*, 144 U.S. 263 (1892).
158 *Logan*, 144 U.S. at 276.
159 Id. at 286-288 (citations omitted).
160 Id.
161 Id. at 286.
Rakove has noted, it is difficult to think about the right of assembly as an individual right, since, \textit{a fortiori}, one cannot assemble with oneself.\textsuperscript{162}

The thrust of the \textit{Logan} decision rests on the conclusion that the federal government does not have an affirmative obligation to enforce these constitutional provisions unless additional authority exists for it to do so.\textsuperscript{163} \textit{Logan} notes that this limitation applies to the Second Amendment and does not otherwise define the scope of the amendment, other than to state that the right "was equally limited in its scope"\textsuperscript{164}—hardly a ringing endorsement of an expansive individual right.

The next case Attorney General Ashcroft cites, \textit{Miller v. Texas}\textsuperscript{165}—not to be confused with \textit{United States v. Miller}\textsuperscript{166}—does address the Second Amendment, but not in a way that supports the Attorney General’s view. In that case, the defendant unsuccessfully challenged a law that prohibited persons from carrying weapons.\textsuperscript{167} The Court rejected the Second Amendment challenge on the ground that the provision does not apply against the states through the Fourteenth Amendment:

Without, however, expressing a decided opinion upon the invalidity of the writ as it now stands, we think there is no Federal question properly presented by the record in this case, and that the writ of error must be dismissed upon that ground. The record exhibits nothing of what took place in the court of original jurisdiction, and begins with the assignment of errors in the Court of Criminal Appeals. In this assignment no claim was made of any ruling of the court below adverse to any constitutional right claimed by the defendant, nor does any such appear in the opinion of the court, which deals only with certain alleged errors relating to the impanelling of the jury, the denial of a continuance, the admission of certain testimony, and certain exceptions taken to the charge of the court. In his motion for a rehearing, however, defendant claimed that the law of the State of Texas forbidding the carrying of weapons and authorizing the arrest without warrant of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the Second and Fourth Amendments to the Constitution of the United States, one of which provides that the

\textsuperscript{162} Discussing the legislative history of the First Amendment right of assembly, Rakove notes the difference between the “collective right of the people to assemble for political purposes, on the one hand, and a personal right to petition for the redress of grievances.” Rakove, \textit{The Second Amendment}, supra note 33, at 120 n.38.

\textsuperscript{163} \textit{Logan}, 144 U.S. at 288-289.

\textsuperscript{164} \textit{Id.} at 287 (citation omitted).

\textsuperscript{165} \textit{Miller v. Texas}, 153 U.S. 535 (1894). In yet another example of the inaccuracy of the citations in Attorney General Ashcroft’s letter, the date for this case is identified incorrectly as 1893.

\textsuperscript{166} \textit{United States v. Miller}, 307 U.S. 174 (1939).

\textsuperscript{167} \textit{Miller v. Texas}, 153 U.S. at 538.
right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures. We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions. . . .

The Court only discussed the language of the Second Amendment to show how it may be constitutionally limited and to demonstrate how a prohibition on carrying a firearm would be constitutional. Attorney General Ashcroft also relies on Robertson v. Baldwin, a decision that reaffirms Miller v. Texas. In Robertson, several sailors, having been convicted of a crime, were sent back to their ship and forced to work against their will. The sailors claimed their rights under the Fifth and Thirteenth Amendments were infringed. The opinion refers to the Second Amendment to make the point that there are limitations on the scope of the rights secured by the Bill of Rights:

The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus . . . the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons.

As in Logan, the Court discusses the Second Amendment without specifying what the right actually is, beyond a recitation of a portion of the amendment’s language. And, as in Miller v. Texas, the Court points out how the right secured by the Second Amendment constitutionally may be limited. This case is useful primarily for the support that it lends to firearm regulations, and does not elucidate the nature of the actual right that the Second Amendment secures.

168 Id. at 537-538 (emphasis added).
169 Id.
171 Id. at 277.
172 Id.
173 Id. at 281-282 (emphasis added).
174 Id.
175 Id.
The final case cited by Attorney General Ashcroft is *Maxwell v. Dow*. As in *Miller v. Texas*, the Court again refused to incorporate the Second Amendment against the states through the Fourteenth Amendment:

In *Presser v. Illinois* . . . it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the National Government, and not of the States. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the National Government, the States could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government. 177

The *Maxwell* decision dealt primarily with the right to a trial by jury and interpreted the right to bear arms with the end of maintaining an effective military. 178 Since citizens have a duty to protect their government, the right to keep and bear arms should not be infringed so as to limit their ability to fulfill that duty. 179 As in the other cases, *Maxwell* does not provide any support for Attorney General Ashcroft’s claim that the Supreme Court recognized a private right to bear arms independent of service in a militia. The right which this opinion discusses as constitutionally protected is the same one which *United States v. Miller* 180 and *The Federalist Papers* indicate, and nothing more—namely, the limited right to keep and bear arms to enable service in a militia in the service of the government.

As supplementary evidence for his reading of the nineteenth-century cases, the Ashcroft Letter claims “Justice Story embraced the same view in his influential *Commentaries on the Constitution*.” 181 Attorney General Ashcroft is correct to his detriment. Justice Story *did* embrace a view identical to the Supreme Court in the string of nineteenth-century cases the Ashcroft Letter cites. 182 However, as with the prior cases, it is not the view that the Letter attributes to him. On the contrary, in his commentary on the Second Amendment, Justice Story interprets the right that the amendment protects as tied to militia service. Justice Story writes:

§ 1890. The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defense of a free country against sudden

---

177 Id. at 597 (citing Presser v. Illinois, 116 U.S. 252 (1886)).
178 Id.
179 Id.
182 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1890 (1833).
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 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.183

Echoing the discussions in the cases Attorney General Ashcroft cites, Story explained that the right to keep and bear arms exists in the context of militia service, and if the militia is to be effective, such service must entail discipline and training.184 To arm the people independent of any organization in the militia and without regard to maintaining discipline would, wrote Story, actually undermine the very protection that the Second Amendment affords.185 In a statement that resonates in the contemporary gun control debates, Story lamented that a breakdown in militia discipline was accompanied by the desire to be “rid of all regulations,” a trend that Story strongly opposed.186 Moreover, while Story suggests that a disciplined militia may protect the people from a domestic usurpation of power by their leaders, he also identifies suppressing domestic insurrections as a responsibility of the organized militia, a role that arguably is incompatible with an individual right of revolution.187 Story did not describe an individual right to keep and bear arms that is independent of military organizations, and to suggest otherwise reads far more into Story’s commentary than its language can support.

---

183 Id. (emphasis added) (footnotes omitted).
184 See id.
185 See id.
186 Id.
187 See id.
B. The Attorney General’s Authority to Interpret the Constitution

Try as he might—whether by misrepresentation or omission—Attorney General Ashcroft fails to break free of the yoke of judicial precedent holding that the Second Amendment does not protect an expansive individual right unconnected to service in an organized state militia. But does he have to? The answer to the question depends on one’s view of the Administration’s authority to interpret the Constitution independent of the other branches of government—a subject that has produced a lively scholarly debate.\(^{188}\)

\(^{188}\) There is an extensive body of scholarship discussing the authority of the President and executive branch officials to interpret constitutional provisions independent of the courts. See, e.g., Kramer, *We the Court*, supra note 130, at 13-14 (advocating the restoration of democratic processes through which the political branches have a say in determining constitutional meaning, and criticizing the “judicial sovereignty” that the Rehnquist Court embraces, for the executive branch’s “understandings of the Constitution are, in the eyes of the Rehnquist Court, hardly more authoritative than yours or mine”); Symposium, *The Constitution Under Clinton: A Critical Assessment*, 63 LAW & CONTEMP. PROBS. 1 (2000); Dawn E. Johnson, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 28-29 (2000) (in context of Presidential non-enforcement power, recognizing limited, independent authority to interpret constitutional provisions provided the President upholds the integrity of the lawmaking process and promotes the Constitution itself, not the President’s own constitutional views, *inter alia*, by recognizing the judiciary’s special role); David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 90 (2000) (arguing that the President can exercise some measure of independent constitutional interpretation, especially when the President has unique interpretive authority over the coordinate branches, but this authority must be duly deferential to competing interpreters); Peter L. Strauss, *The President and Choices Not To Enforce*, 63 LAW & CONTEMP. PROBS. 107, 116-117 (2000) (describing a “rule-of-law” culture within which “the President does, of necessity, have room for his own provisional judgments about what the Constitution means, and the power to act on those judgments”); Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63, 85-86 (1999) (identifying inadequacies on all sides of the debate regarding nonjudicial constitutional interpretation and proposing an agenda for additional research); Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1376-1377 (1997) (arguing that the Supreme Court is, and should remain, the authoritative and supreme interpreter of what the law is and that this and this position furthers the values of coordination, stability, and settlement in constitutional law); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217, 331-332 (1994) (advocating executive interpretive power that is coequal with that of the other branches and arguing that the President is not bound by the Supreme Court’s interpretation of the law; however, independent interpretation should reflect due deference to the considered views of the other branches); Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 377, 436 (1993) (contending that the Attorney General as opinion writer chooses from among different models of constitutional interpretation—which are largely independent of judicial determinations—depending on a given interpretation’s function); Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution*, 61 TUL. L. REV. 979, 985-986 (1987) (arguing that all three branches have independent responsibility to interpret the Constitution, and the constitutional law decisions of the Supreme Court—as distinct from the Constitution itself—bind only the named parties and may be rejected by the President); Burt Neuborne, *Perspective on the Authoritativeness of Supreme Court Decision*, 61 TUL. L. REV. 991, 993-994 (1987) (rebuitting Meese and contending that the President is formally, legally obliged to conform the executive branch’s conduct to the Supreme Court’s precedents for functional, jurisprudential, and historical reasons).
Presidential elections produce winners and losers, and the victor most assuredly is empowered to change existing policies that carry over from previous administrations. Newly elected Presidents have the opportunity to appoint individuals to cabinet positions who share a particular President's agenda and ideology. They in turn can, pursuant to a delegation of authority by the President, carry out policy shifts. However, it does not follow that this authority is unbounded or freewheeling. Critics of such policy shifts need not simply accept a major policy reversal such as the Ashcroft Letter out of an adamantine belief that it is the Attorney General's prerogative to make such a change. A policy shift such as the Ashcroft Letter is not exempt from scrutiny simply because an official might have been empowered to make it.

Larry Alexander and Frederick Schauer pose the question regarding executive branch authority to interpret the Constitution as follows:

[T]he proper inquiry is about legitimacy, and thus about what officials legitimately have the authority to do, rather than just about what they have the power to get away with.\textsuperscript{189}

Their answer to this question is that the executive branch is duty-bound to follow the precedents of the Supreme Court, citing the need for "settlement" of divisive questions of constitutional law.\textsuperscript{190} Under this view, the extant judicial precedents on the Second Amendment would provide the Attorney General with no room to maneuver in interpreting the provision.

Alexander and Schauer have their adherents among scholars who believe the Supreme Court is best suited to resolve constitutional questions.\textsuperscript{191} Their most formidable ally is the Supreme Court itself, which has consistently affirmed its own supremacy as the entity empowered to issue binding constitutional interpretations.\textsuperscript{192} It did so in \textit{Cooper v. Aaron}\textsuperscript{193} and again more recently in \textit{City of Boerne v. Flores}.\textsuperscript{194} In \textit{City of Boerne}, the Court invalidated provisions of the Religious Freedom Restoration Act of 1993\textsuperscript{195} on separation of powers grounds, holding that Congress did not have the authority under Section 5 of the Fourteenth Amendment\textsuperscript{196} to change substantive constitutional law announced by

\textsuperscript{189} Alexander and Schauer, \textit{supra} note 188, at 1366.

\textsuperscript{190} \textit{Id.} at 1371-1372.

\textsuperscript{191} \textit{See}, e.g., Neuborne, \textit{supra} note 188, at 995. Neuborne argues that if the executive and legislative branches were empowered to speak authoritatively about the meaning of the Constitution, the Constitution's role as a check on majority rule, which the judiciary is best-suited to uphold, would be undermined. A member of the majority unhappy with the Supreme Court's constitutional interpretation could ignore the Supreme Court, relying instead on the President's more congenial interpretation.

\textsuperscript{192} \textit{See} \textit{Kramer, We the Court}, \textit{supra} note 130, at 157.


\textsuperscript{194} \textit{City of Boerne v. Flores}, 521 U.S. 507 (1997).


\textsuperscript{196} U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
the Supreme Court in cases involving religious free exercise claims.\textsuperscript{197} Invoking \textit{Marbury v. Madison,}\textsuperscript{198} the Court declared:

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.\textsuperscript{199}

In the Supreme Court’s own view, once it hands down a constitutional interpretation—that interpretation is the law—and the executive branch and Congress are constrained by the decision, and cannot evade or undermine the Court’s ruling in the hope that the Court someday will overrule itself:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including \textit{stare decisis}, and \textit{contrary expectations must be disappointed}.\textsuperscript{200}

The Supreme Court’s self-promotion on this point has proven unpersuasive to scholars and former executive branch officials. The normative trend now recognizes the authority of the legislative and executive branches to engage in independent constitutional lawmaking.\textsuperscript{201}

Former Attorney General Edwin Meese III, who served during the administration of President Ronald Reagan, has staked out the most extreme position in support of independent interpretive authority on the part of the executive branch and Congress. In a controversial speech at Tulane Law School in 1987, Meese maintained that there is an important distinction between the Constitution as originally written and constitutional law that has evolved through

\textsuperscript{197} \textit{City of Boerne,} 521 U.S. at 519-520.
\textsuperscript{198} \textit{Marbury v. Madison,} 5 U.S. (1 Cranch) 137, 177 (1803).
\textsuperscript{199} \textit{City of Boerne,} 521 U.S. at 535-536.
\textsuperscript{200} Id. at 536 (emphasis added).
\textsuperscript{201} See Johnsen, supra note 188, at 28 (“Though the precise contours vary, broad support exists among academic commentators for the authority of the political branches in at least some circumstances to act on their own views of what the Constitution requires, and not just to apply judicial precedent and predict judicial outcomes.”). Note the contrast between Johnsen’s qualified statement and the declarations by the Standard Modelers in the Second Amendment debate, whose “[a]ssertions lacking qualifications are propounded with utmost fervor and conviction, as if a commander was hectoring his troops to smash the enemy line.” Rakove, \textit{The Second Amendment,} supra note 33, at 103. Adherents to the scholarly consensus Johnsen identifies apparently have resisted declaring that a paradigm shift entitles them to the “self-congratulatory” claim that \textit{their} view has become the “standard model.” See id. at 103.
the interpretation of Constitutional provisions by the Supreme Court.\textsuperscript{202} Meese made the extraordinary claim that the only parties bound by a Supreme Court's constitutional decision are the parties named in the case, which would include the executive branch.\textsuperscript{203} Moreover, because the three branches possess co-equal, independent authority to interpret the Constitution, all that really binds those officials in the executive branch who have executed an oath to uphold the Constitution is the Constitution itself.\textsuperscript{204} However, the Tulane speech unleashed a firestorm of criticism, and some three weeks later, Meese published an op-ed in the \textit{Washington Post} in which he softened his views.\textsuperscript{205} He disputed that his speech represented an invitation to lawlessness in the name of the Constitution and emphasized that with respect to the executive branch and Congress, "prudence, the need for stability in the law, and respect for the judiciary will and should persuade officials of these other institutions to abide by a decision of the Court."\textsuperscript{206} It would be, Meese contended, "highly irresponsible for them not to conform their behavior to precedent."\textsuperscript{207} Should the President disagree with the Supreme Court's constitutional interpretation, Meese suggested that the proper course is to file a lawsuit that seeks to change the Court's mind, not to flagrantly disregard precedent.\textsuperscript{208} Because of the discrepancy between Meese's initial speech and his subsequent effort at "damage control," one applies Meese's view to the Ashcroft Letter with some difficulty. However, it is fair to say that Meese, at least in his \textit{Washington Post} op-ed, recognizes that an official like Attorney General Ashcroft presumptively is obliged to adhere to Supreme Court precedent and may not simply ignore the leading Supreme Court decisions and their progeny\textsuperscript{209} in fashioning his own interpretation of the Second Amendment. And if Attorney General Ashcroft disagrees with judicial precedent on the Second Amendment, then the Attorney General should have identified a litigation vehicle through which to express his disagreement, not changed official policy through an unaccountable act such as a letter sent to the chief lobbyist of the NRA.

Michael Stokes Paulsen has expressed a significantly more nuanced, yet still controversial, view that also seeks to maximize the President's independent, co-equal authority to interpret the Constitution.\textsuperscript{210} Paulsen makes the historical case for "coordinate interpretive power,"\textsuperscript{211} relying on, among others, Madison, Hamilton, and Abraham Lincoln,\textsuperscript{212} to conclude that "the theoretical case for

\textsuperscript{202} Meese, \textit{supra} note 188, at 981-982 ("The Constitution, then, is the Constitution, and as such it is, in its own words, 'the supreme Law of the Land'... Constitutional law, on the other hand... is what the Supreme Court says about the Constitution in its decisions resolving the cases and controversies that come before it.").

\textsuperscript{203} \textit{Id}. at 983 ("[S]uch a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore.").

\textsuperscript{204} \textit{Id}. at 986.


\textsuperscript{206} \textit{Id}.

\textsuperscript{207} \textit{Id}.

\textsuperscript{208} \textit{Id}.

\textsuperscript{209} See \textit{Id}.

\textsuperscript{209} Lewis v. United States, 445 U.S. 55 (1980); United States v. Miller, 307 U.S. 174 (1939); see cases cited \textit{supra} note 120.

\textsuperscript{210} Paulsen, \textit{supra} note 188, at 217.

\textsuperscript{211} \textit{Id}. at 331-332.

\textsuperscript{212} \textit{Id}. at 262-263.
independent executive branch interpretation of the law . . . is quite impressive.\textsuperscript{213} Paulsen takes seriously the task of defining how far that independent interpretive authority can extend, identifying the following contexts: pardons and vetoes;\textsuperscript{214} non-execution of statutes;\textsuperscript{215} "nonacquiescence" in a rule announced by the courts;\textsuperscript{216} and non-execution of a court judgment.\textsuperscript{217}

While the extent of this authority sweeps broadly, Paulsen emphasizes that the executive branch is obliged to exercise it responsibly: 
\textquote[It is important to maintain a clear distinction between interpretive authority—the power to say what the law is—and erroneous or abusive interpretations made pursuant to that authority.\textsuperscript{218} Therefore, Paulsen identifies a "standard of review" for executive branch constitutional interpretation and calls it "executive restraint."\textsuperscript{219} This executive branch analog to judicial restraint acknowledges, "each branch should be guided in the exercise of its independent interpretation by a principle of deference to the considered views of the other branches, and by responsibility of a reasonable accommodation of its independent views to those of the others.\textsuperscript{220} Paulsen identifies three principles of executive restraint: deference to the views of the other branches in the formulation of the executive’s interpretation,\textsuperscript{221} accommodation of the executive’s position to the conflicting views of the other branches,\textsuperscript{222} requiring a “willingness to tolerate, where necessary, an ultimate result . . . that is contrary to the result one would reach in the exercise of his own independent judgment, considered in isolation”,\textsuperscript{223} and a restrained and legitimate interpretive method, relying on traditional interpretive tools employed by courts—such as the constitutional text, original intent, structure, and precedents;\textsuperscript{224} and “avoiding interpretations based upon the executive’s individual policy preferences, perceptions of political advantage, and subjective sense of justice.”\textsuperscript{225}

Tellingly, even under Paulsen’s recognition of the executive branch’s broad independent authority to interpret the Constitution, the Ashcroft Letter comes off as an instance of unbridled and illegitimate executive activism. Attorney General Ashcroft feigns deference to the Court’s view of the Second Amendment, but this deference is illusory. Under Paulsen’s view of executive restraint, deference to the judicial branch on the Second Amendment would have

\begin{itemize}
  \item \textsuperscript{213} Id. at 263.
  \item \textsuperscript{214} Id. at 264-267.
  \item \textsuperscript{215} Id. at 267-272.
  \item \textsuperscript{216} Id. at 272-276.
  \item \textsuperscript{217} Id. at 276-284.
  \item \textsuperscript{218} Id. at 321.
  \item \textsuperscript{219} Id. at 331-342 (emphasis added).
  \item \textsuperscript{220} Id. at 332.
  \item \textsuperscript{221} Id. at 332-337. Paulsen dubs this the doctrine of “reverse-Chevron” deference, under which “the executive should be reluctant to disturb the courts’ judgments that are based on a completely defensible reading of the Constitution.” Id. at 336.
  \item \textsuperscript{222} Id. at 337-340.
  \item \textsuperscript{223} Id. at 337.
  \item \textsuperscript{224} Id. at 340-342.
  \item \textsuperscript{225} Id. at 341.
\end{itemize}
required the Attorney General to contend with the Supreme Court's decision in *Miller*, as well as the myriad other decisions in which federal courts of appeal have embraced a militia-based view of the Second Amendment and rejected the expansive individual rights view espoused in the Letter. In addition, the Letter also purports to accommodate the views of Congress and the courts, but under Paulsen's view it would fail the accommodation test, because of the long-settled nature of the Second Amendment's meaning and the unlikelihood that the Supreme Court would support the Attorney General's view of the Second Amendment. Finally, the Ashcrofl Letter does not remotely reflect a restrained interpretive methodology. The Letter flouts not only the Supreme Court's precedent, but also presents a flawed view of the Second Amendment's historical underpinnings and, as discussed in Part IV infra, casts aside any notion of executive branch agency stare decisis with respect to the Justice Department's own interpretations of the Second Amendment in briefs filed with the Supreme Court and opinions of the Office of Legal Counsel (OLC).

David Barron occupies the scholarly middle ground between Alexander and Schauer, at one end, and Paulsen at the other. Barron accepts the notion that each branch can exercise some degree of constitutional interpretation, but this potentially robust authority must be "bound by rules of deference to competing interpreters. . . ."  Whatever authority the President possesses to decide constitutional questions is limited by the competing interests of the Congress and the Supreme Court. Barron emphasizes that a determination of Presidential authority demands that the President inquire whether "the matter at hand is one over which he has interpretive authority relative to the competing branches." When the President lacks interpretive authority in an area relative to the Supreme Court, then the President is bound to abide by the Supreme Court's decisions.

This "middle-of-the-road" approach circumscribes Presidential authority more extensively than Paulsen and suggests the following five limitations on independent executive branch constitutional interpretation. First, as a threshold matter, whatever authority the executive branch possesses to undertake an independent interpretation of the Constitution, such power inheres in the President. Even if the President empowers a subordinate to interpret on the President's behalf, this authority resides in the President, in the same way that

---

227 Barron, supra note 188, at 90.
228 Id. at 90-91.
229 Id. at 92.
230 See id.
231 See McGinnis, supra note 188, at 379-380 (recognizing that the structure of Article II suggests that the "President is ultimately responsible for the legal interpretation of his administration"). Specifically the Take Care Clause in Article II of the Constitution requires the President to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3, cl. 4. See Barron, supra note 188, at 89 (noting that the Take Care Clause "confers, or imposes, upon the President the unique constitutional responsibility"); Peter Strauss, supra note 188, at 108 & n.3 (2000) (suggesting that the Take Care Clause imagines that the President will be overseeing subordinates to ensure that they faithfully execute the laws on the President's behalf and identifying historical understandings of the President's supervisory role).
232 Peter Strauss emphasizes that it is the President who bears ultimate accountability and responsibility for executive branch interpretations:
the President alone exercises the pardon power. 233 If there is doubt as to whether an executive branch officer has acted on the President's behalf, the legitimacy of that subordinate's action may be called into question. 234 In the case of the Ashcroft Letter, there was no express indication that the Attorney General was acting on the President's behalf when the Ashcroft Letter altered the executive branch's understanding of the Second Amendment. 235 This fact, combined with the manner in which the Letter flatly contradicted what was at the time the Administration's consistent, pending litigation position on the Second Amendment, and circumvented the Department's deliberative processes, at the very least raises a question about the extent to which the Letter represents the President's constitutional interpretation.

Second, the executive branch's independent interpretive authority probably is greatest on matters that pertain most directly to the interpretation and exercise of executive power. 236 This would include foreign affairs as well as law enforcement functions. 237 This factor might appear to favor Attorney General Ashcroft, since his interpretation of the Second Amendment relates to the executive branch's law enforcement authority, albeit in a manner that is much more protective of a heretofore unrecognized expansive individual right than the courts or the Justice Department have been in the past.

Third, the executive branch may possess greater authority to second-guess the constitutional interpretations of the Supreme Court on a pure question of constitutional law, as opposed to a refusal to enforce a statute enacted by Congress that incorporates Congress's judgment regarding the constitutionality of its legislation. 238 Here, the Ashcroft Letter stands on shakier ground, because, inevitably, the question of what the Second Amendment means arises in challenges to federal statutes. When Congress passed these statutes, it had the

What we hope is that . . . the President's [behavior], will be influenced by thoughtful consideration of constitutional text as well as possible retaliation of other branches, the voters, or future historians. Thus the question here is how we should prefer the President to imagine his role in a rule-of-law culture—not what he can get away with, not what the sanctions are, but what it is that his role under the Constitution, well-imagined, calls on him to do.

Strauss, supra note 188, at 110.
233 Barron, supra note 188, at 92.
234 See Peter Strauss, supra note 188, at 108 n.3 (quoting nineteenth-century sources asserting that Department heads are prevented by law from acting against the will of the President and the President may remove those officials who fail to follow his directions).
235 The point is not that the President must issue a statement empowering a subordinate official to interpret the Constitution on his behalf. Rather, one should not always assume that an executive branch official is acting to effectuate the President's constitutional interpretation.
236 Barron, supra note 188, at 95 (recognizing that the Supreme Court "evinces little concern with sweeping standardless delegations in these areas precisely because of the structural presumption in favor of executive . . . decisionmaking over such matters").
237 Id. at 94-95.
238 Id. at 91 ("The demands of deference that free the President to adjudge laws unconstitutional that the Court would uphold also may serve to constrain the President to enforce laws he believes to be unconstitutional but that the Congress has enacted.").
opportunity to—and often did—consider whether proposed gun regulations were consistent with the Second Amendment. Congress, exercising its own authority to interpret the Constitution, concluded that the legislation did pass muster under the militia-based interpretation of the Second Amendment. The Attorney General owes Congress some deference—and should allow the Supreme Court to resolve questions regarding the legitimacy of Congress’ constitutional interpretation—before he concludes that he can depart from the legislative branch’s interpretation and decline to enforce or undermine the enforcement of a statute.

Fourth, the President’s authority to disagree with the Supreme Court’s interpretation of the Constitution may be greater when the disagreement is premised on the executive branch’s unique perspective regarding the constitutional question at issue or empirical evidence that was unavailable to the Court. By contrast, the executive branch’s authority is greatly diminished when it departs from the Supreme Court’s interpretation based on its unwillingness to accept the Court’s conclusions regarding text, doctrine, or history. As Professor David Barron notes, “[i]n cases of this type, where the disagreement concerns a dispute over what might be termed ‘formal’ meaning, the President’s interpretive freedom is at its nadir.” Here, the Ashcroft Letter lands with a thud on the weak end of executive branch authority because it relies (to its peril) almost exclusively on historical sources, scholarly materials, and judicial precedents that have been coursing through the Second Amendment debate for decades.

The fifth and final question asks whether the executive branch is interpreting a constitutional matter that is justiciable. Many constitutional questions faced by the executive branch will never be litigated in court. However, if the courts are likely to step in and resolve the constitutional question, then the need for independent interpretation by the executive branch diminishes. The justiciability question is complicated in the case of the Ashcroft Letter. On the one hand, because there was pending litigation concerning the meaning of the Second Amendment on a matter in which the Department had articulated its longstanding position at the time that Attorney General Ashcroft wrote his letter, the question is, a fortiori, justiciable. On the other hand, the Ashcroft Letter leaves open the question of whether this interpretation would result in the invalidation of any given gun regulation. To that extent, the Ashcroft Letter creates a “ripeness” problem, because one does not actually know how this new interpretation would be applied by the Justice

239 See infra Part IV.A.
240 See Barron, supra note 188, at 72.
241 Id.
242 Id.
243 See id. at 67-68.
244 See id.
245 See id. at 67-69. However, Barron cautions that independent executive branch authority may begin where Supreme Court doctrine ends, because the doctrine may fall short of providing the President with “definitive guidance” regarding the President’s response to a statute that he believes in unconstitutional. Id. at 69.
Department in carrying out litigation on behalf of the United States. The justiciability inquiry cuts against Attorney General Ashcroft. The Administration’s interpretation of the Second Amendment likely will come into view in connection with litigation, particularly the Justice Department’s enforcement of federal firearms regulations against Second Amendment challenges, and the courts can be expected to interpret the Second Amendment in accordance with their own relevant institutional competencies, chief among them precedent and stare decisis. In the interim, however, the Ashcroft Letter’s position creates uncertainty and ambiguity within the Justice Department and confuses the public regarding how the Justice Department will enforce federal gun laws and evaluate new legislative proposals.

The Ashcroft Letter does not address expressly the question of the Attorney General’s authority to depart from Supreme Court precedent. In fact the Letter avoids the problem entirely by misrepresenting the cases that it cites and omitting any reference to the authorities—that underscore the departure from precedent that the Letter represents. However, in the Letter, as well as in subsequent comments about the Letter, Attorney General Ashcroft has indicated that he will pay no heed to the qualified scholarly views of Paulsen, Barron, and others who would support executive branch interpretive authority in favor of the controversial view of former Attorney General Meese in its “concentrated” form. In the Letter, Attorney General Ashcroft asserts, “the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms,” avoiding any reliance on how courts, Congress, or the executive branch have interpreted that text for more than 200 years.

Shortly after the Letter was sent, in comments to a group of conservative leaders, Ashcroft said that he does not view the Letter “as reversing the Clinton administration.” Rather, in Meese-like language, Ashcroft describes the Letter as “restoring the Constitution.” The Attorney General appears to view the courts’ interpretations of the Second Amendment as well as the longstanding policy of the Justice Department as ephemeral and inconvenient obstructions to

246 The “ripeness” doctrine imposes a limitation on the availability of judicial review of agency action, and courts will refrain from reviewing agency actions if those actions have not been felt concretely by the party challenging the action. See Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57-58 (1993). “Ripeness” is both a constitutional limitation on the exercise of judicial power under Article III of the Constitution and a prudential restriction self-imposed by a court which declines to exercise jurisdiction. Id. at 57 n.18.

247 See Barron, supra note 188, at 90.


249 Ellen Nakashima, Conservatives Twist At Unexpected Turn, WASH. POST, May 24, 2001, at Cl.

250 Id. According to the Post article, the conservative leaders gathered at the luncheon pounded their fists on the table in approval in response to the comments by Attorney General Ashcroft. In We the Court, supra note 130, at 168, Larry Kramer characterizes the Rehnquist Court as populated by “constitutional fundamentalists,” who act to “restore the Constitution to what they believe is its true form.” Such fundamentalism is not without its costs, and Kramer describes this approach to constitutional adjudication in a way that is just as applicable to the Ashcroft Letter. Like most forms of fundamentalism, their belief rests on an imagined past that never existed. How long must we let them continue fantasizing at our expense.” Id. at 168.
be cleared away. However, with the possible exception of Meese’s view of executive branch authority to interpret the Constitution as originally expressed in his *Tulane Law Review* article, scholarly perspectives ranging from the highly deferential approach of Alexander and Schauer to the executive branch authority-maximizing view of Paulsen and the “kinder, gentler” Meese (to say nothing of the Supreme Court’s own decisions) underscore the status of the Ashcroft Letter as the quintessence of illegitimate and unjustified executive branch lawmaking.

IV. THE JUSTICE DEPARTMENT’S LONGSTANDING POLICY REGARDING THE SECOND AMENDMENT

Not only does the Ashcroft Letter ignore or distort judicial precedent, it also invents a revisionist history of the Justice Department’s Second Amendment policy. Attorney General Ashcroft audaciously argues that prior to the Clinton Administration, Department policy tracked his own.251

A. The Ashcroft Letter’s Misplaced Reliance on Attorney General Homer Cummings

In support of this contention, Ashcroft cites the testimony of former Attorney General Homer Cummings—who served in the administration of President Franklin Delano Roosevelt—before the House of Representatives in 1934.252 The Ashcroft Letter claims that Cummings shared the view that “the right protected by the Second Amendment applied to individuals.”253 Writes Ashcroft:

> It is the view that was adopted by United States Attorney General Homer Cummings before Congress in testifying about the constitutionality of the first federal gun control statute, the National Firearms Act of 1934.254

In fact, Cummings never indicated his support for a broad view of the Second Amendment in his testimony. He testified before the House Ways and Means Committee in 1934 in support of the National Firearms Act (NFA).255 Cummings argued in favor of the legislation in order to impose severe restrictions on the possession of fully automatic machine guns—the then-freely available weapon of choice for gangsters such as Al Capone and John Dillinger.256 The NFA, still in effect to this day, levies a significant tax on the acquisition of machine guns and other “gangster weapons” and establishes stringent sales and possession requirements, including registration,

---

251 See Ashcroft Letter at 1, reprinted in app. A infra p. 799.
252 Id.
253 Id.
254 Id.
photographing, fingerprinting, and local police approval. Not only that, Cummings testified in support of an earlier, more expansive version of the NFA—proposed by the Justice Department—that included handguns within its requirements. Recognizing the bill's severity, Cummings told the Committee: "Frankness compels me to say right at the outset that it is a drastic bill." The NRA, over the objections of the Justice Department, succeeded in stripping handguns from the final version of the bill.

When Attorney General Cummings testified in support of the NFA, he did answer questions about the constitutionality of the legislation. However, they were not the questions or answers that the Ashcroft Letter suggests they were. With one exception, the constitutional questions that arose during the hearing did not concern the Second Amendment at all. Rather, the constitutional issue that Cummings and members of the Committee principally addressed was whether the legislation fell within Congress' power to regulate interstate commerce. Cummings' comments about gun ownership addressed the constitutional effect of a law that restricted the acquisition of firearms across state lines and one that also prohibited the possession of a firearm by someone who happened to cross state lines. In the latter case, such restrictions would, in Cummings' view, raise questions about the law's constitutionality under the Commerce Clause.

For instance, this bill does not touch in any way the owner, or possessor, or dealer in the ordinary shotgun or rifle. There would manifestly be a good deal of objection to any attempt to deal with weapons of that kind. The sportsman who desires to go out and shoot ducks, or the marksman who desires to go out and practice, perhaps wishing to pass from one State to another,

---

259 Id. at 5.
262 Id. at 6. At the time the NFA was proposed, the debate over Congress's power to regulate under the Commerce Clause was raging, because the Supreme Court repeatedly had struck down New Deal legislation, for lack of a sufficient nexus to interstate commerce. For example, on May 27, 1935, on what was known as "Black Monday," the Supreme Court struck down three key provisions of the New Deal, including the National Industrial Recovery Act, a critical part of the Roosevelt Administration's efforts to reduce unemployment and stimulate the economy. See Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). These defeats contributed to President Roosevelt's infamous plan to expand the size of the Supreme Court so that his regulatory program would be upheld. He directed Attorney General Cummings to develop the plan. In February 1937, in the "switch in time that saved nine," the Supreme Court reversed course shortly after the ill-fated Court-packing plan was announced. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), and subsequent decisions, in which the Court took a more expansive view of Congress's power to regulate under the Commerce Clause, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
264 Id. at 5-6.
would not like to be embarrassed, or troubled, or delayed by too much detail. While there are arguments for including weapons of that kind, we do not advance that suggestion. 265

This excerpt from Cummings' opening statement does not support the Ashcroft Letter's contention that he was proffering a view of the Second Amendment. Rather, Cummings was addressing Congress' power to regulate commerce in firearms. While he made no mention whatsoever of the Second Amendment in his opening statement, Cummings did identify expressly the sources of constitutional authority for the bill:

Now we proceed in this bill generally under two powers—one, the taxing power, and the other, the power to regulate interstate commerce. 266

During a subsequent exchange, Cummings again addressed the interstate commerce question:

MR. MCCINTIC: What in your opinion would be the constitutionality of a provision added to this bill which would require registration, on the part of those who now own the type or class of weapons that are included in this bill?

ATTORNEY GENERAL CUMMINGS: We were afraid of that, sir.

MR. MCCINTIC: Afraid it would conflict with state laws?

ATTORNEY GENERAL CUMMINGS: I am afraid it would be unconstitutional. 267

The Ashcroft Letter misreads this statement too, apparently thinking that Cummings was indicating that registration would be unconstitutional under the Second Amendment. Cummings was still discussing the Commerce Clause issue at this point in the hearing. Cummings stated that a registration requirement for persons who currently possessed the weapons included in the bill might be unconstitutional, observing that possession alone might not satisfy the requirement that the weapon traveled in interstate commerce. 268

In the final portion of the testimony cited in the Ashcroft Letter, Cummings completely sidestepped the issue of Second Amendment interpretation.

265 Id. (emphasis added).
266 Id. at 6.
267 Id. at 13.
268 Id.
MR. LEWIS: Lawyer though I am, I have never quite understood how the laws of the various States have been reconciled with the provision in our Constitution denying the privilege to the legislature to take away the right to carry arms. Concealed-weapon laws, of course, are familiar in the various States; there is a legal theory upon which we prohibit the carrying of weapons—the smaller weapons.

ATTORNEY GENERAL CUMMINGS: Of course we deal purely with concealable weapons. Machine guns, however, are not of that class. Do you have any doubt as to the power of the Government to deal with machine guns as they are transported in interstate commerce?

MR. LEWIS: I hope the courts will find no doubt on a subject like this, General; but I was curious to know how we escaped that provision of the Constitution.

ATTORNEY GENERAL CUMMINGS: Oh, we do not attempt to escape it. We are dealing with another power, namely, the power of taxation, and of regulation under the interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say “We will tax the machine gun” and when you say that “the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated,” you are easily within the law.

MR. LEWIS: In other words, it does not amount to prohibition, but allows of regulation.

ATTORNEY GENERAL CUMMINGS: That is the idea. We have studied that very carefully. 269

Here, Cummings responded to a question about the Second Amendment. However, he went only so far as to speculate that one “might say” that an absolute prohibition on the possession of a machine gun by anyone could result in a constitutional question being raised. 270 To read this statement as an

269 Id. at 19.
270 In 1986, Congress enacted a ban on the transfer and possession of machine guns manufactured subsequent to May 19, 1986. This restriction has been upheld by numerous circuit courts of appeal. See United States v. Haney, 264 F.3d 1161, 1164-1165 (10th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002); United States v. Franklyn, 157 F.3d 90, 96 (2d Cir. 1998), cert. denied, 525 U.S. 1112 (1999); United States v. Wright, 117 F.3d 1265, 1270 (11th Cir. 1997), on rehearing, aff’d in part and vacated in part on other grounds, 133 F.3d 1412, cert. denied, 525 U.S. 894 (1998);
affirmation by Cummings that there is an individual right to bear arms of the type that Attorney General Ashcroft posits, or that Cummings himself held such a view, distorts Cummings' words. This point is further supported by the discussion immediately preceding the statement on which Attorney General Ashcroft appears to rely. The Congressman who asked Cummings about the Second Amendment did not even appear to believe that it protects an expansive individual right when he asked Cummings to comment on the strict controls that existed on firearms in other western nations:

MR. LEWIS: What I have in mind mostly, General, is this: The theory of individual rights that is involved. There is a disposition among certain persons to overstate their rights. There is a provision in the Constitution, for example, about the right to carry firearms, and it would be helpful to me in reaching a judgment in supporting this bill to find just what restrictions a law-abiding citizen of Great Britain and those other countries is willing to accept in the way of his duty to society.

ATTORNEY GENERAL CUMMINGS: I will be very glad to supply all the information I can on that subject.271

If Cummings held the view of the Second Amendment that Attorney General Ashcroft ascribes to him, then Lewis' question provided the former Attorney General with the opportunity to express his disagreement with the notion that people "overstate their rights."272 Cummings did not do that; instead, he offered to "supply additional information" to Lewis rather than take a position on the Second Amendment at the hearing.273

B. Justice Department Policy Statements on the Second Amendment from the 1930s until May 17, 2001

Not only does Attorney General Ashcroft completely misread what Cummings said, he wrongly suggests that his own view also was the official view of Justice Department officials in the past.274 On the contrary, Justice Department officials disagreed with the individual rights perspective of the Second Amendment, as evidenced by their policy statements.

United States v. Knutson, 113 F.3d 27, 30 (5th Cir. 1997); United States v. Rybar, 103 F.3d 273, 283 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997); United States v. Kenney, 91 F.3d 884, 890 (7th Cir. 1996); United States v. Wilks, 58 F.3d 1518, 1521 (10th Cir. 1995). The Firearms Owners' Protection Act has been upheld as a Lopez Category I regulation of the channels of interstate commerce by the Sixth and Ninth Circuits. See United States v. Beuckelaere, 91 F.3d 781, 783 (6th Cir. 1996); United States v. Rambo, 74 F.3d 948, 952 (9th Cir.), cert. denied, 519 U.S. 819 (1996).


272 See id.

273 See id.

274 Likewise, the NRA cited it as proof of a shift in Department policy during the Clinton Administration. According to NRA chief lobbyist James Jay Baker:

[T]his dramatically reverses the "collective rights" theory held by the Clinton
Department policy has consistently followed the same interpretation of the Second Amendment that the Supreme Court laid down in *United States v. Miller* in 1939.275 A recent reaffirmation by the Justice Department of this long-held view was made on August 22, 2000, in a letter by then-Solicitor General Seth Waxman.276 In contrast with the Ashcroft Letter, Waxman’s letter merely restates consistent Justice Department policy as expressed in briefs, congressional testimony, and Office of Legal Counsel (OLC) opinions. Unlike the Ashcroft Letter, it does not announce any policy shift whatsoever, does not conflict with the Justice Department’s position in pending litigation, and raises none of the same questions regarding unauthorized executive branch constitutional interpretation. Nor does the Waxman letter suffer from the same substantive defects as the Ashcroft Letter. Waxman writes that “rather than holding that the Second Amendment protects individual firearms rights... courts have uniformly held that it precludes only federal attempts to disarm, abolish, or disable the ability to call up the organized state militia.”277 To support this assertion, Waxman cites a range of cases, including *United States v. Miller*. He also quotes an official in the Office of Legal Counsel during the administration of President Richard Nixon:

> The language of the Second Amendment, when it was first presented to the Congress, makes it quite clear that it was the right of the States to maintain a militia that was being preserved, not the rights of an individual to own a gun [and] [there is no indication that Congress altered its purpose to protect state militias, not individual gun ownership [upon consideration of the Amendment]... Courts... have viewed the Second Amendment as limited to the militia and have held that it does not create a personal right to own or use a gun... In light of the constitutional history, it must be considered as settled that there is no personal constitutional right, under the Second Amendment, to own or to use a gun.278

---

278 Id.
One need not rely solely on Waxman’s assertion regarding the Second Amendment positions of previous Administrations. The Waxman letter cites only one statement by the Office of Legal Counsel concerning the meaning of the Second Amendment, but there are others, and the failure of the Ashcroft Letter even to acknowledge their existence is telling.

Various OLC pronouncements have addressed the scope of the Second Amendment, and they overwhelmingly support the conception of the Second Amendment advanced in the Waxman letter. Of documents obtained by the author through a Freedom of Information Act (FOIA) request,279 the earliest opinion was issued in 1954, by then Assistant Attorney General J. Lee Rankin. Rankin responded to an inquiry from the Atomic Energy Commission on whether the governmental monopoly on fissionable materials violated the Second Amendment right to keep and bear arms.280 In other words, the Commission wanted to know whether the Second Amendment would allow private citizens to build their own nuclear bombs. Rankin concluded that it would not, relying on the analysis prepared by the Commission, which cited Miller for the proposition that the “Second Amendment protects from federal invasion the right to bear only such arms as are appropriate to, or used in connection with the activities of, the organized militia, see United States v. Tot; Cases v. United States.”281 Because individual ownership of atomic weapons bore no relationship to the right of a well regulated militia to be armed by the states, there was no Second Amendment concern with the legislation. Rankin wrote a brief letter to the United States Senate’s Joint Committee on Atomic Energy, in which he endorsed the views expressed by the Commission that the constitutional test under the Second Amendment is whether possession of a weapon has some “reasonable relationship to the preservation or efficiency of a well regulated militia”: 282 “We concur in the conclusion reached by the Atomic Energy Commission that the Second Amendment does not present any valid basis for objection to either the Atomic Energy Act as it now stands, or the amendments which the Commission is proposing.”283

In 1965, OLC, then headed by Assistant Attorney General Norbert A. Schlei, wrote a memorandum on the impact of the Second Amendment on the proposed Federal Firearms Act Amendments, which was the precursor legislation to the Gun Control Act of 1968.284 Schlei cited earlier drafts of the Second

280 Letter from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, to George Norris, Jr., Esq., Joint Committee on Atomic Energy, United States Senate (February 11, 1954) (on file with author).
281 Letter from William Mitchell, General Counsel, United States Atomic Energy Commission, to J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel 2 (February 3, 1954) (citations omitted) (on file with author).
282 Id.
283 Letter from J. Lee Rankin to George Norris, Jr., supra note 280.
Amendment, which included language to protect conscientious objectors from being forced into military service. 285 He contrasted this language—which was ultimately stricken from the final version of the Second Amendment—with the language regarding the right of the people. 286 The conscientious objector language used “person” while the other portion of the amendment used “the people.” “The contrast in terminology,” wrote Schlei, “supports the view that the right to bear arms was intended as a collective right while the protection of religious scruples was a personal benefit.” 287

Schlei also reviewed the claim that state constitutions with analogous clauses supported the view that the Founders intended to protect a private right to bear arms. He concluded that five State constitutions provided for the maintenance of the militia without even mentioning the right to bear arms, while the three states that identified the right of the people to bear arms did so in the connection with the “defense of the state.” 288 Even those state constitutions that provided a right of the people to bear arms for the defense of themselves did not support the expansive individual rights approach, because the word “people” was used in the collective sense throughout the documents, and therefore the language applied to collective defense, not individual self-defense. 289 Ultimately, Schlei concluded:

[A]t the time of the adoption of the Second Amendment neither Congress nor the States indicated any direct concern with an individual “right” to own, carry or use firearms for private purposes. If such a “right” existed, it was not clearly expressed in State Constitutions or Declarations of Rights. Both the States and the Congress were preoccupied with the distrust of standing armies and the importance of preserving State militias. It was in this context that the Second Amendment was written and it is in this context that it has been interpreted by the courts. 290

The conclusion reached in the Schlei memorandum was reflected in even stronger terms in Attorney General Nicholas deB. Katzenbach’s draft written testimony in support of gun control legislation in 1965. Katzenbach reviewed United States v. Miller, 291 United States v. Tot, 292 and Cases v. United States, 293 and concluded:

---

285 See Finkelman, supra note 72, at 226-227 (noting that the exemption on account of religious beliefs comports with Congress’s understanding of the Second Amendment as tied to the militia).
286 Schlei, The Origin of the Second Amendment, supra note 284, at 2.
287 Id.
288 Id. at 3-4.
289 Id. at 4.
290 Id.
In these cases, the courts emphasized that the prohibition in the Second Amendment against infringing the right of the people to bear arms relates back to the beginning statement, "A well regulated militia, being necessary to the security of a free State ***." The contemporaneous evidence shows that it was to protect the State militias from federal infringement that the Second Amendment was adopted, and the Amendment must always be considered in this light. Viewed in this light, it is not necessary to decide whether the right to bear arms belongs only to "the people" collectively—as the use of the term suggests—or whether it belongs to each individual. The right protected by the Second Amendment exists only as it relates to the maintenance of the militia.

During his testimony, Attorney General Katzenbach restated the Department's unchanged view on the meaning of the Second Amendment: "With respect to the second amendment, the Supreme Court of the United States long ago made it clear that the amendment did not guarantee to any individuals the right to bear arms." He then offered for the record a memorandum on the Second Amendment jointly prepared by the Justice and Treasury Departments, and said that it "documents the opinion that the right to bear arms protected by the second amendment relates only to the maintenance of the militia. . . ."

In a comprehensive and careful analysis, the memorandum made four main points about the meaning of the Second Amendment.

First, the memorandum noted, consistent with the above discussion of Attorney General Cummings' testimony, the Second Amendment was not considered an obstacle to passage of the National Firearms Act of 1934. Indeed, the memorandum notes that with respect to the 1935 hearings and committee reports concerning legislation that eventually became the Firearms Act of 1938, the Second Amendment was not referred to even once.

Second, courts have held that the Second Amendment was a "prohibition upon Federal action which would interfere with the organization by States of their militia." The memorandum, recognizing the imprecision of the collective versus individual right labels, notes that even when the Second Amendment is thought of as a right of citizens, it is inextricably linked to the militia: "[I]t

295 Federal Firearms Act, Hearings Before the Subcomm. To Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 89th Cong. 41 (1965) [hereinafter 1965 Federal Firearms Act Hearing]. Attorney General Katzenbach also bridled when asked about the NRA's claim that the legislation could lead to the elimination of "the private ownership of all guns": "I am compelled to say that there is only one word which can serve in reply to such a fear, and that is preposterous." Id. at 40.
296 Id.
297 Id.
298 Id. at 42.
299 Id. at 41.
follows that any act of Congress which does not in fact prevent an eligible citizen from functioning as a State militiaman is not proscribed by the second amendment. 300

Third, the modern-day incarnation of the "well regulated militia" is the National Guard, and the proposed Federal Firearms Act does not interfere with the organization, operation, or growth of the National Guard or Naval Militia. 301

Finally, the memorandum recognized that the Second Amendment—and corresponding provisions in state constitutions—did not prevent states from regulating the carrying of deadly weapons or prohibiting the formation of military organizations outside of the organized militia. 302 In support of this conclusion, the memorandum identified the concept of "bearing arms" as "primarily a military concept distinguished from the carrying of a weapon for personal purposes." 303 The memo also emphasized that regardless of whether it was deemed to be an individual or collective right, the Second Amendment's reach was limited to the militia. 304

Three years later, the Department again articulated its view of the Second Amendment in connection with the pending Gun Control Act of 1968, proposed by the administration of President Lyndon B. Johnson. An unsigned OLC Memorandum stating the Administration's position addressed the various constitutional issues that the bill presented. 305 The Administration's bill included a provision to require the registration of every firearm in the United States 306 that did not become a part of the final bill. In the portion of the memorandum addressing the Second Amendment, OLC included a reprise of the textual analysis provided in the Schlei memorandum of 1965 and supplemented it with the following observation regarding judicial and legislative precedent:

Congressional action in enacting earlier Federal firearms legislation, and judicial rulings sustaining this legislation, confirm this understanding of the Second Amendment. Such was the judgment of Congress in enacting the National Firearms Act in 1934—a judgment confirmed by the Supreme Court in United States v. Miller. . . . The Second Amendment argument was not even raised with respect to the Federal Firearms Act at the time it was considered by Congress in 1938. When raised thereafter in a prosecution under that Act, it was promptly rejected. E.g., United States v. Tot. 307

300 Id. at 45.
301 Id. at 41-42.
302 Id. at 42.
303 Id. See Wills' analysis of what it meant to "bear arms" referenced supra note 70.
304 1965 Federal Firearms Act Hearing, supra note 295, at 42.
305 Unsigned Memorandum on Constitutional Basis for Administration Gun Registration and Licensing Bill 1 (June 25, 1968) (on file with author).
306 Id.
307 Id. at 11 (citing United States v. Tot, 131 F.2d 261 (3d Cir. 1942), rev'd on other grounds, 319 U.S. 463 (1943)).
Once again, if there is ambiguity regarding the meaning of the Second Amendment, it is not reflected in OLC’s conclusion, suggesting that the Second Amendment inquiry simply did not factor into any weighing of the constitutionality of restrictions on individual possession of firearms: “Thus, the interpretations of the Second Amendment by the Congress and the courts, as well as its language and historical context, clearly negate any absolute personal right of an individual to possess firearms. The Amendment does not affect regulation of individual possession as proposed in this bill.”

Because the proposal for registration of firearms did not become part of the Gun Control Act as enacted into law, Johnson Administration Attorney General Ramsey Clark resubmitted the licensing and registration provisions in January 1969, shortly before the inauguration of President Richard M. Nixon. The newly sworn Deputy Attorney General in the Nixon Administration requested the views of the OLC on the legislation, and the head of the OLC at the time, William H. Rehnquist, submitted a memorandum recommending against Justice Department support for the legislation. However, his concerns, consistent with the judicial philosophy he has elevated to the position of a defining principle of the current Supreme Court’s decision-making under his leadership, hinged on federalism, not Second Amendment, concerns. In fact, Rehnquist devotes only a brief paragraph to the Second Amendment. Attaching the 1968 OLC memorandum, which, according to Rehnquist, “sets forth a respectable constitutional argument for the legislation [under the Commerce Clause] and one that, more likely than not, would be accepted by the courts,” he addresses the Second Amendment argument head-on: “Similarly, we do not believe that constitutional objections based on the Second Amendment’s guarantee of ‘the right of the people to keep and bear arms’ present any serious legal obstacle to this legislation. See United States v. Miller; United States v. Tot.”

Rehnquist’s belief that the Second Amendment posed no constitutional impediment to a comprehensive federal licensing and registration regimen provides further evidence of the consistent views of the Justice Department regarding the nature of the right that the Amendment protects. If Rehnquist thought that the Second Amendment protected an expansive individual right, he

---

308 Id. at 11-12.
309 Referring to an absence of evidence to support the need for federal intervention, Rehnquist wrote, “[a]gainst the somewhat speculative advantages to be derived from the bill must be set the disadvantages of imposing a federal registration system and federal standards in dealing with what has hitherto been considered a basically local problem.” Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Richard G. Kleindienst, Deputy Attorney General, Re: Proposed Federal Gun Registration and Licensing Act of 1969 5 (February 13, 1969) (citations omitted) (on file with author).
310 E.g., Christopher H. Schroeder, Causes of the Recent Turn in Constitutional Interpretation, 51 Duke L.J. 307, 308-315 (2001) (acknowledging that the Rehnquist Court’s federalism decisions are central to understanding the current constitutional “moment” and the overall image of the Supreme Court under Chief Justice Rehnquist).
311 Rehnquist Memorandum, supra note 309, at 5.
312 Id. at 4 (citing Tot, 131 F.2d at 261).
would have offered at least some analysis of the contours of that right, rather than dismissing the Second Amendment concern in a cursory statement. In the absence of any indication that Rehnquist, or anyone else at the Justice Department, saw the need to do any constitutional analysis or balancing of interests during the 1960s undermines the claim that OLC at one time believed that the Second Amendment protects a fundamental or expansive individual right to keep and bear arms.

There are two passing references in unpublished Justice Department documents to the Second Amendment that arguably support the expansive individual rights view. Both concerned legislation to require that any missiles, rockets, earth satellites, or other military devices be turned over to the United States military upon recovery. In a 1959 memorandum to Deputy Attorney General Lawrence E. Walsh, Acting Assistant Attorney General for the Office of Legal Counsel, Paul A. Sweeney, wrote that to the extent that "missile" is defined to include conventional ammunition, "serious constitutional problems would arise under the Second Amendment." 313

This conclusory statement—appearing to support the position that the Second Amendment protects the possession of ammunition for private purposes—stands in contrast to the more thoroughgoing analyses described above. It also predates the more detailed statements of the Department's position, which, until the issuance of the Ashcroft Letter, were consistent. This passing statement is sandwiched between the oblique reference to the Second Amendment by Attorney General Homer Cummings, when he testified in 1934, and the detailed and decisive statements made by OLC during the 1960s. The 1959 memorandum fails to provide a precedential or institutional foundation for the position taken by the Ashcroft Letter.

---

313 Memorandum from Paul A. Sweeney, Acting Assistant Attorney General, Office of Legal Counsel, to Lawrence E. Walsh, Deputy Attorney General, Re: H.R. 232, 86th Cong., 1st Sess., Re: a bill "To provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices adaptable to military uses, and for other purposes" (April 9, 1959) (on file with author). In 1961, Nicholas deB. Katzenbach, then serving as the head of the Office of Legal Counsel during the Kennedy Administration, repeated the same concern about the "loose" definition of missile raising constitutional problems under the Second Amendment, in a one-page memo to Deputy Attorney General Byron R. White. Memorandum of Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, to Byron R. White, Deputy Attorney General, Re: H.R. 2507, Re: a bill to provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices adaptable to military use" (May 8, 1961) (on file with author). Without any further analysis, this memorandum simply referenced the previous memorandum on the predecessor to the bill. As noted above, after becoming Attorney General, Katzenbach expressed an unequivocal view of the Second Amendment's limited scope in testimony he delivered to Congress in support of the legislation that ultimately became the Gun Control Act of 1968, Pub. L. No. 90-616, 82 Stat. 1212 (1968) (codified as amended at 18 U.S.C. § 921 et seq. (2002)). See supra notes 291-304 and accompanying text.
C. Justice Department Briefs on the Second Amendment

In addition to the OLC opinions from the 1950s, 1960s, and 1970s, the Justice Department's own briefs from cases filed in the Supreme Court in recent Democratic and Republican Administrations confirm that the Department's position—until now—has been consistent. In the Reagan Administration, Solicitor General Charles Fried laid out the Department of Justice's position on the Second Amendment in a Supreme Court brief in United States Department of Treasury v. Galioto, a case involving an equal protection challenge to the Gun Control Act's permanent prohibition on firearm possession by persons who are adjudicated mentally defective or involuntarily committed to a mental institution. As has been true with all of the recent cases to be heard by the Supreme Court in which various provisions in federal gun control laws have been attacked, the Second Amendment was not central to the case or to the Court's decision. Indeed, in several recent gun cases, the Supreme Court did not mention the Second Amendment at all. Solicitor General Fried's brief quickly disposes of the Second Amendment arguments, made by an amicus curiae, in the Justice Department's reply brief, stating:


316 In fact, the case was rendered moot by the 1986 Firearm Owners' Protection Act, Pub. L. 99-308, 100 Stat. 449, which authorizes petitions for administrative relief from firearms disabilities by persons prohibited because they had been involuntarily committed or adjudicated mentally defective. Galioto, 477 U.S. at 559.

317 See supra note 133 and accompanying text. There are a few exceptions to this silence. Individual Justices have mentioned the Second Amendment in concurring or dissenting opinions. The one Justice who has tipped his hand in favor of an expansive individual right in a Supreme Court opinion is Justice Clarence Thomas. In his concurrence in Printz v. United States, 521 U.S. 898, 937-939 n.1 (1997) (Thomas, J., concurring), Justice Thomas, alone among the Justices, suggested that it might be time for the Supreme Court to revisit the Second Amendment and suggested that the Court's decision in Miller "did not... attempt to define, or otherwise construe, the substantive right protected by the Second Amendment." On the other side of the debate, Justice David Souter made a passing reference to the Second Amendment in his dissenting opinion in United States v. Morrison, 529 U.S. 598 (2000), in which the Court struck down provisions of the Violence Against Women Act § 40302, 42 U.S.C. § 13981 (2002), on Commerce Clause grounds. Justice Souter contrasted provisions of the Bill of Rights that protect individual rights, such as the First Amendment, with the Second Amendment, which he described as upholding the right of the state. Id. at 639 n.11 (Souter, J., dissenting). Thirty years ago, Justice William O. Douglas offered his own view of the Second Amendment in his dissent in Adams v. Williams, 407 U.S. 143 (1972), a Fourth Amendment case in which the majority upheld an investigatory search for concealed weapons when the police officer has reason to believe an individual stopped for drugs was armed and dangerous. Id. at 149. Justice Douglas identified lax gun laws, not the requirements of the Fourth Amendment, as the source of the problem:

The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment.... Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia.

Id. at 150-151 (Douglas, J., dissenting).
Amicus CFREE’s suggestion . . . that the right to acquire firearms must be considered fundamental for purposes of equal protection analysis is entirely without merit. In the context of a Fifth Amendment challenge to Title VII of the Gun Control Act of 1968 . . . the Court has flatly held that “[t]hese legislative restrictions on the use of firearms * * * [do not] trench upon any constitutionally protected liberties.” Lewis v. United States . . . (characterizing United States v. Miller . . . as holding that “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia’”).318

Furthermore, in the administration of former President George H.W. Bush, Solicitor General Kenneth Starr echoed the understanding of his predecessor, Charles Fried, when he stated in opposition to a petition for a writ of certiorari in Farmer v. Higgins:

In United States v. Miller . . . the only decision by this Court construing the Second Amendment in this century, the Court rejected a challenge to provisions of the National Firearms Act prohibiting the interstate transportation of an unregistered firearm. The Court found no evidence that the firearm (a sawed-off shotgun) “has some reasonable relationship to the preservation or efficiency of a well regulated militia,” and held that the possession of that firearm did not fall within the rights guaranteed by the Second Amendment. . . . Since Miller, the lower federal courts have concluded that the mere allegation that a firearm might be of value to a militia is insufficient to establish a right to possess that firearm under the Second Amendment.319


319 Brief for the Respondent in Opposition at 11-12, Farmer v. Higgins, 914 F.2d 1498 (1990), cert. denied, 497 U.S. 548, 550 (4th Cir. 1976); United States v. Warin, 530 F.2d 103 (6th Cir.), cert. denied, 426 U.S. 948 (1976)). Solicitor General Fried expressed a similar view in his brief in opposition to certiorari in Reid v. United States, a case in which the defendant challenged her conviction for making a false statement in connection with the purchase of a firearm. In its brief, the United States rejected the Second Amendment claim in a footnote, noting that “[i]t is settled that the Second Amendment is not an absolute bar to congressional regulation of the use and possession of firearms; it protects use of [sic] possession that ‘has some reasonable relationship to the preservation or efficiency of a well regulated militia.’” Brief for the United States in Opposition at n.4, Reid v. United States, 803 F.2d 714 (4th Cir. 1986), cert. denied, 481 U.S. 1028 (1987) (No. 86-1211) (citing Miller).
Although former Solicitors General Fried and Starr recognized the centrality of the *Miller* decision to an understanding of the Second Amendment, Attorney General Ashcroft ignored the decision as though it never existed. However one interprets the *Miller* opinion, it should not have been overlooked in a policy pronouncement by the Department of Justice on the Second Amendment. This is especially true because of the way in which the Department, which argued and briefed *Miller*, consistently has interpreted the decision over the years.

The trial and appellate court decisions in *Emerson* squarely conflict with established case law. In briefs filed in the *Emerson* appeal, the Department of Justice pointed out that every federal court of appeals has subscribed to the interpretation that the Second Amendment only protects firearm possession that is reasonably related to the maintenance of a militia. The Justice Department’s brief is unequivocal:

Emerson’s challenge to the longstanding interpretation of the Second Amendment wholly fails to counter the weight of Supreme Court precedent and historical facts. He fails to provide any coherent argument as to how the Second Amendment, with its introductory militia clause, grants the right to bear arms completely untethered from militia service. He completely ignores the historical context against which the Amendment was drafted, which shows not only that the Amendment was aimed at protecting the states against the federal government, but that it grew out of a long history of gun control. And, most importantly, he fails to come to grips with *United States v. Miller* . . . the case now recognized by every circuit as providing the definitive interpretation of the Second Amendment.

---


321 *Emerson* Reply Brief, supra note 321, at 24-25 (citation omitted). See also Brief for the United States in Opposition at 10, Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000) (No. 99-626) [hereinafter Gillespie Brief in Opposition] (noting in a Second Amendment challenge to a domestic violence misdemeanor conviction “[t]he link that the
D. Statements by Former High-Ranking Justice Department Officials

Lastly, although they are not official policy pronouncements of the Department of Justice, secondary materials authored by Democratic and Republican former Attorneys General and two former Republican Solicitors General buttress the consistency of the Justice Department's view of the Second Amendment. In 1990, former Solicitor General Erwin Griswold, who served in the Nixon Administration, wrote an op-ed piece in the *Washington Post* that accused the NRA and its allies in Congress of manufacturing a constitutional issue in the debate over the proposed ban on certain types of assault weapons "when the courts have agreed for years that the 'issue' in question does not exist." Griswold recognized that "[t]he clear meaning of *Miller* is that the Constitution does not guarantee a right to be armed for private purposes unrelated to the organized state militia." And with a hint of irony, Griswold concludes that, while the NRA is free to argue on policy grounds against any restrictions on the sale of assault weapons that "can fire scores of bullets in seconds with murderous effect" the gun lobby's assertion regarding the applicability of the Second Amendment "in the face of the unanimous judgment of the federal courts to the contrary, exceeds the limits of principled advocacy."

Two years later, on one of the multiple occasions when the Brady Bill was debated in Congress, six former attorneys general, including Elliot Richardson and Edward Levi, who served in Republican administrations, and Nicholas deB. Katzenbach, Ramsey Clark, Griffin Bell, and Benjamin Civiletti, who served in Democratic administrations, co-authored an op-ed in the *Washington Post* in which they urged passage of the Brady Bill. They also took issue with the claim that requiring a national waiting period and background check for handgun purchasers would violate the Second Amendment:

> Of all the arguments advanced by opponents of the Brady bill, surely the most specious is the charge that it would infringe a constitutional right. For more than 200 years, the federal courts have unanimously determined that the Second Amendment concerns only the arming of the people in service to an organized

---

323 Id.
324 Id.
state militia; it does not guarantee immediate access to guns for private purposes. The nation can no longer afford to let the gun lobby’s distortion of the Constitution cripple every reasonable attempt to implement an effective national policy toward guns and crime.\textsuperscript{326}

Even former Solicitor General Robert Bork, who served during the Nixon Administration and is widely known for his conservative views, as well as his reliance on original intent of the Framers in interpreting the Constitution, has dismissed the expansive individual rights view of the Second Amendment. In his 1996 book, \textit{Slouching Towards Gomorrah}, Judge Bork maintains that the real argument against strict gun control should be based on policy, not constitutionality.\textsuperscript{327} He explains that while the language of the Second Amendment is somewhat ambiguous, “[t]he Supreme Court has consistently ruled that there is no individual right to own a firearm.”\textsuperscript{328} In colorful language, Bork identified the real purpose behind the Second Amendment and its modern-day irrelevance: “The Second Amendment was designed to allow states to defend themselves against a possibly tyrannical national government. Now that the federal government has stealth bombers and nuclear weapons, it is hard to imagine what people would need to keep in the garage to serve that purpose.”\textsuperscript{329}

The Office of Legal Counsel’s opinions and the Solicitor General’s briefs, as well as the statements by former Justice Department officials, make clear the Department of Justice’s official interpretation for more than 65 years: the Second Amendment only protects the right to keep and bear arms in relation to militia service.

\textbf{E. Politically-Motivated Policymaking or How to Avoid This Precedent}

How did Attorney General Ashcroft avoid all of this evidence? He simply ignored it by refusing to take part in and by circumventing the very process that would have forced him to address it.

The following hypothetical places the Ashcroft Letter into perspective. Imagine that a newly elected President appoints an Attorney General who is widely viewed as unsympathetic to abortion rights and has called on the Supreme Court to overrule \textit{Roe v. Wade}.\textsuperscript{330} At this nominee’s confirmation hearing, members of the Senate Judiciary Committee grill him on his willingness to carry out the enforcement responsibilities of the Civil Rights Division in the Department of Justice, including implementation of the Freedom of Access to Clinic Entrances (FACE) Act.\textsuperscript{331} He assures the Committee that his strong anti-choice views will in no way interfere with his obligation to prosecute anti-

\textsuperscript{326} \textit{It’s Time to Pass the Brady Bill}, supra note 325.
\textsuperscript{327} ROBERT H. BORK, \textit{SLOUCHING TOWARDS GOMORRAH} 166 n. † (1996).
\textsuperscript{328} \textit{Id}.
\textsuperscript{329} \textit{Id}.
\textsuperscript{330} 410 U.S. 113 (1973).
abortion protesters to the fullest extent of the law. Following his swearing-in, National Right to Life, an advocacy group that has been at the forefront of opposition to abortion, asks the Attorney General to speak at its annual meeting. The Attorney General declines, but he writes a letter to the organization’s chief lobbyist on official stationery. In the letter, the Attorney General expresses his view that FACE is unconstitutional, because he understands the First Amendment to prohibit laws, like FACE, that impose criminal penalties on the basis of a particular intent—here the intent to interfere with access to reproductive health care. The letter is prepared and sent without first advising or consulting the leadership of the Civil Rights Division or the career attorneys in the Criminal Section of the Civil Rights Division who have responsibility for enforcing FACE. In the Attorney General’s letter, he omits any reference to the numerous court decisions upholding FACE against a First Amendment challenge, any mention of the pending enforcement actions in which the Civil Rights Division attorneys have taken a position that flatly contradicts the position taken in the Attorney General’s letter, and any mention of his predecessor’s determination that FACE is constitutional. When the New York Times obtains a copy of the letter and reports it, the revelation produces an avalanche of criticism—from law enforcement, pro-choice, and women’s groups. They all demand that the Attorney General reverse his position that FACE is unconstitutional. The Justice Department, in turn, admits that the letter represents a shift in Department policy, but concludes that the letter will not interfere with the Department’s enforcement responsibilities under FACE.

This hypothetical approximates what occurred when Attorney General Ashcroft altered Department policy on the Second Amendment with his letter to the NRA and explains why he avoided having the Letter scrutinized against the weight of Justice Department policy. When the Times and other newspapers first reported the existence of the Letter, its significance was unclear. The Department at first declined to state whether the letter amounted to a policy shift, and then later confirmed that it does. The Justice Department could have responded to inquiries about the Letter by stating that it was simply a statement of the Attorney General’s personal views, not official policy—an expression of his well-known views on gun control topics, no different than a letter that he might have sent to a constituent while he served in the United States


336 Id. at 2.


JOHN ASHCROFT'S INTERPRETATION

Aside from the fact that the Letter appears on official Justice Department stationery, the Letter contains none of the indicia of an official policy pronouncement by the Department. It is not an argument made by the Department to a court. Had the Department filed a brief espousing this view, it would have sent an unambiguous sign that the Department had shifted its interpretation of the Second Amendment. It is not an official opinion of the Office of Legal Counsel, prepared at the request of the Attorney General or some other Administration official. It is not the product of notice and comment rulemaking subject to the requirements of the Administrative Procedure Act. And it is not the view of the Department expressed in a letter on a piece of legislation or in official testimony before Congress.

Proposed policy shifts typically are vetted extensively by every component within the Department of Justice, as well as by other interested executive branch agencies whose interests are affected. Had the Department employed such a process in determining whether to shift its position on the Second Amendment, Attorney General Ashcroft would have consulted the Office of the Solicitor General because of its ongoing responsibility to oversee and authorize the United States' posture in appeals. Given that the Emerson case

---

337 This is precisely what the Justice Department did—controversially—during the Clinton Administration in an important reverse discrimination case that originated in Piscataway, New Jersey, Taxman v. Board of Education, 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. granted sub nom. Piscataway Twp. Bd. of Educ. v. Taxman, 522 U.S. 946, cert. dismissed, 522 U.S. 1010 (1997). In Piscataway, the Administration of President George H.W. Bush had filed suit on behalf of Sharon Taxman, a white teacher who challenged the promotion of an African-American colleague under the school board’s affirmative action program. Taxman and the Justice Department won in the trial court. When it came time for the Department to file a brief in the case on the appeal, there was a new Democratic administration, and the Department switched sides in the case, asking the federal appellate court if it could file a brief in support of the school board’s affirmative action program. See Iver Peterson, Justice Dept. Switches Sides In Racial Case, N.Y. TIMES, Aug. 14, 1994, at A37. The newly-confirmed Assistant Attorney General in charge of the Civil Rights Division, Deval Patrick, rejected charges that the Department’s switch was unethical and created a conflict of interest, asserting that “he and his staff considered the conflict and ethical implications very carefully.” Tim O’Brien, Pushing the Race Button, N.J. L.J., September 12, 1994, at 1. While some legal commentators defended policy switches of this type as not uncommon—citing to the Reagan Administration’s effort to dismantle affirmative action decrees entered into by the Carter Administration—others, such as former Solicitor General Fried, were highly critical: “It strikes me as naked politics and transparent and wrong. Just wrong.” Peterson, Justice Dept. Switches Sides In Racial Case, supra. Ultimately, the Justice Department stayed out of the case on appeal. David Stout, Race Can’t Be Used To Decide Layoffs. Appeals Court Says, N.Y. TIMES, Aug. 10, 1996, at A1. Although the policy shift in Piscataway certainly held political implications, raised substantial ethical issues, and reflected the differing position of the new administration on affirmative action issues, the change did not spring out of nowhere, in an unconventional, error-ridden, and insubstantial Letter that was completely unhinged from the ongoing litigation position of the Department in a pending case.

338 See generally Symposium, Government Lawyering, 61 LAW & CONTEMP. PROBS. 1 (1998); cf. Peter H. Schuck, Lawyers and Policymakers in Government, 61 LAW & CONTEMP. PROBS. 7, 10 (1998) (describing legal policymaking: “The processes through which government agencies develop their policies are exceedingly complex. Formal procedures, informal politics, legal interpretation, the force of inertia, and pure happenstance all play important parts. In addition, the practice of policy analysis—the more or less systematic consideration and evaluation of alternative courses of action...is often a crucial activity.”).

339 See David A. Strauss, The Solicitor General and the Interests of the United States, 61 LAW &
was pending in the U.S. Court of Appeals for the Fifth Circuit at the time he sent the Letter, and briefs had been filed with the court that were diametrically opposed to the position Ashcroft wished to take, the Solicitor General’s Office would have weighed in on the advisability of taking such a position outside of pending litigation. In addition, there are many other offices of the Justice Department and Executive Branch that would have had an interest in contributing views in advance of any change of position regarding the Second Amendment, as well as state and local law enforcement organizations, advocacy organizations, and members of Congress. With input from a full range of offices, agencies, and constituencies outside the executive branch, the Justice Department would have launched a deliberate and comprehensive examination of the current policy and its proposed replacement, factoring in legal and policy concerns to formulate a recommendation to the Attorney General and the Department’s political leadership. They would have made a decision acting on the President’s behalf or presented the issue to the President for decision.

The above-described process is an inclusive, deliberative approach that recognizes the important role of experienced Justice Department lawyers who maintain an institutional loyalty and an understanding of the accepted deliberative processes within the Department. It is an approach that respects the myriad interests of different constituencies within the executive branch and takes into account their views. Finally, it is an approach that acknowledges the fundamental role of the Office of Legal Counsel, which is charged with rendering its best legal advice on whether the Second Amendment may be read to support an individual right to keep and bear arms, shielded from the “winds of political pressure and expediency that buffet its executive branch clients.”

---

340 United States v. Emerson, 270 F.3d 203 (5th Cir.), reh'g and reh'g en banc denied, 281 F.3d 1281 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).
341 To name a few, these components might have included the Criminal Division and the United States Attorneys' Offices, with responsibility for prosecuting federal gun control laws; the Civil Division, with responsibility for defending the constitutionality of federal laws; the Office of Legal Counsel, which advises the Attorney General on legal matters; the Federal Bureau of Investigation (FBI), which administers the Brady Law's National Instant Criminal Background Check System (NICS); the Department of the Treasury, which houses the Bureau of Alcohol, Tobacco & Firearms, the agency with primary authority for investigating and enforcing federal gun laws; and the Department of State, which administers export and import controls over certain firearms. See U.S. Department of Justice website at www.usdoj.gov/02organizations/02_1.html (last visited Apr. 30, 2002) (on file with author).
342 See Thomas W. Merrill, High-Level, "Tenured" Lawyers, 61 LAW & CONTEMP. PROBS. 83, 93 (1998) (describing the added value of high-level "tenured" lawyers at the Justice Department, who maintain a longer-term perspective than the Department’s political echelon, and suggesting that this longer-term perspective serves to "enhance the reputation of their office in the eyes of other governmental actors, and hence make the office a more effective instrument for realizing the policy objectives of the incumbent administration, whatever those objectives may happen to be").
343 See id. at 104 (suggesting that "tenured" lawyers may be more "stalwart" in their defense of executive branch prerogatives than lawyers who are political appointees).
344 Id.
345 Harold Hongju Koh, Protecting the Office of Legal Counsel From Itself, 15 CARDOZO L. REV.
In the case of the Justice Department's policy shift as reflected in Attorney General Ashcroft's Letter to the NRA, it is an approach that seems to have been ignored entirely. By all accounts, the Letter was produced entirely within the political echelon of the Justice Department without solicitation of the views of career Justice Department attorneys, including those in the Office of the Solicitor General with responsibility for overseeing the Department's appeal in United States v. Emerson or the federal prosecutor in Dallas who briefed and argued Emerson. As the Washington Post reported:

When [Attorney General Ashcroft] decided last spring to reverse the Justice Department's long-standing legal opinion on the Second Amendment—declaring that it bestowed an individual, rather than a collective, right to bear arms—he did it in a letter to the National Rifle Association drafted by a senior adviser. Key Justice Department prosecutors, including those overseeing a Texas criminal case that went to the heart of the issue, were not consulted, sources said.

Moreover, in the wake of the Ashcroft Letter, the Justice Department is in the process of further entrenching this policy shift, having ordered OLC to prepare a formal opinion on the Second Amendment. OLC occupies an essential role in the executive branch, providing dispassionate legal advice to the President, the Attorney General, and other executive branch officials on a wide range of issues. Thus, the executive branch places a particular reliance on OLC for its analysis of constitutional matters, for it possesses substantial institutional expertise in this area and has an historical role advising the executive branch when constitutional questions arise. For OLC to prepare such an opinion after the policy shift was announced in the Letter is highly irregular, for at least two reasons. First, if he wanted OLC's views, Attorney General Ashcroft should have asked for them before announcing a policy shift on a substantial issue of constitutional interpretation by the executive branch.

513, 514 (1993). Koh served as an attorney in the Office of Legal Counsel. Id. at 513 n*.

347 See id. at 434-435 (emphasizing that OLC employs jurisdictional norms to enable OLC "to avoid entanglements that would be unwise").
criticizes an OLC opinion regarding the executive branch’s conduct in the Iran-Contra Affair that was requested two years after the scandal had become public:

It will never be known whether OLC would have written the same legal position, had it been consulted early in the affair when the government was not already locked into its legal position. But when our government commits itself to a political position and then becomes locked in, with a weak legal opinion or no legal opinion at the front end, the OLC legal opinion that finally issues will be suspect precisely because we can no longer be certain that its result has not been "precooked." 352

Second, there are good reasons for OLC to say nothing at all about the issue, because the Second Amendment is currently the subject of ongoing litigation in Emerson and other cases and the Department of Justice set forth its position regarding the Second Amendment at great length in the briefs filed in the court of appeals in Emerson. 353 This is precisely why OLC—in its traditional role—refrains from commenting on subjects under litigation by the Department, instead allowing its litigators in individual cases to lay out the government’s positions. 354

This criticism of the Ashcroft Letter should not be misconstrued as giving voice to the lamentations of disgruntled bureaucrats. Undoubtedly, some might argue that Attorney General Ashcroft demonstrated the courage of his convictions by refusing to allow his views to become bogged down in the bureaucracy of the Justice Department policymaking apparatus. 355 Alternatively, and implausibly, the Letter might be excused as the failure of a new Administration to appreciate fully or understand the Department’s deliberative processes. A far more likely scenario is that the Attorney General recognized that if he engaged in the institutional process employed by his many predecessors the end result would not have conformed to his preformed conclusion, or, at the very least, would have given rise to embarrassing internal disagreements and debate. 356 Such a review would have addressed seriously the past positions of the

352 Koh, supra note 345, at 516-517 (footnote omitted).
353 See supra notes 320-321 and accompanying text.
354 Koh, supra note 345, at 514 (noting under OLC’s informal “jurisdictional” requirements, OLC “refrains from rendering opinions regarding matters in litigation”). OLC has a longstanding (though occasionally broken) tradition of “disinterested” constitutional analysis. Although OLC may reconsider past court decisions from time to time, it does not do so for political reasons. Id. at 516. Given the nature of the Ashcroft Letter and the Attorney General’s political motivations for reconsidering previous OLC Second Amendment opinions, it is not surprising that Attorney General Ashcroft sent the Letter to the NRA without the benefit of OLC’s views, followed by the Department’s assertion that the Letter “would carry the same legal weight as a formal opinion in stating department policy.” Craig Gordon and Tom Brune, Ashcroft Changes U.S. Gun Position/Says 2nd Amendment Applies to Individuals, NEWSDAY, July 12, 2001, at A4.
355 See Jeffrey Toobin, Ashcroft’s Ascent, NEW YORKER, Apr. 15, 2002, at 52, quoting an Ashcroft aide: “[Ashcroft] came here to move the bureaucracy.”
356 This point can, and has been, made with respect to the Ashcroft Justice Department, which has developed a reputation for disregarding the views of career attorneys and actively discouraging them from expressing their disagreement with Department positions in a manner that may become
Department as presented in briefs, opinions, testimony, and other authoritative statements. It also might have described explicitly the Attorney General’s authority to graft a new interpretation of the Second Amendment onto the Department in light of existing Justice Department policy and precedent. Instead, the Letter, rather than representing legitimate legal policymaking and interpretive authority, is—to borrow Clausewitz’s phrase—politics by other means, sidestepping both policy and process within the Justice Department to advance what is essentially a political agenda.

V. SMOKE AND MIRRORS: THE NOT-SO-STANDARD MODEL

Attorney General Ashcroft refers to legislative and secondary sources in an effort to “mainstream” his expansive individual rights interpretation of the Second Amendment. The Letter notes that, “[a]s recently as 1986, the United States Congress and President Ronald Reagan explicitly adopted this view in the Firearms Owners’ Protection Act.”

Although the 1986 Firearms Owners’ Protection Act, which was essentially a “wish list” for the National Rifle Association, does include Congressional findings to the effect that the right guaranteed by the Second Amendment requires a relaxation of gun control legislation, those findings are simply the wishful thinking of pro-gun members of Congress and bind no one—not the courts, not the executive branch, nor any future Congress. These findings conflict with United States v. Miller, as well as other cases cited by Attorney General Ashcroft, such as Miller v. Texas, Robertson v. Baldwin, and Maxwell v. Dow. When Congressional findings regarding constitutional interpretation conflict with Supreme Court opinions, it is the Supreme Court, not Congress, which possesses the ultimate authority to decide what constitutional law applies in cases.

Given the pattern in the Ashcroft Letter to ignore or minimize those sources that undermine its conclusions, it comes as no surprise that the Ashcroft Letter repeats one of the favored mantras of the Standard Modelers—that those public.


See supra Part III.B.


See Ashcroft Letter at 1-2, reprinted in app. A infra p. 799-800.

Id. (citing Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449, § 1(b) (1986)).


Congress learned this lesson the hard way in City of Boerne v. Flores, 521 U.S. 507 (1997), where the Court rejected Congress’s attempt to overrule the Court’s interpretation of substantive constitutional law in religion cases. See supra notes 195-201 and accompanying text. If Congress attempted to transform through legislation substantive constitutional law under the Second Amendment by defining the scope of constitutional protection beyond that which the Court has recognized, then, under Boerne, Congress would be “disappointed.” See Boerne, 521 U.S. at 536.
who dispute the expansive individual rights view of the Second Amendment are intellectual Luddites swimming against a forceful tide of pro-individual rights scholarship.

The Ashcroft Letter's claim that, "[s]ignificantly, the individual rights view is embraced by the preponderance of legal scholarship on the subject" misleads on numerous levels.\(^{367}\) First, contrary to the statement, there is a wide body of scholarship supporting the Supreme Court's militia-based interpretation of the Second Amendment. This fact was duly recognized by the Justice Department in its brief in the \emph{Emerson} appeal:

\begin{quote}
The case law and history ignored by Emerson are more than adequately set forth in the Government's opening brief and the amicus briefs of the Center to Prevent Handgun Violence \textit{et al.} and the Ad Hoc Group of Law Professors and Historians, as well as by \textit{countless} legal and historical researchers.\(^{368}\)
\end{quote}

Second, because legal scholarship is generally more interesting, controversial, and original when it is contrary to accepted legal doctrine or longstanding court decisions, many constitutional law scholars and historians have focused their energies elsewhere, viewing Second Amendment jurisprudence as well-settled law. As the friend-of-the-court brief filed in \emph{Emerson} by the Ad Hoc Group of Law Professors and Historians states:

\begin{quote}
The individual rights theorists label their account of the Second Amendment the "Standard Model" . . . which implies that it is espoused by the majority of constitutional law scholars. Amici deny that this is the case. Perhaps because the \textit{Miller} view of the Second Amendment has been settled law for so long, few constitutional law scholars have published analyses of the Amendment.\(^{369}\)
\end{quote}

The 52 law and history professors who signed onto this brief\(^{370}\) plainly do not think that the Second Amendment protects an individual right. For them,

\begin{footnotesize}
\begin{itemize}
\item \(^{367}\) \textit{See Ashcroft Letter at 2, reprinted in app. A infra p. 800.}
\item \(^{368}\) \textit{Emerson} Reply Brief, \textit{supra} note 320, at 25 (emphasis added), citing, e.g., Bogus, \textit{The Hidden History of the Second Amendment, supra} note 71, at 309; Cornell, \textit{Commonplace or Anachronism, supra} note 33, at 221; Don Higginbotham, \textit{The Second Amendment in Historical Context}, 16 \textit{CONST. COMMENT.} 263 (1999); \textit{WILLS, A NECESSARY Evil, supra} note 70.
\item \(^{369}\) \textit{Brief for an Ad Hoc Group of Law Professors and Historians as Amici Curiae in Support of Appellant at 2 n.1, United States v. Emerson, 270 F.3d 203 (5th Cir.) (No. 99-10331), reh'g and reh'g en banc denied, 281 F.3d 1281 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).}
\item \(^{370}\) The historians and legal scholars included Bruce Ackerman, Joyce Appleby, Jack M. Balkin, Carl T. Bogus, John Brooke, Edwin G. Burrows, Andrew Cayton, Erwin Chemerinsky, Saul Cornell, Edward Countryman, Michael Dorf, Norman Dorsen, Susan R. Estrich, Hendrik G. Hartog, Don Higginbotham, Peter Charles Hoffer, Nancy Isenberg, Stanley N. Katz, Jan Lewis, Jill Lepore, Rory K. Little, Mari J. Matsuda, Andrew J. McClurg, Frank Michelman, Peter J. Strauss, Richard Uviller, Steve Winter, and David Yassky. \textit{Id.}
\end{itemize}
\end{footnotesize}
JOHN ASHCROFT'S INTERPRETATION

the Supreme Court's interpretation of the Second Amendment is both historically and legally sound.

Finally, as Robert Spitzer, a political scientist, points out in a 2000 article reviewing Second Amendment scholarship, of the 164 law review articles on the Second Amendment written from 1912 to 1999, 88 described a view roughly equivalent to the one Attorney General Ashcroft endorses in his letter. The other 76 articles described a view closer to the position articulated by the Supreme Court in United States v. Miller. Even more interesting is the fact that 58 of these 88 law reviews backing Attorney General Ashcroft's interpretation of the Second Amendment were published between 1990 and 1999. The publication of law review articles supporting the Supreme Court's interpretation of the Second Amendment outpaced the publication of articles supporting Attorney General Ashcroft's view, until this latter group made a surge in publication, largely in the last decade. Professor Carl Bogus suggests this explosion of publication on the Second Amendment supporting the individual rights reading was due in part to financial sponsorship from the NRA.

The Ashcroft Letter's statement about the "preponderance" of scholarship favoring the individual rights position recycles a Standard Model scholars' shibboleth that the scholarly debate is a numbers game and, by their count, they are way ahead. Since the Standard Modelers, as their very name implies, seek to persuade people of the correctness of their position by reference to the numbers of articles that support their side, it is worth noting that their lead evaporates when the scholarship is measured by the number of authors who have written on each side of the debate, rather than the sheer number of articles. When Spitzer's count of articles from 1980 to 1999 is revised so that each author receives one "vote," thereby preventing any one author who has been especially prolific (and redundant) on the Second Amendment from unduly skewing the tally, there is a virtual parity between the two sides, with 51 authors supporting the expansive individual rights view, and 48 authors supporting the more limited militia-based, or collective, rights view. Articles by leading scholars favoring the militia-based view predominated at timely symposia published in Constitutional Commentary in 1999 and in the Chicago-Kent Law Review in 2000. Try as they might, the Standard Modelers will not, in the long run, be

372 Id. at 367-368, 384.
373 Id. at 368.
374 Carl T. Bogus, The History of Second Amendment Scholarship: A Primer, 76 CHI.-KENT L. REV. 3, 4 (2000), reprinted in THE SECOND AMENDMENT IN LAW AND HISTORY, supra note 33, at 1, 6-7 (describing NRA's "concerted effort to promote more writing supporting the individual right position," including helping to fund "Academics for the Second Amendment," and dispensing grants totaling $38,569.45 to Stephen P. Halbrook).
376 See Symposium on the Second Amendment, supra note 33, at 3, reprinted in THE SECOND AMENDMENT IN LAW AND HISTORY, supra note 33; Symposium, 16 CONST. COMMENT. 221 (Saul Cornell ed., 1999) (including Cornell, Commonplace or Anachronism, supra note 33; and
able to ignore these recent scholarly contributions, for they confirm that, to paraphrase Mark Twain, the reports of the militia-based interpretation’s death are exaggerated. 377 So there is even a chance that under the one-author, one-vote model, the militia-based position has taken the lead. 378 In the end, the material representing the scholarly debate over the Second Amendment presents an evenly

Higginbotham, The Second Amendment in Historical Context, supra note 368). Carl Bogus, the organizer and editor of the CHICAGO-KENT LAW REVIEW Symposium, described that gathering as an effort “to bring the collective right perspective up to date.” Bogus, The History and Politics of Second Amendment Scholarship, supra note 374, at 24. He noted that the proliferation of scholarship supporting the expansive individual rights position, including several symposia largely or exclusively dedicated to that perspective, had, “for the first time in more than a century,” called the collective right model into question. Id. at 23-24 & n.106.

377 The original Mark Twain quote, from an 1897 handwritten note, is found at http://www.twainquotes.com/Death.html (last visited May 4, 2002) (on file with author). To his credit, Sanford Levinson acknowledges the contribution of the recent scholarship favoring the militia-based view. In a review of THE SECOND AMENDMENT IN LAW AND HISTORY, supra note 34, Levinson, though aligned with the supporters of an expansive individual right, asserts that the symposium “offers worthy examinations of various legal and historical arguments surrounding the Second Amendment, even if it is by no means the last word on the subject.” Levinson, Second to None?, supra note 1, at 14. Levinson offers several important, if qualified, concessions in his review. For example, he admits being most taken with the contribution by H. Richard Uviller & William G. Merkel, The Second Amendment in Context: The Case of the Vanishing Predicate, 76 CHI.-KENT L. REV. 403 (2000), reprinted sub nom. Muting the Second Amendment: The Disappearance of the Constitutional Militia, in THE SECOND AMENDMENT IN LAW AND HISTORY, supra note 33, at 148, who argue that although the Second Amendment originally gave the individual constituents of a communal military organization the ability to make the militia effective, the “drastic change in the nature, status, and even vitality of the militia has utterly drained the Second Amendment right of meaning in modern America.” Uviller & Merkel, supra, at 560, 599; see Levinson, Second to None?, supra note 1, at 15. Levinson also has “little hesitation” accepting Rakove’s and Finkelman’s decimation of the “naïve notion that American thought of the 18th century was unified around a positive view of firearms as a way of maintaining political liberty.” Id. at 15. He then credits these two symposium contributors with marshaling “strong evidence that many Americans, including those who were members of the Congress that drafted the Amendment, had only disdain for the ‘general militia’ and, consequently, had no desire at all to protect an individual right to possess firearms.” Id. And Levinson “has no difficulty agreeing with Rakove that ‘many Americans thought differently about citizen-militias in 1789, when the Second Amendment was proposed, than they did in 1776,'” and admitting that that Rakove “rightly criticizes many previous writers, including myself, for being less attentive to that shift.” Id. at 16. While Levinson questions the conclusions that Rakove and Finkelman reach based on this evidence, Levinson does profess agreement with at least one contributor on the important question of what all the historical debate means in the end. Levinson notes that Daniel Farber, in his essay, Disarmed by Time: The Second Amendment and the Failure of Originalism, 76 CHI.-KENT L. REV. 167 (2000), reprinted in THE SECOND AMENDMENT IN LAW AND HISTORY, supra note 33, at 28, “argues, altogether correctly I believe, that the present meaning of the Second Amendment, whatever it might be, ought not in the least be determined by what it probably meant in 1789.” Id. at 14. Based on his acknowledgement of the Second Amendment’s modern-day irrelevance in his review of the articles by Uviller and Merkel, and Farber, Levinson might well agree with scholars favoring the militia-based view that the Standard Model has become unglued.

378 See supra note 376 and accompanying text; see also David Yassky, The Second Amendment: Structure, History, and Constitutional Change, 99 MICH. L. REV. 588, 648, 667 (2000) (advocating a “textually holistic and historically sensitive methodology” to interpreting the Second Amendment that identifies as critical to the evolution of the Second Amendment jurisprudence the adoption of the Fourteenth Amendment, when power shifted radically from the state to the federal government).
JOHN ASHCROFT’S INTERPRETATION

divided field, with neither side able to lay claim to a “preponderance of legal scholarship.” However, an academic debate primarily should be judged by the quality of the scholarship, not the quantity of articles. Only in the debate over the Second Amendment—because of the historically precarious position of the Standard Modelers combined with their success in generating law review articles—does scholarship devolve into a numbers game.

VI. FROM THE IVORY TOWER TO THE REAL WORLD: THE EMERSON DECISION AND THE IMPLICATIONS OF THE ASHCROFT LETTER

Not only has the source material in Attorney General Ashcroft’s Letter been manipulated and taken out of context, ironically, much of it mirrors the historical discussion in the trial judge’s Emerson decision, which the Justice Department had appealed. Most of the historical quotes that Ashcroft employs in his letter are identical to those that Judge Cummings relied on in Emerson to craft his expansive interpretation of the Second Amendment. The Attorney General of the United States laid out what he describes as his own understanding of the Second Amendment, and he did so through an appeal to materials used in a court decision which ruled against the Department of Justice’s official position on the Second Amendment, and which his own career lawyers sought to have overturned.


Spitzer attributes the sheer number of law review articles supporting the expansive individual rights position to what he calls “the law journal breeding ground.” Spitzer, supra note 371, at 32. Unlike other professional journals, the unique characteristics of law reviews, including their number and the fact that they are student-run with little faculty supervision, “have opened the door to highly suspect bodies of analysis.” Id. at 33. Joining Spitzer, who is a political scientist, in identifying the role that law reviews have played in promoting the “Standard Model” is Rakove, an historian, who describes how the extensive footnoting endemic to law reviews has generated a perception of the “Standard Model’s” scholarly heft that is undeserved:

Searching for the evidentiary authority on which these assertions rest—that is, reading the footnotes—requires a bewildering chase through the relevant manuals and orderly books, the citations that student law review editors, the industrious sappers of the legal academy, insist must be provided, but which often turn out to be one secondary source supporting another with nary a document in sight.”

Rakove, The Second Amendment, supra note 33, at 103.

United States v. Emerson, 46 F. Supp. 2d 598, 601-608 (N.D. Tex. 1999), rev’d, 270 F.3d 203 (5th Cir.), reh’g and reh’g en banc denied, 281 F.3d 1281 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).

Pro-gun lawyer Stephen Halbrook concedes that the Ashcroft Letter tracks the trial court decision in Emerson. However, he defends the coincidence by stating that it reflects nothing more than the fact that anyone seeking to set out an interpretation of the Second Amendment would be led to the same sources. Stephen P. Halbrook, Attorney General Ashcroft & the Second Amendment, http://www.nraila.org/media/misc/halbrookresp.htm (last visited May 1, 2002) (on file with author).
A. The Emerson Decision

The irreconcilable conflict between the Department’s briefs in Emerson and the Ashcroft Letter did not go unnoticed by the defendant in the Emerson case. On July 18, 2001, Timothy Joe Emerson filed a motion with the court of appeals to have the Ashcroft Letter considered as supplemental authority in support of Emerson’s position by the court of appeals, “for it documents the government’s position on a central issue in the case as explained by the Attorney General himself.”

Emerson was argued in the spring of 2000 and remained pending for over a year, fueling speculation that the Fifth Circuit might affirm the district court’s finding that Emerson had an individual, fundamental Second Amendment right to have a gun, despite the fact that he was subject to a domestic violence restraining order. Nonetheless, before the Fifth Circuit’s decision, courts refused to follow the district court’s decision and some even criticized the trial court’s decision in Emerson explicitly. Even the Fifth Circuit itself had

383 Appellee’s Motion to Allow the Letter to be Submitted Under FED. R. App. P. 28(j) at 1-2, Emerson, 270 F.3d at 203 (No. 99-10331) [hereinafter Emerson Motion]. In addition two scholars, Professors Carl Bogus and David Yassky, both of whom had signed the amici curiae brief submitted on behalf of an ad hoc group of legal scholars and historians, supra note 370, moved to have the VIOLENCE POLICY CENTER study, SHOT FULL OF HOLES: DECONSTRUCTING JOHN ASHCROFT’S SECOND AMENDMENT, considered in the event that Emerson’s motion was granted, in order to assist the Court in assessing the weight that should be given to the Ashcroft Letter. Motion Requesting Leave to Allow Study to be Submitted Under FED. R. App. P. 27 & 29 and 5TH CIR. R. 27.4, Emerson, 270 F.3d at 203 (No. 99-10331). The Justice Department did not oppose the motion by defendant Emerson to have the Ashcroft Letter considered, notwithstanding the fact that it conflicted squarely with the Department’s position in the court of appeals and was being invoked in opposition to the Department’s own position. The Court denied both Emerson’s and the amici’s motions. Emerson, 270 F.3d at 265 n.67.

384 See, e.g., Christopher Chrisman, Note, Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms, 43 ARIZ. L. REV. 439, 440 (2001) (anticipating the Fifth Circuit’s decision in Emerson with uncertainty and hope because “the collective academic lurchation has developed a compelling consensus that concurs with the conclusion of [the trial judge in] Emerson”).

385 See United States v. Napier, 233 F.3d 394, 403-404 (6th Cir. 2000) (because the trial court in Emerson “stands alone” in finding that the Second Amendment guarantees an expansive individual right, the court of appeals identified no reason to retreat from the determination that “the Second Amendment does not guarantee an individual right to bear arms”); Olympic Arms v. Magaw, 91 F. Supp. 2d 1061, 1071 (E.D. Mich. 2000) (“Nor, under the currently controlling authority in this circuit, is there an individual right to bear arms.” (citations omitted)); United States v. Spruill, 61 F. Supp. 2d 587, 591 (W.D. Tex. 1999) (“Defendant’s reliance on Emerson is misplaced. Our Court of Appeals has held consistently that the Second Amendment confers a collective, rather than an individual right to keep and bear arms.” (citations omitted)); and Rupf v. Yan, 85 Cal. App. 4th 411, 421, 102 Cal. Rptr. 2d 157, 164 (1st Dist. 2000) (“The Ninth Circuit is among those federal courts considering the issue that have held ‘that the Second
rejected the claim that the Second Amendment secures an expansive individual right to bear arms unrelated to service in a state militia in Kostmayer v. Department of Treasury, an unpublished decision issued after the trial judge’s decision in Emerson. Judge Garwood’s majority opinion in Emerson strives to be Solomonic. He supports a fundamental rights interpretation of the Second Amendment while at the same time preserving the prohibition against domestic abusers having access to guns. He digresses into a lengthy examination of the historical “evidence” supporting an expansive individual right under the Second Amendment. However, his conclusion regarding the meaning of the Second Amendment was unnecessary to reach the holding in the case. Judge Garwood had no need first to conclude that the Second Amendment protects an individual right in order to hold that Emerson did not have one. It would have been much easier—and appropriate to the judicial role—to conclude that under any interpretation of the Second Amendment, Emerson had no protected right to possess firearms, making it unnecessary to reach the individual rights claim to decide the case.

Judge Garwood’s treatment in Emerson of the Supreme Court’s decision in United States v. Miller shares the same revisionist approach to precedent as the Ashcroft Letter. While the Attorney General ignores the Supreme Court’s decision in Miller altogether, Judge Garwood’s opinion creatively reinterprets it in Emerson. He could not read the decision as affirming the militia-based view

Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.” (citations omitted)).

Kostmayer v. Department of Treasury, 178 F.3d 1291 (5th Cir.) (unpublished), cert. denied, 528 U.S. 928 (1999). See also United States v. Johnson, 441 F.2d 1134, 1136 (5th Cir. 1971) (relying on United States v. Miller, 307 U.S. 174 (1939), for the proposition that the Second Amendment only extends to the possession or use of weapons that bear some “reasonable relationship to the preservation or efficiency of a well regulated militia”).

Kostmayer, 178 F.3d at 1291. See also Emerson Reply Brief, supra note 320, at 1-3. Even though the Kostmayer opinion is unpublished and is therefore not precedent, the Fifth Circuit Rules recognize that “an unpublished opinion may . . . be persuasive” and permit it to be cited. 5TH CIR. R. 47.5.4. As described in the Emerson Reply Brief, supra note 320, at 2-3, the Fifth Circuit in Kostmayer relied on the district court’s reasoning to reject the claim by two federal felons that a lifetime prohibition on firearms possession violated their Second Amendment rights. See id. at 2. After losing in the Fifth Circuit, the plaintiffs petitioned for review in the Supreme Court on the issue whether the Second Amendment “creates a personal right in each citizen that shall not be infringed.” See id. at 3. Their petition relied heavily on the district court’s decision in Emerson, 46 F. Supp. 2d at 598, and critiqued Miller, 307 U.S. at 174. See id. Moreover, the fact that Kostmayer was deemed unworthy of a published opinion does suggest that the judges in that case viewed its Second Amendment holding as unremarkable and completely consistent with precedent.

See, e.g., Michael C. Dorf, Dicta and Article III, 142 U. PA. L. REV. 1997, 2000 (1994) (describing typical understanding of dicta as “statements in a judicial opinion that are not necessary to support the decision reached by the court”). The justifications for treating dicta differently from the holdings recognize that the precise question before the court is considered with care and in relation to the case decided, and the courts’ authority extends to deciding cases, not abstract principles. Id. at 2000-2001.

See Emerson, 270 F.3d at 272-274 (Parker, J. concurring).

Id. at 221-227.
of the Second Amendment, because such an interpretation would have prevented
the appellate court from disagreeing with the Supreme Court. 392

So Judge Garwood devised a third way. He asserts that Miller does not
stand for the proposition that the Second Amendment protects only a collective
right of the militia to be armed, contending that one must look beyond the
language in the Miller decision—to the Justice Department’s brief in the case—
for extrinsic evidence of the opinion’s meaning. 393 In other words, Judge
Garwood takes the position that Miller cannot be understood without reference to
sources outside the Court’s opinion, in which the Solicitor General supposedly
advocated two distinct arguments. According to Judge Garwood, the first of
these arguments supported the position that the Second Amendments protects the
collective right of states to arm their militia—which is how Miller consistently
has been understood. 394 However, Judge Garwood maintains that the Justice
Department argued in the alternative. He identifies a so-called “second
argument”—namely, that sawed-off shotguns of the sort that were prohibited
by the National Firearms Act fall outside the protection of the Second
Amendment. 395 Because the Supreme Court cited language from a nineteenth
century Tennessee case that is discussed in the portion of the government’s brief
that supposedly deals with this “second” argument, Judge Garwood concludes
that this demonstrates that the Supreme Court was relying on this narrower
argument—a sawed-off shotgun had no use by the militia, and therefore fell
outside the scope of the Second Amendment’s protection. 396

Judge Garwood’s approach to interpreting Supreme Court decisions by
reference to extrinsic evidence enables him to craft an extremely innovative
reading of the government’s brief in Miller. The problem is that Judge Garwood
over-interprets the government’s brief, and in the process, misses the forest for
the trees in his reading of that brief. His effort to posit the existence of
arguments in the alternative fails to find support—certainly not in the Justice
Department’s brief in Miller, much less in the Miller decision itself.

By treating the brief like a Gordian knot rather than what it actually is—a
straightforward and coherent argument—Judge Garwood overlooks its simple
structure. The brief opens with a summary of argument that presents a single,

392 Dorf, Dicta and Article III, supra note 390, at 2025 (“A lower court must always follow a higher
court’s precedents.”). However, under what Dorf terms “vertical stare decisis,” how a lower court
goes about deciding what constitutes precedent is another question. See id. One way that lower
courts might avoid being bound by a higher court’s decision is by designating the disfavored
portion of that decision as dicta. See id. at 2026-2027. Lower courts have disagreed on the
preclusive effect of a higher court’s dicta. See id. at 2026 & n.106 (citing lower court cases).
Another way to avoid being locked in by precedent involves reinterpretting the higher court’s entire
decision narrowly—avoiding the dicta/holding conundrum altogether—so as to negate the
preclusive force of any part of the decision. Judge Garwood employed this tactic in Emerson.
Rather than write off the broad portions of the Supreme Court’s decision in Miller as dicta, he
instead makes the unprecedented and extraordinary contention that Miller actually means
something different than what the lower courts have said it means for 63 years.
393 See Emerson, 270 F.3d at 221-224.
394 Id. at 222.
395 Id.
396 Id. at 224.
unified argument, not multiple arguments in the alternative. Referring to the historic understanding of the right to bear arms as it developed in England, the brief states:

[The right to keep and bear arms has been generally restricted to the keeping and bearing of arms by the people collectively for their common defense and security. Indeed, the very language of the Second Amendment discloses that this right has reference only to the keeping and bearing of arms by the people as members of the state militia or other similar military organization provided for by law. The "arms" referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes, and the cases unanimously hold that weapons peculiarly adaptable to use by criminals are not within the protection of the Amendment.

The Justice Department argues that the right to bear arms cannot be understood as protecting a private right, and to the extent that it protects a collective right, it extends only to those arms that are suited for use by a militia for the common defense. The proposition that "arms" within the meaning of the Second Amendment does not include the arms prohibited by the National Firearms Act cannot be understood independent of the Second Amendment’s limited applicability to arms borne collectively in the common defense.

Following this summary, the brief continues under a single heading, "SECTION 11 OF THE NATIONAL FIREARMS ACT DOES NOT VIOLATE THE SECOND AMENDMENT." Had the Department argued in the alternative, it would have made more sense for its brief to contain two headings, one for each separate argument. It does not.

Judge Garwood claims further support for his reading of Miller and the Justice Department brief by maintaining that the portion of a nineteenth century Tennessee Supreme Court case, Aymette v. State, cited in Miller, comes from the portion of the brief that addressed the "second" argument. Aymette upheld a state law prohibiting persons from concealing bowie-knives beneath their clothes, and the court’s opinion interpreted the state constitutional provision stating that "the free white men of this State, have a right to keep and bear arms for their common defence." Judge Garwood suggests that Aymette turned on a determination that a prohibition on concealed carry of a bowie-knife was acceptable, because a bowie-knife was not a weapon of war that would be used in

397 Brief for the United States at 4-5, United States v. Miller, 307 U.S. 174 (1939) (No. 696) [hereinafter "Justice Department Miller Brief"] (on file with author). Solicitor General Robert Jackson signed the brief on behalf of the United States.
398 Id.
399 Id.
400 Id. at 5.
401 Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840).
402 Id. at 156.
the common defense.\textsuperscript{403} However, \textit{Aymette} recognized that the right to bear arms, derived from the English experience, does not protect an individual right. Discussing the importance of "the common defense" language, immediately before the discussion of the bowie-knife that the judges rely on, the Tennessee court explained the meaning of the right to bear arms "for the common defence":

But to keep and bear arms for what? If the history of the subject had left in doubt the object for which the right is secured, the words that are employed must completely remove that doubt. It is declared that they may keep and bear arms for their common defence. The word "common" here used, means according to Webster: 1. Belonging equally to more than one, or to many indefinitely. 2. Belonging to the public. 3. General. 4. Universal. 5. Public. The object, then, for which the right of keeping, and bearing arms is secured is the defence of the public.\textsuperscript{404}

The court in \textit{Aymette} viewed the right to bear arms under the Tennessee Constitution "as relating to public, and not private; to the common, and not the individual defence."\textsuperscript{405} The flaw in claiming that \textit{Aymette} and the Justice Department distinguished between arguments concerning the collective right and the suitability of the arms in question for military use is demonstrated by the language that the Justice Department chose to cite at the conclusion of the supposed "second" argument: "[The Constitution] does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights."\textsuperscript{406} If the Justice Department wished to differentiate among arguments in the Supreme Court, it is at best odd that it would have concluded the discussion of the so-called "second" argument with a strong statement that the Second Amendment does not protect an individual right. In the end, Judge Garwood misinterprets \textit{Aymette} to enable a misinterpretation of the Justice Department's brief in \textit{Miller}, so that \textit{Miller} itself can be misinterpreted.

Why would a judge go to all this trouble, one might ask? In \textit{Dicta and Article III}, Michael Dorf suggests a reason: "One possibility is that the judge does not believe that, under her view of stare decisis, the precedent ought to be overruled, but nonetheless wishes to decide the case in a manner contrary to the precedent."\textsuperscript{407} Dorf criticizes this as an "exceedingly weak justification in that it

\textsuperscript{403} See Emerson, 270 F.3d at 223 n.16.
\textsuperscript{404} \textit{Aymette}, 21 Tenn. At 158.
\textsuperscript{405} Id. at 161.
\textsuperscript{407} Dorf, \textit{Dicta and Article III}, supra note 389, at 2065.
amounts to simple lawlessness.408 Under this view, Judge Garwood’s reinvention of Miller teeters precariously atop a house of cards.

There is an irony in this effort by Judge Garwood—echoing the Standard Modelers’ reading of the case—to argue that Miller turns solely on the type of weapon at issue rather than the nature of the Second Amendment right. In his desire to distinguish and reinterpret Miller, Judge Garwood fails to recognize that his effort to parse Miller in this manner limits, rather than broadens, the protection afforded by the Second Amendment. This is because Miller supports a view of the Amendment in which “arms” are defined narrowly, as weapons having a military purpose.409 The Tennessee Supreme Court made precisely the same point:

A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had borne arms, much less could it be said, that a private citizen bears arms, because he has a dirk or pistol concealed under his clothes, or a spear in a cane.410

Judge Garwood tries to have it both ways. He claims that Miller held only that a sawed-off shotgun serves no military purpose and therefore, the decision supports some expansive individual right that would allow certain weapons of a military nature to be accorded constitutional protection. However, the notion of bearing arms for military use is inseparable from the purposes for which the arms are borne in the first place—in connection with service in an organized militia.

Recognizing that the judges’ discussion of the Second Amendment as an individual right is quintessential dicta, the third judge on the panel, the Honorable Robert M. Parker, concluded that the court had no need to reach the question of whether Emerson had an individual right to have a gun, since under any interpretation of the Second Amendment, he loses. Judge Parker refused to endorse the Second Amendment finding and condemned the lengthy exercise as “misplaced” and “overreaching.”411

In the end, his Emerson opinion unleashes Judge Garwood’s judicial activism in a way that should have little real-world impact, because the Second

408 Id.
409 See Wills’ analysis of what it meant to “bear arms” referenced supra note 70.
410 Aymette, 21 Tenn. at 161.
411 Judge Parker’s concurrence comes as no surprise given the unprincipled approach taken by Judge Garwood’s majority opinion. Dorf suggests that some judges manipulate precedent, disingenuously narrowly characterizing the holding of a case, in order to forge consensus. Dorf, Dicta and Article III, supra note 389, at 2065. In Dorf’s hypothetical, “Judge Flexible” might mischaracterize a precedent to win the vote of “Judge Rigid.” Id. However, Dorf recognizes the pitfalls to this approach, because another judge will be likely to point out that a misreading of precedent that has taken place, and “the cat will be out of the bag.” Id. at 2065-2066. While the internal deliberations in the Fifth Circuit are unknown, Judge Parker’s pointed concurrence let the cat out of the bag, noting that “nothing in this case turns on the original meaning of the Second Amendment” and recognizing that “the majority stirs this controversy without necessity when prudence and respect for stare decisis calls for it to say nothing at all.” Emerson, 270 F.3d at 274 (Parker, J., concurring).
Amendment analysis is no more binding than the many Standard Model law review articles supporting the expansive individual rights interpretation on which it relies. While Judge Garwood's detour may offer individual rights advocates personal validation, as Judge Parker notes, "it is dicta and is therefore not binding on us or on any other court." Instead of a finding of an absolute constitutional right, Emerson finds himself facing a court date under the law he challenged. Federal gun control laws remain intact. Courts in other circuits have continued to reject Second Amendment challenges to federal gun control laws, without even mentioning the Fifth Circuit's decision in Emerson.

B. Judicial Review in the Wake of the Ashcroft Letter and the Emerson Decision

In the wake of the Emerson decision, Attorney General Ashcroft has sought to transform Judge Garwood's Second Amendment discussion into Justice Department policy. First, the November 2001 "Ashcroft Memorandum" directs all 93 U.S. Attorneys to follow the decision and submit Second Amendment cases to Justice Department lawyers in Washington for their review.

---


413 Emerson, 270 F.3d at 272.

414 United States v. Swida, 180 F. Supp. 2d 652, 659 n.11 (M.D. Pa. 2002) (rejecting Second Amendment claim that federal prohibition on machine gun possession, 18 U.S.C. § 922(o), violates the Second Amendment: "Swida has not cited any precedent that suggests that the Rybar [collective rights] analysis of the Second Amendment has been vitiated"); United States v. Smith, 56 M.J. 711, 2001 CCA LEXIS 338 (A.F. Ct. Crim. App. 2001) (rejecting airman's claim that federal prohibition on possession by persons convicted of a misdemeanor crime of domestic violence, 18 U.S.C. § 922(g)(9), violated his Second Amendment rights: "Federal courts have held that [the Second Amendment] is a 'collective right' rather than an individual right. The appellant has not alleged, much less demonstrated that his possession of the Smith & Wesson handgun in this case had any relationship to the preservation and efficiency of a well-regulated militia" (citation omitted)); United States v. Finnell, 2001 U.S. App. LEXIS 24823 (4th Cir.) (unpublished) (November 19, 2001) (rejecting Second Amendment challenge to federal prohibition on possession by persons convicted of a misdemeanor crime of domestic violence, codified at 18 U.S.C. § 922(g)(9): "We further find § 922(g)(9) does not violate the Second Amendment. . ."; United States v. Shaffer, 2001 U.S. App. LEXIS 24371 (8th Cir.) (unpublished op.) (November 13, 2001) (rejecting Second Amendment challenge to prohibition of firearm possession by convicted felons, 18 U.S.C. § 922(g)(1): [I]t is now well-settled that Congress did not violate the Second Amendment in enacting [§ 922(g)(1)]" (citation omitted)); Gorley v. Snyder, 2001 U.S. App. LEXIS 24224 (6th Cir.) (unpublished op.) (November 2, 2001) (upholding on other grounds the dismissal of prisoner's habeas corpus petition alleging that conviction under § 922(g)(1) violated his Second Amendment rights: "Gorley's claims are without merit in any event. Gorley's § 922(g)(1) conviction does not violate his Second Amendment right to bear arms.").

415 Memorandum from John Ashcroft, Attorney General, to All United States Attorneys (Nov. 9, 2001) (reprinted in app. C infra p. 803) [hereinafter Ashcroft Memorandum].
The Ashcroft Memorandum requires all federal prosecutors to treat the judges' interpretation of the Second Amendment as law: "In my view, the Emerson opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment."\(^{416}\) Even though Judge Garwood's views on the meaning of the Second Amendment are non-binding, even in the Fifth Circuit, Attorney General Ashcroft gives the dicta nationwide application by instructing all U.S. Attorneys to follow it.\(^{417}\) To make sure that federal prosecutors do not stray from the newly declared policy, the Memorandum requires them to "advise" the Department anytime a Second Amendment issue arises in the wake of Emerson, and "coordinate all briefing in those cases" with the Criminal Division and the Solicitor General's Office in Washington.\(^{418}\)

Second, if anyone questioned whether the Ashcroft Justice Department would advance the view of the Second Amendment set forth in the Letter and in Emerson, Solicitor General Theodore Olson put to rest any doubts in two briefs filed with the Supreme Court on May 6, 2002. The briefs responded to petitions for certiorari filed by the defendants in the Emerson and Haney cases.\(^{419}\) Solicitor General Theodore B. Olson opposed review by the Court. This comes as no surprise. As the briefs themselves point out, there is no split among the federal courts of appeals regarding the constitutionality under the Second Amendment of either the protective order gun ban at issue in Emerson or the machine gun possession prohibition considered in Haney. Had the Solicitor General submitted briefs that asserted only those arguments that were necessary in order to persuade the Supreme Court to deny review, those briefs would have been limited to pointing out the absence of any circuit split on the question of the statutes' constitutionality under the Second Amendment, for the Solicitor General generally does not engage in gratuitous expressions of policy that are unnecessary to the Court's resolution of the case before it.\(^{420}\)

Instead, the Solicitor General used the opposition briefs to announce, for the first time ever in a Justice Department pleading filed in the Supreme Court, that the Department supports an expansive individual right under the Second Amendment that is unconnected to the militia. Relying on the Ashcroft Memorandum rather than the Letter, footnotes in the briefs state:

\(^{416}\) Id.
\(^{417}\) Id.
\(^{418}\) Id.
\(^{419}\) Brief for the United States in Opposition, Emerson v. United States, 270 F.3d 203 (5th Cir.), \textit{reh'g and reh'g en banc denied}, 281 F.3d 1281 (5th Cir. 2001), \textit{cert. denied}, 122 S. Ct. 2362 (2002) (No. 01-8780) [hereinafter Solicitor General's Emerson brief]; Brief for the United States in Opposition, Haney v. United States, 264 F.3d 1161, 1164-1165 (10th Cir. 2001), \textit{cert. denied}, 122 S. Ct. 2362 (2002) (No. 01-8272) [hereinafter Solicitor General's Haney Brief].
\(^{420}\) Cf., note 339 supra and accompanying text; see also Letter from Andrew L. Frey, Esq., to Theodore B. Olson, Solicitor General (May 2, 2002), \textit{available at} http://www.vpc.org/graphics/olson/pdf (last visited May 10, 2002) (on file with author). Frey's letter, written on behalf of the Violence Policy Center, urged Solicitor General Olson to refrain from espousing an expansive individual rights position in response to the petitions in Emerson and Haney: "To address the lower court's discussion of the Second Amendment, other than to mention briefly that it is dictum and unsupported by case law or history, would be a dubious exercise of the responsibilities of your Office." \textit{Id.} at 15.
In its brief to the court of appeals [in Emerson], the government argued that the Second Amendment protects only such acts of firearm possession as are reasonably related to the preservation or efficiency of the militia. . . . The current position of the United States, however, is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse. 421

The two briefs finally "reconcile" the litigation position of the Department with Attorney General Ashcroft's official interpretation of the Second Amendment. According to the New York Times: "Reversing decades of official policy on the meaning of the Second Amendment, the Justice Department told the Supreme Court for the first time late Monday that the Constitution 'broadly protects the rights of individuals' to own firearms." 422 Rather than providing any justification for the new position, the briefs attach the one-page Ashcroft Memorandum, which asserts that the Emerson decision reflects the "correct understanding" of the Second Amendment. 423 The briefs then cite to a handful of circuit court cases that support the militia-based view of the amendment as a basis for claiming that there is "disagreement concerning the abstract question whether the Amendment protects an individual right to bear arms for reasons unrelated to militia service." 424 More importantly, neither brief mentions the Supreme Court's decisions in United States v. Miller 425 or Lewis v. United States. 426 The omissions are striking because these cases relate directly to Emerson and Haney, and the Solicitor General apparently felt no obligation to cite the Court's own authority. However, citing Miller would have forced the Solicitor General to address the fact that the new position conflicts directly with Miller, which expressly relates the Second Amendment right to the militia. Yet, the Solicitor General does not ask the Court to revisit or overrule Miller. Like the Ashcroft Letter itself, the Solicitor General's briefs appear to try to marginalize or "overrule" Miller by omission—by pretending that it does not exist.

421 Solicitor General's Emerson Brief, supra note 419, at 19-20 n.3; Solicitor General's Haney Brief, supra note 419, at 5 n.2.


423 See supra note 415 and accompanying text.

424 Solicitor General's Emerson Brief, supra note 419, at 20.


While the briefs rely on the Ashcroft Memorandum, their true progenitor is the Ashcroft Letter. The Letter remains the most complete exposition of the Department's view, while briefs filed in the high court are the most authoritative.\textsuperscript{427} Like the Letter, the briefs speak in expansive terms, identifying a Second Amendment right that "broadly" protects individuals, and expressly reject the militia-based view of the Second Amendment. The only qualification—which lacks support in either the historical record or judicial precedents—is that the expansive individual right is subject only to limitations on possession by "unfit persons" or restricting "possession of types of firearms that are particularly suited to criminal misuse."\textsuperscript{428}

Based on this understanding, how will the Justice Department defend Second Amendment challenges, in light of the Letter, the Emerson decision, and the Ashcroft Memorandum to United States Attorneys? In the Ashcroft Letter, the Attorney General concludes: "I believe it is clear that the Constitution protects the private ownership of firearms for lawful purposes."\textsuperscript{429} But in the most radical statement in the entire letter, Ashcroft goes on to state:

Of course, the individual rights view of the Second Amendment does not prohibit Congress from enacting laws restricting firearms ownership for \textit{compelling state interests}, such as prohibiting firearms ownership by convicted felons, just as the First Amendment does not prohibit shouting "fire" in a crowded movie theater.\textsuperscript{430}

It is unclear whether Attorney General Ashcroft means to suggest that other prohibitions on firearms possession, existing or proposed, would be allowable under his expansive individual rights view of the Second Amendment.\textsuperscript{431} Attorney General Ashcroft evidently seeks to reassure Justice Department prosecutors charged with enforcing federal gun laws that his view of the Second Amendment does not foreclose Congress from enacting laws to regulate firearms, a position that is superficially consistent with \textit{Emerson}.

However, by invoking the "compelling state interests" language, the Ashcroft Letter appears to view the Second Amendment as an expansive individual or fundamental right, placing it on an equal footing with the First Amendment.\textsuperscript{432} The Letter invites the comparison by suggesting that the First Amendment "does not prohibit shouting ‘fire’ in a crowded movie theater."\textsuperscript{433}

\textsuperscript{427} See Bob Herbert, Editorial, \textit{More Guns for Everyone!}, N.Y. TIMES, May 9, 2002, at A39 (asserting that the Ashcroft Letter "telegraphed this transparently political move . . . nearly a year ago").

\textsuperscript{428} Solicitor General's \textit{Emerson} Brief, supra note 419, at 20 n.3; Solicitor General's \textit{Haney} Brief, supra note 419, at 5 n.2.

\textsuperscript{429} Ashcroft Letter at 2, reprinted in app. A infra p. 800.

\textsuperscript{430} Id. at 2 n.1 (emphasis added).

\textsuperscript{431} Id.

\textsuperscript{432} See U.S. CONST. amend. I.

\textsuperscript{433} This refers to the oft-quoted statement by Justice Oliver Wendell Holmes in \textit{Schenck v. United States}, 249 U.S. 47, 52 (1919), in which Holmes recognized that First Amendment freedoms were
Attorney General Ashcroft probably intended to make the opposite point, that the state may prohibit a person from falsely shouting "fire" in a crowded movie theater and causing pandemonium, just as the state may prohibit felons from possessing firearms and committing gun crimes. If this is what the Attorney General meant to say, it is imprecise. The chaos that results when someone shouts "fire" in a crowded movie theater could be compared to gun violence in America today. Speech can be curtailed at the point at which public safety and physical well-being are endangered. The same goes for gun possession. Put another way, all too often guns have the same effect on public safety as the person falsely shouting fire in the crowded movie theater, which is why a wide variety of restrictions on gun ownership pass constitutional muster. The Ashcroft Letter does not provide any guidance to those Justice Department lawyers charged with implementing this new policy, nor does it put in place any process for formulating that guidance through a deliberate and comprehensive policymaking process.

It is far from obvious, as Attorney General Ashcroft suggests, that the compelling state interests test provides the appropriate standard of review in constitutional cases. The suspect classifications approach emanated from the famous footnote 4 in Carolene Products v. United States, and provides a theoretical underpinning for courts to scrutinize constitutional claims brought by groups that have been historically excluded from full and robust participation in the political process. The fraternal twin of the compelling state interests test in the Supreme Court's fundamental and individual rights jurisprudence is "strict scrutiny." In First Amendment speech cases, the Supreme Court has applied strict scrutiny to government regulation of political and artistic expression speech and lower-level scrutiny to limitations on commercial speech. State action that infringes on the free exercise of religion is subject to strict scrutiny if not absolute and could be abridged if they could "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

---

434 See Ashcroft Letter at 2 n.1, reprinted in app. A infra p. 800.
435 See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942) (identifying certain classes of speech, including "fighting" words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace" that fall outside the boundary of free speech protected by the First Amendment).
436 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-11, at 902 (3rd ed. 2000) (qualifying his recognition of an individual right under the Second Amendment by emphasizing the irrelevance of the academic Second Amendment debate to contemporary gun control proposals, which are, according to Tribe "plainly constitutional" with the possible exception of a total ban on all firearms).
437 See Ashcroft Letter at 1, reprinted in app. A infra p. 799.
438 Carolene Products Co. v. United States, 304 U.S. 144, 153 n.4 (1938).
439 Id.
440 See, e.g., Cohen v. California, 403 U.S. 15, 25-26 (1971) (upholding political expression even when it takes the form of a four-letter expletive emblazoned on the back of the speaker's jacket to convey his opposition to the Vietnam War).
441 See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553 (2001) (citations omitted) (affording "commercial speech a measure of First Amendment protection 'commensurate with its position in relation to other constitutionally guaranteed expression").
it is targeted at a particular religious group or practice,⁴⁴² and to a lesser standard if a neutral, generally applicable enactment happens to impact on the free exercise of religion.⁴⁴³ The compelling state interests test is the strictest, most probing analysis of government action under constitutional law, and its application has been limited to a few cases—when government has made a classification based on race,⁴⁴⁴ ethnic origin,⁴⁴⁵ or when a government action impacts on the rights of free speech and assembly.⁴⁴⁶ Even classifications based on gender do not have to satisfy the compelling state interests test.⁴⁴⁷ Attorney General Ashcroft's statement would mean that a law restricting firearms ownership would be scrutinized more closely than one that disadvantages women, burdens a woman's reproductive rights, restricts religious expression, or gives the police the right to conduct warrantless searches.

As constitutional law scholar Gerald Gunther observed, when a court strictly scrutinizes governmental actions or regulations, the review virtually always ends up being "'strict' in theory and fatal in fact."⁴⁴⁸ In other words, circumstances in which state actors can enunciate a compelling state interest that suffices to preserve the constitutionality of a law infringing on a fundamental constitutional right are few and far between. The compelling state interests test would require the same type of showing by the government to justify a firearm regulation that is required to justify a restriction on speech. Even though existing federal firearms regulations can indeed be characterized as supported by compelling government interests in protecting the safety of citizenry and inhibiting criminal activity, there is no basis in constitutional law—or the Ashcroft Letter—for importing that standard to the Second Amendment.

By suggesting that the compelling interest standard should apply in Second Amendment cases, Attorney General Ashcroft imperils laws that infringe the newly asserted constitutional right and needlessly complicates the Justice Department's ability to enforce federal gun laws. Invoking the compelling interests tests in the Letter without amplifying how that test actually would apply in given cases illustrates the dangers of developing legal policy in a bubble. Attorney General Ashcroft cites the compelling state interests test seemingly as an afterthought, apparently believing that once the Second Amendment right is shown to be an individual right, it automatically should be treated in the same manner as other individual or fundamental rights, or suspect classifications. The problem, of course, is that not all individual rights protected under the Constitution are fundamental, and not all classifications are suspect. Even what the Supreme Court describes as a fundamental right does not always merit strict scrutiny. Determining whether a right is fundamental such that strict scrutiny or

⁴⁴² See, e.g., Sherbert v. Verner, 374 U.S. 398, 408-409 (a law that burdens religious free exercise directly must be "essential to accomplish an overriding governmental interest").
⁴⁴⁴ See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967)
⁴⁴⁶ See, e.g., Cohen, 403 U.S. at 15.
the compelling interests test should apply has evolved in constitutional jurisprudence over the past decades. The essential point is that the existence of a constitutional right, in whatever forms it takes, does not answer the question as to how that right may be limited, infringed, or even completely outweighed by government interests.

Take free speech as an example. Under First Amendment doctrine, some speech, like political speech, may not be abridged absent a compelling state interest.449 Other speech, like commercial speech, may be infringed if the state’s interest in doing so is substantial.450 And all speech, even political speech, is subject to a panoply of time, place, and manner restrictions, provided they are content-neutral and narrowly tailored.451 Moreover, under the Equal Protection Clause, some classifications, such as racial classifications, are strictly scrutinized,452 others, like gender classifications, are subject to an intermediate standard of review.453 But courts review the lion’s share of classifications according to a rational basis standard, the lowest level of scrutiny in constitutional adjudication.454

A hallmark of Standard Model scholarship is that it fails to grapple effectively with how any newfound individual right would apply in actual cases and controversies.455 Attorney General Ashcroft identifies four law review

450 Lorillard, 533 U.S. at 554.
451 See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 115-116 (1972) (“reasonable ‘time, place and manner’ regulations may be necessary to further significant governmental interests and are permitted”) (citations omitted).
452 Loving, 388 U.S. at 11.
453 See Frontiero, 411 U.S. at 688.
454 FCC v. Beach Communications, Inc., 508 U.S. 307 (1993). In Beach Communications, the Court emphasized the deferential character of rational basis review, under which statutes are accorded a “strong presumption of validity”; a party challenging such classifications bear a heavy burden to negate every possible basis on which the classification rests; the legislature is “never required to articulate its reasons for enacting a statute”; and “a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” Id. at 314-315 (citations omitted). Moreover, courts applying rational basis review recognize that a classification is not invalid simply because the legislature has taken “one step at a time,” first “addressing itself to the phrase of the problem which seems most acute to the legislative mind.” Id. at 316.
455 See, e.g., Robert E. Shalhope, To Keep and Bear Arms in the Early Republic, 16 CONST. COMMENT. 269 (1999). Shalhope notes that the Standard Modelers have propounded “an incredibly anachronistic presentation of the Second Amendment.” Id. at 270. They have done so in order “to affect the manner in which the Supreme Court interprets the Second Amendment in some ‘landmark’ case they hope will arise in the near future.” Id. at 281. However, the real question—“whether armed citizens or militias have any relevance in our society as we enter the twenty-first century”—remains unanswered and remains “for our courts and legislatures to determine.” Id. Shalhope takes issue with the approach to the Second Amendment taken by the Standard Model and has substantially softened his support of the expansive individual rights position in response to scholarship by Saul Cornell and others, see, e.g., Cornell, Commonplace or Anachronism, supra note 33, and in reaction to the Standard Modelers’ efforts to count him as one of their own. However, Shalhope continues to recognize two “distinct but dynamically interrelated rights—the individual right to keep firearms in the home for personal use and the communal right
articles as supporting his view of an expansive individual right—written by William Van Alstyne, Don Kates, Akhil Amar, and Sanford Levinson—all of whom support some version of the expansive individual rights position under the Second Amendment. However, these scholars part ways in addressing how courts should apply the Second Amendment in cases.\textsuperscript{456}

Van Alstyne, a constitutional law scholar, argues in favor of a “rule of reason” analysis and for importing time, place, and manner restrictions from the First Amendment doctrine.\textsuperscript{457} While a restriction on howitzers or on carrying guns into courthouses or public schools might pass muster, writes Van Alstyne, “each kind of example one might give will raise its own kind of question.”\textsuperscript{458}

Don Kates, a pro-gun rights scholar and advocate, acknowledges that “the delay in defining its parameters is attributable to the diversion and monopolization of legal analysis by the false dichotomy between the exclusively state’s right and the unrestricted individual right interpretations.”\textsuperscript{459} The test he proposes focuses on the weapons themselves and purports to draw upon part of the test applied by the Supreme Court in \textit{Miller}, while admittedly rejecting that decision’s focus on the militia-based essence of the Second Amendment.\textsuperscript{460} To receive constitutional protection, the weapon must be “(1) ‘of the kind in common use’ among law-abiding people today; (2) useful and appropriate not just for military purposes, but also for law enforcement and individual self-defense; and (3) lineally descended from the kinds of weaponry known to the Founders.”\textsuperscript{461}

In its application, the boundaries of the right become less clear. Kates argues that under his test, handguns are protected, but cheaply made Saturday Night Specials are probably not protected. “Gangster weapons” like brass knuckles, sawed-off shotguns, and switchblades could “unquestionably” be prohibited, as could machine guns, flame throwers, and rocket launchers.\textsuperscript{462} It may be permissible to restrict the possession of loaded shotguns and rifles “at least in urban areas.”\textsuperscript{463} Finally, while concealed carry laws that vest law enforcement with the discretion to determine whether someone should receive a permit to carry a concealed weapon would fail the test, “shall issue” laws that require the issuance of a permit to carry concealed weapons would pass muster.\textsuperscript{464}

\footnotesize{\textsuperscript{456} Of the four authors, only Sanford Levinson does not discuss the appropriate level of scrutiny to be applied to the newfound right. Rather, he observes taking the Second Amendment seriously might well impose significant social costs, but that does not distinguish it from other provisions in the Bill of Rights. Levinson, The Embarrassing Second Amendment, supra note 1, at 658.\textsuperscript{457} William Van Alstyne, The Second Amendment and the Personal Right To Arms, 43 DUKE L.J. 1236, 1254 (1994).\textsuperscript{458} Id.\textsuperscript{459} Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204, 273 (1983).\textsuperscript{460} Id. at 259.\textsuperscript{461} Id.\textsuperscript{462} Id. at 260-261.\textsuperscript{463} Id. at 261\textsuperscript{464} Id. at 264-265.}
Constitutional law scholar Amar’s approach to the judicial review question flows from his belief that the expansive individual right under the Second Amendment did not emerge until after the Civil War, during Reconstruction with the adoption of the Fourteenth Amendment. Amar contends that there was broad agreement among the Fourteenth Amendment’s Framers that the “privileges and immunities” of citizenship include the privilege of individual citizens to bear arms, and that the militia referred to in the Second Amendment is in fact synonymous with the people referred to elsewhere in the Bill of Rights. While Amar reads the Second Amendment as providing a basis for compulsory or quasi-compulsory military or non-military national service, as well as the inclusion of women and gay men in the Armed Forces, he views the individual right protected under the Second Amendment via the Fourteenth Amendment as “limited.”

As he wrote in a 1999 op-ed jointly authored with fellow constitutional law scholar Laurence Tribe: “The right to bear arms is certainly subject to reasonable regulation in the interest of public safety. Laws that ban certain types of weapons, that require safety devices on others and that otherwise impose strict controls on guns can pass constitutional scrutiny.”

Subsequently, in an Open Letter to the NRA that was reprinted in the New York Times in March 2000, Amar, Tribe, and forty-five other law professors and historians, including leading Pulitzer Prize-winning American historians Jack Rakove, David Kennedy, and Michael Kammen, co-signed a statement that acknowledges that their differences over the meaning of the Second Amendment did not stand in the way of their agreement on what the Second Amendment means in practical terms: “[T]he law is well settled that the Second Amendment permits broad and intensive regulation of firearms, including laws that ban certain types of weapons, require safety devices on others, mandate registration and licensing, and otherwise impose strict regulatory oversight of the firearms industry.”

Other authors have argued for strict scrutiny in the desire to see Second Amendment rights elevated alongside other fundamental rights. However, they cannot quite bring themselves completely to embrace strict scrutiny out of a recognition that its application might result in the invalidation of many gun

---

465 The Fourteenth Amendment provides, in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. U.S. Const. amend. XIV, § 1.
468 Id.
469 Id. at 9.
control laws. Professor Calvin Massey, for example, advocated a watered down version of strict scrutiny that begins with an inquiry into whether the regulation "materially infringes" on the "individual right to arms for self-defense." If the answer is yes—and in Massey’s view it might be in the case of prohibitions on the private possession of handguns, shotguns, and rifles, and might not be in the case of prohibitions on possession by minors or a ban on machine guns—then the regulation would be subjected to a "semi-strict" scrutiny in which the government would have to show that the restriction "substantially advances" a compelling governmental objective, but would be relieved of also having to show that the regulation was the least restrictive means available.

David Kopel, a prolific supporter of an expansive individual right under the Second Amendment, approaches the constitutional question from the other direction, arguing for a "careful" rational basis standard that would lead to the invalidation of gun regulations. Without conceding that strict scrutiny would not apply, Kopel argues that an assault weapons ban would fail to survive what he portrays as rational basis review, but is in fact a far more probing review.

C. **What the Courts Have Said**

In contrast to the expansive individual rights scholarship, Second Amendment caselaw squarely addresses the standard of review, strongly supporting the application of rational basis review under any understanding of the Second Amendment right, be it individual, collective, or something in between. In *United States v. Miller*, the Court clearly stated that it was applying low-level scrutiny to the determination whether a shotgun of less than 18 inches in length bore a reasonable relationship to service in a militia:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot

---

473 Id. at 1132-1133. See also, e.g., Scott A. Henderson, Note, *United States v. Emerson: The Second Amendment As an Individual Right—Time to Settle the Issue?* 102 W. VA. L. REV. 177, 219 (1999) (advocating strict scrutiny so that firearms regulations “would have to be necessary to serve a compelling interest drawn narrowly to achieve that goal” but noting that “in the case of firearm, one would expect that many courts may not find that strict scrutiny is fatal with the ease they have in the past” leading in the end to a balance where “reasonable regulation would develop”). That balance, it should be noted, begins to look a lot like rational basis scrutiny.
475 See id. at 385-417 (asserting that an assault weapons prohibition cannot survive a rational basis test that is “taken seriously” and painstakingly evaluates, inter alia, a plethora of factors relating to the characteristics of assault weapons, such as rate of fire, magazine capacity, conversion to full automatic, lethality of ammunition, the availability of seven accessories, and the insufficient evidence of use in crime).
say that the Second Amendment guarantees the right to keep and bear such an instrument. 476

Substituting, for example, “possession or use of a semi-automatic assault weapon” in place of the “possession of use of a shotgun having a barrel of less than eighteen inches” illustrates the flexibility of this constitutional test and demonstrates the fallacy of an unduly crimped reading of Miller's holding.477

The “reasonable relationship” test was adopted and employed by the Third Circuit three years after Miller in United States v. Tot, upholding a prohibition on gun possession by persons who have previously committed a crime of violence.478

More recently, there was virtually no mention of the Second Amendment in gun cases being heard in the Supreme Court, but the standard of review—rational basis—remained the same. In Lewis v. United States,479 the Supreme Court upheld the prohibition on firearms possession by felons480 against an equal protection challenge. The prohibition upheld in Lewis appears in the very same subsection of the Gun Control Act as the domestic violence protective order gun ban that was at issue in Emerson, and none of the parties—not the Supreme Court, not the Solicitor General, and not even the lawyer for the person challenging the permanent prohibition on gun possession—viewed the Second Amendment as central to the case. Citing Miller, the Court took the view that no fundamental rights of any kind were implicated in the case:

These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See United States v. Miller . . . (the Second Amendment guarantees no right to keep and bear a firearm that does not have “some reasonable relationship to the preservation or efficiency of a well regulated militia”).481


477 If Miller’s holding is limited to determining if a particular type of gun serves a military purpose, is it reductio ad absurdum to wonder whether the decision would apply to a gun that is 18.5” long? How about 20” long? Might judges be forced to become military munitions experts and bring a copy of GUN DIGEST onto the bench in order to decide a Second Amendment case?

478 United States v. Tot, 131 F.2d 261, 266-267 (3rd Cir.), rev’d on other grounds, 319 U.S. 463 (1943) (upholding conviction under the Federal Firearms Act of 1938, 15 U.S.C. § 901 et seq., for possession of a .32 Colt Automatic pistol by person who was convicted of a crime of violence and finding that Congress’ decision to prohibit this violent aggressors was “entirely reasonable and does not infringe upon the preservation of the well regulated militia protected under the Second Amendment”).


481 Lewis, 445 U.S. at 65 n.8 (citing Miller, 307 U.S. at 178).
In the same footnote, the Court also cites three additional lower court cases—
*United States v. Three Winchester, 30-30 Caliber Lever Action Carbines,* 482
*United States v. Johnson,* 483 and *Cody v. United States* 484—for the proposition
that various provisions of the Gun Control Act do not violate the Second
Amendment. 485 Professor Michael Dorf reads this footnote in *Lewis* as
expanding on *Miller,* noting that:

If the Court had been interested in safeguarding an individual
right of firearms possession for law-abiding citizens, it could
have relied on the fact that prohibitions on firearms possession
by felons date back to colonial times. Yet the *Lewis* Court went
considerably further in undermining constitutional protection for
an individual right. It cited *Miller* for the proposition that the
statute at issue did not "trench upon any constitutionally
protected liberties." 486

In the absence of any constitutional right to support a felon's right to
possess a firearm, rational basis was the appropriate constitutional test. 487 If
*Emerson's* Second Amendment holding is replicated in a decision that actually
binds some court in the future, the *Lewis* decision provides a roadmap for how
provisions of the Gun Control Act should be evaluated as a matter of
constitutional law.

Finally, until *Emerson* and *Haney,* the Justice Department's own recent
briefs in the Supreme Court—in response to petitions for a writ of certiorari in
Second Amendment cases which ask the Court to adopt strict scrutiny to
invalidate challenged provisions of the Gun Control Act—consider and reject the
call for stricter review. In *Fraternal Order of Police v. United States,* 488 the
Fraternal Order of Police (FOP), a law enforcement organization, challenged the
constitutionality of a provision of the Gun Control Act that prohibits possession
of firearms by persons convicted of a misdemeanor crime of domestic violence
under the Second Amendment, the Tenth Amendment, and the Commerce
Clause. 489 The FOP lost in the D.C. Circuit and petitioned the Supreme Court to
review the Tenth Amendment and Commerce Clause claims. Tellingly, FOP did
not seek review of the court's Second Amendment ruling, a recognition that the
question of the Second Amendment's meaning was well settled from the
Supreme Court's perspective.

---

482 United States v. Three Winchester, 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290,
n.5 (7th Cir. 1974).
483 United States v. Johnson, 497 F.2d 548 (4th Cir. 1974).
485 Lewis, 445 U.S. at 65 n.8.
486 Dorf, *What Does the Second Amendment Mean Today?*, supra note 132, at 297-298 (citations
omitted) (emphasis added).
487 Lewis, 445 U.S. at 65.
488 Fraternal Order of Police v. United States, 173 F.3d 898, 906 (D.C. Cir.), cert. denied, 528 U.S.
928 (1999).
In its brief opposing the FOP's petition for a writ of certiorari, the Solicitor General noted that the court of appeals had "correctly rejected petitioner's claim that Section 922(g)(9) should be subjected to strict scrutiny" under the Second Amendment. Relying on Lewis, Miller, and court of appeals cases from other circuits that had rejected similar constitutional challenges, the United States affirmed the applicability of rational basis review to cases challenging prohibition on the receipt and possession of a firearm. It restated the test: "[u]nder rational basis review, a legislative classification 'must be upheld * * * if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Applying rational basis review, the United States concluded that the domestic violence misdemeanor provision satisfied the requirements of rational basis and was "an entirely reasonable means of removing firearms from likely scenes of domestic violence."

Even in Emerson, Judge Garwood, at the same time that he went out of his way to identify an expansive individual right, arguably invoked the language of both strict scrutiny and rational basis to determine that Emerson had no Second Amendment right to possess firearms. After reiterating and recycling from other sources the arguments for why the Second Amendment protects an expansive individual right, the court in Emerson then had to explain why Emerson did not have one:

490 Fraternal Order of Police Brief in Opposition, supra note 321, at 9.
491 Id. at 11 (citation omitted).
492 Id. See also Gillespie Brief in Opposition, supra note 321, at 9-11.
493 United States v. Emerson, 270 F.3d 203, 261 & n.62 (5th Cir.), reh'g and reh'g en banc denied, 281 F.3d 1281 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).
494 For historical sources, Judge Garwood relied heavily on a self-published compilation of documents by DAVID E. YOUNG, THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787-1792 (Golden Oak Books, 2nd ed. 1995). Young is neither a trained historian nor a lawyer. He is, however, a pro-individual rights advocate, and his volume overwhelmingly includes only those documents, and the relevant portions thereof, that purport to support the expansive individual rights position on the Second Amendment. The Second Amendment Foundation, a pro-gun organization that participated as amicus in the Emerson case in support of Emerson, apparently provided copies of Young's book to the Fifth Circuit, one for each judge on the case. See Keep and Bear Arms website, http://www.keepandbeararms.com/information/Xc1BViewItem.asp?ID=2722 (last visited May 1, 2002) (on file with author). According to this pro-gun website, Judge Garwood cited the Young book more than 100 times. Id. This heavy reliance on Young's book raises a serious question about the rigor with which the judges reviewed the relevant historical materials, especially since Judge Garwood's opinion concludes, "[w]e have found no evidence that the Second Amendment was intended to convey militia power to the states, limit the federal government's power to maintain a standing army, or applies only to members of a select militia while on active duty." Emerson, 270 F.3d at 260 (emphasis added). Judge Garwood's conclusion is not surprising since he relied on Young for his source materials and Young, in the preface to his book, writes, "[t]he vast majority of documents in this collection are excerpts from longer items with only relevant portions reprinted." Young, supra, at xvi.

There is a difference between an armchair historian and a trained historian, and documentary editing is a scholarly endeavor, not a ministerial task. Any edited version of original materials necessarily requires a multitude of judgments on a wide range of issues: what to include, what to exclude, how to categorize and designate materials, to name a few. Even among historians, documentary editing is viewed as highly specialized work. For example, a standard reference work in the field, MARY-JO KLINE, A GUIDE TO DOCUMENTARY EDITING (2d ed. 1998), is over 250-pages
Although, as we have held, the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear arms as historically understood in this country.\(^4\)

This language restates an amalgam of constitutional tests and seems to suggest strict scrutiny, speaking in terms of both "limited, narrowly tailored exceptions for particular cases" and a "reasonable" basis for infringing the newly declared right.

Judge Garwood further diluted whichever standard he was attempting to apply in a footnote immediately following the articulation of the standard:

Likewise, the Supreme Court has remarked that the right to keep and bear arms is, like other rights protected by the Bill of Rights, long and contains numerous subsections with headings such as "Cautions on Selectivity," "Cautions on Topical Groupings," and "Second Thoughts: Authors Who Try to Rewrite History." In the "Introduction" to her volume, Kline writes: "Documentary editing, although noncritical in terms of classical textual scholarship, is hardly an uncritical endeavor. It demands as much intelligence, insight, and hard work as its critical counterpart, combined with a passionate determination to preserve for modern readers the nuances of evidence that exist in the sources on which the modern documentary editions are based." *Id.* at 2. Young's compilation relies on sources that—unlike his own volume—are recognized by historians as the definitive source materials—including Elliot's debates and the multi-volume DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (DHRC), *supra* note 74. Judge Garwood (and his law clerks) should have gone to those sources if they wanted to present a comprehensive historical treatment of the issue and analysis of primary sources. Young's volume, while evidently a convenient resource for proponents of an expansive individual right, omits much of the valuable information in the DHRC, which is the standard reference work. No information is included about whether or in what publications any of the materials in the Young volume were contemporaneously reprinted after they appeared. And as Larry Kramer has observed in an article extensively discussing the Constitution's ratification debates, reprinting was a "crucial mechanism for disseminating ideas, and it provides a useful proxy for contemporary pertinence and importance." Larry Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 247 n.134 (2000). Finally, the DHRC also includes correspondence that provides yet another important way of evaluating the weight to be accorded a document.

Young determined which portions of a document are relevant and which are not. He decided which documents to include and which to exclude. Arguably, these are significant judgment calls that are best left to trained historians to make. Thus, Young's book serves as a questionable source for a court to rely on for historical source materials, especially in an opinion that, for the first time, relies on the materials to support a conclusion that dramatically departs from prior appellate court decisions and Supreme Court precedent. It certainly is possible that the two Emerson judges might have reached different conclusions about the historical evidence and the meaning of the Second Amendment had they looked at the recognized source materials that reprint the historical documents in full rather than an edited compilation by an advocate aligned on one side in the debate. \(^4\)

Emerson, 270 F.3d at 261. Although the court of appeals describes its Second Amendment conclusion as a "holding," it is not a holding but rather has all the features of dicta in that it is unnecessary to resolve the question in the case. See *supra* notes 389-392 and accompanying text.
“subject to certain well-recognized exceptions, arising from the necessities of the case” and hence “is not infringed by laws prohibiting the carrying of concealed weapons,” Robertson v. Baldwin, or by laws “which only forbid bodies of men to associate together as military organizations . . . to drill or parade in cities and towns unless authorized by law.” Presser v. Illinois. 496

Judge Garwood misquotes Presser. The Supreme Court actually said that the Second Amendment is not violated by laws which “forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.” 497 The actual language from Presser makes clear that in that case, the Supreme Court was upholding a direct prohibition on the activities of the militia to bear arms. It is difficult to imagine a law that more directly infringes on the right of the militia to be armed, disciplined, and well regulated, and therefore tracks the plain language of the Second Amendment so closely. Yet, even this prohibition, in Judge Garwood’s view, does not infringe an individual right.

In addition, in the view of Judge Garwood, laws prohibiting the carrying of concealed weapons, which currently float near the top of the gun lobby’s legislative agenda in state legislatures throughout the country, 498 do not encroach on the expansive individual right that the judges went to great lengths to identify.

Ultimately, Emerson’s bark is far worse than its bite, for the constitutional test it proposes is best described as “strict in theory, almost non-existent in fact.” 499 It exemplifies a case in which a court speaks the language of heightened scrutiny but applies something far more deferential. In the First Amendment context, Michael Dorf identifies another such example—United States v. O’Brien. 500 In O’Brien, an opponent of the Vietnam War claimed that the act of burning his draft card was protected expression. In his article, Incidental Burdens on Fundamental Rights, 501 Dorf asserts that the O’Brien Court enunciates a test that formally resembles what is commonly understood as intermediate scrutiny, under which the regulation must serve a “substantial government interest and must be narrowly tailored to that end in order to pass constitutional muster.” 502 However, in its application, the “narrow tailoring” requirement affords government actors tremendous leeway, and the O’Brien test has ended up being applied very deferentially, resulting in severe “incidental

496 Emerson, 270 F.3d at 261 n.62 (citations omitted).
499 This is a variation on Professor Gunther’s suggestion that strict scrutiny is “strict in theory, fatal in fact” supra note 448 and accompanying text.
502 Id. at 1202.
burdens” being placed on expressive conduct. This is not to equate the right protected under the Second Amendment with First Amendment rights under the Supreme Court’s free speech decisions. Rather, O’Brien illustrates that it is not uncommon for a court to speak in terms of real scrutiny and act in terms of a lower “toothless” standard.

Thus, in Emerson, Judge Garwood’s opinion concludes that the section of federal law at issue in the case—the domestic violence protection order gun ban—satisfies his standard, even though the ban applies to persons who have not been charged or convicted of a crime, only subject to certain qualifying protective orders. If this provision of the Gun Control Act passes muster under Emerson, then every other prohibited category under the Gun Control Act would as well. After Emerson, existing laws restricting firearms possession and ownership certainly would survive if the standard of review as applied in Emerson holds. Ultimately, the failure of the opinion in Emerson to apply a consistent standard of review demonstrates the problem with recognizing the Second Amendment as protecting an expansive individual right in the first place. Timothy Joe Emerson appears to understand that the Fifth Circuit’s embrace of an individual right represents only a pyrrhic victory. In his petition for a writ of certiorari in the United States Supreme Court, one of Emerson’s grounds for appeal was that the Fifth Circuit applied “rational basis” scrutiny to his Second Amendment claim.

For this reason, Attorney General Ashcroft’s subsequent embrace of Emerson in a Memorandum to United States Attorneys and his statement that “the Emerson opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment” should have lead the Justice Department to follow through on the assurance the Attorney General provides in the Memorandum to U.S. Attorneys to “vigorously enforce and defend existing firearms laws.” However, while the constitutional balancing was superficial, Attorney General Ashcroft also embraces, unnecessarily, the underlying Second Amendment discussion and requires U.S. Attorneys to abide by an interpretation of the Second Amendment that does not bind any circuit, including the Fifth Circuit that decided Emerson. If the Attorney General’s commitment “to defend vigorously the constitutionality, under the Second Amendment, of all existing firearms laws” means that the Justice Department will follow Emerson as applied, then the appropriate standard of review is rational basis, which should strip the debate between an expansive individual right and a limited, militia-based right of any practical effect.

Moreover, the Justice Department’s Supreme Court brief in Emerson suggests that it does not read Emerson as applying a de facto rational basis standard. The Solicitor General actually disagrees with the contention by

---

503 Id. at 1208.
504 See id. at 1204.
505 Petition for Writ of Certiorari at 15, United States v. Emerson, 270 F.3d 203, 261 & n.62 (5th Cir.), reh’g and reh’g en banc denied, 281 F.3d 1281 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002) (No. 01-8780).
506 Ashcroft Memorandum, reprinted in infra p. 803.
507 Id.
Emerson in his petition for a writ of certiorari that Judge Garwood applied something less than strict scrutiny: "Contrary to petitioner's suggestion . . . however, the court of appeals did not purport to apply a relaxed standard of review. Rather, the court stated that, 'as historically understood in this country,' an individual's right to possess a firearm is subject to 'limited, narrowly tailored specific exceptions or restrictions.'" Thus, the Solicitor General reads Emerson as even more broadly protective of Second Amendment rights than does the criminal defendant himself. The brief focuses upon the most restrictive language in Judge Garwood's opinion, omitting reference to the qualifying footnote, and cites Judge Garwood's suggestion that the protective order gun ban is "barely" sufficient to support the deprivation of Second Amendment rights. The Department concludes this discussion by stating that the court's analysis produced a result consistent with other courts of appeals, making further review unwarranted. This is all the Solicitor General needed to say. Instead, he intimates that strict scrutiny provides the appropriate standard, which is why Laurence Tribe warned that the Justice Department's Emerson filing "would severely restrict reasonable regulations of firearms. That is a rather frightening reading of the Second Amendment." Despite its historic role to defend acts of Congress and safeguard the institutions of the federal government regardless of which party happens to control the White House, the Solicitor General's Office has been used to legitimize the Department's new position on the Second Amendment, the source of which is the illegitimate Letter.

VII. CONCLUSION

Ultimately, the unsubstantiated and imprecise pronouncements that Attorney General Ashcroft has made regarding the Second Amendment make it difficult to predict exactly how the Justice Department's embrace of an expansive individual right will unfold in litigation and policy decisions by the Department. While his Memorandum to U.S. Attorneys arguably is more narrow than his Letter and contains reassuring language about vigorously enforcing existing firearms laws, the Attorney General continues to advance sweeping, conclusory arguments regarding his position on the Second Amendment, pledging, as he did in his Memorandum to U.S. Attorneys, to "mak[e] every available argument that

508 Solicitor General's Emerson Brief, supra note 419, at 21.
509 See Emerson Petition for Certiorari, supra note 505, at 15.
510 Solicitor General's Emerson Brief, supra note 419, at 21.
511 Biskupic, Individual gun rights get administration's support, supra note 422.
512 Editorial, Guns and Justice, WASH. POST, May 10, 2002, at A36 (describing how the Solicitor General's interpretation of the Second Amendment "undermine[s]" its mission to defend acts of Congress with a position on the Second Amendment that "disserves the interests of the United States").
might win a case, but by vigorously enforcing federal law in a manner that heeds the commands of the Constitution. 513

The Ashcroft Letter informs the Attorney General's understanding of the "commands" of the Constitution. Moreover, the Letter and the Attorney General's subsequent statements amplifying the Letter are a far cry from the assurances Attorney General Ashcroft provided to the Senate Judiciary Committee during his confirmation hearings. 514 Answering queries as to whether his personal views on the Second Amendment would affect his ability to carry out the law enforcement programs of the Department of Justice, Attorney General Ashcroft replied:

What I am trying to clarify here is that I believe that there are constitutional inhibitions on the rights of citizens to bear certain kinds of arms, and some of those I would think good judgment, some of those I would think bad judgment, but as Attorney General, it is not my judgment to make that kind of call. My judgment, my responsibility is to uphold the acts of the legislative branch of this government in that arena, and I would do so and continue to do so in regard to the cases that now exist and further enactments of the Congress. 515

Because the Justice Department insists that the Ashcroft Letter constitutes official Department policy on the Second Amendment, those policy and legal statements that flow from it and rely on it are—much like evidence seized by the police in the course of a search that violates the Fourth Amendment—the "fruits of the poisonous tree." 516 In other words, the individual right as described in the Letter, Emerson, and the Ashcroft Memorandum, together provide the starting point for future applications of the Second Amendment by the Department of Justice.

However, the Standard Modelers and the gun lobby should not put the champagne on ice just yet. As Larry Kramer observes, "Constitutional law is a big institution, and it takes time to change its course." 517 There are institutional factors, stare decisis chief among them, which lead one to wonder how likely it is that the Supreme Court will elect to revisit its 1939 decision in Miller. By pointing out the substantive and procedural illegitimacy of the Ashcroft Letter, this Article hopefully disabuses advocates and scholars on both sides of the debate that an air of inevitability dictates how courts and policymakers will choose to interpret the Second Amendment in the future. Perhaps the Emerson decision can be viewed as epitomizing the current equipoise, because, on the one hand, as Sanford Levinson acknowledges, the decision is an "outlier." But on the other hand, he cautions: "[Emerson] might be a harbinger of the future,

514 Confirmation Hearing on the Nomination of John Ashcroft to be Attorney General of the United States, supra note 2, at 128.
515 Id.
517 Kramer, We the Court, supra note 130, at 158.
especially if George W. Bush is successful in packing the Supreme Court with suitably conservative judges, who agree, for example, not only with the Fifth Circuit but also with even stronger views expressed by Attorney General John Ashcroft.\textsuperscript{18}

The Justice Department’s new Second Amendment position results from illegitimate executive branch activism striving to justify itself by reliance on a court decision that exists only because two judges on the Fifth Circuit were willing to appropriate and replicate a trial judge’s unbridled judicial activism. It says a great deal about the trial and appellate court decisions in \textit{Emerson} and the Ashcroft Letter that all misrepresent the historical evidence and either omit or mischaracterize existing precedent. Such a situation is, at best, confusing and, at worst, destructive to the Department’s ongoing litigating position, as well as to the integrity of the policymaking process at the Department.

Moreover, the way that the Ashcroft Letter appears to have been produced also exposes the new position as the result of an illegitimate lawmaking process. The politically motivated legal policy shift that is the Ashcroft Letter could not withstand the scrutiny of an inclusive deliberative process within the Department and could not be squared with judicial precedent and the longstanding positions of the Department. The Attorney General might have understood that embracing an individual right under the Second Amendment weakens the Department’s ability to enforce federal gun laws, and that prosecutors would oppose the policy shift, underscoring the point that an expansive individual right under the Second Amendment and vigorous enforcement of federal gun laws are irreconcilable positions.\textsuperscript{19} Armed with the Ashcroft Letter, the \textit{Emerson} opinion, and the Solicitor General’s briefs in \textit{Emerson} and \textit{Haney}, gun rights advocates can be expected to use the newfound Justice Department position on the Second Amendment to challenge prosecutions for firearms violations.

That is why the Ashcroft Letter has served as a rallying cry for the National Rifle Association and gun lobby supporters.\textsuperscript{20} In the meantime,

\textsuperscript{18} Levinson, \textit{Second to None?}, supra note 1, at 36.
\textsuperscript{19} See Mathew S. Nosanchuk, Editorial, \textit{The NRA’s True Target, WASH. POST,} July 30, 2001, at A15.
\textsuperscript{20} In California, supporters of an expansive individual right under the Second Amendment are gathering signatures for a petition demanding that Attorney General Ashcroft “restore the free exercise of the Second Amendment in all states.” Citing the Ashcroft Letter and the court of appeals decision in \textit{Emerson}, a statement by one of the groups supporting the petition, Keep and Bear Arms, asserted:

Now that we have an attorney general who has stated unequivocally that Americans have an individual right to own and use firearms, we intend to see his office used to enforce that right . . . We have charged the state of California with violating our Second Amendment rights . . . Our list of violations, in petition form, is intended to force a ruling on all aspects of the Second Amendment.

Attorney General Ashcroft has flouted the Justice Department’s legal policymaking process and tarnished the Department’s reputation. He arguably has used the Second Amendment as a proxy for effectuating his political support of gun rights replacing consistent Department policy on the Second Amendment with a new policy that is justified by referring to boilerplate language from the Standard Model. The Ashcroft Letter accomplishes this by embracing a strong individual right without conceding that this newfound right could lead to the invalidation of gun control laws. This way, the hard questions are left for another day, much in the same way that the Standard Modelers have focused their efforts on defending the existence of an expansive individual right rather than explaining how it would apply; and the Emerson opinion embraces this right in dicta and upholds the protective order gun ban by applying what amounts to rational basis review.\footnote{Kramer describes how slow-growing precedents can become entrenched: “Precedent gathers momentum slowly, but once things are rolling, an avalanche can be difficult to avoid.” Kramer, \textit{We the Court}, supra note 130, at 158.}

It is no accident that the Ashcroft Letter, the Standard Model scholarship, and the Emerson decision form a \textit{troika}, harnessed with the help of the gun lobby, and dispatched to wrest existing legal doctrine on the Second Amendment from its foundation. Ultimately, however, the Attorney General has placed Justice Department enforcement of federal firearm laws based on over 65 years of consistent policy on the Second Amendment on a collision course with his official embrace of an expansive individual right. Depending on the force of the collision, the impact could have dangerous real-world implications that will be measured in increased death and injury from firearms.
Mr. James Jay Baker  
Executive Director  
National Rifle Association  
Institute for Legislative Action  
11250 Waples Mill Road  
Fairfax, VA 22030  

Dear Mr. Baker,

Thank you for your letter of April 10, 2001 regarding my views on the Second Amendment. While I cannot comment on any pending litigation, let me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms.

While some have argued that the Second Amendment guarantees only a "collective" right of the States to maintain militias, I believe the Amendment's plain meaning and original intent prove otherwise. Like the First and Fourth Amendments, the Second Amendment protects the rights of "the people," which the Supreme Court has noted is a term of art that should be interpreted consistently throughout the Bill of Rights. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (plurality opinion). Just as the First and Fourth Amendment secure individual rights of speech and security respectively, the Second Amendment protects an individual right to keep and bear arms. This view of the text comports with the all but unanimous understanding of the Founding Fathers. See, e.g., Federalist No. 46 (Madison); Federalist No. 29 (Hamilton); see also, Thomas Jefferson, Proposed Virginia Constitution, 1764 ("No free man shall ever be debarred the use of arms."); George Mason at Virginia's U.S. Constitution ratification convention 1788 ("I ask, sir, what is the militia? It is the whole people... To disarm the people is the best and most effectual way to enslave them.").

This is not a novel position. In early decisions, the United States Supreme Court routinely indicated that the right protected by the Second Amendment applied to individuals. See, e.g., Logan v. United States, 144 U.S. 263, 276 (1892); Miller v. Texas, 153 U.S. 535, 538 (1895); Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897); Maxwell v. Dow, 176 U.S. 581, 597 (1900). Justice Story embraced the same view in his influential Commentaries on the Constitution. See 3 J. Story, Commentaries on the Constitution § 1890, p. 746 (1833). It is the view that was adopted by United States Attorney General Homer Cummings before Congress in testifying about the constitutionality of the first federal gun control statute, the National Firearms Act of 1934. See The National Firearms Act of 1934: Hearings on H.R. 9065 Before the House Comm. on Ways and Means, 73rd Cong. 6, 13, 19 (1934). As recently as 1986, the United States Congress and President Ronald Reagan...

In light of this vast body of evidence, I believe it is clear that the Constitution protects the private ownership of firearms for lawful purposes. As I was reminded during my confirmation hearing, some hold a different view and would, in effect, read the Second Amendment out of the Constitution. I must respectfully disagree with this view, for when I was sworn as Attorney General of the United States, I took an oath to uphold and defend the Constitution. That responsibility applies to all parts of the Constitution, including the Second Amendment.

Thank you for your interest in this matter.

Sincerely,

John Ashcroft
Attorney General

1Of course, the individual rights view of the Second Amendment does not prohibit Congress from enacting laws restricting firearms ownership for compelling state interests, such as prohibiting firearms ownership by convicted felons, just as the First Amendment does not prohibit shouting "fire" in a crowded movie theater. As Samuel Adams explained at the Massachusetts ratifying convention, the proposed Constitution should "never [be] construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." Reprinted in 2 B. Schwartz, The Bill of Rights: A Documentary History 675 (1971) (emphasis added).
Dear Mr. (Name Deleted):

Thank you for your letter dated August 11, 2000, in which you question certain statements you understand to have been made by an attorney for the United States during oral argument before the Fifth Circuit in United States v. Emerson. Your letter states that the attorney indicated that the United States believes “that it could ‘take guns away from the public,’ and ‘restrict ownership of rifles, pistols and shotguns from all people.’” You ask whether the response of the attorney for the United States accurately reflects the position of the Department of Justice and whether it is indeed the government’s position “that the Second Amendment of the Constitution does not extend to the people as an individual right.”

I was not present at the oral argument you reference, and I have been informed that the court of appeals will not make the transcript or tape of the argument available to the public (or to the Department of Justice). I am informed, however, that counsel for the United States in United States v. Emerson, Assistant United States Attorney William Mateja, did indeed take the position that the Second Amendment does not extend an individual right to keep and bear arms.

That position is consistent with the view of the Amendment taken both by the federal appellate courts and successive Administrations. More specifically, the Supreme Court and eight United States Courts of Appeals have considered the scope of the Second Amendment and have uniformly rejected arguments that it extends firearms rights to individuals independent of the collective need to ensure a well-regulated militia. See United States v. Miller, 307 U.S. 174 (1939) (the “obvious purpose” of the Second Amendment was to effectuate Congress’s power to “call forth the Militia to execute the Laws of the Union,” not to provide an individual right to bear arms contrary to federal law); Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942) (“The right to keep and bear arms is not a right conferred upon the people by the federal constitution.”); Eckert v. City of Philadelphia, 477 F.2d 610 (3rd Cir. 1973) (“It must be remembered that the right to keep and bear arms is not a right given by the United States Constitution.”); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974); United States v. Warin, 530 F.2d 103, 106-07 (6th Cir. 1976) (“We conclude that the defendant has no private right to keep and bear arms under the Second
Amendment.

"There can be no serious claim to any express constitutional right of an individual to possess a firearm."); Ouilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) ("The right to keep and bear handguns is not guaranteed by the second amendment."); United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) ("The rule emerging from Miller is that, absent a showing that the possession of a certain weapon has some relationship to the preservation or efficiency of regulated militia, the Second Amendment does not guarantee the right to possess the weapon."); United States v. Tomlin, 454 F.2d 176 (9th Cir. 1972); United States v. Swinton, 521 F.2d 1255, 1259 (10th Cir. 1975) ("There is no absolute constitutional right of an individual to possess a firearm.").

Thus, rather than holding that the Second Amendment protects individual firearms rights, these courts have uniformly held that it precludes only federal attempts to disarm, abolish, or disable the ability to call up the organized state militia. Similarly, almost three decades ago, the Department of Justice's Office of Legal Counsel explained:

The language of the Second Amendment, when it was first presented to the Congress, makes it quite clear that it was the right of the States to maintain a militia that was being preserved, not the rights of an individual to own a gun...[and] [there is no indication that Congress altered its purpose to protect state militias, not individual gun ownership [upon consideration of the Amendment] . . . . Courts...have viewed the Second Amendment as limited to the militia and have held that it does not create a personal right to own or use a gun . . . . In light of the constitutional history, it must be considered as settled that there is no personal constitutional right, under the Second Amendment, to own or to use a gun.

Letter from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, to George Bush, Chairman, Republican National Committee (July 19, 1973) (citing, inter alia, Presser v. Illinois, 116 U.S. 252 (1886), and United States v. Miller, 307 U.S. 174 (1939)). See also, e.g., Federal Firearms Act, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate 41 (1965) (Statement of Attorney General Katzenbach) ("With respect to the second amendment, the Supreme Court of the United States long ago made it clear that the amendment did not guarantee to any individuals the right to bear arms.").

I hope this answers your question.

Thank you again for writing.

Yours sincerely,

Seth P. Waxman
MEMORANDUM TO ALL UNITED STATES' ATTORNEYS

FROM: The Attorney General

RE: United States v. Emerson

On October 16, 2001, the United States Court of Appeals for the Fifth Circuit issued its decision in United States v. Emerson. I am pleased that the decision upholds the constitutionality of 18 U.S.C. 922(g)(3) — which prohibits violent persons who are under domestic restraining orders from possessing firearms. By taking guns out of the hands of persons whose propensity to violence is sufficient to warrant a specific restraining order, this statute helps avoid tragic episodes of domestic violence. As I have stated many times, reducing gun crime is a top priority for the Department. We will vigorously enforce and defend existing firearms laws in order to accomplish that goal.

Emerson is also noteworthy because, in upholding this statute, the Fifth Circuit undertook a scholarly and comprehensive review of the pertinent legal materials and specifically affirmed that the Second Amendment “protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms . . . .” The Court’s opinion also makes the important point that the existence of this individual right does not mean that reasonable restrictions cannot be imposed to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse. In my view, the Emerson opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment.

The Department can and will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws. The Department has a solemn obligation both to enforce federal law and to respect the constitutional rights guaranteed to Americans. Because it may be expected that Emerson will be raised in any number of firearms case handled by this Department, it is important that the Department carefully assess the implications of the Emerson decision and how it interacts with existing circuit precedents.

Accordingly, United States Attorney’s Offices should promptly advise the Criminal Division of all cases in which Second Amendment issues are raised, and coordinate all briefing in those cases with the Criminal Division and the Solicitor General’s office.

As the Supreme Court has long observed, the mission of the Department “in a criminal prosecution is not that it shall win a case, but that justice shall be done.” Berger v. United States, 295 U.S. 78, 88 (1935). Justice is best achieved, not by making any available argument that might win a case, but by vigorously enforcing federal law in a manner that heads the commands of the Constitution.
THE SECOND AMENDMENT AND THE U.S. COURTS OF APPEALS

by Richard E. Gardiner*

I. INTRODUCTION

Near the end of President Clinton’s second term, an individual wrote to the United States Department of Justice inquiring about the Department’s position on the meaning of the Second Amendment.¹ The Justice Department replied in part, “[T]he Supreme Court and eight United States Courts of Appeals have considered the scope of the Second Amendment and have uniformly rejected arguments that it extends firearms rights to individuals independent of the collective need to ensure a well-regulated militia.”²

The letter goes on to provide brief quotations from each of the cases cited.³ A review of not only the cases cited by the Justice Department, but other cases decided by the federal appellate courts,⁴ reveals that those cases simply do not establish, as the Justice Department unambiguously asserted, that the federal appellate courts have “uniformly rejected arguments that it extends firearms rights to individuals independent of the collective need to ensure a well-regulated militia.”⁵

The following review of the published decisions of the federal appellate courts reveals that, while two of the thirteen federal courts of appeals have held that the Second Amendment guarantees a so-called (and oxymoronic) “collective” right,⁶ three federal courts of appeals have held that the right is individual,⁷ three have decisions going both ways,⁸ four have issued opinions

---

* B.A. from Union College, Schenectady, N.Y; J.D. from George Mason University School of Law. In addition to working as a sole practitioner, Gardiner also serves as counsel for the Law Enforcement Alliance of America, and as Director of the Virginia College of Criminal Defense Attorneys. From 1979 through 1994, Gardiner worked for the National Rifle Association of America (NRA).

³ United States v. Miller, 307 U.S. 174 (1939); Cases v. United States, 131 F.2d 916 (1st Cir. 1942); Eckert v. City of Philadelphia, 477 F.2d 610 (3rd Cir. 1973); United States v. Johnson, 497 F.2d 548 (4th Cir. 1974); United States v. Warin, 530 F.2d 103 (6th Cir. 1976); Stevens v. United States, 440 F.2d 144 (6th Cir. 1971); Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992); United States v. Tomlin, 454 F.2d 176 (9th Cir. 1972); United States v. Swinton, 521 F.2d 1255 (10th Cir. 1975).
⁴ Thirteen of the fourteen courts of appeals’ decisions will be addressed herein.
⁵ Waxman, supra note 2, at 1.
⁶ The Courts of Appeals for the Fourth and Ninth Circuits.
⁷ The Courts of Appeals for the First, Fifth, and Eighth Circuits.
⁸ The Courts of Appeals for the Third, Sixth, and Eleventh Circuits.
which are somewhat uncertain, 9 and one remains silent. 10 Further, while the United States Supreme Court has never issued an opinion directly addressing the individual or "collective" dispute, it has just as clearly never suggested that the right is anything other than individual.

While the primary focus of this article is the decisions of the United States Courts of Appeals, it is helpful first to review briefly the few decisions of the United States Supreme Court concerning the Second Amendment. This will help put into context (and, in some instances, show the clear error) of the decisions of the Courts of Appeals.

II. SUPREME COURT CASE LAW

The Supreme Court has mentioned the Second Amendment in a handful of cases, 11 the most recent being United States v. Verdugo-Urquidez. 12 Verdugo-Urquidez did not concern the Second Amendment, but rather the applicability of the Fourth Amendment to search and seizure of property owned by non-residents located in a foreign country. 13 The courts of appeals which have asserted that the Second Amendment does not guarantee an individual right, can, in considering future cases, find little comfort in the fact that not a single justice disputed the Court's conclusion that the phrase "the people" in the Preamble to the Constitution and in the First, Second, Fourth, and Ninth Amendments means at least all citizens and legal aliens while in the United States. 14 This case thus leaves little doubt that, in the minds of the justices of the Supreme Court, the Second Amendment guarantees an individual right. 15

9 The Courts of Appeals for the Second, Seventh, Tenth, and District of Columbia Circuits.
10 The Court of Appeals for the Federal Circuit.
12 See id. at 937.
13 See id. at 937. The dissent in Verdugo-Urquidez believed that "the people" was a term that encompassed more than just citizens and legal aliens while in the United States; they thought it also included non-resident aliens when apprehended outside the United States by United States Government agents for violating American laws. 494 U.S. 259, 270-97 (1990).
14 See id. at 265. The dissent in Verdugo-Urquidez believed that "the people" was a term that encompassed more than just citizens and legal aliens while in the United States; they thought it also included non-resident aliens when apprehended outside the United States by United States Government agents for violating American laws. 494 U.S. 259, 270-97 (1990).
15 Cf. Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) (In an opinion that Justices Rehnquist, Scalia, and Souter joined, Justice Ginsburg plainly presupposed that the right is individual in interpreting the word "carrying" when she stated, "[s]urely a most familiar meaning is, as the Constitution's Second Amendment ("keep and bear Arms")")
Ten years earlier, in *Lewis v. United States*, the Court held that a convicted felon could not challenge the validity of his underlying conviction in a prosecution for possession of a firearm by a convicted felon. In a brief footnote, the Court observed:

These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See United States v. Miller, 307 U.S. 174, 178 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia")

Thus, in holding that a federal prohibition on firearms possession by convicted felons did not violate the Second Amendment, the Court recognized that the only other limit on the right to keep and bear arms is on the type of firearm protected.

The seminal Supreme Court case concerning the Second Amendment is *United States v. Miller*, the only case in which the Court has considered a direct Second Amendment challenge to a federal firearms statute not involving persons with prior convictions. The heart of the *Miller* opinion is the following:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

Thus, the Court in *Miller* did not focus on either the defendant's possession of firearms or on "service" in the militia.

In speaking of the right to keep and bear "such an instrument" and in noting that it was not "within judicial notice that this weapon is any part of the ordinary military equipment," *Miller* emphasized that the focus of the Second Amendment is not on whether an individual firearm is commonly used in military service, but on the limited right to bear arms for purposes of self-defense and the well-regulated militia.
Amendment was the character of the weapon, not the circumstances of the defendant's possession. Indeed, if the defendant's possession or use of the shotgun had been of concern to the Court, it certainly would have referred to "possession or use" by the defendant of a "shotgun having a barrel of less than eighteen inches in length" and would have discussed the defendant's qualifications with respect to the militia, i.e., his age, sex, criminal history, physical condition, and whether or not he was exempt by virtue of his employment. The Court did not do so.

As to service in the militia, Miller asked whether the possession or use of the specific firearm had "some reasonable relationship to the preservation or efficiency of a well-regulated militia." This test says nothing concerning a defendant's service in the militia. Rather, since the language requires that possession or use of the specific firearm have only "some reasonable relationship" to either the "preservation" or the "efficiency" of a "well-regulated militia," service of the defendant in the militia is immaterial. For example, possession of a firearm by a person not in the militia could contribute to the preservation of a well-regulated militia, and thus meet the reasonable relationship test by enabling a member of the militia to have access to an arm. Once again, this point emphasizes that Miller's focus was the character of the arm, not the relationship of a defendant to the militia.

Basically, the court in Miller devised a test by which to measure the constitutionality of statutes relating to firearms and sent the case back to the trial court for an evidentiary hearing. The essence of the Court's holding was that, for the keeping and bearing of a firearm to be constitutionally protected, the firearm should be a militia-type arm.

There are three other cases from the Supreme Court where the Second Amendment was an issue: Miller v. Texas, Presser v. Illinois, and United States v. Cruikshank. The first two concerned whether the Second Amendment limited the states as well as the federal government; the last concerned whether the Second Amendment limited private individuals. In none of these cases, however, did the Court express the view that the right was anything other than an individual right.

24 id.
25 id.
27 There was no evidence in the record before the Court concerning the uses of the shotgun since the case was in the Supreme Court on a direct appeal by the Government of a district court's dismissal of an indictment following a ruling that Section II of the National Firearms Act was unconstitutional.
28 The functions of the militia are: "to execute the Laws of the Union, suppress Insurrections, and repel Invasions." U.S. Const. art. I, § 8, cl. 15. Thus, an arm which could be used for law enforcement or military purposes would be encompassed.
29 153 U.S. 535 (1894).
30 116 U.S. 252 (1886).
31 92 U.S. 542 (1876).
III. THE CIRCUITS ARE SPLIT ON THE MEANING OF THE SECOND AMENDMENT

A. Introduction

Of the thirteen federal courts of appeals, twelve have spoken on the Second Amendment, three holding that it guarantees an individual right, two holding that the right guaranteed is a "collective" right, three with cases going both ways, and four with holdings that are uncertain, but suggestive of an individual (albeit limited) right; while the Federal Circuit has left the question unanswered. The majority of these cases, however, preceded the Supreme Court's decision in *Verdugo-Urquidez*; those cases which were decided after *Verdugo-Urquidez*, and which did not adopt an individual right interpretation, did not mention it (whether those courts ignored *Verdugo-Urquidez* or it was simply not brought to their attention is unknown). Further, the majority of these cases involved challenges to federal statutes which prohibited the possession of firearms to persons who had previously been convicted of a felony or a misdemeanor crime of domestic violence, so whether the right was individual or "collective" was immaterial since, under either rubric, the statute would be valid.

B. Circuit Court Cases

1. The First Circuit

In *Cases v. United States*, Cases challenged the constitutionality of a federal statute prohibiting the transportation and receipt of firearms by a person convicted of a crime of violence. In upholding the statute, the court first expressly acknowledged that the Second Amendment guarantees an individual right when it noted that the statute "undoubtedly curtails to some extent the right of individuals to keep and bear arms." The court then discussed the Supreme Court's decision in *Miller*, reasoning that *Miller* could not have meant to "formulate a general rule" regarding which arms were protected by the Second Amendment. Under the *Miller* rule, according to the First Circuit, the federal government could not "prohibit the possession or use of any weapon which has any reasonable

---

32 All but the Court of Appeals for the Federal Circuit have spoken on it.  
33 The Courts of Appeals for the First, Fifth, and Eighth Circuits.  
34 The Courts of Appeals for the Fourth and Ninth Circuits.  
35 The Courts of Appeals for the Third, Sixth, and Eleventh Circuits.  
36 The Courts of Appeals for the Second, Seventh, Tenth, and District of Columbia Circuits.  
37 The cases are grouped by circuit; within each group of circuit cases, the cases are in chronological order, beginning with the oldest.  
38 131 F.2d 916 (1st Cir. 1942)  
40 Id.  
41 Id.  
42 See *Cases*, 131 F.2d at 921 (emphasis added).  
43 Id. at 922.
relationship to the preservation or efficiency of a well regulated militia.\textsuperscript{44} Indeed, under Miller, the federal government “would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus”\textsuperscript{45} which had no contemporary military use. Further, Congress “would be prevented”\textsuperscript{46} from regulating “the possession or use by private persons not present or prospective members of any military unit, of distinctly military arms, such as machine-guns, trench mortars, anti-tank, or anti-aircraft guns.”\textsuperscript{47} The court thus determined that the case had to be decided “on its own facts”.\textsuperscript{48}

In deciding the case on its facts, the court first recognized that the firearm involved, a “.38 caliber Colt type revolver,” may “be capable of military use” or that “familiarity with it might be regarded as of value in training a person to use a comparable weapon of military type and caliber”.\textsuperscript{49} Cases, however, had offered “no evidence that . . . his use of the weapon under the circumstances disclosed was in preparation for a military career.”\textsuperscript{50} Accordingly, the court held that, “as applied to the appellant, the Federal Firearms Act does not conflict with the Second Amendment to the Constitution of the United States.”\textsuperscript{51}

In Thomas v. Members of the City Council of Portland,\textsuperscript{52} Thomas challenged a city’s denial of a permit to carry a concealed handgun (a permit created by state law) as a denial of his rights under the Second Amendment.\textsuperscript{53} Citing the Supreme Court’s decisions in Miller (Second Amendment applies only to weapons that have a “reasonable relationship to the preservation or efficiency of a well-regulated militia”), Presser (Second Amendment confers rights as against activities by the “federal government only”), and Lewis, along with the decisions of several other Courts of Appeals\textsuperscript{54} (including its own prior decision in Cases), the court, in a single sentence opinion bereft of any analysis, rejected Thomas’ challenge by simply stating: “Established case law makes clear that the federal Constitution grants appellant no right to carry a concealed handgun.”\textsuperscript{55}

2. The Second Circuit

In United States v. Toner,\textsuperscript{56} Toner was convicted of violating a federal

\begin{footnotes}
\item[44] See Cases, 131 F.2d at 922.
\item[45] 131 F.2d 916, 922 (1st Cir. 1942).
\item[46] Id.
\item[47] Id.
\item[48] Id.
\item[49] See Cases, 131 F.2d at 922-23.
\item[50] Id. at 923.
\item[51] Id.
\item[52] 730 F.2d 41 (1st Cir. 1984).
\item[53] Id. at 42.
\item[54] The Courts of Appeals for the Fourth, Sixth, Seventh, and Tenth Circuits.
\item[55] 730 F.2d 41, 42 (1st Cir. 1984). While two Court of Appeals for the First Circuit cases are discussed in this article, one additional case has been omitted. United States v. Friel, 1 F.3d 1231 (1st Cir. 1993)(unpublished) was also decided by the First Circuit. There was, however, no published opinion, either by the First Circuit or the District Court for the District of Maine.
\item[56] 728 F.2d 115 (2nd Cir. 1984).
\end{footnotes}
statute\textsuperscript{57} that prohibited the possession of a firearm by an illegal alien and challenged the statute on Fifth Amendment equal protection grounds.\textsuperscript{58} In ruling on Toner's equal protection claim, the court first had to determine if the right was fundamental so that it could apply the appropriate equal protection analysis.\textsuperscript{59} Citing Miller, the court noted that the right to keep and bear arms was "not a fundamental right."\textsuperscript{60} In the absence of evidence that the firearm had "some reasonable relationship to the preservation or efficiency of a well regulated militia,"\textsuperscript{61} the Second Amendment does not guarantee the right to keep and bear such a weapon.\textsuperscript{62} As an illegal alien, Toner could not make that showing and the court, concluding that the statute had a rational basis, upheld its validity.\textsuperscript{63}

3. The Third Circuit

\textit{United States v. Tot}\textsuperscript{64} involved a challenge to a federal statute\textsuperscript{65} prohibiting possession of a firearm by a person convicted of a crime of violence. Despite holding that Tot's failure to prove (as required by Miller) a militia use for the firearm was an adequate basis for ruling against him, the court, in dictum, concluded that, unlike the First Amendment, the Second Amendment "was not adopted with individual rights in mind."\textsuperscript{66} This result was based on reliance on an extremely brief -- and erroneous -- analysis of colonial history.\textsuperscript{67} Moreover, the "discussions of this amendment" which the court claimed were "contemporaneous with its proposal and adoption,"\textsuperscript{68} in fact concerned discussions about the adoption and ratification of the main body of the Constitution in 1787-88. These discussions occurred before the Bill of Rights was even debated in the First Congress in 1789, let alone proposed and adopted. Thus, those sources could not have been, and were not, discussing the Second Amendment.

Implicitly recognizing, however, that its decision rested on a shaky foundation, the court stated that there was another ground for its decision and "on this we should prefer to rest the matter."\textsuperscript{69} That other ground was that "[w]eapon

\textsuperscript{57} 18 U.S.C. app. § 1202 (a) (5) (1982).
\textsuperscript{58} See United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984).
\textsuperscript{59} See id.
\textsuperscript{60} See id.
\textsuperscript{61} See United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984) (citing United States v. Miller, 307 U.S. 174 (1939)).
\textsuperscript{62} See United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984).
\textsuperscript{63} See id. at 129.
\textsuperscript{64} 131 F.2d 261 (3rd Cir. 1942), rev'd on other grounds, 319 U.S. 463 (1943).
\textsuperscript{66} See Tot, 131 F.2d at 266.
\textsuperscript{67} See id. For example, the court referred to the colonists as “a defenseless citizenry...” In fact, citizens did have arms and were not defenseless. As James Madison noted, the militia in America “amount[ed] to near half a million of citizens with arms in their hands...” JAMES MADISON, THE FEDERALIST No. 46, 334-35 (B. Wright ed. 1961). Thus, they desired the Second Amendment because they did not want to become defenseless.
\textsuperscript{68} United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942).
\textsuperscript{69} Id.
bearing was never treated as anything like an absolute right by the common law. Because the right to keep and bear arms was not absolute, Congress could "[prohibit] the receipt of weapons from interstate transactions by persons who have previously, by due process of law, been shown to be aggressors against society." Thus, the court decided the case on grounds that the Supreme Court in *Lewis* would later approve, which did not rely on the right not being individual. In *Eckert v. City of Philadelphia*, Eckert challenged a city ordinance regulating the purchase and transfer of firearms. The court's opinion stated:

"[T]here must be "some reasonable relationship to the preservation or efficiency of a well regulated militia". There is nothing whatsoever of that kind in this appeal. It must be remembered that the right to keep and bear arms is not a right given by the United States Constitution." See United States v. Miller.

What the court meant is uncertain since it did not specify what (or who) must have a "reasonable relationship to the preservation or efficiency of a well regulated militia." *Miller*, of course, held that it must be the firearm. Further, what the court meant by its statement that "the right to keep and bear arms is not a right given by the United States Constitution" is also unclear since *Miller* (which the court cited as authority) made no such statement.

In *United States v. Graves*, because Graves did not raise the Second Amendment as a challenge to the "statutory program which restricts the right to bear arms of convicted felons and other persons of dangerous propensities," the only discussion of the Second Amendment is found in a footnote. There the court states, "arguably, any regulation of firearms may be violative of this constitutional provision."
In United States v. Rybar,84 notwithstanding Miller’s focus on the character of the weapon, Rybar stated that Miller “assigned no special importance to the character of the weapon itself.”85 Moreover, contrary to the express statement in Miller that “possession or use”86 of the shotgun had to have “some reasonable relationship to the preservation or efficiency of a well-regulated militia,”87 Rybar concluded that the relationship had to be between the firearm’s “possession or use” and “militia-related activity.”88 Despite its erroneous understanding of Miller, Rybar nonetheless did not hold that the Second Amendment did not guarantee an individual right.

4. The Fourth Circuit

United States v. Johnson90 is one of the few Courts of Appeals cases which uses the term “collective right.”90 The entire opinion regarding the Second Amendment, however, is three sentences, which states in part that the Second Amendment “only confers a collective right of keeping and bearing arms which must bear a ‘reasonable relationship to the preservation or efficiency of a well-regulated militia.’”91 As authority for this statement, the court cites Miller and the Eighth Circuit’s decision in United States v. Cody.92 Yet, as the Supreme Court in Lewis made clear, Miller held that it is the firearm itself, not the act of keeping and bearing it, which must have a “reasonable relationship to the preservation or efficiency of a well-regulated militia.”93 Johnson did, however, recognize that Miller required evidence of the militia nexus.94 Moreover, the particular provision at issue in Johnson concerned the interstate transportation of a firearm by convicted felons,95 a class of persons which historically has suffered the loss of numerous rights (including exclusion from the militia) afforded to other citizens.

Love v. Peppersack96 is the other Fourth Circuit case analyzed. Love simply reiterated the court’s holding in Johnson, ignoring the Supreme Court’s holding in Verdugo-Urquidez.

---

84 103 F.3d 273 (3d Cir. 1996).
85 103 F.3d 273, 286 (3d Cir. 1996).
86 See Rybar, 103 F.3d at 286.
87 See Miller, 307 U.S. at 178.
88 Id. at 286.
89 497 F.2d 548 (4th Cir. 1974).
90 Id. at 550.
91 497 F.2d 548, 550 (4th Cir. 1974) (citing United States v. Miller, 305 U.S. 174, 178 (1939)). As with all rights guaranteed in the Bill of Rights, the Second Amendment does not “confer” any rights; it merely protects rights from government interference.
92 460 F.2d 34 (8th Cir. 1972).
93 Id. at 178.
94 497 F.2d 548, 550 (4th Cir. 1974).
96 47 F.3d 120 (4th Cir. 1995).
5. The Fifth Circuit

The *United States v. Johnson, Jr.* decision merely quotes from *Miller* the statement concerning the requirement of an evidentiary showing of a militia nexus and a consequent rejection, without even the briefest of analysis, of Johnson's challenge to the constitutionality of the National Firearms Act of 1934. Apparently, Johnson failed to put on evidence, as required by *Miller*, that the firearm at issue had a militia use. Thus, *Miller* bound the court to reject his challenge.

In *United States v Bowdach*, the defendant was charged with receipt and possession of a firearm by a felon, when, during a search of his home, officers found a shotgun. Defendant challenged the confiscation of his shotgun because the weapon was not contraband or illegal. The court rejected his arguments and stated that "possession by a felon constitutes a criminal offense...possession of the shotgun by a non-felon has no legal consequences." United States v. Emerson is the only decision of a federal Court of Appeals to undertake a thorough, scholarly analysis of the Second Amendment. The court concluded that the Second Amendment guaranteed an individual right, although it upheld the constitutionality of a statute prohibiting possession of firearms by persons against whom a protective order has been issued after a hearing, which Emerson had challenged. Since *Emerson* is a 122 page opinion with extensive footnotes and an appendix (as reported, *Emerson* is only 63 pages), the following are only highlights.

The first issue dealt with by the court was the proper construction of the statute. The court then reviewed (and rejected) Emerson's Fifth Amendment, Commerce Clause, and Tenth Amendment challenges to the statute. The court next turned to an analysis of the Second Amendment, beginning with a review of what it termed the three models of interpretation of the Second Amendment. In considering the merits of each of those models,
the court initially analyzed the Supreme Court’s decision in Miller.116

Unlike any other of its sister Courts of Appeals before, the Emerson court, to gain a full understanding of Miller since only the Government had filed a brief, “examined a copy of [the Government’s] brief”117 in Miller. That examination enabled the court to place Miller’s holdings in context. The court’s review of Miller concluded:

We believe it is entirely clear that the Supreme Court decided Miller on the basis of the government’s second argument-that a “shotgun having a barrel of less than eighteen inches in length” as stated in the National Firearms Act is not (or cannot merely be assumed to be) one of the “Arms” which the Second Amendment prohibits infringement of the right of the people to keep and bear-and not on the basis of the government’s first argument (that the Second Amendment protects the right of the people to keep and bear no character of “arms” when not borne in actual, active service in the militia or some other military organization provided for by law).118 In support of this conclusion, the court further wrote:

Nowhere in the Court’s Miller opinion is there any reference to the fact that the indictment does not remotely suggest that either of the two defendants was ever a member of any organized, active militia, such as the National Guard, much less that either was engaged (or about to be engaged) in any actual military service or training of such a militia unit when transporting the sawed-off shotgun from Oklahoma to Arkansas. Had the lack of such membership or engagement been a ground of the decision in Miller, the Court’s opinion would obviously have made mention of it. But it did not.119

The court went on to discuss Miller’s understanding of the term “militia,” holding:

These passages from Miller suggest that the militia, the assurance of whose continuation and the rendering possible of whose effectiveness Miller says were purposes of the Second Amendment, referred to the generality of the civilian male inhabitants throughout their lives from teenage years until old age and to their personally keeping their own arms, and not merely to individuals during the time (if any) they might be

116 See id at 221.
117 Id.
118 United States v. Emerson, 270 F.3d 203, 224 (5th Cir. 2001).
119 Id.
actively engaged in actual military services or only to those who were members of special or select units.\textsuperscript{120}

Thus the Court concluded that, "to the extent that \textit{Miller} sheds light on the matter it cuts against the government's position\textsuperscript{121} that the right to keep and bear arms is a "collective right."\textsuperscript{122} Having thoroughly analyzed \textit{Miller}, the \textit{Emerson} court next considered the text of the Second Amendment, focusing first on the word "people" and finding as follows:

There is no evidence in the text of the Second Amendment, or any other part of the Constitution, that the words "the people" have a different connotation within the Second Amendment than when employed elsewhere in the Constitution. And, as used throughout the Constitution, "the people" have "rights" and "powers," but federal and state governments only have "powers" or "authority," never "rights."\textsuperscript{123}

With respect to the phrase "bear arms," which the Government argued applied only to "a member of the militia carrying weapons during actual military service,"\textsuperscript{124} the court "concluded that the phrase 'bear arms' refers generally to the carrying or wearing of arms."\textsuperscript{125} Finally, the court considered the preamble: "A well-regulated Militia, being necessary to the security of a free State"\textsuperscript{126} and concluded, "[T]he Second Amendment's substantive guarantee, read as guaranteeing individual rights, may as so read reasonably be understood as being a guarantee which tends to enable, promote or further the existence, continuation or effectiveness of that "well-regulated Militia" which is "necessary to the security of a free State."\textsuperscript{127} Accordingly, the court determined that the preamble "does not support an interpretation of the amendment's substantive guarantee in accordance with" the "collective rights" models.\textsuperscript{128}

The court next spends almost 40 pages of its opinion (20 pages in the reported decision) reviewing in extraordinary detail the history of the adoption of the Second Amendment,\textsuperscript{129} including the debate on the adoption of the Constitution prior to the state ratifying conventions,\textsuperscript{130} the debates in the state ratifying conventions on the Constitution,\textsuperscript{131} the debate in Congress on the Bill of

\textsuperscript{120} \textit{Id.} at 226.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} United States v. Emerson, 270 F.3d 203, 226 (5th Cir. 2001).
\textsuperscript{123} \textit{Id.} at 227-28.
\textsuperscript{124} \textit{Id.} at 229.
\textsuperscript{125} \textit{Id.} at 231. As to "keep arms," since the parties agreed that such phrase had no "military connotation," the "plain meaning" was that the right to "keep arms" was an individual right. \textit{Id.} at 232.
\textsuperscript{126} U.S. \textit{CONST.} amend. II.
\textsuperscript{127} United States v. Emerson, 270 F.3d 203, 233 (5th Cir. 2001).
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{See id.} at 236-60.
\textsuperscript{130} \textit{See id.} at 236-40.
\textsuperscript{131} \textit{See id.} at 241-44.
Rights," and the public debate on the Bill of Rights. The court also extensively reviewed the comments of 19th Century constitutional scholars, like Thomas Cooley, who, in the court's words, believed, "[T]he right of the individual Americans to keep, carry, and acquaint themselves with firearms does indeed promote a well-regulated militia by fostering the development of a pool of firearms-familiar citizens that could be called upon to serve in the militia." In summarizing its examination of the historical evidence, the court stated:

We have found no historical evidence that the Second Amendment was intended to convey militia power to the states, limit the federal government's power to maintain a standing army, or applies only to members of a select militia while on active duty. All of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects the individual Americans.

In concluding its analysis of the Second Amendment, the court concluded:

We hold, consistent with Miller, that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by Miller.

While finding that the Second Amendment protects the right of individuals, the court nonetheless held that, as applied to Emerson, the statute did not violate the Second Amendment. The basis for the court's conclusion was that under the Texas law, the protective order would not have been issued against Emerson "unless the issuing court conclude[d], based on adequate evidence at the hearing, that the party restrained would otherwise pose a realistic threat of imminent physical injury to the protected party." Thus, the court concluded, "the nexus between firearm possession by the party so enjoined and the threat of lawless violence, is sufficient, though likely barely so, to support the deprivation, while the order remains in effect, of the enjoined party's Second Amendment right to keep and bear arms."
6. The Sixth Circuit

Next is Stevens v. United States. In a one sentence holding, the court concluded that the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms." Citing Miller as authority for this conclusion, the court undertook no analysis of Miller or of the history of the Second Amendment. This case, involved the federal statute prohibiting possession of firearms by convicted felons, a class of persons whose rights traditionally have been more restricted than law-abiding citizens.

In United States v. Day, the court, citing Miller, concluded, in reviewing a challenge to the statute barring dishonorably discharged persons from possessing firearms, that "there is no absolute right of an individual to possess a firearm." Since there are certain narrowly defined classes of untrustworthy persons, such as convicted felons and, as here, persons dishonorably discharged from the armed forces, who may be barred the possession of firearms, it is a truism to say that there is not an absolute right to possess firearms. The courts holding implicitly recognized the individual right of peaceful and honest citizens to possess firearm.

United States v. Warin saw the court following, and relying upon, its earlier decision in Stevens and ignoring its decision in Day. The court concluded, without any reference to the history of the Second Amendment, that it "is clear the Second Amendment guarantees a collective rather than an individual right." The court also indicated that, in reaching its decision, it was relying upon the First Circuit's decision in Cases. Yet in concluding that not all arms were protected by the Second Amendment, Cases did not hold, as did Warin, that the Second Amendment afforded individuals no protections whatsoever. Warin also erred in concluding that Warin's relationship to the militia was relevant in determining whether his possession of a machine gun was protected by the Second Amendment since Miller focused on the firearm itself, not the individual involved. In fact, Miller quite expansively defined the constitutional militia as encompassing "all males physically capable of action in concert for the common defense."

Peoples Rights Organization, Inc. v. City of Columbus is another Sixth Circuit decision. Simply citing to Warin and Stevens and ignoring the Supreme Court's decision in Verdugo-Urquidez, the court, in a single sentence bereft of any analysis, concluded that the "Federal Constitution does not provide a right to

---

142 440 F.2d 144 (6th Cir. 1971).
143 Id. at 149.
145 See Stevens, 476 F.2d at 562.
146 Id. at 568 (emphasis added).
147 530 F.2d 103 (6th Cir. 1976).
148 Id. at 106.
149 See id. at 106.
150 See id.
152 Id at 179.
153 152 F.3d 522 (6th Cir. 1998).
possess an assault weapon." 154

In United States v. Napier, 155 Napier contended that 18 U.S.C. § 922 (g) (8) 156 violated the Second Amendment and the right to keep and bear arms provision of the Kentucky Constitution. Without any analysis, the court simply reiterated its previous holding in Warin that the Second Amendment "guarantees a collective rather than an individual right." 157 In justifying its decision, the court also noted, despite the clear pronouncement by the Supreme Court in Verdugo-Urquidez, that Napier had not cited "any inconsistent decisions of the Supreme Court authority that would require modification of Warin." 158 The court also referred to the Supreme Court's decision in Lewis, but misquoted it, stating that it held generally that "legislative restrictions on the use of firearms do not trench upon any constitutionally protected liberties." 159 Lewis held, referring to a federal statute which prohibited possession of a firearm by a felon: "These legislative restrictions on the use of firearms" do not "trench upon any constitutionally protected liberties." 160

7. The Seventh Circuit

Next are three cases from the Seventh Circuit. In United States v. McCutcheon, 161 the court merely followed Miller in holding that the NFA did not infringe the Second Amendment. 162

Quilici v. Village of Morton Grove, 163 rejected Second and Fourteenth Amendment challenges to a village handgun ban. The court held that the Second Amendment, either in itself or by incorporation through the Fourteenth Amendment, "does not apply to the states." 164 The court, however, went on to "comment" on the "scope of the second amendment," incorrectly summarizing Miller as holding that the right extends "only to those arms which are necessary to maintain a well regulated militia." 165 Thus, finding (without evidence on the record) that individually owned handguns are not military weapons, 166 the court concluded only that "the right to keep and bear handguns is not guaranteed by the second amendment." 167

The court in Gillespie v. City of Indianapolis 168 rejected a challenge to 18

---

154 Peoples, 538 F.3d at 538.
155 233 F.3d 394 (6th Cir. 2000).
157 233 F.3d 394, 402 (6th Cir. 2000) (citing United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976)).
158 233 F.3d 394, 403 (6th Cir. 2000)
159 Id.
160 See id. at 136.
162 446 F.2d 133 (7th Cir. 1971).
163 695 F.2d 261 (7th Cir. 1982).
164 Id. at 270.
165 Id.
166 See id. at 270, n.8.
167 See id.
168 185 F.3d 693 (7th Cir. 1999).
U.S.C. § 922(g)(9), 169 which prohibited the possession of firearms by persons convicted of a misdemeanor crime of domestic violence. The court noted that the Second Amendment’s militia clause “suggests” that it “inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia.” 170 In so holding, the court ignored the Supreme Court’s decision in Verdugo-Urquidez. Nonetheless, despite the apparent “collective” nature of the Second Amendment, the court found the plaintiff had standing to bring his Second Amendment challenge. 171

8. The Eighth Circuit

United States v. Synnes 172 held that 18 U.S.C. App. § 1202(a), 173 which prohibited possession of a firearm by a convicted felon, did not infringe upon the Second Amendment. 174 The court held (based upon its partially erroneous view of Miller) that there needed to be evidence that the statute impaired the maintenance of a well-regulated militia. 175 As there was “no showing that prohibiting possession of firearms by felons obstructs the maintenance of a ‘well regulated militia,’” 176 the court saw “no conflict” between the statute and the Second Amendment. 177 While Miller focused on the need to introduce evidence that the firearm had a militia use, 178 Synnes at least recognized the relevance of a militia nexus. 179 There was a clear recognition, moreover, that the Second Amendment guarantees an individual right.

United States v. Wiley 180 is another case involving possession of a firearm by a convicted felon. The court held that felons are "a separate class whose individual right to bear arms may be prohibited." 181

United States v. Decker, 182 like Synnes, the court held that the defendant did not "present any evidence indicating a conflict" between the statute at issue and the maintenance of a well-regulated militia. 183 Failing to do so, the court declined to hold that the record-keeping requirements of the Gun Control Act of 1968 violated the Second Amendment. 184 As with Synnes, the court once again implicitly recognized that the right guaranteed belonged to individuals.

In United States v. Cody, 185 Cody was convicted of making a false

---

170 See Gillespie, 185 F.3d at 710.
171 See id.
172 438 F.2d 764 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972).
174 See Synnes, 438 F.2d at 772.
175 See id.
176 Id.
177 438 F.2d 764, 772 (8th Cir. 1971).
179 See Synnes, 438 F.2d at 772.
182 446 F.2d 164 (8th Cir. 1971).
183 See id. at 167.
184 See id.
185 460 F.2d 34 (8th Cir. 1972).
statement by a convicted felon in connection with the purchase of a firearm in violation of 18 U.S.C. § 922(a)(6). After citing Miller for the propositions that "the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms," and that the "Second Amendment's guarantee extends only to use or possession which 'has some reasonable relationship to the preservation or efficiency of a well-regulated militia,'" the court held there was "no evidence that the prohibition of § 922(a)(6) obstructs the maintenance of a well-regulated militia." Thus, the court acknowledged that the Second Amendment would be a bar to some congressional regulation of the use or possession of firearms and recognized that Miller required the introduction of evidence which showed a militia use for the firearm involved.

Next is United States v. Nelsen. Nelsen was convicted of a violation of the federal switchblade knife act, not a violation of a federal firearm statute. Based on the holding in Cruikshank, the right to keep and bear arms "is not a right granted by the Constitution," the Eighth Circuit concluded that the right is not fundamental. The statement in Cruikshank -- a civil rights prosecution of Klansmen for the theft of firearms from African-Americans -- simply meant, however, that the right was not created by the Constitution, but that it preexisted the Constitution and that the Second Amendment was "to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes" to state criminal laws.

The Eighth Circuit's one paragraph opinion also cited Miller, Oakes, and Warin, without any explanation, held the Second Amendment has been analyzed "purely in term of protecting state militias, rather than individual rights." Miller did not, however, reject the view that an individual right was protected.

In United States v. Hale, the court concluded that Miller held that it was

not sufficient to prove that the weapon in question was susceptible to military use. Rather, the claimant of Second

186 Id. at 37.
187 Id. at 37 (citing United States v. Miller, 307 U.S. 174, 178 (1939)).
188 See Cody, 460 F.2d at 37.
189 See id.
190 859 F.2d 1318 (8th Cir. 1988).
191 Id. at 1320.
192 Id. Cruikshank was the first case in which the Court spoke to the Second Amendment, acknowledging that the right to keep and bear arms was a right which pre-existed the Constitution when it stated that such a right "is not a right granted by the Constitution . . . [n]either is it in any manner dependent upon that instrument for its existence." United States v. Cruikshank, 92 U.S. 542, 553 (1876).
193 Cruikshank, 92 U.S. at 553.
194 564 F.2d 384 (10th Cir. 1977).
195 See Cody, 859 F.2d at 1320.
196 978 F.2d 1016 (8th Cir. 1992).
Amendment protection must prove that his or her possession of the weapon was reasonably related to a well-regulated militia. Hale introduced no evidence and made no claim of even the most tenuous relationship between his possession of the weapons and the preservation of a well regulated militia.\textsuperscript{197}

The court rejected a "collective right" argument, holding that the "purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia."\textsuperscript{198}

One of the three judges, while concurring in the result, "disagree[d]" with the court's interpretation of \textit{Miller}, insofar as it was interpreted to "say that Congress has the power to prohibit an individual from possessing any type of firearm, even when kept for lawful purposes."\textsuperscript{199}

In \textit{United States v. Farrell},\textsuperscript{200} Farrell contended that the Government had to prove he knew he was violating the law to convict him of possession of a machine gun under 18 U.S.C. § 922(o).\textsuperscript{201} He argued that "his \textit{mens rea} interpretation avoids Second Amendment concerns raised by his case."\textsuperscript{202} In rejecting his argument, the court held that "Farrell has failed to make a fact-specific showing that possession of the regulated weapons bears a reasonable relationship to the preservation or efficiency of a well-regulated militia under Hale."\textsuperscript{203}

In \textit{United States v. Lewis},\textsuperscript{204} Lewis challenged the constitutionality of 18 U.S.C. § 922(g)(9). The entire decision of the court regarding the Second Amendment was: "The argument that the statute violates the Second Amendment is also without merit."\textsuperscript{205}

9. \textit{The Ninth Circuit}

The court in \textit{Hickman v. Block}\textsuperscript{206} performed no analysis of the history of the Second Amendment and simply cited \textit{Warin} and \textit{Johnson} to reach its holding.\textsuperscript{207} In ignoring the Supreme Court's decision in \textit{Verdugo-Urquidez}, the court held that the plaintiff did not have standing to raise the Second Amendment in a challenge to a city's denial of a permit to carry a concealed weapon.\textsuperscript{208}

\textsuperscript{197} \textit{Id.} at 1020.

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} \textit{Id.} at 1021. (Beam, J., concurring specially). Judge Beam also disagreed that the decisions in \textit{Warin}, \textit{Oakes}, and \textit{Nelson}, "properly interpret the Constitution or the Supreme Court's holding in Miller." \textit{Id.}

\textsuperscript{200} 69 F.3d 891 (8th Cir. 1995).

\textsuperscript{201} See \textit{id.} at 893.

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} \textit{Id.} at 894.

\textsuperscript{204} 236 F.3d 948 (8th Cir. 2001).

\textsuperscript{205} \textit{Id.} at 950.

\textsuperscript{206} 81 F.3d 98 (9th Cir. 1996).

\textsuperscript{207} See \textit{id.} at 102.

\textsuperscript{208} See \textit{id.} at 103.
In United States v. Finitz,209 Finitz pleaded guilty to being a felon in possession of a firearm and was sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA) since he had three prior violent or serious drug felony convictions.210 In rejecting his challenge to the constitutionality of the ACCA, the court held simply that his argument was “foreclosed by our opinion in Hickman v. Block”.211

In United States v. Hancock,212 Hancock argued that “18 U.S.C. § 922(g)(9) burdens his fundamental right to bear arms under the Second Amendment.”213 In response, the court held that it had previously “concluded that ‘the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.’”214

10. The Tenth Circuit

In United States v. Swinton,215 in the context of interpreting the meaning of the phrase “engaging in the business of dealing in firearms,”216 the court noted that “there is no absolute constitutional right of an individual to possess a firearm.”217 Clearly, the court recognized that the right is an individual one, albeit not an absolute one.

Although United States v. Oakes218 recognized the requirement of Miller that the defendant show that the firearm in question have a “connection to the militia,” the court concluded, without any explanation of how it reached the conclusion, that the mere fact that the defendant was a member of the Kansas militia would not establish that connection.219 In light of the fact that Miller (which defines the militia as including “all males physically capable of acting in concert for the common defense”)220 saw no relevance in the status of a defendant with respect to the militia, but instead focused upon the firearm itself,221 this conclusion is not without basis.

In United States v. Baer,222 Baer was convicted of possessing firearms after being convicted of a felony in violation of 18 U.S.C. § 922(g)(1). In rejecting his challenge to the constitutionality of § 922(g)(1), the court quoted the Supreme Court’s statement in Lewis that the prohibition on possession of a firearm by a felon does not “trench upon any constitutionally protected liberties.”223

209 No. 99-30272 (9th Cir. 2000).
210 See id. at 1.
211 Id. at 2 (internal citation omitted).
212 231 F.3d 557 (9th Cir. 2000).
213 Id. at 565.
214 Id.
215 521 F.2d 1255 (10th Cir. 1975).
217 Swinton, 521 F.2d at 1259 (emphasis added).
218 564 F.2d 384 (10th Cir. 1977).
219 See id. at 387.
221 See id.
222 235 F.3d 561 (10th Cir. 2000).
223 Id. at 564 (citing Lewis v. United States, 445 U.S. 55, 65, n.8 (1980)).
11. The Eleventh Circuit

Two Eleventh Circuit cases will be discussed. First, in *Gilbert Equipment Co., Inc. v. Higgins*, the court held that the Second Amendment "guarantees to all Americans 'the right to keep and bear arms'". In *United States v. Wright*, although the court recognized that the militia was a "broad segment of the population," it found that the "well regulated militia" referred to only "governmental militias that are actively maintained and used for the common defense." From this, the court concluded that the Second Amendment "was inserted into the Bill of Rights to protect the role of the states in maintaining and arming the militia." Entirely missing in the court's analysis is any mention of the fact that the Second Amendment protects "the right of the people," not the states.

12. The D.C. Circuit

*FOP v. United States* recognized that *Miller* "dealt with Congress' authority to prohibit ownership of short-barreled shotguns." The court noted that the FOP could have argued that the *Miller* test "serves only to separate weapons covered by the amendment from uncovered weapons." The court thus recognized that *Miller* focused on the firearm, not the possessor. Because the FOP did not make the argument, the court concluded that *Miller's" reasonable relationship" test could be met "by evidence supporting a finding" that the challenged law "would materially impair the effectiveness of the militia." The court did not rule on the Second Amendment question, however, as the FOP "presented no evidence on the matter at all." Further, as the FOP did not "indicate how restrictions on" police officers convicted of domestic violence misdemeanors "would have a material impact on the militia," the court did not rule on that issue either.

---

224 709 F. Supp. 1071 (S.D. Ala. 1989), aff'd, 894 F.2d 412 (11th Cir. 1990) (mem.).
225 *Gilbert*, 709 F. Supp. at 1080. The court adopted the magistrate's opinion, which further stated that the Second Amendment didn't give Gilbert the right to import arms.
226 117 F.3d 1265 (11th Cir. 1997).
227 Id. at 1273.
228 Id.
229 Id.
231 Id. at 906.
232 Id.
233 Id.
234 Id.
235 Id.
236 See *FOP*, 173 F.3d at 906.
IV. CONCLUSION

From the above, it is apparent to any disinterested observer without a political agenda that the state of the federal appellate courts' interpretation of the Second Amendment is not universally contrary to a concept of individual rights. Indeed, it is clear that the federal appellate courts lean more toward an individual rights interpretation of the Second Amendment. Moreover, it is equally true that the federal appellate courts which have not held that the Second Amendment protects an individual right have so held only after consideration and analysis which, if applied to virtually any other provision of the Bill of Rights, would be unacceptable.
WHAT STATE CONSTITUTIONS TEACH ABOUT THE SECOND AMENDMENT

by David B. Kopel

I. INTRODUCTION

It is well-settled that state constitutions can serve as an aid to interpreting the federal Bill of Rights.1 Regarding the Second Amendment, state constitutions are especially helpful. First, right to arms provisions are contained in forty-four state constitutions.2 Few parts of the Bill of Rights have as many state analogues as does the Second Amendment.3 Second, the state language has been written or amended from 1776 until the present,4 so we can see how arms rights have or have not changed in a wide variety of American linguistic communities. Third, state arms guarantees have been created or amended by special conventions, by state legislatures, and by initiative and referenda. Thus, we can see how arms rights language is created by both elite and non-elite types of lawmakers.

A great deal of ink has been spilled trying to discern the intent of the authors of the Second Amendment. If we simply look at how the same words in the Second Amendment have been used in state constitutions, we find that these words have had a stable, consistent meaning throughout American history. From 1776 until the present, the words have guaranteed a right of individuals to own

---


2 Those states who have provided a right to arms guarantee are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. The states that have not included an arms right provision in their state constitutions are: California, Iowa, Maryland, Minnesota, New Jersey and New York. All past and present state constitution arms rights guarantees may be found at Eugene Volokh, State Constitutional Right to Keep and Bear Arms Provisions, at http://www.law.ucla.edu/faculty/volokh/bearams/statecon.htm (last visited Feb. 20, 2002).

3 For example, the rights of free exercise of religion and of freedom from religious discrimination are protected by only 34 state constitutions. See JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES App. 4A-12 (1993).

and carry guns.

At least regarding gun rights, modern Americans speak the same language as the founders. Since 1963, the people of Alaska, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Louisiana, Maine, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Utah, Virginia, West Virginia, and Wisconsin have chosen, either through their legislature or through a direct vote, to add a right to arms to their state constitution, to re-adopt the right to arms, or to strengthen an existing right. In every state where the people have had the opportunity to vote directly, they have voted for the right to arms by overwhelming margins.

In this article, I examine each of the state constitutions that contain an arms rights guarantee. For each state, I detail how the state arms right has been interpreted and what implications about the Second Amendment may be drawn from the language of the state provision.

Throughout the analysis, several key questions recur:

- When the Second Amendment was written and adopted, was the language chosen already familiar as guaranteeing and individual’s right to keep and bear arms, or was the language familiar as protecting the power of states over their own militias?

- Is the phrase “bear arms” a term of art referring exclusively to bearing arms while in militia service, or is the phrase used in its more ordinary sense to encompass bearing arms for a variety of purposes, such as personal or family defense or sporting purposes?

- When states adopted the Second Amendment verbatim in their own state constitutions, what did this particular language do?

- What is the effect when concerns about standing armies are expressed contemporaneously or even in the same sentence as arms rights language?

- What is the implication when states create explicit exceptions to the right to arms, such as excepting the concealed carrying of weapons, or excepting large assemblies of armed men, or reserving the power to create certain types of gun laws?

II. STATE CONSTITUTIONS CONTEMPORANEOUS WITH THE SECOND AMENDMENT

The Second Amendment to the United States Constitution was written in 1789 and sent by Congress to the States for ratification.\(^5\) Ratification was

achieved in 1791. Four state constitutions from the very early Republic—Pennsylvania, Vermont, North Carolina and Kentucky—provide important evidence about the meaning of the right to arms in the period surrounding the adoption of the Second Amendment.

**Pennsylvania:** The present-day Pennsylvania Constitution, using language adopted in 1790, declares: “The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.”

Pennsylvania’s first constitution, adopted in 1776, stated in its Declaration of Rights: “That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the 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.”

It is sometimes claimed that the phrase “bear arms” in the Second Amendment is a term of art referring only to bearing arms while serving in a militia. Both in 1790 and 1776, the drafters in Pennsylvania used the language “bear arms in the [or ‘for’] defence of themselves and the state.” This language has always been interpreted by Pennsylvania courts to protect the right of all Pennsylvanians, not just militia members, to possess firearms. The Pennsylvania language suggests that “bear arms” is not a term of art which means only militia usage and nothing else.

A recent opinion by Justice Ruth Bader Ginsburg suggests that “bear arms” continues to encompass carrying guns for diverse purposes. Analyzing the statutory phrase “carries a firearm,” she wrote:

Surely a most familiar meaning is, as the Constitution’s Second Amendment (“keep and bear Arms”) and Black’s Law Dictionary indicate, “wear, bear, or carry... upon the person or in the clothing or in a pocket, for the purpose... of being armed and ready for offensive or defense action in case of a conflict with another person.”

amendments/html (last visited Feb. 21, 2002).

6 See id.
7 P. A. Const. art. 1, § 21.
8 P. A. Const. of 1776, Declaration of Rights, cl. XIII.
10 P. A. Const. of 1776, Declaration of Rights, cl. XIII; P. A. Const. art. 1, § 21.
11 See, e.g., Ortiz v. Commonwealth, 681 A.2d 152 (Pa. 1996) (declaring that the individual right to possess firearms was a matter of statewide concern; therefore, the legislature’s preemption of local “assault weapon” ban was proper); Wright v. Commonwealth, 77 Pa. 470 (1875) (holding an act prohibiting carrying concealed weapons is consistent with the Pennsylvania Bill of Rights, which protects the right of citizens to bear arms in defense of themselves and the state).
13 Id.
Vermont: Adopted in 1777, the Vermont Constitution closely tracks the Pennsylvania Constitution. It states “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.”

Vermont, like Pennsylvania, contributed part of this language to the federal Second Amendment, evincing the state’s interpretation that recognition of the people’s right to bear arms was a recognition of an individual right. Vermont courts have been especially strict in protecting individual arms rights when interpreting the state constitution. For example, an 1892 decision declared that the government could not require licenses for the carrying of concealed weapons.

One of the most important elements of Vermont’s right to arms language is the juxtaposition of a right to bear arms with a denunciation of standing armies. The fact that Vermont’s right to bear arms has been interpreted as individual shows that concern about standing armies does not negate the guarantee of a fundamental personal right to arms.

North Carolina: Like Pennsylvania, North Carolina adopted an arms right in 1776. The North Carolina Bill of Rights reads in part, “[t]hat the people have a right to bear arms, for the defence of 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.”

The 1776 adoption of the phrase “the people have a right to bear arms” precedes James Madison’s derivative use of a substantially similar phrase when he wrote the Second Amendment in 1789. The 1776 North Carolina Constitution declares the right is “for the defence of the State,” but delineates no other purpose. This “right to bear arms” language is included in the same sentence as denunciations of and restrictions on standing armies. This language would be expected to lend strong support to arguments that the Second Amendment was intended exclusively to promote state militias so as to reduce the power of the federal standing army and that the only purpose of the Second Amendment is collective defense, not individual arms possession for personal defense.

---

15 VT. CONST. ch. 1, art. 16.
16 State v. Rosenthal, 55 A. 610 (Vt. 1903).
18 N.C. CONST. of 1776, Bill of Rights, § XVII.
19 1 ANNALS OF CONG. 460 (Joseph Gales ed., 1789).
20 N.C. CONST. of 1776, Bill of Rights, § XVII.
21 Garry Wills, Why We Have No Right to Keep and Bear Arms, N.Y. REV. BOOKS, Sept. 21, 1995, at 62.
22 See, e.g., Love v. Peppersack, 47 F.3d 120,124 (4th Cir. 1995); Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996); U.S. v. Wann, 530 F.2d 103, 106 (6th Cir. 1976); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) (all concluding the Second Amendment does not protect an individual right to bear arms).
However, the North Carolina Constitution has always been, without dissent, construed to guarantee a right of ordinary citizens to carry weapons for personal protection.\(^{23}\) The language of the state constitution, unlike the Second Amendment, explicitly denounces and controls standing armies and specifies only one purpose for the right to bear arms: "the defence of the state."\(^{24}\) A fortiory, the 1776 North Carolina Constitution would protect, at most, people in active militia service, but in 1843, the North Carolina Supreme Court explained that "[f]or any lawful purpose — either of business or amusement — the citizen is at perfect liberty to carry his gun."\(^{25}\)

In 1868, after the Civil War, North Carolina recreated its state constitution, adopting language which directly copied the federal Second Amendment.\(^{26}\) The same constitutional clause also denounced standing armies: "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; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power."\(^{27}\)

Again, if the federal Second Amendment is only about controlling standing armies, then the 1868 North Carolina arms right should, a fortiori, only be about controlling standing armies, since standing army language appears in the very same sentence as the arms right. Yet the North Carolina provision has always been construed as protecting an individual right.\(^{28}\)

The individual nature of the 1868 North Carolina guarantee, mimicking the Second Amendment, was underscored by an 1875 amendment: "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."\(^{29}\) If the North Carolina arms right were only about controlling standing armies, or only about affirming the state militia, it would make no sense for North Carolina to carve out an exception in order to allow the legislature to ban or restrict the carrying of concealed weapons. The concealed weapons control is aimed at individuals, not at active militiamen, who can simply be ordered to carry their guns in the manner their commanding officers require. Again, the North Carolina constitution has always been interpreted to protect an individual right to arms.\(^{30}\)

---

\(^{23}\) See State v. Kerner, 107 S.E. 222 (N.C. 1921) (upholding constitutional right to possess ordinary rifles, shotguns and handguns).

\(^{24}\) N.C. CONST. of 1776, Bill of Rights, § XVII.

\(^{25}\) State v. Huntley, 25 N.C. 418, 422 (1843). See also State v. Newsom, 27 N.C. (5 Ired.) 250, 251 (1844) (upholding gun licensing law for free people of color only because they, unlike citizens, were not parties to the social compact); State v. Kerner, 107 S.E. 222 (N.C. 1921) (upholding constitutional right to possess ordinary rifles, shotguns, and handguns).


\(^{27}\) N.C. CONST. of 1868, art. I, § 24.

\(^{28}\) See, e.g., State v. Kerner, 107 S.E. 222 (N.C. 1921) (pistol carrying license and bond requirement is unconstitutional); State v. Dawson, 159 S.E.3d 1, 9 (N.C. 1968) (stating the right is both individual and collective and is not infringed by punishment of persons who bear arms so as to deliberately disturb the peace).

\(^{29}\) In 1971, the North Carolina Constitution was reorganized, and the words "General Assembly" replaced "legislature" in the clause about controlling concealed weapons. Art. 1, § 30 (1971).

\(^{30}\) See, e.g., Kerner, 107 S.E. 222 (N.C. 1921); see also State v. Dawson, 159 S.E.2d 1, 9 (N.C. 1968).
Therefore, from the North Carolina Constitution, we see:

- Concerns about standing armies do not negate the individual nature of the arms right.
- A reference to "the defence of the state" does not negate the individual nature of the arms right.
- The creation of an exception to allow restrictions on concealed carry underscores the nature of the arms right.
- The exact wording of the Second Amendment is interpreted as recognizing an individual right in North Carolina state courts.

These themes will be continually supported by examination of other state constitutions.

**Kentucky:** The 1792 Kentucky constitution was nearly contemporaneous with the Second Amendment, which was ratified in 1791. Kentucky declared: "That the right of the citizens to bear arms in defence of themselves and the State, shall not be questioned."  

The year after the Second Amendment became the law of the land, Kentucky's constitutional drafters used the phrase "bear arms" to include bearing arms for personal and collective defense: "in defence of themselves and the state." This language suggests that "bear arms" was not commonly understood as encompassing only militia service.  

In 1822, a Kentucky Supreme Court decision declared a law against carrying concealed weapons invalid. This led to an 1850 revision in the Kentucky Constitution to allow restrictions on concealed carry. This was also the basis for the restrictions on concealed carry written into many state constitutions. The final form of the Kentucky arms right was enacted in 1891:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties. . . .

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.

---

1968); State v. Fennell, 382 S.E.2d 231, 233 (N.C. 1989).
32 Ky. Const. of 1792, art. XII, § 23.
33 Id. (emphasis added).
34 See Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822).
35 Ky. Const. of 1850, art. XIII, § 25.
III. IS THE SECOND AMENDMENT MAINLY ABOUT FEDERALISM?

Having examined some very early states’ right to arms guarantees, let us now jump ahead to 1959 and to the last states that joined the Union. The guarantees made by the Alaska and Hawaii Constitutions contradict this argument. If the argument were true, then it would be preposterous for the people of Alaska and Hawaii to place in their constitution language which is identical to the Second Amendment. Because of the Supremacy Clause in the United States Constitution, nothing in the Alaska or Hawaii Constitutions could prevent the federal government from disarming a state militia. The obvious reason that the people of Alaska and Hawaii placed the exact language of the Second Amendment in their state constitutions was to keep the state governments from disarming the people of their respective state. The people of Alaska and Hawaii chose these precise words because they understood those words as used in the United States Constitution to prevent the United States government from disarming the people of the United States.

In 1994, the people of Alaska added additional protection to their arms right by specifically labeling the right “individual,” by specifically prohibiting local governments from restricting the right, and by changing “infringed” to “denied or infringed.” The people of Alaska may have been acting with a great abundance of caution, since the 1994 addition merely restated what was already in the 1959 Constitution: that the arms right limited the power of local government as well as state government, that the right was individual, and that

38 Both states made slight alterations in punctuation and capitalization to conform to modern usage.
40 Yassky, supra note 9, at 609-10.
41 U.S. CONST. art. VI, § 2. This section provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be mad, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 ALASKA CONST. art. I, § 19. “The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.” Id.
43 A local government is the creature of a state government, therefore, it cannot perform an act
the right could not be "denied."\footnote{44}

Hawaii simply interprets its state constitutional right to arms\footnote{45} and gets the same result. Hawaiians have an individual right to arms, which may not be denied by the state or by local governments.\footnote{46} Of course, Hawaii has extensive gun controls, while Alaska has very few.\footnote{47} The issue for this article, however, is not whether any particular gun control is constitutional, but simply whether the text of state constitutions suggests that the federal Second Amendment protects a meaningful individual right.

\textbf{South Carolina:} Like North Carolina, Alaska, and Hawaii, the state of South Carolina adopted the Second Amendment verbatim.\footnote{48} South Carolina also copied North Carolina's language denouncing standing armies: "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."\footnote{49}

In South Carolina, the state constitutional right to arms, with the exact same language as the Second Amendment, is read just as it is in Alaska, Hawaii, and North Carolina: as guaranteeing a right of individuals to bear arms. If Second Amendment language were about state's rights, rather than about individual rights, then surely one would expect the state's rights interpretation to prevail in South Carolina, the state which affirmed state's rights by seceding and thereby starting the Civil War--providing the South Carolina militia with an opportunity to assert its independence from federal control. Yet even in South Carolina, the precise language of the Second Amendment is recognized as guaranteeing individual rights, not militia independence.

\section*{IV. Stability Across Time and Place}

Having examined constitutions from very old states to the newest states, let us now look at the constitutions of the rest of the states. We will proceed mostly, in alphabetical order, although some states will be combined where profitable. We will find great diversity of geography and time, and will we find consistent support for the themes established in Parts I and II.

\footnote{44}{\textit{Alaska Const.} art I, \S 19.}
\footnote{45}{The same as Alaska's 1959 language, without the 1994 Alaska addition.}
\footnote{46}{State v. Mendoza, 920 P.2d 357, 363 n. 9 (Haw. 1996) (The court did not decide the question of what type of right the arms guarantee was, but noted that interpreting the arms right as both collective and individual, subject to state police power, would be consistent with the majority of other state constitutions); Morgan v. State, 943 P.2d 1208 (Alaska Ct. App. 1997) (holding right is not violated by prohibition on gun possession by citizens on probation).}
\footnote{47}{See generally \textit{Alaska Stat.} \S 18.65.700-790 (Michie 2000), \textit{Haw. Rev. Stat.} \S 134-51 (1993).}
\footnote{48}{See State v. Mendoza, 920 P.2d 357, 360 (Haw. 1996).}
\footnote{49}{\textit{S.C. Const.} art. 1, \S 20. (The South Carolina language makes some minor punctuation changes to the Second Amendment and to the North Carolina constitution).}
Alabama: The Alabama Constitution, adopted in 1819, guarantees "[t]hat every citizen has a right to bear arms in defense of himself and the state."\(^5\) Alabama’s guarantee refers to community protection (such as might be provided in militia service) with the phrase “bear arms in defense of the state.”\(^5\) Alabama also refers to personal protection: “bear arms in defense of himself.”\(^5\) Thus, one can bear arms “in defense...of the state” or “in defense of himself.” Bearing arms can include community protection or personal protection.\(^5\)

Arizona and Washington: These states were among the last to be admitted to the Union.\(^5\) Their right to arms language is identical: “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.”\(^5\)

The Washington and Arizona Constitutions make explicit a principle which has been considered implicit in the Second Amendment: protection of an individual right “to bear arms” does not forbid the government from controlling large assemblies of armed men.\(^5\) Just a few years before the Washington Constitution was adopted, the U.S. Supreme Court upheld a state ban on armed parades in public, even as the Court plainly treated the Second Amendment as an individual right protected against federal infringement.\(^5\)

Arkansas: “The citizens of this State shall have the right to keep and bear arms for their common defense.”\(^5\) As in many states, Arkansas’s state constitution is narrower than the Second Amendment, because it guarantees the right only “for

\(^{50}\) ALA. CONST. art. I, § 26 ("defence" changed to "defense" in 1901).

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) See Owen v. State, 31 Ala. 387 (1858) (recognizing that restriction on individual concealed carrying of weapons raises a constitutional issue, but finding restriction to be constitutional); State v. Reid, 1 Ala. 12 (1840) (declaring legislature has broad discretion in determining how arms may be borne; yet “A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional”).


\(^{55}\) WASH. CONST. art. I, § 24; ARIZ. CONST. art. II, § 26. (The Arizona version does not have commas around “or the state” and capitalizes “State”). For application, see City of Tucson v. Rineer, 971 P.2d 207 (Ariz. Ct. App. 1998) (holding city’s restrictions on weapons in parks do not violate the right); City of Renton, 668 P.2d 596 (Wash. Ct. App. 1983) (upholding restriction on possession of arms in places where alcohol is served).


\(^{58}\) ARK. CONST. art. II, § 5 (modifying 1836 version by extending the right to citizens, rather than only whites).
their common defense.”

An 1842 case interpreted the state constitution narrowly, holding that it protected only the kind of people who might serve the militia, i.e. free males, and only the kind of weapons suitable for militia use.\(^5\) A concurring opinion stated that “[T]he provision of the Federal Constitution [and of the state Constitution] . . . is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force.”\(^6\)

This concurrence was never followed in Arkansas, and does not appear to have been cited in any court for the remainder of the nineteenth century. Subsequent Arkansas case law has interpreted the state constitution to guarantee all law-abiding Arkansans the right to own firearms.\(^6\) Arkansas courts apply the “common defense” language so that the right only includes the type of arms that might be useful for militia service.\(^6\) For example, in *Fife v. State*,\(^6\) an 1876 decision, the Arkansas Supreme Court held that large military-sized pistols are within the scope of the arms right, but small concealable handguns are not.\(^6\)

Thus, the Arkansas courts effectuate every word of the state constitution: the right belongs to every “citizen” but the right includes only ownership of the type of firearms useable for the “common defense.” The *Fife* case is one of many state cases whose precedent was followed in *United States v. Miller*,\(^6\) which allowed for a Second Amendment claim on behalf of two individual citizens (Jack Miller and Frank Layton, who were not in any militia), while holding that the Second Amendment does not extend to firearms which are unsuitable for militia use.\(^6\)

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.\(^7\)

Again, the phrase “keep and bear arms” is used for more than militia use. The Colorado Constitution shows that a person may “keep and bear arms in defense of his home, person, or property.”\(^8\) The Colorado provision includes the concealed carry exception.\(^9\) The right is unquestionably individual.\(^10\)

---

\(^5\) State v. Buzzard, 4 Ark. 18, 27 (1842).
\(^6\) *Id.* at 32 (Dickinson, J., concurring).
\(^6\) *Id.* at 32 (Dickinson, J., concurring).
\(^6\) *Fife v. State*, 31 Ark. 455, 460-461 (1876); *see also* Wilson v. State, 33 Ark. 557 (1878).
\(^6\) See *id.*
\(^6\) 31 Ark. 455 (1876).
\(^6\) *Id.* at 460-61; *see also* Wilson v. State, 33 Ark. 557 (1878) (holding a statute making it a misdemeanor to carry a pistol except on a person’s own property or when traveling was an unwarranted restriction on right to bear arms).
\(^6\) 307 U.S. 174 (1939).
\(^6\) *Id.* at 178. For more on *Miller*, see David B. Kopel, *The Supreme Court’s Thirty-five Other Second Amendment Cases*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999).
\(^7\) COLO. CONST. art. II, § 13.
\(^8\) *Id.*
\(^9\) *Id.*
\(^10\) For e.g., Douglass v. Kelton, 610 P.2d 1067 (Colo. 1980) (noting that individual right does not include concealed carry); Hilberg v. F.W. Woolworth Co., 761 P.2d 236 (Colo. Ct. App. 1988) (ruling against civil liability for firearms retailer, noting “The right to bear arms is guaranteed by
Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." Connecticut too uses "bear arms" to encompass personal defense.

Delaware: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." As Delaware shows, "bear arms" can include "hunting and recreational use" as well as defense of "self, family, home and State."

Florida: As enacted in 1968, Florida’s provision states: "(a) 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." Earlier versions were:

1838: "That the free white men of this State shall have a right to keep and to bear arms for their common defence."
1868: "The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State."
1885: "The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne."

---

the Constitution of the United States and the Colorado Constitution, subject to the valid exercise of police power); City of Lakewood v. Pillow, 501 P.2d 744 (Colo. 1972) (restrictions on firearms sale, possession, and carrying were too broad); People v. Nakamura, 62 P.2d 246 (Colo. 1936) (prohibition of firearm possession by lawful aliens is unconstitutional).

CONN. CONST. art. 1, § 15.

72 See, e.g., State v. Wilchinski, 700 A.2d 1 (Conn. 1997) (adopting a narrow construction of home gun storage law, so as to avoid constitutional issue); Benjamin v. Bailey, 662 A.2d 1226 (Conn. 1995) (declaring state constitution guarantees right to possess arms for personal defense, but right is not violated by ban on "assault weapons").

73 DEL. CONST. art. 1, § 20.

74 Id.

75 FLA. CONST. art. 1, § 8. Sections (b)-(d) were adopted in 1990. These sections provide:

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.
(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.
(d) This restriction shall not apply to a trade in of another handgun.

76 FLA. CONST. of 1838, art. 1, § 21.
77 FLA. CONST. of 1868, art. 1, § 22.
78 FLA. CONST. of 1885, art. 1, § 20.
The people of Florida have repeatedly used "right of the people to keep and bear arms" to protect the right of every individual citizen of Florida to possess a firearm. If the Second Amendment does nothing more than protect state militias from federal interference, it is impossible to explain why language based on the Second Amendment appears again and again in state constitutional language throughout the nineteenth and twentieth centuries.

Georgia: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne."

Again, language nearly identical to the Second Amendment is used to guarantee a right of individuals. Before Georgia had its own right to arms guarantee, the Georgia Supreme Court used the Second Amendment to declare a state handgun ban illegal. The Georgia Court explained that the Second Amendment protects:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of free State.

The Nunn decision was consistent with every nineteenth century Supreme Court case, every state court case and every legal treatise that discussed the Second Amendment. Throughout the nineteenth century, it was undisputed that the Second Amendment guaranteed an individual right of every citizen to own and carry firearms.

79 Decisions affirming the individual right, while upholding particular controls, include: Rinzler v. Carson, 262 So.2d 661 (Fla. 1972) (prohibiting machine guns); Nelson v. State, 195 So.2d 853 (Fla. 1967) (Banning possession of certain weapons by convicted felons); Davis v. State, 146 So.2d 892 (Fla. 1962) (requiring a license to carry certain weapons); Carlton v. State, 58 So. 480 (1912) (restricting concealed carry).

80 GA. CONST. art. I, § 1, cl. VIII. Cf. Hill v. State, 53 Ga. 472 (1874) (interpreting 1868 state constitutional language as an individual right, but the legislature may ban the bearing of arms in courthouses).

81 See Rhodes v. R.G. Industries, Inc. 325 S.E.2d 465 (Ga. Ct. App. 1984) (dismissing strict liability action against handgun manufacturers because the Second Amendment guarantees the right of people to keep and bear arms, as does the Georgia Constitution).

82 Nunn v. State, 1 Ga. 243, 251 (1846)

83 Id.; see also AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 154-56 (1998) (explaining Nunn as part of a group of antebellum decisions applying the Bill of Rights to the states). Chief Justice Joseph Henry Lumpkin, author of the Nunn opinion, is recognized as one of the leading State Supreme Court judges of the nineteenth century. For more information on his career see Judge Lumpkin In Memoriam, 36 Ga. 19 (1867); 6 DICTIONARY OF AMERICAN BIOGRAPHY 502 (Dumas Malone ed. 1933); THE STORY OF GEORGIA 243 (Am. Historical Soc’y 1938).

84 Except for the lone concurring opinion from State v. Buzzard, 4 Ark. 18 (1842).

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." 8 6

Once more, language which tracks the Second Amendment is used to protect an individual right. 8 7

Illinois: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." 8 8

This is another modern usage of language from the Second Amendment to protect the rights of individual citizens, and another usage of "bear arms" outside an exclusively military context. 8 9

Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State." 9 0

The earlier version dated from 1816: "That the people have a right to bear arms for the defense of themselves and the State, and that the military shall be kept in strict subordination to the civil power." 9 1

As the 1816 Indiana Constitution shows, one major rationale for the right to arms in the early republic was concern about the dangers of standing armies. 9 2

That is why the people of Indiana put the right to arms provision in the same section as a restriction on standing armies. But it would be erroneous to conclude that the right to arms only includes people who are in a militia which might fight a standing army. Even with the anti-standing army language, Indiana's Constitution, which tracks the Second Amendment, was always construed to protect a right of all citizens of Indiana, not just militiamen, to own and carry firearms--subject, of course, to reasonable restrictions. 9 3

The same is true of the
constitutions of North Carolina, Ohio, South Carolina, and Vermont, all of which use a single constitutional section to denounce standing armies and to protect a right of every citizen to possess arms.\(^{94}\)

**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.”\(^{95}\)

Louisiana is one of many states to use language almost identical to the Second Amendment, while including an explicit provision to allow regulation of the carrying of concealed weapons.\(^{96}\) These arms-carrying restrictions show that Second Amendment language was understood to include ordinary citizens walking around with firearms for personal protection or hunting.\(^{97}\) That is why the legislature was given authority to control the carrying of weapons -- to control ordinary people carrying guns.\(^{98}\)

**Maine:** Maine’s 1819 Constitution stated: “Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.”\(^{99}\)

In *State v. Friel*, decided in 1986, the Maine Supreme Court read the 1819 language as guaranteeing only a “collective” right.\(^{100}\) Like “collective property” in a Communist country, the “collective” right to arms favored by the *Friel* court really belonged exclusively to the government. Thus, this “collective” right was antithetical to the ordinary American understanding of rights as belonging to individuals, not governments. The people of Maine quickly demonstrated that the *Friel* court was grossly out of step with contemporary norms. In 1987 the people overwhelmingly adopted language which reaffirmed that the Maine Constitution guaranteed an individual right to arms: “Every citizen has a right to keep and bear arms and this right shall never be questioned.”\(^{101}\)

**Michigan:** “Every person has a right to keep and bear arms for the defense of himself and the state.”\(^{102}\)

If “to keep and bear arms” is a “term of art” used to mean militia service

---

95 LA. CONST. art. I, § 11.
96 Other states which have similar provisions include: Colorado, Idaho, Kentucky, Mississippi, Missouri, Montana, New Mexico, and North Carolina.
97 E.g., State v. Hamlin, 497 So.2d 1369 (La. 1986) (restricting sawed-off shotguns does not violate the individual right).
99 ME. CONST. of 1819, art. I, § 16.
100 508 A.2d 123, 125 (Me. 1986).
only, that "art" must have been entirely unknown to the people who drafted the
state constitutions of the early American republic, for those drafters used "keep
and bear arms" again and again to protect the right of individuals to possess and
carry firearms for personal defense. Michigan recognizes the state constitution as
guaranteeing an individual right.  

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 when thereto legally
summoned, shall not be called in question, but the legislature may regulate or
forbid carrying concealed weapons." The concealed weapon restriction underscores that "the right to keep and
bear arms" includes the right to carry non-concealed firearms for personal
protection.

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." The 1820 provision stated: "That the people have the right peaceably to
assemble for their common good, and to apply to those vested with the powers of
government for redress of grievances by petition or remonstrance; and that their
right to bear arms in defence of themselves and of the State cannot be
questioned." This language described "the people" as possessing "the right
peaceably to assemble for their common good" and "their right to bear arms." That the right to assemble was specified as being "for their common good" did
not, of course, mean that the right did not belong to individuals, or that the right
was a "collective" right which belonged only to the government. Likewise, as
has been shown, the provision in many state constitutions mentioning only "the
common defense" in the arms guarantee has almost always been interpreted to
recognize a right of individuals.

The 1876 U.S. Supreme Court case United States v. Cruikshank, also
treated the right to assemble and the right to bear arms in pari materia. Both
were rights "found wherever civilization exists," both were recognized but not
created by the Constitution, and neither were within the power of Congress under
the Fourteenth Amendment to protect against infringement by private persons.

103 See generally David Yassky, supra note 9.
104 See, e.g., People v. Zerillo, 189 N.W. 927 (Mich. 1922) (prohibition on unnaturalized, foreign-
born residents possessing a firearm is unconstitutional); People v. Brown, 235 N.W. 245 (Mich.
1931) ("The protection of the constitution is not limited to militiamen nor military purposes, in
terms, but extends to every person to bear arms for the defense of himself as well as of the state.");
105 Miss. CONST. art. III, § 12.
106 Mo. CONST. art. I, § 23.
107 Mo. CONST. of 1820, art. XIII, § 3.
108 Id.
109 92 U.S. 542 (1876).
110 Id. at 555.
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.” This 1889 language closely tracks the Colorado provision from 1876. It supports that point that one may “bear” arms in personal defense. It also underscores that carrying concealed weapons, which militiamen would not do, but individuals might, was something that might be considered part of the arms guarantee, and for which a specific exception was therefore necessary.

Nebraska and North Dakota: Nebraska’s right, adopted in 1988 referendum, states:

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.

North Dakota also added an arms right by a referendum,

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.

Like Kentucky, the states of Nebraska and North Dakota interpolate the right to arms in a larger section that guarantees numerous individual rights. Similarly, James Madison’s original proposal for the right to keep and bear arms...
was to put that clause in Article I, section 9, of the U.S. Constitution, which guarantees various individual rights, such as habeas corpus. If Madison viewed the Second Amendment as a restriction on federal power over the militia, then he would have put the Second Amendment in Article I, section 8, the portion of the Constitution which grants militia powers to the federal government. 116

**Nevada and New Hampshire:** In 1982, the people of both of these states voted to add an arms right to the state constitution. 117 Nevada's provision is "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." 118 New Hampshire's states: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." 119

The vote to include these rights shows the continued importance of the right to arms to Americans. These votes also show modern usage of "the right to keep and bear arms" as encompassing the individual possession and carrying of arms for a variety of purposes, not just militia service.

**New Mexico:** The 1912 New Mexico Constitution guaranteed: "The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons." 120 In 1971, the people voted to rephrase the guarantee, to make explicit that the protection encompassed recreational as well as defensive purposes. 121 The change reads: "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." 122 In 1986, New Mexico did what Alaska would do in 1994, constitutionally forbid local regulation of firearms, adding "[N]o municipality or county shall regulate, in any way, an incident of the right to keep and bear arms." 123 In most states, "preemption" laws against local gun control are accomplished by statute, not by constitutional mandate. Even before the 1986 amendment, however, overly restrictive local gun laws were forbidden by the New Mexico constitution. 124

The constitutional right to arms provisions New Mexico, New

---


120 N.M. Const. of 1912, art. II, § 6.

121 N.M. Const. art. II, § 6

122 Id.

123 Id.

124 City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. Ct.App. 1971) (declaring void a gun carrying ordinance making it unlawful for any person to carry a deadly weapon, concealed or otherwise, within the corporation limits of the municipality).
Hampshire, Nebraska, Nevada, and Montana were adopted as early as 1889 and as late as 1988, but each constitution uses "right to keep and bear arms" to refer unmistakably to an individual right to arms. The usage reflects the shared understanding of the vast majority of the American people that the same phrase in the Second Amendment likewise guarantees a right to every responsible citizen. The popular votes in favor of creating and strengthening these provisions attest to the perceived contemporary importance of the right to keep and bear arms.

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." This 1851 language replaced an 1802 provision: "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 shall not be kept up, and that the military shall be kept under strict subordination to the civil power." The 1851 phrase "for their defense and security" apparently served as a model for New Mexico's 1912 "security and defense" language. The 1851 Ohio language was less explicit in protecting personal defense than was the 1802 Ohio language "for the defence of themselves and the State." Even so, Ohio courts have always construed their constitution to protect an individual right of Ohio citizens to own and carry guns for lawful purposes. The fact that Ohio--like Oregon, Pennsylvania, South Carolina, Texas, Vermont, and Virginia--combines an arms right with anti-standing army language, does not prevent the arms right from being interpreted as applying to all citizens, not just the militia.

Oklahoma: Oklahoma copied and modified Colorado's provision "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." Although half the sentence is about controlling the military,
Oregon courts have always construed the state constitution to protect the bearing of arms, including those suitable for militia purposes, as well as those unsuitable for the militia but useful for personal defense, such as blackjacks and knives.\textsuperscript{132}

\textbf{Rhode Island:} Although Rhode Island became independent in 1776, no state constitution was created until 1842.\textsuperscript{133} The constitution was created after an unsuccessful attempted revolution, known as The Dorr War, against Rhode Island’s highly aristocratic and undemocratic government.\textsuperscript{134} Although the drafters of the Rhode Island Constitution writers had just suppressed what they considered an illegitimate armed insurrection, the popular appeal of the right to bear arms was apparently so strong that the right was included in the constitution: “The right of the people to keep and bear arms shall not be infringed.”\textsuperscript{135}

\textbf{South Dakota:} South Dakota’s 1889 Constitution reflects strong popular support for gun rights, as the constitution omits the exceptions for concealed carrying of arms and for large assemblies of armed men which were common in other state constitutions from the period: “The right of the citizens to bear arms in defense of themselves and the state shall not be denied.”\textsuperscript{136}

\textbf{Tennessee:} The original 1796 constitution provided: “That the freemen of this State have a right to keep and bear arms for their common defence.”\textsuperscript{137} During Reconstruction, the clause was re-written: “That the citizens of this State have a right to keep and to 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.”\textsuperscript{138} Tennessee’s Constitution mentions “common defence” and does not specifically state any other purposes for the arms right. The Tennessee Supreme Court in the 1840 \textit{Aymette} case interpreted the Tennessee guarantee, and suggested that the Second Amendment was intended “[i]n the same view.”\textsuperscript{139} The Court held that bearing arms was only for militia purposes, and that keeping arms was only for collective resistance to tyranny, not for “private” defense.\textsuperscript{140} But even in \textit{Aymette}, the right to own firearms was not restricted solely to people who

\textsuperscript{132} Barnett v. State, 695 P.2d 991 (Or. Ct. App. 1985) (holding a prohibition on black jacks was unconstitutional); State v. Delgado, 692 P.2d 610 (Or. 1984) (holding a prohibition on switchblade knives was unconstitutional); State v. Blocker, 630 P.2d 824 (Or. 1981) (holding that possession of a billy club in public was protected by constitutional right to bear arms); State v. Kessler, 614 P.2d 94 (Or. 1980) (possessing a billy club in own home is protected by right to bear arms provision of Oregon Constitution).

\textsuperscript{133} See Luther v. Borden, 48 U.S. 1, 4 (1849).

\textsuperscript{134} See generally \textit{id}.

\textsuperscript{135} R.I. CONST. art. I, § 22.

\textsuperscript{136} S.D. CONST. art. VI, § 24.

\textsuperscript{137} TENN. CONST. of 1796, art. XI, § 26. In 1836, “freemen” was changed to “free white citizens,” thereby preventing the assertion of the right to arms by free blacks. The North Carolina Supreme Court was forced to confront this issue in 1843. \textit{See} State v. Huntley, 25 N.C. 418 (1843).

\textsuperscript{138} TENN. CONST. art. I, § 26.

\textsuperscript{139} Aymette v. State, 21 Tenn. (2 Hum.) 154, 157 (1840).

\textsuperscript{140} See \textit{id}. at 158.
might be militiamen; rather the right belonged to all citizens: "The citizens have the unqualified right to keep the weapon. But the right to bear arms is not of that unqualified character." Thus, even with the most restrictive reading possible of the scope of "bear arms" and the purpose of the right to arms, all (law-abiding) citizens retain a right to keep arms. In 1866, a gun confiscation law was declared unconstitutional under the Tennessee guarantee.

In Andrews v. State, the court expanded upon Aymette. The court began by opining that the Tennessee Constitution and the Second Amendment, while not identically worded, had the same meaning. The Tennessee court acknowledged that a militia purpose underlay the Tennessee Constitution and the Second Amendment, but this purpose was consistent with the right of ordinary citizens to use ordinary firearms for non-militia purposes.

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

But farther than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace...

What, then, is he protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen... [W]e would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms...

Like some scholars of today, the Tennessee Attorney General recognized that the Tennessee Constitution and the Second Amendment were originally more concerned with the balance of power in a free society than with individual protection against common criminals. Accordingly, the Attorney General argued that right to arms was a "political right." In the legal discourse of 1870s, a "political right" could be restricted by the political branch, the legislature,

141 Id. at 160.
142 See Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866).
143 50 Tenn. (3 Heisk.) 165 (1871).
144 Id. at 177.
145 I.e., as someone who may be called upon to participate in the common defense.
146 50 Tenn. (3 Heisk.) at 178-79.
147 Id. at 162.
whereas a "civil right" was inviolate. The Tennessee court wrote that the Attorney General:

fails to distinguish between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to keep them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.148

Accordingly, even when "bear arms" is read in its narrowest sense, as the Tennessee courts did, there is no parallel constrictive reading of the right to "keep" arms. The latter right is undeniably an individual civil right.149

Texas: “Every citizen shall have the right to keep and bear arms in the lawful defense 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.”150 Like many other states, Texas allows strict controls on concealed carrying, but not denial of the right to bear arms itself. An early case decided under the Texas guarantee, Jennings v. State, struck down a statute requiring forfeiture of pistol after misdemeanor conviction.151

Utah: The 1896 Utah Constitution stated: “The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law.”152 In 1984, the people of Utah adopted a new provision,

148 Id. at 182 (emphasis in original).
149 For post-Andrews jurisprudence, see, e.g., Glasscock v. City of Chattanooga, 11 S.W.2d 678 (Tenn. 1928) (holding an ordinance unconstitutional that made carrying a pistol a misdemeanor on the basis it violated the citizens’ right to keep and bear arms); State v. Foutch, 34 S.W. 1, 6 (Tenn. 1896) (holding the prosecution of a man who shot a home invader was unconstitutional, the court said, “Under our constitution every citizen of the State has the right to keep and bear arms for his proper defense and the Legislature only has power by law to regulate the wearing of arms to prevent crime”).
150 Tex. Const. art. I, § 23. Earlier provisions of the right provided: “Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power.” Tex. Const. of 1836, Declaration of Rights, cl. 14. “Every citizen shall have the right to keep and bear arms in lawful defence of himself or the State.” Tex. Const. of 1845, art. I, § 13. For an interpretation, see Cockrum v. State, 24 Tex. 394 (1859) (interpreting this provision as an individual right in a case upholding additional punishment for use of a knife in a homicide). “Every person shall have the right to keep and bear arms in the lawful defence of himself or the State, under such regulations as the legislature may prescribe.” Tex. Const. of 1868, art. I, § 13. For an interpretation, see English v. State, 35 Tex. 473 (1872) (interpreting this provision as an individual right, but not as encompassing dirks and bowie knives).
151 5 Tex. App. 298 (1878).
152 Utah Const. of 1896, art. 1, § 6.
strengthening the right. "The people" was replaced by "The individual right of the people," apparently to forestall the kind of "collective rights" misreading which, in 1984, was often applied to the Second Amendment. The purposes of the right were broadened to all "other lawful purposes." And the legislature was no longer allowed to regulate "the exercise" of the right, but only to define "the lawful use of arms."154

Virginia: Virginia's 1776 constitution extolled the militia and denounced standing armies. "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; 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."156 The militia part of this provision contributed language which, in more concise form, became the first part of the Second Amendment.

In 1971, the people of Virginia sought explicit protection of their individual right to arms, and so a clause was added after "safe defense of a free state."157 The clause read: "therefore, the right to keep and bear arms shall not be infringed."158

Some scholars read the Second Amendment as if it contains only the first clause, concerning the militia. Yet this misreading ignores the fact that when Virginians wanted to add an explicit individual right to their state constitution, they added the main clause of the Second Amendment.

West Virginia and Wisconsin: The West Virginia provision, adopted in 1986, states: "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."159 Wisconsin's provision, adopted in 1998, states: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."160

The voters of Wisconsin adopted a guarantee by a vote of 1,161,942 to 412,508.161 The voters of West Virginia adopted their guarantee by an overwhelming margin as well.162 West Virginia is a mostly rural state where "traditional values" are especially popular; Wisconsin is the home of the

155 VA. CONST. of 1776.
156 Id. at art. I, § 13.
158 Id.
160 WIS. CONST. art. I, § 25.
162 See David Lamb, Anti-Drug Mood in Oregon; Most Abortion Curbs Fail; Five States Pass Lotteries, L.A. TIMES, Nov. 6, 1986 at pt.1, p. 20.
American progressive movement. In both states, the right to arms was adopted by a huge majority.

The voters of West Virginia and Wisconsin, like the voters of Nebraska, Maine, and Utah, have adopted or strengthened their state right to arms in modern times, with an awareness of modern conditions, such as urbanization, powerful modern firearms, and crime. These votes suggest that the American people do not regard the right to arms as an obsolete relic of frontier days, or as a quaint expression of early republic worries about standing armies. Thus, these votes contradict the notion of some academics that the Second Amendment should be regarded as obsolete or irrelevant.\(^{163}\)

**Wyoming**: “The right of citizens to bear arms in defense of themselves and of the state shall not be denied.”\(^{164}\)

Once more, “bear arms” is something that citizens can do “in defence of themselves,” and not only in defense of “the state.”

V. TWO EXCEPTIONS

We have examined forty-two states where the right to keep and bear arms as expressed in the state constitutions have been consistently interpreted as protecting an individual right. In two states, however, the interpretation has shifted.

**Kansas**: The Kansas Bill of Rights was adopted in 1859, and guaranteed: “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.”\(^{165}\)

The Kansas approach to interpreting the Second Amendment was created in dicta from a 1905 Kansas Supreme Court decision, *City of Salina v. Blaksley*, interpreting the state constitution.\(^{166}\) The case arose out of enforcement of an ordinance against carrying concealed weapons.\(^{167}\) The government, on appeal, simply urged that the ordinance was a reasonable regulation of the right to arms, but the Kansas Supreme Court went much further, and declared that the right to arms protected the state government, not the individual citizen,\(^{168}\) thereby

\(^{163}\) See generally Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 Chi.-Kent L. Rev. 291, 338 (2000); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991) (arguing that modern society does not share the founders’ distrust of standing armies, thus what the Second Amendment accomplished in 1789 has now become irrelevant).

\(^{164}\) Wyo. Const. art. 1, § 24.

\(^{165}\) KAN. Const. of 1859, Bill of Rights, § 4.

\(^{166}\) City of Salina v. Blaksley, 83 P. 619 (Kan. 1905).

\(^{167}\) Id.

\(^{168}\) See generally id.
adopting a "collective rights" theory, meaning the state was not bound to respect it.

Except for the concurring opinion in the 1840 Arkansas case, which was ignored by future Arkansas courts, there was no legal precedent for the Kansas court's theory. All precedent had treated the Second Amendment and its state analogues as individual rights. Thus, the Kansas Supreme Court, prefiguring the scholarship of Michael Bellesiles, simply offered citations to precedents which, when actually examined, were contrary to the court's theory. All of the precedents cited by the Kansas Supreme Court upheld particular gun controls, while treating the right to arms as an individual right.

In 1979, Kansas's courts abandoned the 1905 interpretation. Kansas citizens -- regardless of whether they are in the Kansas National Guard -- may raise claims under the Kansas Bill of Rights guarantee.

Massachusetts: According to the Massachusetts Constitution adopted in 1780, "The people have a right to keep and to bear arms for the common defence. And as, in time 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." In the nineteenth century, Massachusetts's courts interpreted this clause as guaranteeing an individual right to arms. But in 1976, the Massachusetts high court ruled that the Massachusetts arms rights provision is merely an affirmation of the state government's militia powers.

Today, Massachusetts is the only state where the state constitutional right to arms has been held not to extend to individuals who are not in a militia.

Textually, the Massachusetts Constitution offers strong language for the anti-individual interpretation; the right is only "for the common defence" and the right is in the same sentence as restrictions on standing armies, whereas the Second Amendment contains no such language. Also, the 1976 Massachusetts court could rely on the 1905 Kansas case, since the Kansas Supreme Court did not abandon that case until 1979.

Current interpretation of the right to arms in Massachusetts is the exception that proves the rule. Out of forty-four states with a right to arms, Massachusetts is the only one that does not protect individual rights, and that

---

169 State v. Buzzard, 4 Ark. 18 (1840).
170 Kopel, supra note 86, at 1510-12.
172 Kopel, supra note 85, at 1510-12.
174 MASS. CONST. pt. 1, art. 17.
175 Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313 (1825) (right to keep arms is an individual right); Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896) (ordinary individual may invoke arms right, but right does not include mass armed parades in public).
177 This restriction was rejected in U.S. Senate debate on the proposed federal Second Amendment. See 1 ANNALS OF CONG. 460 (Joseph Giles ed., 1789).
policy was not created until nearly 200 years after the state constitution was adopted, and was contrary to Massachusetts precedent.

VI. CONCLUSION

We have examined the text of the forty-four state constitutions which guarantee a right to arms. In forty-two of those states, we have found an unbroken interpretive mode: language identical to or similar to the federal Second Amendment that has been consistently interpreted as guaranteeing an individual right. This individual rights interpretation has prevailed even when the state constitution text denounces standing armies or mentions only "the common defense." Even then, the state arms guarantees have been held to protect individual rights. A fortiori, the federal Second Amendment -- which has no "standing army" language, and whose drafters specifically rejected the inclusion of a "for the common defence" clause -- also guarantees an individual right.

In contrast to the standard of the forty-two states, we did find two states with an exception. In 1976, Massachusetts rejected state precedent, and ruled that the state's arms right was not an individual one.178 From 1905 to 1979, Kansas had a similar interpretation.179

Clever attorneys can sometimes torture constitutional language to mean almost anything. But from 1776 until the present, we have seen that the American people, through the language they have created and revised for their state constitutions, have continued to use arms rights language in a remarkably consistent way. For well over two centuries, language similar or identical to the Second Amendment has been used to guarantee the right of law-abiding individuals, not just militiamen, to personally own and carry firearms. It is simply perverse to suggest that words which from century to century and from state to state have had such a widely-shared meaning in state constitutions, should have an entirely contrary meaning when the same words appear in the federal constitution.

DEFINING THE DUTY OF GUN MANUFACTURERS IN *HAMILTON v. BERETTA U.S.A. CORP.*

*by Katrina R. Atkins*

I. INTRODUCTION

Sirens blare as eighteen-year-old Emily lies dying of a gunshot wound to the head. Emily's mother holds her and looks out into the city wondering how a bullet made its way into the town and into the body of her child. Months later, Robert, a seventeen-year-old, is convicted of murder. Testimony indicated that the gun used to commit the murder was purchased from a trade show by Robert's twenty-one-year-old brother, a convicted felon.

Emily is only one of twelve children who will die today from a gunshot wound.1 Her mother is only one of twelve mothers who will mourn today.2 The grief of a mother becomes the grief of society when twelve more children are lost the following day in an indefinite continuum of gun violence.3

In order to compensate victims4 and costs to municipalities,5 as well as attempt to effect a change in the policies of those who supply guns to children and criminals,6 dozens of suits have been launched at manufacturers of firearms.7 Although the intentional actors are subject to liability for murder, the entities that give those actors their lethal capacity have been largely free from liability.8

This article explores the relationship between gun manufacturers and the victims of gun shootings, specifically whether gun manufacturers owe a duty of care to third parties who are injured by their products. Section II of this article articulates the framework for defining duty by examining the historical and contemporary theories of duty. Section III describes the facts and procedural history of *Hamilton v. Beretta U.S.A. Corp.*9 Section IV examines the conflicting

---

*Katrina R. Atkins is a Juris Doctor Candidate for 2003 at Salmon P. Chase College of Law, Northern Kentucky University; B.S.W. degree from University of Cincinnati, School of Social Work.


2 See generally id.

3 See id.


5 *Id.* at 101-02.

6 *Id.* at 81.

7 *Id.*


opinions of the district court\textsuperscript{10} and the Court of Appeals of New York.\textsuperscript{11} Section IV analyzes those opinions against well-established principles of the law of duty as well as the public policy arguments supporting duty. Section V proposes a framework for examining the duty of gun manufacturers to market their products in a socially and legally acceptable way.

\section*{II. BACKGROUND}

\subsection*{A. The Flow of Firearms into the Criminal Market}

The major theory underlying plaintiffs' claims against gun manufacturers is that the manufacturers are aware of the flow of guns from legal to criminal markets and that manufacturers are negligent in oversupplying markets with the knowledge that firearms flow from those markets to criminals.\textsuperscript{12} That theory is supported by evidence that firearms flow from states with weaker gun control laws to states with stronger gun control laws.\textsuperscript{13}

For example, guns flow from southern states to northern states.\textsuperscript{14} Essentially, the claim is that gun manufacturers knowingly oversupply the southern markets and do not act to protect against the flow of those firearms to criminals who cannot otherwise obtain firearms in their northern states of residence.\textsuperscript{15}

Criminals subsequently obtain firearms in one of several ways.\textsuperscript{16} First, one who is unable to legally purchase handguns because of age or felony conviction restrictions can obtain them through a straw purchaser.\textsuperscript{17} A straw purchaser is a person who legally purchases a firearm for another who is not legally able to do so.\textsuperscript{18}

Second, a person not entitled to own a firearm may obtain one through a trade show.\textsuperscript{19} Non-federal firearms licensees may sell firearms at trade shows and are not required to perform background checks.\textsuperscript{20} Over 4,000 of these trade shows are held annually,\textsuperscript{21} arguably affording criminals ample opportunity to

\textsuperscript{12} See Hamilton, 62 F. Supp. 2d at 826.
\textsuperscript{14} Hamilton, 62 F. Supp. 2d at 830-31.
\textsuperscript{15} Id. at 830.
\textsuperscript{16} Id. at 826.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
purchase firearms. Plaintiffs claim that gun manufacturers can reduce the risk of victim injury and death by refusing to sell to these dealers. 22

Between 1996 and 1998, more than half of all firearms used by juveniles to commit crimes were traceable to federal firearms licensees (FFLs). 23 During that same period of time, almost half of all firearms used in crimes were traceable to 137 of the 21,675 FFLs. 24 Yet, only 23 of the 137 dealers were closed as of April 1998. 25 Plaintiffs argue that gun manufacturers are in the best position to reverse that trend and that a duty to do so should be imposed. 26

B. An Examination of Duty 27

Suits against gun manufacturers have been pursued under four different theories of tort liability: negligence, 28 traditional strict liability, 29 strict products liability, 30 and nuisance. 31 Negligence claims have been largely unsuccessful because courts have refused to charge gun manufacturers with a duty to third-party victims. 32

C. Duty Defined 33

Whether a duty exists is a question of law to be determined by the court. 34 Thus, the court is both the gatekeeper of civil negligence actions and the prescriber of legally acceptable conduct.

23 See id. at 826.
25 Id. at 695.
26 Hamilton, 62 F. Supp. 2d at 826.
27 The purpose of this note is to examine the social and legal duties with which gun manufacturers are charged. Thus, the other causes of action will not be discussed further.
29 See, e.g., Richman v. Charter Arms Corp., 571 F. Supp. 192 (E.D. La. 1983) (holding that genuine issues of material fact precluded summary judgment as to whether handgun manufacturer's marketing practices were ultrahazardous).
31 See, e.g., Chicago v. Beretta U.S.A. Corp., No. 98-CH-15596 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998) (arguing that 23 gun manufacturers, 12 local gun dealers, and numerous middlemen gun distributors created a public nuisance by facilitating trafficking of large numbers of firearms into Chicago, where handguns have been illegal since 1982).
33 Duty is examined in this section under general and widely accepted principals. Jurisdictionally non-specific analysis is warranted since the initiation of suits against gun manufacturers is nation wide.
1. *Reasonableness*

A general, and widely accepted\(^{35}\) definition of duty is:

[W]henever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances he would cause danger of injury to the person or property of the other a duty arises to use ordinary care and skill to avoid such danger.\(^{36}\)

This is commonly known as the reasonableness standard, that one must conform his conduct to the standard of a reasonably prudent person in similar circumstances.\(^{37}\) This standard is rarely used as the sole factor for determining whether a duty exists.\(^{38}\) Whether conduct, or an omission, is reasonable is usually determined by looking at other tests and categories of conduct.\(^{39}\) Affirmative duties are one such category.\(^{40}\)

2. *Affirmative Duties*

A duty is usually found when the act complained of is one of misfeasance.\(^{41}\) In that case, the injury results from affirmative acts of the defendant that have fallen below the reasonable standard of care.\(^{42}\) However, in the case of gun manufacturers, the injury arises from the defendant’s nonfeasance, or risk-creating omissions.\(^{43}\) Courts are reluctant to impose affirmative duties on defendants\(^{44}\) for two reasons. First, broadening liability in this manner may result in the inability of defendants to affect socially useful functions.\(^{45}\) Second, the courts are attentive to the risk of finding liability when the defendant could not have reasonably protected against injury to the plaintiff.\(^{46}\) Thus, imposition of an affirmative duty requires consideration of factors that tend to mitigate against those concerns.\(^{47}\)

The duty to control the acts of third parties is an affirmative duty that requires a special relationship to the third party and the actual or constructive

---

\(^{35}\) *See John L. Diamond et al., Understanding Torts* 47 (1996).

\(^{36}\) *Id.* at 112 (quoting Heaven v. Prender, 11 Q.B. 503, 509 (1883)).

\(^{37}\) *Id.* at 47.

\(^{38}\) *Id.* at 47-49.

\(^{39}\) *Id.* at 112.

\(^{40}\) *Id.* at 113.

\(^{41}\) *See* DIAMOND, supra note 35, at 113.

\(^{42}\) *Id.*

\(^{43}\) *Id.* at 114.

\(^{44}\) *Id.* at 113.


\(^{46}\) *Id.* at 820.

\(^{47}\) *Id.*
knowledge of the need for control of the third party.\textsuperscript{48} The doctrine was first widely recognized in \textit{Tarasoff v. Regents of University of California}\textsuperscript{49}. In \textit{Tarasoff}, the court held that the defendant psychotherapist was liable for failing to warn the deceased victims when he should have known his patient presented a serious risk to them.\textsuperscript{50} There, the jury found that the defendant was aware of the patient’s desires and had enough facts to be aware of the seriousness of the patient’s intentions.\textsuperscript{51} That knowledge created a special relationship between the parties giving rise to a duty.\textsuperscript{52}

That doctrine has been extended beyond liability of therapists to suppliers of alcoholic beverages.\textsuperscript{53} Such cases involve the supplier’s liability to persons injured by drunken drivers.\textsuperscript{54} Other cases include imposing a duty on property owners to protect tenants from criminal acts of third parties.\textsuperscript{55} In all such cases, a special relationship is recognized between the defendant and the actor that places the defendant in the best position (and sometimes only position), to minimize the risk of harm to the plaintiff.\textsuperscript{56}

In the case of gun manufacturers, it is argued that defendants have sufficient control over suppliers and the market in general, that they could take reasonable steps to reduce the risk of injury and death to victims.\textsuperscript{57}

3. \textit{Duty Defined by Policy}

The existence of a duty is guided by public and political policies such as foreseeability of harm to the plaintiff; reprehensibility of the defendant’s conduct; the burden to the defendant of avoiding the risk; the consequences to the community if the defendant effects measures to protect against the conduct; the availability and cost of insuring against the risk; and the connection between the defendant’s conduct and the injury suffered.\textsuperscript{58}

A significant policy influencing whether gun manufacturers have a duty of care involves the social costs and benefits of gun use.\textsuperscript{59} Proponents of gun control laws cite statistics that emphasize deaths and injuries relating to gun use\textsuperscript{60} as well as the economic cost of treating those injuries.\textsuperscript{61} Anti-gun control advocates cite statistical information indicating that guns are used more often in

\textsuperscript{48} See DIAMOND, \textit{supra} note 35, at 121.
\textsuperscript{49} 551 P.2d 334 (Cal. 1976).
\textsuperscript{50} See id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{54} Id.
\textsuperscript{57} Id. at 821.
\textsuperscript{58} Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).
\textsuperscript{59} See Hamilton, 62 F. Supp. 2d at 819.
\textsuperscript{61} Id.
self-defense than in the commission of crimes. They also cite economic benefits stemming from gun sale revenues, the use of guns in sporting events, and the belief that private gun ownership deters crime.

There is also a significant debate over whether the criminal acts of third parties are a foreseeable consequence of the defendant's acts or omissions. Plaintiffs point to crime rates and the evidence of illicit trafficking to prove injury and death are foreseeable results of negligent marketing and distribution. However, defendants contend that the intervening acts of third parties are purely speculative.

Other policy implications include doubt as to whether liability would in fact reduce the risk of injury by criminal use of guns; the asserted lack of culpability of gun manufacturers where products sold are completely legal; and a statutory scheme that has rejected gun manufacturer liability.

In sum, whether a defendant owes a duty of care is not determined solely by the magnitude of his actions. That duty is defined by social needs and views.

III. HAMILTON v. BERETTA U.S.A. CORP.

A. The Facts

Stephen Fox, a sixteen-year-old New York resident, was permanently disabled by a gunshot wound to his head. The shooter was also sixteen-years-old, and purchased the gun from a street dealer who claimed it came from the south. The gun was never found.

Njuzi Ray, a seventeen-year-old resident of New York, was shot and killed over a disagreement involving a mutual girlfriend. The gun was never found but was determined to be a nine-millimeter due to the type of bullet extracted from Njuzi’s body during autopsy.

---

63 Id.
64 Id.
65 Id. at 449.
68 See City of Philadelphia, 126 F. Supp. 2d at 900.
69 Id. at 902.
71 Burnett, supra note 62, at 464.
72 750 N.E.2d 1055 (N.Y. 2001). This note analyzes the conflicting opinions of the federal district court and the Court of Appeals of New York.
74 Id.
75 Id. at 809.
76 Id.
77 Id.
78 Id.
Robert Robles, a sixteen-year-old, was shot and killed in New York after a disagreement about a baseball game. A nine-millimeter Cobray pistol was recovered from the scene.

Leroy Sabb, seventeen, was shot and killed following a chase by undetermined assailants. Nine-millimeter casings and bullets were found at the scene, but no gun was recovered.

Damon Slade, eighteen, was gunned down in an apartment building elevator along with another individual. Although the gun was not found, the defendant in the criminal trial testified that it was a nine-millimeter pistol.

Kei Sunada, twenty-two, died from a gunshot wound fired by another in the course of a robbery. Bullets and casings from a .380 caliber firearm were found at the scene, but no gun was recovered.

Marvin Zaretzky, forty-nine, was shot and killed in a convenience store parking lot during a robbery by his assailants. The gun was not found but two .380 caliber casings were recovered. In each of these seven shootings, the guns used were determined to have been obtained illegally.

The plaintiffs sued fifteen gun manufacturers in the United States District Court for the Eastern District of New York on behalf of the estates of their deceased family members killed by the illegally obtained weapons. Originally, the plaintiffs asserted seven causes of action: the first four were brought under negligent marketing theories, the fifth under strict products liability, the sixth under strict liability for conducting an ultrahazardous activity, and the seventh under fraud. Since the firearms in all but one of the shootings could not be traced to a particular defendant, the plaintiffs asserted their claims under collective liability theories. The district court granted the defendants' motion to dismiss the ultrahazardous activity, products liability and fraud claims, but denied the motion as to the negligent marketing claims.

---

80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
85 See Hamilton, 62 F. Supp. 2d at 809.
86 Id.
87 Id. at 810.
88 Id.
90 See Hamilton, 62 F. Supp. 2d at 810. The plaintiffs originally asserted the claims against 49 gun manufacturers. Id. All but the remaining 15 were transferred or dismissed for lack of jurisdiction. Id.
91 Id. at 808. Gail Fox sued on behalf of her son Steven, the only surviving victim. Id.
The plaintiffs pursued the negligent marketing claims against the fifteen gun manufacturers under a market share theory of collective liability. The plaintiffs asserted that the defendant gun manufacturers had a legal duty to exercise reasonable care in the marketing and distribution of their products. Specifically, the plaintiffs alleged that the gun manufacturers breached this duty by having knowledge that their marketing and distribution practices caused guns to be more available to criminals and minors.

The jury issued verdicts against nine of the gun manufacturers and in favor of three plaintiffs; Sunada, Fox and Trott. The district court approved the verdict examined the issues, then issued an opinion requesting that the United States Court of Appeals for the Second Circuit certify two questions to the Court of Appeals of New York.

Although the district court found an abundance of New York law supporting the verdict, it found the legal questions to be so novel that the state court should set the standard for this type of case. The court recommended certification of two questions:

I. Whether the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture?

II. Whether liability may be apportioned on a market share basis, and if so, how?

The Second Circuit Court of Appeals certified the questions to the Court of Appeals of New York. New York’s high court accepted the certification and found that the defendant gun manufacturers owed no duty to use reasonable care in marketing and distributing handguns.
B. The Courts' Analyses

1. The District Court: Gun Manufacturers Owe a Duty of Care to Market Their Products Responsibly

In its examination of duty, the United States District Court for the Eastern District of New York outlined the general reasonableness standard, then opined that there is a general duty to avoid negligence. However, the court stated that judicial scrutiny is warranted when the negligence of the defendant involves criminal acts of third parties. Finally, the court prefaced its analysis by setting forth the factors, in addition to foreseeability, to be balanced when determining if a duty exists. Those factors are: “the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.” The court examined duty under two theories: the duty to protect against the acts of third parties and a general duty of manufacturers.

After examining New York law concerning the imposition of liability for acts of third parties, the court noted the state’s reluctance to do so. The court cited two reasons. First, a scheme of limitless liability and expansive approaches to duty could inhibit the ability of defendants to serve useful purposes to society. Second, imposing liability on defendants for the acts of others may result in punishment where the party could not have prevented the injury.

However, the court discussed three circumstances when New York law does impose a duty. First, a duty can arise when a special relationship arises out of the defendant’s special ability to protect the plaintiff against the injury. Second, a duty can arise where the defendant is in a special position to control the conduct, here, of the distributors and retailers. Third, a duty can arise from enhancement of the risk.

The court found that New York law recognizes that manufacturers are in a special protective relationship with parties injured by their products because
manufacturers are in the best position to detect and protect against the risks that their products pose. The court also recognized that New York courts had extended this duty to bystanders injured by products. Finding that handgun manufacturers are in a special position to protect plaintiffs from the risks associated with their products, the court cited the complete inability of the plaintiffs to protect themselves from the defendants' products and the ways in which the defendant gun manufacturers could reduce the risk of injury to the plaintiffs. Those include limiting sales at unregulated gun shows, selling only to stocking retailers, and refusing to supply guns to FFLs who have a high pattern of trace requests.

Second, the court found that New York law recognizes a duty on manufacturers when they are in a position to control the actions of distributors that affect the risks to plaintiffs. Finding a duty, the court held that gun manufacturers could prevent risks to plaintiffs by exercising control over distributors and restricting sales. The court cited statistical evidence and expert testimony presented at trial that tended to show gun manufacturer's abilities to reduce risks to plaintiffs by exercising control over FFLs who have a high rate of crime gun sales.

Third, the court found that a duty could be placed on gun manufacturers by the nature of the risk enhancement to the plaintiffs as a result of the defendant's affirmative marketing acts. Again, the court cited the high number of crime guns sold by FFLs and the correlating increase in gun crimes.

In sum, the court did find that gun manufacturers owe a duty of care to persons injured by their products. That duty could arise from a special relationship whereby the manufacturers are in the best position to protect the plaintiffs from harm caused by their products, where gun manufacturers have the ability to control conduct of distributors which increases the risks to plaintiffs, and where the marketing techniques of gun manufacturers are affirmative acts that increase the risk of injury to plaintiffs.

---

128 Id. at 821.  
129 Id. (citing MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916)).  
131 Id. at 826.  
132 Id.  
133 Id. at 826.  
134 Id. at 821.  
135 Id. at 822.  
136 See Hamilton, 62 F. Supp. 2d at 826. Evidence included a Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms report that stated 51% of guns used in crimes committed by juveniles between 1996 and 1998 were acquired from FFLs by intermediaries acting on their behalf. Id.  
137 Id. at 822.  
138 Id. at 825-26.  
139 Id. at 827.  
140 Id. at 821.  
141 Id.  
Next, the court considered the general duty of manufacturers. It found that New York imposes a broad duty of care on manufacturers that requires them to “design, produce and market non-defective products which are reasonably safe for their foreseeable use and are accompanied by warnings commensurate with the degree of reasonably foreseeable risk they present.” Although the court conceded that products liability could not attach to gun manufacturers for lack of a defect, the court cited the Restatement for the theory that negligence remains a valid cause of action for injuries arising from products manufactured by defendants.

Finally, the court examined the policy implications, enumerated above, of imposing a duty on gun manufacturers. The court determined, as the jury had previously found, that even if gun manufacturers could not prevent criminal misuses, they could effectively reduce the risk by ensuring that “the first sale was by a responsible merchant to a responsible buyer.” The court balanced finding with the potential infiniteness of liability and the social utility of firearms. Imposing a duty under negligence would allow gun manufacturers to limit their liability through acting responsibly. The court also held guns to be socially useful but not enough so as to override the manufacturers’ role in the injuries of the plaintiffs.

In considering the unfairness of opening gun manufacturers up to large-scale liability, the court stated: “Where unavoidably hazardous products like handguns are distributed, it is not unfair for the law to minimize unreasonable risk of harm through the imposition of a duty on manufacturers to market and distribute responsibly.” Supporting this finding, the court cited the expansive nature of duty to third parties in the state of New York and the fact that while handgun manufacturers are “setting the stage for [handgun] criminal misuse,” plaintiffs who benefit in no way from the practices of the defendants also have no way to control being injured by them.

143 Id.
144 Id. (citing Liriano v. Hobart Corp., 700 N.E.2d 303, 305 (N.Y. 1998)).
145 Id. at 823 (citing RESTATEMENT (THIRD) OF TORTS § 2 (2000)). See also Bikowicz v. Sterling Drug, Inc., 161 A.D.2d 982 (N.Y. 1990) (discussing whether there is a duty to market drugs in a non-negligent manner).
147 Id. at 820.
148 Id. at 820-21.
149 As opposed to products liability where no measure of care could limit liability.
151 Id. at 821 (comparing guns to public housing).
152 Id. at 824.
153 Id. at 822. See also Blue Cross & Blue Shield of New Jersey, Inc. v. Phillip Morris, Inc., 36 F. Supp. 2d 560, 583 (E.D.N.Y. 1999) (“In place of the rigid formalism of the past, courts have increasingly turned to more flexible and policy oriented standards to circumscribe the limits of tort law. The result has been a liberalization of the law of standing and a substantial broadening of the classes of plaintiffs who are allowed to bring suit.”).
155 Id.
Also, in finding the imposition of a duty on gun manufacturers to be fair, the court examined theories of corrective justice and the unjust enrichment of gun manufacturers. Fairness, the court held, "mandates restoration of the balance [of gains to manufacturers and loss to victims] through the imposition of a duty to market and distribute handguns responsibly." The court also considered policy favoring placing controllable limits on liability. Controllable limits were evidenced by the jury's verdict, finding only fifteen of twenty-five manufacturers to have acted negligently. The court also cited the ability of gun manufacturers to market responsibly or spread the costs to consumers as controllable limits on liability.

Finally, the court considered the impact of imposing a duty on gun manufacturers to market their products responsibly. It found that imposing such a duty would be the "cheapest cost avoider," or the most efficient way of compensating victims and avoiding victims altogether.

Although the district court recommended certification of the duty question to the Court of Appeals of New York, it clearly found that imposing a duty on gun manufacturers to market and distribute handguns in a non-negligent manner was consistent with New York precedent and the policies factoring into the definition of duty.

2. The Court of Appeals of New York: Gun Manufacturers Owe No Duty

Contrary to the findings of the United States District Court for the Eastern District of New York, the New York Court of Appeals held that gun manufacturers owe no duty of reasonable care to persons injured by their products. The court first outlined general principles of duty and the same

---

154 Id.
155 Id. at 826 (citing Ernest J. Weinrib, Corrective Justice, 77 IOWA L. REV. 403, 409 (1992)). See also Kathryn R. Heidt, Corrective Justice From Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?, 47 WASH. & LEE L. REV. 347, 362 (1990). Heidt notes that:

When one receives gains as a result of the wrongful act of a third party, an act that also causes an innocent party a loss, the gains are arguably "unfair," because the gainer is getting more than its share. Even a mechanical application of corrective justice requires that such gains be used to compensate the victims.

Id.
157 Id.
158 Id.
159 Id.
160 Id.
161 Id.
162 Id.
163 Id. at 847 (requesting certification to the New York Court of Appeals because this is an issue of first impression and a state court should have the lead role in determining the law of that state).
166 See Hamilton, 62 F. Supp. 2d at 802.
167 See Hamilton, 750 N.E.2d at 1066.
policy considerations undertaken by the district court. Next, the court examined circumstances in which one may be held liable for the conduct of a third party.

The Court of Appeals of New York explained that the key in imposing a duty on an individual or entity to control the acts of third parties is whether the individual or entity is in the best position to protect against or prevent the risk of injury to the plaintiff. The court recognized such a relationship with regards to landlords and tenants, but explained that such a duty does not extend to society in general. Just as landlords do not owe a duty to passersby to prevent their premises from becoming a crime scene by locking their doors, gun manufacturers do not owe a duty to innocent bystanders to prevent criminals from using their products to commit crimes. The court justified such a holding by citing the large plaintiff-pool and the remoteness of the manufacturers from the injured parties. The finding of a duty would require a more tangible showing that the gun manufacturers were a "direct link in the causal chain" producing the plaintiff's injuries.

Next, the court held that the defendant gun manufacturers did not owe a duty of care arising from an ability to protect against misuse of their products by ensuring the first sale was to a responsible buyer or retailer. Finding that the plaintiffs did not provide any evidence tending to show the gun manufacturers alleged negligent marketing practices actually increased the risk of harm to their loved ones, the court held that mere foreseeability was not enough to impose a duty.

Next, the court found that no duty arose from the defendants' status as manufacturers. First, the court opined that imposition of such a duty would seriously restrict the lawful sale of guns and that the plaintiffs produced no evidence showing which manufacturers were heavily engaged in the unlawful sale of guns.

Second, the court held that imposition of a general duty of care on a manufacturer must rest on a conclusion that the costs of the defendants' conduct outweighs the social utility of the conduct. The court then disposed of the claim by stating that the class of plaintiffs would be indeterminate and liability may be imposed on an equally indeterminate number of defendants "whose

168 Id. at 1061.
169 Id.
170 Id. (emphasis added)
171 Id. at 1061 (citing Nalan v. Helmsley-Spear, Inc., 407 N.E.2d 451 (N.Y. 1980)).
172 Id. at 1061 (citing Waters v. New York City Hous. Auth., 505 N.E.2d 922, 924 (N.Y. 1987)).
173 See Hamilton, 750 N.E.2d at 1061.
174 Id. at 1061-62.
175 Id. at 1062.
176 Id.
177 Id.
178 Id. at 1063.
179 See Hamilton, 750 N.E.2d at 1063.
180 Id.
liability might have little relationship to the benefits of controlling illegal
guns. 181

Finally, the court examined the plaintiffs' claim that the gun
manufacturers owed a duty of care to market and distribute handguns in a non-
negligent manner, which arose out of the defendants' negligent entrustment of
their products to retailers and distributors. 182 The court held that while such a
duty can exist, it did not arise in this case because the plaintiffs failed to prove
that the defendant manufacturers had knowledge of the criminal misuse of their
products. 183 Since the plaintiffs did not prove which distributors were
contributing to the unlawful sale of handguns, the manufacturers could not have a
duty to prevent distribution to those distributors. 184 Additionally, the court
deprecated to extend a general duty on gun manufacturers where legislation was
already implemented to ensure buyer and seller responsibility. 185

In answering the certified question of whether gun manufacturers owed a
duty to market and distribute their products in a non-negligent manner, the court
held that they did not owe such a duty. 186

IV. ANALYSIS OF HAMILTON V. BERETTA U.S.A. CORP. 187

The decision of the United States District Court for the Eastern District
of New York, finding that gun manufacturers have a legal duty to market and
distribute handguns in a non-negligent manner, 188 was a correct examination of
the law. In contrast, the decision of the Court of Appeals of New York, finding
the opposite, 189 is seriously flawed. The shifting of the burden by the district
court onto the state court and the state court's subsequent cursory analysis seem
to be an attempt to avoid dealing with the issue of gun manufacturers' roles in
creating the lethal capabilities of criminal actors. Two major flaws of the state
court's analysis are examined below. They are 1) misuse of the findings of the
district court and 2) a misuse of the district court's findings in relation to policy.

A. Disposing of Duty on the Evidence

In disposing of duty, the Court of Appeals of New York cited the
limitless liability that would flow from the imposition of such a duty. 190 Creation
of a duty in cases of potentially infinite liability would require a stronger

181 Id.
182 Id. at 1064.
183 Id.
184 Id. at 1065.
185 Id.
186 Hamilton, 750 N.E.2d at 1066.
187 Id. at 1055. This note analyzes the conflicting opinions of the federal district court and the
Court of Appeals of New York.
189 Hamilton, 750 N.E.2d at 1055.
190 See Hamilton, 750 N.E.2d at 1062.
showing that the defendants could have prevented harm to the plaintiff by adhering to the proposed standard of care.\footnote{Id.} This holding is flawed for two reasons. First, the state court completely disregarded the findings of the district court. Rather than applying the findings of the district court to applicable New York law, the Court of Appeals of New York answered each theory by citing insufficiency of the evidence.\footnote{Id. at 1062-63.} Second, the state court disregarded the findings of the district court as they relate to policies factoring into imposition of a duty. Again, the court repeatedly cited insufficiency of the evidence.\footnote{Id. at 1063-66.} Each is discussed in turn.

The Court of Appeals of New York erred in citing insufficiency of the evidence with regard to the defendants' contributions to the criminal gun market and the resulting injury to innocent plaintiffs. The court found no "statistically significant relationship between particular classes of dealers and crime guns."\footnote{Id. at 1063 (emphasis omitted).} It also found that there was no evidence showing that the defendants had reason to know [their] distributors [were] engaging in substantial sales of guns into the criminal market.\footnote{Id. at 1064.} The court also found that the connection between the defendant manufacturers and the injured victims was too remote.\footnote{Id. at 1062.}

However, the United States District Court for the Eastern District of New York found that the defendants could have taken reasonable steps to reduce the risks to the plaintiffs.\footnote{See Hamilton v. Accu-tek, 62 F. Supp. 2d 802, 820 (E.D.N.Y. 1999).} It found that the gun manufacturers had an "ongoing close relationship with downstream distributors and retailers putting new guns into consumers' hands [which] provided them with appreciable control over the ultimate use of their products."\footnote{Id. at 829 (citing RESTATEMENT (SECOND) OF TORTS § 290 (1965)).} Additionally, the district court determined that since the defendants are imputed with the common knowledge of the community,\footnote{Id. at 830.} they were chargeable with the knowledge that their products moved in the illegal market.\footnote{Id. at 830.} It specifically found the evidence to support a finding that the defendants had actual awareness.\footnote{Id. at 830.} In fact, the court cited testimony that the majority of crime guns were purchased, not stolen.\footnote{Id. at 830.}

Rather than examining the findings of the district court—that heard all the testimony and reviewed all relevant evidence—and applying those findings to New York precedent, the Court of Appeals of New York dismissed the claims on insufficiency of the evidence, thereby usurping the jurisdiction of the district court.\footnote{Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1063 (N.Y. 2001).} That action was error in itself.\footnote{Id. at 830.} However, the debate over the
sufficiency of the evidence and the ultimate requirements in regard to evidence, were clouded by an incorrect examination of the policies surrounding the imposition of a duty.

B. Policies Governing the Imposition of a Duty on Gun Manufacturers

The Court of Appeals of New York cited several policy reasons for failing to find a duty on the part of gun manufacturers to market their products in a way that does not increase the risk of their criminal misuse and the resulting injury to innocent plaintiffs.205 First, the court cited the limitless liability of the manufacturers and the inability of the court to set controllable limits on claims.206 Second, the court found that the cost-social utility analysis weighed against the imposition of a duty.207 Third, the court claimed that the federal legislative scheme already ensures buyer and seller responsibility.208

The court's first contention, that a duty would be inappropriate due to the limitless liability that would arise,209 is unsound. The district court found that gun manufacturers can limit their own liability through acting responsibly, unlike a defendant in a strict products liability action.210 In fact, the court noted that the jury held only fifteen out of twenty-five defendants liable.211 Nearly all of the acquitted defendants simply had express restrictions against the sale of firearms to FFLs without a walk-in retail store.212 The defendant gun manufacturers should not be free from duty simply because their actions affect so many. Such a notion is contrary to the purposes of tort law to deter harmful behavior and compensate victims.213

Second, the Court of Appeals of New York concluded that the costs of imposing a duty on gun manufacturers would outweigh the social utility of doing so.214 The court offered the following as costs: elimination of lawful gun sales and increased costs and burdens to manufacturers.215

The court’s claim that requiring manufacturers to follow certain restrictions in order to avoid liability would eliminate gun sales to lawful buyers216 was unsupported in their opinion, and is unsupported by statistics. As noted, half of all crime guns are obtained from one percent of FFLs.217 Requiring

204 But see Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 30 (2d Cir. 2001) (holding that because duty is comprised of proximate cause elements, the Court of Appeals of New York did not usurp jurisdiction on the proximate cause issues).
205 See Hamilton, 750 N.E.2d at 1055.
206 Id. at 1061.
207 Id. at 1063.
208 Id. at 1065.
209 Id. at 1061.
211 Id. at 827.
212 Id. at 832.
213 See generally Diamond, supra note 35, at vii (discussing the purposes of tort law).
215 Id.
216 Id.
217 See Myerson, supra note 24, at 695.
gun manufacturers to protect against sales to those dealers would eliminate only 137 of the 21,675 sources for purchased guns, but would eliminate half of all gun related crimes. Even in light of those statistics, the court failed to cite any benefits from the imposition of a duty on the defendants.

The claim above was also cited as a cost to manufacturers and dealers. In addition to eliminating certain dealers, and thus certain buyers, the court cited examination of trace requests to be a burden on the industry. How did it surmise that "unavoidably hazardous products like handguns should be marketed in the means most convenient to the industry and most harmful to society? In fact, the court did not examine the costs to society.

Admittedly, the district court did not give enough attention to the costs and burdens to gun manufacturers. Just as the Court of Appeals of New York opinion reads like a brief for the defendants, the district court opinion reads like a brief for the plaintiffs. However, even reading the one-sided policy arguments of each court, any reasonable court should have concluded, as did the jury, that the social costs of the defendants' negligence outweigh the costs of preventing negligence.

Essentially, the Court of Appeals of New York decided the fate of the plaintiffs' claims by ignoring the district court's findings and giving minimal attention to only two policy considerations. It failed to consider the following policy implications.

1. Corrective Justice and Fundamental Fairness

The district court found that fairness requires, in the absence of more compelling mandates, the imposition of a duty on gun manufacturers to reduce the risk of injury to plaintiffs through responsible marketing practices. Manufacturers "set the stage for their criminal misuse" while the plaintiffs derive no gain or benefit from, nor control their risk of exposure to guns.

One way to examine fairness is by looking to corrective justice theories. Non-reciprocal risks are one justification for finding duty. One example of a non-reciprocal risk is the relationship between a pilot and persons on the ground. Obviously, the pilot's negligence would produce risk to the persons on

---

218 Id.
219 See Hamilton, 750 N.E.2d at 1055.
220 Id. at 1063.
221 Id.
222 Id. at 1065.
224 See Hamilton, 750 N.E.2d at 1055.
225 Id. at 811.
226 Id. at 826.
227 Id.
229 Id.
the ground, but the persons on the ground, in their capacity as pedestrians, pose absolutely no risk to the pilot. 230

The relationship between gun manufacturers and innocent plaintiffs is strikingly similar. Gun manufacturers, through their marketing practices, cause guns to be placed into the hands of criminals, thus increasing the risk of harm to innocents. The innocents however, pose no threat to gun manufacturers. The imposition of a duty on gun manufacturers to market their products in a reasonable manner would restore some balance to the relationship between the parties. It is not just a simple distribution of wealth, which the district court cites. 231 It is also a distribution of power and injurious attributes. The greater the innocent's ability to injure (the pocketbook of) the defendants with the aid of the court, the lesser the willingness of the defendant to injure the plaintiff. 232

2. Goals of Tort Law: Deterring Harmful Behavior

The use of tort liability to deter harmful behavior is not novel. 233 In fact, the imposition of a duty on one gun manufacturer has already resulted in specific deterrence. 234 Wider acceptance by the courts of a duty on gun manufacturers would arguably lead to an increase in general deterrence, thus reducing harm to plaintiffs.

In Morial v. Smith & Wesson, Corp. 235 the court imposed a duty on gun manufacturers to market guns in a manner as not to increase the risk of injury to plaintiffs. 236 Ultimately, Smith & Wesson signed a settlement agreement. 237 To the surprise of those who claimed that duty would bankrupt the industry, the agreement did not contain monetary provisions. 238 Rather, the agreement outlined new policies to be undertaken by the manufacturer to reduce the risks of injuries to plaintiffs. 239 Some of those policies included safety standards for firearms, implementation of distribution practices which eliminate sales that lead to illegal possession of firearms, and sales only to "authorized dealers." 240 Under the settlement, a dealer would only be "authorized" if it met certain requirements including possession of required licenses, refraining from selling at gun shows

---

230 Id.
233 See DOBBS, supra note 228, § 11 at 19.
235 Id.
236 Id.
238 Id.
239 Id.
240 Id.
without performing background checks, and adoption of a trafficking plan, to name a few.\textsuperscript{241}

Essentially, the settlement protects against future risk of injury and shields defendants from liability.\textsuperscript{242} It is doubtful that, even in the absence of a settlement agreement, a gun manufacturer would be found liable after instituting such a rigorous standard for marketing and distribution. The jury’s decision in \textit{Hamilton},\textsuperscript{243} is evidence of that probability since they declined to hold ten gun manufacturers liable just for having a written policy against selling to non-walk-in FFLs.\textsuperscript{244} Thus, imposition of a duty would cause, or at least provide a choice to, responsible and economically prudent firearms manufacturers to self-regulate, limiting ultimate liability and reducing risks to plaintiffs.

\section*{C. The Source of Conflict Between The Courts}

The conflict between the federal district court\textsuperscript{245} and the state court\textsuperscript{246} opinions arises from the absence of a test for determining whether defendants, as manufacturers of a hazardous product, owe a duty of care to market and distribute those products in a non-negligent manner. It is ironic and daunting that two courts could analyze the same facts against the same precedents and arrive at such polar conclusions.\textsuperscript{247}

Other plaintiffs injured by the marketing and distribution practices of gun manufacturers have brought suits, unsuccessfully, under products liability,\textsuperscript{248} nuisance,\textsuperscript{249} and ultrahazardous activity theories. Under products liability theories, it is difficult to assert a defect when guns perform exactly as they are intended to perform.\textsuperscript{250} Under strict liability theories, suits have been unsuccessful because the facts simply do not fit within the categories of behavior that have been reserved to the doctrine.\textsuperscript{251}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Rachana Bhowmik et al., \textit{A Sense of Duty: Retiring the “Special Relationship” Rule and Holding Gun Manufacturers Liable for Negligently Distributing Guns}, 4 \textit{J. HEALTH CARE L. & POL’Y} 42, 46 (2000).
\item Id. at 832.
\item Id.
\item Id.
\item See, e.g., \textit{Chicago v. Beretta U.S.A. Corp.}, No. 98-CH-15596 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998) (arguing that 23 gun manufacturers, 12 local gun dealers, and numerous middlemen gun distributors created a public nuisance by facilitating trafficking of large numbers of firearms into Chicago, where handguns have been illegal since 1982).
\item See, e.g., \textit{Bell}, 92 F. Supp. 2d at 1067 (holding the defendant gun manufacturer liable in strict products liability).
\item See, e.g., \textit{Richman v. Charter Arms Corp.}, 571 F. Supp. 192 (E.D. La. 1983) (holding that genuine issues of material fact precluded summary judgment as to whether handgun manufacturer's marketing practices were ultrahazardous).
\end{enumerate}
\end{footnotesize}
Handguns are one of few, if not the only, products that are available to
the public and are "designed to kill and wound human beings." Handguns are
products that are designed to be hazardous to human life. As demonstrated by
the conflicting opinions of the courts, traditional negligence theories do not
provide a framework for producing consistency. In addition to the policy
implications examined by the courts, the duty of gun manufacturers should be
assessed under a scheme that reflects products liability doctrine and
ultrahazardous activity doctrine, while remaining true to primary negligence
values.

V. PROPOSAL

This section proposes a solution to the problems illustrated by the
conflicting opinions of the state court and the federal district court in
Hamilton v. Beretta U.S.A. Corp. The proposed test is set forth and then
analyzed in light of its applicability to gun manufacturers and the manufacturers
of other dangerous products.

A. The Proposal

In order to give effect to the goals underlying tort law, effect principles
of corrective justice, provide a balance of fairness to manufacturers and
plaintiffs, and provide a basis for consistent judgments in similar cases, the
author proposes that the following test be adopted.

One who manufactures or distributes a product designed, in
whole or in part, to cause injury to the person or property of another has a duty to protect against increased risks to others arising from the
foreseeable misuse of the product if, in balancing the following factors, failure to impose such a duty would be unjust:

a. the likelihood that harm will result from the misuse of the
defendant’s product; and
b. the severity of the harm likely to be caused by misuse of the
   product; and

---

253 See id. (emphasis added).
254 See id. at 802.
256 Id. This note analyzes the conflicting opinions of the federal district court and the Court of
   Appeals of New York.
258 Misuse refers to use for criminal or illegitimate purposes.
259 See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
260 Id.
c. whether the costs of misuse of the product to society outweigh the burden on the defendant to effect the protections;\textsuperscript{261} and
d. the ability of the defendant to protect against harm to the plaintiff;\textsuperscript{262} and
e. the ability of the plaintiff to protect against the risk of harm;\textsuperscript{263} and
f. the ability of the defendant to spread the cost of effecting the protections.\textsuperscript{264}

B. Application

Remember Emily,\textsuperscript{265} from the opening paragraph of this note? Sirens blare as eighteen-year-old Emily lies dying of a gunshot wound to the head. Emily's mother holds her and looks out into the city wondering how a bullet made its way into the town and into the body of her child. Months later, Robert, a seventeen-year-old, is convicted of murder. Testimony indicated that the gun used to commit the murder was purchased from a trade show by Robert's twenty-one-year-old brother, a convicted felon.

Now imagine that instead of dying from a gunshot wound, Emily is dying from inhalation anthrax. Robert purchased the anthrax spores from Bacterium Depot and sent them in a letter addressed to Emily. Bacterium Depot purchased the spores from Disease Research, a company that produces anthrax. Bacterium Depot is one of 542\textsuperscript{266} companies that distribute anthrax to research facilities. Yet, Bacterium Depot is one of three distributors that sold over half of the anthrax samples used to sicken or kill 1,925 citizens in the current year.\textsuperscript{267}

What is Disease Research's duty to Emily and her mother as the manufacturer of a product such as anthrax? Did Disease Research have the duty to market and distribute its anthrax in a responsible manner, ensuring that the first sale was to a responsible buyer?\textsuperscript{268} While it seems clear that Disease Research would have a duty to prevent such a deadly product from falling into the hands of a distributor like Bacterium Depot, let us run it, and the threat of guns, through the proposed test.

\textsuperscript{261} Id.
\textsuperscript{262} Hamilton, 62 F. Supp. 2d at 820 (holding that reasonable steps could have been taken to reduce risks to plaintiffs).
\textsuperscript{263} See id. at 826 (stating that plaintiffs have no control over the risk presented to them by misuse of firearms).
\textsuperscript{264} Id. at 827.
\textsuperscript{265} See supra p. 1.
\textsuperscript{266} The numbers used in the hypothetical anthrax illustration were derived as follows: 542 = 21675 (The number of FFLs) x .025 (to scale down the numbers); 3 = 542 x .006 (The percentage of FFLs that were linked to half of all guns used in crimes); and 1925 = 77010 (the number of injuries traced to crimes in 1998) x .025 (to scale down the numbers). See Myerson, supra note 24, at 695 for original values.
\textsuperscript{267} Id.
\textsuperscript{268} Hamilton, 62 F. Supp. 2d at 820.
Anthrax, as a biological agent, is a product designed in part to injure the person of another.\textsuperscript{269} Admittedly, there are legitimate uses for anthrax such as research for curative functions.\textsuperscript{270} However, anthrax is a biological weapon.\textsuperscript{271} Since anthrax is produced as a biological weapon, it is designed in part to cause injury to the person of another.

Firearms are products designed in part to kill or injure the person of another.\textsuperscript{272} The United States District Court for the Eastern District of New York referred to firearms as a “uniquely hazardous product, designed to kill and wound human beings....”\textsuperscript{273} Like anthrax, firearms have legitimate uses such as sporting and collection.\textsuperscript{274} However, both products are designed as a weapon with legitimate killing power, anthrax for the defense of nations and firearms for the defense of individuals.

Yet, anthrax and firearms have the potential to be misused, or to be used for unjustified killing purposes. The number of anthrax exposures in the hypothetical illustration and the number of guns used in crimes, 77,010,\textsuperscript{275} suggests the potential, and actuality of the misuse. Thus, the proposed test would apply to anthrax and firearms as products that have a legitimate, but injurious purpose, and also have the foreseeable potential to be used to injure innocent persons for unjustified purposes.

Admittedly, the comparison between anthrax and firearms is incongruous because firearms have a legally protected public market, while anthrax is not available to the public.\textsuperscript{276} After all, the right to public gun ownership is protected by the Second Amendment to the Constitution.\textsuperscript{277} But, an examination of the limitations placed on gun ownership, the policies behind those limitations, and the policy behind the limitations placed on public ownership of anthrax minimizes any disparity.

Anthrax possession is limited to certain entities such as research facilities because, unlike those entities, the public has no demonstrated legitimate use for the product.\textsuperscript{278} In fact, possession of such products by the public has been deemed a dangerous threat to society.\textsuperscript{279}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{270} See 18 U.S.C. § 175(b) (2000). See also S. Rep. No. 210-101, at 3-7 (1989) (discussing legitimate uses for anthrax, such as a potential treatment for cancer or HIV).
\item \textsuperscript{271} See S. Rep. No. 210-101, at 3-7 (1989) (listing anthrax along with other biological weapons).
\item \textsuperscript{272} See \textit{Hamilton}, 62 F. Supp. 2d at 825.
\item \textsuperscript{273} See id. See also Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1063 (N.Y. 2001) (stating that handguns are not defective because they are hazardous to human life, that “if anything, the problem is that they work too well”).
\item \textsuperscript{274} Burnett, \textsuperscript{ supra note 62}, at 439.
\item \textsuperscript{275} See \textit{supra} note 247 and accompanying text.
\item \textsuperscript{276} See Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175(a) (2000).
\item \textsuperscript{277} See U.S. Const. amend. II. The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” \textit{Id}.
\end{itemize}
\end{footnotesize}
Like anthrax regulations, federal gun laws are intended to keep “these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow.” Simply put, possession and ownership are regulated based on the threat they pose on the hands of others. Firearms pose a threat to others when in the hands of those the legislature has deemed to be unfit to possess them.

Although the limitations on possession of biological threats are much broader than the limitations on firearms, for each there is an identified population who are not fit to possess them due to the potential of misuse. The remainder of the proposed test examines whether, in light of public policy considerations, there should be a duty on the sole source of such products, so as not to increase the risks to society that arises from these dangerous products falling into the hands of those who have been deemed unfit to possess them.

Sections (a), (b), and (c) of the proposed test are taken from Learned Hand’s $B<PL$ formula, first used in $U.S. v. Carroll Towing$. Although the $B<PL$ formula is a breach measure, it serves to prescribe duty by defining a standard of care that one should exercise to avoid breach. If the likelihood and severity of injury arising from failure to observe certain safety measures, is greater than the burden of taking the precautions, then the defendant has breached his duty to the injured. A duty then arises at the point where the probability and the severity of injury exceed the defendant’s burden.

In the anthrax example, misuse of anthrax would result in almost one death per day including two children per week. Thus, the likelihood of injury arising from misuse is high. The severity of the injury, i.e. death, is high. Our country is outraged by the seven deaths that have occurred from September through October of 2001. As noted, firearms are responsible for thirty-seven homicides each day, including twelve children each day. Why is the outrage less although the probability is so high? Perhaps the disparity is found in the lawmaker’s and judiciary’s perceived ability to protect themselves from firearm misuse by avoiding high crime areas, while they feel more susceptible to the randomness of an anthrax threat.

---

281 Id.
282 Id.
283 Id.
284 See 159 F.2d 169, 173 (2d Cir. 1947).
285 Id.
286 Id.
287 Id.
288 See supra note 247 and accompanying text.
However, section (e) of the proposed test addresses the ability of the plaintiff to protect against the injury. Although there may be a perceived ability to protect against firearm injuries, the judiciary has determined that an innocent bystander has no ability to protect against gun violence. Just like a victim of anthrax, a victim of firearm misuse did not participate in the making, selling, buying, or use of the product, nor did the victim derive any benefit from those activities. Save restricting oneself from enjoying constitutional rights such as freedom of movement, one has no protections against gun violence. In short, given the likelihood and severity of injury from firearm misuse, and the inability of plaintiff's to protect against those injuries, there should be no disparity either in outrage or in legislative and judicial reaction.

The costs to manufacturers of firearms in preventing misuse are minimal in comparison to the costs to society. In addition to cost in lives lost, the economic costs to society are overwhelming. Each year, taxpayers finance the treatment of gunshot related injuries to the tune of 2.3 billion dollars. That figure does not include social costs such as children without parents and welfare programs to support families affected by gun violence. Yet, the costs to manufacturers of firearms to affect measures that do not increase the risks of firearm misuse are low. To decrease the number of crimes in which firearms were used by 50% would only require the industry to refrain from distributing guns to .006% of the 21,675 FFLs. Clearly, the manufacturers of guns have some ability to protect against injury to plaintiffs, section (d) of the proposal, if they can cut the number of crime guns sold in half, just by eliminating less than one-tenth of one percent of their distributors.

292 Id.
293 Id.
294 See U.S. CONST. amend. XIV § 1. This section provides:

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

295 Id.
296 Hamilton, 62 F. Supp. 2d at 826.
298 Id.
299 See Hamilton, 62 F. Supp. 2d at 826 (suggesting measures such as limiting sales at unregulated gun shows and requiring that first sales of guns to the public take place only in fully stocked, responsibly operated stores).
300 See Myerson, supra note 24, at 695.
In addition to gun manufacturers as the least cost avoider, gun manufacturers are able to effectively spread the loss arising from cutting that one-tenth of one percent of its retailers by spreading the cost of effecting the protections to consumers. Contrary to arguments that imposing a duty on gun manufacturers will bankrupt the industry, cost spreading is a viable tool for effecting the goals of tort law. Theories of corrective justice demand that the innocent plaintiff not be made to bear the entire loss resulting from a process she has derived no benefit from. Contrary to arguments against forcing the industry to act as an insurer, the consumer becomes insurer against injuries arising from a dangerous activity in which he or she is a willing participant.

Finally, section (e) of the proposal serves as a limitation on the liability of defendants. The Court of Appeals of New York struck down the Hamilton suit largely because it perceived imposition of such a duty to be synonymous with limitless liability. Under the proposed test, gun manufacturers would not owe a duty to protect plaintiffs from injuries arising out of lawful sales by demonstrably responsible distributors and retailers, or over 99% of such establishments.

Like the hypothetical manufacturers of anthrax, the manufacturers of firearms produce a product that is designed in part to injure the person of another. They manufacture a product that creates probable and severe risks of injury when the product is misused. The cost of protecting against that risk is minimal in comparison to the severity and probability of injury and the industry can pass that minimal cost to consumers. The defendant can protect against the risk of injury, yet the plaintiff cannot. Finally, manufacturers of firearms can limit liability by acting to protect against the injuries that are within its capacity to protect. Thus, a duty should be imposed on the manufacturers of firearms to act reasonably in distributing and marketing guns by protecting against distribution that increases the likelihood of criminal misuse.

One does not need the proposed test to surmise why manufacturers of anthrax would have a duty to market the disease in a way that does not increase the risk of its misuse. While there is no empirical study that would suggest our

---

302 Hamilton, 62 F. Supp. 2d at 827.
303 See DOBBS, supra note 228, § 10 at 17.
304 Hamilton, 62 F. Supp. 2d at 826.
305 Id.
307 See Myerson, supra note 24, at 695.
308 See Hamilton, 62 F. Supp. 2d at 825. See also Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1063 (N.Y. 2001) (stating that handguns are not defective because they are hazardous to human life, that “if anything, the problem is that they work too well”).
311 Id. at 826.
312 Id. at 827.
judiciary would impose a duty on manufacturers of the anthrax bacteria to market the disease responsibly, the imagination and the proposed test do suggest such an answer. The anthrax illustration is merely the firearm actuality scaled down to 2.5%. The disparity in treatment is the discussion of perhaps socioeconomic or sociological concerns left for another day. But, the proposed test illustrates that fairness, justice, and tort law support imposition of a duty of care on the manufacturers of firearms.

VI. CONCLUSION

Gun violence is a pervasive threat to society that is increased by the unreasonable marketing and distribution practices of gun manufacturers. The Court of Appeals of New York opinion, holding that gun manufacturers have no duty to market firearms in a reasonable manner, and the United States Court of Appeals for the Second Circuit's opinion affirming that decision, represents the ability of the courts to decide issues, in the absence of a concrete test, without full recognition of the purposes of tort law. The inherent hazards of products such as firearms should not absolve manufacturers of a duty of care but should warrant a test for duty that captures the principles of fairness to defendants and plaintiffs.

The proposed test considers the totality of interests in light of the purposes of tort law. It forces the courts and the gun industry to recognize that the maker of a product that is designed to kill human beings has some role in achieving that result and provides a framework for examining whether that role is such that a duty should be imposed. More importantly, it defines a legally recognizable standard of social responsibility that, in practical terms, may obviate the necessity for after-the-fact, non-preventative judicial determinations.

---

313 See supra note 247 and accompanying text.
THE THREE R'S: READING, WRITING, AND RIFLES?
HOW THE KENTUCKY SUPREME COURT LESSENED
Penalties for Students Who Bring Guns to School in
DARDEN V. COMMONWEALTH

by Jennifer J. Mabry*

I. INTRODUCTION

Four students and a teacher dead, nine wounded, in Jonesboro, Arkansas.¹ Two students dead, seven wounded, in Pearl, Mississippi.² Four students dead, twenty wounded, in Springfield, Oregon.³ Twelve students and a teacher dead, twenty-eight wounded, in Littleton, Colorado.⁴ Three students dead, five wounded, in Paducah, Kentucky.⁵ Sadly, this list could continue for pages and pages. Each of the tragic events that culminated in these deaths and injuries occurred at a school. During the 1998-1999 school year alone, it is estimated over one million students brought a gun to school.⁶ Chances are, in any classroom in the country, on any given day, at least one student is carrying a gun.

In order to combat this rapidly increasing threat of gun violence, schools began searching students, looking through lockers, installing metal detectors and requiring see-through backpacks.⁷ Some schools even began using SWAT teams and gun-sniffing dogs.⁸ To aid the effort, Congress passed the Gun-Free School Zones Act of 1990,⁹ in effect, establishing “zero-tolerance” for guns at school.¹₀

---

* Jennifer J. Mabry is a J.D. candidate for 2003 at Salmon P. Chase College of Law, Northern Kentucky University; B.A. degree in English from Murray State University.


² See id.

³ Id. at 282 n. 7 (citing Timothy Egan, Shootings in a Schoolhouse: The Overview, N.Y. TIMES, May 23, 1998, at A9).

⁴ Id. at 282 n. 8 (citing Kevin Fagan, et al., School Littered With Bombs, S.F. CHRON., April 22, 1999, at A1, A6).


⁸ See id.


Not surprisingly, Kentucky, along with every other state, implemented similar legislation to deal with this problem.11

Kentucky's legislation, targeted at reducing and eliminating guns in school, deems bringing a weapon on school property as unlawful possession and a felony, punishable by five years in prison and a $10,000 fine.12 This statute serves two functions: punishment and protection.13 Clearly, the legislature, when enacting the law, felt it was necessary and proper to punish those who bring weapons onto school property.14 As part of the legislature's duty to enact laws for the well-being of its state citizens, the statute is also designed to protect those who will be in harm's way if the statute is violated.15

Too often it is juveniles who violate the statute and inflict injury and death upon fellow classmates and teachers.16 The legislature has attempted to address the problem of children and guns,17 but in order for the laws to have any force, the court system must enforce them consistently.18

This article examines gun control legislation in Kentucky with regard to juveniles who possess weapons on school grounds and the punishment that should be imposed upon them. Part II provides a summary of the Gun Free School Zones Act of 1990,19 the subsequent legislation introduced in Kentucky20 and the accompanying court interpretation.21 Part II concludes with the first case in which the Kentucky Supreme Court has had to consider the issues of statutory construction for gun control legislation and of punishment for juveniles who bring weapons onto school property, Darden v. Commonwealth.22 Part III provides an overview of the majority's reasoning in Darden and the dissenting opinion by Justice Wintersheimer.23 Part IV critiques the statutory interpretation of the majority and exposes a loophole created by the decision in Darden that, while not declaring Kentucky's juvenile gun control legislation unconstitutional, effectively invalidates its force.

---

11 See id. at 371.
14 See id.
15 Id.
16 Chamberlin, supra note 1, at 282.
18 Compare Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001), and Britt v. Commonwealth, 965 S.W.2d 147 (Ky. 1998) with Haymon v. Commonwealth, 657 S.W.2d 239 (Ky. 1983).
21 See Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001).
22 See generally id.
23 Id. at 578.
II. BACKGROUND

A. History of Zero Tolerance Legislation

1. Gun-Free School Zones Act

Congress first introduced the Gun-Free School Zones Act as part of the Crime Control Act of 1990. The original enactment stated, "it shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." A school zone was defined to mean on the grounds, or within 1,000 feet of the grounds of a public, parochial or private school which provides elementary or secondary education.

In passing the Gun-Free School Zones Act, Congress intended to address the fact that the nation suffers from the problem of gun violence in schools. It, therefore, made it criminal merely to possess a gun within a certain geographic area, without any requirement that the gun had traveled in interstate commerce, a common source of power for Congress to enact firearm regulation legislation.

This omission caused the Act to run into opposition in United States v. Lopez. In Lopez, the defendant, a 12th grade student, carried a concealed gun and ammunition into the Texas high school he attended. He was charged first with violating a Texas law prohibiting firearm possession on school premises, but the state charges were dropped when federal agents charged him with violating the Gun-Free School Zones Act of 1990.

Lopez challenged the act, claiming it was unconstitutional, as Congress does not have the power to legislate public schools. The district court rejected this argument, finding that it was a valid exercise of constitutional power to regulate commerce and the "business" of elementary, middle and high schools...affects interstate commerce. The district court found him guilty of

---

29 Id. § 922(q).
31 See id.
33 See id. at 551.
34 Id.
35 Id.
36 Id. at 552.
violating the Act and sentenced him to six months in jail and two years supervised release.\(^{37}\)

When Lopez appealed, he based his challenge on the Commerce Clause,\(^{38}\) claiming that Congress had exceeded its power.\(^{39}\) The Fifth Circuit agreed and reversed the conviction, holding 18 U.S.C. § 922 (q), the Gun-Free School Zones Act, invalid because it is beyond the power of Congress under the Commerce Clause.\(^{40}\)

The United States Supreme Court granted review and found the statute unconstitutional on two grounds.\(^{41}\) First, the possession of a gun in a local school zone is in no way an economic activity that might have an effect on interstate commerce.\(^{42}\) Second, it contains no jurisdictional element that would ensure the firearms possession has the requisite nexus with interstate commerce.\(^{43}\)

Following the decision in Lopez, Congress revised the Gun-Free School Zones Act.\(^{44}\) The Act was amended to require proof that the firearms possessed within school zones had moved in interstate commerce,\(^{45}\) codifying the jurisdictional element the Court in Lopez considered a constitutional requirement.\(^{46}\)

The Gun-Free School Zones Act\(^{47}\) has not yet faced opposition based on the Second Amendment\(^{48}\) to the United States Constitution. However, courts have consistently held that the Second Amendment\(^{49}\) does not guarantee an individual right to bear arms and does not preclude gun control laws affecting the private ownership, sale and use of firearms.\(^{50}\) Since the Second Amendment does not grant a fundamental right to possess a gun, to be valid, the regulation of gun possession within a school zone need only be rationally related to the legitimate governmental interest of maintaining education.\(^{51}\) The state's interest in education and safety, the number of children in a school area and the compatibility between federal and school regulations, implies that creating a gun-free school zone is rationally related to a legitimate governmental interest.\(^{52}\)

---

\(^{37}\) Id.

\(^{38}\) U.S. CONST. art. I, § 8, cl. 3. The section and clause provide: "[Congress has the power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

\(^{39}\) See Lopez, 514 U.S. at 552.

\(^{40}\) See id.

\(^{41}\) Id. at 552, 567.

\(^{42}\) Id. at 567.

\(^{43}\) Id. at 561.


\(^{45}\) See id. § 922(q)(2)(A).

\(^{46}\) Lopez, 514 U.S. at 561.


\(^{48}\) U.S. CONST. amend. II. This amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

\(^{49}\) See id.

\(^{50}\) See United States v. Miller, 307 U.S. 174, 178 (1939).

\(^{51}\) Chamberlin, supra note 1, at 311.

\(^{52}\) See id.
2. Kentucky's Zero Tolerance Legislation and its Effects on Juvenile Offenders

Kentucky recognized the state interest in legislation targeted at eliminating firearms on school grounds and enacted section 527.070 of the Kentucky Revised Statutes in 1994. The statute provides, "a person is guilty of unlawful possession of a weapon on school property when he knowingly deposits, possesses, or carries, whether openly or concealed...any firearm or other deadly weapon." Under the statute, an administrator of the school must display a sign stating, "Unlawful possession of a weapon on school property in Kentucky is a felony punishable by a maximum of five (5) years in prison and a ten thousand dollar ($10,000) fine." The statute recognizes exceptions to unlawful possession, such as adults, whose firearms are locked in their vehicles, students in the reserve officers training corps, peace-keeping officers and hunters, among others.

A related statute enacted by the Kentucky legislature also became effective in 1994. It provides that a juvenile shall be transferred to circuit court to be tried as an adult offender if he is charged with a felony in which a firearm, whether functional or not, was used in the commission of the offense. This transfer is based upon a finding by the district court of the following facts: there is probable cause to believe that the child committed a felony, a firearm was used to commit the felony and the child was 14 years of age or older at the time the felony was committed. If convicted in the circuit court the juvenile is subject to the same penalties as an adult offender, except that until he reaches the age of 18 years, he shall be confined in a juvenile detention facility; when he turns 18 years old, he shall be transferred to an adult facility.

Before the enactment of this statute, juveniles were sentenced as "youthful offenders" and at the time they turned 18 years old, the circuit court judge would make a decision to continue treatment in the juvenile facility, probate the juvenile or incarcerate the youthful offender in an adult correction facility for the remainder of the sentence.

3. The Supreme Court of Kentucky Interprets Juvenile Gun Control Legislation

The Supreme Court of Kentucky had an opportunity to interpret the new automatic transfer legislation in Britt v. Commonwealth. In that case, Brad Britt, a 17-year-old, was arrested for robbing a convenience store at gunpoint. The district court found probable cause to believe that Britt committed a felony, that a firearm was used in the commission of that felony and that he was over 14

53 Hereinafter referred to as KRS.
54 KY. REV. STAT. ANN. § 527.070 (Michie 2001).
55 See id. at § 527.070(1).
56 Id. at § 527.070(2).
57 Id. at § 527.070(3).
58 KY. REV. STAT. ANN. § 635.020 (Michie 2001).
59 See id. at § 635.020(4).
60 Id.
61 Id.
62 See KY. REV. STAT. ANN. § 640.040(3) (Michie 1997).
63 965 S.W.2d 147 (Ky. 1998).
64 See id. at 148.
years of age, necessitating transfer to the circuit court, where Britt would be tried as an adult offender under the new statute.\footnote{Id.} In the trial court proceedings, Britt pled guilty to the robbery charge.\footnote{Id.} The Commonwealth opposed probation on the grounds that adult offenders are denied probation for felonies committed with firearms under KRS § 533.060,\footnote{See KY. REV. STAT. ANN. § 633.060 (Michie 2001).} and Britt, being treated as an adult, should be denied probation as an adult would.\footnote{Britt, 965 S.W.2d at 148.} The trial court disagreed, defining Britt as a youthful offender and eligible for probation.\footnote{See id.}

The Court of Appeals of Kentucky reversed, holding that probation was not available to Britt or other juvenile offenders whose cases are transferred to adult court.\footnote{See Commonwealth v. Britt, No. 96-CA-0019-MR, slip op. at 1 (Ky. Ct. App. Jan. 10, 1997).} In doing so, the court interpreted the legislature’s attempt at harsher penalties for juvenile offenders who possess firearms as “an attempt to address the problems associated with youths, crime and guns.”\footnote{See id. at 3.} The court saw the enactment of KRS § 635.020 (4) as creating “a new classification under which juvenile offenders ages fourteen to seventeen years of age who commit a felony with a firearm are to be treated as adults for all purposes related to the crime and not as juveniles.”\footnote{Id.}

The Supreme Court of Kentucky ruled in favor of Britt and rejected the Commonwealth’s argument that KRS § 635.020(4) was unambiguous and should be literally interpreted.\footnote{See Britt v. Commonwealth, 965 S.W.2d 147, 149 (Ky. 1998).} The court decided that all juveniles transferred to circuit court in accordance with KRS § 635.020(4) were to be considered youthful offenders.\footnote{See id. at 150.} Justice Wintersheimer, dissenting, said the “majority misconstrues the clear language of the statute and misinterprets the equally clear legislative intent by injecting a tortured and erroneous interpretation of both the language and intent of the General Assembly.”\footnote{Id. at 151.} He scolded the majority for interpreting the statute in this way when the statute was not ambiguous.\footnote{Id.} According to KRS § 446.080,\footnote{See KY. REV. STAT. ANN. § 446.080 (Michie 2001).} “all statutes shall be liberally construed with a view to promote their objects and carry out the intent of the legislature.”\footnote{See Britt, 965 S.W.2d at 151.} From Justice Wintersheimer’s perspective, the legislature’s intent was “abundantly clear”\footnote{Id.} that juveniles over the age of fourteen who commit a felony with a firearm increase their criminal culpability to that of an adult and should be treated as adults in the court system.\footnote{Id.}
4. The Supreme Court of Kentucky Faces Another Issue of Judicial Interpretation in Darden v. Commonwealth

On September 15, 1995, Officer Moberly of the Elkton Police Department in Todd County, Kentucky was working security for a high school football game. During the game he got a call from Sergeant Marklin concerning a complaint from the school principal that the odor of marijuana was coming from the area of the baseball field. Officer Moberly responded to the call and approached the baseball field in a patrol car. When he entered the lot, he observed five males walk from the field to a car in the parking lot, get in the car and drive away.

Officer Moberly followed the car as directed by Sergeant Marklin and stopped about 150 yards from the gate of the school. When Darden, the driver, rolled down the window, Officer Moberly noticed a strong odor of marijuana. The officer asked if there were any drugs or weapons in the car; Darden answered by directing Officer Moberly to the glove compartment. The consensual search of Darden’s vehicle revealed marijuana, cocaine, drug paraphernalia and weapons.

Darden was a juvenile at the time of the offense and proceedings were initially instituted against him in the juvenile division of the Todd District Court. On October 5, 1995, pursuant to KRS § 635.020(4), the Commonwealth motioned for a transfer to circuit court for Darden to be tried as an adult due to his possession of a weapon on school property. The motion was granted and Darden was indicted on March 13, 1996. He was convicted of possession of a controlled substance in the first degree, a conviction that was enhanced by the possession of a weapon, possession of a weapon on school property, and possession of marijuana. Darden was sentenced to a total of five years imprisonment.

The Court of Appeals of Kentucky, sitting en banc, affirmed his conviction. Darden appealed to the Supreme Court of Kentucky, which granted discretionary review.
III. COURT’S REASONING

A. Holding of Darden v. Commonwealth

In a 5-2 decision, the Supreme Court of Kentucky held that, under KRS § 635.020(4), a juvenile may be transferred to the circuit court to be tried as an adult only if a firearm was “used” in the commission of a felony, and because appellant Darden merely “possessed” a firearm, the transfer statute was not activated. The court based its reasoning on Haymon v. Commonwealth, which held that the term “use of a weapon” in the burglary statute was ambiguous as it is subject to two different interpretations, what the court called “presence” and “actual use,” and that defendants should be entitled to the benefit of the ambiguity.

The court cited Haymon in explaining the conflicting interpretations of the term “used.”

The Commonwealth contends that possession of a weapon involves its use; that the intent of the General Assembly was to deter the involvement or presence of weapons in the commission of crimes. Admittedly, the word ‘use’ is subject to such a construction.

On the other hand, the General Assembly took pains to distinguish between being ‘armed’ with a weapon and the ‘use of a weapon’ in the burglary statute. The offense can be committed by one who is only ‘armed’ with a deadly weapon, but when dangerous instruments are involved there must be a showing of their use or threatened use. The movant contends, therefore, that mere possession of a weapon constitutes being ‘armed’ with a weapon but ‘use of a weapon’ contemplates that it be employed in some manner in the commission of an offense. This too is a plausible explanation of the meaning of the word ‘use.’

The majority in Darden found this interpretation convincing and declared that the terms “possession of a weapon” and “use of a weapon” were two entirely different concepts and, additionally, doubts in statutory construction should be resolved against an interpretation that would produce “extremely harsh or incongruous results.” The majority felt that if the two terms were interpreted as meaning the same thing it would produce disproportionate results.

98 52 S.W.3d 574 (Ky. 2001).
99 See id. at 577.
100 657 S.W.2d 239 (Ky. 1983).
101 Darden, 52 S.W.3d at 577.
102 Haymon, 657 S.W.2d at 240.
103 Darden, 52 S.W.3d at 577 (quoting Haymon v. Commonwealth, 657 S.W.2d 239, 240 (Ky. 1983)).
104 See id.
105 Id. at 577 (quoting Commonwealth v. Colonial Stores, Inc., 350 S.W.2d 467 (Ky. 1961)).
in trying future juvenile cases—clearly not what the legislature intended.\textsuperscript{106} While the court recognized the inherent dangers when children carry guns to school, the "shock and horror at the recent tragedies surrounding guns and schools does not justify the Court to read enhancing penalties into a statute where none exist."\textsuperscript{107}

B. Dissenting Opinion of Justice Wintersheimer\textsuperscript{108}

Justice Wintersheimer’s dissenting opinion, in which Chief Justice Lambert joins, disputes the validity of the court’s reasoning in differentiating “use of a weapon” with “possession of a weapon.”\textsuperscript{109} His disagreement rests on the majority’s emphasis on Haymon v. Commonwealth.\textsuperscript{110} Justice Wintersheimer contended that Haymon\textsuperscript{111} recognized an ambiguity, where the case at hand did not.\textsuperscript{112} He felt that KRS § 527.070,\textsuperscript{113} making unlawful possession of a weapon on school property a felony,\textsuperscript{114} clearly prohibits anyone from knowingly possessing a firearm on school property for purposes other than instructional or school sanctioned activities.\textsuperscript{115} “It is possession of a weapon on school property, in violation of KRS § 527.070,”\textsuperscript{116} he stated, “which constitutes the offense committed for purposes of KRS § 635.020(4),\textsuperscript{117} the Juvenile Transfer Provision.”\textsuperscript{118}

Justice Wintersheimer continued, alleging it was the intent of the General Assembly to “deter involvement or the presence of weapons in the commission of crimes on school property” and that that statutory construction is neither “unduly harsh, nor does it produce an incongruous or disproportionate result.”\textsuperscript{119} He found it unnecessary to dwell on the “tragic events of school-related weapon possession which has touched every community in the nation, including Kentucky” to prove his point.\textsuperscript{120} He declared that there is no ambiguity between the word “use” or “possession” of a weapon as it relates to the prohibition of firearms on school grounds by KRS § 527.070 and that the statute as well as the intent of the legislature was clear.\textsuperscript{121}

IV. Analysis of Opinion

\textsuperscript{106} Id.
\textsuperscript{107} Id. at 578.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} \textit{Darden}, 52 S.W.3d at 577.
\textsuperscript{111} Id. at 578.
\textsuperscript{112} \textit{Darden}, 52 S.W.3d at 577.
\textsuperscript{113} See id.
\textsuperscript{114} 657 S.W.2d 239 (Ky. 1983).
\textsuperscript{115} \textit{Darden}, 52 S.W.3d at 578.
\textsuperscript{116} \textit{Darden}, 52 S.W.3d at 578 (Wintersheimer J., dissenting).
\textsuperscript{117} \textit{Darden}, 52 S.W.3d at 578 (Wintersheimer J., dissenting).
\textsuperscript{118} \textit{KY. REV. STAT. ANN.} § 527.070 (Michie 2001).
\textsuperscript{119} \textit{KY. REV. STAT. ANN.} § 635.020(4).
\textsuperscript{120} \textit{KY. REV. STAT. ANN.} § 635.020(4).
The court's reasoning in *Darden* is flawed in three ways. First, the majority applied the reasoning of *Haymon v. Commonwealth* although the situation they faced in *Darden* is distinguishable from *Haymon*. Second, the majority ignored basic rules of statutory interpretation in the *Darden* decision. Finally, the majority, while giving the illusion of considering public policy by briefly mentioning the inherent dangers of guns in schools, glosses over the impact the *Darden* decision will have on juvenile offenders who possess guns on school grounds and each individual those offenders endanger.

A. Distinguishing *Darden v. Commonwealth* from the Court's Precedent

The court in *Haymon v. Commonwealth* faced the decision of granting eligibility for probation to a defendant who stole two shotguns while committing a burglary. The defendant was not armed with a deadly weapon when he entered the building with intent to commit burglary. The court then analyzed the burglary statute, stating that the legislature's selection of the word "armed" in the burglary statute and the phrase "use of a weapon" in the statute denying parole for violent offenders, created an ambiguity that had to be resolved in favor of the defendant.

*Darden* is distinguishable in two very important ways. First, in *Haymon* the court dealt with the issue of whether a stricter penalty could be imposed on a defendant who, initially, did not intend to use a weapon in the commission of his offense. Marcus Darden, the defendant who brought weapons on school property in *Darden v. Commonwealth* did not acquire his weapons during the commission of a crime. Darden brought weapons onto school grounds intentionally. He knowingly possessed the weapons in his car as evidenced by his pointing them out to the officer who stopped him. He had ample reason to know he was on school property because he was at the baseball field adjacent to the school. The court might have reason to rely on *Haymon* if, perhaps, Darden had been involved in a sale of guns on school property.

---

122 Id. at 574.
123 657 S.W.2d 239 (Ky. 1983).
124 Darden, 52 S.W.3d at 574.
125 See id.
126 Id. at 578.
127 Id.
128 Id.
129 657 S.W.2d 239 (Ky. 1983).
130 See id.
131 Id. at 240.
132 Id.
133 Darden, 52 S.W.3d at 574.
134 Haymon, 657 S.W.2d at 240.
135 Darden, 52 S.W.3d at 574.
136 See generally id. at 575.
137 Id.
138 Id.
139 Haymon, 657 S.W.2d 239 (Ky. 1983).
That way, as in Haymon, he would have taken possession of the weapons during the commission of a crime. As the record reflects, however, Darden was armed with the weapons from the moment he stepped foot on school property and this very important fact makes Darden distinguishable.\footnote{Darden, 52 S.W.3d at 574.}

The second way Darden is distinguishable from Haymon\footnote{Haymon, 657 S.W.2d 239 (Ky. 1983).} involves the statute under which the defendant is charged.\footnote{See id.} The majority in Haymon found that there was an ambiguity in the burglary statute because the legislature chose to use “armed” and the court could not decide whether that meant “possessing the weapon” or “use of a weapon.”\footnote{Darden, 52 S.W.3d at 574.} The statute the majority was asked to interpret in Darden is not subject to the same ambiguity.\footnote{Haymon, 657 S.W.2d 239 (Ky. 1983).} It is true that KRS § 527.070,\footnote{See id.} making unlawful possession of a firearm on school grounds a felony, states that a person is guilty if he knowingly “possesses” a weapon.\footnote{Id. at 240.} It is also true that KRS § 635.020(4)\footnote{Darden, 52 S.W.3d at 574.} states that a juvenile shall be tried as an adult if he commits a felony in which a firearm was “used.”\footnote{Darden v. Commonwealth, 52 S.W.3d 574, 578 (Ky. 2001).} These two statutes, therefore, appear to fall victim to the same problems as the burglary statute in Haymon,\footnote{See generally Darden v. Commonwealth, 52 S.W.3d 574, 578 (Ky. 2001).} but for one primary difference. The Darden majority failed to emphasize that the possession of a weapon on school grounds is the essence of the felony.\footnote{See generally KY. REV. STAT. ANN. § 527.070 (Michie 2001).} Possession is the only act required. Possessing weapons on school property is one of those situations in which possession of a weapon involves its use.\footnote{See generally id. at 241 (Wintersheimer J., dissenting).} The statute was not enacted so juveniles could possess weapons on school property with the built-in defense that they were not “using” the weapon in order to avoid being tried as adults.\footnote{Id. at 240.} The statute was enacted in an effort to eradicate weapons in schools by making the consequences more severe. Legislators felt if the offense was a felony it would
deter children from bringing weapons to school; those caught could be prosecuted and schools would, over time, be rid of guns. In *Darden*, possession of a weapon involved its use. The court, in light of the earlier decision in *Haymon*, should have realized the difference.

The majority’s reliance on *Haymon* is unfounded. There is a factual distinction as well as a difference in the statutes the court was asked to interpret. This is the first reason why the majority’s decision in *Darden* is flawed.

**B. The Court Disregards Rules of Statutory Interpretation**

The Supreme Court of Kentucky said in *Ledford v. Faulkner* that it is a well established rule that “where there is an apparent conflict between statutes or sections thereof, it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both sections or statutes if possible.” In *Darden* the court had an opportunity to follow this rule, but did not. If the conflict between the two statutes was “apparent,” there was a simple way to harmonize the interpretation of them—to act in accordance with the plain language of the statutes and give effect to both their meanings. Marcus Darden possessed weapons on school grounds, a felony under KRS § 527.070. Marcus Darden committed a felony in which weapons were used, activating transfer to be tried as an adult under KRS § 635.020(4). There is no apparent conflict between these two provisions of Kentucky law; these statutes work together.

One reason why these statutes work together is that the legislature intended them to. The Supreme Court of Kentucky recently reiterated the rule of statutory interpretation that the “court must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent.” This idea is even codified by Kentucky statute stating “all statutes shall be

---

160 *Darden*, 52 S.W.3d at 574.
161 *Haymon*, 657 S.W.2d 239 (Ky. 1983).
162 See id.
163 See *Darden v. Commonwealth*, 52 S.W.3d 574 (Ky. 2001) (analyzing the applicability of KRS § 507.070, to § 635.020) and *Haymon v. Commonwealth*, 657 S.W.2d 239 (Ky. 1983) (analyzing the applicability of a burglary statute to KRS § 635.020).
164 *Darden*, 52 S.W.3d at 574.
165 *Ledford v. Faulkner*, 661 S.W.2d 475, 476 (Ky. 1983).
166 See generally *Darden*, 52 S.W.3d at 574.
167 See *Ledford*, 661 S.W.2d at 476.
168 See *Darden*, 52 S.W.3d at 575.
170 See *Darden*, 52 S.W.3d at 575.
171 KY. REV. STAT. ANN. § 635.020 (Michie 2001).
liberally construed with a view to promote their objects and carry out of the intent of the legislature."\textsuperscript{174} This is another rule the majority failed to follow.

The statute making unlawful possession of a weapon on school property a felony\textsuperscript{175} and the current provision allowing for transfer of juveniles who commit felonies with firearms\textsuperscript{176} were both part of the Enacted Acts of 1994 and they both became effective July 15, 1994.\textsuperscript{177} It is unlikely that the Kentucky General Assembly was unaware it had enacted a provision allowing for juvenile transfer for felons who use weapons when it declared possession of a firearm on school property a felony.\textsuperscript{178} The legislature intended this substantial penalty for juveniles because of the extreme danger weapons on school grounds pose to students, teachers and administrators.\textsuperscript{179} This statute was well supported as it passed with 82 votes in favor, 10 opposed.\textsuperscript{180} This suggests that, state-wide, there is extreme concern for weapons brought to school and the legislature responded by supporting a tougher penalty.\textsuperscript{181}

The presumption that the legislature intended the penalty to be more severe for juveniles who bring weapons to school is strengthened by KRS §527.100.\textsuperscript{182} This statute imposes the general penalties for possession of firearms by minors and declares possession of a handgun by a minor to be a misdemeanor,\textsuperscript{183} while KRS §527.070 declares that possession of a firearm on school grounds is a felony.\textsuperscript{184} This is clear evidence of the legislature's intent to impose a more substantial penalty for juveniles who bring weapons to school.\textsuperscript{185} It is ironic for the majority in \textit{Darden} to say that the "possession of a weapon on school property [that] would allow the automatic transfer to circuit court and allow [Darden] to be tried as an adult...is entirely against the intent of the legislature."\textsuperscript{186} In fact it is the majority's interpretation that is entirely in opposition to legislative aims.\textsuperscript{187}

The final rule of statutory interpretation that the majority misuses is that "doubts in the construction of a penal statute are to be resolved not only in favor of lenity, but also against a construction that would produce extremely harsh and incongruous results."\textsuperscript{188} Marcus Darden was on school property with not just one

\textsuperscript{178} See \textit{generally id.}
\textsuperscript{179} See \textit{Darden v. Commonwealth}, 52 S.W.3d 574, 579 (Ky. 2001).
\textsuperscript{180} \textit{Kentucky General Assembly, 1994 House Journal} 904 (1995).
\textsuperscript{181} See \textit{generally id.}
\textsuperscript{183} See \textit{id.} § 527.100(3).
\textsuperscript{184} \textit{Id.} § 527.070.
\textsuperscript{185} See \textit{generally id} § 635.020.
\textsuperscript{186} \textit{Darden v. Commonwealth}, 52 S.W.3d 574, 577 (Ky. 2001).
\textsuperscript{187} See \textit{generally id.} at 578 (Wintersheimer J., dissenting).
\textsuperscript{188} \textit{Id.} at 577 (citing \textit{Commonwealth v. Colonial Stores, Inc.}, 350 S.W.2d 464 at 467 (Ky. 1961)).
weapon, but with multiple weapons.\textsuperscript{189} He was also in possession of marijuana, cocaine and other drug paraphernalia.\textsuperscript{190} As Justice Wintersheimer remarked, imposing the penalty that the legislature intended is not unduly harsh, nor does it produce disproportionate results.\textsuperscript{191} It is not disproportionate for a juvenile, who, in Marcus Darden’s case was over 16, who committed a felony, who used a weapon to commit that felony, to be tried as an adult.\textsuperscript{192} If these statutes imposed some type of cruel and unusual punishment or denied a defendant due process of law, the Supreme Court of Kentucky would have declared them unconstitutional.\textsuperscript{193} Instead, the court found nothing wrong with the law, it simply chose not follow it.\textsuperscript{194}

C. The Court Fails to Consider Public Policy

There are some activities that are so inherently dangerous that liability is imposed regardless of motive or circumstance.\textsuperscript{195} These activities pose such a threat to the public that a stricter standard is applied to a person who engages in those activities.\textsuperscript{196} The Kentucky General Assembly attempted to make possession a weapon on school property one of those activities upon enacting KRS § 527.070.\textsuperscript{197} Unfortunately, the Supreme Court of Kentucky failed to give effect to the legislature’s intent.\textsuperscript{198} However, the court, in past decisions, has upheld harsher penalties for inherently dangerous activities.\textsuperscript{199}

The penalties for adults in Kentucky who possess weapons in the commission of a drug offense are more severe than for offenses in which no weapons are involved.\textsuperscript{200} The court has routinely upheld those decisions, even declaring that actual possession of the weapon is not required; it is enough the defendants have constructive possession.\textsuperscript{201} These decisions were based on the idea that a firearm in connection with drug dealings “increases the likelihood and potential for greater violence.”\textsuperscript{202}

Juveniles in Kentucky are transferred to circuit court to be tried as adults for other felonies in which a firearm was used.\textsuperscript{203} The reasoning behind the enhanced penalty is that, “the juvenile who uses a firearm in the commission of

\textsuperscript{189} Id. at 575.
\textsuperscript{190} Id.
\textsuperscript{191} Id. at 579 (Wintersheimer J., dissenting).
\textsuperscript{192} See generally id.
\textsuperscript{193} U.S. CONST. amend. VIII. This article provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
\textsuperscript{194} See Darden, 52 S.W.3d at 574.
\textsuperscript{195} See generally RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 629 (2000).
\textsuperscript{196} Id.
\textsuperscript{197} See KY. REV. STAT. ANN. § 527.020 (Michie 2001).
\textsuperscript{198} See generally Darden, 52 S.W.3d at 574.
\textsuperscript{199} See generally Commonwealth v. Montague, 23 S.W.3d 629 (Ky. 2000) (holding that enhancing the punishment for drug traffickers who possess weapons reflects the increased danger of violence when weapons are present).
\textsuperscript{200} See KY. REV. STAT. ANN. § 218A.992 (Michie 2001).
\textsuperscript{201} See Houston v. Commonwealth, 965 S.W.2d 925, 927 (Ky. 1998) and Montague, 23 S.W.3d 629 (Ky. 2000).
\textsuperscript{202} Montague, 23 S.W.3d at 634.
\textsuperscript{203} KY. REV. STAT. ANN. § 635.020 (Michie 2001).
an offense clearly chooses to be treated as an adult offender for all purposes. The
use of a firearm when committing a felony elevates the criminal conduct of a
juvenile to that of an adult, and therefore adult consequences must necessarily
follow.\textsuperscript{204}

What makes possession of a weapon on school property different from
any other felony in which a firearm is used? The likelihood and potential for
greater violence is certainly no different.\textsuperscript{205} The Center for Disease Control and
Prevention recorded 105 violent school-related deaths in the 1997-1998 school
year.\textsuperscript{206} Each day in the United States 6,250 teachers are threatened with
violence and 260 teachers are physically assaulted.\textsuperscript{207} Approximately 50% of all
violent crimes against youths age 12 to 19 occur on school property.\textsuperscript{208}

Due to the seeming epidemic of school-related violence of the past
decade, public policy dictates the implementation of zero-tolerance
regulations.\textsuperscript{209} There are few legitimate uses for weapons in the hands of
juveniles at school.\textsuperscript{210} The Kentucky legislature outlined the only uses permitted
in its exceptions to unlawful possession under KRS § 527.070.\textsuperscript{211} Marcus
Darden’s possession did not fall under one of those exceptions.\textsuperscript{212} He was not a
member of the reserve officers training corps,\textsuperscript{213} his weapon was not for
historical display,\textsuperscript{214} and he was not hunting during lawful hunting season.\textsuperscript{215}
Marcus Darden was on school property dealing drugs.\textsuperscript{216} It was necessary to
facilitate his dealing with weapons, weapons he knowingly brought on school
property.\textsuperscript{217} Considerations of public policy demand that a juvenile offender of
this type, who engages in this type of extremely reckless behavior, be subject to
an automatic transfer to circuit court to be tried as an adult.\textsuperscript{218}

Those justices who oppose the automatic transfer provision may feel that
juveniles who commit crimes are not mature enough to fully understand the
ramifications of their actions and should be punished with those considerations in
mind.\textsuperscript{219} That is a valid concern and one that would be considered even if a

\textsuperscript{204}See Britt v. Commonwealth, 965 S.W.2d 147, 151 (Ky. 1998).
\textsuperscript{205}See Chamberlin, supra note 1, at 287.
\textsuperscript{206}See id. at 288 (quoting CENTER TO PREVENT HANDGUN VIOLENCE, CAUGHT IN THE CROSSFIRE: A
REPORT ON GUN VIOLENCE IN OUR NATION’S SCHOOLS 7 (1990)).
\textsuperscript{207}Id. at 283 (citing Charlie Weaver, When Kids Pack a Gun Instead of a Lunch, STAR TRIBUNE,
\textsuperscript{208}Id. at 282 n. 6 (quoting Catherine J. Whitaker & Lisa D. Bastian, U.S. DEPT. OF JUSTICE,
\textsuperscript{209}See supra notes 205–207 and accompanying text.
\textsuperscript{210}See KY. REV. STAT. ANN. § 527.070 (Michie 2001) (listing exhaustively the legitimate reasons
for possessing a weapon on school grounds).
\textsuperscript{211}See id.
\textsuperscript{212}Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001).
\textsuperscript{213}KY. REV. STAT. ANN. § 527.070(3)(b) (Michie 2001).
\textsuperscript{214}See id. § 527.070(3)(f).
\textsuperscript{215}Id. § 527.070(3)(g).
\textsuperscript{216}Darden, 52 S.W.3d at 575.
\textsuperscript{217}See id.
\textsuperscript{218}KY. REV. STAT. ANN. § 635.020 (Michie 2001).
\textsuperscript{219}See Thompson v. Oklahoma, 487 U.S. 815, 824-833 (1988) (holding that juveniles are less
culpable than adults because they are less mature and unable to fully appreciate the consequences
juvenile were to be subject to the automatic transfer provision that the legislature intended. All the transfer provision provides for is that a juvenile be tried as an adult. It does not mean a juvenile will be automatically convicted. It does not mean that considerations of the juvenile’s circumstances will not be pertinent during sentencing, if the juvenile is found to be guilty of the offense. KRS § 610.015(1), part of the Kentucky Juvenile Code, provides that a juvenile, tried as an adult will be subject to the arrest, post-arrest and criminal procedures that apply to an adult, except for the place of confinement. Every right that an adult has at trial will be afforded to the juvenile. Opponents should also bear in mind that the automatic transfer provision is for a very narrow category of offenses and circumstances. It is for juveniles, over 14 years of age, who use a firearm in the commission of a felony. A balancing of the competing policies of appropriate penalties for juvenile offenders and safety of children at school reveals that bringing a weapon on school grounds is an inherently dangerous offense to which a harsher penalty may be imposed.

V. CONCLUSION

If the court plans to continue to override legislative intent, and if its reasoning is to stand further tests by other juvenile offenders, there must be a bright-line rule developed to indicate when a juvenile is “using” a firearm and when the juvenile is “possessing” a firearm. Where will the Court draw the line? If a weapon is in a juvenile’s pocket on the school bus, will that constitute “use” of a weapon in the commission of a felony under KRS § 635.020? If a student has a gun in his locker and gets it out to show other students, will that constitute “use” of a weapon in commission of a felony? If a juvenile offender on a baseball field dealing drugs gets a semi-automatic rifle out of his car and opens fire on the spectators at a football game, will that constitute “use” of a weapon in the commission of a felony, warranting transfer to be tried as an adult offender?

Public policy concerns such as the safety of children, the increasing violence of youthful offenders and the staggering numbers of weapons in our

---

220 See KY. REV. STAT. ANN. § 610.015 (Michie 2001).
222 See id.
223 See generally id. § 610.015.
224 Id.
225 See id.
226 Id.
227 See KY. REV. STAT. ANN. § 635.020 (Michie 2001).
228 See id. § 635.020(4).
230 See generally id.
schools demand that effect be given to the legislature's intent.\textsuperscript{231} If the court's distinction is allowed to stand, the deterrent effect the legislature intended by implementing the zero-tolerance policy will be invalidated. Juveniles will bring weapons to school and the only penalties imposed on them will be those of the juvenile court system because courts will have to use the criteria of \textit{Darden v. Commonwealth}\textsuperscript{232} to determine whether the juvenile "used" the weapon in committing the felony. The legislature changed the policies regarding juvenile offenders\textsuperscript{233} for good reason. The legislature made unlawful possession of a weapon on school grounds a felony\textsuperscript{234} for good reason. There is no good reason for the Court's decision in \textit{Darden v. Commonwealth}.\textsuperscript{235}

\textsuperscript{231} See supra notes 205–207 and accompanying text.
\textsuperscript{232} Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001).
\textsuperscript{233} See \textit{Ky. REV. STAT. ANN.} § 635.020 (Michie 2001).
\textsuperscript{234} See id. § 527.070.
\textsuperscript{235} 52 S.W.3d 574 (Ky. 2001).