

# THE SECOND AMENDMENT: BEARING ARMS TODAY

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## I. INTRODUCTION

The Bill of Rights delineates some of the rights and freedoms that the Founders considered fundamental during the ratification of our Constitution.<sup>1</sup> Included among them is the Second Amendment, which provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>2</sup> Two centuries later, the meaning of that provision is seriously questioned.<sup>3</sup> Some

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1. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 43 (1997) (“[T]he Founders . . . feared that some . . . future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights.”). It is true that many of those present at the Philadelphia Convention “sincerely believed that since the federal government was already limited to its expressed powers, further protection of citizens was not needed.” THEODORE J. LOWI & BENJAMIN GINSBERG, *AMERICAN GOVERNMENT: FREEDOM AND POWER* 53 (5th ed. 1998). Other statesmen, however, were not so willing to trust an uncertain future. Thomas Jefferson, for one, argued strenuously for the adoption of a bill of rights. In a letter to James Madison, Jefferson declared that “a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.” Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 91 (Michael Kammen ed. 1986). Although he may “have agreed privately that a bill of rights was not needed,” in 1789, Madison shepherded through Congress the amendments that, upon their ratification in 1791, became the Bill of Rights. LOWI & GINSBURG, *supra*, at 112. The inclusion of these amendments was crucial to build support among the Anti-federalists for the new Constitution. *Id.* Moreover, in the words of James Madison, they “might be of use, and if properly executed could not be of disservice.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* Kammen, *supra*, at 369. As it turned out, the Supreme Court has since found the first ten amendments to be useful indeed. See Steven D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 HARV. J.L. & PUB. POL’Y 391, 397 (1996) (“[The] provisions [of the Bill of Rights] have formed the bedrock of our constitutional order . . .”). Even those who suggest that those amendments were adopted hastily or casually admit that “in enacting a list of rights, the First Congress and the state legislatures were not starting from scratch.” *Id.* at 398. On the contrary, according to Professor Steven Smith:

In the history of Anglo-American law, these rights had long been discussed and fought over, and they had been adopted in many of the state constitutions. So one might argue that the reason the Framers of the Constitution did not think much about what they were doing is that they did not need to; the rights in question already had a well understood importance and meaning as a result of thought that earlier generations (or the Founders themselves on other occasions) had already given to these rights.

*Id.* at 398–99.

2. U.S. CONST. amend. II.

3. See *United States v. Emerson*, 270 F.3d 203, 274 (5th Cir. 2001) (Parker, J., specially concurring) (suggesting that the original meaning of the Second Amendment is “one of the most hotly-contested issues of

people believe passionately that the amendment was designed to impose broad limitations on government efforts to disarm the citizenry, that it is "our cornerstone of freedom."<sup>4</sup> Others disagree completely, believing it to be "irrelevant."<sup>5</sup> Professor Laurence Tribe, for one, has suggested that the "petty and partisan debate" surrounding the Second Amendment has left scholarship "radically underdeveloped" in this area.<sup>6</sup>

However characterized, much of the current debate about the meaning of the Second Amendment focuses upon whether that provision protects an individual right or collective one.<sup>7</sup> Those who favor the former interpretation believe, as does Attorney General John Ashcroft, that "the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms."<sup>8</sup> Proponents of the latter view argue that the amendment "grants the people a collective right to an armed militia, as opposed to an individual right to keep and bear arms for one's own purposes outside of, or even notwithstanding, governmental regulation."<sup>9</sup> An analysis

the day."), *cert. denied*, 122 S. Ct. 2362 (2002). See also, e.g. WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? (Saul Cornell ed. 2000) [hereinafter WHOSE RIGHT?].

4. Karen Mehall, *Letter from the Editor*, AMERICA'S 1ST FREEDOM, Nov./Dec. 2000, at 6 ("[F]reedom depends on the right to keep and bear arms.").

5. Carl T. Bogus, *Fresh Looks: The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 18 (2000) (citing Professor Laurence Tribe's summary of one side of the Second Amendment debate). See also Bradley A. Smith, The Robert E. Henderson Constitution Day Lecture: Constitutional Values and Constitutional Interpretation, Speech at the John M. Ashbrook Center for Public Affairs, para. 16 (Sept. 17, 2001) [hereinafter Smith speech], available at <http://www.fec.gov/members/smith/smithspeech02.html>:

[M]any of those whom, for policy reasons, oppose the operative clause of the Second Amendment—"the right of the people to keep and bear Arms"—focus on the alleged Constitutional values involved—"a well regulated Militia, being necessary to the security of a free state," to argue that the operative clause is either limited or extinguished. If the alleged constitutional values are no longer served, goes the argument, then perhaps the right no longer exists.

6. Bogus, *supra* note 5, at 18 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 903 (3d Ed. 2000)). See also Joyce Lee Malcolm, Book Review, 54 GEO. WASH. L. REV. 452, 453 (1986) (reviewing STEPHEN P. HALBROOK, THAT EVERY MAN SHOULD BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984)).

7. Bogus, *supra* note 5, at 4-22 (summarizing recent Second Amendment scholarship).

8. Letter from John Ashcroft, Attorney General, to James Jay Baker, Executive Director, National Rifle Association, Institute for Legislative Action (May 17, 2001), reprinted in VIOLENCE POLICY CENTER, SHOT FULL OF HOLES, DECONSTRUCTING JOHN ASHCROFT'S SECOND AMENDMENT app. A-1 (2001), available at <http://www.vpc.org/graphics/holes.pdf>.

9. Bogus, *supra* note 5, at 4. Compare Ashcroft, *supra* note 7, with Letter from Seth P. Waxman, Solicitor General, to (Name Deleted) (Aug 22, 2000), available at VIOLENCE POLICY CENTER, *supra* note 7, at App. B. After a "concerned" member of the National Rifle Association wrote to the Department of Justice (DOJ) seeking clarification on the DOJ's view of the Second Amendment, Solicitor General Seth Waxman "responded promptly and unequivocally . . . that it[] [was] indeed the position of the Clinton-Gore Administration that 'the Second Amendment does not extend an individual right to keep and bear arms.'" Wayne LaPierre & James Jay Baker, *Gore's Gun-Ban Government Exposed*, AMERICA'S 1ST FREEDOM, Nov./Dec. 2000, at 31, 65. Waxman's response echoed previous DOJ statements on the matter. In 1973, for instance, Deputy Assistant Attorney General Mary Lawton had advised future President George H.W. Bush that, "[i]n light of the constitutional history, it must be considered as settled that there is no personal constitutional right, under the Second Amendment, to own or to use a gun." Waxman, *supra*, at app. B-2 (quoting Letter from Mary C.

of these viewpoints, considered in light of the text and historical foundations of the Second Amendment, demonstrates that the individual right proponents have the better argument. Part II of this Note will undertake to demonstrate the truth of this assertion.

Once it is established that the Second Amendment does indeed safeguard an individual right, we must still determine which sovereign—or sovereigns<sup>10</sup>—it limits. Although previous Supreme Court decisions have arguably characterized the amendment as one that protects only a collective right from federal usurpation,<sup>11</sup> the notion that (if properly understood) it also protects an individual right suggests that we must also consider whether that right is one that should be incorporated against the states under the Fourteenth Amendment, as most other provisions of the Bill of Rights have been already.<sup>12</sup> To this end, Part III focuses upon the judiciary's past treatment of the Second Amendment and the doctrine of incorporation. This Note argues that the Second Amendment—in promoting the means to secure a collective freedom—protects a fundamental individual right that may be regulated, but should not be prohibited, by either state or federal action.

This Note will not attempt to make partisan political arguments about the safety or utility of guns. That people can, and sometimes do, use guns to commit crimes in modern society is not contested. Nor is the fact that law-abiding citizens can, and sometimes do, successfully thwart would-be attackers with their personal firearms. The real issue centers on the right to lawfully own, possess, or carry firearms within the United States.<sup>13</sup> It is

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Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, to George Bush, Chairman, Republican National Committee (July 19, 1973)).

10. According to the Supreme Court's decision in *United States v. Printz*, "the Constitution established a system of 'dual sovereignty.' Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' This is reflected throughout the Constitution's text . . ." *United States v. Printz*, 521 U.S. 898, 918-19 (1997) (citations omitted). Just because the Constitution precludes the federal government from doing something, then, does not necessarily mean that it places a similar limitation on state governments.

11. See Bogus, *supra* note 5, at 3 (citing *United States v. Miller*, 307 U.S. 174 (1939); *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1876)).

12. STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876* vii (1998). See generally DAVID M. O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS VOL 2: CIVIL RIGHTS AND CIVIL LIBERTIES* 288-300 (3d ed. 1997) (chronicling the nationalization of the Bill of Rights).

13. This Note recognizes that many commentators are hostile to the views of those who support private ownership of firearms. See, e.g., Smith speech, *supra* note 5, para. 16 (noting that many people oppose "the right of people to keep and bear Arms" for policy reasons). Professor Gary Wills, for instance, suggests that some individual right advocates are nothing more than "urban cowboys" who feel that private gun owners are the only people who can truly protect individual freedom. GARY WILLS, *A NECESSARY EVIL: HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 223 (1999). Other commentators seek to disprove contentions from the individual right camp with potentially misleading historical accounts. The most recent (and, for a time, widely accepted) work used as ammunition by those who would deny the right to bear arms seems to illustrate this turn. In 2000, Professor Michael Bellesiles published *Arming America*, a book that purports to walk

hoped that an outline of the current debate will help establish a framework upon which to construct a more complete Second Amendment jurisprudence.

## II. THE SECOND AMENDMENT AS INDIVIDUAL GUARANTEE

### A. *The Foundation of an Individual Right*

Focusing on the concept of the Second Amendment at the time of its proposal and ratification illuminates the reason for its existence. The founders sought to throw off tyranny,<sup>14</sup> to fortify a militia,<sup>15</sup> and to protect individuals from the government.<sup>16</sup> Early commentary about the right to bear arms, while perhaps not definitive as to whether the founders meant for the Second Amendment to protect private ownership or militia use, is at least instructive as to the weight and importance generally accorded to self-defense when the amendment was drafted.

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readers through the history of firearms in America, adding data suggesting that guns were not widely used or owned by citizens of the early Republic. See generally MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000). Professor Wills and other anti-gun reviewers were at first elated by Bellesiles's effort. See, e.g., Garry Wills, *Spiking the Gun Myth*, N.Y. TIMES, Sept. 10, 2000, at sec. 7., p. 5 ("Bellesiles has dispersed the darkness that covered the gun's early history in America. He provides overwhelming evidence that our view of the gun is as deep a superstition as any that affected Native Americans in the 17th Century."); Glenn Harlan Reynolds, *Fawning Critics Don't Say Book Was Fraud*, Fox News, Apr. 4, 2002, at <http://www.foxnews.com/story/0,2933,49471,00.html> (pointing to several reviews praising Bellesiles's book). While Bellesiles's book generated highly positive reviews and even earned him a Bancroft Prize, it has since come under immense suspicion. See Kimberley A. Strassel, *Guns and Poses*, WALL ST. J., Feb. 22, 2002, at A14. According to a recent article, "Bellesiles turns out to have quoted sources out of context, to have falsely reported data, and to have claimed to have used documents that have not existed since the 1906 San Francisco earthquake." Reynolds, *supra*. Bellesiles is currently "embroiled in scandal," Robert F. Worth, *Historian's Prizewinning Book on Guns is Now Embroiled in a Scandal*, N.Y. TIMES, Dec. 8, 2001, at A13, and critics claim that *Arming America* "is now well-established as untrustworthy," Reynolds, *supra*. Whatever the veracity of the charges leveled against Bellesiles, this Note need not consider the issue further. Debates over statistical methods and what Professor Wills terms the "mythology of the gun" in the American mindset is of little to no relevance to our purpose—which, quite simply, is to focus on the meaning of a duly-enacted provision of the United States Constitution. Wills, *supra*. That some Americans may not like the Second Amendment does not detract from its legal significance. See SCALIA, *supra* note 1, at 43.

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

15. Lawrence Delbert Cress, *A Well-Regulated Militia: The Origins and Meaning of the Second Amendment*, reprinted in WHOSE RIGHT?, *supra* note 3, at 52.

16. Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROB. 125-41 (1986). No evidence suggests that the founders intended the reckless use of arms, however. Professor William Van Alstyne explains this point as follows:

The Second Amendment of course does not assume that the right of the people to keep and bear arms will not be abused. Nor is the amendment insensible to the many forms which such abuses may take (e.g., as in robbing banks, in settling personal disputes, or in threatening varieties of force to secure one's will). But the Second Amendment's answer to the avoidance of abuse is to support such laws as are directed to those who threaten or demonstrate such abuse and to no one else. Accordingly, those who do neither—who neither commit crimes nor threaten such crimes—are entitled to be left alone.

William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1250 (1994). It should be emphasized that to defend the Second Amendment is to defend a legal right, not to rashly disregard the rights of others.

A number of writers expressed views that suggest their agreement with the idea that citizens ought to possess an individual right to own guns. Judge Henry St. George Tucker, for instance, recognized that “[t]he right of self defence is the first law of nature.”<sup>17</sup> He called the right bear to arms “the true palladium of liberty,”<sup>18</sup> noting elsewhere that, in Virginia, “the right of bearing arms . . . is practically enjoyed by each citizen, and is among the most valuable privileges.”<sup>19</sup> Thomas Hobbes, by no means a strong believer in individual rights, entitled individuals to just two rights under the sovereign. The first of these was self-defense.<sup>20</sup> In his Commentaries, William Blackstone listed personal security as the first of his primary rights.<sup>21</sup> The “natural right of resistance and self-preservation,” Blackstone wrote, explained the need for his fifth “auxiliary right of the subject”—namely, “that of having arms for their defence.”<sup>22</sup>

Modern historian Gary Wills quite correctly points out that such commentary, by itself, may be insufficient to prove what the Second Amendment actually means. He counsels: “One must separate what the Second Amendment says from a whole list of other matters not immediately at issue.”<sup>23</sup> Such matters, according to Wills, include debate over whether there is a “natural right to own guns” and whether “such a right may be protected in other places,” outside the Bill of Rights.<sup>24</sup> Wills suggests that all of

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17. ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA VOL. I, app. § 12 (Jon Roland ed., Constitution Society 2001), available at <http://www.constitution.org/tb/t1d12000.htm>. In addition to writing notes and references to an edition of Blackstone’s *Commentaries*, Tucker served as a professor of law at the College of William and Mary, a member of the Supreme Court of Appeals of Virginia and, later, as a federal district court judge. Federal Judicial Center, *Judges of the United States Courts: Tucker, St. George*, at <http://air.fjc.gov/servlet/uGetInfo?jid=2420> (last visited Apr. 11, 2002).

18. TUCKER, *supra* note 17, at § 12.

19. ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 43 (1831), quoted in HALBROOK, *supra* note 12, at 91.

20. THOMAS HOBBS, LEVIATHAN 87 (Edwin M. Curley ed., 1994). The only other right that individuals retained under Hobbes’s virtually all-powerful Sovereign was the right against self-incrimination. *Id.*

21. 1 WILLIAM BLACKSTONE, COMMENTARIES \*125.

22. *Id.* at \*139.

23. Gary Wills, *To Keep and Bear Arms*, reprinted in WHOSE RIGHT?, *supra* note 3, at 67.

24. *Id.* (noting that protections may flow from the common law, state constitutions, statutes, custom, and other sources). True to Wills’s suggestion, several states had constitutional provisions protecting gun ownership at or around the time the Bill of Rights was ratified. See generally PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (2d ed. 1878) (containing reprints of all state constitutions cited in this Note). Some of their constitutions spoke in terms of securing the right for the common good. See TENN. CONST. of 1796, art. XI, § 26 (“[T]he freemen of this State have a right to keep and bear arms for their common defense.”); N.C. DECL. OF RIGHTS of 1776, § 17 (“[T]he people have the right to bear arms, for the common defence of the State . . .”). Other provisions were more explicitly tailored toward granting an individual right. Alabama, Connecticut, and Mississippi, for example, guaranteed that “[e]very citizen has a right to bear arms in defence of himself and the State.” ALA. CONST. of 1819, art. I, § 23; CONN. CONST. of 1818, art. I, § 17; MISS. CONST. of 1817, art. I, § 23. The constitutions of Pennsylvania and Vermont read similarly. See PA. CONST. of 1790, art. IX, § 21 (“[T]he right of citizens to bear arms, in defence of themselves and the State, shall not be questioned.”); VT. CONST. of

the above "could be true without affecting the original scope of the Second Amendment."<sup>25</sup> "In order to make any progress," he writes, "we must restrict ourselves to what, precisely, is covered by the Second Amendment."<sup>26</sup>

### B. *Interpreting the Text of the Amendment*

Professor Wills's suggestion makes perfect sense. As Justice Antonin Scalia tells us, after all, in matters of statutory and constitutional interpretation, "[t]he text is the law, and it is the text that must be observed."<sup>27</sup> Bradley Smith, a law professor and a current commissioner on the Federal Election Commission, suggests that the text of the Second Amendment is not particularly difficult to interpret. In his words: "The Second Amendment states clearly, 'the right of the people to keep and bear Arms, shall not be infringed.' This is a rather straightforward statement that the government may not prohibit the people from owning firearms."<sup>28</sup> Wills and others would likely counter that this reading overlooks "military" nature of the amendment.<sup>29</sup>

One common argument advanced by the collective right advocates is that the first clause of the Second Amendment limits the guarantee provided in the second clause. The statement that "the right of the people to keep and bear Arms, shall not be infringed" is, of course, preceded by these words: "A well regulated Militia, being necessary to the security of a free state . . ."<sup>30</sup> But does this mean, as some would suggest, that the amendment safeguards only a collective right to an armed militia?<sup>31</sup> Not according to Commissioner Smith. He points out that much of the confusion about the Second Amendment stems from the misinterpretation of its first clause (the "justification clause"), which, rather than limiting the latter, simply explains the rationale for the substantive protection embodied in the second clause (the "operative clause").<sup>32</sup>

Putting Commissioner Smith's argument to one side for a moment, Professor Wills is convinced that the Second Amendment speaks of a strictly

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1777, ch. I. art. 15 ("[T]he people have a right to bear arms for the defence of themselves and the State . . .").

25. Wills, *supra* note 13, at 67.

26. *Id.* at 68.

27. SCALIA, *supra* note 1, at 22.

28. Smith lecture, *supra* note 5, at para. 16.

29. See Wills, *supra* note 23, at 70 ("The whole context of the Second amendment was always military.").

30. U.S. CONST. amend. II.

31. See *supra* note 9 and accompanying text.

32. Smith lecture, *supra* note 5, at para. 16. "[N]o great portent should be given to the appearance of a justification clause," Smith explains, because "such clauses were extremely common in the constitutions and bills of rights adopted in the states around the time that the U.S. Constitution was adopted." *Id.* at para. 17 (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998)).

collective right for other reasons. In a recent article—entitled simply “To Keep and Bear Arms”—Wills attempts to dissect the operative clause of the amendment to show that each part of it contemplates military, rather than individual, action.<sup>33</sup> The phrase “bear arms,” he writes, “is, in itself, a military term.”<sup>34</sup> Wills suggests that this is so because its Latin counterpart, *arma ferre*, means to bear arms in a military context.<sup>35</sup> Even if Wills is right—even if the founders sought constitutional protection for only those firearms that could be used in military struggle—this does not prove his broader claim. His real problem is the phrase he left out of the title of his article, which instructs that to keep and bear arms is “the right of the people.”<sup>36</sup>

Wills attempts to explain that phrase away, voicing his disagreement with “[g]un advocates [who] claim that the ‘right of the people’ to keep and bear arms is distributive, the right of every individual to be taken singly.”<sup>37</sup> “The people,” he asserts, really means “the militia.”<sup>38</sup> Interestingly enough, Wills accuses those who read the Second Amendment to protect an individual right of employing “linguistic tricks . . . which wrench terms from context and impose fanciful meanings on them.”<sup>39</sup> Professor Sanford Levinson’s rebuttal to Wills’s article, however, serves to illustrate that Professor Wills might just be the one guilty of semantic chicanery:

The Second Amendment is most plausibly read as acknowledging the right of otherwise peaceable and law-abiding American citizens “to keep and bear arms” against the dreaded possibility that they will find it necessary to join with other citizens in making the Lockean appeal [an “appeal to heaven,” including armed revolt against the government] against an overweening national government.<sup>40</sup>

Unlike Wills’s formulation, Professor Levinson’s reading of the Second Amendment is consistent with the modern understanding of the Fourth

33. See generally Wills, *supra* note 23, at 70-84.

34. *Id.* at 70.

35. *Id.* See OXFORD LATIN DICTIONARY 171 (P.G.W. Glare ed. 1984). *Accord* English v. State, 35 Tex. 473, 476 (1872) (“The word ‘arms’ in the connection we find it in the Constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense.”).

36. U.S. CONST. amend. II (emphasis added).

37. Wills, *supra* note 23, at 80.

38. See *id.* at 80-81.

39. *Id.* at 83.

40. Letter from Sanford Levinson to the Editors, *The New York Review of Books*, reprinted in WHOSE RIGHT?, *supra* note 3, at 89. Cf. Letter from David C. Williams to the Editors, *The New York Review of Books*, reprinted in WHOSE RIGHT?, *supra* note 3, at 91 (“Something in the Second Amendment seems to cause otherwise careful scholars to engage in oversimplification, distortion, and caricature. I regret that Garry Wills, whose past work I have admired, has so succumbed in his recent article . . .”).

Amendment, which also speaks of a “right of the people.”<sup>41</sup> Individual citizens—whose houses, papers, and effects are currently protected against unreasonable searches and seizures under that provision<sup>42</sup>—would no doubt be surprised if someone were to suggest to them that they might need to join a militia before asserting their Fourth Amendment rights against a police officer attempting to enter their homes without a valid search warrant. Professor Wills does not suggest that they need do so, of course, but neither does he offer any particularly persuasive arguments to explain why identical phrases from two amendments, drafted and approved at the same time, should have such vastly different meanings.<sup>43</sup>

Contrary to Wills’s creative suggestion that the Second Amendment protects only the rights of militia members to own guns, Commissioner Smith explains that the amendment “does not refer only to ‘the right of the militia to keep and bear arms.’” Rather, “[i]t says ‘the right of the people to keep and bear arms, shall not be infringed,’ period.”<sup>44</sup> Smith would grant that there remains room for interpretation of the amendment. “For example, one may still question the meaning of the word ‘Arms’ as it appears in the Second Amendment,” he writes, “[b]ut some interpretive options clearly go off the table.”<sup>45</sup> His conclusion: “It is not possible . . . to argue that the Second Amendment right to bear arms pertains only to the militia . . . .”<sup>46</sup>

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41. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

42. Wills, *supra* note 23, at 80.

43. Consider the Fifth Circuit’s recent treatment of this issue:

For the sophisticated collective rights model to be viable, the word “people” must be read as the words “members of a select militia.” The individual rights model, of course, does not require that any special or unique meaning be attributed to the word “people.” It gives the same meaning to the words “the people” as used in the Second Amendment phrase “the right of the people” as when used in the exact same phrase in the contemporaneously submitted and ratified First and Fourth Amendments. There is no evidence in the text of the Second Amendment, or in any other part of the Constitution, that the words “the people” have a different connotation within the Second Amendment than when employed elsewhere in the Constitution. In fact, the text of the Constitution, as a whole, strongly suggests that the words “the people” have precisely the same meaning within the Second Amendment as without.

*United States v. Emerson*, 270 F.3d 203, 227-28 (5th Cir. 2001) (footnote omitted), *cert. denied*, 122 S. Ct. 2362 (2002).

44. Smith lecture, *supra* note 5, at para. 17. Commissioner Smith further notes that that “the Amendment does not say ‘so long as the militia is necessary’ the right to bear arms shall not be infringed.” *Id.* In fact, as a matter of constitutional law, until the Second Amendment is itself amended, the militia is necessary. *See id.* (“In a proper system of constitutional law, it is up to the people, through their elected representatives, in the manner provided by the Constitution . . . to determine if the right is now obsolete, or too broad to meet its justification, or otherwise no longer necessary.”). *See also* Van Alstyne, *supra* note 16, at 1250 (making a similar argument).

45. Smith lecture, *supra* note 5, at para. 23.

46. *Id.* Civil rights attorney Don Kates points out the difficulty Professor Wills and other collective right adherents face in the text of the Constitution:

To justify an exclusively states right view, the following set of propositions must be accepted: (1) when the first Congress drafted the Bill of Rights it used “right of the peo-



### C. Judicial Recognition of an Individual Right to Gun Ownership

Law professors are not the only ones to have recognized that the Second Amendment safeguards something more than the means to effectuate a well-regulated militia. Michigan Supreme Court Justice Thomas Cooley, in his early commentary on constitutional law, demonstrated that he understood the Second Amendment to embrace an individual right:

The [Second] [A]mendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. . . . 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.<sup>47</sup>

In accord is the United States Court of Appeals for the Fifth Circuit, which recently declared in *United States v. Emerson* that the Second Amendment "protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms . . . that are suitable as personal, individual weapons . . . ."<sup>48</sup>

At least two members of the current Supreme Court have written that they, too, may be leaning toward the individual right view. In his concurring opinion in *United States v. Printz*, Justice Clarence Thomas noted that "a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."<sup>49</sup> Justice Scalia has written that "[i]t would . . . be strange to find in the midst of a catalog of the rights of individuals a provision securing to the states the right

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ple" in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states; but then, forty-six words later, the fourth amendment's "right of the people" had reverted to its normal individual right meaning; (4) "right of the people" was again used in the natural sense in the ninth amendment; and (5) finally, in the tenth amendment the first Congress specifically distinguished "the states" from "the people," although it had failed to do so in the second amendment.

Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 218 (1983), quoted in Koren Wai Wong-Ervin, Note, *The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence*, 50 HASTINGS L.J. 177, 182 (1998).

47. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 270-71 (1880).

48. *Emerson*, 270 F.3d at 260.

49. *United States v. Printz*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (citations omitted).

to maintain a designated 'Militia.'"<sup>50</sup> "Dispassionate scholarship," Scalia continues, "suggests quite strongly that the right of the people to keep and bear arms meant just that."<sup>51</sup>

If the above-cited scholars and jurists are correct in their assessment of the text and underlying purpose of the Second Amendment, that provision should be read to secure an individual right against governmental infringement. This does not end the matter, however. We must still determine which sovereigns are required to respect that right.<sup>52</sup>

### III. AN ARGUMENT FOR INCORPORATION

#### A. *The Nationalization of the Bill of Rights*

To be sure, the founders intended that the Bill of Rights limit the power of Congress to deprive citizens of certain specified, fundamental rights. While only one of the first ten amendments speaks in specific terms of what Congress alone may not do,<sup>53</sup> it is commonly understood that, like the First Amendment, the rest were not intended to restrict state action.<sup>54</sup> So, although the Second Amendment does not say "the right of the people to keep and bear Arms, shall not be infringed by the Congress," this is how that provision was generally understood until at least the time of the Civil War.<sup>55</sup>

50. SCALIA, *supra* note 1, at 137 n.13.

51. *Id.*

52. See *supra* note 10 and accompanying text.

53. See U.S. CONST. amend. I (providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added).

54. See, e.g., O'BRIEN, *supra* note 12, at 288.

55. See Van Alstyne, *supra* note 16, at 1251. Simply reading the text of the Constitution could lead one to a different conclusion, however. According to the Supremacy Clause, the "Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. If the federal Constitution really is the supreme law of the land, and if it grants the people a right to bear arms without expressly limiting the applicability of that right to infringing acts by Congress, it would appear that any state law infringing upon the people's ability to bear arms would be in violation of the Second Amendment—which is itself a portion of the supreme law of the land. It seems rather peculiar that James Madison would draft one amendment with a jurisdictional limitation yet leave such limitations out of the remaining provisions of the Bill of Rights, after all. See LOWI & GINSBERG, *supra* note 1, at 115 (noting that "the First Amendment is the only part of the Bill of Rights that is explicit in its intention to put limits on the national government . . ."). Despite the inherent attraction of the textual argument, however, scholars generally do not impute a purpose to Madison's (perhaps unconscious) decision to couch the First Amendment in terms of what Congress may not do. According to Professor Van Alstyne, "neither the First nor the Second Amendment, nor any of the other amendments in the Bill of Rights were addressed as limits on the states." Van Alstyne, *supra* note 16, at 1251 (citations omitted). See also *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (denying that the provisions of the federal Bill of Rights had any effect on state action). But see *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (calling the "right to carry arms 'in full open view' . . . is [a] right guaranteed by the Constitution of the United States . . . which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."); *Nunn v. State*, 1 Ga. 243, 250 (1846) ("The language of the second amendment is broad enough to embrace both Federal and State

It was not until after the Civil War—and, more specifically, until the ratification of the Fourteenth Amendment—that the seeds of a modern-day constitutional disagreement were planted.

### 1. Total Incorporation

Professor William Van Alstyne lays out the case that the drafters of the Fourteenth Amendment intended to make each provision of the Bill of Rights applicable to state action. He explains that, after the Civil War, the “original constitutional toleration of state differences with respect to their internal treatment of these rights came to an end . . . .”<sup>56</sup> In response, Van Alstyne writes, “[t]he immunities of citizens with respect to rights previously secured only from abridging acts of Congress were recast in the Fourteenth Amendment as immunities secured also from any similar act by any state.”<sup>57</sup> Under this understanding of the Fourteenth Amendment, its ratification in 1868 meant that no state could thereafter infringe upon a citizen’s right to keep and bear arms.

Whatever its appeal, this position has not been favored historically.<sup>58</sup> In 1871, for example, the Supreme Court of Tennessee relied on Chief Justice Marshall’s pre-Fourteenth Amendment decision in *Barron v. Mayor of Baltimore*<sup>59</sup> to deny that the Second Amendment bound the Tennessee legis-

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governments . . . .”) (emphasis deleted and citation omitted).

56. Van Alstyne, *supra* note 16, at 1251.

57. *Id.* Justice Hugo Black seems to have thought similarly. The appendix to his dissenting opinion in *Adamson v. California* quotes at length from remarks made by Senator Jacob Meritt Howard in 1866, when Howard presented the proposed Fourteenth Amendment to the Congress for its consideration. According to Senator Howard:

The first section of the amendment . . . submitted for the consideration of the two Houses, relates to the privileges and immunities of citizens of the several States, and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States . . . .

[To] the privileges and immunities spoken of in the second section of the fourth article of the Constitution . . . should be added the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms*; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

*Adamson v. California*, 332 U.S. 46, 104-06 (1947) (Black, J., dissenting) (quoting Sen. Howard) (emphasis added).

58. See *infra* notes 67-79 and accompanying text.

59. 32 U.S. (7 Pet.) 243. See *supra* note 55.

lature.<sup>60</sup> The court admitted that “[u]pon the face of [the Second Amendment], it might have been plausibly insisted that it would have been operative upon, and control the action of the State, as well as of the Federal Government; and this position would apparently be strengthened by the [Supremacy Clause].”<sup>61</sup> Nevertheless, the Tennessee court continued, in *Barron*:

Chief Justice Marshall . . . la[id] down the proposition: “That the Constitution was ordained and established by the people of the United States, for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated.”<sup>62</sup>

Without making any reference to the newly-ratified Fourteenth Amendment, the court concluded that *Barron* required it to rule that “[t]he State Legislature is not . . . limited in its powers . . . by [the Second Amendment] of the Constitution of the United States . . . .”<sup>63</sup>

The Tennessee court’s failure to address the issue in light of the presence of a new amendment in the federal Constitution might seem strange,<sup>64</sup> but the United States Supreme Court would soon deliver an opinion lending credence to this methodology. In the *Slaughter-House Cases*, a five to four decision handed down in 1873, the Supreme Court ruled that no provision of the Fourteenth Amendment prevented the Louisiana legislature from granting a monopoly to operate slaughterhouses in New Orleans.<sup>65</sup> As the authors of one textbook on American government put it:

Within five years of ratification of the Fourteenth Amendment, the Court was making decisions as though it had never been adopted. The shadow of *Barron* grew longer and longer. In an important 1873 decision known as the *Slaughter-House Cases*, the Supreme Court determined that the federal government was under no obligation to protect the “privileges and immunities” of citizens of a particular state against arbitrary actions by that state’s government.<sup>66</sup>

60. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

61. *Id.* at 172. See *supra* note 55 (advancing a similar argument).

62. *Andrews*, 50 Tenn. at 173.

63. *Id.* at 175.

64. See, e.g., LOWI & GINSBERG, *supra* note 1, at 116 (“Just reading the words of the Fourteenth Amendment, anyone might think it was almost perfectly designed to impose the Bill of Rights on the states and thereby to reverse *Barron v. Baltimore*.”).

65. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), cited in WILLIAM B. LOCKHART ET AL., *THE AMERICAN CONSTITUTION: CASES—COMMENTS—QUESTIONS* 221 (8th ed. 1996).

66. LOWI & GINSBERG, *supra* note 1, at 117.

The aggrieved slaughterhouse owners in New Orleans had argued that the action of the state legislature amounted to an unlawful taking of their private property, in contravention of the Fifth Amendment of the United States Constitution.<sup>67</sup> This amendment protected them, they asserted, because "the Fourteenth Amendment incorporated the Fifth Amendment, applying it to the states."<sup>68</sup> Five justices of the Supreme Court thought otherwise:

The Supreme Court argued, first, that the primary purpose of the Fourteenth Amendment was to protect "Negroes as a class." Second, and more to the point here, the Court argued, without trying to prove it, that the framers of the Fourteenth Amendment could not have intended to incorporate the entire Bill of Rights.<sup>69</sup>

For better or for worse, strains of this interpretation linger on in Supreme Court jurisprudence even to this day.<sup>70</sup> Whatever the intent of the Fourteenth Amendment's framers, then, it seems clear that those who hope to see the Second Amendment applied against the states must advocate its individual incorporation.

## 2. Selective Incorporation

In the decades following the Court's divided ruling in *Slaughter-House*, proponents of incorporation have looked to the Due Process Clause of the Fourteenth Amendment,<sup>71</sup> rather than its Privileges and Immunities Clause,<sup>72</sup> to support their efforts to have some or all of the provisions of the Bill of Rights applied against the states. The Supreme Court recognized in 1908 that "it is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."<sup>73</sup> In 1937, Justice Benjamin Cardozo announced his theory of "selective incorporation," which has guided the Court's approach to incorporation decisions to a certain extent ever since.<sup>74</sup> Under Justice Cardozo's

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67. *Id.*

68. *Id.*

69. *Id.*

70. See LOCKHART, *supra* note 65, at 224 ("The restrictive interpretation given the privileges and immunities clause in *Slaughter-House* has been consistently followed.")

71. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

72. U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

73. *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), *overruled by Griffin v. California*, 380 U.S. 609 (1965).

74. See William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Reli-*

theory, those provisions of the Bill of Rights that were "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked as fundamental" deserved incorporation against state action.<sup>75</sup>

Early application of the Cardozo approach did not facilitate the incorporation of constitutional rights in many cases.<sup>76</sup> As Professors Theodore Lowi and Benjamin Ginsberg have pointed out, "until 1961, only the First Amendment had been fully and clearly incorporated into the Fourteenth Amendment."<sup>77</sup> After that time, however, Supreme Court opinions evidenced an apparent relaxation of the standards required for incorporation. By 1968, for instance, the Court decided that the Fourteenth Amendment incorporated the Sixth Amendment right to trial by jury because that right was "fundamental to the American scheme of justice."<sup>78</sup> Despite Justice John Marshall Harlan's protests that the Court's Fourteenth Amendment jurisprudence "amounts to little more than a diluted form of the full incorporation theory"<sup>79</sup> that had been rejected in cases such as *Adamson v. California*,<sup>80</sup> the Court of the 1960s "'selectively' 'incorporated' or 'absorbed' more and more of the specifics of the Bill of Rights into the fourteenth amendment."<sup>81</sup> As a result, the only provisions of the first eight amendments that

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*gious Freedom in Alabama*, 49 ALA. L. REV. 509, 535 n.115 (1998). See generally *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

75. *Palko*, 302 U.S. at 325.

76. In *Palko*, for example, Justice Cardozo relied on his "'ordered liberty'—'fundamental fairness' test" to hold that the Fourteenth Amendment did not incorporate the entire constitutional prohibition against double jeopardy against the state of Connecticut. LOCKHART, *supra* note 65, at 255. Professors Lowi and Ginsberg explain the Cardozo test and its application in *Palko* as follows:

*Palko* appealed to the Supreme Court on what seemed an open and shut case of double jeopardy . . . Justice Benjamin Cardozo . . . rejected the argument made by *Palko*'s lawyer that "whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also." Cardozo responded tersely, "There is no such general rule." As far as Cardozo and the majority were concerned, the only rights from the Bill of Rights that ought to be incorporated into the Fourteenth Amendment as applying to the states as well as to the national government were those that were "implicit in the concept of ordered liberty." He asked the questions: Does double jeopardy subject *Palko* to a "hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?' . . . The answer must surely be 'no.'"

LOWI, *supra* note 1, at 119 (quoting from *Palko*) (emphasis deleted).

77. LOWI, *supra* note 1, at 120.

78. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

79. *Pointer v. Texas*, 380 U.S. 400, 409 (1965) (Harlan, J., concurring in the result).

80. *Adamson v. California*, 332 U.S. 46 (1947), *overruled by* *Griffin v. California*, 380 U.S. 609 (1965). In *Adamson*, Justice Black had argued that the Fourteenth Amendment was intended to incorporate the first eight amendments in their entirety. See Gray, *supra* note 74, at 535 n.115. This view "has never commanded a majority" of the Court. LOCKHART, *supra* note 65, at 254.

81. LOCKHART, *supra* note 65, at 260.

remain unincorporated today are the Second, the Third,<sup>82</sup> the Seventh,<sup>83</sup> and parts of the Fifth<sup>84</sup> and Eighth<sup>85</sup> Amendments.

### B. *The Supreme Court's Second Amendment Jurisprudence*

The Supreme Court has not addressed the Second Amendment since adopting its more accommodating theory of incorporation in the 1960's. In fact, the only cases that specifically refused to apply the right to bear arms against the states were decided long before even Justice Cardozo fashioned his restrictive selective incorporation test in *Palko v. Connecticut*.<sup>86</sup>

Between 1876 and 1894, the Court handed down three rulings denying the applicability of the Second Amendment to state government action. The first such case involved an indictment against several white men in Louisiana who had driven a group of black people into the county courthouse, set the building on fire, and then shot the victims as they attempted to flee from the burning structure.<sup>87</sup> The indictment in *United States v. Cruikshank* alleged, among other charges, that the defendants had conspired to hinder their victims' right of keeping and "bearing arms for a lawful purpose."<sup>88</sup> While the Supreme Court ruled that a private citizen could not violate a constitutional right—and, therefore, could not conspire to do so—the Court did declare that the Second Amendment "means no more than that [the right to bear arms] shall not be infringed by Congress."<sup>89</sup>

The *Cruikshank* Court called the Second Amendment "one of the amendments that has no other effect than to restrict the powers of the national government."<sup>90</sup> Citing the pre-Fourteenth Amendment ruling in *Barron v. Mayor of Baltimore*, the Court concluded that each amendment included in the Bill of Rights "was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone."<sup>91</sup> Much like the Tennessee Supreme Court's

82. U.S. CONST. amend. III (protecting against the quartering of soldiers in a person's home). According to Professor Van Alstyne, it is hardly surprising that no effort has yet been made to incorporate the Third Amendment. See Van Alstyne, *supra* note 16, at 1239-40 (noting that there has really been no occasion to develop Third Amendment law to date).

83. U.S. CONST. amend. VII (safeguarding the right to a jury trial in civil cases).

84. U.S. CONST. amend. V (protecting the right to be indicted by a grand jury).

85. U.S. CONST. amend. VIII (preventing the imposition of excessive fines or bails).

86. See *United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

87. HALBROOK, *supra* note 12, at 160 (citing THE DAILY PICAYUNE (New Orleans, La.), Apr. 15, 1873, at 1).

88. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

89. *Id.*

90. *Id.*

91. *Id.* at 552.

earlier—discussed decision in *Andrews v. State*,<sup>92</sup> the *Cruikshank* Court made no effort to consider the potential effect of the Fourteenth Amendment on the provisions of the Bill of Rights.

The two Second Amendment cases that immediately followed *Cruikshank* followed a similar approach. At issue in *Presser v. Illinois* was the constitutionality of certain provisions of the Illinois Military Code forbidding “bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.”<sup>93</sup> The Court noted that “the States cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.”<sup>94</sup> As to the specific issue of whether the state law under review offended the Second Amendment, however, the *Presser* Court came down on the same side as the *Cruikshank* Court had a decade earlier. Relying on *Barron* and *Cruikshank*, the Court reaffirmed that “the [A]mendment is a limitation upon the power only of Congress and the National government, and not upon that of the States.”<sup>95</sup>

Nine years after the *Presser* decision, the Court was presented with a challenge to a Texas statute “forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law.”<sup>96</sup> Because the defendant’s pleadings below did not raise the Fourteenth Amendment as being potentially applicable to his claim that the Texas law violated the Second and Fourth Amendments, the Supreme Court in *Miller v. Texas* refused to reach the issue.<sup>97</sup> This left the Court in familiar territory, prompting the following ruling: “[I]t is well settled that the restrictions of [the Second and Fourth Amendments] operate only on the federal power, and have no reference whatever to proceedings in state courts.”<sup>98</sup> Yet again, the Court cited *Barron* and *Cruikshank* to support its ruling.<sup>99</sup>

In not one of the Second Amendment cases decided between 1876 and 1894 did the Supreme Court address the applicability of the right to bear arms under the modern interpretation of the Fourteenth Amendment. Rather, in each instance, the Court applied the timeworn *Barron-Slaughter-House* methodology, which counseled that the Bill of Rights had no effect on state

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92. See *supra* notes 59-63 and accompanying text.

93. 116 U.S. 252, 264-65 (1886).

94. *Id.* at 265.

95. *Id.*

96. *Miller v. Texas*, 153 U.S. 535, 538 (1894).

97. *Id.* (“And if the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court.”).

98. *Id.*

99. *Id.*



governments. Were *Cruikshank* and *Miller* “good law” today, for instance, we would have to recognize that the Fourteenth Amendment did not protect the First Amendment right of citizens to free assembly,<sup>100</sup> nor their Fourth Amendment right to be free from unreasonable searches and seizures.<sup>101</sup> As the Fifth Circuit recognized in 2001, “these holdings all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment.”<sup>102</sup> Because “they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing”<sup>103</sup> the possible incorporation of the Second Amendment today.<sup>104</sup>

The only Supreme Court case to specifically address the Second Amendment since Justice Cardozo laid the framework for modern selective incorporation came just two years after the *Palko* decision. In 1939, the Court entertained a claim by two individuals who had been convicted in federal court of transporting an unregistered sawed-off shotgun in interstate commerce, in violation of the National Firearms Act.<sup>105</sup> The defendants in *United States v. Miller*<sup>106</sup> had argued in the court below that the Second

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100. According to the Court in *Cruikshank*, “[t]he first amendment to the Constitution prohibits Congress from abridging ‘the right of the people to assemble and petition the government for a redress of grievances.’ This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments . . . .” 92 U.S. 542, 552 (1876). But see *DeJonge v. Oregon*, 299 U.S. 353 (1937) (incorporating the freedom of assembly).

101. The *Miller* Court disposed of the Second and Fourth Amendment claims together:

In his motion for a rehearing, however, defendant claimed that the law of the State of Texas forbidding the carrying of weapons, and authorizing the arrest without a warrant of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the Second and Fourth Amendments to the Constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures. We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions, and even if he were, it is well settled that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts.

*Miller v. Texas*, 153 U.S. 535, 538 (1894). But see *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the federal exclusionary rule to evidence obtained by state law enforcement officers in violation of a defendant’s Fourth Amendment rights).

102. *United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).

103. *Id.*

104. Professor Michael Dorf admits as much in his recent article advocating a collective right interpretation of the Second Amendment:

Although these decisions postdated the enactment of the Fourteenth Amendment, they predated the modern cases holding that the Fourteenth Amendment incorporates most of the provisions of the Bill of Rights. To the extent that *Cruikshank* and *Presser* simply rely on the subsequently rejected constitutional understanding of *Barron v. City of Baltimore*, they might appropriately be reexamined.

Michael C. Dorf, *Fresh Looks: What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 296 (2000) (internal citation omitted).

105. Act of June 26, 1934, 48 Stat. 1236 (then codified at 26 U.S.C. § 1132).

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

Amendment protected their right to possess the sawed-off shotgun, but the Supreme Court thought otherwise. According to the Court:

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.<sup>107</sup>

While collective right advocates have long relied on this ruling to support their contention that the Supreme Court does not believe the Second Amendment affords any individual right to possess a firearm,<sup>108</sup> there is nothing explicitly stated nor implicitly suggested by the Court's ruling to support this claim.<sup>109</sup> What is more, the decision is equally unhelpful on the

107. *Id.* at 178 (citation omitted).

108. See, e.g., Bogus, *supra* note 5, at 3; Waxman, *supra* note 9, at 1. The government made this same claim in *United States v. Emerson*, in fact. 270 F.3d 203, 221 (2001) ("The government steadfastly maintains that the Supreme Court's decision in *United States v. Miller* mandated acceptance of the collective rights or sophisticated collective rights model, and rejection of the individual rights or standard model, as a basis for construction of the Second Amendment.") (internal citations omitted), *cert denied*, 122 S. Ct. 2362 (2002).

109. All that *Miller* actually says is that, in 1939, the Supreme Court did not believe there was any individual right to own the type of firearm *that could not be used by a member of a militia*. Consider Professor Dorf's assessment of the ruling and its implications:

The individual right advocates correctly point out that *Miller* might plausibly be read to suggest a negative pregnant: "if the sawed-off shotgun had been a militia weapon, then," on this reading, the defendants "would have had a constitutional right to possess it." By further implication, in general, individuals would have a Second Amendment right to private possession of whatever weapons might be useful in military service.

Dorf, *supra* note 104, at 297 (quoting Eugene Volokh et al., *The Second Amendment As a Teaching Tool in Constitutional Law Classes*, 48 J. LEGAL. EDUC. 591, 595 (1998)). See also *United States v. Emerson*, 270 F.3d 203, 224 (5th Cir. 2001) ("Had the lack of [membership in an organized militia or engagement in actual military service] been a ground of decision in *Miller*, the Court's opinion would obviously have made mention of it. But it did not."), *cert. denied*, 122 S. Ct. 2362 (2002); *Printz v. United States*, 521 U.S. at 938 n.1 (1997) (Thomas, J., concurring) (explaining that *Miller* held that "the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be 'ordinary military equipment,'" but did not "attempt to define or otherwise construe, the substantive right protected by the Second Amendment.").

Ultimately, although some may read *Miller* in an extremely broad fashion to find within it support for their claims that the Court does not believe there is any individual right to own firearms, any such reading must rest almost entirely on conjecture. Cf. Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 974 (1995) ("Read narrowly, the Supreme Court's decision was based more on an absence of evidence in the record than any searching inquiry into the origin and development of the Second Amendment."). In fact, it is rather curious that advocates of gun control would rely on *Miller* at all. Consider Professor Dorf's warning about reading that case too broadly: "we extrapolate from the logic of *Miller* at our peril, because, under modern conditions, it would seem to grant the most constitutional protection to just those weapons that are least suitable to private possession—distinctly military 'arms' such as tanks, attack helicopters, rocket launchers, or even nuclear weapons." Dorf, *supra* note 104, at 297 (citing Erwin Griswold, *Phantom Second Amendment "Rights"*, WASH. POST, Nov. 4, 1990, at C7). Incidentally, the *Miller* decision was authored by Justice James McReynolds, whom former U.S. Senator Paul Simon (D-IL) recently labeled "the clear winner of the award as the worst

issue of incorporation. As the *Miller* defendants were asserting a Second Amendment claim against the federal government, there was no cause for the Court to consider whether, in the post-*Palko*, selective incorporation world, the Second Amendment might constrain state action by way of the Fourteenth Amendment's Due Process Clause.

Considering the foregoing, there seems to be ample support for Professor Van Alstyne's recent observation that the lack of Second Amendment jurisprudence is similar to paucity of First Amendment case law a century ago. In 1994, Van Alstyne wrote:

[T]he Second Amendment has generated almost no useful body of law. Indeed, it is substantially accurate to say that the useful case law of the Second Amendment, even in 1994, is mostly just missing in action. In its place, what we have is roughly of the same scanty and utterly underdeveloped nature as was characteristic of the equally scanty and equally underdeveloped case law (such as it then was) of the First Amendment in 1904, as of which date there [still had not been a single Supreme Court decision] establishing the First Amendment as an amendment of any genuine importance at all.<sup>110</sup>

Van Alstyne blames the "vacuum of useful Second Amendment understanding" primarily on "the Supreme Court's own inertia."<sup>111</sup> It was "the same inertia," Van Alstyne continued, "that similarly afflicted the First Amendment virtually until the third decade of the th[e] twentieth century when Holmes and Brandeis finally were moved personally to take the First Amendment seriously."<sup>112</sup>

Van Alstyne cautions that we should be no more inclined to trust the "arrested treatment" of the Second and Fourteenth Amendments today than people should have been to trust the First Amendment jurisprudence of 1904.<sup>113</sup>

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Justice to serve on [the Supreme Court]." *The Senate's Role in the Nomination and Confirmation Process: Whose Burden?: Hearing Before the Subcommittee on Administrative Oversight and the Courts, Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Sen. Simon), available at <http://judiciary.senate.gov/oldsite/te090401so-simon.htm>.

110. Van Alstyne, *supra* note 16, at 1239 (internal citations omitted).

111. *Id.* at 1240.

112. *Id.* (citing *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ., concurring); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes and Brandeis, JJ., dissenting); *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 417 (1921) (Holmes and Brandeis, JJ., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes and Brandeis, JJ., dissenting)).

113. *Id.* at 1241.

### C. Preparation for Incorporation

Writing in 1994, Professor Van Alstyne opined that no “convincing” Second Amendment jurisprudence was possible “until something more in the case law of the Second Amendment begins finally to fall into place.”<sup>114</sup> Since then, there have been indications that perhaps “something more” is beginning to fall into place. According to Professor Carl Bogus, statements by various justices suggest that “a number of Supreme Court justices may be eager to hear a Second Amendment case.”<sup>115</sup> Most recently, two judges on the Fifth Circuit Court of Appeals signed their names to a lengthy discussion of the Second Amendment in *Emerson v. United States*. In the words of Judge Parker, who concurred specially in *Emerson*, “special interests and academics on both sides of this debate will take great interest in the fact that at long last some court has determined . . . that the Second Amendment bestows an individual right.”<sup>116</sup> Academics have, in fact, been taking notice of the issue in recent years,<sup>117</sup> but the recent judicial attention may signal that the Court will reconsider the scope of the Second Amendment sooner than Professor Van Alstyne might have predicted in 1994.<sup>118</sup>

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114. *Id.*

115. Bogus, *supra* note 5, at 23 n.104. Justice Scalia’s extra-judicial writings have indicated that he has been thinking about the Second Amendment. See *supra* notes 50-51 and accompanying text.

Justice Thomas has “express[ed] the hope that the Court would be able to reconsider the Second Amendment at a future date.” Bogus, *supra* note 5, at 23 n.104. See *Printz v. United States*, 521 U.S. 898, 939 (1997) (Thomas, J., concurring) (“Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms ‘has justly been considered, as the palladium of the liberties of a republic.’”) (quoting 3 J. STORY, COMMENTARIES § 1890 (1833)).

Justice Souter, in a dissenting opinion joined by Justices Stevens, Ginsburg, and Breyer, “has hinted that the Second Amendment may grant a collective right.” Bogus, *supra* note 5, at 23 n.104 (citing *United States v. Morrison*, 529 U.S. 598, 638 n.11 (2000) (Souter, J., dissenting)). According to Justice Souter: “While [the Bill of Rights] protected a range of specific individual rights against federal infringement, it did not, with the possible exception of the Second Amendment, offer any similarly specific protections to areas of state sovereignty.” *Morrison*, 529 U.S. at 638 n.11.

116. *United States v. Emerson*, 270 F.3d 203, 273 (5th Cir. 2001) (Parker, J., specially concurring), *cert. denied*, 122 S. Ct. 2362 (2002). Judge Parker’s concurrence argued that the majority’s treatment of the Second Amendment was entirely dicta and, as such, “no court need follow what the majority has said in that regard.” *Id.* at 274. Judge Garwood, who authored the majority opinion, countered: “We reject the special concurrence’s impassioned criticism or our *reaching* the issue of whether the Second Amendment’s right to keep and bear arms is an individual right. That precise issue was decided by the district court and . . . argued by both parties in this court and in this district court.” *Id.* at 265 n.66 (Garwood, J.). Whether the majority or the concurrence has the better argument, the fact remains that the court’s interpretation of the Second Amendment is a marked departure from the previous opinions of other circuits. See Denning, *supra* note 109 (criticizing numerous courts of appeals for misrepresenting the Supreme Court’s Second Amendment jurisprudence, particularly the Court’s holding in *United States v. Miller*).

117. See, e.g., *Emerson*, 270 F.3d at 220 n.12 (citing fourteen recent articles authored within the past two decades endorsing the individual right model); *Symposium on the Second Amendment: Fresh Looks*, 76 CHI.-KENT L. REV. 1, 3-600 (2000) (containing ten articles supporting the collective right view), available at <http://lawreview.kentlaw.edu/Articles/76.1/contents76.1.htm>.

118. The Supreme Court did not grant certiorari in *Emerson v. United States*, 122 S. Ct. 2362 (2002), but it is conceivable that the Court might entertain a Second Amendment case in the future if the decision prompts one or more circuits to reconsider its approach to such cases.

If and when the Court does hear another Second Amendment case, the justices ought to hold that the amendment protects an individual right, just as the Fifth Circuit has done. Moreover, should a case come to the Court challenging action by a state government, the Court should incorporate the Second Amendment against the states. The Court has already concluded that the vast majority of protections afforded by the first eight amendments apply against the states,<sup>119</sup> and, by the same logic used to incorporate other amendments, the Second Amendment should be applied to state action as well.

In a 1996 article, Professor Nelson Lund demonstrates why the Second Amendment is worthy of incorporation.<sup>120</sup> Under modern incorporation framework, Lund explains, the right of an individual to keep and bear arms must be considered fundamental:

The case for incorporating the Second Amendment is made even stronger by *Duncan's* revision of the *Palko* test. . . . [T]he question is whether the history of a right in England and America demonstrates that it has a fundamental place in our scheme of ordered liberty. The right to arms meets this test under any honest reading of the text. Like the right to a jury trial in criminal cases, which was at issue in *Duncan* itself, "its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689." And, like the right to jury trial, the right to arms "came to America with English colonists, and received strong support from them." When the Second Amendment was adopted, almost half the states with bills of rights included provisions protecting the right to arms, and no state had laws infringing that right. Even today, forty-three states have constitutional provisions expressly protecting a right to arms, and no jurisdiction has attempted to ban guns completely.<sup>121</sup>

Indeed, the right to bear arms was reportedly the protection most commonly requested in the materials the states sent to James Madison for his consideration in drafting the Bill of Rights.<sup>122</sup> Some eighty years later, at the

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119. See *supra* notes 81–85 and accompanying text.

120. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 46–55 (1996).

121. *Id.* at 53–55 (citations omitted).

122. David E. Murley, *Private Enforcement of the Social Contract: DeShaney and the Second Amendment Right to Own Firearms*, 36 DUQ. L. REV. 827, 835–36 (1998). According to Robert Rutland, "Madison drafted the Bill of Rights based on a pamphlet that compiled proposed amendments from state ratifying conventions." *Id.* at 835 (citing Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* (Leonard W. Levy & Dennis J. Mahoney, eds., 1987)). As it turned out, "[n]o right was more requested than the right to bear arms." *Id.* at 835–36 (citing David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. &

time of the Fourteenth Amendment's ratification, Southern states still considered the right sufficiently fundamental to rewrite their constitutions in favor of granting freed blacks the same right to bear arms that their white citizens had previously enjoyed.<sup>123</sup> Even today, the right is believed by many to be the "ultimate guarantor of all . . . other constitutionally recognized rights,"<sup>124</sup> not to mention a freedom worthy of protection because of its "contribution to the underlying fundamental right of self-defense [by] law-abiding citizens [against] criminal predators."<sup>125</sup>

In light of all of this evidence, Professor Lund's conclusion is hardly surprising:

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PUB. POL'Y, 598, 607 (1986) (indicating that the right to bear arms was requested more than twice as often as the right to free speech). Such requests make perfect sense in light of Justice Scalia's assertion that the Founders "thought the right of self-defense to be absolutely fundamental." SCALIA, *supra* note 1, at 43.

123. In a book entitled *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, Stephen P. Halbrook outlines the response by southern states to the adoption of the Fourteenth Amendment, focusing specifically on gun laws. See generally HALBROOK, *supra* note 12, at 87-106. As Halbrook points out, Congress passed a law in 1867 that required the people in each "rebel state" to "form[ ] a constitution of government in conformity with the Constitution of the United States in all respects" if they wished to rejoin the Union. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 5, 14 Stat. 428, 429 (1867); HALBROOK, *supra* note 12, at 87. Had the Southern states not considered the right to bear arms to be fundamental in the 1860s, they could have simply removed gun guarantees from their constitutions, as opposed to altering those provisions to include black citizens. Yet they did update, and thus reaffirm, their constitutional guarantees protecting the right.

In all, "[t]en Southern states held conventions in 1867-68 [to] draft[] new state constitutions" that would conform to the U.S. Constitution. HALBROOK, *supra* note 12, at 87. Whereas state constitutions and laws had previously prevented blacks from owning, possessing, or carrying guns, they were changed to allow freedmen to do so after the ratification of the Fourteenth Amendment.

Some states adopted constitutional provisions identical to the Second Amendment. See, e.g., GA. CONST. of 1865, art. I, § 14; N.C. CONST. of 1868, art. I, § 24. Others settled on similar language to accomplish the same purpose. Tennessee's antebellum constitution, for instance, guaranteed only "that the free white men of this state have the right to keep and bear arms for their common defense." TENN. CONST. of 1834, art. I, § 26 (altered by TENN. CONST. of 1870, art. I, § 26). Two years after the ratification of the Fourteenth Amendment, however, that provision was changed to recognize: "That the Citizens Of This State have a Right to keep and bear arms for their common defense. But the Legislature shall have the power by law, to regulate the wearing of arms, with a view to prevent crime." TENN. CONST. of 1870, art. I, § 26.

In 1871, the Supreme Court of Tennessee interpreted the meaning of the new constitutional provision in a fashion quite inconsistent with what collective right advocates have said about the Second Amendment. The Tennessee amendment seems the more likely candidate for application to only "common defense"-related rights, but the state supreme court thought otherwise:

What rights are guaranteed by the . . . clause . . . "that the citizens have a right to keep and bear arms for their common defense?" . . . The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home . . . . But farther than this, it must be held, that the right to keep arms, involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.

Andrews v. State, 50 Tenn. (3 Heisk.) 165, 177-79 (1871).

124. David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 B. Y. U. L. REV. 55, 57; see also *id.* at 56 ("[T]he Second Amendment assumes awesome importance, not only recognizing one among many particular rights of the people, but also providing an independent means of preserving and enforcing those rights.").

125. Lund, *supra* note 120, at 55.

The right protected by the Second Amendment meets the Court's test of what is "fundamental" far more easily than other rights that have already been incorporated, some of which were never even included in the fundamental documents of the English constitution. Unless we have a thimble for a Supreme Court, the incorporation of the Second Amendment must inevitably occur.<sup>126</sup>

Just as Justice Scalia would find it "strange" to learn that the Second Amendment did not protect an individual right,<sup>127</sup> many people would think it similarly odd to find out that the provision did not meet the Supreme Court's modern incorporation standards. The Court could—and, given the appropriate opportunity, should—incorporate the Second Amendment against the states.

#### IV. CONCLUSION

Despite decades of neglect by the Supreme Court,<sup>128</sup> the Second Amendment endures as one of the explicit guarantees of our federal Constitution. Though some believe the amendment was once the "quintessential example" of "settled constitutional law,"<sup>129</sup> even they must admit that recent scholarship in the area has fueled a lively debate among academics, jurists, and citizens alike concerning the scope of the right to bear arms.<sup>130</sup> There is no modern consensus among Americans on the issue, but a growing number of people have concluded that, consistent with the text of the amendment itself, the Second Amendment safeguards an individual right from federal infringement. At least two justices of the Supreme Court have indicated that they suspect the same to be true. Quite recently, moreover, the United States Court of Appeals for the Fifth Circuit has also endorsed the individual right interpretation of the amendment.

Those who have concluded that the Second Amendment protects an individual right may disagree with the formulations of several federal courts of appeals, but it is their conclusion that finds support in the United States Constitution. If and when the Supreme Court answers Justice Thomas's recent call to reconsider the scope of the Second Amendment,<sup>131</sup> the justices

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126. *Id.*

127. *Supra* notes 50-51 and accompanying text.

128. See Wong-Ervin, *supra* note 46, at 177 ("Despite a large number of United States Supreme Court cases interpreting the Bill of Rights, the Supreme Court has almost entirely avoided interpreting the Second Amendment."); Murley, *supra* note 122, at 827 ("The United States Supreme Court has been derelict in its duty to interpret the right to keep and bear arms.").

129. Bogus, *supra* note 5, at 3.

130. See Wong-Ervin, *supra* note 46, at 178.

131. See *Printz*, 521 U.S. at 939 (Thomas, J., concurring) ("Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms

should recognize as much. Moreover, in the event that someone brings a challenge against a state law infringing upon the right to bear arms, the Court should incorporate the right to bear arms against the states under the Due Process Clause of the Fourteenth Amendment. Only then will the Second Amendment, which safeguards what Justice Joseph Story called “the palladium of the liberties of a republic,”<sup>132</sup> be afforded its proper place amongst our fundamental freedoms.

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‘has justly been considered, as the palladium of the liberties of a republic.’”) (quoting 3 J. STORY, COMMENTARIES § 1890 (1833)).

132. *Id.*