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The Rise and Demise of the Collective Right Interpretation of the Second Amendment

David T. Hardy

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THE RISE AND DEMISE OF THE “COLLECTIVE RIGHT” INTERPRETATION OF THE SECOND AMENDMENT

DAVID T. HARDY*

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ABSTRACT

When first I wrote on the subject in 1974, Second Amendment scholarship was almost nonexistent, but the common belief was that the Amendment protected some manner of State right to control National Guard units, a belief universally accepted in case law at the federal level.

Thirty-five years later, the picture has radically changed. *District of Columbia v. Heller*,¹ established the Second Amendment as an individual right, and *McDonald v. Chicago*,² held it was a fundamental right incorporated under the 14th Amendment. There already are several appellate rulings on its scope, and approximately a dozen more test cases on the way.

This article explores the origins of the two competing theories of the Second Amendment – the "individual rights" approach which carried the majority in *Heller* and *McDonald*, and the variants of a "collective right" theory which was previously dominant in the lower courts, and one variant of which was endorsed by the *Heller* dissents. Careful analysis of states' bills of rights of the Framing period suggests that two guarantees were desired, by different political factions. Framers closely adhering to the Classical Republican point of view favored protection for the militia as a system; those favoring the emerging Jeffersonian point of view favored guarantees of individual rights to arms. The Second Amendment has two clauses because it has two purposes.

¹ *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

² *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

This article also suggests that the prior Supreme Court ruling, *United States v. Miller*,³ was almost certainly a collusive case, and that its ambiguity is a product of very poor briefing and assignment to the exceptionally lazy Justice McReynolds, whom the Chief Justice understandably detested.

The "collective right" theory, while dominating case law circa 1990, had little standing throughout most of our history. It rose to prominence only in the lower federal courts beginning in the 1940s, and achieved its dominance only in the 1970s. Put in historical context, *Heller* and *McDonald* are not so much a dramatic change in constitutional interpretation so much as a rejection of a relatively recent trend in the lower courts, a trend that was subject to academic criticism even as it took form.

*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.*⁴

As late as a decade ago, the federal courts' interpretation of the Second Amendment was simple. Every circuit that had ruled upon it had held that it did not guarantee an individual right to arms for individual purposes. Rather, it reflected some form of "collective right," either (1) a right of states to have militia systems, or (2) a right of individuals, but only to engage in state-organized militia activities.⁵

Five years later this position had collapsed. In *District of Columbia v. Heller*,⁶ followed by *McDonald v. City of Chicago*,⁷ the Supreme Court accepted the individual right for individual purposes view. More astonishing, the first form of "collective rights," which saw it as a right of States and had prevailed in three circuits,⁸ lost 9-0!⁹ The circuits quickly turned to determining the parameters of the right which they had previously thought nonexistent.¹⁰

³ *United States v. Miller*, 307 U.S. 174 (1939).

⁴ U.S. CONST. amend. II. (denoting 18th century copyists freely altered punctuation when transcribing text thus there are versions with one, two, and three commas).

⁵ See, e.g., *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1997), *cert. denied*, 522 U.S. 807 (1997); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997); *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), *cert. denied sub nom.*; *Hickman v. City of Los Angeles*, 519 U.S. 912 (1996); *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1993); *United States v. Toner*, 728 F.2d 115 (2d Cir. 1984); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1978); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

⁶ *Heller*, 554 U.S. 570 (2008).

⁷ *McDonald*, 130 S. Ct. 3020 (2010).

⁸ *United States v. Napier*, 233 F.3d 394, 402 (6th Cir. 2000) ("[T]here can be no serious claim to any express constitutional right of an individual to possess a firearm."); *United States v. Scanio*, No. 97-1574, 1998 WL 802060, at *2 (2d Cir. Nov. 12, 1998) (indicating the Second Amendment was "meant solely to protect the right of the states to keep and maintain armed militia . . ."); *Block*, 81 F.3d 98, 101 (9th Cir. 1996) ("[T]he Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.").

Such a change might be considered “revolutionary” in the modern usage of that word. But when the Second Amendment is placed in historical context, it becomes apparent that the change was revolutionary in the original use of the term – a change which returns things to the point of their beginning.¹¹ From the framing of the Bill of Rights onward, the individual right view (*i.e.*, individual right for individual purposes such as self-defense) held sway in every venue – courts, commentators, Congress. The collective right view did not begin to gain acceptance in the federal courts until the 1940s, and did not become widespread until the 1970s. At the time of *Heller*, it was but a few decades old, and had been subject to serious scholarly challenge for most of that brief lifespan.

This article will examine the history of the two competing theories in terms of the Framing period, the developments in American law prior to the Civil War, and the understandings of courts, commentators, and Congress following that War. We will then review developments of the Twentieth Century, including the origins of collective right interpretation over that period.

I. THE AMERICAN RIGHT TO ARMS AS SEEN BY THE FRAMERS AND THEIR CONTEMPORARIES

A. *Background: the Anglo-American Experience*

When conceptualizing the right to arms, early American thought was informed by two well-known concepts, one of which focused upon individual ownership of arms to implement a core right of self-defense, the other which focused upon a universal militia as the only safe defense of a free polity.

As Joyce Malcolm has extensively documented,¹² the English perception of an individual right to arms arose out of a 17th century reversal of policy course.¹³ Prior to the Stuart dynasty, English governments actively *forced* their subjects to own and use arms. All healthy male subjects were required to own arms appropriate to the period and their wealth,¹⁴ towns were required to construct shooting ranges,¹⁵ and all

⁹ Even the *Heller* dissenters argued against it: “The question presented by this case is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ Surely it protects a right that can be enforced by individuals.” 554 U.S. at 636 (Stevens, J., dissenting).

¹⁰ See, e.g., *United States v. Chester*, No. 09-4084, 2010 U.S. App. Lexis 26508 (4th Cir. Dec. 30, 2010); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009); *In re United States*, 578 F.3d 1195 (10th Cir. 2009); *United States v. Engstrom*, 609 F. Supp.2d 1227 (D. Utah 2009).

¹¹ See THE CONCISE OXFORD DICTIONARY OF POLITICS 465 (Iain McLean & Alistair McMillan eds., 2003) (“Before 1789, the word often meant, truer to its literal meaning, a return to a previous state of affairs . . .”).

¹² JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994).

¹³ *Id.* at 1, 13-15.

¹⁴ The 1181 Assize of Arms, for instance, required all free men to possess a lance and armor. EUGENE MORROW VIOLETTE ET AL., SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL

games other than marksmanship were outlawed in order to ensure that Englishmen would have but one legal sport.¹⁶ The arms-bearing populace eventually came to be known as the militia, and was organized under royal officials, the Lords Lieutenant.

Wracked by instability,¹⁷ the Stuart kings radically reversed these policies. Their primary legal tools were the Militia Act of 1662, which authorized the Lords Lieutenant or their deputies to disarm anyone they might "judge dangerous to the peace of the Kingdom," and the Game Act of 1671, which (under the justification of preventing poaching) forbade all but the wealthiest landowners to possess firearms.¹⁸ James II in particular tried to enforce these measures. One example is a 1686 order that informed the Lords Lieutenant that James had heard that "a great many persons not qualified by law under pretence of shooting matches keep muskets or other guns in their houses," and ordered them "to cause strict search to be made for such muskets or guns and to seize and safely keep them till further order."¹⁹

James was overthrown in the Glorious Revolution of 1688, to be succeeded by William and Mary.²⁰ Parliament then drafted a Declaration of Rights,²¹ which the new monarchs were required to accept before taking the throne.

The Declaration was a minimalist guarantee of rights; only the most "ancient and indubitable" English rights were spelled out. Free speech was protected only in Parliament; freedoms of the press, of assembly, and of religion were nowhere mentioned. But among the core rights protected was that of arms: "the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."²²

The individual nature of this right was clear, not only from its text, but from its history. The Parliamentary debates had centered upon individual disarmaments under the 1662 Militia Act. Sir Richard Temple referred to "Militia Bill—Power to disarm all England—Now done in Ireland," Mr. Boscawen lodged a personal

HISTORY 23 (George B. Adams & H. M. Stephens eds., 1926) (1901). The 1285 Statute of Winchester extended this duty to all males aged 15-60, including serfs. *Id.* at 43, 78-79. In 1511, Parliament required all Englishmen aged 7-60 to have and practice with the longbow. 3 Hen. 8 c. 3, 3 STATUTES OF THE REALM 25 (1511).

¹⁵ See An Acte for Maynten'nce of Artillarie and debarring of unlawful Games, 33 Hen. 8 c. 9, 3 STATUTES OF THE REALM 837, 838 (1541).

¹⁶ *Id.* See also ALEC R. MYERS, 4 ENGLISH HISTORICAL DOCUMENTS 1182 (Alec R. Myers ed., 1969) (including a 1363 proclamation of Edward III outlawing "throwing stones, wood, or iron, playing handball, football, or 'stick-ball' . . . or hockey, or cock-fighting . . ." or any other games of this kind, which are worthless).

¹⁷ Charles I was overthrown by the English Civil Wars of 1642-1651 and beheaded in their aftermath, while his sons Charles II and James II were driven into exile, returning with the Restoration of 1660. James II in turn was overthrown by the Glorious Revolution of 1688.

¹⁸ 14 Car. 2, c. 2 (1662); 22 & 23 Car. 2, c. 25 (1671). See generally P. B. MUNSCHÉ, GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671-1831 11-14 (1981).

¹⁹ 2 JAMES II, CALENDAR OF STATE PAPERS DOMESTIC SERIES 314 (London 1686).

²⁰ Mary being his daughter and William his son-in-law. Dysfunctional families are not a modern concept.

²¹ 1 W. & M., c. 2 (1689).

²² *Id.*

complaint, “Militia—Imprisoning without reason; disarming—Himself disarmed . . .” and Sergeant (then a legal rank) added “Militia Act—An abominable thing to disarm the nation”²³ Early drafts, which would have focused upon the keeping and providing of arms “for the common defense” were dropped in favor of an individual right guarantee.²⁴ Thus one modern English military historian’s complaint that: “The original working implied that everyone had a duty to be ready to appear in arms whenever the state was threatened. The revised wording suggested only that it was lawful to keep a blunderbuss to repel burglars.”²⁵

Blackstone’s Commentaries, the foremost explanation of law available to the Framing generation, explained this in individualist terms:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute, 1 W. and M. St. 2, c. 2 [the Declaration of Rights], and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or as they are frequently termed, the liberties of Englishmen²⁶

It is thus not surprising that when, prior to the Revolution, the British complained of Americans’ stockpiling of arms, Sam Adams published a response: “It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.”²⁷

The other component of the legal background was the American militia systems. From their beginning, the colonies had required all adult males (and sometimes adult females, if heads of households)²⁸ to possess arms. In an echo of the modern

²³ 2 PHILLIP YORKE, MISCELLANEOUS STATE PAPERS FROM 1501 TO 1726 416-17 (Phillip Yorke ed., London 1778). Hardwick found the penciled notes of Lord Somers, covering the debate in the House of Commons.

²⁴ See MALCOLM, *supra* note 12, at 119.

²⁵ *Id.*

²⁶ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143-44 (J.B. Lippincott Co. 1893).

²⁷ OLIVER DICKERSON, BOSTON UNDER MILITARY RULE 79 (1936) (reprinting the article as it appeared in THE NEW YORK JOURNAL SUPPLEMENT).

²⁸ See CLAYTON E. CRAMER, ARMED AMERICA 4, 7 (2006).

"unorganized militia,"²⁹ some statutes exempted critical occupations from militia training, yet still required those persons to own arms.³⁰

In a world faced with attacks by Native Americans and by rival French, Spanish, and Dutch colonists, the militia concept was a practical one. It acquired intellectual underpinnings from the writings of the English Classical Republican authors, such as Roger Molesworth, James Harrington, and James Burgh.³¹ These argued that a universal militia was the only safe and effective defense of a free people: A professional army must either be too weak to defend a free people, or powerful enough to take over the government and private property. A militia composed of voters and property owners could be as powerful as desired, yet pose no risk to government or property, since its members were the very ones who controlled both.

The Framing generation thus acted against a dual legal background, both components of which linked individual arms ownership to freedom. One component stressed the right to have arms, as a means of individual self-defense; the other stressed the duty to have arms, as a means of collective self-defense. It is not surprising that when, following the Declaration of Independence, the new States drafted bills of rights, provisions on arms took two different courses, which only became merged late in the period.

B. Understanding of the Framing Period

1. Framing Period Evidence for an Individual Rights Understanding

a. Evidence of Separate Origins for the Amendment's Clauses

During the *Heller* oral argument, Justice Kennedy advanced a theory that the Second Amendment's two clauses had two independent purposes:

[I]t seems to me that there is an interpretation of the Second Amendment differing from that of the district court and in *Miller* and not advanced particularly in the red [Respondent's] brief, but that conforms the two clauses and in effect delinks them.

The first clause I submit can be read consistently with the purpose I've indicated of simply reaffirming the existence and the importance of the militia clauses.

²⁹ See 10 U.S.C. § 311 (2006).

³⁰ See Robert A. Churchill, *Gun Regulation, the Police Power, and the Right to Bear Arms in Early America*, 25 LAW & HIST. REV. 139, 145, 148, 166 (2007); Militia Act of 1792, §§ 1-2, 1 Stat. 271-72.

³¹ See FRANCIS HOTOMAN, *FRANCO-GALLIA* iv (Roger Molesworth trans., London 1711); THE POLITICAL WORKS OF JAMES HARRINGTON 442 (J.G.A. Pocock ed., 1977); 2 JAMES BURGH, *POLITICAL DISQUISITIONS: AN ENQUIREY INTO PUBLIC ERRORS, DEFECTS AND ABUSES* 345, 390, 474-76 (London 1774) (reprint 1971). These authors, and especially Burgh, carried great influence among Americans of the Framing period. See generally Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 127-29 (1986); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J. L. & PUB. POL'Y 559, 586-87 (1986).

Those were very important clauses. As you've indicated, they're in Article I and Article II.

And so in effect the amendment says we reaffirm the right to have a militia, we've established it, but *in addition*, there is a right to bear arms.³²

The historical record supports Justice Kennedy's theory. The Bill of Rights originated as a Federalist attempt to appease, or neutralize, critics of the original Constitution, who feared that the new government would abuse its powers.³³ The Second Amendment has two clauses, because it had a dual ancestry and was intended to appease two different concerns. The first concern rose directly from Classical Republican thought: of all defenses for a republic, only a militia composed of land-owning voters could be both strong and safe. The second concern's origins came from what would later be known as Jeffersonianism, and centered upon guarantees of rights, including an individual right to arms.

At the outset, framers of American constitutions treated the two as a binary choice; only very late in the process did they realize that both could be combined. The comparative influence of Classical Republicanism and Jeffersonianism can be illustrated by comparing a body's militia vs. arms choice to its decisions relating to another tenet of Classical Republicanism – that voters should be landowners – and of Jeffersonianism – universal manhood suffrage.

Virginia, 1776. The two approaches appeared at the very outset, as Virginia drafted the first State constitution and declaration of rights. The framers were presented with two approaches.

Thomas Jefferson's proposal

³² District of Columbia v. Heller – Oral Argument, The Oyez Project at IIT Chicago-Kent College of Law, *available at* http://www.oyez.org/cases/2000-2009/2007/2007_07_290/argument (emphasis added) (last visited Oct. 2, 2011). Justice Scalia then took a related approach:

I don't see how there's any, any, any contradiction between reading the second clause as a . . . as a personal guarantee and reading the first one as assuring the existence of a militia, not necessarily a State-managed militia because the militia that resisted the British was not State-managed.

But why isn't it perfectly plausible, indeed reasonable, to assume that since the framers knew that the way militias were destroyed by tyrants in the past was not by passing a law against militias, but by taking away the people's weapons . . . that was the way militias were destroyed.

The two clauses go together beautifully: Since we need a militia, the right of the people to keep and bear arms shall not be infringed.

Id.

³³ *See generally* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 30-39 (1999).

Guarantee: "No freeman shall ever be debarred the use of arms."³⁴
 Franchise: All residents.³⁵

George Mason's (successful) proposal

Guarantee: "That a well-regulated militia, or composed of the body of the people, trained to arms, is the proper, natural and safe defense of a free state"³⁶
 Franchise: Landowners.³⁷

Pennsylvania, 1776. The Virginia Declaration was quickly followed by that of Pennsylvania, where "radical" forces had stage a political coup.³⁸ The Pennsylvanians borrowed heavily from the Virginia measure, but made one major change.

Guarantee: "That the people have a right to bear arms for the defence of themselves and the state."³⁹
 Franchise: All taxpayers.⁴⁰

Maryland, 1776.

Guarantee: "That a well-regulated militia is the proper and natural defence of a free government."⁴¹
 Franchise: Freeholders with 50 acres of land, or 30 pounds of property.⁴²

³⁴ 1 PAPERS OF THOMAS JEFFERSON 344 (Julian P. Boyd ed., 1950). Jefferson's draft adds "[within his own lands or tenements]," the brackets indicating that he was either considering adding, or considering deleting, this phrase.

³⁵ In a letter to Edmund Pendleton, dated August 26, 1776, Jefferson explained, "I was for extending the right of suffrage (or in other words the right of a citizen) to all who had a permanent intention of living in the country Whoever intends to live in a country must wish that country well"

³⁶ Virginia Declaration of Rights § 13 (1776), *available at* http://www.constitution.org/bcp/virg_dor.htm (last visited Oct. 2, 2011). The inclusion of the word "safe" highlights the Classical Republican understanding that the militia was the only defensive system that could be both effective as to enemies and safe from the standpoint of a free State.

³⁷ The franchise had long been limited to landowners. An act for prevention of undue election of Burgesses, 3 Henings' Laws of Virginia 173 (1699), and Mason's draft left this in place.

³⁸ *See generally* Samuel B. Harding, *Party Struggles Over The First Pennsylvania Constitution*, in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1894 371 (1895).

³⁹ 5 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3082-83 (1909).

⁴⁰ *Id.*

⁴¹ MD. DECLARATION OF RIGHTS § XXV, *available at* <http://www.nhinet.org/ccs/docs/md-1776.htm> (last visited Oct. 2, 2011).

⁴² MD. CONST. § II, *available at* <http://www.nhinet.org/ccs/docs/md-1776.htm> (last visited Oct. 2, 2011).

Vermont, 1777.

Guarantee: "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."⁴³

Franchise: All freemen.⁴⁴

Massachusetts, 1780.

Guarantee: "The people have a right to keep and to bear arms for the common defence."⁴⁵

Franchise: Freehold worth three pounds, or property worth sixty, for the lower house; freehold worth sixty pounds, for the upper.⁴⁶

Kentucky, 1792.

Guarantee: "The rights of the citizens to bear arms in defense of themselves and the State shall not be questioned."⁴⁷

Franchise: All free males.⁴⁸

Framers of the early state constitutions thus appear to have seen a binary choice between praising the militia or guaranteeing an individual right to arms, and the choice largely parallels their choice between the Classical Republican belief that only property owners should vote and the Jeffersonian ideal of universal manhood suffrage. There are two sets of concerns being expressed here, backed by two somewhat different political philosophies.

The debates over the ratification of the proposed Constitution begat the movement for an American bill of rights. The earliest proposals still regarded matters as a binary choice, and uniformly went with the individual right to arms rather than a militia clause. Thus the publicized report of the minority of the Pennsylvania ratifying convention⁴⁹ called for:

[T]he people have a right to bear arms for the defense of themselves and their own state, or the United States, or the purpose of killing game; and

⁴³ VT. DECLARATION OF RIGHTS § XV, *available at* http://avalon.law.yale.edu/18th_century/vt01.asp (last visited Oct. 2, 2011).

⁴⁴ VT. CONST. § XVI, *available at* http://avalon.law.yale.edu/18th_century/vt01.asp.

⁴⁵ MASS. DECLARATION OF RIGHTS § XVII, *available at* <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited Oct. 2, 2011).

⁴⁶ MASS. CONST. ch. 1, art. II, ch. 3, art. IV, *available at* <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited Oct. 2, 2011).

⁴⁷ KY. CONST. art. XII, § 23, *available at* <http://courts.ky.gov/NR/rdonlyres/7471028C-8BCC-41A2-BA80-02013D4FA550/0/1stKYConstitution.pdf> (last visited Oct. 2, 2011).

⁴⁸ *Id.* at art. III, § 1.

⁴⁹ The merchant class had eventually returned to power.

no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals⁵⁰

The next demand came in Massachusetts, where Samuel Adams unsuccessfully proposed a guarantee "that the said constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms" ⁵¹ When New Hampshire gave the Constitution the ninth vote necessary for ratification, it requested the guarantee that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."⁵²

Then came the Virginia ratifying convention, and the breakthrough. The Virginians realized that the militia/right to arms choice was a false dichotomy. If those who wanted a right to arms were also in favor of the militia system, and those who preferred a militia guarantee also believed in a right to arms, why not incorporate both? The Virginia ratifiers thus proposed a guarantee that was the direct ancestor of the Second Amendment: "That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state" ⁵³ The Virginia formulation became instantly popular among the few remaining State conventions. New York (which ratified) and North Carolina (which did not) accepted it with but a minor change in wording.⁵⁴

The Framers and their contemporaries understood that the future Second Amendment had dual roots. One portion related to rights, arising from individual self defense, the other related to duties, arising from needs for social self defense. As there was no conflict between the two, it made sense to put *both* in writing. Omitting praise for the militia might alienate constitutional critics such as George Mason; omitting an individual right to arms would alienate others, such as the Pennsylvania minority and New Hampshire majority. "Either/or" was resolved by "and."

⁵⁰ 2 MADISON STATE HISTORICAL SOC'Y OF WIS., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 597-98 (Merrill Jensen ed., Wisconsin, Worzalla Publishing Company, 1796). The minority's proposals were met with criticism based on the argument that the new national government would have no power over individual arms ownership, so that its provisions would be superfluous. See Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131, 150 (1991).

⁵¹ DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86-87 (Boston 1856). See also PAUL LEWIS, THE GRAND INCENDIARY: A BIOGRAPHY OF SAMUEL ADAMS 361 (1973); 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (Leon Friedman et al. eds., 1971).

⁵² 2 SCHWARTZ, *supra* note 51, at 761. See generally, JOSEPH BURBEEN WALKER, BIRTH OF THE FEDERAL CONSTITUTION: A HISTORY OF THE NEW HAMPSHIRE CONVENTION (Boston, Supples & Sound, Publishers, 1888).

⁵³ 2 SCHWARTZ, *supra* note 51, at 842.

⁵⁴ *Id.* at 912 ("including the body of the people" rather than "composed of the body of the people").

b. The Drafting of the Second Amendment

Madison's understanding came into play when he began work on a national bill of rights. Madison's arms-related amendment would indeed praise the militia and guarantee a right to arms, but he appears to have placed greater weight on the latter provision. First, we have his handwritten outline for a speech introducing his bill of rights, a portion of which lists the inadequacies of the English Declaration of Rights, including its guarantee of arms rights to protestants only:

fallacy on both sides—especky as to English Decln. of Rts.—

1. mere act of parl.
2. no freedom of press—Conscience
 - Gl. Warrants—Habs. corpus
 - jury in Civil Causes—criml.
 - attainders—arms to Protestts.⁵⁵

A second indication lies in Madison's original format for the bill of rights. Today we are accustomed to a Bill of Rights which has ten numbered "stand alone" provisions. Madison's draft, as introduced in Congress, envisioned the amendments being inserted in the body of the Constitution, and designated where each portion would so be placed.⁵⁶ Thus—

His first two provisions, which dealt with Congressional apportionment and compensation (and failed of ratification) were to be placed in Article I, sections two and six, which dealt with representation in the House and with compensation of House members;

Provisions which would become the First through Sixth, and Ninth, Amendments were to be placed at "Article 1st, Section 9, between Clauses 3 and 4" – following the original Constitution's restrictions on enactment of ex post facto laws and bills of attainder.

An unsuccessful attempt to restrict State infringements of religious liberty, freedom of the press, or the right to criminal jury trial was inserted in Article I, section 10, alongside the original Constitution's restriction of State powers.

Provisions relating to appeals, jury trial, and indictment, were to be inserted in Article III, which had dealt with the Judiciary.

⁵⁵ 12 THE PAPERS OF JAMES MADISON 193-94 (Charles F. Hobson et al. eds., 1979).

⁵⁶ 1 ANNALS OF CONG. 201 (Joseph Gales ed., 1789).

A provision on separation of powers, and the future Tenth Amendment, would become a new Article VII, with the existing Article VII renumbered as Article VIII.

Madison did not designate the future Second Amendment as a modification of Article I, section 8's establishment of Congressional power over the militia. Instead he grouped it with the future first six amendments as restrictions on Congressional legislative power contained in Article I, section 9. The Committee of Eleven, to whom Madison's proposals were assigned, kept his organization.⁵⁷

There is strong evidence that others – in particular, members of the First Congress – shared this understanding. The First Senate voted down two proposed additions to the Bill of Rights. The first would have appended "for the common defense" to the right to keep and bear arms.⁵⁸ The Massachusetts Constitution of 1780 had included such a phrase in its right to arms clause, but the inclusion had generated controversy and criticism in town meetings.⁵⁹

The second would have given states additional militia powers, authorizing them to arm and organize the militia should Congress neglect to do so.⁶⁰ This likewise failed on a voice vote.⁶¹ The First Congress thus rejected both the attempt to narrow and by inference militia-link the right to arms, and the attempt to constitutionalize State power over the militia.

Others of the Framing generation likewise stressed the individual right aspect of the Second Amendment. Even while the Bill of Rights was being debated, Madison's friend Tench Coxe published a series of newspaper articles explaining it, which is known to have been carried by papers in Boston, New York, and Philadelphia.⁶² His explanation of the Second Amendment gave not a word to the well-regulated militia, but assured Americans that:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.⁶³

⁵⁷ 5 THE DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870 186-87 (1905). See also Robert E. Shalhope, *The Second Amendment and the Right to Bear Arms: An Exchange*, 71 J. OF AM. HIST. 587, 589 (1984).

⁵⁸ JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES 77 (1820) ("On motion to amend article the fifth, by inserting these words: 'for the common defense' next to the words 'to bear arms': it passed in the negative.").

⁵⁹ See Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, VT. L. REV. 255, 302-304 (1985).

⁶⁰ *Id.* at 75.

⁶¹ *Id.*

⁶² See STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 77 n.152 (2d ed. 1994).

⁶³ See *id.* at 76-77.

Coxe sent a copy to Madison, who complimented him on it, noting that the article was already in the newspapers in New York, where the First Congress was sitting.⁶⁴

In short, the Second Amendment had dual points of origin, and was meant to appeal to two different political groups. James Madison and the First Congress kept the two concepts independent, and tended to treat the right to arms as if it were the predominant clause.

2. Framing Period Evidence for a Militia-Uses-Only Right to Arms

While there were mentions of the militia in the ratification debates, most are useless to our present inquiry. References to the militia's perceived importance merely state what is already obvious from the first clause of the Second Amendment. Concerns that Congress might create a select, handpicked militia,⁶⁵ or worries that Congress would make militia service too burdensome so as to sabotage the system⁶⁶ likewise shed no light at all on whether the right to arms was seen as limited to militia service.

The Stevens dissent in *Heller* sees the Second Amendment as motivated by fears that the new national government might "disarm the state militias" (*i.e.*, by failing to provide arms or mandate their purchase) thereby threatening "the sovereignty of the several States."⁶⁷ The dissent quotes George Mason in the Virginia ratifying convention, concerned that "Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has the exclusive right to arm them."⁶⁸ Since the Virginia Convention ended with a call for a bill of rights that included an obvious ancestor of the Second Amendment ("the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state"),⁶⁹ the dissent suggests that this proposal, and thus the Second Amendment, was meant to meet Mason's desire to protect State rights to arm their militias.

A simple timeline shows, however, that Mason's concerns did not underlie the Second Amendment ancestor, but rather a *different* proposal which was added to the Virginia demands *after* he gave the above speech, and which failed to be accepted by the First Congress. That different proposal read: "That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same"⁷⁰

⁶⁴ 12 THE PAPERS OF JAMES MADISON, *supra* note 55, at 239-41, 257.

⁶⁵ See, e.g., LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 21-22, 124 (Walter Hartwell Bennett ed., 1978); 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 50, at 509; 12 THE PAPERS OF JAMES MADISON, *supra* note 55, at 378.

⁶⁶ See, e.g., Patrick Henry's argument that Congress might require one type of militia musket, and the States another: "But can the people afford to pay for double sets of arms?" 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 386 (2d ed. 1836).

⁶⁷ District of Columbia v. Heller, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting).

⁶⁸ *Id.* at 639.

⁶⁹ *Id.*

⁷⁰ 3 ELLIOT, *supra* note 66, at 660.

The Virginians were capable of clearly addressing a problem, and did so here. This becomes even clearer when we examine a timetable:

June 11, 1788: The Virginia Ratifying Convention considers a draft of a bill of rights, containing the ancestor of the Second Amendment: "The people have a right to keep and bear arms; 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 . . ." ⁷¹ This draft said nothing about State powers to arm militias.

June 14, 1788: George Mason realizes there is an *unaddressed* problem with regard to the militia, and tells the Convention it needs a remedy. Congress might "neglect to arm them [the militia], and prescribe proper discipline." He moves for a guarantee: "I wish, that in case the general government should neglect to arm and discipline the militia, that there should be an express declaration, that state governments might arm and discipline them." ⁷²

June 27, 1788: The Virginia convention ratifies the proposed constitution, keeping the ancestor of the Second Amendment, *and adding to the proposed amendments a new proviso*: "11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same . . ." ⁷³

It is apparent from this sequence that the Virginians did not see their proto-Second Amendment as protecting state rights to arm militias; not one delegate argued that the June 27 proposal was unnecessary since it was covered by the existing "right of the people to keep and bear arms" guarantee. The militia concerns were addressed by a separate proviso, which went nowhere. Madison did not include it in the bill of rights he introduced in the First Congress, and when members of the First Senate proposed to add it, the motion lost on a voice vote. ⁷⁴

Conclusion. In the Framing period, there is strong evidence of an intent to recognize an individual right to arms that is independent of militia service. This is borne out by the common law background, Madison's reference to the English Bill of Rights, his original placement of the Second Amendment, Tench Coxe's description of it, and the First Senate's rejection of a proposal to allow States to arm

⁷¹ 3 THE PAPERS OF GEORGE MASON 1725-1792 1054, 1068 (Robert A. Rutland, ed., 1970) (hereinafter GEORGE MASON PAPERS).

⁷² See *id.* at 1075.

⁷³ 3 ELLIOT, *supra* note 66, at 660.

⁷⁴ JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES, *supra* note 58, at 75.

their militias. There is also strong evidence of an intent to commemorate the importance of the militia system to freedom and security. There is, however, *no evidence* of any understanding that the right to arms was restricted to militia service.

II. THE UNDERSTANDING OF THE RIGHT TO ARMS IN EARLY AMERICAN LAW

Here, there are two sets of information to be considered – the writings of early legal commentators, and early State case law.

A. *Writings of Early Legal Commentators*

1. Evidence from Early Commentators Supporting an Individual Right to Arms

a. *St. George Tucker*

St. George Tucker, professor of law at William and Mary, was a friend of Madison, and had friends and relatives in the First Congress.⁷⁵ His 1803 edition of Blackstone's *Commentaries* was the first version of that text annotated with American decisions, and remained for two decades the legal treatise most often cited by the Supreme Court.⁷⁶ Tucker dropped a footnote to Blackstone's description of the British Declaration of Rights, noting "The right of the people to keep and bear arms shall not be infringed. Amendments to C., U.S., Art. 4, and this without any qualification to their condition or degree, as is the case in the British government."⁷⁷ (The Bill of Rights as sent out for ratification had twelve amendments, with today's Second Amendment in fourth place.) In an appendix volume, Tucker returned to one of his favorite themes, American legal exceptionalism:

The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept-up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure⁷⁸

⁷⁵ Jefferson described Tucker as one of his "earliest and best friends, and acquaintances," while Madison appointed him to the federal bench. His brother served in the First Senate, and his closest friend in the First House. HARDY, *supra* note 31, at 611-12.

⁷⁶ WILLIAM HAMILTON BRYSON, *LEGAL EDUCATION IN VIRGINIA 1779-1979* 682 (1982).

⁷⁷ 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS 143 n.40 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803).

⁷⁸ 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS app. at 300 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803).

Tucker's views of the Amendment are clearly individualistic. It is linked to self-defense, and was violated by England's Game Acts, which had nothing at all to do with its militia.⁷⁹

b. William Rawle

William Rawle was another contemporaneous commentator – indeed, he sat in the Pennsylvania Assembly when it ratified the Second Amendment.⁸⁰ Rawle's 1825 *View of the Constitution* was a popular college text in the early Republic.⁸¹

Rawle gave consideration to both clauses of the Second Amendment. With regard to the well-regulated militia clause, Rawle discussed the dangers of standing armies and of undisciplined militias, concluding: "The duty of the state government is, to adopt such regulations as will tend to make good soldiers with the least interruption of the ordinary and useful occupations of civilian life."⁸²

He then recognized the independent meaning of the right to keep and bear arms clause: "The corollary, from the first position is, that *the right of the people to keep and bear arms shall not be infringed*. The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to Congress a power to disarm the people."⁸³ Rawle's understanding parallels that of the First Congress. Yes, the militia system is important, and the first clause of the Amendment recognizes this. But the Amendment's second clause absolutely bars disarmament of the people.

c. Justice Joseph Story

Justice Joseph Story is the third major commentator of the period.⁸⁴ His 1833 *Commentaries on the Constitution of the United States*⁸⁵ refers to a right to arms that supports both popular resistance and a militia system, and to his fears that without a

⁷⁹ Historian Saul Cornell disputed Tucker's commitment to an individual rights view, contending that his earlier lecture notes had emphasized the militia aspects of the Second Amendment. Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006). I demonstrated, however, that Prof. Cornell was citing from Tucker's comments on the Militia Clauses in the unamended Constitution, and that when Tucker's lecture notes turned to the Second Amendment, they paralleled, often to the word, his later discussion of Blackstone. David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 1527, 1533-34 (2009).

⁸⁰ ELIZABETH KELLEY BAUER, COMMENTARIES ON THE CONSTITUTION 1790-1860 60 (1965).

⁸¹ DAVID PAUL BROWN, EULOGIUM UPON WILLIAM RAWLE 38 (Philadelphia, E. L. Carey & A. Hart 1837).

⁸² WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125 (Philadelphia, Philip H. Nicklin, 2d ed. 1829) (1825).

⁸³ *Id.*

⁸⁴ Thomas Cooley is frequently listed as a fourth, but since he wrote well after the Framing period, he will be considered *infra*.

⁸⁵ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION (reprint 1991) (1833).

militia system the people will fail to own arms, which would undermine the purposes of the Second Amendment.

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.⁸⁶

While Story is the only one of the three major commentators to treat the Second Amendment as primarily militia-centric, he stresses both arms and the militia; indeed, his fear is that with the loss of the mandatory militia system it will be difficult to keep the people properly armed. He gives no suggestion that a loss of the mandatory militia system renders nugatory any *right* to arms. Indeed, his militia-centric approach is inconsistent with a militia-uses-only concept of the right. In that understanding, membership in a well-regulated militia is a legal precondition to a right to arms. Story fears that a well-regulated militia may be a practical precondition to being armed, the lack of which will undermine the purpose of the Second Amendment.

d. Other Commentators of the Period

There were also less influential Constitutional commentators during this period; these have been extensively surveyed by David Kopel.⁸⁷ He documents twenty-five such 19th century commentators.⁸⁸ As to the relationship between the Second Amendment's two clauses, their most frequent theme is that the right to arms guarantees that the people can be skilled in arms, and thus enable formation of a militia.⁸⁹ This the opposite of any collective right conceptualization, which sees

⁸⁶ *Id.* at 746-47.

⁸⁷ David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359.

⁸⁸ *Id.* at 1397-1408, 1468-1503.

⁸⁹ For example, Joel Tiffany explained, "The second amendment of the constitution provides that the right of the people to keep and bear arms shall not be infringed, because a well-regulated militia is necessary to the security of a free state[.]" while John Norton Pomeroy wrote, "a militia would be useless unless citizens were allowed to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against usurpations of the government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms." *Id.* at 1469, 1477.

militia service as a precondition of possession of a right to arms. The later commentators also made reference to limits which could be placed on rights to arms, such as restrictions on concealed carry, or use in brawls,⁹⁰ which again is inconsistent with a view that the right to arms was limited to militia service.

2. Evidence for a Militia-Only Right in Early Commentaries

a. Benjamin Oliver

These views were not *completely* unanimous; one commentator did dissent. In 1832, a Benjamin Oliver published a booklet entitled *The Rights of an American Citizen*.⁹¹ Oliver spent a page discussing the virtues of the militia system. He then suggested, without citation to authority, that

The provision of the constitution, declaring the right of the people to keep and bear arms, &c., was probably intended to apply to the right of the people to bear arms for such purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it.⁹²

Oliver's language is tentative ("probably," "always going armed," "a different construction however has been given it") and supported by no references. We know little of the author; a search of the Library of Congress's catalog indicates he published a book on business law, and one of forms for conveyances. A search of nineteenth century case law turns up no citations; the booklet's one judicial citation comes after its 1970 reprinting.⁹³ His influence cannot be ranked alongside that of Tucker, judge and author of the foremost legal text of his day, or Rawle, who had served in a body that ratified the Bill of Rights.

Conclusion. Numerous early 19th century commentators, including leaders of the Framing generation, viewed the right to arms as an individual right which either (a) arose out of a right to self-defense or (b) existed as a precondition of the militia system, rather than the militia system existing as a precondition of the right. The one dissenting voice appears to have had no discernable impact upon Americans' understanding.

B. The Right To Arms In Pre-Civil War American Case Law

Beginning in the 1820s, State courts faced issues arising from the interaction of early weapons laws, chiefly bans on concealed carry.⁹⁴ Most rulings upheld the bans

⁹⁰ *Id.* at 1474, 1476, 1488-89.

⁹¹ BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN; WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES* (reprint 1970) (1832).

⁹² *Id.* at 177.

⁹³ *See Harmelin v. Michigan*, 501 U.S. 957, 1009-10 (1991) (White, J., dissenting).

⁹⁴ Excellent discussions of case law of this period can be found in STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 89-98 (1984) and in Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 500-04 (1995).

as reasonable restrictions on the manner of bearing, since arms could still be carried openly.

1. Antebellum Case Law Supporting an Individual Right to Arms

Most of the case law of this period arose in the context of newly-enacted bans on concealed carry of all or certain arms, with the courts treating the right to arms as an individual one.

The first such case, *Bliss v. Commonwealth*,⁹⁵ struck down the Kentucky ban on concealed carry on the grounds that no restrictions on bearing of arms could be permissible: “whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden”⁹⁶ In contrast, concealed weapon restrictions were upheld as reasonable regulation by Alabama⁹⁷ and Louisiana.⁹⁸ The Alabama court added a *caveat*: “A statute which, under the pretence 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.”⁹⁹

The concept was soon given effect in a Georgia decision, *Nunn v. State*,¹⁰⁰ which struck down a Georgia law which prohibited possession of all except the larger handguns (“horseman’s pistols”). Georgia had no state right to arms provision, but the court viewed the Second Amendment as documenting a right which existed whether enumerated or not. It rejected any claim that the right was limited to militia service: “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*”¹⁰¹

Finally, Tennessee weighed in with a somewhat different approach, which would find greater popularity later in the century. Its statute prohibited concealed carry only of Bowie knives and other listed weapons, and the court held that certain non-military weapons were not “arms” within its constitutional guarantee. The weapons whose carrying was protected were those “usually employed in civilized warfare,” not those “usually employed in private broils” or “by the robber and the assassin.”¹⁰² It reasoned that the purpose of the arms right was so that citizens might “protect the

⁹⁵ *Bliss v. Commonwealth*, 12 Ky. 90 (1822).

⁹⁶ *Id.* at 92-93. In 1850, *Bliss* was overturned by a constitutional amendment. See Eugene Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 197 (2006).

⁹⁷ *State v. Reid*, 1 Ala. 612 (1840).

⁹⁸ *State v. Chandler*, 5 La. Ann. 489 (1850).

⁹⁹ *Reid*, 1 Ala. at 616-17.

¹⁰⁰ *Nunn v. State*, 1 Ga. 243 (1846).

¹⁰¹ *Id.* at 251.

¹⁰² *Aymette v. State*, 21 Tenn. 154, 158 (1840).

public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws" and that these needs were best served by military-type weaponry.¹⁰³

2. Antebellum Case Law Supporting a Military-Use-Only View

This survey is brief. In *State v. Buzzard*,¹⁰⁴ the Arkansas Supreme Court upheld a statute forbidding the concealed carrying of pistols and certain knives, against the background of a State constitution that had a "for the common defense" limitation. The three judges divided three ways.

Chief Justice Ringo's opinion referred to the constitutional language and found that the militia was "the best security a free state could have," and that "for this purpose only, it is conceived the right to keep and bear arms was retained"¹⁰⁵ This understanding is militia-related but not necessarily militia-restricted; the Tennessee court had used the same understanding to conclude there was an individual right to possess and use military-type arms, since experience with them would serve militia purposes. Chief Justice Ringo went on, though, to suggest, first, that the provision was militia-restricted, allowing a "legal right to keep and bear arms for that purpose."¹⁰⁶ Alternately, he viewed the concealed weapons ban as reasonable restriction of a right, since it "inhibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified."¹⁰⁷

Justice Dickinson, concurring, did clearly take a militia-restricted view: "arms and the right to use them for that purpose [militia] are solely guaranteed."¹⁰⁸

Justice Lacey, in dissent, took a pragmatic view along the lines later espoused by Thomas Cooley.¹⁰⁹ Since the legislature controlled the membership of the militia, and could exclude whoever it willed, limiting the right to militia use would make a constitutional right "valueless and not worth preserving."¹¹⁰

Conclusion. State case law prior to the Civil War, with one less-than-clear exception, treated the right to arms as an individual right, with no restriction to militia service. The only questions were: (1) what regulation of the right is permitted and (2) whether the "arms" protected were only those which are military or militia suitable. The one exception was a case involving a right to arms "for the common defense," where one opinion accepted a militia-restricted view, one rejected it, and a third seemed to favor it.

¹⁰³ *Id.* The court would later hold that this narrowing construction was applicable only to restrictions on carry, not to those on possession, since while "bear arms" had a military connotation, to "keep" arms did not. *Andrews v. State*, 50 Tenn. 141, 156 (1871).

¹⁰⁴ *State v. Buzzard*, 4 Ark. 18 (1842).

¹⁰⁵ *Id.* at 24-25.

¹⁰⁶ *Id.* at 25.

¹⁰⁷ *Id.* at 27.

¹⁰⁸ *Id.* at 32 (Dickinson, J., concurring).

¹⁰⁹ See note 84 and accompanying text *infra*.

¹¹⁰ *Buzzard*, 4 Ark. at 35.

III. THE AMERICAN RIGHT TO ARMS AS UNDERSTOOD IN THE LATTER HALF OF THE NINETEENTH CENTURY

We can survey American understanding of the period in terms of the abolitionist movement and its opposition, the understandings displayed in the formulation of the 14th Amendment, and the teachings of case law and commentators during this time.

It is appropriate first to note a historical change spanning the period before and during this time. As we have seen above, Justice Story's 1833 *Commentaries on the Constitution* complained that the universal, mandatory, militia system was in decline.¹¹¹ By that point, Ohio and Delaware had abandoned mandatory militia service.¹¹² In the 1840s, mandatory militia service was abolished in Massachusetts, Maine, Ohio, Vermont, Connecticut, New York, and Missouri; New Hampshire followed in the early 1850s.¹¹³ Following the Civil War, even voluntary militia units faded out in the North; their membership had largely enlisted in the regular forces, and after four years of fighting, had little interest in additional service.¹¹⁴ Additionally, there was the effect of the Civil War itself, where State resistance to federal actions or predicted future actions led to the loss of 600,000 lives. Against this background, the already weak militia-centric approach rapidly declined.

A. *The Right to Arms, Abolitionism, and the Reaction to It*

We need not weigh evidence here; the historical record is entirely one-sided. Abolitionist writers (who were themselves at considerable physical risk) universally viewed the Second Amendment as an individual right linked to self-defense.¹¹⁵ Lysander Spooner, for example, wrote that the right to arms implied the right to use arms "in defence of life, liberty, chastity, &c.,"¹¹⁶ while Joel Tiffany wrote that "the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would hardly have been worth the paper it consumed."¹¹⁷

On the pro-slavery side, the infamous *Dred Scott* case¹¹⁸ accepted this premise. Writing for the majority, Chief Justice Taney argued that the states which agreed to form the United States could not have meant to accept free blacks as citizens, since a slave State would have to accord entering free blacks "the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to

¹¹¹ See note 86 and accompanying text *supra*.

¹¹² JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 83 (Louis Morton ed., 1983); see also *New Militia Law*, Ohio Repository, March 21, 1814, at 3.

¹¹³ MAHON, *supra* note 112, at 83.

¹¹⁴ MICHAEL D. DOUBLER, CIVILIAN IN PEACE, SOLDIER IN WAR: THE ARMY NATIONAL GUARD, 1636-2000 110 (2003).

¹¹⁵ See Kopel, *supra* note 87, at 1435-40.

¹¹⁶ LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 66 (Burt Franklin ed., 1965) (1860).

¹¹⁷ JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT, IN RELATION TO THAT SUBJECT 117-18 (Mnemosyne Publishing Co., 1969) (1856).

¹¹⁸ *Scott v. Sanford*, 60 U.S. 393 (1856).

hold public meetings upon political affairs, and to keep and carry arms wherever they went."¹¹⁹

This unexpected agreement between abolitionist thinkers and the *Dred Scott* majority is paralleled by a concurrence between Republican and Democratic presidential platforms. The 1856 Republican platform came in the wake of fighting in "Bleeding Kansas," where attempts were made to disarm the anti-slavery side. The Republican platform argued "the dearest Constitutional rights of the people of Kansas have been fraudulently and violently taken from them The right of the people to keep and bear arms has been infringed."¹²⁰

Conversely, after the outbreak of the Civil War, Union forces searched some Maryland homes for arms. With the shoe on the other foot, the 1864 Democratic platform protested the imposition of martial law, "the suppression of freedom of speech and of the press . . . and the interference with and denial of the right of the people to bear arms in their defense."¹²¹

Conclusion. The 1850s saw the most bitter of divides between abolitionists and the defenders of slavery. But abolitionists and Chief Justice Taney, and Republicans and Democrats, agreed that the right to keep and bear arms was an individual one.

B. *The Right to Arms and the Fourteenth Amendment*

Here, too, the relevant evidence is one-sided. The historical record was extensively explored in *McDonald v. Chicago*: the majority points out,¹²² and the dissents do not deny, that when Congress considered the Fourteenth Amendment, the right to arms was frequently cited as one of the rights meant to be protected, and that all these references viewed it as an individual right unrelated to militia service.¹²³

¹¹⁹ *Id.* at 417. Taney's underlying reasoning takes a bit of explanation. He appears to be relying on Article IV § 2's requirement that States allow citizens of other States the "privileges and immunities" of their own citizens, and that in so doing the visited State could not discriminate based on the race of the visitor. This view seems related to early case law construing Article IV § 2 as protecting visitors to a State against deprivation of rights of citizens of the United States, in the sense of the national entity. See *Corfield v. Coryell*, 6 F. Cas. 545 (C.C.E.D. Pa 1823). Modern case law treats that provision as forbidding States to deprive visitors of major rights the State accords *its own* citizens. See *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 384 (1978); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

¹²⁰ DONALD BRUCE JOHNSON & KIRK H. PORTER, NATIONAL PARTY PLATFORMS 1840-1972 27 (1973).

¹²¹ *Id.* at 34.

¹²² *McDonald v. Chicago*, 130 S. Ct. 3020, 3038-41 (2010).

¹²³ In his *Heller* dissent, Justice Stevens speculated that references to violations of the right to arms might have referred to disarming of the Reconstruction era "Negro Militias." *District of Columbia v. Heller*, 554 U.S. 570, 679-71 (2008) (Stevens, J., dissenting). He does not reassert this in his *McDonald* dissent. 130 S. Ct. 3020 (2010). In fact, at the time of Congressional debates on the Fourteenth Amendment, these militias had not yet been formed, let alone destroyed. In 1866, the southern militias were all-white, and largely bent upon disarming and terrorizing blacks. OTIS A. SINGLETARY, NEGRO MILITIA AND RECONSTRUCTION 5 (1957); ALLEN W. TRELEASE, WHITE TERROR; THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION xxii (1971). Thus the complaint in the 39th Congress that the southern militias would rather "hang some freedman or search negro houses for arms." CONG. GLOBE, 39th CONG., 1st Sess., pt. 1, 941 (1866).

The Reconstruction Congress underscored this view when, in 1867, it voted to order dissolution of the Southern militias,¹²⁴ while refraining from disarming their members out of concern that that would violate the Second Amendment.

The dissolution bill began as a proposal by Senator Wilson which would have commanded that the militias (which he denounced as bands of former rebels bent upon terrorizing the freedmen) “be forthwith disarmed and disbanded”¹²⁵ On the floor, Senator Willey objected: “It strikes me also that there may be some constitutional objection against depriving men of the right to bear arms and the total disarming of men in time of peace.”¹²⁶

Senator Wilson responded that he was willing to “modify the amendment by striking out the word ‘disarmed.’ Then it will provide simply for disbanding these organizations.”¹²⁷ Senator Willey found the amended bill, which dissolved militia units but preserved the individual right to arms for these former enemies, “much more acceptable to me than it was originally,”¹²⁸ and in that form it was enacted.¹²⁹

C. *The Right to Arms in Postwar Courts and Commentators*

Postwar courts faced right to arms issues at both state and federal levels. Both bodies of the judiciary treat the right as an individual one, not limited to military service, and state courts focused on determining its boundaries.

1. Postwar State Case Law

Most legal challenges of this period arose out of a wave of enactments barring carrying (but not ownership) of non-gun weapons such as bowie knives, sharply pointed daggers known as “Arkansas toothpicks,” and impact weapons such as brass knuckles and “slung shots.”¹³⁰ Some enactments also extended to carrying of small handguns. (In the vernacular of the time, handguns were divided into “holster” or “horse” pistols, very large firearms holstered on the saddle, “belt” pistols of standard military size suitable for carry in a belt, and “pocket” pistols, the smallest class of handguns).

The best-reasoned case of the period came from Tennessee. *Andrews v. State*¹³¹ held overbroad a ban on carrying (openly or concealed) a “belt or pocket pistol or revolver.”¹³² The ruling came against an unusually extensive legal background.

¹²⁴ Act of March 2, 1867, § 6, 14 Stat. 487.

¹²⁵ CONG. GLOBE, 39th CONG., 2d Sess. 1848 (1867).

¹²⁶ *Id.*

¹²⁷ CONG. GLOBE, 39th CONG., 2d Sess. 1849 (1867).

¹²⁸ *Id.*

¹²⁹ Act of March 2, 1867, § 6, 14 Stat. 487.

¹³⁰ Slung shots were not slingshots, but blackjacks, pocket-sized flexible clubs with a weighted end.

¹³¹ *Andrews v. State*, 50 Tenn. 165 (1871).

¹³² *Id.* at *3. Pistols were then roughly classed by how they were customarily carried. The largest were “horse pistols,” heavy cavalry weapons (by then outdated) meant to be holstered on the saddle. Then came “belt pistols,” of a size and weight to be carried in a belt holster. The smallest were “pocket pistols.”

Defending the statute, the Attorney General argued for a militia-use-only interpretation: "it is the *bearing* of arms, not for private broils and purposes of blood, but in defense of a common cause; as citizen soldiers *bearing* arms for the defense, in common with each other; not commonly; *i.e.*, on ordinary occasions."¹³³

The *Andrews* court rejected his view. Indeed, it reasoned that the right to "keep" covered certain forms of carrying arms; its purpose was to ensure that a citizen was sufficiently proficient in their use to participate in the common defense, and that implied a right to transport ordinary firearms for practice.¹³⁴

Arkansas enacted carrying restrictions similar to those of Tennessee, and its rulings tracked those of that state. *Fife v. State*¹³⁵ involved a defendant charged with "carrying a pistol as a weapon."¹³⁶ The court avoided constitutional problems by construing the ban to cover only small handguns, "used in private quarrels and brawls," and not ones of military size.¹³⁷ Later, in *Wilson v. State*,¹³⁸ the court held the ban was invalid as applied to a full-sized revolver: "to *prohibit* the citizen from wearing or carrying a war arm . . . is an unwarranted restriction upon his constitutional right to keep and bear arms."¹³⁹

Other courts accepted the reasoning of the Tennessee and Arkansas rulings. In *English v. State*,¹⁴⁰ a Texas court upheld that state's ban on carrying various knives and small handguns with the note that "[t]he terms dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives, belong to no military vocabulary."¹⁴¹ Still others treated limits on carrying as raising the issue of reasonable regulation of a constitutional right.¹⁴² In several of these decisions the State cited the militia-use-only ruling in *State v. Buzzard*, but no court took the decision seriously enough to mention it.¹⁴³

¹³³ 50 Tenn. at *2 (emphasis added).

¹³⁴ *Id.* at *7.

¹³⁵ *Fife v. State*, 31 Ark. 455 (1876).

¹³⁶ He had done more than carry it: testimony indicated he had stuck it in another man's face. *Id.* at *1.

¹³⁷ *Id.* at *4.

¹³⁸ *Wilson v. State*, 33 Ark. 557 (1878).

¹³⁹ *Id.* at *2 (emphasis added). See also *Dabbs v. State*, 39 Ark. 353 (1882). At issue in *Dabbs* was a ban on sale of small revolvers (those not used by the Army or Navy). The Attorney General cited *State v. Buzzard* for the proposition that the right to arms "may be absolutely prohibited," *Dabbs*, 39 Ark. At *1, but the court cited *Fife*, holding that the statute "in no wise restrains the use or sale of such arms as are useful in warfare." *Id.* at *3.

¹⁴⁰ *English v. State*, 35 Tex. 473 (1872).

¹⁴¹ *Id.* at *3.

¹⁴² See *State v. Wilforth*, 74 Mo. 528 (1881) (construing a ban on carrying into public assemblies as forbidding concealed carry only, and citing *State v. Reid*, 1 Ala. 612 (1840), as to regulation); see also *State v. Shelby*, 90 Mo. 302 (1886) (construing the same as to carrying while intoxicated); *State v. Rosenthal*, 75 Vt. 295 (1903) (striking down municipal ban on concealed carry).

¹⁴³ See *Dabbs*, 39 Ark. at *1; *Wilforth*, 74 Mo. At *1.

In short, it is clear that state courts of the period took seriously a right to arms, and treated it as an individual right. At most, they allowed that the right might be limited to arms of a military nature, or (more broadly) arms whose use gave skills that might enable a citizen to participate in the common defense.

2. Postwar Federal Case Law

The Supreme Court likewise gave no indication that it saw the right to arms as restricted to militia service. In *United State v. Cruikshank*,¹⁴⁴ the issue was whether the Fourteenth Amendment's privileges or immunities clause made the federal rights to assemble and to keep and bear arms applicable to the States. Cruikshank was a Louisiana sheriff who was one of the leaders in the infamous Colfax Courthouse Massacre, where a mob broke up an assembly of blacks, disarmed them, and then killed over a hundred of them.¹⁴⁵

The relevant clause of the Fourteenth Amendment forbade States to abridge "the privileges or immunities of citizens of the United States." The *Cruikshank* Court eviscerated this by holding that: (1) this could only describe rights created (as opposed to guaranteed) by the U.S. Constitution, and (2) these did not include rights that could be seen as natural, inherent in any free government, and thus pre-existing the creation of U.S. citizenship.¹⁴⁶ Thus the Court ruled the right to assemble and the right to arms outside the protections of the privileges or immunities clause, because they had pre-existed their written guarantee:

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference.

. . . .

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.¹⁴⁷

It is easy to see how an individual right to arms for self-defense could be characterized as a natural right that pre-existed the Constitution. It is quite hard to see how a right to engage in organized militia activities could meet that description.

3. Postwar Constitutional Commentators

As with the courts, so with the commentators of the late 19th century. The leading constitutional commentator of the period was Thomas Cooley, Michigan Supreme Court justice and professor of law, considered by one scholar to have been

¹⁴⁴ *United States v. Cruikshank*, 92 U.S. 542 (1875).

¹⁴⁵ See generally CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008).

¹⁴⁶ *Cruikshank*, 92 U.S. at 552-53.

¹⁴⁷ *Id.*

"the greatest authority on constitutional law in the world."¹⁴⁸ Of the Second Amendment, Cooley wrote:

The Right is General. — It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.¹⁴⁹

The other great commentator of the period was Joel Bishop, famed for his analysis of the criminal law. His *Commentaries on the Criminal Law* treated the right to arms as an individual right, albeit one excluding non-military arms and criminal uses.

The constitution of the United States provides, that, "a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." This provision is found among the amendments; and, though most of the amendments are restrictions on the General Government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures. If, however, we look to the question of its interpretation in the light of judicial reason, without the aid of specific authority, we shall be led to the conclusion, that the provision protects only the right to "keep" such "arms" as are used for purposes of war, in distinction from those which are employed in quarrels and brawls and fights between maddened individuals; since such, only, are properly known by the name of arms; and such, only, are adapted to promote "the security of a free State." In like manner, the right to "bear" arms refers merely to the military way of using them, not to their use in bravado and affray. Still, the Georgia tribunal seems to have held, that a statute prohibiting the open wearing of arms upon the person violates this provision of the constitution, though a statute against the wearing of the arms concealed does not. And, in

¹⁴⁸ See Stephen A. Siegal, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 Wis. L. REV. 1431, 1485 n.302.

¹⁴⁹ THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 282-83 (Boston, Little Brown, and Co. 2d ed. 1891).

accord with the latter branch of this Georgia doctrine, the Louisiana court has laid it down, that the statute against carrying concealed weapons does not infringe the constitutional right of the people to keep and bear arms; for this statute is a measure of police, prohibiting only a particular mode of bearing arms, found dangerous to the community.¹⁵⁰

Conclusion. By the end of the Nineteenth Century, acceptance of a purely individual right to arms was literally universal. Congress, federal and state courts, and commentators all saw the right to arms as having no restriction to militia duties. The only issues were to what extent this private right could be regulated, and whether its “arms” included weapons more suited to brawling and street crime than to resistance to political oppression.

IV. THE MILITIA-RESTRICTED RIGHT TO ARMS’ ORIGINS IN THE TWENTIETH CENTURY

We are left with a paradox. If the militia-uses-only view was unknown to the Framers, and nearly so to courts, Congress, and commentators for a century after the Framing, whence did it arise?

The evidence indicates that the collective right view (1) had a tentative origin in the early 20th century; (2) it began to gain ground in the mid-century based upon policy considerations (primarily the need to sustain the National Firearms Act’s restrictions upon machine guns and related arms) rather than law or history; (3) it gained widespread acceptance among lower federal courts in the 1960s, and thereafter as a means of upholding firearm laws in general.

The Supreme Court’s rejection of collective rights in *District of Columbia v. Heller* was thus no legal novelty; it was simply a refusal to accept a recent invention of lower courts. We will examine the 20th century trend in three parts. The first will be the right to arms as it was seen prior to *United States v. Miller*,¹⁵¹ the second will be its treatment in *Miller*; the third will discuss the lower court reactions to *Miller*, and the countering reaction from the legal academy.

A. *The Right to Arms 1900 – 1939*

1. 1905: *City of Salina v. Blaksley*

Early in the century came the first clear use, and the first use since *State v. Buzzard*, of a militia-use-only reading of a state constitution. The case arose in Kansas, whose right to arms clause did have an exceptionally military context. The constitutional provision referred only to bearing, and not keeping, of arms, had a link to the people’s “defense and security,” and was accompanied by two references to clearly military affairs: “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.”¹⁵²

In 1905, James Blaksley was charged with possessing (and apparently firing) a firearm while intoxicated, in violation of a city ordinance. Blaksley appealed his

¹⁵⁰ 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 124 (Boston, Little Brown, and Co. 3d ed. 1865).

¹⁵¹ *United States v. Miller*, 307 U.S. 174 (1939).

¹⁵² See Volokh, *supra* note 96, at 196.

misdemeanor conviction all the way to the Kansas Supreme Court, which showed little sympathy for litigious, armed drunks, and affirmed his conviction.

An interesting feature of *Blaksley* was that *neither* party contended that the right to arms was limited to militia service, likely because there was almost no precedent supporting such an approach (*State v. Buzzard* is not cited in the Kansas ruling and apparently was undiscovered by the court). The State argued that the right to arms was limited to military-type arms, whereas Blaksley had fired off a small .32 caliber pocket pistol; it also contended that a restriction on carrying while intoxicated was a reasonable regulation of the right.¹⁵³ Blaksley, on the other hand, contended that the right to arms was absolute, protecting both pocket pistols and carrying while intoxicated.¹⁵⁴

The Kansas court came up with its own rationale, noting that the state provision, taken in context, "deals exclusively with the military. Individual rights are not considered in this section."¹⁵⁵ It treated the Second Amendment (which had no such context) in the same way: "The right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose is clearly indicated to be as a member of a well-regulated militia, or some other military organization provided for by law."¹⁵⁶

The court cited two authorities, neither of which supported its position. The first was Joel Bishop's *Commentaries on The Law of Statutory Crimes*,¹⁵⁷ from which it took a passage stating, "the keeping and bearing of arms has reference only to war and possibly also to insurrections wherein the forms of war are, as far as practicable observed."¹⁵⁸ One is left wondering what Bishop was thinking when he wrote of a constitutional right to bear arms in insurrections! The court's citation actually omits part of the relevant sentence: "In reason the keeping and bearing of arms has reference only to war and possibly also to insurrections wherein the forms of war are, as far as practicable observed"; yet certainly not to broils, bravado, and tumult, disturbing the public repose, or to private assassination and secret revenge.¹⁵⁹ Bishop is explaining (rather clumsily) that the right to arms relates to enabling political resistance and does not cover criminal use.

Blaksley's second reference was to *Commonwealth v. Murphy*,¹⁶⁰ which had upheld a statute forbidding non-militia organizations to drill and parade with firearms. The state court held that "it is within the police power of the legislature to regulate the bearing of arms, so as to forbid such unauthorized drills and parades."¹⁶¹

¹⁵³ See Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 77 n.124 (1989).

¹⁵⁴ *Id.*

¹⁵⁵ *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905).

¹⁵⁶ *Id.*

¹⁵⁷ JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF STATUTORY CRIMES* §§ 792-93 (Boston, Little Brown, and Co. 2d ed. 1883).

¹⁵⁸ *Salina*, 83 P. at 620.

¹⁵⁹ *Id.*

¹⁶⁰ *Commonwealth v. Murphy*, 44 N.E. 138 (Mass. 1896).

¹⁶¹ *Id.* at 138.

Murphy was a “reasonable regulation” ruling, not one holding that the bearing of arms was only protected during militia duty.

2. 1915: Lucilius Emery’s Harvard Law Review Article

A decade after the decision, *Blaksley* formed the basis of an article in the Harvard Law Review, by Lucilius Emery.¹⁶² The article’s tone was tentative, its author beginning with note that his arguments referred only to bearing arms, not to keeping them: “I think there are deducible several propositions as to the power of the legislature to restrict and even forbid carrying weapons by individuals, however powerless it may be as to the simple possessing or keeping weapons.”¹⁶³

First, he noted that legislatures might control the carrying of weapons that are not suited for use in civilized warfare, such as daggers and brass knuckles. This was of course in accord with existing precedent. Second, he suggested that only men suitable for military service should be protected. “Women, young boys, the blind, tramps, persons *non compos mentis*, or dissolute in habits, may be prohibited from carrying weapons.”¹⁶⁴ This would fit under the concept of reasonable (or in many cases, unreasonable) regulation. He ended on an ambiguous note:

Lastly, I submit that the right guaranteed is not so much to the individual for his private quarrels or feuds as to the people collectively for the common defense against the common enemy, foreign or domestic. The guaranty is to insure the safety of the people, their “laws and liberties,” against assaults from any source or quarter, but not to give individuals singly or in groups uncontrollable means of aggression upon the rights of others. Granting that the individual may carry weapons when necessary for his personal defense or that of his family or property, it is submitted that he may be forbidden to carry dangerous weapons except in cases where he has reason to believe and does believe that it is necessary for such defense.¹⁶⁵

3. Reception of the “Militia-Uses-Only” Concept in Case Law Prior to 1939

Neither *Blaksley* nor the article spawned a trend in case law. Early Twentieth Century courts continued to treat the right to arms as an individual right. Thus *In Re Brickey*¹⁶⁶ invalidated an Idaho law banning carrying of handguns within cities and towns, holding that it violated both the State constitution and the Second Amendment. In *Glasscock v. City of Chattanooga*,¹⁶⁷ the Supreme Court of Tennessee held that a city ordinance forbidding the carrying of handguns offended

¹⁶² Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915). While the article does not mention *Blaksley*, it appropriates its sources, down to the incomplete quotation from Joel Bishop.

¹⁶³ *Id.* at 476.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 477.

¹⁶⁶ *In re Brickey*, 70 P. 609 (Idaho 1902).

¹⁶⁷ *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (Tenn. 1928).

the State guarantee of a right to arms. *People v. Zerillo*¹⁶⁸ struck down a Michigan statute requiring noncitizens to obtain a permit before possessing a revolver. *People v. Nakamura*¹⁶⁹ struck down a similar Colorado law, the court refusing to accept the State's claim that the right to arms was "one of collective enjoyment for common defense."¹⁷⁰ *State v. Kerner*¹⁷¹ invalidated a North Carolina statute that required a permit for open carry of a handgun. The ruling had an interesting populist twist:

To *exclude* all pistols, however, is not a regulation, but a *prohibition*, of arms which come under the designation of "arms" which the people are entitled to bear. This is not an *idle* or an *obsolete* guaranty, for there are still localities, not necessary to mention, where great corporations, under the guise of detective agents or private police, terrorize their employees by armed force. If the people are forbidden to carry the only arms within their means, among them pistols, they will be completely at the mercy of these great plutocratic organizations.¹⁷²

Even within Kansas itself, *Blaksley* had an uncertain acceptance. A 1975 ruling¹⁷³ treated it as good law, but a 1979 decision,¹⁷⁴ holding a firearm law unconstitutional due to overbreadth, cast doubt upon this. As this article was being written, Kansas voters amended its Bill of Rights to recognize a clearly individual right, mooted the *Blaksley* holding.¹⁷⁵

Conclusion. It is apparent that while the period 1900-1939 saw the birth of the collective rights theory, the infant failed to thrive. It was the invention of a state court, so novel that neither party had briefed the theory, and arose out of the unique wording of the State guarantee. Other state courts continued to treat the right to arms as an individual one. *Blaksley* gave rise to no case law, and Emery's ambiguous article failed even to spawn more articles.

B. 1939: United States v. Miller

1. *Miller* in the District Court

In 1934, Congress passed the first significant federal firearms measure. The National Firearms Act of that year imposed a \$200 excise tax (and through its

¹⁶⁸ *People v. Zerillo*, 189 N.W. 927 (Mich. 1922).

¹⁶⁹ *People v. Nakamura*, 62 P.2d 246 (Colo. 1936).

¹⁷⁰ *Id.* at 247-48.

¹⁷¹ *State v. Kerner*, 107 S.E. 222 (N.C. 1921).

¹⁷² *Id.* at 225 (emphasis added).

¹⁷³ *Junction City v. Lee*, 532 P.2d 1292 (Kan. 1975).

¹⁷⁴ *Junction City v. Mevis*, 601 P.2d 1145, 1151 (Kan. 1979).

¹⁷⁵ Section four of the Kansas Bill of Rights presently provides: "Individual right to bear arms; armies: A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." Kan. Const. Bill of Rights § 4 (2010).

reporting, registration) upon a narrow class of firearms, chiefly machine guns and short barreled (“sawed off”¹⁷⁶) shotguns and rifles.¹⁷⁷

Five years later, in *United States v. Miller*,¹⁷⁸ the U.S. Supreme Court had an opportunity to pass upon the constitutionality of this measure. It managed a ruling so ambiguous that seventy years later its core meaning was still in dispute: in *District of Columbia v. Heller*, both majority and the dissent could make a decent claim to *Miller*’s support.¹⁷⁹ *Miller*’s only halfway clear holding was that perhaps not every tax on everything that goes “bang!” will, by that fact alone, come within the protection of the Second Amendment. *Miller*’s real significance is not what it said, but what lower courts could later read it to say. It is thus important to grasp how completely muddled — and probably collusive — the case was from its very outset.

The defendants, Jackson “Jack” Miller and Frank Layton, were a pair of bank robbers; Miller in particular had followed the hazardous course of alternating his criminal career with snitching out his cohorts in exchange for leniency.¹⁸⁰ Their transportation of an untaxed short-barreled shotgun earned them an indictment in the Western District of Arkansas, Judge Heartsill Ragon presiding.

Citing the Second Amendment and no other authority, Judge Ragon dismissed the indictment.¹⁸¹ Perhaps because it had failed to appeal in time, the government re-indicted Miller and Layton, and Ragon again dismissed.¹⁸²

Judge Ragon’s actions gave the government a direct appeal to the Supreme Court.¹⁸³ Since they were taken without evidentiary findings or, indeed any evidence, the dismissal could only be sustained if the Second Amendment was so absolute that even machineguns and sawed-off shotguns were protected against registration and taxation.

Seventy years later, Brian L. Frye explored the history of the case, and reached the remarkable conclusion that the appeal was almost certainly collusive.¹⁸⁴ Judge Ragon had, before being appointed to the bench, served for many years in the U.S. House of Representatives, where he introduced, endorsed, and supported federal firearms laws.¹⁸⁵ He argued on the floor that “I am unequivocally opposed to pistols in any connection whatever” and dismissed Second Amendment concerns with the

¹⁷⁶ “Sawed off” became the popular term, although a shotgun could fall within NFA without its barrel being sawed off (some shotguns were then being made with barrels already shorter than the NFA threshold) or could be sawed off without coming within NFA (provided the barrel was not shortened to less than the statutory threshold).

¹⁷⁷ See 26 U.S.C. § 5811 (2006).

¹⁷⁸ *United States v. Miller*, 307 U.S. 174 (1939).

¹⁷⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁸⁰ See Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & LIB. 48 (2008).

¹⁸¹ *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1938).

¹⁸² *Id.*

¹⁸³ See Criminal Appeals Act, 34 Stat. 1246 (Supp. 1907) and 28 U.S.C. § 345 (1940).

¹⁸⁴ See Frye, *supra* note 180.

¹⁸⁵ *Id.* at 64.

observation that his State had prohibited pistol sales and the measure had been upheld.¹⁸⁶ (In this, Rep. Ragon was mistaken.)¹⁸⁷ It is hard to explain why a judge who believed that an absolute ban on ordinary pistol sales passed constitutional muster, would believe that registering and taxing sawed-off shotguns was facially unconstitutional.

Research into Judge Ragon's papers at the University of Arkansas¹⁸⁸ casts little light on *Miller* itself: while Judge Ragon was a prolific writer, no extant document mentions the ruling. Several things did, however, stand out.

First, the District Court had little in the way of research tools, and nothing that would have led Judge Ragon to change his mind on the right to arms. He was quite proud that the District Court had acquired a set of United States Code Annotated for each of its four courthouses.¹⁸⁹ The Federal Supplement was a scarcer commodity; apparently the courthouses had to share a single set.¹⁹⁰ That reporter's one relevant reference was to another District Court which had sustained the National Firearms Act as constitutional.¹⁹¹

Second, Judge Ragon remained a Washington insider even while on the bench. His judicial correspondence files were mundane, consisting of granting excuses from jury duty or brushing aside requests that he recommend parole. His political files were anything but mundane. He wrote Rep. William Bankhead, coaching him on his run against Sam Rayburn for Speaker of the House, and reporting a head count of the Arkansas delegation on the matter.¹⁹² He reported to Secretary of State Cordell Hull on conditions in Mexico,¹⁹³ and wrote President Roosevelt on behalf of Arkansas'

¹⁸⁶ *Id.*

¹⁸⁷ The legislation challenged had outlawed sale of non-military-type pistols, *i.e.* pocket pistols, and while it had been upheld, the only reference to the State right to arms was the note that "it in no wise restrains the use or sale of such arms as are useful in warfare." *Dabbs v. State*, 39 Ark. 353, 357 (1882).

¹⁸⁸ Heartsill Ragon Papers, University of Arkansas at Little Rock Archives and Special Collections.

¹⁸⁹ Letter from Heartsill Ragon, Judge, W.D. Ark., to L.S. Mercer, Editorial Counsel, West Publ'g Co. (April 28, 1939) (on file with the University of Arkansas at Little Rock Archives and Special Collections).

¹⁹⁰ Letter from Heartsill Ragon, Judge, W.D. Ark., to Lowell Gibbons, Deputy U.S. Dist. Court Clerk, W.D. Ark. (December 6, 1938) (on file with the University of Arkansas at Little Rock Archives and Special Collections).

¹⁹¹ *United States v. Adams*, 11 F. Supp. 216, 218-19 (S.D. Fla. 1935) ("The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act.").

¹⁹² Letter from Heartsill Ragon, Judge, W.D. Ark., to William Bankhead, U.S. Representative, Ark. (September 15, 1934) (on file with the University of Arkansas at Little Rock Archives and Special Collections).

¹⁹³ Letter from Heartsill Ragon, Judge, W.D. Ark., to Cordell Hull, Sec'y of State, U.S. (July 21, 1938) (on file with the University of Arkansas at Little Rock Archives and Special Collections). The letter closes with "Mrs. Ragon joins me in kindest personal regards to you and Mrs. Hull." *Id.*

governor.¹⁹⁴ During “an hour or two of recess from the court,” he wrote a letter endorsing another Arkansas Representative’s desire to succeed him on House Ways and Means.¹⁹⁵ Yet another letter urges Sen. Hattie Caraway to obtain a government post for “Beanie” Bell, “the most effective political worker in Sebastian County You will need him daily in this section when your campaign gets in action.”¹⁹⁶ Judge Ragon’s plan was detailed:

Now, what I want you to do is to go down and see Attorney General Cummings personally and tell him that you want this man; that it means a lot to you personally. Now, don’t telephone or don’t let Garrett telephone, but go down there personally and see the Attorney General and you will have no trouble. Now, Mrs. Caraway, I can’t over emphasize the importance of this to you. I am writing the Attorney General today¹⁹⁷

Judge Ragon also had close ties with Treasury’s Alcohol Tax Unit, which was charged with enforcing the National Firearms Act and would have approved the charges against Miller. The Unit’s District Supervisor was John J. Burkett.¹⁹⁸ While *Miller* was under advisement in the Supreme Court, Ragon wrote a member of the House, describing Burkett as “a lifelong, close, personal friend of mine,” and asking for his promotion in light of “the smooth running of the Alcohol Tax United under his supervision.”¹⁹⁹

Judge Ragon’s role an Administration “insider” must be placed in political context. The FDR administration was then seeking greatly to expand the federal law enforcement role, and establishing broad federal control over firearms was a key component of this campaign. Its legislative successes were the 1934 National Firearms Act, discussed above, and the 1938 Federal Firearms Act,²⁰⁰ which for the first time applied federal controls to commerce in ordinary firearms. The Administration – and in particular Attorney General Homer Cummings and his assistant Joseph B. Keenan – spent much of the period from 1934 through 1938 seeking still more.

¹⁹⁴ Letter from Heartsill Ragon, Judge, W.D. Ark., to Charles Brough, Governor, Ark. (March 1, 1934) (on file with the University of Arkansas at Little Rock Archives and Special Collections).

¹⁹⁵ Letter from Heartsill Ragon, Judge, W.D. Ark., to Robert L. Doughton, U.S. Representative, N.C. (January 8, 1934) (on file with the University of Arkansas at Little Rock Archives and Special Collections).

¹⁹⁶ Letter from Heartsill Ragon, Judge, W.D. Ark., to Hattie Caraway, U.S. Senator, Ark. (April 30, 1938) (on file with the University of Arkansas at Little Rock Archives and Special Collections).

¹⁹⁷ *Id.*

¹⁹⁸ Letter from Heartsill Ragon, Judge, W.D. Ark., to John J. Cochran, U.S. Representative, Mo. (April 10, 1939) (on file with the University of Arkansas at Little Rock Archives and Special Collections).

¹⁹⁹ *Id.*

²⁰⁰ Federal Firearms Act, ch. 850, § 2(f), 52 Stat. 1250, 1250-51 (1938) (current version at 18 U.S.C.A. § 921 (West 2011)).

In a 1934 speech, Cummings had listed among his twelve highest priorities: "A law to regulate the importation, manufacture or sale, or other disposition of machine guns and concealable firearms."²⁰¹ The National Firearms Act was actually something of a disappointment to him. As originally proposed, it had required registration, not just of machineguns and short-barreled long arms, but also of handguns. The extension to handguns was, however, removed in committee consideration; Keenan responded with a speech denouncing the deletion, to no avail.²⁰²

Cummings spent much of the period from 1935 through 1938 seeking to restore the deletion, and to enact further national firearm measures. Among Cummings' papers is a 1935 memorandum from Joseph Keenan, proposing to seek new legislation to include pistols within the National Firearms Act, and in the longer term (preceded by a public relations campaign) to push for tight firearm permit requirements along the lines of those of Great Britain.²⁰³ The following year Cummings published magazine articles endorsing national handgun registration,²⁰⁴ and in 1937 and 1938 he campaigned to extend those requirements to rifles and shotguns as well.²⁰⁵

In short, the FDR Administration viewed extensive federal firearm controls, right up to national registration and permit systems for all firearms, as a high legislative priority. Judge Ragon was a political insider who had argued that even firearm bans were constitutional. He was an unlikely man to "go activist," with a ruling that would bar as unconstitutional the entire arena of national firearm controls. If the federal government could not register even machine guns and sawed-off shotguns, it is hard to see what it *could* do in the area of firearm controls.

On the other hand, if Judge Ragon wanted to arrange a test case that would remove the Second Amendment as a barrier to the Administration's plans, Miller's case was near-perfect: a Second Amendment challenge to registration of sawed-off shotguns, brought by a bank robber, after a cursory ruling that handed the government a direct appeal to the Supreme Court.

2. Miller in the Supreme Court

If that was Judge Ragon's purpose, his move seemed destined for success. On March 15, the Clerk of the Supreme Court wrote Miller's attorney, Paul Gutensohn, informing him the Court had taken the case and it would be argued on March 31!²⁰⁶

²⁰¹ SELECTED PAPERS OF HOMER CUMMINGS: ATTORNEY GENERAL OF THE UNITED STATES 1933-1939 38 (Carl Brent Swisher ed., 1972).

²⁰² Thomas Earl Mahl, A History of Individual and Group Action in Promoting National Gun Control Legislation During the Interwar Period, 1919-1941 153-54 (Aug. 1972) (unpublished Master's thesis, Kent State University) (on file with Kent State University Libraries).

²⁰³ Memorandum from Joseph B. Keenan, Assistant Attorney Gen., to Homer Cummings, Attorney Gen. (Nov. 20, 1935) (on file with the University of Virginia Library, collection 9973).

²⁰⁴ Editorial, *Cummings wants "G-Men" Stronger; In Dodge's Magazine He Asks Congress to Pass Law to Register All Pistols.*, N.Y. TIMES, June 29, 1936, at 34.

²⁰⁵ Mahl, *supra* note 202, at 184-87.

²⁰⁶ FRYE, *supra* note 180, at 67.

A week later Gutensohn wrote back, stating that he had not even received the government's brief.²⁰⁷ On March 25, the Clerk replied that

You are correct in your understanding that the appellant is required to file a brief, and ordinarily appellant's brief is required to be filed three weeks before the date of argument. Toward the end of the Term cases are reached so promptly after preliminary consideration that it is very often impossible to comply with the rules as to the filing of briefs and the argument of the cases is not delayed for that reason.²⁰⁸

The Clerk added the government had provided Gutensohn with a typewritten brief, and that Gutensohn could file his brief in the next week, or argument could be put over to April 17.²⁰⁹

Gutensohn was having none of it. On March 28, he telegraphed the Clerk:

US VS MILLER ET AL NUMBER 696 – SUGGEST CASE BE
SUBMITTED ON APPELLANTS BRIEF. UNABLE TO OBTAIN
ANY MONEY FROM CLIENTS TO BE ABLE TO PRESENT &
ARGUE CASE

PAUL E. GUTENSOHN.²¹⁰

Apparently concerned that he had not been entirely clear as to the briefing, he followed the next day with "DO NOT INTEND TO FILE BRIEF = PAUL E. GUTENSOHN."²¹¹

The stage seemed set for a decision that would narrow, if not negate, the Second Amendment. Judge Ragon's order had given the government a direct appeal of a decision that could only be defended under an absolutist view of the Amendment's meaning. Gutensohn's decision meant there would no opposing brief – indeed, he was recommending that the case be decided based on the government's arguments.

Then fate took a hand.

²⁰⁷ *Id.*

²⁰⁸ Letter from Clerk of the Court to Paul E. Guntensohn, March 25, 1939, National Archives, file for United States v. Miller, No. 696, O.T. 1938. By modern standards, this seems incredibly rushed and informal. After consulting files for other cases taken late in the Term, and now housed at National Archives, it appears to have been standard procedure then. In *Maytag v. Hurley*, No. 76, certiorari was granted on April 1, 1939, and argument set for the session of April 17. In *United States v. Marxen*, No. 544, counsel telegraphed that he had only yesterday received the order setting argument for tomorrow, and he could possibly travel to D.C. in that time. The Clerk wired back informing him that the Court hadn't reached the case on the date given, and would be argued in two weeks. In *Lane v. Wilson*, No. 460, certiorari was granted on January 18, and argument was set for the week of February 6, unless it were held over for the week of February 27. The Clerk instructed counsel to inquire on Saturday, February 4, whether argument would go in the next week or not.

²⁰⁹ FRYE, *supra* note 180, at 67.

²¹⁰ National Archives, file for United State v. Miller, No. 696, O.T. 1938.

²¹¹ *Id.*

Probably because of the time pressures involved, especially in a case of first impression, the government filed a rambling brief with little internal organization.²¹² Its arguments can be outlined as:

1. The common law allowed regulation of the carrying of exceptionally "dangerous or unusual" weapons; this argument then merged into the 1689 Declaration of Rights' recognition of a right to arms "suitable to their conditions and as allowed by law."
2. This was followed by a reference to a "collective rights" concept; the right related to "arming of the people as a body" to deter tyranny, not to "keeping of arms for purposes of private defense."²¹³
3. An argument that the purpose of the right to arms was to avoid creation of a standing army (rather a moot point by 1939).
4. An argument that the "arms" whose possession is protected refers only to weapons of military or militia use. The government cited *Aymette*, *Fife* and other cases, and argued that a sawed-off shotgun was a weapon of gangsters rather than of militiamen.

If the case were to be decided upon the government's position, it was going to take some effort to ascertain what that position was. And here the human factor came into play.

The Chief Justice assigned the *Miller* opinion to Justice James McReynolds. This probably reflects the low priority given the case, which had been presented with one side poorly briefed, and the other not briefed at all.

McReynolds was, to put it charitably, not a Justice to be entrusted with a significant constitutional ruling. He was a racist, anti-Semite, misogynist, and undifferentiated bigot: Chief Justice Taft described him as "fuller of prejudice than any man I have ever known," and "selfish to the last degree."²¹⁴ Historians disagree on whether Woodrow Wilson nominated him to the bench to get him out of his position as Attorney General, where he had alienated much of the Cabinet.²¹⁵ On the Court, he repeated his performance, shunning and insulting the other Justices.²¹⁶

More to the point, Reynolds was incredibly lazy and slipshod. The Chief Justice considered him a man with "no sense of duty," in good part because of his tendency

²¹² The text of the government's brief may be found at <http://www.guncite.com/miller-brief.htm>.

²¹³ "Such recognition as existed of a right in the people to keep and bear arms appears to have resulted from oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people. 1 COOLEY'S CONSTITUTIONAL LIMITATIONS 729 (8th ed.); see also 28 HARV. L. REV. 473. This right, however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense."

²¹⁴ ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 215 (1965).

²¹⁵ Cf. JOHN KNOX, THE FORGOTTEN MEMOIR OF JOHN KNOX 265 (2002), with JAMES E. BOND, I DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK McREYNOLDS 49-50 (1992) (the title erroneously describes Reynolds as Chief Justice).

²¹⁶ MASON, *supra* note 214, at 217; BOND, *supra* note 215, at 53-55.

to go duck-hunting, with no notice, while leaving opinions unwritten.²¹⁷ When he did write, he was cursory. “McReynold’s opinions ran short because, as in *Hopkins v. Hebard*, he cited little supporting authority and did not discuss the authority he did cite In some opinions he declined to cite case authority at all.”²¹⁸ An examination of Justice McReynolds’ contributions to October Term 1938 confirms this evaluation. The signed opinions of that Term span 1,778 pages.²¹⁹ To that, McReynolds’ opinions contributed 97 pages, mostly comprising remarkably brief rulings.²²⁰

It is also apparent that the Chief Justice assigned him only uncontroversial cases, or safe ones where errors would have less consequence. While the Court was sharply divided, McReynolds was entrusted only with unanimous opinions. The subject matter was often rather banal – an admiralty suit over spoiled fish meal,²²¹ whether the dormant Commerce Clause applied to interstate shipment of a dead horse,²²² whether the conditional seller of a forfeited automobile met the statutory standard for an innocent interest-owner.²²³ The remainder largely involved issues with obvious answers: a gift from an 80 year old male with health problems was a transfer in contemplation of death,²²⁴ a creditor cannot execute upon a disabled veteran’s pension,²²⁵ two states cannot impose full inheritance taxes on the same trust,²²⁶ a search incident to arrest can occur on private property.²²⁷

²¹⁷ MASON, *supra* note 214, at 215-16.

²¹⁸ BOND, *supra* note 215, at 58. The reference is to *Hopkins v. Hebard*, 235 U.S. 287 (1914).

²¹⁹ Volume 305, U.S., has 556 pages of signed opinions, Volume 306, U.S., has 614 pages, and Volume 307 U.S., has 608 pages.

²²⁰ McReynolds authored two and three page opinions in *Fairbanks v. United States*, 306 U.S. 436 (1939) and *United States v. Durkee Famous Foods*, 306 U.S. 68 (1939). He wrote four four page opinions, *Carrier v. Bryant*, 306 U.S. 545 (1939); *Colorado Nat’l Bank of Denver v. Comm’r.*, 305 U.S. 23 (1938); *Guaranty Trust Co. of New York v. Virginia*, 305 U.S. 19 (1938); *Scher v. United States*, 305 U.S. 251 (1938). He authored a pair of five pagers, *Clason v. Indiana*, 306 U.S. 439 (1939); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); three six pagers, *United States v. Bertelsen & Petersen Eng’g*, 306 U.S. 276 (1939); *United States v. Powers*, 305 U.S. 527 (1939); *Utah Fuel Co. v. National Bituminous Coal Comm’n*, 306 U.S. 56 (1939); and one spanning seven pages, *Smith v. Ferncliff*, 306 U.S. 444 (1939). *Miller* was one of only three McReynolds opinions that made it into the double-digit range: *United States v. Miller*, 307 U.S. 174 (1939) (10 pages); *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30 (1939) (12 pages); *United States v. One 1936 Model Ford V-8 De Luxe Coach*, Motor No. 18-3306511, 307 U.S. 219 (1939) (19 pages).

²²¹ *Smith*, 306 U.S. 444.

²²² *Clason*, 306 U.S. 439.

²²³ *One 1936 Model Ford*, 307 U.S. 219.

²²⁴ *Colorado Nat’l Bank*, 305 U.S. 23.

²²⁵ *Carrier*, 306 U.S. 545.

²²⁶ *Guaranty Trust Co.*, 305 U.S. 19.

²²⁷ *Scher*, 305 U.S. 251.

McReynolds was, in short, an intellectually lazy man on a rather brilliant court. The Chief Justice, who as noted above had little respect for his reliability, probably gave him *Miller* because it seemed safe: a potential 9-0, where only one side had briefed, and the issue was whether a bank robber could challenge a tax on sawed-off shotguns.

The result was an opinion outstanding for its lack of clarity — which explains why in *Heller*, it could be cited as support for the majority, which held for a right to arms for individual purposes, in Justice Stevens' dissent, which repudiated such a right, and in Justice Souter's dissent, which accepted such a right *arguendo*, but maintained a handgun ban was reasonable regulation.²²⁸

The one halfway clear part of McReynold's opinion came at the beginning:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.²²⁹

By this standard, *Miller* was as much a ruling on the law of evidence as it was on the Constitution. Even here it is murky. The first sentence argues that possession of an arm is protected if that has a "reasonable relationship" (a rather loose standard) to the efficiency of the militia. The second sentence refers to protection of "ordinary military equipment" and cites *Aymette*, which suggested that military arms were protected by the right to arms, and Bowie knives were not. This would suggest (but not clearly rule) that the "reasonable relationship" is met if civilian practice with an arm would develop militarily-useful skills. The first sentence might be read to support a right related (in some unspecified way) to militia service; the second sentence supports a more individualistic right to possession and practice with military-type arms. No wonder that both the *Heller* majority and its dissents could find comfort in *Miller*!

The opinion went downhill from there. McReynolds follows with a reference to Congressional power over the militia and the note that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."²³⁰ The opinion does not explain the latter point: Is the militia concept a limit to the right, or merely counsel upon its meaning?

Next, McReynolds turned to the question of what is the militia, citing Framing period sources which

²²⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 618-25 (2008); *id.* at 637-41 (Stevens, J., dissenting); *id.* at 684-85 (Breyer, J., dissenting).

²²⁹ *United States v. Miller*, 307 U.S. 174, 178 (1939) (citing *Aymette v. Tennessee*, 2 Humph., Tenn. 154, 158).

²³⁰ *Id.*

show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. “A body of citizens enrolled for military discipline.” And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.²³¹

Here we have three different concepts, listed without analysis. Is the militia all physically suitable males, or only those enrolled in an organization? What is the significance of the fact that they were expected to produce arms “of the kind in common use?” Is this merely a historical note — militiamen were expected to bring what they had, not cannons and mortars or medieval catapults — or a limitation of the scope of the right? If a limitation, does “in common use” relate to then, or now? In common use by civilians, or by the military?²³² *Miller* gave no clue.

Finally, rather than analyzing available case law and commentators, McReynolds simply noted “[i]n the margin, some of the more important opinions and comments by writers are cited.”²³³ Among the sources cited were *Blaksley*, which held that the right to arms was limited to militia service; both *Aymette* and *Fife*, which held that it was not; Joseph Story, who discussed the Amendment in terms of the militia; and Thomas Cooley, who vigorously denied that its protections were limited to militia service. None were given a word of analysis or reconciliation.

Miller, in short, probably began as a collusive case, set up to be an easy win for the government. This plan backfired, due to a rambling, one-sided briefing, and assignment of the “easy cases” to the lazy Justice McReynolds. As a result, in the lower courts *Miller* became not so much guidance as an obstacle to be circumvented and later mere background material to be invoked in passing.

C. 1939 – 2008: *Miller* in the Lower Courts

1. Early Decisions: *Cases* and *Tot*

The first two Circuits to deal with *Miller* did so in the context of the Federal Firearm Act’s prohibition on interstate receipt of firearms by those convicted of violent felonies. While it would seem this restriction would easily pass muster as a reasonable restriction of any right to arms, the courts spent considerable time grappling with *Miller*’s murky reasoning.

In *Cases v. United States*,²³⁴ the First Circuit concluded that, under *Miller*, the government “cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.”²³⁵ “However,” it added, “we do not feel that the Supreme Court in this case

²³¹ *Id.* at 179.

²³² The divergence between civilian and military firearms is a product of the latter half of the 20th century; before then, both civilians and military used bolt-action rifles, and surplus military rifles were sold at surplus to converted for civilian use. The author has a book published in the 1960s describing how to make the conversions, by lightening the wooden stock and installing improved civilian sights. With handguns, even today the military issue – 9mm and .45 semiautomatics -- are identical to civilian ones.

²³³ *Miller*, 307 U.S. at 182.

²³⁴ *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

²³⁵ *Id.* at 922.

was attempting to formulate a general rule applicable to all cases."²³⁶ The First Circuit did not distinguish *Miller* so much as refuse to follow it:

At any rate the rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well known fact that in the so called 'Commando Units' some sort of military use seems to have been found for almost any modern lethal weapon.²³⁷

It then announced, with no citation to authority, a militia-use-only rule, or a least a strict version of a militia-related requirement. It noted that the defendant had taken the pistol to a night club and shot another patron and

[w]hile the weapon may be capable of military use, or while at least familiarity with it might be regarded as of value in training a person to use a comparable weapon of military type and caliber, still there is no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career. In fact, the only inference possible is that the appellant at the time charged in the indictment was in possession of, transporting, and using the firearm and ammunition purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia which the Second Amendment was designed to foster as necessary to the security of a free state.²³⁸

As Professor Denning has noted,

Far from reading it as rendering no protection to an individual's right to keep and bear arms, the *Cases* court assumed, by carrying Justice McReynold's reasoning to its logical conclusion, that the *Miller* opinion, if intended as a general rule, afforded entirely too much protection to a wide range of potentially destructive devices that individuals might seek to possess. The Second Circuit thus rejected the *Miller* decision out of hand and proceeded, inexplicably, to engraft a state of mind requirement onto the Second Amendment where one had not previously existed The *Cases* decision serves as a good example of a case decided according to what Karl Llewellyn would call the judges' "sense of the situation." The court assumed that, as a matter of public policy, any meaningful limitation upon the government's ability to restrict private ownership of arms is bad; and the court decided the case accordingly, assuming that the framers of the Second Amendment did not intend it to present an impediment to the government in this regard.²³⁹

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 922-23.

²³⁹ Brannon Denning, *Can This Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 983-84 (1996).

In *United States v. Tot*,²⁴⁰ the Third Circuit at least tried to follow *Miller*, suggesting that the defendant, a convicted violent felon, had failed to show that his possession of a pistol was linked to the preservation of a well-regulated militia, but concluded

the same result is definitely indicated on a broader ground and on this we should prefer to rest the matter. Weapon bearing was never treated as anything like an absolute right by the common law One could hardly argue seriously that a limitation upon the privilege of possessing weapons was unconstitutional when applied to a mental patient of the maniac type. The same would be true if the possessor were a child of immature years. In the situation at bar Congress has prohibited the receipt of weapons from interstate transactions by persons who have previously, by due process of law, been shown to be aggressors against society. Such a classification is entirely reasonable and does not infringe upon the preservation of the well regulated militia protected by the Second Amendment.²⁴¹

Cases cited no authority for its interpretation of the Second Amendment, and expressly acknowledged it was trying to circumvent, rather than follow, *United States v. Miller*.²⁴² *Tot* ultimately centered upon reasonable regulation of the right involved, a position quite defensible in the context of a convicted violent felon.

At that, the two rulings lay largely quiescent, as did the firearm issue itself, for the next thirty years.

2. 1970-2000: The Spread of “Collective Rights” in the Lower Federal Courts

Cases and *Tot* did set the stage for the next development, as the gun control policy issue came to the forefront in the late 1960s and the following decade. The lower federal courts widely employed variants of a collective rights view to rebuff challenges to firearms restrictions. “Unfortunately, many of these contemporary courts seized on *Cases*’ bizarre state of mind requirement and *Tot*’s unsupported ‘collective theory’ interpretation as a convenient way to dispose of bothersome Second Amendment claims. Further, many courts began to cite *Miller* as actually standing for the holdings in *Cases* and *Tot*.”²⁴³

One approach involved paraphrasing the *Miller* references to arms suitable for militia use into “militia arms,” and then treating “militia arms” as being arms actually in use for militia duties. By the 1980s, courts taking this approach were apt simply to invoke *Miller* as establishing “that the right to keep and bear arms extends only to those arms which are necessary to maintain a well regulated militia” and thus

²⁴⁰ *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

²⁴¹ *Id.* at 266-67.

²⁴² *Cases*’ announcement that a recent Supreme Court ruling was “outdated” is surely an unusual event!

²⁴³ Denning, *supra* note 239, at 989.

that "[u]nder the controlling authority of *Miller* we conclude that the right to keep and bear handguns is not guaranteed by the second amendment."²⁴⁴

A second approach was the purest form of "collective right." In the words of the Sixth Circuit, "[s]ince the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."²⁴⁵

A third approach involved taking the second position to its logical extreme, and holding that individuals lacked even standing to raise a Second Amendment challenge, since the right involved was that of a State.²⁴⁶

The first of these variants at least involved an attempt to follow *Miller's* ambiguous reasoning; the second, and still more so the third, reached conclusions difficult to reconcile with that decision. The lower courts following the three variants made no attempt to examine the historical record; their view of history began in 1939, or perhaps 1942. To be fair, at the beginning of this period, there had been little documentation of the relevant history. That was about to change.

3. 1975-2010: The Downfall of Collective Right Theories

The collective right approach had been hastily constructed; it was about to be subjected to a detailed criticism, which came in three waves.

The first wave consisted of researchers who, over several decades, uncovered and documented the seemingly-lost history of the right to arms.²⁴⁷ These discoveries, or rediscoveries, need not be detailed here, since they represent the content of the first portion of this article.

²⁴⁴ *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). *See also* *United States v. Oakes*, 564 F.2d 387 (10th Cir. 1977) ("[T]o apply the amendment so as to guarantee defendant's right to keep an unregistered firearm which was not shown to have any connection to the militia, merely because defendant was technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy.").

²⁴⁵ *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *accord* *United States v. Warin*, 530 F.2d 103, 105 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); *see also* *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981) ("[T]he right guaranteed by the Second Amendment is a collective right to bear arms rather than an individual right, and has application only to the right of the state to maintain a militia and not to the individual's right to bear arms.").

²⁴⁶ *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) ("[T]he Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.").

²⁴⁷ *See, e.g.*, David T. Hardy & John Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62 (1974); David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment 1787-1791*, 10 N. KY. L. REV. 13 (1982); Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177 (1982); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1 (1981); STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED* 107-54 (Univ. of New Mexico Press 1982).

The second wave was begun by Don Kates' 1983 article in *Michigan Law Review*,²⁴⁸ which exposed their findings to a larger audience. Over the following decade, the individual right view of the Second Amendment secured the endorsement of established constitutional scholars, including Sanford Levinson,²⁴⁹ William van Alstyne,²⁵⁰ Akhil Amar,²⁵¹ Leonard Levy,²⁵² Larry Tribe,²⁵³ as well as rising stars such as Randy Barnett,²⁵⁴ Glenn Harlan Reynolds,²⁵⁵ Robert Cottrol,²⁵⁶ and Eugene Volokh.²⁵⁷ In 1983, Joyce Lee Malcolm would aptly describe the then-current understanding of the Second Amendment as "historical amnesia."²⁵⁸ A dozen years later, Glenn Harlan Reynolds would describe the individual rights view as the "Standard Model" of the Amendment.²⁵⁹

That left defenders of militia-use-only theories with one last refuge: the federal case law that had arisen during the period of historical amnesia. For example: "An extraordinarily consistent body of case law has held that a variety of restrictions on private firearms ownership, use, and sales do not violate the Second Amendment, because such restrictions have no effect on the maintenance of a well-regulated militia—the National Guard."²⁶⁰ The third and final wave of Second Amendment renaissance came as the individual rights view secured acceptance in the courts. This stage began with *United States v. Emerson*,²⁶¹ where the Fifth Circuit recognized an individual right to arms, and culminated in the Supreme Court's rulings in *District of Columbia v. Heller* and *McDonald v. Chicago*.

²⁴⁸ Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

²⁴⁹ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

²⁵⁰ William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

²⁵¹ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 257-67 (Yale Univ. Press 1998).

²⁵² LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 133-49 (Yale Univ. Press 1999).

²⁵³ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 896-97 (3d ed., Foundation Press 2000).

²⁵⁴ Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

²⁵⁵ Reynolds, *supra* note 94.

²⁵⁶ Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

²⁵⁷ Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998).

²⁵⁸ Malcolm, *supra* note 247, at 285.

²⁵⁹ Reynolds, *supra* note 94, at 463.

²⁶⁰ Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 68 (1995).

²⁶¹ *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

V. CONCLUSION

From the viewpoint of a court in 2001, it might seem that the meaning of the Second Amendment was well settled; it related only to service in an organized State militia. In reality, that view had dominated the federal courts only for about three decades, and had been subject to serious criticism even during this brief lifespan.

The period of the Framing had seen the evolution of two competing ideas for bills of rights – a recognition of the militia system, and a guarantee of an individual right to arms. The two were not merged until the Virginia Ratifying Convention of 1788. Thereafter, of the two, the individual right to arms was seen as dominant, as documented by Madison's writings, his original organization of the Bill of Rights, and the actions of the First Senate in rejecting both a right to arms "for the common defense" and amendments which would have expressly protected State power over the militia.

These understandings were confirmed by the early constitutional commentators, and by early American courts. The militia-uses-only view was represented by one minor exception in each case.

By the time of the Civil War, the individual right view was accepted by abolitionists and by Justice Taney, by Republican and Democratic national platforms alike; in postwar years the Reconstruction Congresses, the courts, and the major legal commentators took the same approach, as did (with a single exception) early 20th century courts.

To a casual observer in the early 21st century it might *seem* that the militia-uses-only view of the Second Amendment had always been predominant, and the *Heller* and *McDonald* involved dramatic legal change. In full historical context, however, it becomes apparent that those decisions recognize the individual rights understanding that had prevailed from the Framing onward. The militia-uses-only approach rejected in *Heller* and *McDonald* was in fact a very recent creation of the lower federal courts, utterly ahistoric, and which had been subject to scholarly challenge almost from its outset.