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THE SUPREME COURT'S THIRTY-FIVE OTHER GUN CASES:

WHAT THE SUPREME COURT HAS SAID ABOUT THE SECOND AMENDMENT

David B. Kopel [FNa1]

Part two of this article.

Part three of this article.

Among legal scholars, it is undisputed that the Supreme Court has said almost nothing about the Second Amendment. [FN1] This article suggests that the Court has not been so silent as the conventional wisdom suggests. While the meaning of the Supreme Court's leading Second Amendment case, the 1939 United States v. Miller [FN2] decision remains hotly disputed, the dispute about whether the Second Amendment guarantees an individual right can be pretty well settled by looking at the thirty-five other Supreme Court cases which quote, cite, or discuss the Second Amendment. These cases suggest that the Justices of the Supreme Court do now and usually have regarded the Second Amendment "right of the people to keep and bear arms" as an individual right, rather than as a right of state governments.

Chief Justice Melville Fuller's Supreme Court (1888-1910) had the most cases involving the Second Amendment: eight. So far, the Rehnquist Court is in second place, with six. But Supreme Court opinions dealing with the Second Amendment come from almost every period in the Court's history, and almost all of them assume or are consistent with the proposition that the Second Amendment in an individual right.

Part I of this Article discusses the opinions from the Rehnquist Court. Part II looks at the Burger Court, and Part III at the Warren, Vinson, and Hughes Courts. Part IV groups together the cases from the Taft, Fuller, and Waite Courts, while Part V consolidates the Chase, Taney, and Marshall Courts.

*100 But first, let us quickly summarize what modern legal scholarship says about the Second Amendment, and why the Court's main Second Amendment decision --United States v. Miller-- does not by itself settle the debate.

Dennis Henigan, lead attorney for Handgun Control, Inc., argues that the Supreme Court has said so little about the Second Amendment because the fact that the Second Amendment does not protect the right of ordinary Americans to own a gun is "perhaps the most well-settled point in American law." [FN3] Henigan argues that the Second Amendment was meant to restrict the Congressional powers over the militia granted to Congress in Article I of the Constitution--although Henigan does not specify what the restrictions are. [FN4] One of Henigan's staff criticizes the large number of American history textbooks which "contradict[ ] a nearly unanimous line of judicial decisions by suggesting the meaning of the Second Amendment was judicially unsettled." [FN5]

Similarly, Carl Bogus argues that the only purpose of the Second Amendment was to protect state's rights to use their militia to suppress slave insurrections--although Bogus too is vague about exactly how the Second Amendment allegedly restricted Congressional powers. [FN6] This article refers to the *101 State's Rights theory of the Second Amendment as the "Henigan/Bogus theory," in honor of its two major scholarly proponents. [FN7]

In contrast to the State's Rights theory is what has become known as the Standard Model. [FN8] Under the Standard Model, which is the consensus of most modern legal scholarship on the Second Amendment, the Amendment guarantees a right of individual Americans to own and carry guns. [FN9] This modern *103 Standard Model is similar to the position embraced by every known legal *104 scholar in the nineteenth century who wrote about the Second Amendment: the Amendment guarantees an individual right, but is subject to various reasonable restrictions. [FN10]

Both the Standard Model and the State's Right theory claim that Supreme Court precedent, particularly the case of United States v. Miller, supports their position.

Two other scholarly theories about the Second Amendment are interesting, but their theories have little to do with Supreme Court precedent. Garry Wills argues that the Second Amendment has "no real meaning," and was merely a clever trick that James Madison played on the Anti-Federalists. [FN11] David Williams argues that the Second Amendment once guaranteed an individual right, but no longer does so because the American people are no longer virtuous and united, and hence are no longer "the people" referred to in the Second Amendment. [FN12] Neither the Wills Nihilism theory nor the Williams Character Decline theory make claims which depend on the Supreme Court for support, or which could be refuted by Supreme Court decisions.

Like the scholars, the lower federal courts are split on the issue, although their split is the opposite of the scholarly one: most federal courts which have stated a firm position have said that the Second Amendment is not an individual right. [FN13] The federal courts which follow the academic Standard Model *105 are in the minority, although the ranks of the minority have grown in recent years. [FN14] The courts on both sides, like the scholars, insist that they are following the Supreme Court.

One approach to untangling the conflict has been to see if the lower federal courts have actually been following Miller. In Can the Simple Cite be Trusted?, Brannon Denning makes a persuasive argument that some lower courts have cited Miller for propositions which cannot reasonably be said to flow from Miller. [FN15] But part of the problem with deciding whether the courts or the scholars are being faithful to Miller is that Miller is such an opaque opinion.

Miller grew out of a 1938 prosecution of two bootleggers (Jack Miller and Frank Layton) for violating the National Firearms Act by possessing a sawed-off shotgun without having paid the required federal tax. The federal district court dismissed the indictment on the grounds that the National Firearms Act violated the Second Amendment. [FN16] Freed, Miller and Layton promptly absconded, *106 and thus only the government's side was heard when the case was argued before the Supreme Court. [FN17]

Unfortunately, Miller was written by Justice James McReynolds, arguably one of the worst Supreme Court Justices of the twentieth century. [FN18] The opinion nowhere explicitly says that the Second Amendment does (or does not guarantee) an individual right. The key paragraph of the opinion is this:

> 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, 2 Humphreys (Tenn.) 154, 158. [FN19]

This paragraph can plausibly be read to support either the Standard Model or the State's Rights theory. By the State's Right theory, the possession of a gun by any individual has no constitutional protection; the Second Amendment only applies to persons actively on duty in official state militias.

In contrast, the Standard Model reads the case as adopting the "civilized warfare" test of nineteenth century state Supreme Court cases: individuals have a right to own arms, but only the

type of arms that are useful for militia service; for example, ownership of rifles is protected, but not ownership of Bowie knives (since Bowie knives were allegedly useful only for fights and brawls). [FN20] The case cited by the Miller Court, Aymette v. State [FN21], is plainly in the Standard Model, since it interprets the Tennessee Constitution's right to arms to protect an individual right to own firearms, but only firearms suitable for militia *107 use; in dicta, Aymette states that the Second Amendment has the same meaning. [FN22]
While scholars can contend for different meanings, it is true that, as a matter of pure linguistics, the Miller decision does not foreclose either the Standard Model or the State's Rights theory.

And what is one to make of the opinion's penultimate paragraph, stating, "In the margin some of the more important opinions and comments by writers are cited." [FN23] In the attached footnote, the opinion cites two prior U.S. Supreme Court opinions and six state court opinions, all of which treat the Second Amendment or its state analogue as an individual right, even as the opinions uphold particular gun controls. [FN24] The footnote likewise cites treatises by Justice Joseph Story and Thomas Cooley explicating the Second Amendment as an individual right. [FN25] But the same Miller footnote also cites a Kansas Supreme Court *108 decision which is directly contrary; that case holds that the right to arms in Kansas belongs only to the state government, and in dicta makes the same claim about the Second Amendment. [FN26]

The Miller footnote begins with the phrase "Concerning the militia --" but several of the cases cited have nothing to do with the militia. For example, Robertson v. Baldwin (discussed infra) simply offers dicta that laws which forbid the carrying of concealed weapons by individuals do not violate the Second Amendment. [FN27]

If Miller were the only source of information about the Second Amendment, the individual right vs. government right argument might be impossible to resolve conclusively. Fortunately, the Supreme Court has addressed the Second Amendment in thirty-four other cases--although most of these cases appear to have escaped the attention of commentators on both sides of *109 the issue. This article ends the bipartisan scholarly neglect of the Supreme Court's writings on the Second Amendment. [FN28]

The neglected cases are not, of course, directly about the Second Amendment. Rather, they are about other issues, and the Second Amendment appears as part of an argument intended to make a point about something else. [FN29] Nevertheless, all the dicta may be revealing. If Henigan and Bogus are correct, then the dicta should treat the Second Amendment as a right which belongs to state governments, not to American citizens. And if the Standard Model is correct, then the Amendment should be treated as an individual right. Moreover, the line between dicta and ratio decendi is rarely firm, [FN30] and one day's dicta may become another day's holding. [FN31]

C.S. Lewis observed that proofs (or disproofs) of Christianity found in apologetic documents are sometimes less convincing than offhand remarks made in anthropology textbooks, or in other sources where Christianity is only treated incidentally. The Supreme Court cases in which the Supreme Court mentions the Second Amendment only in passing are similarly illuminating. [FN32]

*110 Before commencing with case-by-case analysis, let me present a chart which summarizes the various cases. The columns in chart are self-explanatory, but I will explain two of them anyway. A "yes" answer in the "Supportive of individual right in 2d Amendment?" column means only that the particular case provides support for the individual rights theory; although the part of the case addressing the Second Amendment might make sense only if the Second Amendment is considered an individual right, the case will not directly state that

proposition. If the case is labeled "ambiguous," then the language of the case is consistent with both the Standard Model and with State's Rights.

The next column asks, "Main clause of 2d A. quoted without introductory clause?" The National Rifle Association and similar groups are frequently criticized for quoting the main clause of the Second Amendment ("the right of the people to keep and bear Arms, shall not be infringed") without quoting the introductory clause ("A well-regulated Militia, being necessary to the security of a free State"). [FN33] The critics argue that the introductory, militia, clause controls the meaning of the main, right to arms, clause. They contend that to omit the introductory clause is to distort completely the Second Amendment's meaning. (And if, as these critics argue, the Second Amendment grants a right to state governments rather than to individuals, then omission of the introductory clause is indeed quite misleading.) On the other hand, if the Second Amendment is about a right of people (the main clause), and the introductory clause is useful only to resolve gray areas (such as what kind of arms people can own), then it is legitimate sometimes to quote the main clause only. As the chart shows, the Supreme Court has quoted the main clause alone much more often than the Supreme Court has quoted both clauses together.

This Supreme Court quoting pattern is consistent with the theory Eugene Volokh's article, The Commonplace Second Amendment, which argues that the Second Amendment follows a common pattern of constitutional drafting from the Early Republic: there is a "purpose clause," followed by a main clause. [FN34] *111 For example, Rhode Island's freedom of the press provision declared: "The liberty of the press being essential to the security of freedom in a state, any person may publish sentiments on any subject, being responsible for the abuse of that liberty." [FN35] This provision requires judges to protect every person's right to "publish sentiments on any subject"--even when the sentiments are not "essential to the security of freedom in a state," or when they are detrimental to freedom or security.

Similarly, the New Hampshire Constitution declared: "Economy being a most essential virtue in all states, especially in a young one; no pension shall be granted, but in consideration of actual services, and such pensions ought to be granted with great caution, by the legislature, and never for more than one year at a time." [FN36] This provision makes all pensions of longer than one year at a time void--even if the state is no longer "a young one" and no longer in need of economy. Volokh supplies dozens of similar examples from state constitutions. [FN37]

Of the twenty-nine U.S. Supreme Court opinions (including Miller) which have quoted the Second Amendment, twenty-three contain only a partial quote. This quoting pattern suggests that, generally speaking, Supreme Court justices have not considered the "purpose clause" at the beginning of the Second Amendment to be essential to the meaning of the main clause.

Case name and year.	**Opinion by**	**Main issue in case**	**Type of opinion**	**Supportive of individual right?**
Spencer v. Kemna. 1998	Stevens	Article III case or controversy	Dissent from denial of cert.	Yes, but could possibly be read as referring to rights under state co
Muscarello v. U.S. 1998	Ginsburg	Fed stat. interp.	Dissent	Yes
Printz v. U.S. 1997	Thomas	Federalism	Concur	Says that Miller did not decide the issue. Thomas appears to suppo

Albright v. Oliver. 1994	Stevens	14th A. and § 1983	Dissent	Yes
Planned Parenthood v. Casey. 1992	O'Connor	14th A.	Majority	Yes
U. S. v. Verdugo-Urquidez. 1990	Rehnquist	4th A. applied to foreign national	Majority	Yes
Lewis v. U.S. 1980	Blackmun	Interp. of Gun Ctl. Act of 1968	Majority	Ambiguous, but probably not. If an individual right, less fundamen
Moore v. East Cleveland. 1976	Powell	14th A	Plurality	Yes. (But contrary opinion expressed by Justice Powell after retirer
" "	White	""	Dissent	Yes
Adams v. Williams. 1972	Douglas	4th A.	Dissent	No
Roe v. Wade. 1973	Stewart	14th A.	Concur	Yes
Laird v. Tatum. 1972	Douglas	Justiciability	Dissent	Ambiguous
Burton v. Sills. 1969	Per curiam	Challenge to state gun licensing law	Summary affirm.	Ambiguous
Duncan v. Louisiana. 1968	Black	Incorporation of 6th Amendment	Concur	Yes
Malloy v. Hogan. 1964	Brennan	Incorporation of 5th Amend.	Majority	Yes
Konigsberg v. State Bar. 1961	Harlan	1st Amendment	Majority	Yes
Poe v. Ullman. 1961	Harlan	14th Amendment	Dissent	Yes
" "	Douglas	" "	Dissent	Yes, but implicitly abandoned in Adams.
Knapp v. Schweitzer. 1958	Frankfurter	Incorp. of 5th Amendment	Majority	Yes
Johnson v. Eisentrager. 1950	Jackson	5th A. applied to trial of enemy soldier	Majority	Yes
Adamson v. Calif. 1947	Black	Incorp. of 5th Amendment	Dissent	Yes
Hamilton v. Regents. 1935	Butler	Conscientious objector	Majority	No, but not necessarily inconsistent with an individual right.
U. S. v. Schwimmer. 1929	Butler	Immigration laws	Majority	Ambiguous
Stearns v. Wood. 1915	McReynolds	Article III case or controversy	Majority	Ambiguous, since court refuses to hear any of plaintiff's claims

Twining v. N.J. 1908	Moody	Incorp. of 5th A self-incrim.	Majority	Yes
Trono v. U.S. 1905	Peckham	5th A. in the Philippines	Majority	Yes
Kepner v. U.S. 1904	Day	" "	Majority	Yes. Same as Trono.
Maxwell v. Dow. 1899	Peckham	Incorp. of 5th A. jury trial	Majority	Yes
Robertson v. Baldwin. 1897	Brown	13th Amend.	Majority	Yes
Brown v. Walker. 1896	Field	5th Amend.	Dissent	Yes
Miller v. Texas. 1894	Brown	14th Amendment	Majority	Yes
Logan v. U.S. 1892	Gray	Cong. Power from 14th A.	Majority	Yes
Presser v. Illinois. 1886	Woods	2d A	Majority	Yes
U. S. v. Cruikshank 1876	Waite	Cong. Power under 14th Amendment	Majority	Yes. A basic human right guaranteed by the Const., like 1st A. rt. of assembly
Scott v. Sandford. 1857	Taney	Citizenship; Cong. powers over territories.	Majority	Yes
Houston v. Moore. 1820	Story	State powers over militia.	Dissent	Yes, but also supportive of a state's right. (A later treatise written by Story is for indivic

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I. The Rehnquist Court

Since William Rehnquist was appointed Chief Justice in 1986, six different opinions have addressed the Second Amendment. The authors of the opinions include the small left wing of the Court (Justices Stevens and Ginsburg), the Court's right wing (Justices Thomas and Rehnquist), and the Court's centrist Justice O'Connor. Every one of the opinions treats the Second Amendment asan *114 individual right. Except for Justice Breyer, every sitting Supreme Court Justice has joined in at least one of these opinions-- although this joinder does not prove that the joiner necessarily agreed with what the opinion said about the Second Amendment. Still, five of the current Justices have written an opinion in which the Second Amendment is considered an individual right, and three more Justices have joined such an opinion.

A. Spencer v. Kemna

After serving some time in state prison, Spencer was released on parole. [FN38] While free, he was accused but not convicted of rape, and his parole was revoked. [FN39] He argued that his parole revocation was unconstitutional. [FN40] But before his constitutional claim could be judicially resolved, his sentence ended, and he was released. [FN41] The majority of the Supreme Court held that since Spencer was out of prison, his claim was moot, and he had no right to pursue his constitutional lawsuit.

Justice Stevens, in dissent, argued that being found to have perpetrated a crime (such as the rape finding implicit in the revocation of Spencer's parole) has consequences besides prison:

An official determination that a person has committed a crime may cause two different kinds of injury. It may result in tangible harms such as imprisonment, loss of the right to vote or to bear arms, and the risk of greater punishment if another crime is committed. It may also severely injure the person's reputation and good name. [FN42] A person can only lose a right upon conviction of a crime if a person had the right before conviction. Hence, if an individual can lose his right "to bear arms," he must possess such a right. Justice Stevens did not specifically mention the Second Amendment, so it is possible that his reference to the right to bear arms was to a right created by state constitutions, rather than the federal one. (Forty-four states guarantee a right to arms in their state constitution. [FN43]) *117 When particular gun control laws are before the Supreme Court for either statutory or constitutional interpretation, Justice Stevens is a reliable vote to uphold the law in question, often with language detailing the harm of gun violence. [*118 FN44] It is notable, then, that Justice Stevens recognizes a right to bear arms as an important constitutional right, whose deprivation should not be shielded from judicial review. [FN45]

B. Muscarello v. United States

Federal law provides a five year mandatory sentence for anyone who "carries a firearm" during a drug trafficking crime. [FN46] Does the sentence enhancement apply when the gun is merely contained in an automobile in which a person commits a drug trafficking crime--such as

when the gun is in the trunk? The Supreme Court majority said "yes." [FN47] In dissent, Justice Ginsburg--joined by Justices Rehnquist, Scalia [FN48], and Souter--argued that "carries a firearm" means to carry it so that it is ready to use. [FN49] In support for her view, Justice Ginsburg pointed to the Second Amendment "keep and bear arms" as an example of the ordinary meaning of carrying a firearm:

> It is uncontested that §924(c)(1) applies when the defendant bears a firearm, i.e., carries the weapon on or about his person "for the purpose of being armed and ready for offensive or defensive action in case of a conflict." Black's Law Dictionary 214 (6th ed. 1990) (defining the phrase "carry arms or weapons"); see ante, at 5. The Court holds that, in addition, "carries a firearm," in the context of §924(c)(1), means personally transporting, possessing, or keeping a firearm in a vehicle, anyplace in a vehicle.
>
> Without doubt, "carries" is a word of many meanings, definable to mean or include carting about in a vehicle. But that encompassing definition is not ubiquitously *119 necessary one. Nor, in my judgment, is it a proper construction of "carries" as the term appears in §924(c)(1). In line with Bailey and the principle of lenity the Court has long followed, I would confine "carries a firearm," for §924(c)(1) purposes, to the undoubted meaning of that expression in the relevant context. I would read the words to indicate not merely keeping arms on one's premises or in one's vehicle, but bearing them in such manner as to be ready for use as a weapon.
>
> . . .
>
> Unlike the Court, I do not think dictionaries, surveys of press reports, or the Bible tell us, dispositively, what "carries" means embedded in §924(c)(1). On definitions, "carry" in legal formulations could mean, inter alia, transport, possess, have in stock, prolong (carry over), be infectious, or wear or bear on one's person. At issue here is not "carries" at large but "carries a firearm." The Court's computer search of newspapers is revealing in this light. Carrying guns in a car showed up as the meaning "perhaps more than one third" of the time. Ante, at 4. One is left to wonder what meaning showed up some two thirds of the time. Surely a most familiar meaning is, as the Constitution's Second Amendment ("keep and bear Arms") (emphasis added) and Black's Law Dictionary, at 214, indicate: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." [FN50]

Perhaps no word in the Second Amendment is as hotly contested as the word "bear." The Standard Model scholars, following the usage of Webster's Dictionary, [FN51] the 1776 Pennsylvania Constitution, [FN52] and the 1787 call for a Bill of Rights from the dissenters at the Pennsylvania Ratification Convention read the word "bear" as including ordinary types of carrying. [FN53] Thus, a person carrying a gun for personal protection could be said to be bearing arms. If individuals can "bear arms," then the right to "bear arms" must belong to individuals.

In contrast, Garry Wills (who argues that the Second Amendment has "no real meaning" [FN54])

argues that "bear" has an exclusively military context. [FN55] It is impossible, he writes, to "bear arms" unless once is engaged in active militia service. *120 Hence, the right to "bear arms" does not refer to a right of individuals to carry guns. [FN56]

Justice Ginsburg's opinion plainly takes the former approach. She believes that "to bear arms" is to wear arms in an ordinary way. [FN57]

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C. Printz v. United States

In Printz v. United States, the Supreme Court voted 5 to 4 to declare part of the Brady Act unconstitutional, because the Act ordered state and local law enforcement officials to perform a federal background check on handgun buyers. [FN58] While the Printz decision was not a Second Amendment case, Printz did result in some Second Amendment language from Justice Clarence Thomas's concurring opinion.

Justice Thomas joined in Justice Scalia's five-person majority opinion, but he also wrote a separate concurring opinion--an opinion which shows that all the *122 Second Amendment scholarship in the legal journals is starting to be noticed by the Court.

The Thomas concurrence began by saying that, even if the Brady Act did not intrude on state sovereignty, it would still be unconstitutional. [FN59] The law was enacted under the congressional power "to regulate commerce. . .among the several states." [FN60] But the Brady Act applies to commerce that is purely intrastate--the sale of handgun by a gun store to a customer in the same state. [FN61] Justice Thomas suggested that although the interstate commerce clause has, in recent decades, been interpreted to extend to purely intrastate transactions, that interpretation is wrong. [FN62]

Even if the Brady Act were within the Congressional power over interstate commerce, Justice Thomas continued, the Act might violate the Second Amendment:

> . . . .Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. The First Amendment, for example, is fittingly celebrated for preventing Congress from "prohibiting the free exercise" of religion or "abridging the freedom of speech." The Second Amendment similarly appears to contain an express limitation on the government's authority. That Amendment provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. [n.1] If, however, the Second Amendment is read to confer [FN63] a personal right to "keep and bear arms," *123 a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. [n.2] As the parties did not raise this argument, however, we need not

> consider it here. 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." 3 J. Story, Commentaries §1890, p. 746 (1833). In the meantime, I join the Court's opinion striking down the challenged provisions of the Brady Act as inconsistent with the Tenth Amendment. [FN64]

There are several notable elements in the Thomas concurrence. First, Justice Thomas equates the Second Amendment with the First Amendment. This is consistent with the rule from the Valley Forge case that all parts of the Bill of Rights are on equal footing; none is preferred (or derogated). [FN65] He implicitly rejected second-class citizenship for the Second Amendment.

Justice Thomas then suggests that the Brady Act could be invalid under the Second Amendment. [FN66] Regarding right to bear arms provisions in state constitutions, some state courts have upheld various gun restrictions as long as all guns are not banned. [FN67] Justice Thomas plainly does not take such a weak position in defense of the Second Amendment. [FN68] His implication is that by requiring government permission and a week-long prior restraint on the right to buy a handgun, the Brady Act infringed the Second Amendment.

And of course by recognizing that handguns are a Second Amendment issue, Justice Thomas implicitly rejects the argument that the Second Amendment merely protects "sporting weapons" (usually defined as a subset of rifles and shotguns). [FN69]

Noting that the Second Amendment was not at issue in the case before the Court (the case was brought by sheriffs who did not want to be subject to federal commands, rather by gun buyers or gun dealers), Justice Thomas gently urges the rest of the Court to take up a Second Amendment case in the future. And he leaves no doubt about his personal view of the issue, as he quotes the 19th century legal scholar and Supreme Court Justice Joseph Story, who saw the right to bear arms "as the palladium of the liberties of a republic." [FN70]
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There are two footnotes in the Second Amendment portion of the Thomas concurrence. In the first footnote, the Justice states that the Supreme Court has not construed the Second Amendment since the 1939 case United States v. Miller (which upheld the National Firearms Act's tax and registration requirement for short shotguns [FN71]). He added that the Supreme Court has never directly ruled on the individual rights issue.

> 1 Our most recent treatment of the Second Amendment occurred in United States v. Miller, 307 U.S. 174 (1939), in which we reversed the District Court's invalidation of the National Firearms Act, enacted in 1934. In Miller, we determined 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" that could "contribute to the common defense." Id., at 178. The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.

The second footnote addressed the growing scholarship on the Second Amendment:

> 2 Marshaling an impressive array of historical evidence, 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. See, e.g., J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo American Right 162 (1994); S. Halbrook,

That Every Man Be Armed, The Evolution of a Constitutional Right (1984); Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L. J. 1236 (1994); Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L. J. 1193 (1992); Cottrol & Diamond, The Second Amendment: Toward an Afro Americanist Reconsideration, 80 Geo. L. J. 309 (1991); Levinson, The Embarrassing Second Amendment, 99 Yale L. J. 637 (1989); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204 (1983). Other scholars, however, argue that the Second Amendment does not secure a personal right to keep or to bear arms. See, e.g., Bogus, Race, Riots, and Guns, 66 S. Cal. L. Rev. 1365 (1993); Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L. J. 551 (1991); Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 Yale L. J. 661 (1989); Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. Am. Hist. 22 (1984). Although somewhat overlooked in our jurisprudence, the Amendment has certainly engendered considerable academic, as well as public, debate.

In the second footnote, Justice Thomas points out that the text of the Second Amendment (which refers to "the right of the people") suggests that the Second Amendment right belongs to individuals, not the government.
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As Justice Thomas notes, a large body of legal scholarship in the last fifteen years has examined the historical evidence, and found very strong proof that the Second Amendment guarantees an individual right. [FN72]

The Supreme Court does not always follow the viewpoint of the legal academy. But for most of this century, the Court has always been influenced by the academy's opinion. In the 1940s, for example, legal scholars paid almost no attention to the Second Amendment, and neither did the Supreme Court; in that decade, the Second Amendment was mentioned only once, and that mention was in a lone dissent. [FN73] But starting in the late 1970s, a Second Amendment revolution began to take place in legal scholarship. That an intellectual revolution was in progress became undeniable after the Yale Law Journal published Sanford Levinson's widely influential article The Embarrassing Second Amendment in 1989. [FN74] Since then, scholarly attention to the Second Amendment has grown even more rapidly. And more importantly, for purposes of this article, the Supreme Court Justices have raised the Second Amendment in six different cases in 1990-98. Six mentions in nine years hardly puts the Second Amendment on the same plane as the First Amendment; but six times in one decade is a rate six times higher than in the 1940s.

D. Albright v. Oliver

Albright involved a Section 1983 civil rights lawsuit growing out of a malicious decision to prosecute someone for conduct which was not crime under the relevant state law. [FN75] The issue before the Supreme Court was whether the prosecutor's action violated the defendant's Fourteenth Amendment Due Process rights. The majority said "no," in part because the claim

(growing out of the victim's unlawful arrest) would be better presented as a Fourth Amendment claim. [FN76]

Justice Stevens dissented, and was joined by Justice Blackmun; part of the dissent quoted Justice Harlan's analysis of the meaning of the Fourteenth Amendment, and the Fourteenth Amendment's protection of the "right to keep and bear arms":

*126 At bottom, the plurality opinion seems to rest on one fundamental misunderstanding: that the incorporation cases have somehow "substituted" the specific provisions of the Bill of Rights for the "more generalized language contained in the earlier cases construing the Fourteenth Amendment." Ante, at 7. In fact, the incorporation cases themselves rely on the very "generalized language" the Chief Justice would have them displacing. Those cases add to the liberty protected by the Due Process Clause most of the specific guarantees of the first eight Amendments, but they do not purport to take anything away; that a liberty interest is not the subject of an incorporated provision of the Bill of Rights does not remove it from the ambit of the Due Process Clause. I cannot improve on Justice Harlan's statement of this settled proposition:

> "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, 367 U.S. 497, 543 (1961) (dissenting opinion). [FN77]
>
> I have no doubt that an official accusation of an infamous crime constitutes a deprivation of liberty worthy of constitutional protection. The Framers of the Bill of Rights so concluded, and there is no reason to believe that the sponsors of the Fourteenth Amendment held a different view. The Due Process Clause of that Amendment should therefore be construed to require a responsible determination of probable cause before such a deprivation is effected. [FN78]

In Poe v. Ullman, the second Justice Harlan construed the "liberty" protected by the Fourteenth Amendment. [FN79] Although Justice Harlan's words originally were written in dissent, they have been quoted in later cases as the opinion of the Court. [FN80] Fourteenth Amendment "liberty" of course belongs to individuals, not to state governments. The point of the Fourteenth Amendment was to protect individual liberty from state infringement.

This "liberty" is not limited to "the specific guarantees elsewhere provided in the Constitution" including "the right to keep and bear arms." These individual *127 rights in the Harlan list, like other individual rights in the Bill of Rights, might be included in the Fourteenth Amendment's protection of "liberty" against state action. The point made by Justice Harlan (and Justice Stevens, quoting Justice Harlan), is that Fourteenth Amendment "liberty" includes things which are not part of the Bill of Rights, and does not necessarily include every individual right which is in the Bill of Rights.

While the Harlan quote makes no direct claim about whether the individual Bill of Rights items should be incorporated in the Fourteenth Amendment, Justice Harlan was plainly saying that simply because an individual right is protected in the Bill of Rights does not mean that it is protected by the Fourteenth Amendment. (Justice Black's view was directly opposite. [FN81]) Therefore, although the Harlan quote is not dispositive, the quote could appropriately be used to argue against incorporating the Second Amendment into the Fourteenth.

At the same time, the quote obviously treats the Second Amendment as an individual right. That is why Justice Harlan used the Second Amendment (along with the religion, speech, press, freedom from unreasonable searches, and property) to make a point about what kind of individual rights are protected by the Fourteenth Amendment.

As we shall see below, Justice Harlan's words are the words about the Second Amendment which the Supreme Court has quoted most often.

E. Planned Parenthood v. Casey

Planned Parenthood was a challenge to a Pennsylvania law imposing various restrictions on abortion. [FN82] In discussing the scope of the Fourteenth Amendment, Justice Sandra Day O'Connor's opinion for the Court approvingly quoted Justice Harlan's earlier statement that "the right to keep and bear arms" is part of the "full scope of liberty" contained in the Bill of Rights, and made applicable to the state by the Fourteenth Amendment. [FN83] Although the Planned Parenthood decision was fractured, with various Justices joining only selected portions of each others' opinions, the portion where Justice O'Connor quoted Justice Harlan about the Fourteenth and Second Amendments was joined by four other Justices, and represented the official opinion of the Court.

Planned Parenthood is the second of the four Supreme Court opinions that quote the Harlan dissent in Poe. (The other two will be discussed infra.) Had the authors of those opinions chosen to delete the "right to keep and bear arms" words, by using ellipses, they certainly could have done so. As we shall see when we come to the original Harlan opinion in Poe v. Ullman, the full Harlananalysis *128 of the scope of Fourteenth Amendment liberty includes important material which later Justices carefully avoided quoting. [FN84]

F. United States v. Verdugo-Urquidez

United States v. Verdugo-Urquidez [FN85] involved American drug agents' warrantless search of a Mexican's homes in Mexicali and San Felipe, Mexico. When Verdugo-Urquidez was prosecuted in a United States court for distribution of marijuana, his attorney argued that the evidence seized from his homes could not be used against him. [FN86] If the homes in question had been located in the United States and owned by an American, the exclusionary rule clearly would have forbade the introduction of the evidence. But did the U.S. Fourth Amendment protect Mexican citizens in Mexico?

Chief Justice Rehnquist's majority opinion said "no." Part of the Court's analysis investigated who are "the people" protected by the Fourth Amendment:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects

> "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendment provide that certain rights and power are retained by and reserved to "the people." See also U.S. Const., Amdt. 1 ("Congress shall make no law. . .abridging. . .the right of the people peaceably to assemble") (emphasis added); Art I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the Several States")(emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the People" protected by the Fourth Amendment, and by the First and Second Amendment, and to whom rights are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. [FN87] *129

By implication therefore, if "the people" whose right to arms is protected by the Second Amendment are American people, then "the right of the people" in the Second Amendment does not mean "the right of the states." [FN88] To adopt the *130 Henigan/Bogus theory, and find that the Second Amendment "right of the people" belongs to state governments would require a rejection of Verdugo's explication of who are "the people" of the Second Amendment and the rest of the Constitution.

The dissent by Justice Brennan would have given "the people" a broader reading: "'The People' are 'the governed.' " [FN89] The dissent's reading is likewise consistent only with the Standard Model, and not with the State's Rights view. If "the people" of the Second Amendment are "the governed," then the "right of the people" must belong to people who are governed, and not to governments. [FN90]
*131

Interestingly, the majority opinion's analysis of "the people" protected by the Bill of Rights was an elaboration of a point made by the dissenting opinion from the Ninth Circuit Court of Appeals, when the majority had held that Mr. Verdugo was entitled to Fourth Amendment protections. [FN91] When the Verdugo case went to the Supreme Court, the Solicitor General's office quoted from Ninth Circuit's dissent, but used ellipses to remove the dissent's reference to the Second Amendment. [FN92] The Supreme Court majority, of course, put the Second Amendment back in.

II. The Burger Court

The Second Amendment record of the Burger Court is more complex than that of the Rehnquist Court. The Rehnquist Court dicta about the Second Amendment points exclusively to the Second Amendment as an individual right. Indeed, except for Justice Thomas's observation that Miller did not resolve the individual rights issue, nothing in the Rehnquist Court's record contains even a hint that the Second Amendment might not be an individual right. In contrast, the Burger Court's dicta are not so consistent.

A. Lewis v. United States

The one Supreme Court majority opinion which is fully consistent with the Henigan/Bogus state's rights theory is Lewis v. United States. [FN93] Interestingly, the same advocates who dismiss Verdugo because it was not a Second Amendment case rely heavily on Lewis even though it too is not a Second Amendment *132 case. The issue in Lewis was primarily statutory interpretation, and secondarily the Sixth Amendment. A federal statute imposes severe penalties on persons who possess a firearm after conviction for a felony. [FN94] In 1961, Lewis had been convicted of burglary in Florida [FN95]; since Lewis was not provided with counsel, his conviction was invalid under the rule of Gideon v. Wainright. [FN96] The question for the Court was whether Congress, in enacting the 1968 law barring gun possession by a person who "has been convicted by a court of the United States or of a State. . .of a felony," meant to include persons whose convictions had been rendered invalid by the 1963 Gideon case. Writing for a six-justice majority, Justice Blackmun held that the statutory language did apply to person with convictions invalid under Gideon. [FN97]

Given the non-existent legislative history on the point, Justice Blackmun was forced to be rather aggressive in his reading of Congressional intent. For example, Senator Russell Long, the chief sponsor of the Gun Control Act of 1968, had explained that "every citizen could possess a gun until the commission of his first felony. Upon his conviction, however, Title VII would deny. . .the right to possess a firearm. . . ." [FN98] This supposedly showed Congressional intent to disarm people like Lewis, since the Senator had "stressed conviction, not a 'valid' conviction." [FN99] By this reasoning, the Gun Control Act of 1968 would likewise apply to Scottsboro Boys; they had been tortured into confessing a crime which they did not commit, but they did indeed have a "conviction" for murder, even if not "a valid conviction." [FN100] Justice Brennan's dissent pointed out that the majority's reasoning would impose the Gun Control Act even on people whose convictions had been overturned by an appellate court. [FN101]
Did the Gun Control Act (as interpreted by the Court) violate equal protection?

> Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit possession of a firearm. See, e.g., United States v. Ransom, 515 F.2d 885, 891-892 (CA5 1975), cert. Denied, 424 U.S. 944 (1976). This Court has repeatedly recognized that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm. See Richardson v. Ramirez, 418 U.S. 24 (1974)(disenfranchisement); De Veau v. Braisted, 363 U.S. 144, 363 U.S. 144 (1960)(proscription against holding *133 office in a waterfront labor organization); Hawker v. New York, 170 U.S. 189 (1898)(prohibition against the practice of medicine). [FN102]

From this, it is reasonable to infer that possession of a firearm is a "right," but a right which is far less "fundamental" than voting, serving as an officer in a union, or practicing medicine. As to whether possessing a firearm is a constitutional right, the opinion does not say. But the opinion could certainly be cited for support that arms possession is not "fundamental" enough to be protected by the Fourteenth Amendment's due process clause.

In a footnote of the section supporting the rationality of a statute disarming convicted felons, Justice Blackmun wrote:

> These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See United States v. Miller, 307 U.S. 174, 178 (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well-regulated militia"); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F. 2d 1288, 1290, n. 5 (CA7 1974); United States v. Johnson, 497 F.2d 548 (CA4 1974); Cody v. United States, 460 F.2d 34 (CA8), cert. denied, 409 U.S. 1010 (1972)(the latter three cases holding, respectively, that 1202(a)(1), 922(g), and 922(a)(6) do not violate the Second Amendment). [FN103]

Attorney Stephen Halbrook (the successful plaintiffs' attorney in the Supreme Court gun cases of Printz v. United States [FN104], and United States v. Thompson/Center [FN105]) reads Lewis as reflecting the principle that since a legislature may deprive a felon "of other civil liberties, and may even deprive a felon of life itself--felons have no fundamental right to keep and bear arms." [FN106]

As a matter of formal linguistics, Halbrook's reading of Lewis is not impermissible. But it is also possible to read the Lewis opinion as saying, in effect, "since no-one has a right to have a gun, a law against felons owning guns does not infringe on Constitutional rights."

What of the three Court of Appeals cases cited by Justice Blackmun?

*134 The Three Winchester 30-30 Caliber Lever Action Carbines case upholds the forfeiture of guns possessed by a convicted felon. The footnote cited by the Supreme Court states:

Apparently at the district court level the defendant argued that 18 U.S.C. App. § 1202 was invalid as an "infringement of the second amendment's protection of the right to bear arms, the first amendment's prohibition of bills of attainder and ex post facto laws, and the fourteenth amendment's due process clause." These arguments were appropriately rejected. [citations omitted] [FN107]

The Cody [FN108] case upheld the conviction of a felon who falsified a federal gun registration form and falsely claimed that he had no felony conviction. Regarding Cody's Second Amendment claim, the Eighth Circuit stated:

> It has been settled that the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms. The Second Amendment's guarantee extends only to use or possession which "has some reasonable relationship to the preservation or efficiency of a well regulated militia." Id [Miller]. At 178, 59 S. Ct. at 818. See United States v. Synnes, 438 F.2d 764, 772 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009, 92 S. Ct. 687, 30 L. Ed. 2d 657 (1972); Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942), cert. denied sub nom., Velazquez v. United States, 319 U.S. 770, 63 S. Ct. 1431, 87 L. Ed. 1718 (1943). [FN109] We find no evidence that the prohibition of § 922(a) (6) obstructs the maintenance of a well regulated militia. [FN110]

In Johnson, the Fourth Circuit upheld the Gun Control Act as applied to a convicted felon who transported a firearm in interstate commerce. [FN111] Regarding Johnson's Second Amendment claim, the Circuit wrote that "The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship

to the preservation or efficiency of a well regulated militia." ' [FN112]

Now a "collective right" can be read two ways: it can be like "collective property" in a Communist property; since it belongs to all the people collectively, it belongs only to the government. Alternatively, a "collective right" to arms can be a right of all the people to have a militia, and for this purpose, *135 each person has a right to possess arms for militia purposes (but not to possess arms for other purposes, such as self- defense). [FN113] Indeed, this is the approach taken by Aymette, the Tennessee Supreme Court case which is the sole citation for the rule of decision in Miller; Aymette states that the Second Amendment protects individual possession of militia-type arms, so that those individuals may collectively exercise their rights in a militia. [FN114]

Neither Lewis nor its three cited Court of Appeals cases claim that the Second Amendment right belongs to state governments. And none of them goes so far as to claim that law-abiding American citizens have no Second Amendment right to possess arms. But Lewis and its cited cases, especially Johnson, certainly come close to that proposition. Although Halbrook's reading of Lewis is not formally wrong, the spirit of Lewis has little in common with the Standard Model of the Second Amendment.

If Lewis were the Supreme Court's last word on the Second Amendment, the Standard Model, no matter how accurate in its assessment of original intent, would seem on shaky ground as a description of contemporary Supreme Court doctrine. But Lewis, while not ancient, is no longer contemporary. As discussed above, six subsequent Supreme Court cases have addressed the Second Amendment as an individual right. Only two justices from the Lewis majority remain on the Court, and both of those justices (Rehnquist and Stevens) have written 1990s opinions which regard the Second Amendment as an individual right.

The Rehnquist cases suggest that it is unlikely that the current Court would read Lewis's hostile but ambiguous language as negating an individual right.

B. Moore v. East Cleveland

Not only do the Rehnquist cases impede any effort to read Lewis as the definitive state's right case, so does a case decided four years before Lewis. The Moore v. East Cleveland litigation arose out of a zoning regulation which made it illegal for extended families to live together. [FN115] The plurality opinion by Justice Powell found in the Fourteenth Amendment a general protection for families to make their own living arrangements. [FN116] Thus, the East Cleveland law, which, for example, forbade two minor cousins to live with their grandmother, [FN117] was unconstitutional.

*136 In discussing the boundaries of the Fourteenth Amendment, the Powell plurality opinion for the Court quoted from Justice Harlan's dissent in Poe v. Ullman. This was the same language that was later quoted by Justice O'Connor's majority opinion in Planned Parenthood v. Casey, [FN118] and by Justice Stevens' dissent in Albright v. Oliver [FN119]:

> But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.
> Understanding those reasons requires careful attention to this Court's function under the Due Process clause. Mr. Justice Harlan described it eloquently:

> Due process cannot be reduced to any formula; its content cannot be determined by reference to any code. . .The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . .
> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints" Poe v. Ullman, supra, at 542-543 (dissenting opinion). [FN120]

In dissent, Justice White also quoted from Justice Harlan's words in Poe. While Justice White included the language about the Second Amendment, he did not include the preceding paragraph about tradition. [FN121]

Since the Fourteenth Amendment belongs exclusively to individuals, and not to state governments, the only possible reading of Moore v. East Cleveland is that the Second Amendment protects an individual right.

The "tradition" paragraph from Justice Harlan, quoted by Justice Powell, strengthens an argument for incorporating the Second Amendment. The right to arms had roots as one of the "rights of Englishmen" recognized by the English 1689 Bill of Rights, [FN122] and was adopted in nine of the first fifteen states' *137 constitutions. [FN123] When the Constitution was proposed, five state ratifying conventions called for a right to arms--more than for any other single right that became part of the Bill of Rights. [FN124] With the exception of a single concurring opinion by an Arkansas judge in 1842, [FN125] every known judicial opinion and scholarly commentary from the nineteenth century treated the Second Amendment as an individual right. [FN126]

Justice Harlan's "tradition is a living thing" analysis also looks at whether the right in question is supported by modern "tradition." The right to arms fares well under this analysis too. Between a third and a half of all American households choose to own firearms, [FN127] and many others own other types of "arms" (such as edged weapons) which might fall within the scope of protected "arms." [FN128] Today, forty-four state constitutions guarantee a right to arms [FN129]; in 15 states in the last three decades, voters have added or strengthened an arms right to their state constitution, always by a very large majority. [FN130] Twenty years ago, only a few states allowed ordinary citizens to obtain a permit carry a concealed handgun for protection; now twenty-nine states have "shall issue" laws, and two states require no permit at all. [FN131]

Contrast all the "traditional" support for the right to arms with the absence of such support for the Fifth Amendment's guarantee against the taking of property without due process and just compensation. No state ratifying convention had demanded such a clause, and no such right was recognized in in the *138 English Bill of Rights. [FN132] If the just compensation is "traditional" enough to have been incorporated, as it has been, [FN133] the argument for incorporating the Second Amendment is all the stronger.

But while the Harlan language quoted in East Cleveland has favorable implications for Second Amendment incorporation, East Cleveland does not itself perform the incorporation. [FN134]

And while East Cleveland's implication for the Second Amendment as an individual right seems clear enough under its own terms, Justice Powell's personal views appear to have changed after 1976. After retiring from the Court, in 1988 he gave a speech to the American Bar Association in which he said that the Constitution should not be construed to guarantee a right to own handguns [FN135]; this speech was not necessarily inconsistent with East Cleveland, since a Second Amendment right to arms might exclude some types of arms. But in 1993, Justice Powell went even further, suggesting in a television interview that the Constitution should not be read to as guaranteeing a right to own even sporting guns. [FN136]
*139 Whatever the evolution of Justice Powell's thoughts about gun rights, the only words he ever put in the United States Reports treat the Second Amendment as an individual right.

C. Adams v. Williams

The only written opinion from a Supreme Court Justice which plainly rejects an individual right came from Justice Douglas, dissenting in the 1972 case of Adams v. Williams. [FN137] Acting on a tip, a police officer stopped a motorist for questioning, and then grabbed a revolver hidden in the driver's waistband. [FN138] The Supreme Court majority upheld the officer's actions as a reasonable effort to protect his safety. [FN139]
Justice Douglas, a strong defender of the Fourth Amendment right to be free from unreasonable searches, dissented. [FN140] After discussing Fourth Amendment issues, Justice Douglas then editorialized in favor of handgun control and prohibition, and asserted that the Second Amendment posed no barrier to severe gun laws:

> The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, "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."
> There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.
> The leading case is United States v. Miller, 307 U.S. 174, upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence that a sawed-off shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia." Id., at 178. The Second Amendment, it was held, "must be interpreted and applied" with the view of maintaining a "militia."
> "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without theconsent *140 of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia - civilians primarily, soldiers on occasion." Id., at 178-179.

> Critics say that proposals like this water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia. But if watering-down is the mood of the day, I would prefer to water down the Second rather than the Fourth Amendment. I share with Judge Friendly a concern that the easy extension of Terry v. Ohio, 392 U.S. 1, to "possessory offenses" is a serious intrusion on Fourth Amendment safeguards. "If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows 'that criminal activity may be afoot." ' 436 F.2d, at 39, quoting Terry v. Ohio, supra, at 30. [FN141]

Justice Douglas's statement is a clear affirmation of the anti-individual interpretation of the Second Amendment which is espoused by the anti-gun lobbies. Since Justice Douglas was writing in dissent, his opinion creates no legal precedent. Nevertheless, the opinion is emblematic of the belief of some civil libertarians that the move to "water down" the Fourth Amendment can be forestalled by watering down the Second Amendment.

Justice Brennan did not join the Douglas dissent, but instead wrote his own. Justice Brennan presciently noted that the Court's loose standard for "stop and frisk" would become a tool for police officers to search people at will, with officer safety often serving as a mere pretext. [FN142] (Adams v. Williams is one of the key cases opening the door to the broad variety of warrantless searches which are now allowed.) Justice Brennan also noted the illogic of allowing stop-and-frisk for guns in a state which allows citizens to carry concealed handguns. [FN143] (Connecticut was one of the first states to adopt "shall issue" laws for concealed handgun permits; now, thirty-one states have such laws. [FN144])

Justice Marshall's dissent made a similar point, noting that after the officer discovered the gun, he immediately arrested Williams, without asking if Williams had a permit. [FN145]

D. Roe v. Wade

*141

The year after Justice Douglas took a clear stand against individual Second Amendment rights in Adams, Justice Stewart authored an opinion in the opposite direction.

The majority opinion in Roe v. Wade, [FN146] written by Justice Harry Blackmun, has been justly criticized for having no connection with the text of the Constitution, and only a tenuous connection with the prior precedents of the Supreme Court. [FN147] Justice Potter Stewart, perhaps recognizing the weakness of the Blackmun opinion, authored a concurring opinion coming to the same result as Justice Blackmun, but attempting to ground the result more firmly in precedent. [FN148] As part of the analysis arguing that the right to abortion was part of the "liberty" protected by the Fourteenth Amendment, Justice Stewart quoted Justice Harlan's dissenting opinion in Poe v. Ullman [FN149], which had listed the right to keep and bear arms as among the liberties guaranteed by the Fourteenth Amendment:

> As Mr. Justice Harlan once wrote: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum

which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, 367 U.S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (dissenting opinion). [FN150]

Thus, the Harlan dissenting language about the Second Amendment, from Poe v. Ullman, has been quoted in one majority opinion (Planned Parenthood v. Casey [FN151]), one plurality opinion (Moore v. East Cleveland [FN152]), two dissents*142 (Albright v. Oliver and Moore v. East [FN153]), and one concurrence (Roe v. Wade [FN154]). In contrast, the Douglas dissenting language about the Second Amendment, from Adams v. Williams, [FN155] has never been quoted in an opinion by any Justice.

E. Laird v. Tatum

During the Cold War and the Vietnam War, the United States Army illegally spied on American anti-war critics. [FN156] When the Army's conduct was to discovered, a group of individuals who had been spied upon brought suit in federal court. [FN157] In a sharply divided five-four decision, the Supreme Court majority held that the suit was not justiciable. [FN158] The plaintiffs could not show that they had been harmed by the Army, or that there was a realistic prospect of future harm, and hence there was no genuine controversy for a federal court to hear. [FN159] Justice Douglas (joined by Justice Marshal) penned a fiery dissent, invoking the long struggle to free civil life from military domination. [FN160]

Justice Douglas began by examining the power which the Constitution grants Congress over the standing army and over the militia. [FN161] Since Congress is not granted any power to use the army or militia for domestic surveillance, it necessarily follows that the army has no power on its own to begin a program of domestic surveillance. [FN162]

Moving onto a broader discussion of the dangers of military dictatorship, Justice Douglas quoted an article which Chief Justice Earl Warren had written in the New York University Law Review, which mentioned the Second Amendment as one of the safeguards intended to protect America from rule by a standing army. [FN163]

As Chief Justice Warren has observed, the safeguards in the main body of the Constitution did not satisfy the people on their fear and concern of military dominance:

> "They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any housein *143 time of peace without the consent of the owner. Other Amendments guarantee the right of the people to assemble, to be secure in their homes against unreasonable searches and seizures, and in criminal cases to be accorded a speedy and public trial by an impartial jury after indictment in the district and state wherein the crime was committed. The only exceptions made to these civilian trial procedures are for

> cases arising in the land and naval forces. Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe that our Founders' determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights." [FN164]

The Earl Warren law review language is, on its face, consistent with individual rights. He listed the right to arms among other individual rights, and he treated the Second Amendment's subordinate clause (about the importance of well-regulated militia) as protecting something distinct from the Second Amendment's main clause (the right of the people to keep and bear arms). [FN165]

But based on Justice Douglas's dissent the same year in Adams, we cannot ascribe to Justice Douglas the full implication of what Chief Justice Warren wrote in the N.Y.U. Law Review. And while Chief Justice Warren's N.Y.U. article is interesting, Chief Justice Warren never wrote anything about the Second Amendment in a Supreme Court opinion.

III. The Warren, Vinson, and Hughes Courts

During the tenure of Chief Justices Earl Warren (1953-69) and Fred Vinson (1946-53), opinions in nine cases addressed the Second Amendment. Seven of those opinions (majority opinions by Justices Brennan, Frankfurter, Harlan, and Jackson; a concurrence by Justice Black; and dissents by Justices Black and Harlan) recognized an individual right in the Second Amendment. The eighth case, an "appeal dismissed" contained no explanation, and thus was consistent with both the Standard Model individual right and the Henigan/Bogus state's right. The earliest case in this period was a 1934 decision that used the Second Amendment to support a state's right to control its militia. [FN166]

A. Burton v. Sills

*144 Burton v. Sills involved a challenge to the then- new gun licensing law in New Jersey. [FN167] The law did not ban any guns, but established a licensing system intended to screen out people with serious criminal convictions, substance abusers, and the like. After the New Jersey Supreme Court rejected a Second Amendment challenge to the law [FN168], the plaintiffs asked the Supreme Court to review the case; the request came in the form of an "appeal," rather than a petition for a writ of certiorari. [FN169]

The United States Supreme Court declined to hear the case. [FN170] Since the case had come by appeal, rather than petition for a writ, the Court wrote the standard phrase used at the time in denying an appeal: "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question." [FN171]

The Supreme Court has explained that dismissals such as the one in Burton have some value in guiding lower courts:

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. After Salera, for example, other courts were not free to conclude that the Pennsylvania provision invalidated was

nevertheless constitutional. Summary actions, however, including Salera, should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved. [FN172]

Thus, following the appeal dismissal in Burton v. Sills, a lower federal court could not conclude that the New Jersey gun licensing law violated the Second Amendment.

The appeal dismissal does not necessarily endorse the reasoning of the state court against which the appeal was taken. (The New Jersey Supreme Court had said that the Second Amendment is not an individual right. [FN173])

*145 The plaintiffs in Burton had conceded that prior Supreme Court cases (particularly the 1886 Presser case) had said that the Second Amendment limits only the federal government, and not state governments. [FN174] The plaintiffs invited the courts to use the Burton case as an opportunity to reverse prior precedent. [FN175] The appeal dismissal in Burton may be read as the Court's declining the invitation to re-open the issue decided by Presser.

Justice Thomas's concurrence in Printz, [FN176] suggesting that the Brady Act waiting period may violate the Second Amendment, implies he would not read Burton as asserting that a New Jersey-style gun licensing system would be constitutional if enacted by the Congress. Reading Burton as an authorization for sweeping federal gun licensing would be inconsistent with the Supreme Court's teaching that appeal dismissals "should not be understood as breaking new ground." [FN177]

Given the plaintiffs' requested grounds for Supreme Court review (to overturn Presser) it is logical to view Burton as a re-affirmance of Presser. [FN178]

On the other hand, since Burton contains no explicit reasoning, the case is not directly contradictory to the Henigan/Bogus theory.

B. Duncan v. Louisiana

In this case, the Supreme Court incorporated the Sixth Amendment right to jury trial, as part of the Fourteenth Amendment's "due process" guarantee. [FN179] Justice Black, joined by Justice Douglas, concurred, and restated his argument from Adamson v. California [FN180] (infra) that the Fourteenth Amendment's "privileges and immunities" clause should be read to include everything in the first eight Amendments. [FN181] He quoted a statement made on the Senate floor by Senator Jacob Howard, one of the lead sponsors of the Fourteenth Amendment:

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. . .To these privileges and immunities, whatever they may be--for they are not and cannot be fully defined in their entire extent and precise nature--to these should be added the personal rights guaranteed 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 *146 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 bear arms; the right to be exempted from the quartering of soldiers in a house without consent of the owner. . . . [FN182]

Justice Black's use in Duncan of the quote describing "the right to keep and bear arms" as one of "the personal rights guaranteed and secured by the first eight amendments" is fully consistent

with his writing on the bench and in legal scholarship that the Second Amendment right to arms was one of the individual rights which the Fourteenth Amendment (properly interpreted) makes into a limit on state action. [FN183]

C. Malloy v. Hogan

This 1964 case used the Fourteenth Amendment's due process clause to incorporate the Fifth Amendment's privilege against self-incrimination. [FN184] Discussing the history of Fourteenth Amendment jurisprudence, Justice Brennan listed various "Decisions that particular guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment." [FN185] Among these were "Presser v. Illinois, 116 U.S. 252, 265 (Second Amendment)," [FN186] along with various other cases, almost of which had been, or would be, repudiated by later decisions on incorporation. [FN187]

As discussed above, any discussion of the Second Amendment as something which could be incorporated, even if no incorporation has been performed, necessarily presumes that the Second Amendment is an individual right. Justice Brennan's explication of Presser as a case which rejects privileges and immunities incorporation is of some significance as a modern interpretation of Presser, since, as we shall discuss infra, the years after the1886 *147 Presser decision generated a variety of opinions about whether Presser actually had rejected incorporation.

D. Konigsberg v. State Bar of California

In Konigsberg, the Court majority upheld the state of California's refusal to admit to the practice of law an applicant who refused answer questions about his beliefs regarding communism. [FN188] In dissent, Justice Black argued that First Amendment rights were absolute and that the inquiry into the prospective lawyer's political beliefs was therefore a violation of the First Amendment. [FN189]

Justice Harlan's majority opinion rejected Justice Black's standard of constitutional absolutism. [FN190] The Harlan majority opinion is one of the classic examples of the "balancing" methodology of jurisprudence. [FN191] Justice Harlan pointed to libel laws as laws which restrict speech, but which do not infringe the First Amendment. [FN192] Similarly, he pointed to the Supreme Court's ruling in United States v. Miller as an example of a law which restricted the absolute exercise of rights, but which had been held not to be unconstitutional. [FN193] Justice Harlan thereby treated the First and Second Amendment as constitutionally identical: guaranteeing an individual right, but not an absolute right.

n. 10. That view, which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: "Congress shall make no law . . . abridging the freedom speech, or of the press; or the right of the people peaceably to assemble . . . ." But as Mr. Justice Holmes once said: "[T] he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." Gompers v. United States, 233 U.S. 604, 610. In this connection also compare the

equally unqualified command of the Second Amendment: "the right of the people to keep and bear arms shall not be infringed." And see United States v. Miller, 307 U.S. 174. [FN194]

The year before Justice Black's absolutist interpretative model was rejected by the majority of the Court, Justice Black had detailed the absolutisttheory *148 in the first annual James Madison lecture at the New York University School of Law. [FN195] Discussing each part of the Bill of Rights, Justice Black explained how each guarantee was unequivocal and absolute. For example, under the Sixth Amendment, a defendant had a "definite and absolute" right to confront the witnesses against him. [FN196] Regarding the Second Amendment, Justice Black explained: Amendment Two provides that:

> A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
> Although the Supreme Court has held this Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute. [FN197]

Did Justice Black mean that individuals have an absolute right to possess militia-type arms, or did Justice Black mean that state governments have an absolute right to arm the state militias as the state governments see fit? His view is particularly important, because he served on the Court that decided Miller, and he joined in the Court's unanimous opinion.

Throughout the New York University speech, Justice Black referred exclusively to individual rights, and never to state's rights. For example, he began his speech by explaining "I prefer to think of our Bill of Rights as including all provisions of the original Constitution and Amendments that protect individual liberty. . ." [FN198] If Justice Black thought that the Second Amendment protected state power, rather than individual liberty, he would not have included the Second Amendment in his litany of "absolute" guarantees in the Bill of Rights. In the discussion of Adamson v. California, infra, we will see "definite and absolute" proof that Justice Black considered the Second Amendment an individual right.

E. Poe v. Ullman

In the 1961 case Poe v. Ullman, the Court considered whether married persons had a right to use contraceptives. [FN199] The majority said "no," but the second Justice Harlan, in a dissent (which gained ascendancy a few years later in Griswold v. Connecticut), wrote that the Fourteenth Amendment did guarantee a right of privacy. In developing a theory of exactly what the Fourteenth Amendment due process clause did protect, Justice Harlan wrote that the clause was not limited exclusively to "the precise terms of the specific guarantees *149 elsewhere provided in the Constitution," such as "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures." [FN200]

It is impossible to read Justice Harlan's words as anything other than a recognition that the Second Amendment protects the right of individual Americans to possess firearms. The due process clause of the Fourteenth Amendment, obviously, protects a right of individuals against governments; it does not protect governments, nor is it some kind of "collective" right. It is also notable that Justice Harlan felt no need to defend or elaborate his position that the Second Amendment guaranteed an individual right. Despite the Henigan claim that the non-individual nature of the Second Amendment is "well- settled," it was unremarkable to Justice Harlan that

the Second Amendment guaranteed the right of individual people to keep and bear arms.

Like the Brandeis and Holmes dissents in the early free speech cases, the Harlan dissent in Poe today seems to be a correct statement of the law.

Some parts of the Harlan dissent, however, have not been quoted by future courts. For example, even though later opinions have quoted approvingly the Harlan language that the Fourteenth Amendment forbids "all substantial arbitrary impositions," [FN201] those quotations omit the list of cases that Justice Harlan cited for the proposition. That list included Allgeyer v. Louisiana [FN202] and Nebbia v. New York, [FN203] both of which used the Fourteenth Amendment in defense of economic liberty. But Justice Harlan was certainly right that modern use of the Fourteenth Amendment to protect non- enumerated rights has its roots in the liberty of contract due process cases from the turn of the century. Although it is not currently respectable to say so in a Supreme Court opinion, cases such as Allgeyer and its progeny have as much a logical claim to be part of the Fourteenth Amendment as do Griswold [FN204] and its progeny; both lines of cases protect personal freedom from "substantial arbitrary impositions."

But the fact that Allgeyer and Nebbia end up trimmed in later quotations of Justice Harlan's words shows that the Justices who used the quote later (Stevens, O'Connor, Powell, and Stewart) were not just quoting without thought; they knew how to excise parts of Harlan's language that they did not agree with, such as the references to economic liberty. That economic liberty was excised, while the Second Amendment stayed in, may, therefore, be plausibly considered as the writer's decision.

*150 Also unquoted by later Courts has been Justice Harlan's statement, "Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights." [FN205] In support of this proposition, he cited, inter alia, Presser v. Illinois, a nineteenth century case which will be discussed infra.

Interestingly, Justice Douglas wrote his own dissent, in which he stated that the Fourteenth Amendment must protect "all" the Bill of Rights. [FN206] This implies that the Second Amendment is an individual right, if it can be protected by the Fourteenth Amendment. But Justice Douglas later rejected this view, in his Adams v. Williams dissent. [FN207]

F. Knapp v. Schweitzer

Knapp involved the applicability of the Fifth Amendment's self-incrimination clause to the states. [FN208] Justice Frankfurter's majority opinion refused to enforce the clause against the states. In support of his position, the Justice reeled off a list of nineteenth century cases, including Cruikshank (discussed infra) which he cited for the proposition that it was well-settled almost all of the individual rights guarantees in the Bill of Rights were not applicable to the states:

> n. 5. By 1900 the applicability of the Bill of Rights to the States had been rejected in cases involving claims based on virtually every provision in the first eight Articles of Amendment. See, e. g., Article I: Permoli v. Municipality No. 1, 3 How. 589, 609 (free exercise of religion); United States v. Cruikshank, 92 U.S. 542, 552 (right to assemble and petition the Government); Article II: United States v. Cruikshank, supra, at 553 (right to keep and bear arms); Article IV: Smith v. Maryland, 18 How. 71, 76 (no warrant except on probable cause); Spies

v. Illinois, 123 U.S. 131, 166 (security against unreasonable searches and seizures); Article V: Barron v. Baltimore, note 2, supra, at 247 (taking without just compensation); Fox v. Ohio, 5 How. 410, 434 (former jeopardy); Twitchell v. Pennsylvania, 7 Wall. 321, 325-327 (deprivation of life without due process of law); Spies v. Illinois, supra, at 166 (compulsory self-*151 incrimination); Eilenbecker v. Plymouth County, 134 U.S. 31, 34-35 (presentment or indictment by grand jury); Article VI: Twitchell v. Pennsylvania, supra, at 325-327 (right to be informed of nature and cause of accusation); Spies v. Illinois, supra, at 166 (speedy and public trial by impartial jury); In re Sawyer, 124 U.S. 200, 219 (compulsory process); Eilenbecker v. Plymouth County, supra, at 34-35 (confrontation of witnesses); Article VII: Livingston's Lessee v. Moore, 7 Pet. 469, 551-552 (right of jury trial in civil cases); Justices v. Murray, 9 Wall. 274, 278 (re-examination of facts tried by jury); Article VIII: Pervear v. Massachusetts, 5 Wall. 475, 479- 480 (excessive fines, cruel and unusual punishments). [FN209]

Here again, the Court majority treated the Second Amendment right to arms as simply one of the many individual rights guarantees contained in the Bill of Rights.

G. Johnson v. Eisentrager

After the surrender of Germany during World War II, some German soldiers in China aided the Japanese army, in the months that Japan continued to fight alone. [FN210] The American army captured them, and tried them by court-martial in China as war criminals. [FN211] The Germans argued that the trial violated their Fifth Amendment rights, and pointed out that the Fifth Amendment is not by its terms limited to American citizens. [FN212]

Justice Jackson's majority opinion held that Germans had no Fifth Amendment rights. [FN213] He pointed out that if Germans could invoke the Fifth Amendment, they could invoke the rest of the Bill of Rights. [FN214] This would lead to the absurd result of American soldiers, in obedience to the Second Amendment, being forbidden to disarm the enemy:

If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, [FN215] the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "were-wolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the *152 Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments. [FN216] The "irreconcilable enemy elements, guerrilla fighters, and 'were-wolves' " in Justice Jackson's hypothetical are obviously not American state governments. Instead they are individuals and as individuals would have Second Amendment rights, if the Second Amendment were to apply to non-Americans. [FN217] Interestingly, Justice Jackson's reasoning echoed an argument made in Ex Parte Milligan by the Attorney General: the Fifth Amendment must contain implicit exceptions, which allow trial of civilians under martial law; the whole Bill of Rights contains implicit exceptions, for without such exceptions, it would be a violation of the Second Amendment to disarm rebels, and the former slave states' forbidding the slaves to own guns would likewise have been unconstitutional. [FN218]

*155

H. Adamson v. California

In the Adamson case, the defendant was convicted after a trial in a California state court; California law allowed the judge to instruct the jury that the jury could draw adverse inferences from a defendant's failure to testify. [FN219] This jury instruction was plainly inconsistent with established Fifth Amendment doctrine; [FN220] but did the Fifth Amendment apply in state courts, or only in federal courts?

The Adamson majority held that the Fifth Amendment's protection against compelled self-incrimination was not made enforceable in state courts by the Fourteenth Amendment's command that states not deprive a person of life, liberty, or property without "due process of law." [FN221]

In dissent, Justice Black (joined by Justice Douglas) argued that the Fourteenth Amendment made all of the Bill of Rights enforceable against the states, via the Amendment's mandate: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." [FN222] Listing a series of 19th century cases in which the Supreme Court had refused to make certain individual rights from the Bill of Rights enforceable against the states (including Presser, involving the right to keep and bear arms), Justice Black argued that the Court's prior cases had not been so explicit as to foreclose the current Court from considering the issue:

> Later, but prior to the Twining case, this Court decided that the following were not "privileges or immunities" of national citizenship, so as to make them immune against state invasion: the Eighth Amendment's prohibition against cruel and unusual punishment, In re Kemmler, 136 U.S. 436; the Seventh Amendment's guarantee of a jury trial in civil cases, Walker v. Sauvinet, 92 U.S. 90; the Second Amendment's 'right of the people to keep and bear arms. . .,' Presser v. Illinois, 116 U.S. 252, 584; the Fifth and Sixth Amendments' requirements for indictment in capital or other infamous crimes, and for trial by jury in criminal prosecutions, Maxwell v. Dow, 176 U.S. 581. While it can be argued that these cases implied that no one of the provisions of the Bill of Rights was made applicable to the states as attributes of national citizenship, no one of them expressly so decided. In fact, the Court in Maxwell v. Dow, supra, 176 U.S. at pages 597, 598, 20 S.Ct. at page 455, concluded no more than that 'the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to *156 the Federal Constitution against the powers of the Federal government.' Cf. Palko v. Connecticut, 302 U.S. 319, 329, 153. [FN223] Thus, Justice Black put the Second Amendment in the same boat as Amendments Five, Six, Seven, and Eight: individual rights which prior Courts had declined to enforce against the states, but which the present Court still had the choice to incorporate.

In a lengthy Appendix, Justice Black set forth the history of the creation of the Fourteenth Amendment, quoting at length from congressional proponents of the Amendment, who indicated

that the Amendment was intended to make all of the rights in the first eight amendments of the Bill of Rights enforceable against the states. [FN224] This view, held by Justice Black and many of the backers of the Fourteenth Amendment, is of course inconsistent with the idea that the Second Amendment guarantees only a right of state governments. The point of the Fourteenth Amendment is to make individual rights enforceable against state governments.

First, the Appendix set forth the background to the Fourteenth Amendment. Congress had enacted the Civil Rights Bill in response to problems in states such as Mississippi, where, Senator Trumball (Chairman of the Senate Judiciary Committee) explained, there was a statute to "prohibit any negro or mulatto from having firearms. . ." [FN225] When the Civil Rights Bill went to the House, Rep. Raymond, who opposed the Bill "conceded that it would guarantee to the negro 'the right of free passage. . .He has a defined status. . . .a right to defend himself. . .to bear arms. . . .to testify in the Federal courts." [FN226]
Then,

> On May 23, 1866, Senator Howard introduced the proposed amendment to the Senate in the absence of Senator Fessenden who was sick. Senator Howard prefaced his remarks by stating:
> "I. . .present to the Senate. . .the views and the motives [of the Reconstruction Committee]. . . .One result of their investigation has been the joint resolution for the amendment of the Constitution of the United States now under consideration. . . .
> "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. . . .
> . . .
> *157 "Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be--for they are not and cannot be fully defined in their entire extent and precise nature--to these should be added the personal rights guarantied 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. [FN227]

Later in the Appendix, Justice Black quoted Rep. Dawes's statement that by the Constitution the American citizen

> "secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he had secured to him the right to keep and bear arms in his defense. Then, after that, his home was secured in time of peace from the presence of a soldier. . . ." [FN228]
>
> . . . .
>
> "It is all these, Mr. Speaker, which are comprehended in the words 'American citizen,' and it is to protect and to secure him in these rights, privileges, and immunities this bill is before the House. And the question to be settled is, whether by the Constitution, in which these provisions are inserted, there is also power to guard, protect, and enforce these rights of the citizens; whether they are more, indeed, than a mere declaration of rights, carrying with it no power of enforcement. . . ." Cong. Globe, 42d Cong., 1st Sess. Part I (1871) 475, 476. [FN229]

Also dissenting, Justice Murphy wrote "that the specific guarantees of the Bill of Rights should be carried over intact into the first Section of the Fourteenth Amendment." [FN230] The Second Amendment implications of his statement are the same as for Justice Black's longer exposition, although Justice Murphy did not enumerate the Second Amendment, or any other right.

Senator Howard, quoted by Justice Black, listed the individual right to arms in its natural order among the other individual rights listed in the Bill of Rights. [*158 FN231] The Henigan/Bogus state's right theory, however, requires us to believe that when Congress sent the Bill of Rights to the states, Congress first listed four individual rights (in the First Amendment), then created a state's right (in the Second Amendment), and then reverted to a litany of individual rights (Amendments Three through Eight). [FN232] Finally, Congress explicitly guaranteed a state's right in the Tenth Amendment. [FN233] While Congress used "the people" to refer to people in the First, Fourth, and Ninth Amendments, Congress used "the people" to mean "state governments" in the Second Amendment. [FN234] Finally, even though Congress had used "the people" in the Second Amendment to mean "the states," Congress in the Tenth Amendment explicitly distinguished "the people" from "the states," reserving powers "to the States respectively, or to the people." [FN235]

Which reading is more sensible: The Black/Howard/Dawes reading, under which "the people" means the same thing throughout the Bill of Rights, and which makes all of the first eight amendments into a straightforward list of individual rights, or the Henigan/Bogus theory, which requires that "the people" change meanings repeatedly, and which inserts a state's right in the middle of a litany of individual rights?

H. Hamilton v. Regents

This case has been almost entirely overlooked by Second Amendment scholarship. [FN236] Hamilton's obscurity is especially surprising, since it is the one Supreme Court case which actually uses the Second Amendment in the way that we would expect the Amendment to be used if it were a state's right: to bolster state authority over the militia.

Two University of California students, the sons of pacifist ministers, sued to obtain an exemption from participation in the University of California's mandatory military training program. [FN237] The two students did not contest the state of California's authority to force them to participate in state militia exercises, but they argued, in part, that the university's training

program was so closely connected with the U.S. War Department as to not really be a militia program. [FN238] A unanimous Court disagreed, and stated that California's acceptance of federal assistance in militia training did not transform the training *159 program into an arm of the standing army. States had the authority to made their own judgements about training:

> So long as [the state's] action is within retained powers and not inconsistent with any exertion of the authority of the national government, and transgresses no right safeguarded to the citizen by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends. Second Amendment. Houston v. Moore, 5 Wheat. 1, 16-17, Dunne v. People, (1879) 94 Ill. 120, 129. 1 Kent's Commentaries 265, 389. Cf. Presser v. Illinois, 116 U.S. 252. [FN239]

Thus, the Court used the Second Amendment to support of a point about a state government's power over its militia.

This usage was not consistent with a meaningful state's right theory. A state's right Second Amendment, to have any legal content, would have to give the state some exemption from the exercise of federal powers. [FN240] But the Court wrote that the state's discretion in militia training must be "not inconsistent with any exertion of the authority of the national government." [FN241]

Another way to read Hamilton's Second Amendment citation would be as a reminder of the expectation by all the Founders that states would supervise the militia. This reminder would be consistent with the state's rights theory and with the standard model.

The authorities cited along with "Second Amendment" by the Hamilton Court do not support a reading of the Second Amendment as guaranteeing a state's right, but instead support an individual right.

Houston v. Moore (to be discussed in more detail below), involved the state of Pennsylvania's authority to punish a man for evading service in the federal militia, which had been called to fight the war of 1812. [FN242] The report of the attorneys' arguments, on both sides, shows that the Second Amendment was not raised as an issue. [FN243] The Houston pages which were cited by the Hamilton Court contain the statement, spanning the two pages, that "[A]s state militia, the power of the state governments to legislate on the same subjects [organizing, arming, disciplining, training, and officering the militia], having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the states, subordinate nevertheless to the paramount law of the general government, operating on the same subject." [FN244] In other words, state militia powers were inherent in the *160 nature of state sovereignty, and continue to exist except to the extent limited by Congress under its Constitutional militia powers.

In Dunne v. People, the Illinois Supreme Court affirmed the centrality of state power over the militia, citing the Tenth Amendment and the Houston v. Moore precedent. [FN245] The Dunne court also explained how a state's constitutional duty to operate a militia was complemented by the right of the state's citizens to have arms:

> "A well regulated militia being necessary to the security of a free State," the States, by an amendment to the constitution, have imposed a restriction that Congress shall not infringe the right of the "people to keep and bear arms." The chief executive officer of the State is given power by the constitution to call out the militia "to execute the laws, suppress insurrection and repel invasion." [FN246] This would be a mere barren grant of power unless the State had power

> to organize its own militia for its own purposes. Unorganized, the militia would be of no practical aid to the executive in maintaining order and in protecting life and property within the limits of the State. These are duties that devolve on the State, and unless these rights are secured to the citizen, of what worth is the State government? [FN247]

The cited pages of Kent's Commentaries discuss state versus federal powers over the militia. Chancellor Kent uses Martin v. Mott [FN248] to show that a President's decision that there is a need to call out the militia is final. Houston v. Moore [FN249] (state authority to prosecute a person for refusing a federal militia call) is used to show that if the federal government neglects its constitutional duty to organize, arm, and discipline the militia, the states have the inherent authority to do so. The Second Amendment was not used by Kent or by Kent's cited cases to support his propositions.
Presser v. Illinois will be discussed below; the case affirmed a state's authority to make a gun control law (a ban on armed parades in public) which contained an exemption for the state's organized militia. [FN250]

Later in the opinion, the Hamilton Court quoted United States v. Schwimmer, a 1929 decision which held that an immigrant pacifist's refusal to bear arms in the army or in the Second Amendment's well-regulated militia proved that the immigrant was not fit for citizenship. [FN251]

IV. The Taft, Fuller, and Waite Courts

Between the end of Reconstruction and the New Deal, there were eleven opinions (all but one a majority opinion) touching on the Second Amendment. Most involved the scope of the "privileges and immunities" which the Fourteenth Amendment protected from state interference. Nine of the opinions (including the one dissent) treated the Second Amendment as an individual right, while the tenth was ambiguous, and the eleventh refused to address any of a plaintiff's arguments (of which the Second Amendment was one) because of a lack of injury and hence a lack of standing.

A. United States v. Schwimmer

A divided Supreme Court held that a female pacifist who wished to become a United States citizen could be denied citizenship because of her energetic advocacy of pacifism. [FN252] The Court majority found the promotion of pacifism inconsistent with good citizenship because it dissuaded people from performing their civic duties, including the duty to bear arms in a well regulated militia. [FN253] Since it is agreed by Standard Modelers and their critics alike that the federal and state governments have the authority to compel citizens to perform militia service, the Schwimmer opinion does not help resolve the individual rights controversy:

> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

> The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming, and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several states when called into the service of the United States; it declares that, a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws, by armed citizens. This court, in the Selective Draft Law Cases, 245 U.S. 366, page 378, 38 S. Ct. 159, 161 (62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856), speaking through Chief Justice White, said that "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. . . ."
> *162 Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. . . .The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. . .her objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms. [FN254]

Schwimmer illustrates two points about which the Standard Model authors agree with Bogus and Henigan: first, the phrase "bear arms" in the Second Amendment can have militia service connotations. The Standard Modelers (and Justice Ginsburg) [FN255], however, disagree with Bogus and Henigan's claim that "bear arms" always has a militia/military meaning, and never any other. Second, Schwimmer illustrates that bearing arms can be a duty of citizenship which the government can impose on the citizen. While opponents of the standard model use this fact to argue that the Second Amendment is about a duty, and not about an individual right, [FN256] the Standard Model professors respond by pointing to jury service, to show that an individual constitutional right (the right to be eligible for jury service [FN257]) can also be a duty.

B. Stearns v. Wood

This case came to the Court after World War I had broken out in Europe. [FN258] The U.S. War Department had sent "Circular 8" to the various National Guards, putting restrictions on promotion. Plaintiff Stearns, a Major in the Ohio National Guard, was thereby deprived of any opportunity to win promotion above the rank of Lieutenant Colonel. [FN259] Stearns argued that Circular 8 violated the Preamble to the Constitution, Article One's specification of Congressional powers over the militia, Article One's grant of army powers to the Congress, Article Two's making the President the Commander in Chief of the militia when called into federal service, the Second Amendment, and the Tenth Amendment. [FN260]

Writing for a unanimous Court, Justice McReynolds contemptuously dismissed Stearns' claim without reaching the merits. [FN261] Since Stearns' present rank *163 of Major was undisturbed,

there was no genuine controversy for the Court to consider, and the Court would not render advisory opinions. [FN262]

Even though the Court never reached the merits of the Second Amendment argument, it is possible to draw some inferences simply from the fact that the Second Amendment argument was made in the case. First of all, Major Stearns' argument shows that using the Second Amendment to criticize federal control of the National Guard was not an absurd argument--or at least no more absurd than using the Preamble to the Constitution for the same purpose. And after the 1905 Kansas Supreme Court case Salina v. Blaksley ruled that the Kansas constitution's right to arms (and, by analogy, the U.S. Second Amendment) protected the state government, and not the citizen of Kansas, [FN263] Stearns' attorney's argument did have some foundation in case law.

C. Twining v. New Jersey

In Twining, the Supreme Court (with the first Harlan in dissent) refused to make the Fifth Amendment self-incrimination guarantee in the Bill of Rights applicable to state trials, via the Fourteenth Amendment. [FN264] In support of this result, the majority listed other individual rights which had not been made enforceable against the states, under the Privileges and Immunities clause:

The right to trial by jury in civil cases, guaranteed by the Seventh Amendment (Walker v. Sauvinet, 92 U.S. 90), and the right to bear arms guaranteed by the Second Amendment (Presser v. Illinois, 116 U.S. 252) have been distinctly held not to be privileges and immunities of citizens of the United States guaranteed by the Fourteenth Amendment against abridgement by the States, and in effect the same decision was made in respect of the guarantee against prosecution, except by indictment of a grand jury, contained in the Fifth Amendment (Hurtado v. California, 110 U.S. 516), and in respect to the right to be confronted with witnesses, contained in the Sixth Amendment. West v. Louisiana, 194 U.S. 258. In Maxwell v. Dow, supra. . .it was held that indictment, made indispensable by the Fifth Amendment, and the trial by jury guaranteed by the Sixth Amendment, were not privileges and immunities of citizens of the United States. [FN265]

The Second Amendment here appears--along with Seventh Amendment civil juries, Sixth Amendment confrontation, and Fifth Amendment grand juries--as a right of individuals, but a right only enforceable against the federal government. As we shall see below, the exact meaning of the 1886 Presser case was subject to dispute; some argued that the case simply upheld a particular gun control as not being in violation of the Second Amendment,*164 while others argued that Presser held that the Second Amendment was not one of the "Privileges and Immunities" which the Fourteenth Amendment protects against state action. Twining clearly takes the latter view.

D. Maxwell v. Dow

Maxwell was the majority's decision (again, over Harlan's dissent) not to make the right to a jury in a criminal case into one of the Privileges or Immunities protected by the Fourteenth Amendment. [FN266] Regarding the Second Amendment and Presser, the Court wrote:

In Presser v. Illinois, 116 U.S. 252, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of the Congress and the National Government, and not of the States. It was therein said, however, that as all

citizens capable of bearing arms constitute the reserved military force of the National Government, the States could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government. [FN267]

The Maxwell description of Presser was somewhat narrower than Twining's description. Maxwell used Presser only to show that the Second Amendment does not in itself apply to the states; Twining used Presser to show that the Fourteenth Amendment privileges and immunities clause did not make the Second Amendment indirectly applicable to the states.

E. Trono v. United States, and Kepner v. United States

After the United States won the Spanish-American War, the Philippines were ceded to the United States. American control was successfully imposed only after several years of hard warfare suppressed Filipinos fighting for independence. [FN268] Congress in 1902 enacted legislation imposing most, but not all of the Bill of Rights on the Territorial Government of the Philippines. The 1905 Trono [FN269] case and the 1904 Kepner [FN270] case both grew out of criminal prosecutions in the Philippines in which the defendant claimed his rights had been violated.

In Trono, at the beginning of the Justice Peckham's majority opinion, the Congressional act imposing the Bill of Rights was summarized:

*165 The whole language [of the Act] is substantially taken from the Bill of Rights set forth in the amendments to the Constitution of the United States, omitting the provisions in regard to the right of trial by jury and the right of the people to bear arms, and containing the prohibition of the 13th Amendment, and also prohibiting the passage of bills of attainder and ex post facto laws. [FN271]

As with other cases, the "right of the people" to arms is listed in a litany of other rights which are universally acknowledged to be individual rights, not state's rights. [FN272]

It could be argued that the Second Amendment was omitted from the Congressional Act because the Amendment is a state's right, and there was no point in putting a state's right item into laws governing a territory. Indeed, the omission of the Tenth Amendment from the Congressional 1902 Act is perfectly explicable on the grounds that the Tenth Amendment protects federalism, but does not control a territorial or state government's dealings with its citizens. [FN273]

And thus, when the Supreme Court listed the individual rights which were not included in the 1902 Act, the Court did not note the omission of the Tenth Amendment; there was no possibility that Congress could have included the Tenth Amendment, since it would have no application to the territorial government's actions against the Filipino people. [FN274]

In contrast, the Court did note the omission of "the right of trial by jury and the right of the people to bear arms." [FN275] The logical implication, then, is that jury trial and the right to arms (unlike the Tenth Amendment) are individual rights which Congress could have required the Territorial Government to respect in the Philippines. [FN276]

The 1904 United States v. Kepner case involved a similar issue. [FN277] There, the Court described the 1902 Act in more detail. The description of items omitted from the Act was nearly identical to the Trono language. [FN278]

*166

F. Robertson v. Baldwin

In 1897, the Court refused to apply the Thirteenth Amendment to merchant seamen who had jumped ship, been caught, and been impressed back into maritime service without due process. [FN279] The Court explained that Thirteenth Amendment's ban on involuntary servitude, even though absolute on its face, contained various implicit exceptions. [FN280] In support of the finding of an exception to the Thirteenth Amendment, the Court argued that the Bill of Rights also contained unstated exceptions:

> The law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by law prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or the verdict was set aside upon the defendant's motion. . . . [FN281] Likewise, the self-incrimination clause did not bar a person from being compelled to testify against himself if he were immune from prosecution; and the confrontation clause did not bar the admission of dying declarations. [FN282]

In 1897, state laws which barred individuals from carrying concealed weapons were common, and usually upheld by state supreme courts [FN283]; the laws did not forbid state militias from carrying concealed weapons. The prohibitions on concealed carry are the exceptions that prove the rule. Only if the Second Amendment is an individual right does the Court's invocation of a concealed carry exception make any sense.

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G. Brown v. Walker

When a witness before an Interstate Commerce Commission investigation invoked the Fifth Amendment to refuse to answer questions under oath, the majority of the Supreme Court ruled against his invocation of the privilege against self- incrimination. [FN284] The majority pointed out that a Congressional statute protected the witness from any criminal prosecution growing out of the testimony. [FN285]

Dissenting, Justice Stephen Field (perhaps the strongest civil liberties advocate on the Court during the nineteenth century) contended that the "infamy and disgrace" which might result from the testimony was justification enough not to testify, even if there could be no criminal

prosecution. [FN286] Justice Field's opinion carefully analyzed English and early American precedent, reflecting Field's vivid appreciation of the long Anglo-American struggle for liberty against arbitrary government. [FN287] Law and order was less important than Constitutional law, he continued, for the claim that "the proof of offenses like those prescribed by the interstate commerce act will be difficult and probably impossible, ought not to have a feather's weight against the abuses which would follow necessarily the enforcement of incriminating testimony." [FN288] All Constitutional rights ought to be liberally construed, for:

> As said by counsel for the appellant: "The freedom of thought, of speech, and of the press; the right to bear arms; exemption from military dictation; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment,--are, together with exemption from self-crimination, the essential and inseparable features of English liberty. Each one of these features had been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the constitution, and the contests were fresh in the memories and traditions of the people at that time." [FN289]

This is just the opposite of Dennis Henigan's assertion that the Second Amendment is written so as to be less fundamental than the first. [FN290] Justice Field's paragraph is not a list of state powers, it is a list of personal rights won at *168 great cost--rights which may never be trumped by the legislature's perceived needs of the moment.

H. Miller v. Texas

Franklin P. Miller was a white man in Dallas who fell in love with a woman whom local newspapers would later call "a greasy negress." In response to a rumor that Miller was carrying a handgun without a license, a gang of Dallas police officers, after some hard drinking at a local tavern, invaded Miller's store with guns drawn. A shoot-out ensued, and the evidence was conflicting as to who fired first, and whether Miller realized that the invaders were police officers. But Miller was stone cold sober, and the police gang was not; thus, Miller killed one of the intruders during the shoot-out, although the gang's superior numbers resulted in Miller's capture.

During Miller's murder trial, the prosecutor asserted to the jury that Miller had been carrying a gun illegally. Upon conviction of murdering the police officer, Miller appealed to various courts, and lost every time.

Appealing to the Supreme Court in 1894, Miller alleged violations of his Second Amendment, Fourth Amendment, Fifth Amendment, and Fourteenth Amendment rights. [FN291] Regarding the Second Amendment, Miller claimed that it negated the Texas statute against concealed carrying of a weapon. [FN292]

A unanimous Court rejected Miller's contentions: A "state law forbidding the carrying of dangerous weapons on the person. . . does not abridge the privileges or immunities of citizens of the United States." [FN293] This statement about concealed weapons laws was consistent with what the Court would say about such laws three years later, in the Robertson case. [FN294] Moreover, the Second Amendment, like the rest of the Bill of Rights, only operated directly on the federal government, and not on the states: "the restrictions of these amendments [Second,

Fourth, and Fifth] operate only upon the Federal power." [FN295]
But did the Fourteenth Amendment makes the Second, Fourth, and Fifth Amendments applicable to the states? Here, the Miller Court was agnostic: "If the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to the citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." [FN296]

Just eight years before, in Presser the Court had said that the Second Amendment does not apply directly to the states; Miller reaffirmed this part of *169 Presser. Another part of Presser had implied that the right to arms was not one of the "privileges or immunities" of American citizenship, although the Presser Court did not explicitly mention the Fourteenth Amendment. In Miller v. Texas, the Court suggested that Miller might have had a Fourteenth Amendment argument, if he had raised the issue properly at trial. [FN297] If Presser foreclosed any possibility that Second Amendment rights could be enforced via the Fourteenth Amendment, then the Miller Court's statement would make no sense. Was Miller an early hint that the Fourteenth Amendment's due process clause might protect substantive elements of the Bill of Rights? Three years later, the Court used the Fourteenth Amendment's due process clause for the first time to apply part of the Bill of Rights against a state. [FN298]

A decade after Miller, Twining in 1908 did claim that Presser stood for the Second Amendment not being a Fourteenth Amendment privilege or immunity. But between Presser in 1886 and Twining in 1908, other readings were permissible. Not only does Miller in 1894 appear to invite such readings, but so does the 1887 case Spies v. Illinois, which involved the murder prosecutions arising out of the Haymarket Riot. [FN299] John Randolph Tucker represented the defendants. Tucker, an eminent Congressman, author of an important treatise on constitutional law, a future President of the American Bar Association, and a leading law professor at Washington and Lee [FN300]-- argued that the whole Bill of Rights was enforceable against the states, including the right to arms. [FN301]

*170 Tucker argued that all "these ten Amendments" were "privileges and immunities of citizens of the United States, which the Fourteenth Amendment forbids every State to abridge," and cited Cruikshank in support. [FN302] As for Presser, that case "did not decide that the right to keep and bear arms was not a privilege of a citizen of the United States which a State might therefore abridge, but that a State could under its police power forbid organizations of armed men, dangerous to the public peace." [FN303]

Chief Justice Waite's majority opinion in Spies cited Cruikshank and Presser (along with many other cases) only for the proposition that the first ten Amendments do not apply directly to the states. [FN304] (An 1890 opinion, Eilenbecker, again cited Cruikshank and Presser as holding that the Bill of Rights does not apply directly to the states. [FN305]) The Spies' defendants' substantive claims (relating to the criminal procedure and jury portions of the Bill of Rights) were rejected as either incorrect (e.g., the jury was not biased) or as not properly raised at trial, and thus not appropriate for appeal. [FN306]

Tucker's reading of Presser is not the only possible one, but Tucker--one of the most distinguished lawyers of his time--was far too competent to make an argument in a capital case before the Supreme Court that was contrary to Supreme Court precedent from only a year before. It may be permissible to read Presser the same way that John Randolph Tucker did (as upholding a particular gun control law), or as Spies, Maxwell, and Eilenbecker did (as stating*171 that the Second Amendment does not by its own power apply to the states), or as Twining and Malloy v. Hogan did (as rejecting incorporation of the Second Amendment via the Privileges and Immunities clause). We will get to Presser soon, so that the reader can supply her own

interpretations. [FN307]

Whatever Miller v. Texas implies about the Fourteenth Amendment, its Second Amendment lessons are easy. First, the Amendment does not directly limit the states. Second, the Amendment protects an individual right. Miller was a private citizen, and never claimed any right as a member of the Texas Militia. But according to the Court, Miller's problem was the Second Amendment was raised against the wrong government (Texas, rather than the federal government), and at the wrong time (on appeal, rather than at trial). If the Henigan/Bogus state's right theory were correct, then the Court should have rejected Miller's Second Amendment claim because Miller was an individual rather than the government of Texas. Instead, the Court treated the Second Amendment exactly like the Fourth and the Fifth, which were also at issue: all three amendments protected individual rights, but only against the federal government; while the Fourteenth Amendment might, arguably, make these rights enforceable against the states, Miller's failure to raise the issue at trial precluded further inquiry.

I. Logan v. United States

This case arose out of a prosecution under the Enforcement Act, a Congressional statute outlawing private conspiracies against the exercise of civil rights. [FN308] The Enforcement Act was also as issue in Cruikshank, infra. In Logan, a mob had kidnapped a group of prisoners who were being held in the custody of federal law enforcement. [FN309] The issue before the Court was whether the prisoners, by action of the mob, had been deprived of any of their federal civil rights.

Logan affirmed Cruikshank's position that the First and Second Amendments recognize preexisting fundamental human rights, rather than creating new rights. The First Amendment right of assembly and the SecondAmendment*172 right to arms are construed in pari materia, suggesting that they both protect individual rights:

> In U. S. v. Cruikshank, 92 U.S. 542, as the same term, in which also the opinion was delivered by the chief justice, the indictment was on section 6 of the enforcement act of 1870, (re-enacted in Rev. St. 5508, under which the present conviction was had,) and the points adjudged on the construction of the constitution and the extent of the powers of congress were as follows:
> (1) It was held that the first amendment of the constitution, by which it was ordained that congress should make no law abridging the right of the people peaceably to assemble and to petition the government for redress of grievances, did not grant to the people the right peaceably to assemble for lawful purposes, but recognized that right as already existing, and did not guaranty its continuance except as against acts of congress; and therefore the general right was not a right secured by the constitution of the United States. But the court added: "The right of the people peaceably to assemble for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guarantied by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs, and to petition for a redress of grievances. If it had been alleged in these counts that the object of the

defendants was to prevent a meeting for such a purpose, the cause would have been within the statute, and within the scope of the sovereignty of the United States." 92 U.S. 552, 553.
(2) It was held that the second amendment of the constitution, declaring that "the right of the people to keep and bear arms shall not be infringed," was equally limited in its scope. 92 U.S. 553.
(3) It was held that a conspiracy of individuals to injure, oppress, and intimidate citizens of the United States, with intent to deprive them of life and liberty without due process of law, did not come within the statute, nor under the power of congress, because the rights of life and liberty were not granted by the constitution, but were natural and inalienable rights of man; and that the fourteenth amendment of the constitution, declaring that no state shall deprive any person of life, liberty, or property, without due process of law, added nothing to the rights of one citizen as against another, but simply furnished an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. It was of these fundamental rights of life and liberty, not created by or dependent on the constitution, that the court said: "Sovereignty, for this purpose, rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment or

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Part two of this article.

Part three of this article.

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