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## CAN THE SIMPLE CITE BE TRUSTED?: LOWER COURT INTERPRETATIONS OF *UNITED STATES V. MILLER* AND THE SECOND AMENDMENT

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When courts fail to engage in oversight or even distort the Constitution to rationalize the *ultra vires* actions of government, and when academics and political activists aid and abet them in this activity by devising ingenious rationalizations for ignoring the Constitution's words, they are playing a most dangerous game. For they are putting at risk the legitimacy of the lawmaking process and risking the permanent disaffection of significant segments of the people.

Randy Barnett\*\*

### INTRODUCTION

#### A. *Second Amendment Scholarship and the Elite Bar*

In his recent *Boston University Law Review* article entitled *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*,<sup>1</sup> Andrew Herz blasts recent Second Amendment<sup>2</sup> scholarship<sup>3</sup> for promoting a "constitutional (pg.962) fish story told by the gun lobby,

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\*\* Randy E. Barnett, *Foreword: Guns, Militias and Oklahoma City*, 62 TENN. L. REV. 443, 458 (1995).

<sup>1</sup> Andrew Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995).

<sup>2</sup> "A well regulated Militia, being necessary for the maintenance of a free State, the right of the people to keep and bear arms shall not be infringed." U.S. CONST. amend. II.

<sup>3</sup> See, e.g., JOYCE LEE MALCOM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); Symposium, *The Second Amendment*, 62 TENN. L. REV. 443 (1995); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Robert Cottrol & Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Brannon P. Denning, *Palladium of Liberty?: Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, OKLA. CITY U. L. REV. (forthcoming 1996); Dennis A. Henigan, *Arms, Anarchy, and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1736 (1995); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

swallowed by the public, and rarely challenged by politicians, the media, or legal scholars."<sup>4</sup> In particular, he accuses legal scholars who have written on the Second Amendment of failing "to discuss a central aspect of the legal 'truth' about the Second Amendment—that the courts constantly reject the gun lobby's broad-individual-right position."<sup>5</sup>

Herz is at least partially correct—most of the recent scholarship on the Second Amendment has focused on the origins of the right and how that right was understood by the Framers.<sup>6</sup> Such historical research is necessary, for judges as well as scholars, to aid in the interpretation of any amendment to, or provision of, the Constitution. This new research, for example, demonstrates the error of many of the assumptions about the nature of militias and private citizens' roles in them.<sup>7</sup> Though extremely interesting, such issues are outside the scope of this article.<sup>8</sup>

My purpose in writing this article is to fill a void in the Second Amendment scholarship. Picking up Professor Herz's gauntlet, I propose to take on Second Amendment critics where they feel unassailable: the case law.<sup>9</sup> In particular, I will focus on *United States v. Miller*,<sup>10</sup> the only Supreme Court decision directly interpreting the Second Amendment in this century; and, to avoid Herz's charges of a "Supreme Court-only tunnel vision,"<sup>11</sup> I will also examine the subsequent (pg.963) lower federal court interpretations and applications of *Miller*. I will argue that the lower courts have strayed so far from the Court's original holding to the point of being intellectually dishonest. In illustrating both the depth and breadth of the lower courts' dishonesty, I will draw upon Karl Llewellyn's studies of appellate court decisionmaking.<sup>12</sup>

Certainly, the elite bar has lined up behind Professor Herz and seems to be in favor of "[l]etting settled law lie."<sup>13</sup> The public statements of the American Bar Association provide concrete examples of how lower courts' erroneous interpretations of the *Miller* decision have effected the constitutional debate surrounding the meaning of the Second Amendment.<sup>14</sup> In August, 1994, the

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<sup>4</sup> Herz, *supra* note 1, at 61.

<sup>5</sup> *Id.* at 136.

<sup>6</sup> See *supra* note 3 and articles cited therein.

<sup>7</sup> For example, in light of historical evidence, it seems that the assertions made on the part of many who deny that the Second Amendment means much that the National Guard is the "militia" of which the Second Amendment speaks is simply wrong. See *infra* note 174 and accompanying text.

<sup>8</sup> For an excellent overview of issues surrounding the Second Amendment, see Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995).

<sup>9</sup> See, e.g., Herz, *supra* note 1, at 68 ("An extraordinarily consistent body of case law has held that a variety of restrictions on private firearms ownership, use, and sales do not violate the Second Amendment, because such restrictions have no effect on the maintenance of a well-regulated militia—the National Guard."). Herz, like many other critics of the new Second Amendment scholarship, assumes that the National Guard was the kind of militia the Framers had in mind. *But see infra* note 174 and accompanying text.

<sup>10</sup> 307 U.S. 174 (1939).

<sup>11</sup> "It requires an advanced case of Supreme Court-only tunnel vision to ignore more than five decades of consistent interpretation from the federal courts." Herz, *supra* note 1, at 143. Of course, that assumes the intervening five decades of law have been correct.

<sup>12</sup> See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

<sup>13</sup> See Herz, *supra* note 1, at 77.

<sup>14</sup> That this prevailing lower court orthodoxy is being challenged by reputable scholars who are all arriving at the conclusion that the Second Amendment means something may account for the hysterical tone of Herz's article. It would be hard to imagine Professor Herz making such an impassioned defense of *stare decisis* in the context of the First or Fourteenth Amendments. *Id.* at 77-82 (arguing that the Supreme Court should not even deign to hear another Second Amendment case because the amendment itself is "obsolete").

American Bar Association's Task Force on Gun Violence issued a series of recommendations to the ABA's House of Delegates.<sup>15</sup> One recommendation called upon "leaders of the legal profession" to "[e]ducate the public and lawmakers regarding the meaning of the Second Amendment to the United States Constitution."<sup>16</sup> The purpose:

to make widely known the fact that the United States Supreme Court and lower federal courts have consistently, uniformly held that the Second Amendment to the United States Constitution right to bear arms is related to "a well regulated militia" and that there are no federal constitutional decisions which preclude regulation of firearms in private hands ....<sup>17</sup>

Edward E. Kallgren, the Chairman of the ABA's Coordinating Committee on Gun Violence, further fleshed out the ABA's position on the Second Amendment in a 1993 statement given to the House Subcommittee on Crime.<sup>18</sup> In his (pg.964) statement, Mr. Kallgren outlined the position of the ABA regarding the "considerable confusion and misunderstanding about the meaning of the Second Amendment and ... the power of the federal government to enact laws regulating firearms in private hands."<sup>19</sup> Mr. Kallgren assured the House subcommittee there was "no confusion in the law itself" because "[f]ederal and state court decisions in this century have been uniform in the view that the Second Amendment permits the exercise of broad power to limit private access to firearms by all levels of government."<sup>20</sup>

According to Mr. Kallgren, *Miller* held that "the scope of the people's right to bear arms is qualified by the introductory phrase of the Second Amendment regarding the necessity of a 'well regulated militia' for the 'security of a free State.'"<sup>21</sup> Mr. Kallgren also argued that *Miller* "held that the 'obvious purpose' of the Amendment was 'to assure the continuation and ... effectiveness of the state militias' and cautioned that the Amendment "'must be interpreted and applied with that end in view."<sup>22</sup> "The absolutist view of the Second Amendment," a view Mr. Kallgren obviously does not share, "argued by some opponents of regulation of firearms has not been sustained by a single U.S. Supreme Court or lower court decision in our nation's history."<sup>23</sup> The real question for Congress, said

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<sup>15</sup> ABA Task Force on Gun Violence, *Report to the House of Delegates* (1994) (copy on file with author).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* As I shall show, this statement is wrong. See *infra* note 73-75 and accompanying text.

<sup>18</sup> *Government Policies Associated with the Second Amendment: Hearings Before the Subcomm. on Crime of the House of Representatives*, 103d Cong., 1st Sess., at 1 (1993) (statement of Edward E. Kallgren) [hereinafter *Kallgren Statement*].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* To be sure, much of the literature and case law arguing that the Second Amendment protects no individual right leans heavily on the introductory clause of the Second Amendment which speaks of a "well regulated Militia" to support the conclusion that the Framers intended only to protect the right of states to have a militia free from federal abrogation. See, e.g., Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 40 (1989) (arguing that the present day National Guard is the modern equivalent of the 18th century state militia, thus rendering the Second Amendment anachronistic and its protections unnecessary).

<sup>23</sup> *Kallgren Statement*, *supra* note 18, at 3.

Mr. Kallgren (and presumably the American Bar Association), is "where to draw the line to balance interests of gun owners and manufacturers with public safety and public order."<sup>24</sup>

Mr. Kallgren concluded his testimony by citing statistics illustrating that "[g]un violence in the United States is a grave national problem."<sup>25</sup> To eliminate it, Mr. Kallgren and the (pg.965) ABA recommended Congress take appropriate regulatory steps "to reduce the tragic carnage of gun-related deaths and injuries plaguing this country."<sup>26</sup> Kallgren assured the subcommittee that because the "Constitution clearly permits such regulation, ... the Second Amendment cannot be used as a reason for not adopting [such legislation]."<sup>27</sup> Thus, rather than balancing interests, the ABA merely read the Second Amendment to contain not even token constraints on the power of Congress to regulate, or even prohibit, gun ownership.

Professor Herz's and the ABA's conclusion that the Second Amendment provides no constitutional impediment to the regulation of privately-held arms proceeds from two premises: first, that the Supreme Court in *Miller* held that the Second Amendment guaranteed no individual right to keep and bear firearms; second, that lower courts have honestly, consistently, and uniformly applied the holding in *Miller* and have all arrived at the same conclusion. Imbedded within this argument, however, are two very important implied premises: first, that the Supreme Court's *Miller* decision actually held what Herz and Kallgren say it held; and second, that subsequent lower court decisions have honestly interpreted and consistently applied *Miller* when deciding Second Amendment cases.

This article challenges the conclusions regarding *Miller* and the Second Amendment shared not only by the ABA, but also by most lower federal court opinions that purport to apply *Miller* and to interpret the Second Amendment. First, I intend to make clear that *Miller*, perhaps more than the Second Amendment, is the subject of "considerable confusion and misunderstanding." To paraphrase Mr. Kallgren, there is perhaps no other Supreme Court decision in our nation's history that has been "more distorted and cluttered by misinformation than this one." Second, I intend to show that the lower federal courts have consistently misinterpreted the Court's holding in *Miller*. I will also speculate upon the causes and political consequences of such casual judicial attitudes toward the Second Amendment.(pg.966)

## B. *Appellate Courts and Second Amendment Cases: A Question of Legitimacy*

### 1. Karl Llewellyn and Appellate Court Decisionmaking

#### a) Trusting the Simple Cite

An examination of how *Miller* has been misused by lower federal courts should begin with questions about the role of appellate court decision-making. In 1960, Karl Llewellyn wrote that courts were feeling less and less constrained by precedent and that the "Formal Style" deference to precedent was eroding.<sup>28</sup> An entire chapter of his seminal work on the appellate decisionmaking

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<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.*

<sup>28</sup> LLEWELLYN, *supra* note 12, at 3-4.

process was devoted to categorizing legitimate and illegitimate techniques that courts use to escape the gravitational pull of precedent.<sup>29</sup>

While Llewellyn did not necessarily think that abandonment of *stare decisis* was always a bad thing, he did warn of the growing loss of confidence among older members of the bar in the predictability of appellate decisions. Even more alarming to Llewellyn was the growing sentiment among the younger members of the bar that one could *not* predict appellate outcomes from existing doctrines, and that the judges just rationalized predetermined outcomes, whatever the law might be.<sup>30</sup> Still "worst" for Llewellyn was that "the courts themselves may by tomorrow have lost their own feeling for and responsibility to continuity."<sup>31</sup> Llewellyn noted many techniques that have been developed for evading responsibility for court decisions by courts themselves. As lower federal court opinions which purport to apply *Miller* are examined, several of these techniques will become readily recognizable. The question that most often arises in the case of post-*Miller* federal court opinions is that which Llewellyn asks: "Can the Simple Site Be Trusted?"<sup>32</sup> By posing such a question, Llewellyn is asking whether, when a court cites a case in support of its statement of the law, the case so cited actually stands for that proposition. As that same question is posed to (pg.967) courts citing *Miller* in support of various sweeping statements about the Second Amendment, the answer, sadly, is "No."

#### b) Manhandling the Facts

One of Llewellyn's illegitimate precedent-avoidance techniques is described as

manhandling ... the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach.<sup>33</sup>

A further illegitimate precedent-avoidance is "the unvarnished citation of a few alleged authorities which have little or nothing to do with the proposition for which they are cited."<sup>34</sup> Llewellyn concludes that despite a "pure heart" on the part of the judges, "the cost of such procedure is excessive, it is exorbitant ... [w]hen the fair—even the strained—meaning of an authority is distorted into nonrecognizability, the immediate effect on the detail of doctrine in question is confusion."<sup>35</sup> As for disingenuously citing authority for untoward propositions, this is venal, as compared to other judicial sins, but

[s]uch action leaves the particular point moderately clear: the court has wanted it badly enough to lie to get it.... But it does rap at a thing capital: it raises doubts about either

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<sup>29</sup> *Id.* at 63-120.

<sup>30</sup> "The danger today is that the middle and younger generations of the bar may have already lost all confidence in the steadiness of both the courts in their work and in the law in its. That is worse." *Id.* at 15.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 101.

<sup>33</sup> *Id.* at 133.

<sup>34</sup> *Id.* at 134.

<sup>35</sup> *Id.*

competence or candor in judicial craftsmanship, and any such doubt leaks over into worry over wisdom, even over uprightness of the court. Today, ... any practice such as any of the above must be pilloried as flatly and flagrantly illegitimate.<sup>36</sup>

### c) The Importance of Honesty

Attempting to change the law or extend precedent to cover an unimagined situation without acknowledging the change in the name of stability, Llewellyn maintains, actually undermines stability by encouraging courts to make dishonest or illogical citations to cases as if those cases cited actually addressed the issue before the court. This is particularly dangerous because<sup>(pg.968)</sup>

[t]he pseudo gain in stability of the precedent-regime which, for the moment at least, and perhaps forever, lies in covering up the particular change is ... no real gain; and, if it were, it would rest still on a mistaken choice of policy. *For the gain sought is a gain in confidence in institutions and in officers*; whereas these vagaries of practice ... infect and rot away that very confidence; and whereas we draw from the long years of the Grand Style in our common law tradition abundant evidence that change in case law, when based on reason and accompanied by explicit reason given, not only does not sap but strengthens confidence in the appellate courts and in their work.<sup>37</sup>

These illegitimate practices Llewellyn indicts as "evil," and as

true and low abuses of power entrusted for other ends: their cost is too high, their policy is unsound, they are consonant neither with candor nor with courage, they are as unnecessary as they are misleading, they tend to trip up even their practitioners, and they inexcusably undercut clean interaction and understanding between bar and bench.<sup>38</sup>

Legitimacy is the core of Llewellyn's concern. As a good Realist, Llewellyn realized that all law, and not just common law, is to a substantial extent judge-made. When a judge or a group of judges renders a decision memorialized by a published opinion, the law bears the indelible print of the court's consideration. The court must then rely on the other branches to see that its rulings are given life. It is incumbent upon judges, particularly when faced with a constitutional question, to render a reasoned opinion which analyzes precedent fairly and applies or interprets the law before it without preconceived notions of how the case ought to come out. Moreover, as new facts and information come to life which elucidate earlier decisions and perhaps highlight mistakes, courts should not invoke *stare decisis* out of discomfiture with possible ramifications of their decisions, if by not rendering that decision they run the risk of calling into question the intelligence, honesty and integrity of the bench.

While Llewellyn admits that "[t]here are no panaceas,"<sup>39</sup> he does suggest how courts *should* decide appellate cases. He personally favors what he terms the "Grand Style" of reason in which the judge, through the application of reason and sense, and by developing an eye for the "type-situation"

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<sup>36</sup> *Id.* at 135.

<sup>37</sup> *Id.* (emphasis in original).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 403.

and the (pg.969) "type-problem," formulates rules of law.<sup>40</sup> These rules of law are to be distinguished from "mere just or right *decisions*, much less ... decisions merely according to any personal equities in individual cases."<sup>41</sup> Llewellyn concludes that:

The whole setup leads above all—a recognition of imperfection in language and in officer—to *on-going and unceasing judicial review of prior judicial decision* on the side of rule, too, and technique. That, plus freedom and duty to do justice *with* the rules but *within* both them and their whole temper, that is the freedom, the leeway for own-contribution, the scope for the person, which the system offers.<sup>42</sup>

## 2. Legitimacy: The Price of Precedent-Avoidance

As Alexander Hamilton noted in *The Federalist*, the courts have only "Judgment," as opposed to "Force" or "Will."<sup>43</sup> Hamilton also noted that "the courts must declare the sense of the law; and if they should exercise WILL instead of JUDGMENT, the correspondence would equally be the substitution of their pleasure for that of the legislative body."<sup>44</sup> Thus, were the court to exceed its legitimate role of declaring "the sense of the law," the judiciary would lose legitimacy. The desire for the courts to be seen as rendering judgments untainted by partisan concerns or by public pressure was one reason that the Framers' sought to protect federal judges from the vicissitudes of political majorities by providing them with life tenure during good behavior.<sup>45</sup> Judges ought to be able to render legitimate, as opposed to politically expedient, judgments while protected from the "occasional ill humors in the society." This independence was hoped to produce firmness of judicial character. Of this Hamilton writes, "[c]onsiderate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."<sup>46</sup> (pg.970)

While scholars have articulated theories supporting the exercise of judicial powers, particularly that of judicial review,<sup>47</sup> the judges have imposed restraints on themselves in an effort to demonstrate to others that they will not abuse their unique position in our constitutional democracy.<sup>48</sup> Many courts have struggled with the legitimacy of judicial review in the wake of the New Deal, which authorized an unprecedented expansion of federal power, and the Warren Court, which just as radically altered the relationship between government and its citizens. Lower federal courts were often on the front lines, charged with implementing decisions that, whatever their social

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<sup>40</sup> *Id.* at 402.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> THE FEDERALIST No. 78 (Alexander Hamilton).

<sup>44</sup> *Id.*

<sup>45</sup> U.S. CONST. art. III.

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., ALEXANDER BIKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); LEARNED HAND, THE BILL OF RIGHTS (1958).

<sup>48</sup> See, e.g., *Ashwander v. T.V.A.*, 297 U.S. 288, 341-356 (1936) (Brandeis, J., concurring). Alex Bickel called these the Court's "passive virtues." See BICKEL, *supra* note 47, at 111.

utility, were neither "based on reason" nor "accompanied by explicit reason given."<sup>49</sup> Cynics began to appear correct: the Constitution *is* what the judges say it is—and nothing more.

### 3. The Courts and the Second Amendment: An Overview

Such cynicism can wear on the body politic. Once the legitimacy of those charged with making sense of the law is questioned when they are seen exercising only Will, and as more people believe that the supposed foundation of our polity is merely a rhetorical exercise, it is only a matter of time before the institutions established by the document are ridiculed.<sup>50</sup> One sees this today: doubts about government legitimacy may be one of the reasons for the proliferation of private "militias" around the country. I am convinced, particularly after reading lower court decisions, that their hostility is given further impetus by the casual manner with which Second Amendment claims are addressed by the courts. Beginning with *Miller*, decided in 1939, and continuing on through the Ninth Circuit's recent decision in *Hickman v. (pg.971) Block*,<sup>51</sup> there has been a collective judicial assumption made about the Second Amendment that the Framers' *could not* have *really* meant that individuals should have a judicially-enforceable right to keep and bear arms.

The most common approach in disposing of Second Amendment claims in the lower courts has been to apply what the courts have decided is the *Miller* "test." Of course, the courts are not in agreement as to what the *Miller* test is. Reading the cases, one gets the feeling that the lower courts simply invent new obstacles as soon as the old ones are surmounted by sharp litigants with carefully crafted claims. Although the formulations tend to overlap as courts freely borrow from one another's opinions, there are basically three interpretations of *Miller*.

The first concludes that *Miller* directs courts to grant Second Amendment protection only where there is some demonstrable relationship between the weapon that is restricted and the maintenance of a militia.<sup>52</sup> As it became evident that almost any type of weapon could be effectively used in combat, the courts' focus shifted to the state of mind of the possessor, *i.e.*, did the person using or possessing the weapon have first and foremost in her mind the intent to insure the maintenance and efficacy of a militia. Finally, if a plaintiff can overcome the tests in the first two formulations of the test, the court might play its trump card: no individual can make such a colorable Second Amendment claim because the Second Amendment protects only a collective right of undifferentiated state citizens to form militias and to employ them to oppose federal tyranny. A variation on this theme reads the Second Amendment as protecting only the states' right to maintain

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<sup>49</sup> See *supra* note 38 and accompanying text.

<sup>50</sup> It is no surprise that in the wake of the Warren Court decisions of the 1950s and 1960s, which were seen by many as purely political and having no foundation in the text of the Constitution, there would be somewhat of a scholarly backlash against the Court as an institution. See, *e.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

<sup>51</sup> 81 F.3d 98 (9th Cir. 1996).

<sup>52</sup> This is a remnant of a time when courts were better able to clearly distinguish between "military" weapons that a militia might use, like a rifle, and nonmilitary weapons, like an easily concealable derringer, which some state courts that decided these issues found could be regulated. For a discussion of the difference, see *Amyette v. State*, 21 Tenn. 154, 159 (1840) (holding that the legislature has a right to prohibit the wearing of those weapons that are either unfit for "civilized warfare" or incapable of contributing to the common defense). *But see* *Cases v. U.S.*, 131 F.2d 916, 922 (1st Cir. 1942) (stating that the advent of modern warfare has rendered useless any distinction between "military" and "nonmilitary" weapons).

militias free from federal control.<sup>53</sup> Over the years, the courts (pg.972) have moved so far away from what *Miller* actually says that their citations of the case cease to have any meaning. The courts seem guilty of using the illegitimate precedent-avoidance techniques Karl Llewellyn described as "manhandling facts" and the "unvarnished citation of ... alleged authorities" to avoid outcomes "the court cannot stomach."<sup>54</sup>

Thus, the history of Second Amendment jurisprudence is the history of the federal courts constructing arguments to explain away or at least limit the language of the Second Amendment. In order to preserve the stability of that "precedent," lower courts have resorted to many of the judicial sins, cardinal and venal, that Karl Llewellyn documented.<sup>55</sup> The short term stability of the courts' dishonesty in the face of contrary authority will likely be outweighed by the loss of legitimacy that courts will sustain by ignoring a right provided for in the Bill of Rights. The Second Amendment presents an opportunity for federal appellate courts to provide leadership in the vacuum left by the Supreme Court's unwillingness to revisit questions left unanswered by *Miller*. Supreme Court silence here is an invitation to action.

## I. *MILLER, CRUIKSHANK AND PRESSER*: POINTS OF DEPARTURE

### A. *The Miller Decision*

*United States v. Miller*<sup>56</sup> is the only case dealing directly with the Second Amendment decided by the Court this century.<sup>57</sup> Usually cited as proof of Supreme Court hostility to an individual rights interpretation of the Second Amendment,<sup>58</sup> the actual holding is considerably more ambiguous.(pg.973)

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<sup>53</sup> [ed. footnote missing from printed copy.]

<sup>54</sup> See *supra* notes 34-36 and accompanying text.

<sup>55</sup> See *supra* note 37 and accompanying text.

<sup>56</sup> 307 U.S. 174 (1939).

<sup>57</sup> The only other Supreme Court cases that directly address Second Amendment claims are *Cruikshank v. U.S.*, 92 U.S. 542 (1875) and *Presser v. Illinois*, 116 U.S. 252 (1886). These decisions are also used by courts as proof of the Supreme Court's nonrecognition of the right to keep and bear arms.

<sup>58</sup> See, e.g., Herz, *supra* note 1, at 69 ("The *Miller* holding most plausibly means only that it is a *necessary* condition that a firearm be useful to the militia and an individual's service therein, not that military utility is a *sufficient* condition to grant constitutional protection. The individual using the firearm still must be doing so in the context of service in a government-organized (not independent) militia.") (footnote omitted). As I will point out, these interpretations find little support in the text of the *Miller* opinion, often relying on various interpretations by the lower federal courts.

Interestingly enough, and often overlooked or dismissed by lower courts and Second Amendment critics, there are a number of Supreme Court cases that specifically mention the Second Amendment as one of the rights individuals possess. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (suggesting that the use of the phrase "the right of the people" in the Bill of Rights, specifically in the First, Fourth and Second Amendments should be construed consistently); *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J. dissenting) (stating that the right to keep and bear arms is part and parcel of the "full scope of the liberty" provided to the individual by the constitution); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 417 (1850) (Chief Justice Taney writing that to admit African-Americans as citizens of the United States would mean that they too would enjoy the individual right to keep and bear arms). All these citations to the Second Amendment are however, dicta, and incidental to the Court's discussion. However, the repeated references to the Second Amendment as a "right of the people" that accompany these Supreme Court decisions, indicate that, given the contemporaneous nature of the first ten amendments, the language used therein should be interpreted consistently. See *Patton v. United States*, 281 U.S. 276, 298 (1930) ("The first ten amendments ... were substantially contemporaneous and should be construed *in pari materia*.").

*Miller* reached the Supreme Court on appeal from a Kansas district court opinion which held that § 6 of The National Firearms Act<sup>59</sup> violated the Second Amendment<sup>60</sup> to the Constitution.<sup>61</sup> The defendants, Jack Miller and Frank Layton, were charged with "unlawfully, knowingly, wilfully, and feloniously transport[ing] in interstate commerce ... a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length ... [and] not having registered said firearm as required."<sup>62</sup>

The trial court judge sustained a demurrer which alleged that § 6 of The National Firearms Act "offend[ed] the inhibition of the Second Amendment to the Constitution."<sup>63</sup> The Supreme Court reversed this decision and remanded the case to the district court.<sup>64</sup> At this point it is appropriate to note that the defendants were apparently unwilling to risk an unfavorable outcome in the Supreme Court. The defendants not only chose not to have counsel appear at the Supreme Court to engage in oral argument, but in fact disappeared<sup>65</sup> after the district court's decision was handed down.<sup>66</sup> (pg.974)

As a preliminary matter, that *Miller* made it to the Supreme Court at all is due to the fact that the government appealed the decision of the district court<sup>67</sup>—meaning the government *lost* at the trial court level.<sup>68</sup> The existence of the district court opinion proves that claims made by courts and critics of the Second Amendment that federal courts have uniformly rejected challenges to federal regulation of firearms on Second Amendment grounds<sup>69</sup> are just plain false. That the trial court's position was overturned on appeal is ultimately of little consequence, since the statement is usually made to imply that no right-thinking judge would ever entertain such an interpretation of the Second Amendment.

What, then, did the Supreme Court hold? Justice McReynolds, for a unanimous court, held simply that

[i]n 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

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<sup>59</sup> 48 Stat. 1238 (1934). The Act was passed in response to public outrage over the activities of organized crime. The act forbade the transportation of certain firearms in interstate commerce as well as imposed taxes on firearms transported in interstate commerce. Penalties for violation of the act included fines and imprisonment.

<sup>60</sup> "A well regulated Militia, being necessary for the security of a free State, the right of the people to keep and bear arms shall not be infringed." U.S. CONST. amend. II.

<sup>61</sup> *Miller*, 307 U.S. at 175.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 176.

<sup>64</sup> *Id.* at 182.

<sup>65</sup> Actually, it is more fair to say they went along their way. The indictment was, after all, quashed, and the defendants were legally free to go.

<sup>66</sup> See William F. Buckley, Jr., *Ban the Guns?*, THE NAT'L REV., April 21, 1989, at 54. "Second Amendment zealots pointed out that rather than fight the case, the defendants ... disappeared, and the result of this was that their case was half-heartedly argued." *Id.* at 55. Actually, according to the opinion, there was no appearance made on behalf of the appellees, so their position, whatever it may have been, was not argued at all. *Miller*, 307 U.S. at 174.

<sup>67</sup> *Miller*, 307 U.S. at 174.

<sup>68</sup> See *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939). The lower court opinion sustained the demurrer filed by the defendants with the following words: "The court is of the opinion that this section is invalid in that it violates the Second Amendment to the Constitution of the United States ...." *Id.*

<sup>69</sup> See *supra* note 18 and accompanying text.

within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>70</sup>

Read narrowly, the Supreme Court's decision was based more on an absence of evidence in the record than any searching inquiry into the origin and development of the Second Amendment.<sup>71</sup> Given the rather limited holding, it is important to note that Solicitor General Robert Jackson argued a (pg.975) "collective-rights" interpretation<sup>72</sup> of the Second Amendment in the government's brief.<sup>73</sup>

Although the opinion assumes some connection between the right to keep and bear arms and a militia,<sup>74</sup> it is clear from the opinion that the Court did not buy wholesale the government's "collective rights" argument.<sup>75</sup> Had the Court accepted the government's interpretation of the Second Amendment, the case would have likely been disposed of on the issue of standing. This is because the defendants were not members of militias, and under the government's interpretation of the Second Amendment, the Court could have found that Jack Miller had no standing to invoke the Second Amendment in the district court.<sup>76</sup> For the government, *Miller* was less than a clear victory.<sup>77</sup> (pg.976)

More significantly, the actual holding of *Miller* is a far cry from the proposition for which it is cited by many groups: that the Second Amendment does not protect an individual, enforceable right. On the contrary, the Court's opinion acknowledges that historical sources "show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense .... And further, ... these men were expected to appear bearing arms supplied by themselves

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<sup>70</sup> *Miller*, 307 U.S. at 178.

<sup>71</sup> Justice McReynolds did refer to various state and federal statutes, as well as treatises like Blackstone's *Commentaries* and state case law, but did so without much comment. *See Miller*, 307 U.S. at 179-182.

<sup>72</sup> The collective rights view of the Second Amendment denies that an individual can claim an enforceable right to keep and bear arms. The classic collective rights view of the Second Amendment regards membership in a "well regulated Militia," as a condition precedent to "the right of the People to keep and bear arms."

<sup>73</sup> *See* Brief for Appellant at 4-5, *U.S. v. Miller*, 307 U.S. 174 (1939) ("Indeed, the very language of the Second Amendment discloses that this right has reference only to the keeping and bearing of arms by the people as members of the state militia or other similar military organization provided for by law.").

<sup>74</sup> Most of the historical sources cited in dicta by Justice McReynolds mention the militia's universality of membership in the colonies. *See Miller*, 307 U.S. at 179-182. This point is significant because it belies a claim made by critics of the Second Amendment that "the Second Amendment was not designed to ensure that every citizen would have weapons" but rather it was drafted "to assure the states and citizens that they could maintain effective militias." *See Ehrman & Henigan, supra* note 22, at 40.

<sup>75</sup> *See* Appellant's Brief, *supra* note 73, at 12 ("[The right to keep and bear arms], however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense."). *See also id.* at 15 ("Indeed, the very declaration that 'a well-regulated militia, being necessary to the security of a free State,' indicates that the right to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.").

In fact only three and a half pages of the government's brief were devoted to the argument that even if the Second Amendment protected the individual right to bear arms, the only arms it protected were those that were suitable to military purposes, as opposed to those weapons that "constitute the arsenal of the 'public enemy' and the 'gangster'" that the National Firearms Act was aimed at prohibiting. *See id.* at 18, 20. Even this argument met with mixed success, as the Supreme Court stated that it would not take judicial notice that the weapons at issue *were* the type suitable for use by a militia; it did not accept the government's argument that these weapons served no military purpose at face value. *See Miller*, 307 U.S. at 178.

<sup>76</sup> *Cf. Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939) (holding that an electric company cannot challenge TVA because it has no "legal right" to be free from competition); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938).

<sup>77</sup> Even commentators like Herz admit that the Court's holding was "less than crystal clear." *See Herz, supra* note 1, at 68.

and of the kind in common use at the time."<sup>78</sup> Unfortunately, the Court fails to explore the logical consequences of its conclusion. Thus *Miller* is perhaps most notable for the questions it left unanswered. What would have happened, for example, if Miller and Layton had retained an attorney to represent them at oral argument and put on evidence about the militia and weapons that militia members generally possessed? Or what if they had argued that the introductory phrase of the Second Amendment merely expressed a widespread sentiment against standing armies and was not meant to qualify or to limit the "right of the people to keep and bear arms?" Given the incomplete record before the *Miller* court, as well as the very narrow holding of the case, questions regarding the meaning of the Second Amendment and its outer limits should be regarded as far from settled. Nor should the alleged "unanimity" of *Miller's* application in the lower courts be evidence of its persuasiveness,<sup>79</sup> for, as I shall show, this "unanimity" is largely a function of the lower courts' less-than-honest treatment of *Miller's* holding.<sup>(pg.977)</sup>

## B. Cruikshank and Presser: *The Second Amendment and the States*

### 1. *United States v. Cruikshank*

Even if the Supreme Court overturned *Miller*, under existing case law states would still be free to regulate, to the extent permitted by various state constitutions, the right to keep and bear arms. Since comprehensive, nationwide gun control legislation is regarded as not politically feasible, many gun control advocates have concentrated their efforts at the state and local level. In places like New York state or Morton Grove, Illinois, gun control initiatives have been enacted. To what extent have courts held that the Second Amendment operates as a limitation upon state power? Unfortunately, the federal courts have employed reasoning from antiquated Supreme Court decisions—the foundations of which have been largely repudiated by modern Court decisions—in opinions addressing the Second Amendment's protection against state and local government attempts at gun control. Therefore, despite well over half a century of incorporation in which the federal courts have held almost all provisions of the Bill of Rights applicable to the states, the Second Amendment has not been applied to the states.<sup>80</sup>

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<sup>78</sup> *Miller*, 307 U.S. at 179.

<sup>79</sup> "The lower federal courts have shown remarkable unanimity in applying the Second Amendment. Never in history has a federal court invalidated a law regulating the private ownership of firearms on Second Amendment grounds." Richard H. Kuh, *The Firearm Explosion: The Bar Has Not Been Silent*, N.Y.L.J., January 20, 1994, at 2 (quoting former Solicitor General Erwin M. Griswold).

Of course, once again, because of the district court's opinion in *Miller*, the inaccuracy of this statement cannot be overstated. Mr. Kuh's statement is just plain wrong. See *supra* note 70 and accompanying text.

Certainly the only reason for the "unanimity" of the lower federal courts is that despite how they might feel about the prior decisions, absent indications the Supreme Court is going to depart from precedent, they are bound to apply it. Or rather to misapply it, for as I argue, subsequent lower courts have read *Miller* more broadly than the opinion warrants. See *Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) ("[I]t seems clear that the right to bear arms is inextricably connected to the preservation of a militia. This is precisely the manner in which the Supreme Court interpreted the [S]econd [A]mendment in [Miller].").

<sup>80</sup> See, e.g., *Quilici*, 695 F.2d at 269. In *Quilici*, the Seventh Circuit upheld an ordinance passed by the city of Morton Grove, Illinois that, in essence, banned the possession of handguns within the city limits. *Id.* at 263. In its decision, the Seventh Circuit cited *Presser v. Illinois*, 116 U.S. 252 (1886), as controlling. *Id.* at 269. The court held that *Presser* "plainly states that '[t]he Second Amendment declares that it shall not be infringed, but this ... means no more than it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government....'" *Id.* (quoting *Presser*, 116 U.S. at 265). For a discussion of *Presser*, see *infra* notes 100-10 and accompanying text.

Conventional wisdom holds that *United States v. Cruikshank*<sup>81</sup> settled the question of the Second Amendment's applicability to state governments.<sup>82</sup> However, in the haste to dispose of Second Amendment claims, the background against which the *Cruikshank* decision took place is ignored. Moreover, language in the opinion, as well as a half century of Supreme Court doctrine, calls into serious question the continuing viability of either the holding or the reasoning. *Cruikshank*, decided during Reconstruction, "was part of a larger campaign of the Court to ignore the original purpose of the Fourteenth (pg.978) Amendment—to bring about a revolution in federalism, as well as race relations."<sup>83</sup>

*Cruikshank* originated in Louisiana where a sixteen count indictment was handed down against over one hundred individuals under § 6 of the Enforcement Act of 1870.<sup>84</sup> The indictment alleged that the defendants, *inter alia*, conspired to "hinder and prevent" two African-American citizens from exercising certain "rights and privileges."<sup>85</sup> Among the rights and privileges asserted were the "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceable and lawful purpose"<sup>86</sup> and the right of "bearing arms for a lawful purpose."<sup>87</sup>

First, it is important to note that the Court's holding emphasizes that the guarantees in the Bill of Rights operate to restrain governments as opposed to individuals.<sup>88</sup> The necessary element of state action was missing. But in dicta, the portion of the opinion upon which modern lower courts tend to rely, the Court repeated the then-valid doctrine that the Bill of Rights does not apply to the states. Dismissing the First Amendment count, the Supreme Court found that despite the passage of the Fourteenth Amendment, the First Amendment to the Constitution "was not intended to limit the powers of the State governments in respect to their own citizens, but to operate on the National government alone."<sup>89</sup> Under the Court's construction, because the right of the people to peaceably assemble was neither "created" by the Constitution, (pg.979) nor "was its continuance guaranteed,

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<sup>81</sup> 92 U.S. 542 (1875).

<sup>82</sup> See Henigan, *supra* note 3, at 112 n.23.

<sup>83</sup> Cottrol & Diamond, *supra* note 3, at 347.

<sup>84</sup> The section made it a crime if

[T]wo or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same ....

*Id.* at 347 (citing 16 Stat. 141 (1870)).

<sup>85</sup> *Cruikshank*, 92 U.S. at 548.

<sup>86</sup> *Id.* at 551.

<sup>87</sup> *Id.* at 553.

<sup>88</sup> See STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 159 (1984) ("The federal courts ... could not offer relief against defendants accused of conspiracy to deprive complainants of their freedom of action and their firearms, for these violations were common-law crimes actionable only at the local level.").

<sup>89</sup> *Cruikshank*, 92 U.S. at 552.

except as against congressional interference,"<sup>90</sup> the people must look to the states for protection of this right.<sup>91</sup>

The Court relied on much the same reasoning in dismissing the claim that the defendants conspired to hinder the complainants' right to "[bear] arms for a lawful purpose."<sup>92</sup> First noting that "bearing arms for a lawful purpose" was "not a right granted by the Constitution,"<sup>93</sup> the Court held that the Second Amendment's language "means no more than it shall not be infringed by Congress."<sup>94</sup> Concluding the short paragraph dealing with the Second Amendment, the Court stated that internal police powers were "not surrendered or constrained by the Constitution of the United States."<sup>95</sup>

The Supreme Court devoted exactly one paragraph in the entire opinion to the Second Amendment issue, an issue that was arguably ill-framed in the first place. Not only was there little analysis, but what analysis there was with regard to the First Amendment issue is now outdated when considered in light of the Supreme Court's incorporation decisions.<sup>96</sup> Yet, lower courts continue to cite this case for the proposition that the Second Amendment poses no obstacle to state gun control legislation, even if it amounts to an outright ban on certain types of arms. While lower courts have little choice but to apply Supreme Court precedent as it exists, the Court itself should revisit this decision, applying the criteria it has adopted for the incorporation of every other constitutional provision.<sup>97</sup> (pg.980)

## 2. *Presser v. Illinois*

The only other Supreme Court case that addresses in any detail the applicability of the Second Amendment to the states is the case of *Presser v. Illinois*.<sup>98</sup> In light of the development of subsequent Supreme Court doctrine, modern reliance on the logic of *Presser*, like that of *Cruikshank*, is anachronistic and begs for reexamination.

Presser was charged with violating an Illinois statute that made it a crime for "any body of men" other than "the regular organized volunteer militia of [Illinois], and the troops of the United States, to associate themselves together as a military company, or organization, or to drill or parade with arms" in the cities or towns of Illinois without a license of the Governor, who had unlimited

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 553.

<sup>93</sup> *Id.* Cf. *Eckert v. Philadelphia*, 477 F.2d 610, 610 (3rd Cir. 1973) (stating that "the right to keep and bear arms is not a right given by the United States Constitution"); *U.S. v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981) ("It is well established that the Second Amendment is not a grant of a right but a limitation on the power of Congress and the national government ....").

<sup>94</sup> *Cruikshank*, 92 U.S. at 553.

<sup>95</sup> *Id.*

<sup>96</sup> See *Gitlow v. New York*, 268 U.S. 652 (1925) (assuming that the First Amendment operated as a restraint on state governments). Even though not all of the Bill of Rights has been applied to the states through the Due Process Clause of the Fourteenth Amendment, the extreme reliance of the Supreme Court's dismissal of the Second Amendment claim in *Cruikshank* upon their rationale for the dismissal of the First Amendment claim in the same case seems to preponderate in favor of at least a reexamination by lower courts of the *Cruikshank* decision's rationale.

<sup>97</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). While the jury may still be out on whether the Due Process Clause of the Fourteenth Amendment was actually *meant* to incorporate the Bill of Rights, unless the Court is prepared to repudiate a doctrine it has developed over a half century of decisions, it ought to at least be consistent in its application of existing doctrine.

<sup>98</sup> 116 U.S. 252 (1886).

authority to revoke that license.<sup>99</sup> In September of 1879, Presser and 400 fellow members of a society calling itself *Lehr und Wehr Verein*,<sup>100</sup> marched without gubernatorial license in the streets of Chicago.<sup>101</sup> Presser was convicted and fined ten dollars.<sup>102</sup>

Presser complained that this law of Illinois had the effect of depriving him of his Second Amendment right to keep and bear arms.<sup>103</sup> The Court answered that the right to gather as a group and hold armed parades was not included in the right to keep and bear arms and that "the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States."<sup>104</sup> The Court, of course, cited *Cruikshank* for support of this proposition.<sup>105</sup> Curiously, the Court, in dicta, suggests that to the extent that state citizens are also members of the *national* militia, state (pg.981) regulation which prohibited "the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security" would not be sustainable, "even laying the [Second Amendment] out of view."<sup>106</sup> The Court did not explore that point further because it felt the Illinois statute in question was a valid exercise of the state's police power.<sup>107</sup> But the dicta of the case suggests, independent of the Second Amendment, that the state's right to restrict the lawful bearing of arms is not absolute. As one commentator notes,

[E]ven if the Second Amendment was not infringed by a state requirement of a license for private armed marches or even if it did not apply to the states, nevertheless, a right to keep and bear arms existed for "all citizens capable of bearing arms," and this right could not be infringed by the states.<sup>108</sup>

Subsequent courts have found it convenient, however, to ignore this loose thread left by the *Presser* Court.<sup>109</sup>

## II. LOWER COURT INTERPRETATIONS OF *MILLER*: GOING OFF THE RAILS

### A. Cases and Tot

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<sup>99</sup> *Id.* at 253 (quoting ILL. MIL. CODE Art. XI (1879)).

<sup>100</sup> The Supreme Court's opinion notes that the group was incorporated under the laws of Illinois and stated its aim, in its charter, as having the purpose of "improving the mental and bodily condition of its members" that they may be qualified "for the duties of citizens of a republic." This goal it intended to accomplish through "knowledge of ... laws and political economy ... and ... in military and gymnastic exercises." *Id.* at 254.

<sup>101</sup> *Id.* U.S. at 254-55.

<sup>102</sup> *Id.* at 254.

<sup>103</sup> *Id.* at 264.

<sup>104</sup> *Id.* at 265.

<sup>105</sup> *Id.* "The ... proposition to the effect that *Cruikshank* held that the Second Amendment is not a limitation on the states ignored that *Cruikshank* did not involve state infringement of rights." HALBROOK, *supra* note 88, at 160.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 265-66.

<sup>108</sup> See HALBROOK, *supra* note 88, at 161.

<sup>109</sup> See, e.g., *Quilici*, 695 F.2d at 269.

The first lower court cases interpreting *Miller* appeared in the early 1940s, during World War II. America's involvement in the war, as well as the whole notion of twentieth century "total war," seems to have had an impact on the courts' decisions. Unfortunately, the courts' interest in preserving the "stability" of the *Miller* "precedent regime"<sup>110</sup> by extending *Miller*, without acknowledging a change in the regime, has allowed subsequent courts to evade responsibility for their decisions by claiming fidelity to the *Miller* decision as "clarified" by *Cases* and *Tot*. The result has been the distortion of *Miller* into unrecognizability.<sup>111</sup>

### 1. *Cases v. United States*

In 1942, a mere three years after the *Miller* decision, the First Circuit decided a very interesting case that is the origin (pg.982) of much of the subsequent confusion among the lower courts. One of the very few lower court cases to carefully parse the language of *Miller* and attempt to use the Court's logic to formulate the rule of law, *Cases v. United States*<sup>112</sup> raises an interesting challenge to the conventional reading of *Miller*. Uncomfortable with what it deemed to be the societal implications of the *Miller* case, the *Cases* court rejected *Miller's* logic, looking instead to the state of mind of the person claiming a Second Amendment right. The *Cases* court required that the person, as a prerequisite to maintaining a Second Amendment claim, have in mind the maintenance and preservation of the militia as his or her paramount concern.<sup>113</sup> In rejecting the *Miller* test, the Court stated that if it were to take *Miller's* reasoning to its logical conclusion,

under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia. *However, we do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases.*<sup>114</sup>

While it may be correct that the Supreme Court did not intend its decision to be given a broad reading, the First Circuit offered no basis for its ultimate conclusion about *Miller*.

The most interesting portion of the *Cases* opinion is what the First Circuit concluded to be the consequences of a logical extension of the *Miller* rule, if it were intended to be applied broadly:

At any rate the rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well known fact that in the so called "Commando Units" some sort of military use seems to have been found for almost any modern lethal weapon.<sup>115</sup>

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<sup>110</sup> See *supra* note 40 and accompanying text.

<sup>111</sup> See *supra* note 38 and accompanying text.

<sup>112</sup> 131 F.2d 916 (1st Cir. 1942).

<sup>113</sup> "The First Circuit Court of Appeals, in deciding [*Cases*] began what can only be described as a rebellion against the holding in *Miller* that the Second Amendment guarantees the right of every individual to keep and bear any arms suitable for militia use." HALBROOK, *supra* note 88, at 188.

<sup>114</sup> *Cases*, 131 F.2d at 922 (emphasis added).

<sup>115</sup> *Id.*

The court concluded that given the state of modern warfare, "if the rule of the *Miller* case is general and complete, the (pg.983) result would follow that ... the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket ...."<sup>116</sup> The First Circuit worried that following the *Miller* rule would tend to make the limitation of the Second Amendment absolute,<sup>117</sup> and prevent the government from prohibiting "the possession or use by private persons not present or prospective members of any military unit, of distinctly military arms, such as machine guns, trench mortars, anti-tank, or anti-aircraft guns."<sup>118</sup>

Thus abandoning an attempt "to formulate any general test by which to determine the limits imposed by the Second Amendment,"<sup>119</sup> the court addressed the facts in the record. The court found that the defendant in question possessed a gun and ammunition, "transporting and using the firearm and ammunition purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia that the Second Amendment was designed to foster as necessary to the security of a free state."<sup>120</sup> The court found that there was no conflict between the federal statute and the Second Amendment and upheld the conviction.<sup>121</sup>

While the *Cases* opinion does little to further any attempt by federal courts to give effect to the Second Amendment, it is notable for its expansion of the Supreme Court's language in *Miller*. Far from reading it as rendering no protection to an individual's right to keep and bear arms, the *Cases* court assumed, by carrying Justice McReynold's reasoning to its logical conclusion, that the *Miller* opinion, if intended as a general rule, afforded entirely too much protection to a wide range of potentially destructive devices that individuals might seek to possess.<sup>122</sup> The Second Circuit thus rejected the (pg.984) *Miller* decision out of hand and proceeded, inexplicably, to engraft a state of mind requirement onto the Second Amendment where one had not previously existed. As we shall see, subsequent courts have seized upon *Cases* reasoning, expanding it even further in some instances.<sup>123</sup>

The *Cases* decision serves as a good example of a case decided according to what Karl Llewellyn would call the judges' "sense of the situation."<sup>124</sup> The court assumed that, as a matter of public policy, any meaningful limitation upon the government's ability to restrict private ownership of arms is bad; and the court decided the case accordingly, assuming that the framers of the Second Amendment did not intend it to present an impediment to the government in this regard.

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 923.

<sup>121</sup> *Id.* The court also found the Commerce Clause empowered the Federal Government to pass such firearm statutes despite the language of the Second Amendment. *Id.*

<sup>122</sup> A later circuit court opinion, citing the *Cases* interpretation of the *Miller* decision, called adherence to the *Miller* court's test as "madness" in an age of nuclear weapons. See *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976). Of course, the very language of the Second Amendment itself suggests limits to the Second Amendment's guarantee. See *Kates*, *supra* note 3, at 261 (suggesting the language of the Second Amendment itself would exclude from protection "weapons too heavy or bulky for the ordinary person to carry"). Applied along with some old-fashioned common sense, these limits would take care of the parade of horrors (the individual right to possess nuclear weapons) that gun control advocates always spring on anyone who suggests the language of the Second Amendment means something.

<sup>123</sup> "Interestingly, most of *Cases* may be considered mere *dictum* because its narrow holding was that convicted violent felons (a class which traditionally had forfeited various civil rights, including militia membership) could be constitutionally disarmed." HALBROOK, *supra* note 88, at 189.

<sup>124</sup> See *infra* note 217 and accompanying text.

## 2. *United States v. Tot*

*United States v. Tot*<sup>125</sup> offered historical analyses of the Second Amendment to support its reading of *Miller*, and to bolster the court's claims about the lack of a constitutional right to keep and bear arms. While notable for the attempt to use original source material to interpret the Second Amendment, the *Tot* court either discriminated against material that did not support its desired outcome, or simply cited sources that did not support its position.<sup>126</sup>

The defendant in *Tot* was convicted of violating a federal law which prohibited the possession of a firearm capable of being fitted with a silencer.<sup>127</sup> One of the grounds upon which the defendant attacked his conviction was the Second Amendment.<sup>128</sup> The Third Circuit embarked upon its interpretation of the history surrounding the adoption of the (pg.985) Second Amendment and offered its conclusions to "explain" the Supreme Court's *Miller* decision. Like the *Cases* court, the Third Circuit thought that the *Miller* decision left a good deal unanswered.<sup>129</sup>

The *Tot* court begins its discussion of the Second Amendment claim as follows:

It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachment by the federal power.<sup>130</sup>

The court offered little support for this sweeping conclusion and ignored much writing to the contrary. Recounting abuses in England under James II,<sup>131</sup> the court concluded that the colonists "wanted no repetition of that experience in their newly formed government."<sup>132</sup> The Third Circuit thus implied that the Framers drafted the amendment as a mere constitutional admonishment to the government not to overstep its bounds with respect to the states or citizens, lest it become worse than what it replaced. For, despite whatever rhetorical force the amendment may possess, the court certainly did not consider it a right the Framers would have thought to give individuals. The right was treated by the court as, to quote a later court, mere "historical residue."<sup>133</sup> Once again, the court

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<sup>125</sup> 131 F.2d 261 (3rd Cir. 1942).

<sup>126</sup> "[N]ot a single original source quoted in *Tot* substantiates its assertion that the Second Amendment 'was not adopted with individual rights in mind,'" and "at least two of [the articles cited by the court] directly contradict the *Tot* thesis." HALBROOK, *supra* note 88, at 190-91.

<sup>127</sup> *Tot*, 131 F.2d at 265.

<sup>128</sup> *Id.* at 266.

<sup>129</sup> "The contention of the appellant in this case could, we think, be denied without more under the authority of [*Miller*]." *Id.*

<sup>130</sup> *Id.* (footnotes omitted).

<sup>131</sup> "The experiences in England under James II of an armed royal force quartered upon a defenseless citizenry was fresh in the minds of the Colonists." *Id.* I confess being puzzled by the court's choice of historical examples here. Might not the memory of the armed royal forces of George III being quartered among the colonists in America have been a bit fresher in the minds of those who framed the Second Amendment?

<sup>132</sup> *Tot*, 131 F.2d at 266.

<sup>133</sup> *See* *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992).

was unshakable in its belief that the Framers did not mean what the language of the Second Amendment suggests they meant—that individuals have a right to keep and bear arms.

The court then made a curious observation. "Weapon bearing," it stated, "was never treated as anything like an absolute right by the common law."<sup>134</sup> It was regulated by (pg.986) statute as to time and place as far back as the Statute of Northampton in 1328<sup>135</sup> and on many occasions since."<sup>136</sup> The court continued, stating that

decisions under the State Constitutions show the upholding of regulations prohibiting the carrying of concealed weapons, prohibiting persons from going armed in certain public places and other restrictions, in the nature of police restrictions, but which do not go so far as substantially to interfere with the public interest protected by the constitutional mandates.<sup>137</sup>

Judicial refusal to recognize the right to bear arms as an absolute right does not mean, however, that this right was not meant to be a right possessed by individuals. Yet the *Tot* court asserted with confidence that the Second Amendment "was not adopted with individual rights in mind."<sup>138</sup> Although states regulated certain types of weapons notwithstanding their state constitutions that protected the right to keep and bear arms, state courts were often unsympathetic to local governments' (pg.987) attempts to ban certain types of weapons outright.<sup>139</sup> More importantly, federal courts' reliance on state experiences are of little relevance because the federal government does not

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<sup>134</sup> *Tot*, 131 F.2d at 266. Again, the court indulged in a straw man argument. None of the scholars cited in note 3 argued for an unqualified or absolute right to keep and bear arms.

<sup>135</sup> The Statute of Northampton, enacted by Richard III, stated as follows:

[N]o man great or small, of whatever condition soever he be, except the King's servants in his presence, ... and also upon a cry for arms to keep the peace, and the same in such places where such acts happen, be so hardy as to come before the King's Justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the Justices or other ministers, nor in no part elsewhere....

DAVID T. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 15 (1986) (quoting Statute of Northampton, 1328, 2 Edw. III, ch. 3). Despite the absolute language of the statute, there is no evidence whatsoever that anyone was actually prosecuted under it. In fact, when James II attempted to use the Statute of 1328 against a militant Bristol Anglican named Sir John Knight, the King's Bench refused to interpret it as anything approaching an absolute prohibition. See MALCOM, *supra* note 3, at 104-05. According to the reports of the case, the King's Bench noted that the statute was "almost gone in desuetudinem." See HARDY, *supra* at 16 (quoting Sir John Knight's Case, 87 Eng. Rep. 75, 90 Eng. Rep. 330 (King's Bench 1687)) (the latter term being used to denote a statute that has lapsed from neglect). Sir John was acquitted by a jury, and the Chief Justice noted the intent of the statute was to punish those who went armed to "terrify the King's subjects." *Id.* Further, the court specifically recognized that it was customary to allow "[g]entlemen to ride armed for their security." See MALCOM, *supra* note 3, at 105. Professor Malcom further notes that "[i]t was very likely the unwillingness of the Court of King's Bench to apply the statute of 1328 in Knight's case that drove home to [James II] the need for a more general statute to disarm subjects." *Id.*

<sup>136</sup> *Tot*, 131 F.2d at 266 (footnote omitted).

<sup>137</sup> *Id.* For an examination of Tennessee's version of the Second Amendment and the case law interpreting it, see Reynolds, *supra* note 3.

<sup>138</sup> *Tot*, 131 F.2d at 266.

<sup>139</sup> See, e.g., *Andrews v. State*, 50 Tenn. 141, 156-57 (1875) (holding that the attempt to ban "military weapons" like "repeating pistols" was unconstitutional under the Tennessee constitution). For a discussion of *Andrews*, see Reynolds, *supra* note 3, at 663-65. As previously mentioned, at the time these cases were decided, there was general agreement as to the line of demarcation between military and nonmilitary weapons.

possess the broad police powers that state governments do.<sup>140</sup> Thus, the *Tot* court's contributions to Second Amendment jurisprudence are of questionable significance.

Most federal court decisions that followed challenges to post-1968 federal gun control legislation "almost invariably seek support not in any historical document, but in similarly nonsupported previous cases, traceable to the *Cases* and *Tot* precedents."<sup>141</sup> Courts dismiss Second Amendment claims with banal statements like the following: "[t]here can be little dispute with the proposition that 'there is no absolute constitutional right of an individual to possess a firearm.'"<sup>142</sup> A district court in Pennsylvania offered the similarly unhelpful observation that "[t]he Second Amendment to the Constitution is not a bar to Congressional regulation of use and possession of firearms."<sup>143</sup> Courts and commentators who argue against an "absolute" Second Amendment right weigh in against a straw man since no reasonable scholar has argued that the Second Amendment right is any more absolute than the First Amendment.<sup>144</sup> Such willingness to engage arguments that no one is making demonstrates the reluctance of (pg.988) federal courts even to hypothecate, based on the holding in *Miller*, situations in which government regulation of firearms would infringe upon the protections given by the Second Amendment. These courts give no indication of what the law is and provide no guidance to legislators.<sup>145</sup>

Similar to the *Tot* court's reasoning, a South Carolina district court judge in *United States v. Jones*<sup>146</sup> reasoned that "[s]ince there is no absolute constitutional right of an individual to possess a firearm ... the test of determining the constitutionality of 18 U.S.C. § 922(h) (4)<sup>147</sup> depends on finding a rational basis for the particular classification."<sup>148</sup> Under this judge's formulation, no right that is not absolute can qualify as "fundamental," thus triggering the heightened scrutiny of federal courts. Under such a test, there is not a right in the Constitution that would so qualify. It would be hard to imagine a similar statement being made in connection with federal restrictions of freedom of speech or religion.

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<sup>140</sup> Article I, section 10 of the Constitution limits the legislative power to those "herein granted." Further, the Tenth Amendment seems to have been meant to backstop Constitutional silence by explicitly resolving any doubts about where any residuum of power lies: either the states or the people.

<sup>141</sup> HALBROOK, *supra* note 88, at 189 (footnote omitted).

<sup>142</sup> *Thompson v. Dereta*, 549 F. Supp. 297, 299 (C.D. Utah 1982) (quoting *United States v. Swinton*, 521 F.2d 1255, 1259 (10th Cir. 1975)). This case represents another bad habit lower courts have developed: making sweeping statements about the Second Amendment followed by a citation to another lower court decision. Sometimes, as in this case, it is misleadingly followed by a citation to *Miller*, as if the Supreme Court's decision contained language that somehow echoed that of the language quoted from the other lower court.

<sup>143</sup> *Rice v. United States*, 850 F. Supp. 306, 309 (E.D. Penn. 1994).

<sup>144</sup> See Van Alstyne, *supra* note 3, at 1254 ("The freedoms of speech and of the press, it has been correctly said, are not absolute. Neither is one's right to keep and bear arms absolute."). See also Don B. Kates, *The Second Amendment: A Dialogue*, 49 J.L. & CONTEMP. PROBS. 142, 145-46 (1986) (writing that "reasonable gun controls are no more foreclosed by the second amendment than is reasonable regulation of speech by the first amendment").

<sup>145</sup> Thus, they seem to be abdicating that oft-quoted role of the judiciary: to interpret the law. See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>146</sup> 569 F. Supp. 395 (D.S.C. 1983).

<sup>147</sup> This statute prohibits the sale of firearms to those who have been found to be "mentally defective" or who have been committed to any mental institution. *Id.* at 398.

<sup>148</sup> *Id.* (citations omitted).

Other courts disingenuously cite *Miller* purporting to show that, historically, "the right to keep and bear arms is not a right given by the United States Constitution."<sup>149</sup> Similar sentiment was expressed by a New Hampshire district court that stated, "[i]t is well established that the Second Amendment is not a grant of a right but a limitation upon the power of Congress and the national government."<sup>150</sup> Both cases cite *Miller* for that proposition even though there is no language in *Miller* that suggests such an interpretation was a part of the Court's holding.<sup>151</sup> Further, the courts employing this reasoning do not explain the effect such observations have on the interpretation of the Second Amendment, i.e., *how* does it *limit* the power of Congress?<sup>(pg.989)</sup>

## B. *Can the Simple Cite Be Trusted?*

### 1. *United States v. Warin*

Following the lower court decisions in *Cases* and *Tot*, there was little litigation concerning the Second Amendment until individuals began to challenge the federal gun control legislation of the late 1960s. Unfortunately, many of these contemporary courts seized on *Cases*' bizarre state of mind requirement and *Tot*'s unsupported "collective theory" interpretation as a convenient way to dispose of bothersome Second Amendment claims. Further, many courts began to cite *Miller* as actually standing for the holdings in *Cases* and *Tot*. These decisions made it possible for courts to make statements like that of a Minnesota district court, which held, citing *Miller*, that since "[t]here is no evidence ... that the defendant was possessing the ... .22 caliber semi-automatic rifle with any thought or intention of contributing to the efficiency of the well-regulated militia," her conviction on federal firearms charges should be upheld.<sup>152</sup> While such judicial hostility to Second Amendment claims would normally discourage all but the most desperate defendants, as the case of *United States v. Warin*<sup>153</sup> demonstrates, one should never underestimate the ingenuity of the citizen accused or his lawyer in formulating a clever argument. But again in *Warin*, the courts changed the rules, while maintaining piously that Second Amendment jurisprudence had followed studiously the language of *Miller*.

Francis J. Warin was convicted by an Ohio district court for possessing an unlicensed submachine gun, in violation of federal law.<sup>154</sup> Mr. Warin appealed on the grounds that he was a member of the "sedentary militia" of Ohio<sup>155</sup> and that he had been making improvements to the weapon in question so that he might offer it "to the Government as an improvement on the military

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<sup>149</sup> See *Eckert v. City of Philadelphia*, 477 F.2d 610, 610 (3rd Cir. 1973).

<sup>150</sup> See *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981).

<sup>151</sup> The notion that the Constitution, as a document, "grants" any rights would have horrified the Framers, many of whom were opposed to the Bill of Rights on the ground that any enumeration would tempt people to claim that no rights existed outside those enumerated.

<sup>152</sup> See *U.S. v. Wiley*, 309 F. Supp. 141, 145 (D. Minn. 1970) (citing *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942)).

<sup>153</sup> 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 105. The source of the term "sedentary militia" is unclear." *Id.* at n.1. The term was likely drawn from the Ohio Constitution. See OHIO CONST. Art. IX, § 1 (subjecting all resident citizens between the ages of 17 and 67 to possible militia service).

weapons presently in use."<sup>156</sup> *Warin* (pg.990) seems to have satisfied the rigorous test set forth in *Cases* and in *Hale*. The Sixth Circuit disagreed and affirmed the conviction.<sup>157</sup>

In affirming *Warin*'s conviction, the Sixth Circuit articulated a variation on the theme in *Cases* and held that the *Miller* decision articulated no hard and fast rule.<sup>158</sup> The court relied on a case it had decided just five years before, *Stevens v. United States*,<sup>159</sup> which held that since the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right to possess a firearm."<sup>160</sup> Based on the *Stevens* decision, the court felt it could confidently conclude that "[i]t is clear that the Second Amendment guarantees a collective rather than an individual right."<sup>161</sup> The *Stevens* court cited *Miller*<sup>162</sup> for the proposition that there can be "no serious claim to any express constitutional right of an individual to possess a firearm" and that the Second Amendment applies only "to the right of the State to maintain a militia."<sup>163</sup>

The Sixth Circuit's *Warin* opinion does, however, give one a clue as to what the court's real concern was. Needless to say, neither *stare decisis* nor fidelity to the text or the intent of the Second Amendment has much to do with its decision. Describing the First Circuit's opinion in *Cases*, the court wrote the following:

The ... [First Circuit] noted the development of new weaponry during the early years of World War II and concluded that it was not the intention of the Supreme Court to hold that the Second (pg.991) Amendment prohibits Congress from regulating any weapons except antiques "such as a flintlock musket or a matchlock harquebus...." *If the logical extension of the defendant's argument for the holding of Miller was inconceivable in 1942, it is completely irrational in this time of nuclear weapons.*<sup>164</sup>

Of course, the statement is a non sequitur since no one is talking about the right to keep and bear a nuclear weapon. The court explicitly endorses the Second Circuit's disregard of the Second Amendment based on technological advancement. In doing so, it adopts the *Cases* court's assumptions that recognition of limits in the Second Amendment, or even an honest application of the logic of *Miller*, would lead to anarchy. Arguing that the Second Amendment might be employed to vindicate an individual's right to possess nuclear weapons represents the steepest slippery slope

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<sup>156</sup> *Warin*, 530 F.2d at 105. The district court also found that the defendant was "an engineer and designer of firearms whose employer develops weapons for the government ...." *Id.* Further, the defendant had made the nine-millimeter submachine gun himself. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> "Agreeing as we do with the conclusion in *Cases* ... that the Supreme Court did not lay down a general rule in *Miller*, we consider the case on its own facts and in light of applicable authoritative decisions." *Id.* at 106.

<sup>159</sup> 440 F.2d 144 (6th Cir. 1971).

<sup>160</sup> *Warin*, 530 F.2d. at 106 (quoting *Stevens*, 440 F.2d at 149).

<sup>161</sup> *Id.*

<sup>162</sup> After the quoted statement, the *Stevens* court cites to page 178 of the Court's opinion in *Miller*. *Miller* merely noted that absent evidence that a sawed-off shotgun was somehow related to a well regulated militia, the court could not say that its possession was protected by the Second Amendment. *Miller*, 307 U.S. at 178. That is the whole of its treatment of the Second Amendment claim in *Stevens*, yet the *Warin* court cites it as if it was a conclusion with some legitimate basis in law. The Sixth Circuit's opinions are monuments to intellectual dishonesty with regard to the Second Amendment and the *Miller* opinion.

<sup>163</sup> *Stevens*, 440 F.2d at 149.

<sup>164</sup> *Warin*, 530 F.2d at 106 (citations omitted) (emphasis added).

argument available.<sup>165</sup> It also belies a world view in which government is the sole legitimate instrument of violence.

## 2. *United States v. Hale*

More recently, the Eighth Circuit, describing *Cases* as "one of the most illuminating circuit opinions on the subject of 'military' weapons and the Second Amendment," based its opinion in *United States v. Hale*<sup>166</sup> in large part on its reading of *Cases* and not on *Miller*.<sup>167</sup> *Hale* involved the prosecution and conviction of an individual for possession of unregistered machine guns in violation of federal law.<sup>168</sup> The defendant appealed his conviction, arguing that the indictment violated his Second Amendment rights.<sup>169</sup> The Defendant made the plausible argument that, based on *Miller*, he had every right to possess the machine guns because they were just the sort of weapons that would be employed by a military unit, and thus were weapons that would contribute to the preservation or (pg.992) efficiency of the militia.<sup>170</sup> The Eight Circuit rejected this interpretation of *Miller*, claiming without explanation that the function of the *Miller* court's language to that effect was merely to "recogniz[e] ... historical residue."<sup>171</sup>

The court went on to cite *Cases* approvingly for the following proposition:

[T]he claimant of Second Amendment protection must prove that his or her *possession* of the weapon was reasonably related to a well regulated militia.... Where such a claimant presented no evidence either that he was a member of a military organization or that his use of the weapon was "in preparation for a military career," the Second Amendment did not protect the possession of that weapon.<sup>172</sup>

It would have been egregious enough had the Eighth Circuit merely stopped at dismissing the holding of the *Miller* opinion as "historical residue," but the court compounded its error by conditioning Second Amendment rights upon a showing of membership in or preparation for membership in a military organization!<sup>173</sup> If "militia," as used in the Second Amendment,

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<sup>165</sup> The Sixth Circuit's argument is the B side to a familiar argument put forth by gun control advocates: The Second Amendment should be interpreted to protect only the right to keep and bear those arms in use at the time of the Framing, i.e., flintlock muskets. Strangely enough, such quaint constitutional analysis is quickly abandoned when interpreting the First Amendment's free speech clause or the Eighth Amendment's cruel and unusual punishment clause—both of which have been employed in ways the Framers could never have imagined.

<sup>166</sup> 978 F.2d 1016, 1019 (8th Cir. 1992).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1017.

<sup>169</sup> *Id.* at 1018.

<sup>170</sup> *Id.* at 1019.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1020 (emphasis in original) (citations omitted).

<sup>173</sup> The entire purpose for the Framers' provisions in the Constitution for "militias" must be understood in light of their juxtaposition with "standing armies." Compare U.S. CONST. art. I, § 8, cl. 12 (giving Congress the power to "raise and support Armies") with U.S. CONST. art. I, § 8, cl. 15 (giving Congress the power to "provide for calling forth the Militia ..."). Standing armies were antithetical to the ideals of eighteenth century republican ideology. Joyce Lee Malcom writes that "[American] jealousy of their personal right to have weapons was magnified by what one historian characterized as an 'almost panic fear' of a standing army ...." See MALCOM, *supra* note 3, at 143. See also J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 432 (1975) (describing the scheme for military training of all freeholders in England as

(pg.993) meant anything to the Framers, it was intended to be the opposite of "army."<sup>174</sup> It seems the court wanted the decision "badly enough to lie to get it."<sup>175</sup>

### 3. *Quilici v. Morton Grove*

The Seventh Circuit, in *Quilici v. Morton Grove*,<sup>176</sup> relied heavily on *Presser* and ignored *Cruikshank* in its decision upholding the constitutionality of a city's ban on the possession of handguns within the city limits. Victor Quilici and others initially brought suit against the city in state court.<sup>177</sup> After Morton Grove removed the action to federal district court, that court granted Morton Grove's motion for summary judgment.<sup>178</sup> In granting the motion for summary judgment, the district court, relying on *Presser*, stated that the Second Amendment had not been applied to the

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"essentially a means of education in civic virtue").

Furthermore, the "militia" as a military force comprised of the body of the citizenry was distinguished from a "select militia"—like the modern National Guard—which was regarded as just as threatening to civic republican ideals as a standing army. See MALCOM, *supra* note 3, at 142 ("Although armies were particularly feared, the colonists were also alert to the dangers of a 'select militia' ....") (footnote omitted). Don Kates takes aim at those, like Dennis Henigan or officials of the ACLU, who have suggested that the National Guard and the "Militia" of the Second Amendment are equivalent. Kates writes:

The American Civil Liberties Union's argument against an individual right interpretation states that the amendment uses "militia" in the sense of a formal military force separate from the people. But this is plainly wrong. The Founders ... defined it in some phrase like "the whole body of the people," while their references to the organized-military-unit usage of militia, which they called a "select militia," were strongly pejorative.

Kates, *supra* note 3, at 216.

<sup>174</sup> For contemporaneous statements expressing distrust of standing armies, see 5 THE FOUNDERS' CONSTITUTION 210 (Philip B. Kurland & Ralph Lerner eds., 1987) (excerpting statements from the Pennsylvania Constitution of 1776, and the debates in Congress over the Bill of Rights). For the history of the elimination of the state militia as a player in national defense policy, see Denning, *supra* note 3 (describing the successful efforts of the military establishment to bring state militia units under federal control).

Despite scholarly opinion to the contrary, the Militia-equals-National-Guard-equals-no-right-to-keep-and-bear-arms is a familiar refrain among those holding a collectivist view of the Second Amendment. See Henigan, *supra* note 3, at 199. *But see* Williams, *supra* note 3, at 598 (acknowledging that it is "probable that [the Amendment] used 'Militia' in this broader sense"). Rarely, however, do these proponents take their argument to its logical conclusion. *But see* Reynolds & Kates, *supra* note 3, at 1745 (taking the argument seriously in an effort to demonstrate to those who use it the unintended consequences of such a position). In fact, I have argued elsewhere that the those forming the neomilitias, so much in the news recently, often take this position as support for the legality of their actions. See Denning, *supra* note 3.

The Supreme Court recognized as much when it stated as follows:

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep .... The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense ... could be secured through the Militia—civilians primarily, soldiers on occasion.

*Miller*, 307 U.S. at 178-79.

<sup>175</sup> See LLEWELLYN, *supra* note 12 at 135.

<sup>176</sup> *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

<sup>177</sup> *Id.* at 264.

<sup>178</sup> *Id.* at 264-65. See *Quilici v. Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981).

states through the Fourteenth Amendment, and thus was ineffective as a restraint upon the states.<sup>179</sup> (pg.994)

The Seventh Circuit agreed with the district court. In a 2-1 decision, the court held that the Second Amendment did not apply to the states.<sup>180</sup> The court ignored the fact that the *Presser* decision did not address the *individual* right to keep and bear arms and rejected as "dicta quoted out of context" the language from *Presser* in which the Supreme Court stated that, independent of the Second Amendment protections, states could not so impair their citizens' right to bear arms in a manner which deprived the United States of a means for its defense.<sup>181</sup> Similarly, the court rejected the related arguments that the entire Bill of Rights has been incorporated<sup>182</sup> and that *Presser* is no longer good law.<sup>183</sup>

*Presser* was not decided in a vacuum. The *Presser* Court specifically relied upon *Cruikshank* in support of its decision.<sup>184</sup> As previously mentioned, the *Cruikshank* Court gave only cursory treatment to the Second Amendment claim, devoting much of its decision to refuting the notion that the First Amendment provided any protection to individuals from other individuals not acting under government authority, and, in any event, holding that the Bill of Rights did not operate against the states.<sup>185</sup> The 1912 Supreme Court decision of *Gitlow v. New York*<sup>186</sup> which applied the First Amendment, by assumption, to the states seems to have overruled *Cruikshank sub silento* or at least would seem to approve the reexamination of its theoretical underpinnings. While the Seventh Circuit is correct that the Supreme Court has never held that the entire Bill of Rights is incorporated through the Due Process Clause of the Fourteenth Amendment,<sup>187</sup> it is curious that it declines (pg.995) to articulate the test by which the Supreme Court purports to evaluate whether a particular provision is deserving of incorporation and to apply that test to the Second Amendment.<sup>188</sup> As the dissent points out, there is an argument that "nothing could be more fundamental to the 'concept of ordered liberty' than the basic right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions."<sup>189</sup>

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<sup>179</sup> *Id.* While Illinois, like many other states, had a provision in its constitution that ostensibly protected the right to keep and bear arms, the provision bore a qualification which I argue renders it almost useless as a protection. Article 1, section 22 of the Illinois constitution reads: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." ILL. CONST. art. I, § 22. Conditioning such a right on the continued approval of the state tends to reduce the efficacy of such a right. In any event, the *Quilici* court found that Morton Grove's proposal was well within its police powers and that as a matter of state constitutional law, the ordinance was valid. *Quilici*, 695 F.2d at 267.

<sup>180</sup> *Quilici*, 695 F.2d at 269.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 270.

<sup>183</sup> *Id.*

<sup>184</sup> *See Presser*, 116 U.S. at 265.

<sup>185</sup> *See supra* note 180 and accompanying text.

<sup>186</sup> 268 U.S. 652 (1925).

<sup>187</sup> "The Supreme Court has specifically rejected the proposition that the entire Bill of Rights applies to the states through the [F]ourteenth [A]mendment." *Quilici*, 695 F.2d at 270 (citations omitted).

<sup>188</sup> *See, e.g.,* *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968) (stating as one test whether the "right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'"); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (asking whether a right is "the very essence of a scheme of ordered liberty") (*overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969)).

<sup>189</sup> *Quilici*, 695 F.2d at 278 (Coffey, J., dissenting).

Unfortunately, the *Quilici* court also took the opportunity to parrot the predominant judicial thinking regarding the meaning of the Second Amendment and contributed to a wider misunderstanding of *Miller*.<sup>190</sup> Predictably, the court found that "according to its plain meaning, ... the right to bear arms is inextricably connected to the preservation of a militia."<sup>191</sup> Further, the court cited *Miller* for the proposition that "the right to keep and bear arms extends only to those arms which are necessary to maintain a well regulated militia."<sup>192</sup> The court expressed incredulity at the appellants' argument that "[t]he fact that the right to keep and bear arms is joined with language expressing one of its purposes in no way permits a construction which limits or confines the exercise of that right."<sup>193</sup> The majority remarked blithely that appellants "offer no explanation for how they have arrived at this conclusion."<sup>194</sup> By way of response, one might paraphrase William Van Alstyne who writes of the Second Amendment (pg.996) that, whatever words serve as a prelude, the right to keep and bear arms belongs to the people.<sup>195</sup>

#### 4. *Love, Hickman* and the Rise of the "Collective Rights" Theory of *Miller*

The most popular theory of the Second Amendment is now the so-called "collective right" theory advanced by the government but implicitly rejected by the Supreme Court in *Miller*, then resurrected by the Third Circuit Court of Appeals in *United States v. Tot*. Advocated by scholars like Dennis Henigan and Andrew Herz, the collective right argument proposes that the Second Amendment was primarily intended to prevent federal interference with the militias of the individual states. Since the National Guard, they argue, has replaced the militias of the individual states, the Second Amendment—like the Third Amendment<sup>196</sup>—is little more than an anachronistic curiosity.<sup>197</sup>

Recently, the Fourth Circuit joined the fray in *Love v. Pepersack*.<sup>198</sup> The Fourth Circuit concluded that "lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual right"<sup>199</sup> and that it is the "collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated

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<sup>190</sup> No sooner does the court finish stating that "since we hold that the second amendment does not apply to the states, we need not consider the scope of its guarantee of the right to bear arms," than it "briefly comment[s] on ... the scope of the second amendment." *Id.* at 270.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* Actually, the Supreme Court's language was a bit broader; it conditioned its holding on the "absence of any evidence tending to show" the possession or use of a shotgun "has some *reasonable* relationship to the preservation or efficiency of a well regulated militia." See *Miller*, 307 U.S. at 178 (emphasis added). Nor is the difference in phraseology insignificant. The Seventh Circuit's formulation of the *Miller* holding is considerably more restrictive, not to mention less ambiguous than that of the Supreme Court.

<sup>193</sup> *Quilici*, 695 F.2d at 270.

<sup>194</sup> *Id.*

<sup>195</sup> See Van Alstyne, *supra* note 3, at 1237-38. Professor Nelson Lund makes the similar point that nothing is wrong with the amendment, the problem lies with modern *readers* of the amendment. See Nelson Lund, *The Past and Future of the Individual's Right to Arms*, GEO. MASON U. L. REV. (forthcoming 1996). He writes that "[t]he clumsiness of the modern reader ... can be cured if one simply uses standard interpretive tools and avoids imposing anachronistic prejudices on the text." *Id.*

<sup>196</sup> "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

<sup>197</sup> See Herz, *supra* note 1; Henigan, *supra* note 3.

<sup>198</sup> 47 F.3d 120 (4th Cir. 1995).

<sup>199</sup> *Id.* at 124.

militia."<sup>200</sup> Just as courts have not been impressed by such arguments in the past, the present court concluded that the defendant in the case "has likewise not identified how her possession of a handgun will preserve or insure the effectiveness of the militia."<sup>201</sup> (pg.997)

Even more recently, the Ninth Circuit has embraced the "collective rights" theory of the Second Amendment. In *Hickman v. Block*<sup>202</sup> the Ninth Circuit rejected the plaintiff's Second Amendment challenge to state and municipal officials in California who rejected his application for a concealed carry permit.<sup>203</sup> The Ninth Circuit rejected the challenge, not on the ground that the Second Amendment did not apply to the states,<sup>204</sup> but on the grounds that the plaintiff lacked standing to bring the claim at all. The court held as follows: "We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen. We conclude that Hickman can show no legal injury, and therefore lacks standing to bring this action."<sup>205</sup>

In its analysis, the Ninth Circuit ignored whatever historical materials were provided to it, as well as the incredible amount of scholarly information about the Second Amendment that is now available. Further, the opinion makes several errors that cause the reader to question whether the author of the opinion actually read the cases she cited. First, the court repeats the erroneous statement that "no individual has ever succeeded in demonstrating such injury in federal court."<sup>206</sup> I have shown this to be completely false.<sup>207</sup> Further, the court maintains that the decision in *Miller* "upheld a conviction under the National Firearms Act."<sup>208</sup> This too, is incorrect. The Supreme Court in *Miller* merely vacated the lower court decision that quashed the indictment of the defendants.<sup>209</sup> Further, the fact there was no appearance at the Supreme Court for Layton, and that it was the *government* which pursued the appeal from the lower court renders the Ninth Circuit's interpretation of the *Miller* decision erroneous as well: "The Court rejected the appellant's hypothesis that the Second Amendment protected his possession of [a sawed-off shotgun] .... [T]he Court found that the right to keep and (pg.998) bear arms is meant solely to protect the right of the states to keep and maintain armed militia."<sup>210</sup> The *Miller* Court merely refused to take judicial notice of the fact that Miller's sawed-off shotgun was the type of weapon which would be useful to a militia. Further, as I pointed out earlier, the government strenuously argued in its brief for the position that the Ninth Circuit adopts, and which the Supreme Court did not: that the Second Amendment protects only a state's right to an armed militia.<sup>211</sup> Finally, the Ninth Circuit cites the usual suspects for support of its position and concludes that "[b]ecause the Second Amendment guarantees the right of the states

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<sup>200</sup> *Id.* (quoting *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974) (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939))).

<sup>201</sup> *Id.*

<sup>202</sup> 81 F.3d 98 (9th Cir. 1996).

<sup>203</sup> *Id.* at 100.

<sup>204</sup> *See Presser*, 116 U.S. at 265.

<sup>205</sup> *Hickman*, 81 F.3d at 101.

<sup>206</sup> *Id.*

<sup>207</sup> *See supra* note 68 and accompanying text.

<sup>208</sup> *Id.*

<sup>209</sup> *See supra* note 64 and accompanying text.

<sup>210</sup> *Hickman*, 81 F.3d at 101.

<sup>211</sup> *See supra* note 77 and accompanying text.

to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed."<sup>212</sup>

The Ninth Circuit had an opportunity to make use of the works of many talented legal scholars to correct the judicial neglect of the Second Amendment. Sadly, with its inartful and erroneous opinion, it chose to continue the regretful tradition of judicial indifference to those making Second Amendment claims. The *Hickman* decision adds another layer of judicial gloss on *Miller*, as inaccurate as it is thick, making it all the more difficult for future courts to strip away.

## CONCLUSION

Reading lower federal court opinions where a Second Amendment challenge is raised, one can hear the exasperated sighs emanating from the pages. Mr. Kallgren of the ABA expresses similar disbelief at the prospect that any right thinking lawyer who paid attention during Constitutional Law could hold the belief that the Second Amendment means anything. "The Supreme Court has settled this!" they cry.<sup>213</sup> Courts invoke *Miller* with vehemence and regularity in dismissing, out of hand, challenges to the various pieces of gun control legislation passed by Congress in the last fifty years.<sup>214</sup> (pg.999)

In all fairness to Mr. Kallgren and the ABA, if one were to read only the lower court opinions since 1939, the year *Miller* was decided, one would come away fairly convinced that the Supreme Court had in fact settled all past and future issues with respect to the Second Amendment. A close examination of the lower courts' opinions and comparison with the actual holding of *Miller*, however, reveals that the lower courts have demonstrated a remarkable obtuseness, sometimes

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<sup>212</sup> *Hickman*, 81 F.2d at 102.

<sup>213</sup> Of course, the Supreme Court was thought to have "settled" the issue of Congress's power under the Commerce Clause, too. *See* *United States v. Lopez*, 115 S. Ct. 1624 (1995). Thus the argument that a constitutional argument is invalid because the Supreme Court has "settled" this issue is a dangerous one to make—the Court could always change its mind.

<sup>214</sup> When one federal appeals court judge had the temerity to disagree with his court's general statements regarding the Second Amendment, while still concurring with the result, he was attacked, almost hysterically, in the court's opinion.

In the case of *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), Circuit Judge Beam wrote a special concurrence in which he stated, in relevant part:

I ... agree that Hale's possession of ... [an unregistered firearm] ... is not protected by the Second Amendment. I disagree that *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976); *United States v. Oakes*, 564 F.2d 394 (10th Cir. 1977); and *United States v. Nelson*, 859 F.2d 1318 (8th Cir. 1988) properly interpret the Constitution or the Supreme Court's holding in *United States v. Miller* ... insofar as they say that Congress has the power to prohibit an individual from possessing any type of firearm, even when kept for lawful purposes. Judge Gibson's opinion seems to adopt that premise and with that holding, I disagree.

*Hale*, 978 F.2d at 1021 (Beam, J. concurring specially).

For his part, Judge Gibson said:

The concurrence flies in the face of *stare decisis* in arguing that this court did not properly interpret the Second Amendment or *Miller* in *Nelson*, which is consistent with our earlier decisions in *Cody* and *Decker*. The concurrence would also flout uniform precedent from other circuits, particularly since *Nelson* cites and relies on *Oaks* and *Warin* and *Cody* on *Cases*.

*Id.* at 1019 n.3. This petulant aside is a good example of how terrified judges are of questioning too closely the underpinnings of these Second Amendment cases. Many courts use *stare decisis* precisely in this manner: as a sword to strike down those who would question the reasoning of the cases.

lurching into intellectual dishonesty. As I have shown, the courts have indulged in constitutional gymnastics in an effort to avoid construing the Second Amendment to contain anything resembling a right under which an individual might make a colorable claim. On this point alone, courts might be said to be construing the wording of a provision of the Constitution to be meaningless—a result that should be avoided.<sup>215</sup> (pg.1000)

While difficult to classify because the reasoning of the opinions overlaps to some degree, it is possible to ascertain different approaches taken by federal courts over the years in an effort to render the Second Amendment a constitutional eunuch. It is fair to say that the "interpretations" of the *Miller* decision tend to evolve in response to arguments following the logic of the *Miller* decision to a reasonable conclusion. While few lower courts choose to do more than issue conclusory statements regarding the Second Amendment and the right to keep and bear arms (always slavishly citing *Miller* as if the Supreme Court's decision supported their statements), their steadfast reluctance to recognize an enforceable right in the Second Amendment often has little to do with the *Miller* decision and more with the courts' discomfit with the right to keep and bear arms as a matter of public policy.<sup>216</sup>

Surveying the state of Second Amendment jurisprudence, another one of Karl Llewellyn's judicial decision-making models comes to mind. The phrase Llewellyn uses is "sense of the situation."<sup>217</sup> This is no more than how the court "sees" the case and how, through the application of "fireside equities," judges think a case should be decided. Llewellyn writes that the "felt sense of a situation" can "strongly ... affect the court's choice of techniques for reading or interpreting and then applying the authorities."<sup>218</sup> The greater the felt need, as perceived by the courts, the more leeway they believe they have to "reshap[e] an authority or the authorities."<sup>219</sup> Sometimes judges get so caught up in the personalities involved in a particular case such that:

[I]t is hard to disentangle general sense from personalities and from "fireside" equities. Such response is dangerous ... because it leads readily to finding an out *for this case only*—and

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<sup>215</sup> Contemporary construction is properly resorted to to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the universality of that construction, and the known ability and talents of those, by whom it is given, is the credit, to which it is entitled. *It can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.*

1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 288 (3d. ed. 1858) (emphasis added) (footnotes omitted).

<sup>216</sup> Nor am I alone in my suspicions. Sanford Levinson has written that he

cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning" interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulations.

Levinson, *supra* note 3, at 642.

<sup>217</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 397 (1950).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 398.

that leads (pg.1001) to a complicating multiplicity of refinement and distinction, as also to repeated resort to analogies unthought through and unfortunate of extension.

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It is, instead, the business of the courts to use the precedents constantly to make the law always a *little* better, to correct old mistakes, to recorrect mistaken or ill-advised attempts at correction—but always within limits severely set not only by the precedents, but equally by the traditions of right conduct in judicial office.<sup>220</sup>

Federal judges who address constitutional questions are not common law judges, free to change the law in light of changing "sense" and public policy. The Constitution as text and tradition commands their fidelity and restrains their decisions. Presumably all but the most unrepentant activist would acknowledge that when adjudicating constitutional issues, justices and judges are not free to write on a blank slate. However, many of the courts interpreting *Miller* in the nuclear age have concluded that the stakes are too high to trust anyone but the State with war-making capabilities.<sup>221</sup> They then look to history to support them in their assumptions that the Founders would not have intended that either or interpret the amendment into meaninglessness. This is a dangerous tactic, for as Joseph Story wrote,

If, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not have intended what they say, it must be one, where the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.<sup>222</sup>

According to a poll taken in the spring of 1995, seventy-five percent of Americans believe citizens possess a constitutional right to keep and bear arms.<sup>223</sup> (pg.1002)

There are two lessons that might be drawn from a survey of post-*Miller* Second Amendment decisions: one about federal judges; the other, about their audience—the public at large. Federal judges, like Llewellyn's common law judges, are driven by a sense of situation, Constitution or no Constitution. Precedent is no obstacle to determined federal courts.<sup>224</sup> This is nowhere better illustrated than in the Second Amendment cases. One explanation of their reluctance to treat the subject with honesty and candor may be the unappetizing prospect of having to outline the boundaries of the right, once admitted. Unfortunately, it appears that the judges are more uncomfortable with the right *qua* right. Reading the opinions one senses not only the exasperation rising from the pages of the judges' opinions, but also the nervousness, bordering on hysteria, which

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<sup>220</sup> *Id.* at 398-99. Or, one might add, by the text of the Constitution.

<sup>221</sup> *See Warin*, 530 F.2d at 106 ("If the logical extension of the defendant's argument for the holding of *Miller* was inconceivable in 1942, it is completely irrational in this time of nuclear weapons.").

<sup>222</sup> STORY, *supra* note 215, at 303 (quoting *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819)).

<sup>223</sup> In that poll, the question presented was whether one agreed or disagreed with the following statement: "Do you agree that the Constitution guarantees you the right to own a gun?" In response, 75% of those polled agreed; only 18% disagreed. *The Fight to Bear Arms*, U.S. NEWS AND WORLD REPORT, May 22, 1995, at 29.

Curiously, the poll, taken only a month after the Oklahoma City bombing, indicated that people were less willing, as compared to the previous year, to exchange some of their constitutional rights for greater "security." The numbers indicated that 47% of those asked would not trade liberty for security, as opposed to 38% in 1994. *Id.*

<sup>224</sup> *See LLEWELLYN*, *supra* note 12, at 401 (describing a student's conclusion about a Pennsylvania state court judge as: "*Gibson, C.J. decided as he wanted to, whether the precedents were in his way or not.*").

results from someone audaciously questioning collective judicial assumptions about the Second Amendment.<sup>225</sup> Judges' unwillingness to reexamine the judicial conventional wisdom in light of recent scholarship and repeated use of slippery slope arguments are symptoms of an underlying distrust of a provision of the Constitution that they think is just plain bad public policy.

Whatever doubts the judiciary harbors about the Second Amendment, the public seems not to share them. The seventy-five percent of Americans who believe the Second Amendment means what it says hardly constitute the unanimous rejection of "all mankind" Joseph Story suggests would be necessary to render a provision of the Constitution meaningless.<sup>226</sup> The gun control lobby has been able to employ the professional bar,<sup>227</sup> many federal judges, law professors<sup>228</sup> and even a former Chief Justice of the United States<sup>229</sup> to publicize its view that the Second Amendment is antiquated and that the (pg.1003) price of its viability is outweighed by its social cost. They have been most successful preaching to the converted.<sup>230</sup> With the wider audience of the American people, however, the elites have been wholly unpersuasive.

It is perhaps for that reason that Andrew Herz exhorts his like-minded colleagues to dust off "their hard drives" and "weigh in on gun control," but not in "the insular literary universe of the law review."<sup>231</sup> He tells his colleagues to eschew the "law review culture," in favor of fulfilling their "social responsibility to venture forth to frame popular arguments."<sup>232</sup> Such popular arguments are happily free from the rigors of scholarship and the examination of one's peers—perfect for the sort of "talking head constitutionalism"<sup>233</sup> Herz advocates, whereby one's reading of the Constitution supports one's preconceived notions of good and bad policy.<sup>234</sup>

Lawyers, judges, courts and the government in general have come under increasing suspicion from those citizens who believe many of these same elites manipulate the system at the expense of the "common man." It is this sort of distrust that breeds the resentment that manifests itself in what

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<sup>225</sup> See *supra* note 214 and accompanying text.

<sup>226</sup> See *supra* note 222 and accompanying text.

<sup>227</sup> See *supra* note 18 and accompanying text.

<sup>228</sup> See N.Y. TIMES, May 2, 1994, at A24 (advertisement from constitutional law professors opining that the Second Amendment protected only a state's right to have a National Guard unit and that opinions to the contrary were somehow fraudulent).

<sup>229</sup> See Warren E. Burger, *The Right to Bear Arms*, PARADE MAGAZINE, Jan. 14, 1990, at 4.

<sup>230</sup> See Gary Wills, *To Keep and Bear Arms*, THE N.Y. REV. OF BOOKS, Sept. 21, 1995, at 62 (arguing that the Second Amendment was anachronistic and rhetorical at the time Madison proposed it).

<sup>231</sup> Herz, *supra* note 1, at 146.

<sup>232</sup> *Id.*

<sup>233</sup> See Reynolds & Kates, *supra* note 3, at 1767.

<sup>234</sup> See, e.g., H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 677 (1987) ("Rule 8: If your history uniformly confirms your predilections, it is probably bad history.").

historian Gordon Wood termed "out-of-doors" political activity<sup>235</sup>—private militias<sup>236</sup> and the so-called "common law courts" are two contemporary examples. By staking their prestige and power of judgment on a position that citizens do not accept and new scholarship shows to be untenable, federal courts that continue to nonchalantly dismiss the Second Amendment, (pg.1004) disingenuously citing *Miller* as their authority, do so at the risk of their legitimacy. *Miller* left many questions unanswered and the assumptions upon which it was decided bear reevaluation.

The Second Amendment offers an opportunity for federal courts. The question now is whether a federal court will seize the opportunity to provide leadership and judicially reinvigorate a constitutional right that has too long suffered from judicial sclerosis, or will the courts continue to misconstrue *Miller*, the result being further failure and confusion?<sup>237</sup> To judges who may be faced with a Second Amendment case, scholars who wish to engage the subject, or even laypersons who want to figure it out for themselves, I conclude with some unintentionally apt advice (and an admonition) from Karl Llewellyn:

*First:* The necessity and duty of constant creative choice demands open accounting to the authorities, to the situation, and to reason; with an eye always on the basic need for wiser and for clearer guidance for tomorrow.

*Second:* A conscious recognition of the foregoing and a conscious effort to mobilize the best tested resources can very materially step up marksmanship and reduce off-target shots. Insight and inspiration flourish best in the black earth of schooled craftsmanship. The great stroke, the fortunate stroke, that can clarify a whole area, is most likely when the years of neat smaller jobs have gone before.

*Third:* There are no panaceas.<sup>238</sup>

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<sup>235</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 320 (1969). Wood writes:

These were not the anarchic uprisings of the poor and destitute; rather they represented a common form of political protest and political action in both England and the colonies during the eighteenth century by groups who could find no alternative institutional expression for their demands and grievances, which were more often than not political.

*Id.* (footnote omitted).

<sup>236</sup> See Denning, *supra* note 3, at 44-45.

<sup>237</sup> See *supra* note 12 and accompanying text.

<sup>238</sup> LLEWELLYN, *supra* note 12, at 402-03.