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# The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders

Nelson Lund[\*]

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*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.*

The Second Amendment

## [I.](#) Introduction

Divorce can be an extraordinarily painful and unsettling experience. Even in our current culture of laid-back nonjudgmentalism, the primal emotions of sexual jealousy and possessiveness toward one's children remain unconquered, not to mention the deep passions associated with the acquisition and defense of wealth. Everybody knows from common experience that people going through the traumatic experience of divorce are typically more prone than usual to erratic, abusive, and even violent behavior. But what can be done about it? Because we usually look to

Congress to address serious problems, perhaps there should be new federal laws aimed specifically at preventing wrongful behavior by individuals whose emotional stability has been threatened by their involvement in divorce proceedings.

Here are some suggestions. These estranged couples, who often say ugly and hurtful things to each other, could be deprived of access to telephones, which are often the instrument of choice for abusive harangues. And because such couples frequently spread malicious and untrue tales about each other, they could be forbidden by law from speaking about their spouses to anyone except their lawyers and the divorce court. Speech about each other to their children might be specially prohibited in order to prevent the well-known stresses that children can suffer when their parents force them to take sides in adult disputes. In order to head off the obvious danger of someone seeking "justice" outside the courts, couples who are divorcing might also be dispossessed of firearms, as well as all sharp or blunt objects that might be used to injure other people.

Despite such measures as these, considerable dangers would remain. These dangers might be alleviated with additional precautions, such as random, unannounced government searches of the living quarters of people involved in divorces. Such searches would no doubt discourage people from (p.159)stockpiling prohibited objects like knives, guns, screwdrivers and cell phones. Similarly, well-placed eavesdropping devices would help discourage unauthorized speech about spouses. And perhaps these people should be strip-searched for weapons by government agents before they come within a certain distance of their spouses and children.

All these measures could rationally be expected to reduce the level of domestic abuse and violence, perhaps to a very significant degree. But the whole scheme sounds like a joke because it is blatantly unconstitutional in every one of its particulars. Or is it?

## **II. The *Emerson*[1] Case**

Timothy Joe Emerson is a Texas physician who bought a Beretta pistol in 1997.[2] When he bought the gun, he was required to fill out a form designed by the federal Bureau of Alcohol, Tobacco, and Firearms. On that form, he was asked whether he had any of several characteristics that would disable him from lawfully buying or possessing a firearm. He was asked, for example, whether he was a convicted felon, a fugitive from justice, or an adjudicated mental defective. The form also asked whether he was "subject to a court order restraining [him] from harassing, stalking, or threatening an intimate partner or child of such partner." [3] Emerson truthfully answered that he did not have any of the disabling characteristics.

Approximately one year later, Emerson's wife filed for divorce and sought a temporary restraining order against him. Mrs. Emerson's application for the restraining order, which was essentially a form order routinely used in Texas divorce courts, stated no factual basis for the relief sought. The order itself, which was issued *ex parte*, contained twenty-nine separate prohibitions, most of which sought to ensure that Emerson did not engage in significant financial transactions or otherwise use the family property in a manner adverse to his wife's interests. The order also prohibited various sorts of interference with the (p.160)couple's child, and it forbade

Emerson to threaten or injure his wife or to communicate with her in vulgar or indecent language.

At a hearing a few days later, a Texas divorce court judge explored in considerable detail the financial circumstances of the couple and decided on the amount of temporary child support Emerson should provide. The hearing included a brief colloquy between the judge and Mrs. Emerson in which she noted that Emerson had never threatened to kill her, though she said that he had threatened a friend of hers. Although the judge made no findings that Emerson had committed or was likely to commit any of the twenty-nine separate acts prohibited in the temporary restraining order, he converted that order to a temporary injunction.[\[4\]](#)

Nothing in the story so far is particularly unusual, or even striking. It is apparently routine for Texas courts to issue prophylactic restraining orders in divorce cases, without findings or even evidence that the acts prohibited in those orders would otherwise be likely to occur.[\[5\]](#) The story became less commonplace when the federal government indicted Emerson for violating *18 U.S.C. § 922(g)(8)*, which imposes a total firearms disability on any person:

Who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and(p.161)

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.... [\[6\]](#)

Since the Texas divorce court judge made no finding that Emerson represented any threat at all to the safety of his wife or child, the government indicted Emerson only under subsection (C) (ii). On its face, that provision applied to Emerson because the restraining order "explicitly" prohibited violence or threatened violence against Mrs. Emerson. Because the statute applies only to cases involving a threat against an "intimate partner" or child of that partner, the statute renders the evidence about Emerson's threat against his wife's friend legally irrelevant. (While the testimony about Emerson's threat against his wife's friend might suggest that the Texas divorce court judge *could* have found that Emerson posed a credible threat to his wife's physical safety, no such finding was made.[\[7\]](#)) Similarly irrelevant is the fact that Emerson had *never* been found to pose any threat to the physical safety of his wife or child. And it is also irrelevant that Emerson may have later exhibited threatening behavior toward his wife.[\[8\]](#) According to the prosecutors, the (p.162)mere fact of an "explicit" prohibition in a restraining order--unsupported

by *any* judicial finding of dangerousness, by *any* evidence of dangerousness or by *any* subsequent dangerous or threatening behavior--is enough to impose a total firearms disability on an American citizen.

This was too much for Judge Sam R. Cummings of the United States District Court for the Northern District of Texas, who dismissed the indictment on the ground that the federal statute violates the Second Amendment. Judge Cummings's opinion, which included a lengthy discussion of the history and meaning of the Second Amendment, concluded that the constitutional right to keep and bear arms exists and may be asserted by citizens who have been subjected to unjustified infringements by the federal government. His application of this principle to the facts of Emerson's case was straightforward:

*18 U.S.C. § 922(g) (8)* is unconstitutional because it allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights. The statute allows, but does not require, that the restraining order include a finding that the person under the order represents a credible threat to the physical safety of the intimate partner or child. If the statute only criminalized gun possession based upon court orders with particularized findings of the likelihood of violence, then the statute would not be so offensive, because there would be a reasonable nexus between gun possession and the threat of violence. However, the statute is infirm because it allows one to be subject to federal felony prosecution if the order merely "prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner."

.... All that is required for prosecution under the Act is a boilerplate order with no particularized findings. Thus, the statute has no real safeguards against an arbitrary abridgement of Second Amendment rights. Therefore, by criminalizing protected Second Amendment activity based upon a civil state court order with no particularized findings, the statute is (p.163)over-broad and in direct violation of an individual's Second Amendment rights.[\[9\]](#)

If this case had concerned any other provision of the Bill of Rights, Judge Cummings's analysis would have bordered on the obvious. The law can and does forbid us to libel other people. But just as obviously, this does not mean that anyone who has been officially told to refrain from breaking the libel laws can also be told to remain completely silent or be barred from possessing a printing press. If it did, the legislature could simply outlaw speech, or printing presses, on the ground that this will help prevent libel. Though this sort of sweeping prior restraint might well be a rational means of preventing libel, it would violate the First Amendment.

Unless the Second Amendment is fundamentally different from the rest of the Bill of Rights, the same analysis should apply. The law can and does forbid people to cause or threaten bodily injury to others. But how is it that people can be deprived of their right to possess weapons merely because they have been told to obey this law? If they can, it would seem to follow that Congress could choose to promote obedience to the laws against murder and assault by forbidding everyone to possess weapons. If that is permitted, the Second Amendment must mean

that the right of the people to keep and bear arms shall not be infringed unless the government decides to infringe (or even to abolish) it.

### **III. The Second Amendment in the Courts**

Despite the straightforward nature of his analysis, Judge Cummings's decision shocked the legal world.<sup>[10]</sup> No federal statute had ever been invalidated on Second Amendment grounds, and it is widely supposed that this is because the Second Amendment,<sup>[11]</sup> unlike any other provision of the Bill of Rights, contains a prefatory phrase telling us that the right to keep and bear arms applies only to the National Guard. As we (p.164) shall see, this widespread belief is simply wrong. But there is also a good reason for being shocked at Judge Cummings's decision: it is inconsistent with a very large mountain of precedent. Although none of this precedent is binding in the Fifth Circuit, almost every other court of appeals has rejected the approach he adopted (and no court of appeals has accepted it). The government has appealed the *Emerson* case, and that appeal is anything but a lost cause. If the Fifth Circuit agrees with Judge Cummings, it will break sharply with most of its sister circuits.

Assuming, as the district court did, that the government is correct in interpreting § 922(g) (8) to impose a firearms disability where no court has made a finding that there is a likelihood of violence,<sup>[12]</sup> the Fifth Circuit should indeed refuse to follow the other circuits. Every one of them has misinterpreted both the Second Amendment and the applicable Supreme Court precedent. The opinions from the other circuits are almost uniformly insouciant, intellectually lazy, and unnecessarily sweeping. *Emerson*, moreover, is the first case involving a federal statute that would be difficult to uphold on narrow constitutional grounds, and a decision in favor of the government would therefore create a very significant new intrusion on the right to keep and bear arms.

The Fifth Circuit has a real opportunity to inject an element of badly needed intellectual rigor into the case law. This would be a service not only to the Constitution, but also to the Supreme Court, which will eventually have to decide whether it (p.165) agrees with the many lower courts that have so casually read the Second Amendment to mean essentially nothing.

There is now a substantial academic literature about the Second Amendment,<sup>[13]</sup> some of which was discussed in Judge Cummings's opinion. The Fifth Circuit--as a court of law--will presumably begin its analysis, however, by consulting the existing judicial precedents. The following discussion will suggest how those precedents should be regarded.<sup>[14]</sup>(p.166)

#### **A. United States v. Miller**<sup>[15]</sup>

The Supreme Court has issued one decision addressing the meaning of the Second Amendment. The Court's opinion in the case is very brief and highly ambiguous. For three reasons, it can and should be read narrowly. First, the Court's statement of its holding invites a narrow construction. Second, the logic that appears to underlie some of the Court's reasoning would lead to manifest absurdities. Third, the Court heard arguments on only one side of the case.

*United States v. Miller* arose from a prosecution under the National Firearms Act of 1934,<sup>[16]</sup> which required the registration of specified firearms, including short-barreled (or sawed-off) shotguns and rifles, machine guns, and silencers. The defendants were indicted for transporting an unregistered sawed-off shotgun across state lines. The district court quashed the indictment, holding without explanation that the statute violated the Second Amendment.<sup>[17]</sup> Upon the government's appeal to the Supreme Court, the defendants did not appear and the Court did not appoint counsel to defend the judgment below.<sup>[18]</sup>

Most of Justice McReynolds's short opinion is devoted to a review of the meaning and history of the term "militia." The Court correctly concluded that the militia had traditionally been understood to include, in general terms, "all males physically capable of acting in concert for the common defense."<sup>[19]</sup> As the Court noted, the militia members were "civilians primarily, soldiers on occasion," and they were set in sharp contrast with "troops" or "standing armies."<sup>[20]</sup>

The Constitution does not define the term "militia." Article I, however, assumed the militia's existence and divided authority over it between the state and federal governments. The new federal government was authorized to keep the militia in a state (p.167)of readiness and to use it for law enforcement and national defense; the states retained their authority to appoint officers and to train the militia in the way prescribed by Congress.<sup>[21]</sup> After quoting the relevant provisions of Article I, Justice McReynolds made the following inference: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."<sup>[22]</sup>

In some sense, this must be true. The Second Amendment begins by announcing: "A well regulated Militia, being necessary to the security of a free State ...." But if McReynolds's statement is interpreted to mean that the Second Amendment was meant to make it easier for Congress to exercise its Article I powers, he would plainly be wrong. Congress already had almost plenary authority to assure the continuation and effectiveness of the militia.<sup>[23]</sup> Under Article I, for example, Congress could (and did) require citizens to purchase and keep weapons and to attend regular training exercises.<sup>[24]</sup> The Second Amendment adds nothing at all to the power Congress already possessed under Article I. Nor does the Second Amendment add anything to the powers (of appointing officers and training the militia) reserved by Article I to the states.

It might be possible to interpret McReynolds's statement about the "obvious purpose" of the Second Amendment to mean that constitutional protection of the right of the people to keep and bear arms would *encourage* the federal government to exercise its constitutional authority to provide the militia with training. This would make considerable sense because the Constitution authorizes but does not oblige the government to (p.168)keep the militia in a state of readiness.<sup>[25]</sup> If the federal government were faced with a choice between an armed but undisciplined populace and a well-trained body of citizen-soldiers, it might be more likely to choose the latter than it would be if it had the option of depriving the citizenry of *both* arms and training. Unfortunately, McReynolds did not make it clear whether this, or something else, was what he meant.

The Court's statement of its holding is similarly ambiguous:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840).[\[26\]](#)

At first blush, this might be taken to mean that the Second Amendment protects only "military" weapons and to strongly suggest that "ordinary military equipment" is *per se* protected by the Second Amendment. This interpretation is supported by the fact that the *Miller* Court never raised any question about the status of the defendants as members of the militia. The Court seems to have concluded that it would make no difference at all if the defendants were disqualified from active military service (for example, by being elderly or physically disabled), and that the outcome of the case turned solely on the character of the weapon they were charged with possessing.[\[27\]](#) If the decisive constitutional factor was the presumed "non-military" nature of the shotgun, rather than the apparently "non-military" nature of the defendants, it would seem to follow that private citizens are entitled under the Second Amendment to possess ordinary (p.169)military weapons--which today would include such items as fully automatic battle carbines and portable rocket launchers.

It is not likely that the *Miller* Court intended this logical extension of its apparent reasoning, and it is virtually inconceivable that today's Supreme Court would accept it. The true explanation of the Court's formulation of its holding may be simple sloppiness. That would account for McReynolds's inapposite citation of the Tennessee decision in *Aymette*,[\[28\]](#) and it could be explained at least in part by the fact that the Court heard only the government's side of the case. Precisely because of its highly problematic apparent implications, *Miller's* holding should be read cautiously. It thus bears emphasis that *Miller* did *not* specify what the Court thought a "well regulated militia" was. Neither did *Miller* purport to say what could be said to have a reasonable relationship to the "preservation and efficiency" of the militia, or what such a relationship might require. Nor did the Court say that contributions to "the common defense" would necessarily have to have a military character.

The ambiguity of *Miller's* reference to the "common defense" deserves special emphasis because of the fact, unremarked upon by the Court, that the legal theory and social conditions at the time of the founding allowed little or no distinction to be made among the various ways in which armed citizens can contribute to the defense of the community. Blackstone (the foremost legal authority of the time) had included the right to arms among the five indispensable auxiliary rights, "which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."[\[29\]](#) The right to arms, according to Blackstone, is rooted in "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to (p.170)restrain the violence of oppression."[\[30\]](#) Americans at the time of the founding were without organized police forces,

and thus were at least as well aware as Blackstone that the "violence of oppression" could arise as easily from criminals, or indeed from the government itself, as from a foreign invasion or a civil insurrection. Defending oneself and one's family from criminal violence was a public service on which the community relied, just as the community relied at that time on private prosecutors to enforce the law.<sup>[31]</sup> Thus, one of the ways in which an armed citizenry can contribute to "the security of a free [s]tate" is by providing a deterrent against criminal violence.<sup>[32]</sup>

*Miller* leaves a great many questions unexplored and unanswered. At least until the Supreme Court revisits the Second Amendment, however, it is reasonably safe to say that the lower courts should consider federal laws closely resembling the statute at issue in *Miller* at least presumptively valid. That statute imposed registration requirements and a tax on machine guns and short-barreled rifles and shotguns, as well as silencers.<sup>[33]</sup> The common characteristic of these devices is that they appear particularly suited to criminal uses. It is true, of course, that one can conceive of legitimate uses for short-barreled rifles and shotguns, and even for machine guns. But it is also true that these weapons would seldom be *needed* for legitimate civilian purposes because there are closely comparable (or even superior) substitutes for them. Thus, even if one assumes that *Miller* would permit a total civilian ban on all such weapons (which was not the effect of the National Firearms Act or (p.171)succeeding statutes), the adverse effect on law-abiding citizens would be small while the effect on criminals might be substantial. Accordingly, *Miller* should be read to approve restrictions only on weapons that have the special characteristics shared by those identified in the National Firearms Act of 1934--*i.e.*, slight value to law-abiding citizens and high value to criminals. As the First Circuit pointedly noted shortly after *Miller* was decided: "[W]e do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go."<sup>[34]</sup>

## **B. Circuit Precedent**

Circuit court decisions since *Miller* fall into two main categories. One line of cases treats the Second Amendment right as one belonging to state governments, so that all laws infringing on the right of private citizens to keep and bear arms are valid. Another line of cases arrives at much the same result by reading *Miller* to impose insurmountable hurdles in the path of those asserting the right to keep and bear arms. Neither approach can withstand analysis, and the Fifth Circuit should refrain from following either line of cases.<sup>[35]</sup>

### **1. The States' Rights Theory of the Second Amendment**

As the discussion of *Miller* above should make clear, the Supreme Court has not so much as hinted that Second Amendment rights belong to state governments rather than to individuals. That theory was introduced into federal case law by way of a dictum in *United States v. Tot*,<sup>[36]</sup> which said in its entirety:

It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers

since[13] that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in (p.172)mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.[14] The experiences in England under James II of an armed royal force quartered upon a defenseless citizenry[15] was fresh in the minds of the Colonists. They wanted no repetition of that experience in their newly formed government. The almost uniform course of decision in this country,[16] where provisions similar in language are found in many of the State Constitutions, bears out this concept of the constitutional guarantee. A notable instance is the refusal to extend its application to weapons thought incapable of military use.

13. 1 *Elliot's Debates on the Federal Constitution* (2d Ed. 1901) 371, 372 (Luther Martin's letter to the Maryland Legislature); 4 *Id.* 203 (Lenoir, North Carolina Convention); 5 *Id.* 445 (Sherman of Connecticut at the Federal Convention). *Emery, The Constitutional Right to keep and Bear Arms* (1915) 28 *Harv.L.Rev.* 473; *Haight, The Right to Keep and* (1941) 2 *Bill of Rights Rev.* 31; *McKenna, The Right to Keep and Bear Arms* (1928) 12 *Marq.L.Rev.* 138.

14. As to the latter, see *The Federalist*, Nos. XXIV-XXIX and No. XLVI.

15. See *Aymette v. State*, 1840, 2 *Humph.* 154, 21 *Tenn.* 154; also law review articles in *f.n.* 13.

16. See *Haight, supra* and *McKenna, supra*.[\[37\]](#)

This has proved to be an enchanting reading of the Second Amendment, later embraced by several other courts of appeals, and thoughtlessly accepted by large segments of the legal profession.[\[38\]](#) It is also completely untenable, as we shall see. But it is worth pausing at the outset to note that the *Tot* court, contrary to the very first assertion in its dictum, did not cite a single discussion "contemporaneous with [the Second Amendment's] proposal and adoption."[\[39\]](#) Every single one of the cited sources from the founding period recorded discussions that occurred *before* the Second Amendment was proposed or (p.173)adopted. Therefore, they could not possibly have been discussing the meaning of the Second Amendment.

This outright factual misstatement by the *Tot* court turns out to have considerable importance. Each of the eighteenth century sources cited by the court--Sherman at the Constitutional Convention; Martin and Lenoir at their state ratifying conventions; and the *Federalist Papers*--involves commentary about an issue that was a major source of dispute between the Federalists and the Anti-Federalists. That issue was whether the new federal government should or should not be given almost plenary authority over the militia. The states' rights theory adopted by the *Tot* court entails the false assumption that the Second Amendment was designed to give the Anti-Federalists a major victory that they had been denied when the original Constitution was adopted. If that had happened, it would indeed distinguish the right to keep and bear arms from the freedoms of speech and religion. But it did not happen, and neither the *Tot* court nor anyone else has ever been able to find a single statement supporting the states' rights interpretation of the

Second Amendment by anyone who spoke during the time it was being proposed and adopted.[\[40\]](#)

The flaws in the states' rights theory fall into three principal categories. First, the theory cannot be derived from the text of the Constitution. Second, it is inconsistent with the legislative history of the Constitution. Third, it leads to manifest absurdities.

#### [a.](#) *The Constitutional Text*

The operative language of the Second Amendment provides in no uncertain terms that "the right of the people to keep and bear Arms, shall not be infringed." The phrase "right of the people" is the same term used in the First and Fourth Amendments, where it undoubtedly protects the rights of individuals, not states.[\[41\]](#) As the Tenth Amendment makes clear, (p.174) moreover, the framers of the Bill of Rights were quite aware of the difference between the "people" and the "states."[\[42\]](#) Thus, the framers of this constitutional provision clearly did not mean to say that "the right of the *states* to keep and bear arms shall not be infringed."

Nor does the Second Amendment say that "the right of the *state militias* to keep and bear arms shall not be infringed."[\[43\]](#) The states' rights theory, to the extent that it is even suggested by the Constitution, would have to derive from the prefatory phrase, "A (p.175)well regulated Militia, being necessary to the security of a free State ...." Grammatically, this prefatory phrase does not limit or qualify the operative clause, and it cannot be read to change the meaning of the operative clause. The prefatory phrase offers a reason for adopting the rule laid down in the operative clause, but that reason is perfectly consistent with protecting the right of private individuals to keep and bear arms.

To see why this is true, one must set aside the frame of mind encouraged by our experience with the modern bureaucratic Leviathan. When we talk about making some aspect of life "well regulated," we usually mean that it should be *heavily* regulated, or at least *more* regulated. But this is simply a modern prejudice. The term "well regulated" does not imply heavy regulation, or more regulation. When one thinks about it, one should easily recognize what would have been much more immediately apparent to any eighteenth-century reader: that something can only be "well regulated" when it is not *overly* regulated or *inappropriately* regulated.[\[44\]](#)

Recall that Article I of the Constitution gave Congress virtually plenary authority to regulate the militia. As the operative clause of the Second Amendment makes perfectly clear, its purpose is simply to forbid *one* inappropriate regulation (among the infinite possible regulations) that Congress might be tempted to enact under its Article I "necessary and proper" authority: disarming the citizenry from among which the militia (a constitutionally undefined entity) must be constituted.[\[45\]](#)

It is certainly true that protecting the right of civilians to keep and bear arms is not sufficient to ensure a well-regulated militia. And it is certainly true that protecting the civilian right to arms has effects in addition to avoiding inappropriate militia regulations. But the same can be said whenever a constitutional provision is prefaced with a statement of purpose. The Patent (p.176)and Copyright Clause,[\[46\]](#) for example, is not sufficient to promote the progress of science and useful arts, for we also appropriate funds for education in science and technology. Nor does

the Patent and Copyright Clause authorize Congress to protect *only* those writings and inventions that promote the progress of science and useful arts, as we can easily see from the fact that copyrights are granted to *Hustler* magazine and the ravings of racist demagogues, not to mention a wide range of literature that overtly seeks to *retard* the progress of science and useful arts.[\[47\]](#)

Furthermore, as Professor Volokh has shown in considerable detail,[\[48\]](#) the state constitutions familiar to the framers of the Second Amendment were filled with provisions containing prefatory statements like the one in the Second Amendment. The courts had never held that the operative language in these clauses should be interpreted so as to create a perfect "fit" with the stated purposes, and the framers had no reason to think that any such interpretive exercise would be performed on the Second Amendment.[\[49\]](#)(p.177)

#### **b. Legislative History**

Once one reads the text of the Second Amendment carefully, it becomes obvious that it does not imply, or even suggest, the states' rights theory. It should therefore come as no surprise that the legislative history strongly confirms the obvious textual implication that the Second Amendment protects the individual right of civilians to keep and bear arms. Indeed, there is absolutely no evidence that *anyone* who spoke about the Second Amendment during the period when it was being considered and ratified ever suggested that it protected a right of states rather than of individuals.[\[50\]](#)

This is not to say that the decision to guarantee the right of the people to keep and bear arms was unconnected with the Framers' interest in a well-regulated militia. As is well known, there was a widespread fear and distrust of standing armies among the founding generation. Memories were still fresh of the oppressive behavior of royal armies, in England as well as in the colonies.[\[51\]](#) It was widely believed in America that political liberty would be safer if the federal government raised armies only to prosecute wars, relying exclusively on the citizen militia during times of peace.[\[52\]](#) Nevertheless, the Framers of the Constitution also recognized that there were obvious dangers in restricting the federal government's authority to raise armies.[\[53\]](#) The Constitutional Convention concluded that the second danger was greater than the first, and the Constitution provides (p.178)the government with virtually unfettered authority to raise armies of any size at any time.[\[54\]](#)

The political danger in giving this power to the federal government could have been reduced if there were some way to ensure that the militia was kept in a high state of readiness during times of peace. But this is something that the Constitution could not achieve. If control of the militia were reserved to the states, the resulting disparities in training and equipment would ensure that it could never be an effective military force. But if control of the militia were given to the federal government, it could be trained and equipped so as to become little more than an instrument of federal policy, indistinguishable from a standing federal army. This, of course, is exactly what our modern National Guard has become.[\[55\]](#) Alternatively, the militia could be allowed by the federal government to fall into desuetude, deprived of training and discipline, so that it would be unable to act effectively when it was most needed for the defense of liberty. This is precisely what has in fact happened to the bulk of the modern militia, which is outside the National Guard system.[\[56\]](#)

The Constitution came down firmly in favor of federal control, for it leaves with the states only the appointment of militia officers and the responsibility for training the militia according to federal rules.<sup>[57]</sup> The Second Amendment responded to concerns about this decision, but it did *not* change the decision. The Second Amendment does nothing to prevent the federal government from effectively absorbing the organized state militias into the federal armed forces, as it has done in the modern National Guard system.<sup>[58]</sup> Nor does the Second (p.179) Amendment prevent the federal government from allowing the remainder of the militia to go without formal training. All the Second Amendment does is to prevent the federal government from taking the next logical step: disarming the portion of the civilian population that remains outside the government's military establishment.<sup>[59]</sup>

The Anti-Federalists probably regarded this as a rather trivial safeguard against federal oppression.<sup>[60]</sup> They may well have recognized that it had some value, for the mere existence of an armed citizenry would raise the costs and risks of governmental oppression.<sup>[61]</sup> But neither was there any realistic prospect, even in the eighteenth century, that an unorganized and untrained body of citizens could prevail in battle against a determined federal government deploying a genuine army. The very inadequacy (from an Anti-Federalist point of view) of the (p.180) protection that an armed citizenry could offer against federal oppression, however, also rendered the Second Amendment completely noncontroversial. It could not have been enough to satisfy Anti-Federalist desires for constitutional provisions aimed at preserving the military superiority of the states over the federal government. Attempting to satisfy that desire would have been hugely controversial, and it would have entailed amending Article I. Nobody suggested that the Second Amendment could have any such effect,<sup>[62]</sup> but neither did anyone suggest that the federal government needed or rightfully possessed the power to disarm American citizens.<sup>[63]</sup> As a political gesture to the Anti-Federalists, the Second Amendment was something of a sop. But the provision was easily accepted because everyone *agreed* that the federal government should not have the power to infringe the right of the people to keep and bear arms, any more than it should have the power to abridge the freedom of speech or prohibit the free exercise of religion.

This focus on preventing individual citizens from being disarmed, rather than on seeking to render the state militias a match for federal armies, is reflected in the textual adjustments that Congress made as it refined and clarified Madison's first draft. Madison's initial draft read:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously (p.181) scrupulous of bearing arms shall be compelled to render military service in person.<sup>[64]</sup>

After committee consideration and debate, the House adopted a different version:

A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed; but no one scrupulous of bearing arms, shall be compelled to render military service in person.<sup>[65]</sup>

The Senate made further revisions and adopted the text that is now a part of the Constitution:

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.[\[66\]](#)

All the major changes made during the congressional process increased the clarity with which the Second Amendment protects an individual right, *not* a right of the states to maintain military organizations. The conscientious objector clause was dropped.[\[67\]](#) The reference to a "well armed militia" was eliminated. The description of the militia as an entity "composed of the body of the people" was omitted. Each of these phrases could have suggested that the right to keep and bear arms was somehow restricted to the context of military service. Although Madison meant to imply no such thing,[\[68\]](#) the (p.182)fact that each of these potentially misleading phrases was deliberately removed from the text confirms that Congress knew exactly what it was doing when it proposed for ratification the unambiguous text that is now part of the Constitution.[\[69\]](#) The result was a text to which no one at the time could or did object, largely because it does *not* imply a states' rights theory. State control over the militia was what the Anti-Federalists *wanted*. They did not get what they wanted at the Constitutional Convention, and they were certainly not silently and without any controversy given what they wanted by the Second Amendment.[\[70\]](#) Thus, the states' rights theory of the Second (p.183)Amendment requires nothing less than a rewriting of American constitutional history.[\[71\]](#)

### c. *The States' Rights Theory Leads to Absurd Consequences*

As if it were not enough that the states' rights theory is without support in the constitutional text or the legislative history of that text, the theory implies outright absurdities. Apart from the textual impossibility of reading "the people" to mean "the states" or "the state militias," the purpose imputed to the Second Amendment by the states' rights theory makes no sense. That purpose, we are told, is to prevent the federal government from undermining the state military organizations, which were supposed to provide a political counterweight to federal armies.[\[72\]](#) But if this was its purpose, the Second Amendment must also have been meant to repeal Article I's prohibition against the states' keeping troops without the consent of Congress.[\[73\]](#) But nobody ever mentioned this obvious effect at the time the Second Amendment was being considered and adopted. The notion that it escaped their attention is simply risible.

The purpose of the Second Amendment under the states' rights theory also appears to imply that Article I's grant to Congress of virtually plenary authority over the militia must have been modified, again without anyone's having noticed or commented on the matter. Indeed, if the purpose of the Second Amendment is to protect the independence of state military (p.184)organizations, our modern National Guard system would seem to be unconstitutional because it has rendered these organizations little more than appendages of the federal armed forces.[\[74\]](#) And because the states must be free under the states' rights theory to decide for themselves how to train and arm their own militias, that theory must free them to equip their state armies with nuclear weapons and to authorize (or even require) their citizens to keep military weapons like fully automatic assault rifles at home, thus preempting contrary federal laws.[\[75\]](#)

The judicial opinions that adopt the states' rights theory never explain how these absurdities can be avoided. Neither do they explain how their theory can be derived from or reconciled with the text of the Constitution. They just announce it, as though it were self-evident,[\[76\]](#) or they cite some other case that announced it,[\[77\]](#) or they cite some other case that did *not* announce it[\[78\]](#) As we have seen, the theory is anything but self-evident, and there is simply no reason for the Fifth Circuit, let alone the Supreme Court, to join in this ongoing hoax.

## **2. The "Government Always Wins" Interpretation of *Miller***

A more subtle, and therefore more dangerous, line of cases avoids embracing the states' rights theory, but comes essentially to the same result. The opinions in these cases typically begin with some version of *Miller's* statement that the possession or use of a particular firearm must have "a reasonable relationship to the preservation or efficiency of a well-regulated militia."[\[79\]](#) Whatever analysis follows, and there is usually not much, always puts a burden on the claimant of Second Amendment rights to demonstrate such a relationship. And the court always (p.185)concludes that the claimant failed to make the required demonstration. It is never made quite clear how an individual's possession of firearms ever *could* have a reasonable relationship to the preservation or efficiency of a well-regulated militia, except of course when the individual is serving in the National Guard. The effect, accordingly, is similar to that of the states' rights theory, in a different form: Second Amendment rights belong to individuals, but they cannot exercise those rights without the government's leave.

The leading decision is *Cases v. United States*, which upheld a federal statute imposing a firearms disability on persons convicted of a violent crime.[\[80\]](#) After quoting *Miller's* holding, the court promptly noted that the Supreme Court was wrong to assume that sawed-off shotguns were without military value: this was so 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."[\[81\]](#) Understandably recoiling from the implication, implicit in *Miller's* reasoning, that the federal government can regulate only militarily useless weapons like the antique matchlock harquebus, the *Cases* court threw up its hands in despair and opted for no interpretation of the Constitution at all:

Considering the many variable factors bearing upon the question it seems to us impossible to formulate any general test by which to determine the limits imposed by the Second Amendment but that each case under it, like cases under the due process clause, must be decided on its own facts and the line between what is and what is not a valid federal restriction pricked out by decided cases falling on one side or the other of the line.[\[82\]](#)

The court then upheld the statute on the ground that there was no evidence that the defendant belonged to a military organization or was using the gun "in preparation for a military career."[\[83\]](#) Instead, said the court, the defendant was "purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated (p.186)militia which the Second Amendment was designed to foster as necessary to the security of a free state."[\[84\]](#)

This analysis is vaporous. A good argument can be made for upholding the constitutionality of laws forbidding the possession of weapons by people who have been convicted of violent crimes. But that argument would have nothing to do with whether the felon in question was preparing for a military career, let alone with whether he was thinking about the militia when he used the gun. The *Cases* court, like the courts that have adopted the states' rights theory, simply misread the Second Amendment as a provision protecting some right or interest of a government-organized "militia" rather than the "right of the people."

The unjustified common law approach adopted by *Cases* has been followed by several later courts.<sup>[85]</sup> The actual results, like the result in *Cases* itself, are frequently defensible. But their reasoning has been so completely detached from the Constitution that they have finally succeeded in drawing lines that put *every* private use and possession of arms outside the Second Amendment. Thus, starting from *Miller's* reference to "a reasonable relationship to the preservation or efficiency of a well-regulated militia," one court has concluded that the Second Amendment does not cover those *who are in fact members of the United States militia*.<sup>[86]</sup> Similarly, other courts have declared irrelevant the fact that a person is *in fact a member of his state (p.187)militia*.<sup>[87]</sup> And at least one court has come very close to declaring that the federal absorption of the state militias into the National Guard system renders the Second Amendment a dead letter.<sup>[88]</sup>

Thus, the Second Amendment is found, at the end of the day, inapplicable to military or non-military weapons possessed by citizens who are or are not members of the militia. What is left? Apparently nothing, except possession of weapons by the National Guard or perhaps by some hypothetical state armies that the courts consider sufficiently "well regulated." In substance, this is at best the states' rights theory all over again. And while it may not be surprising that federal judges would arrive at this result by following the common law process of adjudication initiated by the First Circuit in *Cases*, it has no basis in the Constitution or in anything that even looks like analysis of the Constitution.

If the substance of this body of common law is wholly detached from the Constitution, its form is constitutionally unique. Picking up on *Miller's* comments about "the absence of any evidence" about a reasonable relationship to the militia,<sup>[89]</sup> the courts have effectively adopted a version of strict scrutiny that is strict in theory but fatal in fact. Unlike the strict scrutiny associated with other constitutional rights, however, this is a completely upside-down form of review that applies to the *claimant* of the constitutional right rather than to the challenged law.<sup>[90]</sup>

Although this is not an utterly impossible interpretation of *Miller*, it is certainly a bizarre interpretation of the Constitution. The Second Amendment purports to protect the "right of the (p.188)people to keep and bear arms," but it turns out that they only have this right to the extent that the government chooses to include them in its armed forces.<sup>[91]</sup> Similarly, one might conclude that only registered lobbyists are protected by the First Amendment "right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Or that only government bureaucrats are protected by the Fourth Amendment's "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." All three of these examples are preposterous, and it is a sad fact that one of them has become the law in large parts of this nation.

What the courts should do, starting with the *Emerson* case itself, is to scrutinize federal gun control laws rather than the claimants of the constitutional right, just as they do with every other guarantee of individual liberty in the Bill of Rights.<sup>[92]</sup> In (p.189)carrying out this task, there will be room for reasonable debates about the appropriate level of heightened scrutiny. And there will no doubt be cases about which reasonable minds can differ. But anarchy will not descend upon the land.

Indeed, it may well be that most existing forms of gun control would survive such scrutiny because they are sufficiently well tailored to achieve sufficiently worthy government purposes. Restrictions on particular weapons that are only marginally, if at all, suitable for the constitutionally protected function of self-defense, for example, are not obviously unconstitutional.<sup>[93]</sup> Nor are firearms disabilities imposed on people who have been found through due process of law to be exceptionally dangerous, such as violent felons and adjudicated mental defectives. Indeed, a strong case can be made for upholding that part of § 922(g) (8) that imposes a firearms disability on persons who are under a domestic violence restraining order because a court has found that they represent a credible threat to the physical safety of their domestic partner or child.<sup>[94]</sup> Just as a divorce court judge may forbid an abusive husband to continue subjecting his wife to hateful late-night telephonic tirades, so a judge should be able to deprive a threatening husband of convenient tools for murdering his wife.<sup>[95]</sup>

But the *Emerson* case is different. By its literal terms, the statute at issue purports to impose a firearms disability on citizens who have never been convicted of a crime and who have never been shown to be any more dangerous than anyone else. (p.190)If they can automatically lose their Second Amendment rights merely because a divorce court judge has entered a routine order instructing them to obey the law, it becomes hard to imagine how any civilian disarmament statute could violate the Constitution. If the judiciary is going to empty the Second Amendment of all content, it might be better simply to announce that the judges have decided to repeal this provision of the Bill of Rights, and be done with it. In this era of crowded dockets and judicial vacancies, why should the courts continue to make a pretense of reviewing Second Amendment claims if all they are doing is thinking up ways to ensure that no constitutional right can ever be recognized?

## **IV. Conclusion**

The Second Amendment has long been the victim of courts that have refused to read it with the care due a legal text, have refused to read its legislative history in light of that text, and have casually adopted interpretations that range from the baseless to the absurd. So long as Congress refrained from adopting statutes that made serious inroads on the right of the people to keep and bear arms, this carelessness had relatively limited practical consequences. With the *Emerson* case, however, that could change. If a federal statute can deprive American citizens of their Second Amendment rights on the basis of nothing more than a state court's order to obey the law, there would seem to be no limits on the federal power to disarm anyone who *might* disobey the law. And that means everyone.

The Fifth Circuit now has an opportunity to begin the judicial process of treating the Second Amendment like law, rather than like some crazy constitutional aunt. The following propositions, which have never been refuted, should guide that court, and future courts as well:

- The Second Amendment protects a "right of the people," not a right of the states or the militia, let alone of the National Guard.
- The Second Amendment does not say or imply either that the right to keep and bear arms will guarantee a well regulated militia, or that the right to keep and bear arms only exists to the extent that it secures a well-regulated militia.
- Article I of the Constitution gives Congress virtually plenary powers to maintain a "well regulated militia." The (p.191)Second Amendment secures against a particular, inappropriate regulation, namely infringing "the right of the people to keep and bear arms."
- The government cannot make the Second Amendment "right of the people" disappear by the simple expedient of failing to include them in what the courts believe is a sufficiently well-regulated militia.
- The Anti-Federalists who wanted the Constitution to ensure that the state militias were maintained as bulwarks against federal standing armies, and who lost that fight at the Federal Convention, were not silently granted their wish by those who drafted and ratified the Second Amendment.
- The framers of the Second Amendment thought they were writing a law, not an invitation for future legislatures and future courts to write their own policy views into the Constitution.

Following these principles will not resolve every controversy about the meaning of the Second Amendment. But it would help to rectify the continuing embarrassment that our Second Amendment jurisprudence has become.

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[\*] Professor of Law, George Mason University School of Law; Ph.D., 1981, Harvard University; J.D., 1985, University of Chicago. The author, who has advised the National Rifle Association about the *Emerson* case, is grateful to Stephen G. Gilles, Mara S. Lund, John O. McGinnis, Daniel D. Polsby, and Eugene Volokh for helpful comments on an earlier draft. Financial assistance was provided by the George Mason University School of Law. The views expressed in this article are those of the author alone.

[1] *United States v. Emerson*, 46 F. Supp.2d 598 (N.D. Tex. 1999).

[2] See Kim Cobb, *Gun-rights Case Could Set Precedent*, *Hous. Chron.*, Sept. 12, 1999, at A4.

[3] *Emerson*, 46 F. Supp.2d at 599. The quote from the form is based on the language in 18 U.S.C. § 922(g)(8) (1994 & Supp. II 1996).

[4] A copy of the temporary restraining order and a transcript of the divorce court hearing were filed as Defendant's Exhibit B. *See Defendant's Exhibit B, United States v. Emerson*, 46 F. Supp.2d 598 (N.D. Tex. 1999) (No. CRA: 6-98-CR-103-C).

[5] The Texas judge who converted the *ex parte* temporary restraining order to a temporary injunction in Emerson's divorce case later testified as to the routine nature of the orders. *See Hearing on Motion to Dismiss, United States v. Emerson*, 46 F. Supp.2d 598 (N.D. Tex. 1999) (No. CRA: 6-98-CR-103-C). Nor should it be surprising that judges would issue such orders routinely. Especially where the request for an order is uncontested, a busy judge would have little reason to be reluctant about ordering a person to obey the law.

[6] 18 U.S.C. § 922(g)(8) (1994 & Supp. II 1996).

[7] *See* 18 U.S.C. § 922(g)(8); *see also Emerson*, 46 F. Supp.2d at 599. Nor does the combination of Mrs. Emerson's testimony and the prohibitory language in the restraining order imply that the divorce court judge made an implicit finding that Emerson posed a credible threat to his wife's safety. The restraining order in Emerson's divorce case in fact contained numerous prohibitions as to which *norelevant* evidence whatsoever had been introduced. *See id.* Despite assurances at the hearing that there was no dispute between the Emersons about child custody and visitation, for example, the restraining order contained several provisions prohibiting Emerson from doing such things as "molesting or disturbing the peace of the child," "hiding or secreting the child," and "disrupting or withdrawing the child" from the school in which she was enrolled. These and other prohibitions that were not supported in any way by any evidence about Emerson or his behavior demonstrate that the mere existence of a prohibition in the restraining order does not imply that the judge made any sort of factual finding to justify the prohibition. Most important of all, even if no evidence had been introduced about a threat by Emerson against his wife's friend, the federal government could nonetheless have brought exactly the same case under 18 U.S.C. § 922(g) (8) (C) (ii).

[8] *See U.S.C. § 922 (g)(8) (C) (ii)*. Sometime after the restraining order was issued, Emerson apparently brandished a gun in front of his wife and daughter. *See Eugene Volokh, Guns and the Constitution, Wall St. J., Apr. 12, 1999, at A23*. It may well be appropriate to prosecute Emerson for such behavior under applicable state laws. This subsequent event may even suggest, to those with the gift of hindsight, that Emerson *should* have been found to pose a threat to his wife's safety before he ever threatened her. But no such finding was made. And even if Emerson had never threatened his wife at all, he would still have been subject to prosecution under 18 U.S.C. § 922(g) (8) (C) (ii).

[9] *Emerson*, at F. Supp.2d at 610-11 (citations omitted). The court also held that "[b]ecause § 922(g)(8) is an obscure, highly technical statute with no *mens rea* requirement, it violates Emerson's Fifth Amendment due process rights to be subject to prosecution without proof of knowledge that he was violating the statute." *Id.* at 613.

[10] Indeed, within a few weeks of the *Emerson* decision, its holding had already been rejected by another district court. *See United States v. Henson*, 55 F. Supp.2d 528, 529 (S.D. W. Va. 1999).

[\[11\]](#) *U.S. Const. amend. II.*

[\[12\]](#) This assumption is questionable. *Section 922(g) (8)* was enacted as § 110401 of the *Violent Crime Control and Law Enforcement Act of 1994*. *Pub. L. No. 103-322, §110401, 108 Stat. 1796, 2014-15 (codified as amended at 18 U.S.C. § 922(g) (8) (1994 & Supp. II 1996))*.

Although other provisions of this very lengthy and complex act had generated considerable political and legislative conflict, there had been ready acceptance of proposals to impose a firearms disability on those who had been found by a court to pose a threat to the safety of their partners and their children. *See generally H.R. Conf. Rep. No. 103-711(1994), reprinted in 1994 U.S.C.C.A.N. 1839*. In particular, *subsection (C)(ii)*, which appears to eliminate the requirement of a judicial finding of dangerousness, was added by the Conference Committee without explanation. *See H.R. Conf. Rep. No.103-711, at 391*. The radical and constitutionally dubious effects created by a literal interpretation of subsection (C) (ii) were probably the result of inadvertence. It is possible to avoid the serious constitutional questions that Judge Cummings addressed if one interprets subsection (C) (ii) to include an implicit requirement of a judicial finding that the subject of the restraining order poses a threat to the safety of his partner or her child. Under this interpretation, subsection (C) (i) would apply to cases where the finding is included in the restraining order itself, while subsection (C)(ii) would apply to cases where the finding is memorialized somewhere else (such as the transcript of a hearing). Supreme Court precedent may require the Fifth Circuit to adopt such an interpretation. *See, e.g., Cheek v. United States, 498 U.S. 192, 203 (1991)*.

[\[13\]](#) *See Randy E. Barnett & Don B. Kates, Under Fire: The New Consensus on the Second Amendment, 45 Emory L.J. 1139, 1143-45 & nn.12-17 (1996) (citing dozens of books and articles)*.

[\[14\]](#) It is worth noting at the outset that there is a distinct set of questions, not present in *Emerson*, raised by cases that involve the constitutionality of *state* gun control laws. Beginning with its decision in *Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833)*, the Supreme Court consistently held that the individual rights guaranteed by the first eight amendments to the Constitution were good only against the federal government. *See id. at 250-51*. Accordingly, the states were free to make whatever decisions they thought best about matters like freedom of speech and religion, gun control, and criminal procedure. *See id.* During the nineteenth century, the Supreme Court repeatedly reaffirmed the principle articulated in *Barron* and held that the Second Amendment, just like the rest of the Bill of Rights, offered no protection against infringements by the state governments on people's freedom to keep and bear arms. *See, e.g., Presser v. Illinois, 116 U.S. 252, 264-65 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1875)*. During the twentieth century, the Supreme Court has applied some (but not all) provisions of the Bill of Rights to the states through the doctrine of Fourteenth Amendment substantive due process. *See, e.g., Duncan v. Louisiana, 391 U.S. 145, 147-50 (1968) (discussing the selective incorporation doctrine and articulating the test currently used to decide whether a particular Bill of Rights provision should be incorporated)*. The Supreme Court has never said, one way or the other, whether this process of "selective incorporation" means or will mean that the Second Amendment applies against the states. Several courts have treated *Cruikshank* and *Presser* as good law. *See, e.g., Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522, 538 n.18 (6th Cir. 1998) (citing Cruikshank and Presser for the proposition that the Second*

Amendment does not apply to states); *Love v. Pepersack*, 47 F.3d [120](#), [123-24](#) (4th Cir.1995) (same); *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 729-30 (9th Cir. 1992) (same); *Quilici v. Village of Morton Grove*, 695 F.2d [261](#), [270](#) (7th Cir. 1982) (holding that *Presser* is the "law of the land," which must be followed by the lower courts until the Supreme Court makes a "policy" decision to overrule it).

Under the principles articulated in *Duncan v. Louisiana*, "incorporation" of the Second Amendment appears to be inevitable. See *Nelson Lund, The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. [1](#), [46-55](#) (1996). The lower courts have not explained their refusal to apply *Duncan* to the Second Amendment. See, e.g., *Peoples Rights Org., Inc.*, 152 F.3d at 538 n.18. Part of the explanation may lie in the facts that *Duncan* itself changed the earlier incorporation test announced in *Palko v. Connecticut*, 302 U.S. 319 (1937), and that substantive due process in general is so notoriously flexible that there is good reason to doubt that it can even properly be characterized as law. Nevertheless, whether or not the Supreme Court is likely to cook up yet another Fourteenth Amendment incorporation test in the future, challenges to *federal* laws require only an application of the Second Amendment itself.

[\[15\]](#) 307 U.S. [174](#) (1939).

[\[16\]](#) *Id.* at [175](#); Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 18 U.S.C. §§ 921-30 (1994 & Supp. II 1996)).

[\[17\]](#) See *United States v. Miller*, 26 F. Supp. [1002](#), [1002](#) (W.D. Ark. 1939).

[\[18\]](#) See *Miller*, 307 U.S. at [175](#).

[\[19\]](#) *Id.* at [179](#). In the first Militia Act, for example, Congress required militia service of most able-bodied white male citizens between the ages of 17 and 45. *Act of May 8, 1792*, Pub. L. No. 2-1, ch. 33, 1 Stat. 271, 271-74 (codified as amended at 10 U.S.C. §§ 311-312 (1994)).

[\[20\]](#) *Miller*, 307 U.S. at [178-79](#).

[\[21\]](#) U.S. Const. art. I, § 8, cls. 15-16, provides Congress with the power:

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

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

[\[22\]](#) *Miller*, 307 U.S. at [178](#).

[\[23\]](#) See generally U.S. Const. art. I, § 8, cls. 15-16.

[24] See Act of May 8, 1792, Pub. L. No. 2-1, ch. 33, 1 Stat. 271, 271-74 (codified as amended at 10 U.S.C. §§ 311-312 (1994)).

[25] U.S. Const. art. I, §8, cl. 16.

[26] *Miller*, 307 U.S. at [178](#).

[27] As Professor Powe has pointed out, the Government argued to the *Miller* Court that the Second Amendment protects the rights only of "members of the state militia or other similar military organization provided for by law." L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 *Wm. & Mary L. Rev.* [1311](#), [1331-32](#) (1997). Even though the Court heard no opposition to his claim (because the defendants did not make an appearance), the Court declined to endorse the Government's argument. See *id.* at [1331-32](#).

[28] *Aymette* was a state court decision construing the Tennessee Constitution, which by its terms secured to the "free white men of this State a right to keep and bear arms for their common defense." See *Aymette v. State*, 21 *Tenn. (2 Hum.)* [154](#), [158](#) (1840). The Tennessee court held that this state constitutional provision did not protect weapons that would be "useless in war" (namely, certain knives "usually employed in private broils, and which are efficient only in the hands of the robber and the assassin"). *Id.* at [158](#). Unlike the Tennessee Constitution, the Second Amendment protects "the people," not just "free white men." *U.S. Const. amend. II*. Nor does the Second Amendment contain the other textual limitation ("for their common defense") found in the Tennessee Constitution. *Id.* The *Miller* Court apparently never stopped to wonder whether the much broader language of the Second Amendment implies a different meaning than the Tennessee court found in its facially narrower state provision.

[29] 1 William Blackstone, *Commentaries* \*141.

[30] *Id.* at \*144.

[31] One thing that has not changed since the eighteenth century is the government's inability to prevent criminal violence. Indeed, the Supreme Court has held that the government need not even attempt to protect its citizens from criminals. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202-03 (1989). It is indecent, not to mention inconsistent with republican principles, for the government simultaneously to claim that it may arbitrarily disarm its citizens and then to disclaim any obligation to protect them after it renders them helpless. For further discussion of the Second Amendment issues raised by *DeShaney*, see David E. Murley, *Private Enforcement of the Social Contract: DeShaney and the Second Amendment Right to Own Firearms*, 36 *Duq. L. Rev.* 827 (1998).

[32] *U.S. Const. amend. II*. This deterrent effect remains quite robust in contemporary America. See, e.g., Gary Kleck, *Targeting Guns: Firearms and their Control* (1997); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and the Right-to-Carry Concealed Weapons*, 26 *J. Leg. Stud.* 1 (1997); Daniel D. Polsby, *The False Promise of Gun Control*, *Atlantic Mo., Mar. 1*, 1994, at [57](#).

[33] See *National Firearms Act of 1934*, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 18 U.S.C. §§ 921-930 (1994 & Supp. II 1996)).

[34] *Cases v. United States*, 131 F.2d 916, 922 (1942), cert. denied, 319 U.S. 770 (1943).

[35] Fifth Circuit precedent goes no farther than *Miller* itself. See *United States v. Williams*, 446 F.2d 486 (5th Cir. 1971) (upholding prohibition on possession of unregistered sawed-off shotgun); *United States v. Johnson*, 441 F.2d 1134 (5th Cir. 1971) (same).

[36] 131 F.2d 261 (3d Cir. 1942), rev'd on other grounds, 319 U.S. 463 (1943).

[37] *Tot*, 131 F.2d at 266 (footnotes in original). The Second Amendment holding--a quite sensible one, in contrast to the dictum quoted in text--is that a firearms disability may be imposed on persons who have been convicted of crimes of violence. See *id.* at 266-67.

[38] See *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *Stevens v. United States*, 440 F.2d 144, 149-50 (6th Cir. 1971).

[39] *Tot*, 131 F.2d at 266.

[40] See, e.g., *Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right* 83 (1984) ("If anyone entertained this notion [of a states' rights interpretation of the Second Amendment] in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.").

[41] *U.S. Const. amends. I & IV*. This indubitable fact is not altered by Professor Amar's vain effort to escape its obvious implications. Professor Amar contends that the "core" of the right protected by the First Amendment is a right to assemble in "constitutional conventions and other political conclaves." *Akhil Reed Amar, Second Thoughts: What The Right to Bear Arms Really Means*, *New Republic*, July 12, 1999, at 24, 25. Taking his word for this, it still does not imply that the First Amendment right to petition the government is something other than a right belonging to individuals. Even Professor Amar cannot bring himself to suggest that the Fourth Amendment protects something other than an individual right. That amendment, he acknowledges, is "trickier." *Id.* And the trick turns out to be Professor Amar's suggestion that the word "people" was used by the Framers "to highlight the role that jurors--acting collectively and representing the electorate--would play in deciding which searches were reasonable and how much to punish government officials who searched or seized improperly." *Id.* This is all extremely ingenious, but the most one could actually conclude from it is that the Second Amendment protects a "collective" right in about the same sense as the First and Fourth Amendment do, which is to say only in some "core" or "tricky" sense. Or, in other words, that "the people" sometimes act in groups and sometimes as individuals, which nobody ever doubted.

[42] *U.S. Const. amend. X* ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[43] As the framers of the Second Amendment obviously knew, the "militia" is not defined in the Constitution, and they would have expected that many citizens (who constitute "the people") would surely be excluded from the militia: women most obviously, but also older men and the physically infirm. That in fact is how Congress did define the militia in 1792, and that is how Congress still defines the militia today. *See Act of May 8, 1792, Pub. L. No. 2-1, ch. 33, 1 Stat. 271, 271-74 (codified as amended at 10 U.S.C. §§ 311-312 (1994)) (quoted infra note 86)*. As *Miller* correctly recognized, the militia had never been thought to consist of standing military organizations like our National Guards. *Miller, 307 U.S. at 178-79*. But neither did it ever include, in its legal sense, all citizens. The "militia" and the "people" are different entities, and the Second Amendment does not treat them as interchangeable.

While it is true that eighteenth century orators sometimes conflated the militia with the people in order to emphasize the desirability of a broad-based militia system, the law never did so. Thus, in his effort to avoid being anachronistic, Professor Amar falls into the trap (a surprising one for a lawyer) of mistaking eighteenth-century political rhetoric for eighteenth-century legal precision. *See Amar, supra note 41, at 24* ("The key subject-nouns ['militia' and 'people'] were simply different ways of saying the same thing: at the Founding, the militia was the people and the people were the militia."). On the difference between the militia and the people, *compare The Federalist No. 45, at 299 (James Madison) (Clinton Rossiter ed., 1961)* (offering a comparison between "the militia officers of three millions of people" and the "military officers of any establishment which is within the compass of probability"), *with The Federalist No. 46, at 299 (James Madison)* (noting that the militia "amount[ed] to near half a million of citizens [*i.e.*, about one-sixth of the population] with arms in their hands"). A militia consisting of roughly one-sixth of the population is obviously not the same thing as "the people."

[44] Unlike many modern readers, the early commentators on the Constitution had no difficulty at all in appreciating how an individual, private right to arms could contribute to a well-regulated militia. *See David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. Rev. 1359, 1370-409 (1998)* (discussing Tucker, Rawle, Story, and other early commentators).

[45] It is true, of course, that Article I does not on its face authorize the federal government to disarm private citizens. But neither does Article I on its face authorize the federal government to abridge the freedom of speech or the right of the people to petition the government. Like the rest of the Bill of Rights, the Second Amendment is a precaution against some (not all) overreaching interpretations of the authorities granted to the government in the original Constitution.

[46] *U.S. Const. art. I, § 8, cl. 8* ("The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

[47] The Patent and Copyright Clause does not have the same grammatical structure as the Second Amendment. But the differences are such that it would actually be *more* plausible to interpret the Patent and Copyright Clause as authorizing only the protection of socially beneficial

intellectual property than to interpret the Second Amendment as authorizing only "militia-related" possession of arms.

[48] See Eugene Volokh, *The Commonplace Second Amendment*, 73 *N.Y.U. L. Rev.* 793, 807-14 (1998).

[49] See *Id.* A typical example, among dozens discussed by Professor Volokh, is the speech and debate provision of the 1780 Massachusetts Constitution: "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." *Id.* at 795 (quoting *Mass. Const. pt. I, art. XXI (1780)*). On its face, this provision permits legislators to libel their fellow citizens, order their arrest, and issue subpoenas, all without any legal restraint or threat of punishment. Yet, no one ever suggested that the provision should be interpreted to mean that speech and debate in the legislature is protected only to the extent that courts believe such protection is "essential to the rights of the people."

[50] See, e.g., Halbrook, *supra* note 40, at 83; Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 *J. Contemp. L.* 353, 360 (1994).

[51] See, e.g., Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 143-50 (1994).

[52] During the Constitutional Convention, for example, George Mason proposed adding the following prefatory phrase to the clause that allocates authority over the militia between the states and the federal government: "And that the liberties of the people may be better secured against the danger of standing armies in time of peace ...." 2 *The Records of the Federal Convention of 1787*, at 616-17 (Max Farrand ed., Yale Univ. Press 1966). James Madison favored the proposal for the following reason: "It did not restrain Congress from establishing a military force in time of peace if found necessary; and as armies in time of peace are allowed on all hands to be an evil, it is well to discountenance them by the Constitution, as far as will consist with the essential power of the Govt. on that head." *Id.* at 617.

[53] See, e.g., *Letter from Gouverneur Morris to Moss Kent (Jan. 12, 1815)*, reprinted in 3 *The Records of the Federal Convention of 1787*, at 420 (Max Farrand ed., Yale Univ. Press 1966) ("Those, who, during the Revolutionary storm, had confidential acquaintance with the conduct of affairs, knew well that to rely on militia was to lean on a broken reed.").

[54] *U.S. Const. art. I, § 8, cl. 12* ("The Congress shall have Power ... To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years").

[55] See *Perpich v. Department of Defense*, 496 *U.S.* 334, 340-46 (1990) (discussing the modern integration of state national guard units into the federal armed forces).

[56] See 10 *U.S.C. § 311* (1994) (quoted *infra* note 86).

[57] *U.S. Const., art. I, § 8, cl. 16.*

[58] The Federal Farmer, writing on October 10, 1787, registered the following complaint about the proposed Constitution:

Should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenceless.

2 *The Complete Anti-Federalist* 242 (Herbert J. Storing ed., 1981). This is a pretty fair description of exactly what our modern National Guard system, for good or ill, has accomplished. For an argument that something along these lines would be a good thing, see *The Federalist No. 29* (Alexander Hamilton), *supra* note [43](#), at 182-87.

[59] It should be unnecessary to point out that the Second Amendment's protection of an armed citizenry does not imply the creation of some sort of Second Amendment "right to insurrection," any more than the Commander-in-Chief Clause creates some sort of presidential "right to *coups d'état*." To the extent that the Second Amendment and the Commander-in-Chief Clause protect the citizenry and the President from being disarmed, they obviously increase the ability of the citizenry and the President either to defend the Constitution or to defy it. But that does not imply a constitutional right to defy the Constitution, any more than Congress's constitutional authority to grant letters of marque and reprisal implies that the legislature may hire someone to kidnap a Supreme Court Justice who issues an unpopular decision. For a completely unsubstantiated claim that those who interpret the Second Amendment to protect the private rights of citizens believe in a public right to armed insurrection, see Gary Wills, *To Keep and Bear Arms*, *N.Y. Rev. Books*, Sept. 21, 1995, at 62, 69-71 (discussing the supposed views of unidentified "wacky scholars").

[60] Luther Martin, for example, bitterly denounced the original Constitution for including "this extraordinary provision, by which the militia, the only defence and protection which the State can have for the security of their rights against arbitrary encroachments of the general government, is taken entirely out of the power of their respective states, and placed under the power of Congress." Luther Martin, *The Genuine Information, delivered to the Legislature of the State of Maryland, relative to the Proceedings of the General Convention, held at Philadelphia, in 1787* (Nov. 29, 1787), reprinted in 3 *The Records of the Federal Convention of 1787*, at 208-09 (Max Farrand ed., Yale Univ. Press 1966) (emphasis in original). This document, which predated the Constitution's adoption and which clearly suggests why the Second Amendment could not satisfy Anti-Federalist concerns, was erroneously cited by the *Tot* court as an explication of the meaning of the Second Amendment. *United States v. Tot*, 131 F.2d [261](#), [265 n.13](#) (3rd. Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

[61] See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* [637](#), [657 n.96](#) (1989) (quoting Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 *Ala. L. Rev.* [103](#), [115](#) (1987)). For a discussion of objections that have been

raised to this proposition, see *Nelson Lund, The Past and Future of the Individual's Right to Arms*, 31 *Ga. L. Rev.* [1](#), [56 n.135](#) (1996).

[\[62\]](#) Indeed, during the congressional debate about the Bill of Rights, Elbridge Gerry specifically noted (quite unhappily) that what became the Second Amendment could have no such effect:

Now it must be evident, that under this provision, together with their other powers, Congress could take such measures with respect to a militia, as make a standing army necessary. Whenever Government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins.

*The Complete Bill of Rights 186* (Neil H. Cogan ed., 1997) (reprinting 2 *Congressional Register* 219 (Aug. 17, 1789)) [hereinafter *Complete Bill of Rights*]. Nevertheless, during consideration of what became the Second Amendment, motions to add restrictions on Congress's Article I power to establish standing armies during peacetime were defeated in both the House and Senate. See *Id.* at 172, 173-74 (reprinting various congressional documents).

[\[63\]](#) On the shared views of Federalists and Anti-Federalists about the impropriety of federal interference with the private possession of arms, see *Leonard W. Levy, Origins of the Bill of Rights* 143-44 (1999).

[\[64\]](#) *Complete Bill of Rights*, *supra* note [62](#), at 169 (reprinting 1 *Congressional Register* 427 (June 8, 1789)).

[\[65\]](#) *Id.* at 172 (reprinting *Journal of the House of Representatives* 107 (1789)); see also *Id.* at 173 (reprinting Senate journal entries memorializing the text received from the House).

[\[66\]](#) *Id.* at 177 (reprinting Senate pamphlet).

[\[67\]](#) We have no records of the reasons for the changes made by the Senate. In the House, the conscientious objector clause had been controversial, though for disparate reasons. Scott, for example, was worried that the irreligious would seize on this clause as a pretext for avoiding their military obligations. See *id.* at 189-90 (reprinting 2 *Congressional Register* 242-43 (Aug. 20, 1789)). Gerry, on the other hand, objected that "people in power ... can declare who are those religiously scrupulous, and prevent them from bearing arms." *Id.* at 186 (reprinting *Daily Advertiser*, Aug. 18, 1789).

[\[68\]](#) Madison's initial proposal contemplated that the right to arms provision would be inserted in Article I, § 9, immediately after the Bill of Attainder and Ex Post Facto Clauses, rather than in Article I, § 8, after the Militia Clauses. See *id.* at 169 (quoting three contemporaneous accounts of Madison's proposal). Furthermore, Madison's personal notes and correspondence confirm that his intention was to supply further guards for "private rights." 12 *James Madison, Papers of James Madison 194-95* (Charles F. Hobson et al. eds., Va. Univ. Press 1979) (containing Madison's notes for a speech proposing a bill of rights); see also 11 *James Madison, Papers of*

*James Madison 307 (Charles F. Hobson et al. eds., Va. Univ. Press 1977) (reprinting Madison's letter to Edmund Pendleton).*

[69] Contrary to a popular misconception, the military connotations frequently associated with the term "bear arms" do not mean that the term invariably implies a military context. This was made perfectly clear in one of the earliest proposals for a bill of rights, which was drafted by the Anti-Federalist minority at the Pennsylvania ratifying convention:

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

*Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents (Dec. 18, 1787), reprinted in 2 The Documentary History of the Ratification of the Constitution 623-24 (Merrill Jensen ed., State Hist. of Wis. 1976). Apart from the fact that the phrase "bear arms" does not necessarily carry military implications, the term "keep arms" certainly has no military connotations at all; if anything, this term appears to have had specifically civilian connotations. See Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 219-20 (1983).*

Nor should one be misled by Gary Wills's completely unsupported assertion that "to-keep-and-bear is a description of one connected process," that refers to the militia's "permanent readiness." *Wills, supra note 59, at 67-68.* This is pure invention by Mr. Wills, who offers absolutely no evidence that anyone ever used the phrase in this way. Furthermore, as Professor Shalhope has pointedly noted, Mr. Wills's argument for his interpretation requires "linguistic tricks," among which is to interpret the word "keep" in a fashion "that exceeds even [Mr. Wills's] powers of linguistic prestidigitation." *Robert E. Shalhope, To Keep and Bear Arms in the Early Republic, 16 Const. Comment. 269, 279 (1999).*

[70] Interestingly, Roger Sherman seems to have drafted a bill of rights that would have made a very substantial concession to the Anti-Federalists. His draft did *not* include a right to keep and bear arms, instead providing that the "militia shall be under the government of the laws of the respective States, when not in the actual Service of the united [sic] States...." *Robert Dowlut, Federal and State Constitutional Guarantees to Arms, 15 U. Dayton L. Rev. 59, 65 (1989).* There is no indication in the historical record that this proposal was ever seriously entertained; indeed, because this draft was found among Madison's papers, there is a good possibility that Sherman's approach was affirmatively rejected.

[71] In an erudite and amazingly misguided recent article, historian Saul Cornell vigorously attacks several legal scholars who have argued that the Second Amendment protects an individual right to arms. See *Saul Cornell, Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory, 16*

*Const. Comment.* 221 (1999). Professor Cornell provides considerable evidence to support his entirely plausible claim that there were significant divisions among the Anti-Federalists about the appropriate way for the *states* to regulate arms and the militia. *See id.* at 237-45. But the Second Amendment was not thought by anyone to be a measure aimed at protecting citizens against their *state* governments. Professor Cornell provides not a shred of evidence to support the proposition that a single American, let alone any significant body of opinion, held that the *federal* government should have the power to disarm individual American citizens. Eighteenth-century differences of opinion about the proper treatment of citizens by their state governments are quite irrelevant to that issue, as is Professor Cornell's article.

[72] *See, e.g., United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942) (noting that the Second Amendment "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power"), *rev'd on other grounds*, 319 U.S. 463 (1943) (footnote omitted).

[73] U.S. Const. art. I, § 10, cl. 3.

[74] Not surprisingly, given the lack of any basis for the states' rights theory, the Supreme Court has not found any constitutional problem with integrating the state militia organizations into the federal armed forces. *See, e.g., Perpich v. Department of Defense*, 496 U.S. 334, 340-46 (1990).

[75] *See generally Glenn Harlan Reynolds & Don B. Kates, The Second Amendment and States' Rights: A Thought Experiment*, 36 *Wm. & Mary L. Rev.* 1737 (1995) (providing further detail on the absurd implications of the states' rights theory).

[76] *See Tot*, 131 F.2d at 266.

[77] *See, e.g., Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976).

[78] *See, e.g., United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) and *United States v. Stevens*, 440 F.2d 144, 149-50 (6th Cir. 1971) (both cases citing *United States v. Miller*, 307 U.S. 174 (1939)).

[79] 307 U.S. at 178.

[80] 131 F.2d 916, 922-23 (1st Cir. 1942).

[81] *Id.* at 922.

[82] *Id.*

[83] *Id.* at 923.

[84] *Id.*

[85] See *United States v. Wright*, 117 F.3d 1265, 1276-77 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 285-86 (3rd Cir. 1996), cert. denied 522 U.S. 807 (1997); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977).

[86] *Rybar*, 103 F.3d at 286 (asserting that a defendant's invocation of 10 U.S.C. § 311, which defines the militia of the United States, "does nothing to establish that his firearm possession bears a reasonable relationship to 'the preservation or efficiency of a well regulated militia,' as required in *Miller*"). The statute provides:

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except [for certain older members of the National Guard], under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b) The classes of the militia are--

(1) the organized militia, which consists of the National Guard and the Naval Militia; and

(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

10 U.S.C. § 311 (1994).

[87] See *Wright*, 117 F.3d at 1273 (holding that Georgia's militia regulation is irrelevant because the Second Amendment "was intended to protect only the use or possession of weapons that is reasonably related to a militia *actively maintained and trained by the states*") (emphasis added); *Oakes*, 564 F.2d at 387 ("To apply the [Second A]mendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, *merely because he is technically a member of the Kansas militia*, would be unjustifiable in terms of either logic or policy.") (emphasis added).

[88] See *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) ("Considering this history [of the federalization of state militia organizations], we cannot conclude that the Second Amendment protects the individual possession of military weapons. In *Miller*, the Court simply recognized this historical residue.").

[89] *United States v. Miller*, 307 U.S. 174, 178 (1939). Naturally, there was no such evidence in a case where the Court heard only the Government's arguments.

[90] Cf. *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) ("This *Miller* test appears in some sense to invert the commercial speech test, which requires the government to show that legislation restricting such speech bears a reasonable relationship to some 'legitimate' or 'substantial' goal.") (citations omitted).

[91] As Justice Cooley pointedly and correctly noted:

[T]he 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 enrollment 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 [to keep and bear arms] 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.*

*Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 271 (Boston, Little, Brown & Co. 1880) (emphasis added).*

[92] Even Professor Tribe, a long-time proponent of the states' rights theory, has finally retreated from his previous position and agreed that the government has the burden of justifying the disarmament of individual citizens. *Compare Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 11 (1991) ("[I]n modern circumstances, those words [i.e. the text of the Second Amendment] most plausibly may be read to preserve a power of the state militias against abolition by the federal government, not the asserted right of individuals to possess all manner of lethal weapons.") with Laurence H. Tribe, 1 American Constitutional Law 902 n.221 (3d ed. 2000) (emphasis added):*

[The Second Amendment's] central purpose is to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit. Rather the amendment achieves its central purpose by assuring that *the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias.* That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes--not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons--a right that directly limits action by Congress or the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action.

This concession may be a reluctant one, and it is buried at the end of an exceedingly long footnote. But there it is: "the federal government may not disarm individual citizens without some unusually strong justification." *Id.* The qualification "consistent with the authority of the states to organize their own militias" actually subtracts nothing from Professor Tribe's

concession because federal disarmament of individual citizens would obviously have to be "consistent" with many constitutional provisions, such as the Due Process and Ex Post Facto Clauses, as well as with the Militia Clauses of Article I.

[93] Indeed, they are pretty obviously constitutional under *Miller*. If the Supreme Court were to reconsider *Miller*, there could be a reasonable debate about the constitutionality of some of these restrictions. For an argument in favor of invalidating at least some restrictions on "disfavored" weapons, see *Lund*, *supra* note [14](#), at [70-71](#).

[94] 18 U.S.C. § 922(g) (8) (1994 & Supp. II 1996).

[95] In this paragraph, I abstract from questions about the reach of the federal government's authority under Article I and about the applicability of the Second Amendment to state laws.