

Journal on Firearms and Public Policy

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EVEN DEADLY FORCE FULLY JUSTIFIABLE HOMICIDE VS. BARELY EXCUSABLE HOMICIDE

David I. Caplan

From the 1970s to the present; attorney David Caplan's scholarship on the Second Amendment has played an important part in the intellectual rediscovery of the right to keep and bear arms. This article summarizes Dr. Caplan's current research on the right to self-defense, which will later be published in a major law review article.

The early common law (13th century and before) drew a very sharp, bright-line distinction between socially desirable, fully justifiable homicide as opposed to socially undesirable, barely excusable homicide.

Justifiable homicide occurred when the victim of an inherently dangerous common-law felony (arson, stranger burglary, stranger robbery, stranger rape), or a bystander thereof, resisted the felony. In such cases, the perpetrator of the felony was considered to be what we call now a "career criminal," a "professional criminal," or a "recidivist criminal." The perpetrator of any of these felonies was considered to threaten continuing grave dangers to the community should he be successful or escape justice and roam at large. Therefore, the felon had lost his "right to life" by engaging in such conduct, so long as it was clear that the felon had actually attempted or completed an inherently dangerous felony. Therefore, no showing of necessity other than the actual perpetration of the stranger attack was needed to justify force, even deadly force, to be used to resist the felon. Necessity for using deadly force against the perpetrator was presumed in these cases, "even though not in his self-defence." (Because of the change in word usage, we would say today: "even though not necessary for his self-defense.")

On the other hand, many later common-law writers, especially those writing after the 16th century, believed that if (but only if) the felon had clearly desisted and was clearly in flight, then justification for using deadly force to stop him required a showing of factual necessity. Thus, even according to those later writers, no issue of “excessive force” (modern terminology) arose until clear flight. Even according to those later writers, upon a felon’s clear flight, the common law not only encouraged but also required the use of force, even deadly force, if necessary to prevent a fleeing felon from escaping trial. Failure of the victim or bystander to use force necessary for this purpose was a misdemeanor, punishable by fine and imprisonment.

What I have said concerning the justification rules according those “later common-law writers,” regarding the supposed need of showing factual necessity for using deadly force to effect an arrest, was not supported by the relevant caselaw. To the contrary, I read and understand differently the settled caselaw, going as far back as at least the early 13th century and cited approvingly until the middle of the 20th century — including in Coke’s Institutes. My understanding is that once it was clear that an inherently dangerous common-law felony was being committed, the law presumed the necessity for using force against the felon if and when the felon did not peaceably surrender *OR* fled. Immediate flight furnished immediate necessity. The law did not require the victim or bystander to judge the exact or inexact moment of time at which the commission of the felony ended and the immediate flight therefrom began. The common law did not set legal traps for innocent victims or heroic bystanders.

For example, the common law did not require that, as soon as murderous bank robbers were in flight from a lucrative bloody bank robbery, a heroic victim or bystander must not shoot the fleeing gunmen unless ordered to do so by a police officer who happened to be there. The common law did not want these heroic victims and bystanders to be punished or, more important, these dangerous felons to escape and prey on other victims.

The public policy encouraging force, even deadly force, to be used against felons in the act of inherently dangerous felonies — such as arson, stranger robbery, stranger burglary, or stranger rape — included creating “the more against offenders” rather than terrorizing peaceful subjects of the Crown. It also included the legal principle that in all these felonies the life of the victim “either is, or is presumed to be in peril” and that the roles of victim and villain should not be interchanged upon any uncertain facts. The law did not presume that the precise details of heroic acts could be reconstructed in a courtroom for juries to dissect according to their emotional prejudices once it was clear that an inherently dangerous felony in fact had been attempted or committed.

Indeed, the common law considered thwarting, resisting or preventing a clear-cut inherently dangerous felony as “laudable” and worthy of “commendation rather than blame.” In addition, the common law considered the act of using force, even deadly force for this purpose to be “promoting justice, and performing a public duty” and “for the advancement of public justice.” The common law justification rules were designed to prevent “wicked men from assailing peaceable members of society, by exposing them to the danger of fatal resistance at the hands of [their victims].” The dastardly felony by itself created the presumption that (1) it endangered human life; (2) it required its immediate termination; and (3) it required the immediate prevention of the escape of the felon.

In some modern and postmodern cases and statutes, the doctrine of factual necessity or even “absolute necessity” applies to even clear-cut victims of arson, stranger robberies, stranger burglaries, and stranger rapes. An International Convention, not yet ratified by the United States, adopts this doctrine. As a result, even a clear-cut overt recidivist career criminal becomes the “victim” and the initial true victim becomes the “actor- [villain]”. Morality turned upside down and inside out! New rules based upon highly theoretical speculations concerning irrelevant and extreme academic hypotheticals have replaced the wisdom of ancient common-law and Jewish law tested by ages of experience.

(Parenthetically, in both Hebrew and classical Latin, one of the meanings of “religion” is “law.”)

The social policy encouraging deadly force to be used if factually necessary — or according to caselaw, even if not factually necessary — to prevent the escape of these felons fleeing from the scene was based upon the rational presumption that a dangerous felon at large threatens the peace and security of society — i.e., the next victims. Immediate stopping of the fleeing felon, whether actually or presumably dangerous, was deemed absolutely necessary for the security of the people in a free state, and for maintaining the “public security.” Parenthetically, notice here the striking similarity of concepts and language with those contained in the Second Amendment, and in *Presser v. Illinois*, 116 U.S. 252, 264–265 (1886).

Indeed, it has been said that the social policy of the common law in this matter was not only to threaten dangerous felons and hence deter them, but was also to induce them to “surrender peaceably” if they dared commit inherently dangerous felonies, rather than allow them to “escape trial for their crimes.” The common law did not want dangerous felons to escape justice. It did not want to enable them to continue to prowl and roam atlarge. It did not want to enable or empower these criminals to commit yet more dastardly crimes, or to continue to terrorize the community, or to continue to endanger the public safety and security. The common law considered as paramount the social objectives of “promoting peaceable surrender” to the legal process and of promoting public peace, tranquility, and security.

Please rest assured that I am aware of *Tennessee v. Garner*, 471 U.S. 1 (1985), regarding inherently dangerous nocturnal burglary of a temporarily empty home albeit temporarily empty. In my opinion, however, based upon my research, the holding of that case as well as its broad language rely upon some crucial, glaring historical mistakes of fact; and the case contains critical errors and misconceptions regarding its asserted earlier public policies. Only in this way did the case result in its criminal friendly ruling. Besides, the ruling in that case does not apply to civilian arrests.

More fundamentally, why should we punish the innocent victim or bystander (who stands in the shoes of the victim) for the sins of the career criminal? By what moral or legal principle should we be concerned with the health and well being of fleeing recidivist criminals at the legal and physical peril as well as expense of their chosen victims or their hapless bystanders? These heroic public-spirited victims and bystanders deserve “commendation rather than blame.” The felon takes all-risks of violence resulting from attempts to prevent his escape and to bring him to justice, rather than to allow him to prowl and roam at large and continue to terrorize the entire community.

The Lord rejoices at the premature deaths of the wicked and mourns for the premature deaths of the righteous. Why? Premature deaths of the wicked prevents them from committing more sins, prevents them from killing more righteous people, and hence prevents the wicked from preventing these righteous people from performing more good deeds; premature deaths of the righteous prevents them from performing more good deeds and from enjoying proportionately more benefits in the World to Come. (Talmud, Tractate Sanhedrin, fol. ca. 70.)

The common law encouraged and required even civilians to use force, even deadly force, to arrest and prevent escape of inherently dangerous felons at, or fleeing from, the scene of the crime — at which times mistakes of stopping the wrong man would be minimal, as opposed to long times thereafter. The social policy here was to assure that dangerous felons should not continue to prowl and roam at large and thereby create a constant terror to the people and danger to the public and social order. Instead, the paramount object comprised promoting the public peace and public safety, as well as the security of the people. In addition, the policy here was that these felons should not escape justice.

It is important to note that 14th century cases confirming these rules were approvingly cited as controlling law by court decisions and common-law scholars many times over the centuries both in England and America — until Parliament abolished these rules in 1967, and until various times in 20th

century America. This extremely unfortunate (in my opinion) development occurred only after some 19th and 20th English and American commentators (superficial and error-prone commentators, in my opinion), as well as misguided cases and statutes (again, superficial and error-prone, in my opinion) confused or even fused the previously clearly disjoint rules governing the fully justifiable homicide rules discussed above and the barely excusable homicide rules discussed below. More specifically, the new rules foolishly imported barely excusable “self-defense” rules into fully justifiable rules. The resulting merger of doctrines was not merely a conceptual mess. The previous disjoinder had been socially very beneficial, if not absolutely necessary for a rational legal system, in both my opinion and the opinions of many great and not-so-great 16 through 20th century law commentators.

Parenthetically, the above-mentioned 14th century cases were not the first to lay down clearly the justification rules. The earliest cases that I have found on the topic go back to the early 13th century (1220–1230).

The rules in force prior to the 13th century are not clear to me — perhaps because the rules were so clear that no cases arose, or perhaps because the judicial system had not yet been developed, or perhaps because cases were not reported prior to 1220, or perhaps because courts then felt constrained to go easy on gangs of roving robber barons, led by noblemen, who may have been as powerful as the King in those unruly, rough and tough, and chaotic times. (Would you want to go back to those days? For some time, I have felt that the Revolutionaries, as well as post-Revolutionaries, of the 1960’s were the true reactionaries in the classical Latin sense of the term.)

At any rate, I would seriously doubt that the Crown (or especially the Hundred before Henry I) would have punished either civilly or criminally a (taxpaying) worker, a fighter-soldier (upon whom the King relied for conquest and lucre), or a cleric (the King’s perceived ticket to Heaven? and/or means for instilling awe and fear in the hearts of the King’s subject to keep them in line?) for having dispatched a common criminal. Rather, the Crown (or the Hundred) would have viewed such a

felony-resisting chap as a faithful, valiant, and chivalrous subject, for his having thereby promoted the King's peace and the public's security (the peace and security of the Hundred).

Many law writers have theorized that the common law developed these justification rules at a time when at the common law all felonies were punishable by death. These writers therefore conclude that the use of deadly force to kill a fleeing felon in those days was merely a premature execution of the inevitable judgment of death. The fallacies with this theory are legion. For example, the fact is that the judgment of death was by no means inevitable:

(1) The felon might escape all punishment through successful flight to areas of the country where felons were in control;

(2)The felon might be found guilty after capture and trial;

(3)Even after having been found guilty the felon might, and often did, receive a royal pardon as of grace (de gratia) on condition that he serve in the King's army for two years;

(4) After trial, benefit of clergy averted capital punishment; and

(5) After trial, more often than not the punishment was outlawry and not death.

Besides, common-law judges were diligent in finding all sorts of defects in the indictment in cases where they thought that capital punishment was not warranted.

Summarizing, from the dawn of the common law the crime victim was assured that resistance to inherently dangerous felons, including using even deadly force against them, would entail absolutely no penalty whatever. The common law considered resistance to dangerous felons to be a public duty. By stark and critical contrast, in cases of homicide in fights or spontaneous disputes where people knew each other or in barroom brawls, the common law laid down an entirely different set of rules. The common law classified the killing as (barely) excusable homicide, and not justifiable homicide, even if the killer had retreated as far as he could to a wall, a ditch, or to the sea.

In what follows, for the sake of clarity I will use the term “self-defense” to denote only (barely) excusable homicide, as opposed to (fully) justifiable homicide discussed above.

In disquisitions on homicides in which the deceased was *NOT* a career felon, a famous difference of opinion existed between Sir Edward Coke and William Blackstone. The difference of opinion involved the question whether the early common law treated as a felony, punishable by both death and forfeiture, any use of deadly force in barely excusable “self-defense.” In this context, “self-defense” related to using force in barroom brawls or between people who knew each other, in necessary “self-defense” (that is, after retreat to the wall, to a ditch, or to the sea). Lord Coke believed that homicide in “self-defense” was punished with death as well as forfeiture. Here Lord Coke here relied upon the need for 13th century Statute of Gloucester, declaring that capital punishment was not to be imposed in such cases. Blackstone believed that even prior to the Statute of Gloucester, the defender suffered forfeiture but did not suffer capital punishment. I recall reading somewhere that Blackstone and his camp thought that the Statue of Gloucester was needed only for cases of necessary “self-defense” against a Dane (when Canute ruled England, or a Norman (when William the Conqueror ruled). What comes to mind here is the frequently appearing “Englishry was presented” and “murdrum” terminology occurring in pre- and early post- Norman Conquest cases obviously indicating the more serious nature of killing a Dane or a Norman than of killing an Englishman.

At any rate, Coke and Blackstone agreed that after the Statute of Gloucester the early common law treated “self-defense” as some sort of crime punishable by forfeiture and imprisonment. In order to get out of prison, the prisoner in these cases had to obtain a royal pardon, which was forthcoming as a matter of right, and not of grace, after a lapse of time — the length of the lapse of time, and hence the term of imprisonment, depending upon the degree of blame as judged by the Crown, or the prison term ending upon voluntarily serving in the Crown's army for two years, or ending upon payment of a fee to the Crown (bribery? and/or

proportional to blame?). All agreed, however, that *UN*necessary “self-defense” — occasioned, for example, by a killing in “self-defense” without retreat to the wall, to a ditch, or to the sea — was still a capital offense even after the Statute of Gloucester. It later was called “manslaughter.” Also, all agreed that neither before or after the Statute of Gloucester was killing an inherently dangerous felon on the spot any crime whatever; rather it was considered to be courageous, praiseworthy, and protective of the entire community.

The rationale for punishing necessary “self-defense” included the following: (1) some degree of blame should be imputed to both sides of the dispute for having caused or allowed it to escalate; and (2) whoever had been killed presumably had been a valuable subject of the King’s realm. It was a case of fights among equals. Not so in cases of justifiable homicide! Or today, I may add, in my opinion. And therein resides a basic issue of morality and jurisprudence (accent on the “prudence”).

I believe that much of the difference between the pro- and anti-Second Amendment camps boil down to whether one likes or dislikes the following principles and propositions.

1. The common law of England and America regarded resisting the commission of an inherently and presumably lethally dangerous felony not only as “one of the major privileges, particularly as to the use of deadly force,” but also a duty of citizenship;

2. Such a privilege is socially desirable and indispensable, as well as emotionally comforting; and

3. The common law considered the value of the victim’s life to be paramount: the felon had forfeited such consideration when he decided to engage in his depredations.

I would label the perpetrator of an excusable homicide a “selfish-defender”; and I would label as a “selfless-defender” the performer of the critically important public service of justifiable homicide. The great common-law commentators, as well as the not-so-great law writers, characterized justifiable homicide by many phrases of approbation such as “laudable”; deserving “commendation rather than blame”; “necessary, and in the interest of the safety and good order of society.”

From what appears above, I hope that you will understand that the key to understanding the “origins of ‘self-defense’” includes recognizing the critical distinction between “forcible” stranger felonies for lust or lucre and disputes or fights between people who knew each other or among barroom brawlers. It is ridiculous to import considerations underlying the barely excusable homicide rules into the fully justifiable homicide rules. In the former case we have a fight or dispute amongst equals; in the latter case, between peaceable citizens suddenly confronted by career criminals.

One of the first, if not the first, writers in English history to champion First Amendment values, namely John Milton, wrote that a robber should note accorded even the laws of war, since a robber was worse than a “national enemy.”

Just a few days ago, my wife and I took a firearm “training course” given at a South Florida arms show, the first such “show” that we have ever visited. I was saddened but not surprised that most of the course was devoted to teaching us when not to shoot, rather than how to shoot. His stated rationale included the repeated warning that we must always bear in mind that a judge or jury will review our actions with a fine-tooth comb and with their emotional prejudices, and that the mutually different whims of prosecutors in the twenty-seven different Florida counties will govern whether we will be prosecuted. Moreover, during the practice shoot, the instructor directed us to fire one and only one shot. By stark contrast, a firearm “training course” that I took more than 25 years ago during a visit to West Point emphasized the importance of emptying my firearm in as little time as possible, with one reloading intervening, for a total of twelve shots. Whom are they trying to protect these days? Could this change in the law be a potent factor in the burgeoning of violent stranger felonies? English stranger felony rates before and after the great 24 H. 8 c. 5 would seem to indicate a connection, if for no other reason than the public attitudes and criminal behavior patterns thereby symbolized and stimulated.

Loss of Institutional Memory and the Diminution of Liberty

By Ted Goldman

Ted Goldman, an experienced federal law enforcement officer, traces recent problems in federal law enforcement to personnel laws which force the retirement of seasoned agents who would be able to prevent or rectify agency misjudgments.

More than 20 years ago, the Congress of the United States passed legislation that, in hindsight, ultimately set in motion a process directly leading to the horror of Waco, the tragedy of Ruby Ridge, the FBI Crime Lab fiasco, and the Keystone cops events of the Atlanta Olympic bombing episode. The process started, rather innocuously, as the result of a wildcat strike in New York City in the late 1960s by employees of the U.S. Postal Service. The factors precipitating the walkout were newspaper and television reports disclosing that a typical full-time New York City postal employee, with two children, was receiving less in salary than the sum of the benefits, subsidies, and cash paid to a similarly situated welfare family. The strike was settled when the federal government promised to review the pay scale of all federal employees.

At that time, I had been employed as a Special Agent with the Intelligence Division of the U.S. Treasury Department, a small, elite law enforcement group within the Internal Revenue Service.

This organization's original claim to fame had been the "Alphonse Capone" case, made famous by the dramatizations of the real and fictional exploits of crime-fighter Elliot Ness.

In the early years of my 33 year career in federal law enforcement I worked with a nearly 70-year-old agent who had been assigned to the Al Capone case. This bright energetic

man had a distinguished academic past, and was one of the fortunate few, in those Great Depression years, to obtain a coveted position as a government employee.

This man with the “institutional memory” of more than 40 years became my mentor, sharing his wisdom, knowledge, and experiences.

The commission studying the federal employee pay scale, originally undertaken because of the postal strike, submitted its report to rectify the low salary structure.

As part of the increased salary structure, an unnoticed provision planted the seed for recent tragedies resulting from the loss of “institutional memory.” Among those who received pay raises were the Federal Bureau of Investigation; the Secret Service; Alcohol, Tobacco, and Firearms; the Bureau of Narcotics (predecessor to the DEA); my own Intelligence Division (now called the Criminal Investigation Division); and other federal law enforcement units. The unnoticed provision in the new pay raise legislation mandated early retirement for federal law enforcement agents.

Where once maximum retirement was 70, the age was been lowered to 55 years, while reducing the practical retirement age to only 50 years old. This effective “20 year loss of experience” was to be the most tragic consequence of that legislation. Though minimum retirement had always been 50, a few agents had always chosen to stay, such as my 70-year-old mentor, despite a generous pension and opportunities in private industry.

Congressmen, many of whose ages considerably exceeded the newly instituted retirement age of 55, decimated the heart and soul from the collective wisdom and history of federal law enforcement. Unknown and unforeseen by those who mandated the new salary structure was the eventual unintended and ultimately tragic impact of that legislation.

A similar error had occurred in the CIA when experienced senior employees, with the collective wisdom of that institution, had been summarily purged. It is not surprising that, as a result, one of the CIA’s major responsibilities, to monitor and report the status of the Soviet Union, dramatically

failed when the CIA did not predict its sudden and complete collapse.

Similarly, heretofore unimaginable mistakes and bungling at Waco, Ruby Ridge, the FBI Crime Lab, and the Atlanta Olympic bombing would result.

I. The Consequences of the Loss of Institutional Memory

A. Waco

Why the Federal Bureau of Investigation and the Alcohol, Tobacco, and Firearms Bureau acted in the manner they did at Waco may be open to different interpretations. That these agencies acted foolishly, and incompetently, is not in question.

It has been reported that Branch Davidian leader David Koresh could have been arrested when he and several of his followers left the Waco compound several times each week to pick up mail and supplies. Why were decisions made that a religious sect, no matter how unappealing to some, should be subjected to a full scale military assault? As a result, nearly 100 innocent individuals perished, including dozens of women and children, not to mention the unnecessary sacrifice of the lives of four young law enforcement agents.

Why was Koresh not apprehended while shopping? Once the leader was captured, the other members would have probably considered surrendering. Even if this had not occurred, why were they not allowed to remain at an isolated residence indefinitely? The ATF and the FBI knew that this event was unfolding on CNN before the entire nation. When questioned by Congress later, these agents chose to publicly dissemble, while simultaneously fabricating incredible rationalizations in a futile attempt to avoid responsibility. The 1997 movie documentary *Waco: The Rules of Engagement* shows the willingness of these officials to repeatedly lie before a Congressional committee in a futile attempt to cover up their incompetence.

It has been reported that the ATF was going to have its budget up for Congressional reconsideration shortly after the Waco operation. Did the ATF seek a big media event to justify their proposed new budget? Even if this information is not entirely accurate, how could the burning deaths of women, and children, as well as the old and infirm members of a religious sect, justify all the appalling actions?

In view of the Waco fiasco, I strongly suspect that if the current FBI and ATF had been at Mount Sinai, when Moses carried the Ten Commandments, they would have justified slaughtering the Children of Israel simply because they failed to obtain government permits to assemble before God.

B. Ruby Ridge

At Ruby Ridge, an FBI sharpshooter killed a mother holding an infant inside a cabin. This young agent fired from a distance exceeding the length of three football fields. A judge has ruled that his actions were clearly unconstitutional. Older, experienced agents could have avoided the entire episode by refusing to issue the ridiculous order to which the young sniper was subject. After being predictably exonerated by a so-called federal investigation, the sniper was indicated for manslaughter by a courageous Idaho county prosecutor. Other involved FBI agents are being sued for millions.

Not only was this standoff unnecessary, any purported gain was far outweighed by the scorn heaped upon a once formidable agency. That the FBI became a laughingstock to most of the civilized world is not in serious question. That such a sniper order could have even been made is a direct result lack of common sense due to a lack of institutional memory.

C. FBI Crime Lab

The FBI Crime Lab had been repeatedly warned by an unusually brave in-house technical gadfly that it had consistently been violating its standards and procedures. Not only was the work of hundreds of cases placed in jeopardy, the labs' misfeasance required the courts to go through convoluted reasoning to justify upholding the convictions of overwhelmingly guilty criminals. The gadfly was placed in professional jeopardy, isolated, and subjected to the full weight of bureaucratic punishment. No one in a position to stem the damage, change the course of events, or summarily correct the known errors, and mishandling of evidence, dared speak up. Fear of reprisal outweighed any benefit of doing what was required, or of setting the matter right.

Why was this brave man subjected to punishment for doing his job well? Who will fix this matter and begin the overdue process of repairing this formerly great agency? In the fashionable language of today, "mend it, don't end it."

D. Olympic Bombing

At the Atlanta Olympics, a young security guard, unnecessarily ridiculed by some as not quite up to the "standards" of the more traditional law enforcement agencies, noticed a suspicious package. Richard Jewell followed correct procedures, reported this violation to the authorities, and ultimately suffered the wrath, vindictiveness, and injustice of an ever more incompetent, but very powerful, federal law enforcement agency.

Again, the FBI's actions were incomprehensible, even after the back-to-back-to-back horrors of Waco, Ruby Ridge, and the FBI Crime Lab fiasco. The tactical decision to violate an innocent man's rights and liberty, if not so serious, was a Keystone Kops series of absurdly foolish errors of judgment, again monitored by the entire world news media. Institutional wisdom would have prevented this obvious blunder.

II. Comments, Conclusions and Recommendations

What are we all to think of federal law enforcement's abilities and competence? Who is protecting our liberty? Are we to believe that the agencies seek justice, tempered with mercy, compassion, and common sense? Hopefully they will, but not before a system permitting self-correction is restored.

The FBI still continues to waffle about a forthright public apology owed to Richard Jewell. It is an apology owed to all of us for patently attempting to entrap a vulnerable, innocent man. Without a public apology our liberty has been diminished.

That those responsible probably believe they are competent professionals compounds these successive horrors immeasurably.

Perhaps, hidden away, are some "letters of reprimand" issued to designated scapegoats. One FBI bureaucrat was trapped by his own criminal cover-up attempt when he destroyed an "after-action critique" about Ruby Ridge that could have confirmed this horror. He was disgraced and sentenced to 18 months in prison. At a minimum, his actions are evidence of the arrogance that these matters should not see the light of public scrutiny. Skilled bureaucratic in fighters can frequently cover up their own foibles. Their success is based on the ability to shift the spotlight, blame, and responsibility to others. Under the current system, no lasting improvement can be sustained.

Where were the seasoned agents with institutional memory who could derisively condemn these actions? Why was the chain of command afraid to speak in opposition? A lack of experienced agents, unafraid to criticize superiors for fear of ending their careers, made these tragedies possible. Three reforms should be implemented:

1. End Career Compression Increase (the now mandatory retirement age), in order to create a wiser, more balanced, and courageous federal law

enforcement bureaucracy capable of expressing unreserved criticism.

2. **Require On-Site Decisions.** Experienced field agent decisions should not be overruled, except in writing. A written record will contribute to sound thinking, and unquestioned responsibility.

3. **Commission to Review Future Major Bureaucratic Foul-Ups.** Create an on-going, independent commission with the dual authority to recommend criminal sanctions, and review all internal documents.

In conclusion, institutional memory should not be lost. Our liberty as free citizens requires no less. For my former 70-year-old mentor of blessed memory, this article is for you.

The Political Culture of Contemporary American Liberalism and Firearms Prohibition: An Exploratory Inquiry

By Roy T. Wortman

Why has modern “liberalism” developed such an intolerant and un-liberal view about firearms possession? In this essay, Roy Wortman suggests that contemporary liberalism has become profoundly distrustful of “the people” and therefore no longer follows in the tradition of liberalism associated with Franklin Roosevelt. Roy Wortman is a Professor of History at Kenyon College.

Liberalism was born in the minds of those convinced that liberty is not only mine, belonging to those who agree with me, but also “theirs,” belonging to those who do not agree with me. Those holding such convictions are few. They became many. Now they are not so many. Liberalism acquired significance when dissent--heresy, deviation, and opposition--became legitimate, when “I” and “they” were on the same level, when the major political problem was no longer how to achieve any specific goal, but rather how to establish an institutional structure enabling people equal but different, and pursuing different goals, to coexist peacefully.

Massimo Salvadori, *The Liberal Heresy* (1977)

Contemporary American liberalism, shaped in large part by Progressive Era and New Deal foundations, contained, in the late twentieth century, contradictions within a tension: it

became libertarian on some issues, such as acceptance and tolerance of lifestyles, gender equality, and personal choice in matters of reproductive rights, and communitarian on other issues, such as defining membership in protected groups as requisites for affirmative action, and on reliance on police power and protection rather than on individual self-sufficiency in matters of self-defense. This tension between libertarian and communitarian goals can be seen not only in liberalism, but in conservatism. Indeed, it would be simplistic to designate a preponderance in either in the matter of possession of firearms, however, this difference is clear. In contemporary conservatism the libertarian appreciation of individualism, self-sufficiency, and self-reliance favors the possession of firearms. In contemporary liberalism, on the other hand, the idea of community harmony and reliance on police power for protection mandate, rather than individual self-reliance, greater state power and regulation. Crucial to understanding the tension between these two competing visions is a broader question: to what extent does the debate over civilian possession of arms, and especially handguns, stem from practical arguments of policy, and to what extent does the debate stem from deeply held ideological views that transcend practical considerations of self-defense?

The theoretical base of contemporary liberalism's concern for certain kinds of rights as opposed to others stems from an emphasis on egalitarianism rather than from the more classical liberal emphasis on individualism. As an example, the contemporary egalitarian impulse in liberalism sees a need for past historical inequities to be righted, a perspective evidenced in liberalism's affirmative action. On the other hand, victimization by criminals is not regarded as a past injustice to be corrected by social policy which could encourage lawful self-defense through the prudent and reasonable use of handguns in the hands of responsible and trained civilians. Central to the tension between contemporary liberalism and conservatism is the Rousseauian strand in contemporary liberalism. It emphasizes communal compassion and anti-violence over individual initiative and action in the name of self-defense. In opposition to the historic Republican visions

of liberalism which distrusted the power of the state, the Rousseauian strand in liberalism trusted state power as the expression of the will of the people.¹

In large part, the twentieth century liberal notion, very much consonant with Rousseau's, is that the collective entity represented by the state is superior to individual self-sufficiency in self-protection. Certainly, contemporary liberalism is concerned about excessive police power of the state, as witness the current stands of the American Civil Liberties Union. Yet in as much as it is critical of excessive abuse of police power, it equally worries over individual possession of firearms as anarchic, archaic, and anti-communitarian relic of a past era. Self-preservation in contemporary liberalism shifted to a public-spirited moral sphere in which the theme of community transcended the private wills of anomic individuals. The moralism of contemporary liberalism rests on public-spirited interests which claim peacefulness and order for the broader community. Thus, the vision of the National Rifle Association, for example, is seen as a narrowly self-interested and amoral interest group. The element of community in contemporary liberalism is regarded as moral high ground; it continually looks down on the idea of individual possession of arms as a relic of a social Darwinian past or as an antique sentiment of archaic American colonial republicanism. Central to this view in the 1960s was a new group of intellectual "elites" and critics, to use Christopher Lasch's term,² who, through their environmentalist, anti-violence, and anti-gun positions rejected the very foundation of New Deal liberalism's constituency Blue-collar and rural voters. From the 1930s, they affirmed the intervention of the state in political and social affairs, but from the late 1960s onward were no longer viewed as a necessary component in the *moral* sphere claimed by other constituencies. Since the mid-1960s, this new elite could challenge deeply rooted social ills not fully repaired by the earlier liberalism of the New Deal; the Robert McNamara social science approach of input of problems and output of solutions to those problems became a temporary panacea for social as well as military issues.

Excluding criticism of U.S. involvement in Vietnam, the very idea of state power itself was not challenged by liberals of the 1960s and 1970s. Thus, the classical, or republican liberalism of the Founders of the American Republic, which asserted that an armed populace existed as a check on arbitrary and capricious acts of a strong central government was viewed as a Baroque, outmoded notion from another era, a vestige of an older era applicable to the days of musket-toting, when arms were in the hands of the general population. “A people numerous and armed”³ remains unacceptable to contemporary liberals and communitarians with rare exceptions.

The position of contemporary liberalism on handguns since the 1960s has been one of developing social and public policy hostile to lawful civilian possession and use of handguns. A “we know what’s good for the public” refrain echoes in the debate over public policy since the 1960s, a refrain which, despite empathy for disenfranchised and marginal groups such as persons of color and gays and lesbians, holds some of the very groups which helped install the New Deal — rural and blue-collar — in contempt. In one sense the division is class-ridden, with newer liberal elites on one side of the debate over firearms possession, and a populist — and less affluent — America on the other.

The driving force for this dichotomy in the United States today is an increasingly polarized position on certain issues such as firearms prohibition, abortion, and affirmative action which define principle and morality as a means of identification for respective interest group constituencies. Where contemporary American conservatives view themselves as tough-minded yet decent in asserting “traditional” values, including self-defense, the contemporary liberal image is that of caring, sharing, and nurturing, in short, the vision of public compassion. Affirmative action is a prime example where people who in the 1960s were deeply committed to equality of opportunity now support racial quotas or hiring by race and ethnicity. The reasons for this contradiction is contemporary liberalism’s belief, in part, that to assert affirmative action is to show that one cares, that one is both good and compassionate. The self-image of sharing

and caring motivates contemporary liberalism's proponents to assert that people may do what they want so long as their actions do not hurt others. Firearms and self-protection simply do not fit this mold, and from this stemmed the exclusion of concern for the values of many small town, rural, and working class people, especially Southerners, who believe in the culture and utility of self defense, firearms, and hunting.

Contemporary liberalism's base of support stems chiefly from urban and suburban areas where neither the culture of hunting nor of gun ownership is clearly understood, not to mention the civil libertarian aspect of gun ownership. What many liberals perceive of as the culture of the gun is, in urban actuality, the culture of criminality, and thus liberal policy seeks to place limitations on firearms ownership. It is a view which derived from an urban perspective of criminality rather than from the more realistic assessment of lawful possession of arms for either sport or self-defense.

Crucial to the debate over handguns is the way in which politics in the United States is painted in broad, sweeping strokes. Firearms offer an opening wedge for a liberal perspective on prohibition through cultural stereotyping. Here the very existence of the firearm is connected to criminality rather than to trained, responsible, and law-abiding people.

The argument for possession of handguns, especially for self-defense, is an argument that finally forces contemporary liberals to admit that the police cannot protect the citizenry. Liberalism, in order to maintain its socially progressive outlook, denies this argument, maintaining, instead, that an admission that the police cannot protect is an admission that the world is fraught with Hobbesian selfishness, Augustinian sin, or just plain human "cussedness." Extending this position, contemporary liberals argue that one gives up his or her right to punish others through retribution and self-defense because civil society is a social contract which mandates that the state be charged with the duty of protection. Yet in opposition to contemporary liberal arguments, John Locke, the thinker who contributed the broad theoretical foundations to Western liberalism, noted that

...the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defense and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy where the mischief may be irreparable. [Force] without right upon a ... person makes a state of war both where is and is not a common judge.⁴

As American liberals glorify self-expression in lifestyles, in freedom of speech and in artistic creativity, they cannot admit that their world is less safe. The argument for the use of firearms for self-protection is an argument which admits to a less safe world and a violation of the social contract between governed and governor. Indeed, to argue for individual possession of firearms for self-protection is to argue that collectively, Americans have retreated back to something akin to the Hobbesian state of nature.

In theory the liberal state repudiated the age-old view of a relationship between the dominator, the government, and the dominated, the governed. Since the American Revolution the idea of the liberal state embraced the concept of popular sovereignty which claimed to identify the needs and the “will of the people” with the state itself; no one faction or interest group, to use the Madisonian nomenclature, could be entrusted with the aggregation of power. In the early American historical experience the concept of popular sovereignty embraced a people at arms for defense of self and commonwealth. These traditions, coupled with the idea of civic obligation of a citizenry under arms in defense of colony and state merged when tradition and custom became law. Yet in spite of this deeply rooted heritage in American political culture, a heritage that highlights self-protection at the individual and collective levels, the contradiction in contemporary liberalism is, given its political culture in the last four decades of the twentieth century, eminently

understandable. Liberalism's creed in the United States initially understood both the sanctity of the individual and his or her moral imperative to defense. Ironically, the individual's right to self-defense and possession of arms became a casualty of those intellectual elites who speak to the glories of "community." If, as Reinhold Niebuhr observed, irony is part of the heart and fabric of American history,⁵ the understandable yet ironic paradox of the twentieth century is that at least for issues of individual self-defense and possession of arms, American conservatives now uphold what initially was part of the republican libertarian and classical liberal tradition.

Acknowledgements and Endnotes

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1. Jean-Jacques Rousseau, *Rousseau's Political Writings*, tr. Julia Conaway Bandanella. Ed. Alan Ritter and Julia Conaway Bondanella (New York: W.W. Norton, 1988).
2. Christopher Lasch, *The Revolt of the Elites and the Betrayal of Democracy* (New York: W.W. Norton, 1995).
3. John Shy, *A People Numerous and Armed: Reflections on the Military Struggle for American Independence* (New York: Oxford University Press, 1976).
4. John Locke's 1690 analysis of self-defense is in "Of the State and War," in *The Second Treatise of Government*, ed. Thomas P. Peardon (Indianapolis: Bobbs - Merrill, 1952), p. 13.

5. Reinhold Niebuhr, *The Irony of American History* (New York: Scribner, 1952). Niebuhr tended toward social and political progressive views but asserted a theologically conservative world view.

The Political Economy of Gun Control: An Analysis of Senatorial Votes on the 1993 Brady Bill

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Abstract

Although much research has addressed the effects of guns on violent crime and the efficacy of gun-control laws in reducing violent crime, surprisingly little attention has been given to the political process through which gun policies are determined. This paper contributes towards bridging this research gap by analyzing the important factors that determined senatorial voting on the Brady Bill. Although the Democratic Party and pro-control ideology enabled passage of the Brady Bill, senators were less likely to vote for the bill if they received pre-vote contributions from the NRA, if their constituencies faced high rates of violent crime, or if their constituencies had a strong interest in hunting.

I. Introduction

With approximately 212 million guns in private hands, 284,000 licensed gun dealers, and violent crime rates exceeding those of most western democracies, it is hardly surprising that gun control has become a popular and controversial political issue in the United States.¹ Arguments for and against gun control have become standard fare in political races, on the editorial page, and in any debate over how to curb crime. In response to these debates, many researchers have attempted to analyze the effects of gun-control laws on rates of violent crime.

The results of this research have not been conclusive. Some early research indicated that gun-control laws could effectively reduce crime. However, later research challenged this conclusion. The literature is indeed voluminous.²

Surprisingly, the political process that yields gun-control laws has received scant attention. Langbein and Lotwis (1990) provide a notable exception in their analysis of House votes on amendments to the Firearms Owners Protection Act of 1986. In the spirit of their work, I analyze the political economy of the 1993 Brady Bill, the first federal gun-control legislation to pass since the Gun Control Act of 1968. To carry out this analysis, I use data on senators' votes on the Brady Bill and characteristics of their constituents, including the rates of violent crime these constituents face, to infer constituent beliefs about the effects of gun-control laws. This methodology, predicated upon the assumption that legislators' votes reflect the preferences of their constituents, has strong theoretical and empirical support in the legal and economic literature.³ More directly, if a legislator's constituents believe gun control reduces violent crime, the legislator should reflect this belief by voting in favor of gun-control legislation. On the other hand, if a legislator's constituents believe gun control has a negligible impact on crime, or may increase violent crime by disarming victims, or that gun control threatens other legitimate gun uses (e.g., hunting, target shooting), the legislator should reflect this belief by voting against gun-control legislation.

Some might question whether constituents' beliefs are accurate reflections of reality. Admittedly, the public may not "know" the results of the empirical work cited in endnote 2; yet, this ignorance does not imply that members of the public do not "know" the effects of public policies on their lives. With respect to the issue addressed in this paper, surely individuals with an interest, particularly those confronted with the threat of violent crime and the need for self-defense, should intuitively "know" the effects of a change in gun-control policy on their safety, and express this knowledge through the political process, even if they cannot quantify these effects. The contribution of this paper is to offer an

alternative, yet complementary, means of testing the link between gun-control laws and the prevalence of violent crime by examining how senators from states with vastly different rates of violent crime voted on the Brady Bill.

Some of the important findings are these: (1) senators from states with high rates of violent crime were not differentially likely to vote for the Brady Bill and, if anything, were more likely to vote against the Brady Bill; (2) senators from states where hunters form a strong interest group were more likely to vote against the Brady Bill; (3) senators receiving relatively large campaign contributions from the National Rifle Association (NRA) were more likely to vote against the Brady Bill; and (4) democrats and politically “liberal” senators were more likely to vote for the Brady Bill. These findings are important because they identify and measure the effectiveness of important political interests that influence U.S. gun-control policy. Of particular significance, these findings corroborate the results of other studies finding no link between gun-control laws and reductions in violent crime by their implication that many citizens of highly violent states viewed the Brady Bill as either ineffective or as a potential impediment to self-defense.

The paper is outlined as follows. The following section provides a brief review of the legislative history and contents of the Brady Bill. Section three provides an analysis of the constituent characteristics that should have influenced senatorial voting on the Brady Bill, paying special attention to the theories and evidence on the efficacy of guns as means of self-defense and a deterrent to crime. The results of empirical tests of the significance and impact of these constituent characteristics and other political variables on senatorial votes are presented and discussed in section four. After briefly considering why the pro-gun lobby lost, the conclusion offers some final thoughts on the effectiveness of the Brady Bill and the future of gun-control legislation.

II. The Brady Bill

On November 30, 1993, President Bill Clinton signed the Brady Bill (PL 103-159), ending a long and controversial fight

for the first piece of federal gun-control legislation in 25 years. The House approved the bill by a 238-189 margin on November 10, and the Senate followed suit 10 days later by a 63-36 vote. House Judiciary chairman, Jack Brooks (D-Texas) facilitated passage by separating the Brady bill from the omnibus crime bill (HR 3131), which he realized had far less chance of passage. (A Brady bill had died in 1992 as part of an omnibus crime package.)

The primary provision of the bill is a five-day waiting period for the purchase of handguns. Advocates of the bill argued the waiting period would help prevent “heat of the moment” shootings as well as allow police to conduct background checks on buyers to prevent the sale of handguns to convicted felons. The five-day waiting period is to be replaced within five years by a computerized system that would allow instant background checks of potential buyers. Secondary provisions of the bill are an increase in the licensing fees of gun dealers and a requirement that police be notified of multiple gun purchases.⁴

III. Constituent Interests and Gun Control

To elucidate the political pressures constituents may bring to bear on their legislators, I now turn to a discussion of the utility of guns for self-defense, recreation, and cultural identification.⁵

A. Guns as instruments of violence or tools of self-defense

Individual opinions on gun-control policy are certain to vary, at least in part, depending upon an individual’s assessment of the effects of such policies on violent crime. Three effects are possible: (1) the gun-control law may effectively reduce crime, or (2) the gun-control law may have an insignificant impact on crime, or (3) the gun-control law may effectively increase crime by reducing victims’ capacity for self-defense. If an individual believes the net effect of crime reduction from gun control exceeds any increased threat of victimization, support of gun control is rational. On the

other hand, an individual who believes gun control impedes self-defense and does not reduce violent crime will rationally oppose gun control. The beliefs of citizens, as expressed through the voting of their legislators, is explored in the following section. However, insight into what constituent preferences might be can be gained by examining theoretical, anecdotal, survey, and statistical evidence on the efficacy of handguns as not only tools of self-defense, but also as effective deterrents to crime.

To begin, the theoretical positive link between gun availability and gun violence is suspect simply because correlation need not imply causation. The high levels of gun ownership in the United States may be the *result* of crime-weary citizens arming themselves against perceived and real dangers.⁶ Of course, the causality may run both ways, but an assumption of unilateral causality from guns to crime overlooks a hypothesis of equal validity. Indeed, some researchers, examining game theory and the likelihood that the criminal tendencies of some segment of the population may depend upon the effectiveness of deterrence, conclude that guns may be an important means of self-defense.⁷

Theoretical evidence, however, can only go so far towards determining the efficacy of guns as a deterrent to crime or citizens' beliefs about the effectiveness of gun control as a means of reducing crime or inhibiting defensive capabilities. Fortunately, additional evidence is revealed in anecdotes and surveys.

For example, after a 1966-67 Orlando, Florida program trained 6,000 women in firearm safety, Orlando's rape rate dropped an astounding 88 percent the following year and did not rise to pre-program levels until 1972.⁸ Similarly, a 1982 ordinance requiring gun ownership in Kennesaw, Georgia reduced the burglary rate by 89 percent. Other programs to effectively arm ordinary citizens have yielded similar results.⁹

At an individual level, the effectiveness of handguns to thwart a criminal attack is uncertain. Much conventional wisdom, advice from criminal justice practitioners, and advocacy from pro-control supporters encourages potential crime victims to comply with criminals' demands.

Nevertheless, Ziegenhagen and Brosnan (1985) conclude that “victim compliance is no guarantee of safety from physical injury” (p. 687). Analyzing data from 3,679 robbery attempts, they find that without resistance, most crime victims suffer loss of property, though not injury. However, when potential victims do resist, they are less likely to suffer either property loss or injury. And potential victims who resist by using or brandishing a weapon escape injury and property loss over 65 percent of time and suffer injury or property loss only 28 percent of the time. Kates (1991) argues that resistance may be particularly valuable to those threatened by repeated attacks.

Survey data from gun users corroborate these findings. Of the 20-25 percent of U.S. households owning handguns, approximately 40 percent give self-defense as the primary reason.¹⁰ And intent often translates into use. Citing evidence from anti-gun organizations, Kates reports estimates of 645,000 defensive uses of handguns per year in the United States.¹¹ Further, these uses are usually successful, since “(e)vidence suggests that handgun armed defenders succeed in repelling criminals, however armed, in eighty-three to eighty-four percent of the cases” (p. 143). In a vast survey of the gun literature, Reynolds and Caruth (1992) cite evidence of approximately 1 million defensive uses of handguns per year in the U.S. These defensive uses kill an estimated 2,000 to 3,000 criminals and injure another 9,000 to 17,000, with few accidental shootings or occasions when criminals seize the gun and turn it on the victim.

Kleck (1995) argues that the rising stock of handguns in the U.S. is a response to rising crime and that “(m)ost handguns are owned for defensive reasons” (p. 13). Using data on total guns, Kleck estimates 2.5 million defensive uses per year and that deterrence is a motive for ownership for approximately one third of gun owners.¹²

Further, surveys of criminals reveal that they perceive gun ownership as a valid threat against crime. Over half of surveyed felons say they worry more about an armed victim than about the police and that an armed store owner is less likely to be robbed.¹³ Thirty-four percent of felons report worry about being shot at and an equal percentage say they

have been confronted by an armed victim with the result being either too much fear to carry out the crime, or being fired upon, or injury or capture.¹⁴

Numerous studies analyze the statistical relationship between gun prevalence and crime. Kleck and Patterson (1993) review these studies as well as their own study, and find that “(h)omicide (gun, nongun, and total), gun assault, and rape rates all had significant positive coefficients in the gun prevalence equations,” supporting “the hypothesis that some violence rates encourage the acquisition of firearms for self-defense” (p. 272). In sum, theoretical, anecdotal, survey, and statistical evidence indicate that many constituents find guns an effective means of self-defense, and therefore may lobby their legislators to vote against gun-control legislation.

B. Guns and recreation

A second motive for gun ownership is recreation. Wright (1984), citing evidence from a 1978 Decision Making Information study for the NRA, reports that 54 percent of gun owners say hunting is the most important reason for ownership. However, only 9 percent of handgun owners cite hunting as the most important reason. Target shooting and collection are other important motives for gun ownership.

C. Guns and culture

Pro-control advocates are fond of criticizing a gun “subculture.” That this subculture exists is hardly questionable, as many clearly identifiable traits indicate whether or not a given individual is likely to be a gun owner. Specifically, an older male, with a high income and an interest in hunting, raised in the rural South with a Protestant background is most likely to be a gun owner.¹⁵ These “segments of the population . . . have the lowest rates of violent behavior,”¹⁶ and consequently are unlikely to view gun control as necessary to deter crime. If anything, gun control is a threat to their cultural identity. The presence of a gun subculture provides indirect evidence that the recent rise in

gun ownership is a response to rising crime. Because members of the gun subculture have owned guns since the country's origin, the rise in gun ownership "since the mid-1960s" must be "attributable to concerns about crime."¹⁷

IV. An Empirical Analysis of Senatorial Votes on the Brady Bill

Standard arguments supporting the Brady Bill assert that waiting periods reduce violent crime, especially crimes committed in the "heat of the moment." If this assertion is correct, legislator's constituents, especially those subject to violent crime, should express their preferences in support of the Brady Bill. In turn, their legislators can be expected to cast votes in favor of the Brady Bill. On the other hand, if constituents consider gun control a threat to their self-defensive capabilities, recreational opportunities, or cultural identity, they will lobby their legislators to vote against gun control.

A. The model

To test the effects of constituent interests on senators' votes on the Brady Bill, I have estimated an econometric model, based on the assumption that legislators do reflect their constituents' interests when voting. The model identifies significant constituent interests and measures their influence by estimating the effects these interests had on the probability that a given senator voted for or against the Brady Bill.

The single-equation model is given below¹⁸:

$$\text{BRADY} = a_0 + a_1\text{VCRIME} + a_2\text{RURAL} + a_3\text{HUNTREV} + a_4\text{POLICE} + a_5\text{NRA} + a_6\text{HCI} + a_7\text{PARTY} + a_8\text{ADARESID} + E. \quad (1)$$

Variables are defined as follows:

(1) BRADY: A given senator's vote on the Brady Bill, coded one if the senator voted in favor of the Brady Bill and zero if the senator voted against the bill

(2) VCRIME: Violent crimes per 100,000 of population in a given senator's state¹⁹

(3) RURAL: Rural population per 1,000 of total population in a given senator's home state

(4) HUNTREV: Hunting license revenues per thousand of population in a given senator's home state

(5) POLICE: State and local government full-time equivalent police employment per thousand of population in a given senator's home state

(6) NRA: NRA contributions received by a given senator, in real terms, from 1987 to 1992²⁰

(7) HCI: Handgun Control Inc. contributions received by a given senator, in real terms, from 1987 to 1992

(8) PARTY: A given senator's political party affiliation coded one if the senator is a Democrat and zero if the senator is a Republican

(9) ADARESID: The residuals from a regression of each senator's rating from the Americans for Democratic Action against all independent variables in equation (1) and other socio-economic variables.²¹

All data are for 1992 or the year closest to 1992 for which data are available. Descriptive statistics for each variable (and additional variables used later in the paper) are presented in Table 1²², and an appendix lists data sources.²³

The equation provides an estimate of the probability that a given senator will vote for the Brady Bill, given all constituent interests modeled. This equation is examined below.

The VCRIME variable measures the citizenry's exposure to violent crime in a given senator's state. If citizens exposed to high rates of violent crime believed the Brady Bill would help to reduce that crime, then senators from high crime state should be differentially likely to vote in favor of the Brady Bill, (i.e., a_1 is predicted to be positive). On the other hand, if citizens believed the Brady Bill would have no effect on violent crime or might inhibit possibilities for self defense, senators from high crime states would not be differentially likely to vote for the Brady Bill and would likely vote against it.

Other measures of constituent characteristics should also

affect senators' votes. RURAL may reflect the prevalence of a "gun culture" in a given state. If so, a high share of state population that is rural should make a given senator less likely to vote for the Brady Bill, all else equal, so a_2 should be negative. HUNTREV proxies the economic impact of hunting in a state. Because over half of gun owners and nine percent of handgun owners cite hunting as the most important reason for gun ownership,²⁴ and because hunters may not perceive a link between gun ownership and violent crime, hunters may be opposed to gun control of any kind. Therefore, senators from states where hunting is an important business and hobby may be less likely to vote for the Brady Bill, and a_3 is predicted to be negative.

The effect of POLICE is ambiguous. If constituents consider police protection effective, senators from states with high levels of police protection may face little pressure to vote for or against the Brady Bill, regardless of constituent views of the effectiveness of gun control. On the other hand, in states with relatively little police protection, citizens who believe gun control works will lobby their senators to vote for the Brady Bill, while those who believe gun control is ineffective or an impediment to self-defense will lobby against the bill. However, consideration of individual citizens alone ignores the lobbying efforts of police. Public statements given by many chiefs of police, police organizations, and police unions indicate that police forces take active positions in the fight for gun control.²⁵ For example, Washington, D.C. Metropolitan Police Department chief, Fred Thomas, and New York City's police commissioner, Raymond Kelly, strongly supported the Brady Bill, with Kelly saying that "(g)un control laws, the stricter the better, are critical [to reduce violent crime]."²⁶ Further, both the Fraternal Order of Police and the National Association of Police Organizations favored the Brady Bill.²⁷ Nevertheless, Ayooob calls these statements and positions into question by arguing that unlike police chiefs and commissioners, whose public statements may reflect political appointments and realities, the majority of "street cops" believe gun control does nothing to reduce crime and that guns are an effective defense against crime. The sign on a_4 is

uncertain.

The importance of campaign contributions to political outcomes is well recognized, so NRA and HCI are included in the model, with the sign of a_5 expected to be negative and the sign of a_6 expected to be positive.²⁸ With over 3 million members and over \$2.5 million spent on congressional races in 1992,²⁹ the NRA has long been recognized as a potent political force.³⁰ Its rival organization, HCI, is smaller, with only 360,000 members in 1993, but still an important political force, whose president, Richard Aborn, considered the Brady Bill “a national referendum on public support for a more comprehensive gun control debate.”³¹

Finally, political affiliation and ideology are considered. Since the Democratic Party is known to generally favor gun control, PARTY is included in the model, and a_7 is expected to be positive, especially if party affiliation reflects a constituency’s preferences not fully captured by the state average statistics. PARTY also proxies for the effects of party control, loyalty, and discipline, which may have been especially important, given a Democratic president who firmly supported the Brady Bill. The variable ADARESID is designed to capture any ideological preference not reflected in constituent characteristics. If a senator’s ADA rating is greater than predicted by PARTY and other variables reflecting constituent interests, that senator is more “liberal” than his constituents and is predicted to be more likely to vote for the Brady Bill (i.e., a_8 is expected to be positive).³²

B. The results

The results of the empirical estimate are shown in Table 2. Before examining these results, three notes are in order. First, the empirical model is estimated using logit regression because the dependent variable is qualitative. Second, the results are presented for two equations, one with the POLICE variable and one with the POLICE variable omitted. The second equation is presented because of multicollinearity between POLICE and VCRIME, though the estimates of the two equations are fundamentally the same.³³ Finally, because

the coefficient is not equivalent to the derivative in logit regression, the derivative of each variable (noted as the partial effect) is presented in an adjacent column.³⁴

The predictive power of the model is high as evidenced by the significance of the likelihood ratio test, the R-square value, and the fraction of senatorial votes forecasted correctly.³⁵ The model clearly identifies many of the factors that influenced senatorial votes on the Brady Bill and provides reasonable measures of their effects.

Turning to the variable of primary interest, VCRIME, we find that senators from states with high rates of violent crime were *not* more likely to vote for the Brady Bill. Though the coefficient is significant at only the relatively weak 10 percent level for a one-tail test, the negative sign indicates that senators from states with high rates of violent crime were *less* likely to vote for the Brady Bill. And when the POLICE variable is omitted, the coefficient becomes significant at the 10 percent level for a *two*-tail test. The partial effects suggest that an increase in the violent crime rate of 100 violent crimes per 100,000 of population reduced the probability a senator voted for the Brady Bill by about 0.05.

The importance of hunters as an interest group is evident, with the coefficient on HUNTREV being negative and significant in both regressions. An additional \$1,000 per capita in hunting license revenues reduced the likelihood a senator would vote for the Brady Bill by almost 0.05.

Campaign contributions, at least those given by the NRA, are clearly important determinants of senatorial votes. The coefficient on NRA contributions is negative and significant in both regressions, and the partial effect indicates that an additional \$1,000 contribution to a senator's campaign yielded the NRA an increased likelihood of a vote for its position (against the Brady Bill) of at least 0.035. Senators clearly do respond to NRA contributions. The partial effect of HCI contributions appears even larger than that of NRA contributions, indicating an additional \$1,000 contribution from HCI yielded this pro-control lobby an increased likelihood of a vote for the Brady Bill of approximately 0.07. This relatively high effect indicates that HCI contributions are

more effective than NRA contributions, and perhaps that HCI allocates its funds more efficiently; however, the efficacy of HCI contributions is called into question by the insignificance of the coefficients.

Political party affiliation and ideology are apparently very important determinants of senatorial votes on gun control. The power of the Democratic Party's position in favor of the Brady Bill is evidenced by the partial effect showing that, all else equal, a Democratic senator was more likely to support the Brady Bill by a factor of at least 0.36. Similarly, senators with a more liberal ideology than their constituents were more likely to vote for the bill.³⁶

The negative coefficients on RURAL are consistent with the presence of a "gun culture" in less densely populated areas, but the variable is only marginally significant in the first estimate and insignificant in the second. The POLICE variable is also insignificant, perhaps reflecting the conflicting views and interests captured in this variable.³⁷

To test the robustness of these results, I re-estimated the equation, replacing the rate of violent crime with the murder rate and the rate of murders *by handguns*.³⁸ Because these results are nearly identical to those reported in Table 2, they are not fully reported.³⁹ However, the coefficients on the crime measures reveal that an increase in the murder rate of one per 100,000 of population reduced the likelihood a senator voted for the Brady Bill by at least 0.03, and an increase in the rate of murder by handgun by one per 100,000 reduced the likelihood of voting for the Brady Bill by approximately 0.05 to 0.06. These results offer no support to the hypothesis that senators from states with high rates of violent crime are differentially likely to support a national waiting period for purchases of handguns. To the contrary, the evidence presented indicates that these senators were *less* likely to support a national waiting period, reflecting the preferences of constituents who perceived the Brady Bill as at best ineffective and at worst an impediment to crime deterrence and self-defense.⁴⁰

V. A Closer Look at NRA Campaign Contributions

The effects of campaign contributions on any political outcome, including gun control, is the subject of much debate and controversy. Rather than enter that debate, I present a positive analysis of how the NRA determines contributions to (and against) senatorial candidates by estimating the following model:

$$pBRADY = B_0 + B_1VCRIME + B_2RURAL + B_3HUNTREV + B_4POLICE + B_5HCI + B_6PARTY + B_7ADARESID + E. (2)$$

$$pNRA = d_0 + d_1pBRADY + d_2pBRADYSQ + d_3MARGIN + E. (3)$$

In equation (2), predicted values of the probability a senator will vote for the Brady Bill ($pBRADY$) are estimated using all the variables in equation (1) except NRA contributions.⁴¹ Then in equation (3), predicted NRA contributions are modeled as a function of the probability a senator will vote for the Brady Bill, the squared probability a senator will vote for the Brady Bill ($pBRADYSQ$), and the senator's margin of victory in the last election ($MARGIN$).⁴²

This model tests hypotheses about how the NRA allocates contributions. One argument is that the NRA should first determine a senator's likely vote before determining what contribution, if any, to make to that senator's campaign.⁴³ Contribution dollars should be most effective when given to candidates who are vacillating in their voting decision (i.e., candidates with $pBRADY$ values of approximately 0.5). Dollars contributed to candidates known to staunchly oppose gun control (candidates with $pBRADY$ values approaching zero) and candidates known to staunchly favor gun control (candidates with $pBRADY$ values approaching one) are unlikely to affect voting behavior. Hence, NRA contributions, if wisely allocated, should be highest for undecided candidates and low or zero for those candidates with known and firm positions. (Inclusion of the $pBRADYSQ$ variable allows determination of whether or not the NRA follows this strategy.)

Nevertheless, Langbein (1993) argues just the opposite on

grounds that the NRA is a “membership group” that must respond to constituents’ preferences, especially on highly visible issues, to reward legislators who vote the NRA’s position and to withhold contributions from those who do not. If Langbein’s hypothesis is correct, NRA contributions should be a monotonically increasing function of pBRADY. In an analysis of the Firearms Owners Protection Act, Langbein finds that although the NRA did allocate some funds to pro-control House representatives, the vast majority of NRA contributions went to representatives securely in the NRA camp. If d_1 is positive and significant and d_2 is insignificantly different from zero, Langbein’s hypothesis is supported. On the other hand, if d_1 is positive and significant and d_2 is negative and significant, the first hypothesis is supported.

In addition, contributions should be greater, all else equal, for candidates in close races, where additional funds may have a significant impact on the outcome of the race.⁴⁴

Ordinary Least Squares and Tobit estimates of equation (3) are shown in Table 3, where VCRIME is used as the crime variable to estimate a senator’s probability of voting for the Brady Bill.⁴⁵ The estimates provide strong support for the first hypothesis presented. The positive and significant estimate of d_1 , and the negative and significant estimate of d_2 , indicate that when mapped against the probability of voting for the Brady Bill, NRA contributions follow an inverted-U pattern. Solving for the contribution-maximizing value of pBRADY yields a value of 0.35 for the OLS estimate and 0.37 for the Tobit estimate. Though these estimates are not exactly 0.5, they are close to the center of the political spectrum and may reflect the NRA’s efforts to concentrate on candidates moderately opposed to gun control. The predictive power of equation (2) and the significance of the estimate of d_2 suggest the finding is not spurious. Perhaps the NRA changed strategies for the Brady Bill vote relative to the Firearms Owners Protection Act votes of seven years earlier. At a minimum, this result indicates that additional research into the allocation of funds by the NRA is needed.

Finally, every 10 percentage point difference in the victor’s margin over his opponent reduced contributions by

approximately \$640 to \$1,369, depending upon the estimate. The NRA clearly distinguishes close races, where contributions matter most, from races that are settled or races that could only be affected by enormous contributions.⁴⁶ As a whole, these results provide evidence that the NRA is a rational and efficient allocator of campaign funds.

VI. Why Did the Pro-Gun Lobby Lose?

The central task of this paper has been to determine and measure the factors that influenced senatorial votes on the Brady Bill. The Brady Bill vote is special, not only because it marked the most important gun-control vote since 1986, but also because the pro-gun forces (NRA) lost. Unfortunately, the analysis reveals little about the forces leading to passage of the Brady Bill, though it does yield valuable insight into the factors that worked (unsuccessfully) against its passage. Clearly, Democratic party affiliation and “liberal” ideology played pivotal roles in passing the Brady Bill, with Democratic party affiliation alone raising the probability of a vote for the Brady Bill by over 0.36. (To contrast, a \$1,000 contribution from the NRA reduced the probability of a vote for the Brady Bill by less than 0.04.) The Democratic party variable may capture the influence of politically active, pro-gun interests that are not identified in state average statistics. And the positive and significant coefficient on ADARESID may suggest that some senators voted in favor of the Brady Bill to impose their views of how to fight crime or how to form a “better society,” even if their views differed from those of a majority of their constituents. Future political battles over gun control are virtually assured and will provide other examples to determine the important interests that drive political outcomes on this important and controversial issue.

VII. Politics and the Future of Gun Control

Predicting the future of the gun-control movement in the United States is hazardous. Early indications are that the

Brady Bill is of dubious effectiveness. As reported in *Business Week*, the impending passage of the Brady Bill spurred countless Americans to *buy* guns. Legislation to ban some types of assault weapons produced an identical effect,⁴⁷ leading to the ironic result that legislation designed to reduce gun purchases may, in the short run, increase them. In addition, claims by President Clinton during the 1996 campaign that the Brady Bill had prevented 60,000 to 100,000 “felons, fugitives and stalkers” from obtaining handguns are clearly false.⁴⁸

Indeed, the climate may be shifting against control. Fear of crime is spurring many states to pass laws permitting citizens to carry concealed weapons. A crime-weary public, led in part by women, are supporting this legislation in the name of crime deterrence and self-defense. And, evidence from Florida and academic researchers indicates that concealed-carry laws do not increase gun violence.⁴⁹

Consistent with the ideas expressed in this paper, public opinion, reflected through elected legislators, will determine the ultimate outcome of gun-control legislation in the United States. So long as crime rates soar and ordinary citizens believe guns are an effective means of protection, the constitutional rights of gun owners will be, in large part, preserved.

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Appendix: Data Sources

Votes on Brady Bill: *1993 Congressional Quarterly Almanac*, p. 51-S.

Political Party: *1993 Congressional Quarterly Almanac*, p. 51-S.

ADA Ratings: *Almanac of American Politics*, various issues.

Electoral Margins: *Almanac of American Politics*, various issues.

Consumer Price Index: *1996 Economic Report of the President*, Table B-56, p. 343.

Violent Crime Rate: *Crime State Rankings 1994: Crime in the 50 United States*, Kathleen O'Leary Morgan, Scott Morgan, and Neal Quitno, editors. Morgan Quitno Corp., 1994, p. 283.

Murder Rate: *Crime State Rankings 1994: Crime in the 50 United States*, Kathleen O'Leary Morgan, Scott Morgan, and Neal Quitno, editors. Morgan Quitno Corp., 1994, p. 289.

Murder with Handgun Rate: *Crime State Rankings 1994: Crime in the 50 United States*, Kathleen O'Leary Morgan, Scott Morgan, and Neal Quitno, editors. Morgan Quitno Corp., 1994, p. 295.

Rural Population: *Crime State Rankings 1994: Crime in the 50 United States*, Kathleen O'Leary Morgan, Scott Morgan, and Neal Quitno, editors. Morgan Quitno Corp., 1994, p. A5.

State Population: *Crime State Rankings 1994: Crime in the 50 United States*, Kathleen O'Leary Morgan, Scott Morgan, and Neal Quitno, editors. Morgan Quitno Corp., 1994, p. A1 for 1992 figures, p. A2 for 1990 figures.

Hunting License Revenues: *Gale State Rankings Reporter*, Table 87, p. 49.

State and Local Government Full-Time Equivalent Police Employment: *Sourcebook of Criminal Justice Statistics 1994*, Table 1.27, pp. 34-38.

NRA Contributions: Federal Election Commission, Committee Index of Candidates Supported/Opposed (D)

HCI Contributions: Federal Election Commission, Committee Index of Candidates Supported/Opposed (D)

Name	N	Mean	Std. Dev.	Minimum	Maximum
BRADY	98	0.633	0.485	0.000	1.000
VCRIME	98	565.35	288.82	85.30	1,207.2
MURDER	98	7.038	3.856	0.600	17.400
MUHGUN	96	3.282	2.408	0.000	10.380
RURAL	98	315.92	146.50	73.56	678.51
HUNTREV	98	\$3,604	\$4,935	\$92	\$27,893
POLICE	98	2.646	0.453	1.667	3.968
NRA	98	\$3,725	\$7,427	-\$28,718	\$51,136
HCI	98	\$491	\$1,289	-\$56	\$6,886
PARTY	98	0.551	0.500	0.00	1.00
ADA	98	52.01	33.92	2.50	99.00
MARGIN	98	22.94	20.60	0.00	100.00

Variable Name	Coefficient/ (t-statistic)	Partial Effect	Coefficient/ (t-statistic)	Partial Effect
VCRIME	-0.00222 (-1.420)	-0.00045	-0.00280 (-1.974) *	-0.00055
RURAL	-0.00348 (-1.319)	-0.00070	-0.00275 (-1.090)	-0.00054
HUNTREV	-0.000245 (-2.356) **	-0.000049	-0.000247 (-2.473) **	-0.000049
POLICE	-0.880 (-0.824)	-0.177		
NRA	-0.000188 (-2.259) **	-0.000038	-0.000183 (-2.251) **	-0.000036
HCI	0.000359	0.000072	0.000341	0.000067

	(0.784)		(0.743)	
PARTY	1.854 (2.649) **	0.373	1.850 (2.644) **	0.364
ADARES ID	0.847 (2.612) **	0.170	0.840 (2.632) **	0.165
CONSTA NT	6.0219 (1.935) *		3.833 (2.499) **	
L.R. Test	58.616***		57.940***	
R-square	0.455		0.450	
Percent Correct	85.7		86.7	
N	98		98	

* Significant at the 10 percent level or greater for a two-tail test.

** Significant at the 5 percent level or greater for a two-tail test.

*** Significant at the 1 percent level or greater for a one-tail test.

Variable Name	Coefficient / (t-statistic)
pBRADY	17,460 (1.931) *
PBRADYSQ	-24,940 (-3.050) ***
MARGIN	-64.05 (-1.941) *
CONSTANT	6,773 (3.345) ***
Adj. R-square = 0.237	
F-statistic = 11.028	

* Significant at the 10 percent level or greater for a two-tail test.

*** Significant at the 1 percent level or greater for a two-tail test.

Variable	OLS	Tobit
	Coefficient/ (t-statistic)	Regression Coefficient/ (asymptotic normal statistic)
pBRADY	17,460 (1.931)*	35,138 (2.988)***
pBRADYSQ	-24,940 (-3.050)***	-48,110 (-4.282)***
MARGIN	-64.05 (-1.941)*	-136.94 (-2.770)***

CONSTANT	6,773 (3.345)***	5,713 (2.242)**
Adj. R-square = 0.237		
F-statistic = 11.028		

* Significant at the 10 percent level or greater for a two-tail test.

** Significant at the 5 percent level or greater for a two-tail test.

*** Significant at the 1 percent level or greater for a two-tail test.

Table 4. Regression Results with Murder Rate as Independent Variable

Variable Name	Coefficient / (t-statistic)	Partial Effect	Coefficient/ (t-statistic)	Partial Effect
MURDER	-0.149 (-1.576)	- 0.03006	-0.180 (-1.993) *	-0.03569
RURAL	-0.00257 (-0.981)	- 0.00052	-0.00113 (-0.505)	-0.00022
HUNTREV	-0.000251 (-2.357) **	- 0.00005	-0.000245 (-2.469) **	-0.000049
POLICE	-1.062 (-1.058)	-0.214		
NRA	-0.000179 (-2.108) **	- 0.00003	-0.000177 (-2.144) **	-0.000035
HCI	0.000352 (0.771)	0.00007	0.000320 (0.703)	0.000063
PARTY	1.846 (2.674) ***	0.372	1.808 (2.634) **	0.358
CONSTANT	5.994 (1.918) *		3.001 (2.439) **	
L.R. Test				
	59.072		57.949	
R-square				
	0.458		0.450	
Percent Correct				
	85.7		84.7	
N				
	98		98	

* Significant at the 10 percent level or greater for a two-tail test.

** Significant at the 5 percent level or greater for a two-tail test.

*** Significant at the 1 percent level or greater for a two-tail test. Table 5. Regression Results with Murder Rate by Handgun as Independent Variable				
Variable	Coefficient/	Partial	Coefficient/	Partial

Name	(t-statistic)	Effect	(t-statistic)	Effect
MUHGUN	-0.223 (-1.410)	-0.0469	-0.284 (-1.849) *	-0.0582
RURAL	-0.00369 (-1.361)	-0.00077	-0.00181 (-0.799)	-0.00037
HUNTREV	-0.000254 (-2.258) **	-0.000053	-0.000243 (-2.389) **	-0.000050
POLICE	-1.305 (-1.296)	-0.274		
NRA	-0.000178 (-2.111) **	-0.000037	-0.000176 (-2.148) **	-0.000036
HCI	0.000340 (0.736)	0.000071	0.000293 (0.652)	0.000060
PARTY	1.954 (2.737) ***	0.410	1.904 (2.686) ***	0.390
ADARESID	0.762 (2.359) **	0.160	0.734 (2.353) **	0.150
CONSTAN T	6.515 (2.038) **		2.732 (2.373) **	
L.R. Test				
	58.413		56.717	
	0.460		0.447	
Percent Correct	83.3		85.4	
N	96		96	

* Significant at the 10 percent level or greater for a two-tail test.

** Significant at the 5 percent level or greater for a two-tail test.

*** Significant at the 1 percent level or greater for a two-tail test.

Endnotes

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1. See "Home on the Range," *The Economist*, March 26, 1994, p. 23.

2. For research indicating that gun-control laws can reduce crime, see Geisel, Roll, and Wettick (1969), who estimate that if the gun-

control laws of New Jersey had been applied nationally in 1965, 2,000 to 3,000 lives would have been saved. On the other hand, Magaddino and Medoff (1984) find that neither state nor federal gun-control laws reduce crime. Perhaps the best study is by Kleck and Patterson (1993) who find “most gun restrictions appear to exert no significant negative effect on total violence rates” (p. 275). The most important contribution since Kleck and Patterson has been by Lott and Mustard’s (1997) detailed study of concealed-carry laws. They conclude that laws permitting concealed carry are highly effective deterrents to violent crime.

3. Bender and Lott (1986) provide a thorough review of this literature.

4. For additional details on the legislative background and political wrangling that led to passage of the Brady Bill, see “President Signs ‘Brady’ Gun Control Law,” 1993 Congressional Quarterly Almanac, pp. 300-303.

5. Survey evidence reveals great temperance by Americans on questions of gun control. For example, Gallup reported that 88 percent of Americans, including 57 percent of gun owners, supported the Brady Bill. (See The Gallup Poll Monthly, March 1993, n330, p. 2(4).) Nevertheless, these same polls “demonstrate no decline since the 1950s in Americans’ desire to own guns.” (See Tim Smart, Catherine Yang, and Mike Seemuth, “Ready, Aim . . . “ Business Week, December 27, 1993, pp. 34-35.) Similarly, The Economist reports that “[f]ully 80% of Americans (including about 60% of the 3.3 million members of the NRA) now favour some sort of restrictions on guns; [yet] fewer than 30% support a ban.” (See “Home on the Range,” The Economist, March 26, 1994, pp. 24, 28.)

6. See Benson (1984) for a thorough discussion of this point.

7. See, for example, Polsby (1986) and Green (1987).

8. See Green (1987), who cites this evidence originally reported by Kleck and Bordua.

9. For additional details, see Green (1987), pp. 72-76 and Kates (1991), pp. 153-155. For an account of the effects of handgun confiscation, see Kopel’s (1993) discussion of the Jamaican experience, where crime rates rose dramatically.

10. See Wright (1984).

11. This estimate is based on the 1980 U.S. population, implying a significant underestimate of current defensive handgun use.
12. Not all researchers agree with these findings. For example, DeFronzo (1979) concludes that fear of crime does not cause handgun ownership. This finding is difficult to interpret, however, because DeFronzo also concludes that handgun ownership reduces fear of crime. Apparently, handgun purchasers are not motivated by a fear of crime before their purchase, but gain considerable peace of mind after their purchase.
13. See Reynolds and Caruth's (1992) citation of the seminal work by Wright and Rossi.
14. See Kates (1991), p. 144.
15. See Kleck (1995) for additional details.
16. See Kleck (1995) p. 14. For evidence that hunting license rates are uncorrelated or negatively correlated with rates of violent crime, see Eskridge (1986).
17. See Kleck (1995), p. 14.
18. Editor's Note: The equations in this paper are normally written with Greek letters (alpha, beta, etc.). The printed version of this article uses the nearest English letter equivalent. For example, a lowercase "a" is used for alpha, an uppercase "B" for beta, etc.
19. Violent crimes include murder, forcible rape, robbery, and aggravated assault.
20. The figure includes contributions to and expenditures on behalf of a given senator. Independent expenditures against a senator are entered as negative amounts.
21. The ADA is an interest group promoting traditionally "liberal" causes. High ADA ratings indicate a senator is to the "left" of the political center.
22. Some researchers question the use of state average characteristics as determinants of senatorial voting on grounds that different senators from the same state may serve different constituencies. That different senators from the same state can display markedly different political preferences and voting patterns is readily observed. Goff and Grier (1993) find evidence that more diverse states are likely to

elect senators with different political preferences and voting patterns, as measured by differences in their ADA scores. Nevertheless, the most statistically significant determinant of differences in ADA scores is political party affiliation. Goff and Grier find that when senators from the same state are of the same political party, the difference between their ADA scores narrows by 22-24 points. Since political party alone indicates the constituency served and accounts for much of the measured differences in senatorial voting patterns, the estimates reported in this paper should not be adversely affected by inclusion of state averages for other variables.

23. As shown in Table 1, data are for 98 observations. Senator Dorgan (D-ND) is omitted because he did not vote on the Brady Bill, and Senator Matthews (D-TN), who filled the seat held by Al Gore, is omitted because no ADA data are available.

24. See Wright (1984).

25. See Blackman (1990) for a thorough discussion of police lobbying on gun control legislation.

26. See Kime (1993) and Kelly (1993).

27. See Idelson (1993). Langbein and Lotwis document that the Fraternal Order of Police, National Sheriffs Association, National Troopers Coalition, and the International Association of Chiefs of Police opposed the Firearms Owners Protection Act.

28. NRA membership by state is a logical variable to include in the model; however, the NRA denied my request for these data.

29. See Idelson (1993).

30. Blackman and Gardiner (1986) provide an interesting and thorough discussion of why the NRA has had such remarkable political success.

31. See Idelson (1993), p. 1026.

32. This procedure for determining ideology was pioneered by Carson and Oppenheimer (1984) and has been widely employed, despite some criticisms. See Bender and Lott (1996), pp. 69-73 and pp. 79-80.

33. The zero-order correlation coefficient between POLICE and VCRIME is 0.531.

34. Because the logit model is nonlinear, the derivative (partial effect) of any independent variable is not constant and is calculated as $ap(1-p)$, where a is the estimated coefficient and p is the forecasted value of the dependent variable. The derivative (partial effect) presented in the tables is calculated using a value of p that is calculated with all independent variables at their means.

35. The likelihood ratio test is calculated as $2[L(a) - L(0)]$ where $L(\cdot)$ designates the likelihood function. The reported R-square is the McFadden R-square and is calculated as

$$1 - [L(a)/L(0)].$$

36. The reported partial coefficient cannot be interpreted linearly. Because ADA ratings are constrained to values between zero and 100, they must be converted to decimal form and transformed to $\ln(ADA/(1-ADA))$ before estimation by OLS. To convert forecasted values of the transformed variable into actual ADA ratings, e must be raised to the power of the forecasted transformed variable and this value must be set equal to $ADA/(1-ADA)$. For example, if the forecasted value of the transformed variable is zero, solving for the actual ADA rating yields a value of 0.50 (or 50). The effect of the residuals upon the dependent variable depends upon actual and forecasted values of ADA, but the relationship is not linear. For example, if the forecasted value of the transformed variable is zero, but the actual value of the transformed variable is one, the senator's forecasted ADA rating is 50, but his actual ADA rating is 73. Thus, a senator with an ADA rating 23 points above his forecast is more likely to vote for the Brady Bill by a factor of approximately 0.16. However, if the predicted value of the transformed variable is one (so the predicted ADA rating is 73), but the actual transformed variable is two, the forecasted ADA rating is 88, meaning that an ADA rating only 15 points above its forecasted value is sufficient to raise the probability a senator voted for the Brady Bill by 0.16. Consequently, the effect of the ADA residuals on the probability a senator will vote for the Brady Bill is not a linear function.

37. These results are broadly consistent with those reported by Langbein and Lotwis in their analysis of House votes on the 1986 Firearms Owners Protection Act. Specifically, Langbein and Lotwis find that district population density, a crime proxy, and state rates of violent crime (note that examining representative votes using state data is problematic) are insignificant. Their examination of

campaign contributions reveals that both NRA and HCI contributions are significant, the later finding being inconsistent with the results reported in this paper. However, like me, they find that the coefficient on HCI contributions is greater than that of NRA contributions. With respect to ideology, Langbein and Lotwis find that Congressional Quarterly's Conservative Coalition scores are significant, though they find party affiliation insignificant. These results are consistent with my own since I find ADA residuals to be significant. Further, since I enter party affiliation in the equation for the ADA residuals, my measure of ideology is not intermingled with party, as is the case with the Langbein-Lotwis estimates, where collinearity between party and Conservative Coalition scores is likely high. To capture a "hunting gun culture," Langbein and Lotwis use several constituent characteristics, such as percent of population living in rural areas, median income levels, and percent of population that are veterans, which are significant. Although my rural population variable is insignificant, the hunting revenue variable is significant. Finally, the Langbein-Lotwis finding that police contacts with representatives were effective is contrary to my finding that the number of police per capita does not affect voting.

38. The sample for the regression using murders by handguns (MUHGUN) is only 96 because Maine did not report murders by category of weapon. Consequently, the observations for Senator Mitchell (D) and Senator Cohen (R) are omitted from this estimate.

39. The complete results may be obtained from the author upon request.

40. Many opponents of the Brady Bill perceived it as inconsequential in and of itself, but saw it as a first step down a "slippery slope" towards more stringent gun-control measures.

41. Even with NRA contributions omitted, equation (2) predicts well, correctly forecasting the votes of 79 of 98 senators.

42. Grier and Munger (1993) model corporate, labor union, and trade association contributions to members of congress in the House and Senate. They find that for senators, seniority is never significant and that committee assignments are rarely significant. In unreported regressions, I add membership on the Senate Judiciary Committee, which handles crime bills, and seniority to equation (3). Neither variable is significant.

43. The model is recursive. The predicted vote from equation (2) (which omits NRA contributions) is used in equation (3) to forecast the NRA contribution received by each senator.

Arguably, equations (1) and (3) should be estimated simultaneously by two-stage least squares regression or some other estimation technique that accommodates systems of equations, if votes are a function of contributions and contributions are, in turn, a function of votes. Nevertheless, a simultaneous technique is inappropriate if, as I argue, contributions are a function of predicted votes rather than actual votes. That is, contributions determine actual votes, but predicted votes determine contributions. Since actual and predicted votes are not the same, the equations should not be estimated simultaneously. Indeed, all NRA contributions were received before 1993 (some dating back to 1988), casting doubt on any simultaneous determination of past contributions by 1993 senatorial votes.

Langbein and Lotwis also assume a unidirectional relation between campaign contributions and votes, and argue that because they “examine the impact of prevote contributions on the vote and assume that events occurring after cannot cause events occurring before, we do not use simultaneous equation techniques for parameter estimation” (p. 435).

Like Langbein and Lotwis, I argue unidirectional causality is correct not only because contributions preceded votes but also because it is unlikely that contributions could be a reward for prior votes. The last federal gun-control legislation, the Firearms Owners Protection Act, passed seven years earlier, and at that time 38 of the 98 senators in this sample were not even in the Senate. A “Brady Bill” was part of the 1992 omnibus crime package, but was not voted on separately, so an analysis of the 1992 crime bill would not yield a “pure” vote on its Brady Bill component.

Finally, simultaneous estimation is problematic for two reasons. First, the logit model is nonlinear and two-stage least squares regression is linear. Second, the variable pBRADY is a monotonically increasing function of NRA contributions, but NRA contributions may not be a monotonically increasing function of pBRADY. For all these reasons, equation (1) is estimated as a single equation.

44. Blackman and Gardiner (1986) note the NRA is especially likely to support “friends who need particular help in tight races” (p. 9).

45. Since contributions against a senator are included in the model, the OLS estimates may be appropriate. On the other hand, the NRA spent money against only three (winning) senators, and 41 senators received nothing from the NRA, indicating the Tobit analysis may be more appropriate. As shown in Table 3, the results are qualitatively identical, regardless of the estimation method, though the (absolute values of the) coefficients are greater with the Tobit estimate.

46. Grier and Munger find MARGIN to be a significant determinant of union contributions, but not a significant determinant of corporate or trade association contributions.

47. See Martin (1994).

48. See Bovard (1996) for details.

49. See Witkin (1994) and Shiflett (1995) for details of Florida's experience with concealed-carry laws. Academic researchers Lott and Mustard present evidence that if all states had concealed-carry laws, 1,500 murders, 4,000 rapes, 11,000 robberies, and 60,000 aggravated assaults would be prevented each year.

The Supreme Court's Thirty-five *Other* Gun Cases: What the Supreme Court Has Said About the Second Amendment

David B. Kopel*

Among legal scholars, it is undisputed that the Supreme Court has said almost nothing about the Second Amendment.¹ This article suggests that the Court has not been so silent as the conventional wisdom suggests. While the meaning of the Supreme Court's leading Second Amendment case, the 1939 *United States v. Miller*² decision remains hotly disputed, the dispute about whether the Second Amendment guarantees an individual right can be pretty well settled by looking at the thirty-five other Supreme Court cases which quote, cite, or discuss the Second Amendment. These cases suggest that the Justices of the Supreme Court do now and usually have regarded the Second Amendment "right of the people to keep and bear arms" as an individual right, rather than as a right of state governments.

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

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

But first, let us quickly summarize what modern legal scholarship says about the Second Amendment, and why the

Court's main Second Amendment decision—*United States v. Miller*—does not by itself settle the debate.

Dennis Henigan, lead attorney for Handgun Control, Inc., argues that the Supreme Court has said so little about the Second Amendment because the fact that the Second Amendment does not protect the right of ordinary Americans to own a gun is “perhaps the most well-settled point in American law.”³ Henigan argues that the Second Amendment was meant to restrict the Congressional powers over the militia granted to Congress in Article I of the Constitution—although Henigan does not specify what the restrictions are.⁴ One of Henigan's staff criticizes the large number of American history textbooks which “contradict[] a nearly unanimous line of judicial decisions by suggesting the meaning of the Second Amendment was judicially unsettled.”⁵

Similarly, Carl Bogus argues that the only purpose of the Second Amendment was to protect state's rights to use their militia to suppress slave insurrections—although Bogus too is vague about exactly how the Second Amendment allegedly restricted Congressional powers.⁶ This article refers to the State's Rights theory of the Second Amendment as the “Henigan/Bogus theory,” in honor of its two major scholarly proponents.⁷

In contrast to the State's Rights theory is what has become known as the Standard Model.⁸ Under the Standard Model, which is the consensus of most modern legal scholarship on the Second Amendment, the Amendment guarantees a right of individual Americans to own and carry guns.⁹ This modern Standard Model is similar to the position embraced by every known legal scholar in the nineteenth century who wrote about the Second Amendment: the Amendment guarantees an individual right, but is subject to various reasonable restrictions.¹⁰

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

Two other scholarly theories about the Second Amendment are interesting, but their theories have little to do with Supreme Court precedent. Garry Wills argues that the

Second Amendment has “no real meaning,” and was merely a clever trick that James Madison played on the Anti-Federalists.¹¹ David Williams argues that the Second Amendment once guaranteed an individual right, but no longer does so because the American people are no longer virtuous and united, and hence are no longer “the people” referred to in the Second Amendment.¹² Neither the Wills “Nihilism” theory nor the Williams “Character Decline” theory make claims which depend on the Supreme Court for support, or which could be refuted by Supreme Court decisions.

Like the scholars, the lower federal courts are split on the issue, although their split is the opposite of the scholarly one: most federal courts which have stated a firm position have said that the Second Amendment is *not* an individual right.¹³ The federal courts which follow the academic Standard Model are in the minority, although the ranks of the minority have grown in recent years.¹⁴ The courts on both sides, like the scholars, insist that they are following the Supreme Court.

One approach to untangling the conflict has been to see if the lower federal courts have actually been following *Miller*. In *Can the Simple Cite be Trusted?*, Brannon Denning makes a persuasive argument that some lower courts have cited *Miller* for propositions which cannot reasonably be said to flow from *Miller*.¹⁵ But part of the problem with deciding whether the courts or the scholars are being faithful to *Miller* is that *Miller* is such an opaque opinion.

Miller grew out of a 1938 prosecution of two bootleggers (Jack Miller and Frank Layton) for violating the National Firearms Act by possessing a sawed-off shotgun without having paid the required federal tax. The federal district court dismissed the indictment on the grounds that the National Firearms Act violated the Second Amendment.¹⁶ Freed, Miller and Layton promptly absconded, and thus only the government’s side was heard when the case was argued before the Supreme Court.¹⁷

Unfortunately, *Miller* was written by Justice James McReynolds, arguably one of the worst Supreme Court Justices of the twentieth century.¹⁸ The opinion nowhere explicitly says that the Second Amendment does (or does not

guarantee) an individual right. The key paragraph of the opinion is this:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 2 Humphreys (Tenn.) 154, 158.¹⁹

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

In contrast, the Standard Model reads the case as adopting the “civilized warfare” test of nineteenth century state Supreme Court cases: individuals have a right to own arms, but only the type of arms that are useful for militia service; for example, ownership of rifles is protected, but not ownership of Bowie knives (since Bowie knives were allegedly useful only for fights and brawls).²⁰ The case cited by the *Miller* Court, *Aymette v. State*²¹, is plainly in the Standard Model, since it interprets the Tennessee Constitution's right to arms to protect an individual right to own firearms, but only firearms suitable for militia use; in *dicta*, *Aymette* states that the Second Amendment has the same meaning.²²

While scholars can contend for different meanings, it is true that, as a matter of pure linguistics, the *Miller* decision does not foreclose either the Standard Model or the State's Rights theory.

And what is one to make of the opinion's penultimate paragraph, stating, “In the margin some of the more important

opinions and comments by writers are cited.”²³ In the attached footnote, the opinion cites two prior U.S. Supreme Court opinions and six state court opinions, all of which treat the Second Amendment or its state analogue as an individual right, even as the opinions uphold particular gun controls.²⁴ The footnote likewise cites treatises by Justice Joseph Story and Thomas Cooley explicating the Second Amendment as an individual right.²⁵ But the same *Miller* footnote also cites a Kansas Supreme Court decision which is directly contrary; that case holds that the right to arms in Kansas belongs only to the state government, and in *dicta* makes the same claim about the Second Amendment.²⁶

The *Miller* footnote begins with the phrase “Concerning the militia—” but several of the cases cited have nothing to do with the militia. For example, *Robertson v. Baldwin* (discussed *infra*) simply offers *dicta* that laws which forbid the carrying of concealed weapons by individuals do not violate the Second Amendment.²⁷

If *Miller* were the only source of information about the Second Amendment, the individual right vs. government right argument might be impossible to resolve conclusively. Fortunately, the Supreme Court has addressed the Second Amendment in thirty-four other cases—although most of these cases appear to have escaped the attention of commentators on both sides of the issue. This article ends the bipartisan scholarly neglect of the Supreme Court’s writings on the Second Amendment.²⁸

The neglected cases are not, of course, directly about the Second Amendment. Rather, they are about other issues, and the Second Amendment appears as part of an argument intended to make a point about something else.²⁹ Nevertheless, all the *dicta* may be revealing. If Henigan and Bogus are correct, then the *dicta* should treat the Second Amendment as a right which belongs to state governments, not to American citizens. And if the Standard Model is correct, then the Amendment should be treated as an individual right. Moreover, the line between *dicta* and *ratio decendi* is rarely firm,³⁰ and one day’s *dicta* may become another day’s holding.³¹

C.S. Lewis observed that proofs (or disproofs) of Christianity found in apologetic documents are sometimes less convincing than offhand remarks made in anthropology textbooks, or in other sources where Christianity is only treated incidentally. The Supreme Court cases in which the Supreme Court mentions the Second Amendment only in passing are similarly illuminating.³²

Before commencing with case-by-case analysis, let me present a chart which summarizes the various cases. The columns in chart are self-explanatory, but I will explain two of them anyway. A “yes” answer in the “Supportive of individual right in 2d Amendment?” column means only that the particular case provides support for the individual rights theory; although the part of the case addressing the Second Amendment might make sense only if the Second Amendment is considered an individual right, the case will not directly state that proposition. If the case is labeled “ambiguous,” then the language of the case is consistent with both the Standard Model and with State’s Rights.

The next column asks, “Main clause of 2d A. quoted without introductory clause?” The National Rifle Association and similar groups are frequently criticized for quoting the main clause of the Second Amendment (“the right of the people to keep and bear Arms, shall not be infringed”) without quoting the introductory clause (“A well-regulated Militia, being necessary to the security of a free State”).³³ The critics argue that the introductory, militia, clause controls the meaning of the main, right to arms, clause. They contend that to omit the introductory clause is to distort completely the Second Amendment’s meaning. (And if, as these critics argue, the Second Amendment grants a right to state governments rather than to individuals, then omission of the introductory clause is indeed quite misleading.) On the other hand, if the Second Amendment is about a right of people (the main clause), and the introductory clause is useful only to resolve gray areas (such as what kind of arms people can own), then it is legitimate sometimes to quote the main clause only. As the chart shows, the Supreme Court has quoted the main clause

alone much more often than the Supreme Court has quoted both clauses together.

This Supreme Court quoting pattern is consistent with the theory of Eugene Volokh's article, *The Commonplace Second Amendment*, which argues that the Second Amendment follows a common pattern of constitutional drafting from the Early Republic: there is a "purpose clause," followed by a main clause.³⁴ For example, Rhode Island's freedom of the press provision declared: "The liberty of the press being essential to the security of freedom in a state, any person may publish sentiments on any subject, being responsible for the abuse of that liberty."³⁵ This provision requires judges to protect every person's right to "publish sentiments on any subject"—even when the sentiments are not "essential to the security of freedom in a state," or when they are detrimental to freedom or security.

Similarly, the New Hampshire Constitution declared: "Economy being a most essential virtue in all states, especially in a young one; no pension shall be granted, but in consideration of actual services, and such pensions ought to be granted with great caution, by the legislature, and never for more than one year at a time."³⁶ This provision makes all pensions of longer than one year at a time void—even if the state is no longer "a young one" and no longer in need of economy. Volokh supplies dozens of similar examples from state constitutions.³⁷

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

Case name and year	Main issue in case	Opinion by	Type of opinion	Supportive of individual right in 2d Amendment?	Main clause of 2d A. quoted without introductory clause?
Spencer v. Kemna. 1998	Article III case or controversy	Stevens	Dissent from denial of cert.	Yes, but could possibly be read as referring to rights under state constitutions	No quote.
Muscarello v. U.S. 1998	Fed stat. interp.	Ginsburg	Dissent	Yes	Partial quote
Printz v. U.S. 1997	Federalism	Thomas	Concur	Says that <i>Miller</i> did not decide the issue. Thomas appears to support individual right.	Full quote.
Albright v. Oliver. 1994	14 th A. and § 1983	Stevens	Dissent	Yes.	Partial quote.
Planned Parenthood v. Casey. 1992.	14 th A.	O'Connor	Majority	Yes.	Partial quote.
U.S. v. Verdugo-Urquidez. 1990.	4 th A. applied to foreign national.	Rehnquist	Majority	Yes.	Partial quote.
Lewis v. U.S. 1980.	Statutory interp. of Gun Control Act of 1968	Blackmun	Majority	Ambiguous, but probably not. If an individual right, less fundamental than some others.	Full quote.

Moore v. East Cleveland. 1976.	14 th A.	Powell	Plurality	Yes. (But contrary opinion expressed by Justice Powell after retirement.)	Partial quote.
“ “	“ “	White	Dissent.	Yes.	Partial quote.
Roe v. Wade. 1973	14 th A.	Stewart	Concur	Yes.	Partial quote.
Adams v. Williams. 1972	4 th A.	Douglas	Dissent	No.	Full quote.
Laird v. Tatum. 1972.	Justiciability	Douglas	Dissent	Ambiguous.	Partial quote.
Burton v. Sills. 1969.	Challenge to state gun licensing law	Per curiam	Summary affirm.	Ambiguous.	No quote.
Duncan v. Louisiana. 1968.	Incorporation of 6 th Amendment	Black	Concur	Yes.	Partial quote.
Malloy v. Hogan. 1964.	Incorporation of 5 th Amend.	Brennan	Majority	Yes.	No quote.
Konigsberg v. State Bar. 1961.	1 st Amendment	Harlan	Majority	Yes.	Partial quote.
Poe v. Ullman. 1961.	14 th Amendment	Harlan	Dissent	Yes	Partial quote.
“ “	“ “	Douglas	Dissent	Yes, but implicitly abandoned in <i>Adams</i> .	No quote.
Knapp v. Schweitzer. 1958.	Incorp. of 5 th Amendment	Frankfurter	Majority	Yes	Partial quote.
Johnson v. Eisentrager. 1950.	5 th A. applied to trial of enemy soldier.	Jackson	Majority	Yes	Partial quote.
Adamson v. Calif. 1947.	Incorp. of 5 th Amendment	Black	Dissent	Yes	Partial quote.

Hamilton v. Regents. 1935.	Conscientious objector.	Butler	Majority	No, but not necessarily inconsistent with an individual right.	No quote.
U.S. v. Schwimmer. 1929.	Immigration laws	Butler	Majority	Ambiguous	Full quote.
Stearns v. Wood. 1915.	Article III case or controversy	McReynolds	Majority	Ambiguous, since court refuses to hear any of plaintiff's claims	No quote.
Twining v. N.J. 1908.	Incorp. of 5 th A self-incrim.	Moody	Majority	Yes.	Partial quote
Trono v. U.S. 1905	5 th A. in the Philippines.	Peckham	Majority	Yes.	Partial quote.
Kepner v. U.S. 1904.	“ “	Day	Majority	Yes. Same as <i>Trono</i> .	Partial quote.
Maxwell v. Dow. 1899.	Incorp. of 5 th A. jury trial	Peckham	Majority	Yes.	Partial quote.
Robertson v. Baldwin. 1897.	13 th Amend.	Brown	Majority	Yes.	Partial quote.
Brown v. Walker. 1896.	5 th Amend.	Field.	Dissent	Yes.	Partial quote.
Miller v. Texas. 1894.	14 th Amendment	Brown	Majority	Yes.	Partial quote.
Logan v. U.S. 1892.	Cong. Power from 14 th A.	Gray	Majority	Yes.	Partial quote.
Presser v. Illinois. 1886.	2d A.	Woods	Majority	Yes.	Full quote.
Scott v. Sandford. 1857.	Citizenship; Cong. powers over territories.	Taney	Majority	Yes.	Partial quote.
Houston v. Moore. 1820.	State powers over militia.	Story	Dissent	Yes, but also supportive of a state's right. (A later treatise written by Story is for individual right only.)	No quote.

I. The Rehnquist Court

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

A. *Spencer v. Kemna*

After serving some time in state prison, Spencer was released on parole.³⁸ While free, he was accused but not convicted of rape, and his parole was revoked.³⁹ He argued that his parole revocation was unconstitutional.⁴⁰ But before his constitutional claim could be judicially resolved, his sentence ended, and he was released.⁴¹ The majority of the Supreme Court held that since Spencer was out of prison, his claim was moot, and he had no right to pursue his constitutional lawsuit.

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

An official determination that a person has committed a crime may cause two different kinds of injury. It may result in tangible harms such as imprisonment, *loss of the right to vote or to bear arms*, and the risk of greater punishment if another crime is committed. It may also severely injure the person's reputation and good name.⁴²

A person can only lose a right upon conviction of a crime if a person had the right before conviction. Hence, if an individual can lose his right “to bear arms,” he must possess such a right. Justice Stevens did not specifically mention the Second Amendment, so it is possible that his reference to the right to bear arms was to a right created by state constitutions, rather than the federal one. (Forty-four states guarantee a right to arms in their state constitution.⁴³) When particular gun control laws are before the Supreme Court for either statutory or constitutional interpretation, Justice Stevens is a reliable vote to uphold the law in question, often with language detailing the harm of gun violence.⁴⁴ It is notable, then, that Justice Stevens recognizes a right to bear arms as an important constitutional right, whose deprivation should not be shielded from judicial review.⁴⁵

B. Muscarello v. United States

Federal law provides a five year mandatory sentence for anyone who “carries a firearm” during a drug trafficking crime.⁴⁶ Does the sentence enhancement apply when the gun is merely contained in an automobile in which a person commits a drug trafficking crime—such as when the gun is in the trunk? The Supreme Court majority said “yes.”⁴⁷ In dissent, Justice Ginsburg—joined by Justices Rehnquist, Scalia⁴⁸, and Souter—argued that “carries a firearm” means to carry it so that it is ready to use.⁴⁹ In support for her view, Justice Ginsburg pointed to the Second Amendment “keep and bear arms” as an example of the ordinary meaning of carrying a firearm:

It is uncontested that §924(c)(1) applies when the defendant bears a firearm, i.e. , carries the weapon on or about his person “for the purpose of being armed and ready for offensive or defensive action in case of a conflict.” Black’s Law Dictionary 214 (6th ed. 1990) (defining the phrase “carry arms or weapons”); see ante, at 5. The Court holds that, in addition, “carries a firearm,” in the context of §924(c)(1), means personally transporting,

possessing, or keeping a firearm in a vehicle, anyplace in a vehicle.

Without doubt, “carries” is a word of many meanings, definable to mean or include carting about in a vehicle. But that encompassing definition is not a ubiquitously necessary one. Nor, in my judgment, is it a proper construction of “carries” as the term appears in §924(c)(1). In line with Bailey and the principle of lenity the Court has long followed, I would confine “carries a firearm,” for §924(c)(1) purposes, to the undoubted meaning of that expression in the relevant context. I would read the words to indicate not merely keeping arms on one’s premises or in one’s vehicle, but bearing them in such manner as to be ready for use as a weapon.

...
Unlike the Court, I do not think dictionaries, surveys of press reports, or the Bible tell us, dispositively, what “carries” means embedded in §924(c)(1). On definitions, “carry” in legal formulations could mean, *inter alia*, transport, possess, have in stock, prolong (carry over), be infectious, or wear or bear on one’s person. At issue here is not “carries” at large but “carries a firearm.” The Court’s computer search of newspapers is revealing in this light. Carrying guns in a car showed up as the meaning “perhaps more than one third” of the time. (Ante, at 4). One is left to wonder what meaning showed up some two thirds of the time. Surely a most familiar meaning is, as the Constitution’s Second Amendment (“keep and bear Arms”) and Black’s Law Dictionary, at 214, indicate: “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”⁵⁰

Perhaps no word in the Second Amendment is as hotly contested as the word “bear.” The Standard Model scholars, following the usage of Webster’s Dictionary,⁵¹ the 1776 Pennsylvania Constitution,⁵² and the 1787 call for a Bill of Rights from the dissenters at the Pennsylvania Ratification Convention read the word “bear” as including ordinary types of carrying.⁵³ Thus, a person carrying a gun for personal protection could be said to be bearing arms. If individuals can “bear arms,” then the right to “bear arms” must belong to individuals.

In contrast, Garry Wills (who argues that the Second Amendment has “no real meaning”⁵⁴) argues that “bear” has an exclusively military context.⁵⁵ It is impossible, he writes, to “bear arms” unless once is engaged in active militia service. Hence, the right to “bear arms” does not refer to a right of individuals to carry guns.⁵⁶

Justice Ginsburg’s opinion plainly takes the former approach. She believes that “to bear arms” is to wear arms in an ordinary way.⁵⁷

C. *Printz v. United States*

In *Printz v. United States*, the Supreme Court voted 5 to 4 to declare part of the Brady Act unconstitutional, because the Act ordered state and local law enforcement officials to perform a federal background check on handgun buyers.⁵⁸ While the *Printz* decision was not a Second Amendment case, *Printz* did result in some Second Amendment language from Justice Clarence Thomas’s concurring opinion.

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

The Thomas concurrence began by saying that, even if the Brady Act did not intrude on state sovereignty, it would still be unconstitutional.⁵⁹ The law was enacted under the congressional power “to regulate commerce...among the several states.”⁶⁰ But the Brady Act applies to commerce that

is purely *intrastate*—the sale of handgun by a gun store to a customer in the same state.⁶¹ Justice Thomas suggested that although the interstate commerce clause has, in recent decades, been interpreted to extend to purely intrastate transactions, that interpretation is wrong.⁶²

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

... Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. The First Amendment, for example, is fittingly celebrated for preventing Congress from "prohibiting the free exercise" of religion or "abridging the freedom of speech." The Second Amendment similarly appears to contain an express limitation on the government's authority. That Amendment provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment.^[n.1] If, however, the Second Amendment is read to confer⁶³ a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections.^[n.2] As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine

whether Justice Story was correct when he wrote that the right to bear arms “has justly been considered, as the palladium of the liberties of a republic.” 3 J. Story, Commentaries §1890, p. 746 (1833). In the meantime, I join the Court’s opinion striking down the challenged provisions of the Brady Act as inconsistent with the Tenth Amendment.⁶⁴

There are several notable elements in the Thomas concurrence. First, Justice Thomas equates the Second Amendment with the First Amendment. This is consistent with the rule from the *Valley Forge* case that all parts of the Bill of Rights are on equal footing; none is preferred (or derogated).⁶⁵ He implicitly rejected second-class citizenship for the Second Amendment.

Justice Thomas then suggests that the Brady Act could be invalid under the Second Amendment.⁶⁶ Regarding right to bear arms provisions in state constitutions, some state courts have upheld various gun restrictions as long as all guns are not banned.⁶⁷ Justice Thomas plainly does not take such a weak position in defense of the Second Amendment.⁶⁸ His implication is that by requiring government permission and a week-long prior restraint on the right to buy a handgun, the Brady Act infringed the Second Amendment.

And of course by recognizing that handguns are a Second Amendment issue, Justice Thomas implicitly rejects the argument that the Second Amendment merely protects “sporting weapons” (usually defined as a subset of rifles and shotguns).⁶⁹

Noting that the Second Amendment was not at issue in the case before the Court (the case was brought by sheriffs who did not want to be subject to federal commands, rather by gun buyers or gun dealers), Justice Thomas gently urges the rest of the Court to take up a Second Amendment case in the future. And he leaves no doubt about his personal view of the issue, as he quotes the 19th century legal scholar and Supreme Court Justice Joseph Story, who saw the right to bear arms “as the palladium of the liberties of a republic.”⁷⁰

There are two footnotes in the Second Amendment portion of the Thomas concurrence. In the first footnote, the Justice states that the Supreme Court has not construed the Second Amendment since the 1939 case *United States v. Miller* (which upheld the National Firearms Act's tax and registration requirement for short shotguns⁷¹). He added that the Supreme Court has never directly ruled on the individual rights issue.

1 Our most recent treatment of the Second Amendment occurred in *United States v. Miller*, 307 U.S. 174 (1939), in which we reversed the District Court's invalidation of the National Firearms Act, enacted in 1934. In *Miller*, we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense." *Id.*, at 178. The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.

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

2 Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the "right to keep and bear arms" is, as the Amendment's text suggests, a personal right. See, e.g., J. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo American Right* 162 (1994); S. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984); Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *Duke L. J.* 1236 (1994); Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L. J.* 1193 (1992); Cottrol & Diamond, *The Second Amendment: Toward an Afro Americanist Reconsideration*, 80 *Geo. L. J.* 309 (1991);

Levinson, *The Embarrassing Second Amendment*, 99 *Yale L. J.* 637 (1989); Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *Mich. L. Rev.* 204 (1983). Other scholars, however, argue that the Second Amendment does not secure a personal right to keep or to bear arms. See, e.g., Bogus, *Race, Riots, and Guns*, 66 *S. Cal. L. Rev.* 1365 (1993); Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *Yale L. J.* 551 (1991); Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 *Yale L. J.* 661 (1989); Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 *J. Am. Hist.* 22 (1984). Although somewhat overlooked in our jurisprudence, the Amendment has certainly engendered considerable academic, as well as public, debate.

In the second footnote, Justice Thomas points out that the text of the Second Amendment (which refers to “the right of the people”) suggests that the Second Amendment right belongs to individuals, not the government.

As Justice Thomas notes, a large body of legal scholarship in the last fifteen years has examined the historical evidence, and found very strong proof that the Second Amendment guarantees an individual right.⁷²

The Supreme Court does not always follow the viewpoint of the legal academy. But for most of this century, the Court has always been influenced by the academy's opinion. In the 1940s, for example, legal scholars paid almost no attention to the Second Amendment, and neither did the Supreme Court; in that decade, the Second Amendment was mentioned only once, and that mention was in a lone dissent.⁷³ But starting in the late 1970s, a Second Amendment revolution began to take place in legal scholarship. That an intellectual revolution was in progress became undeniable after the *Yale Law Journal*

published Sanford Levinson's widely influential article *The Embarrassing Second Amendment* in 1989.⁷⁴ Since then, scholarly attention to the Second Amendment has grown even more rapidly. And more importantly, for purposes of this article, the Supreme Court Justices have raised the Second Amendment in six different cases in 1990-98. Six mentions in nine years hardly puts the Second Amendment on the same plane as the First Amendment; but six times in one decade is a rate six times higher than in the 1940s.

D. *Albright v. Oliver*

Albright involved a Section 1983 civil rights lawsuit growing out of a malicious decision to prosecute someone for conduct which was not crime under the relevant state law.⁷⁵ The issue before the Supreme Court was whether the prosecutor's action violated the defendant's Fourteenth Amendment Due Process rights. The majority said "no," in part because the claim (growing out of the victim's unlawful arrest) would be better presented as a Fourth Amendment claim.⁷⁶

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

At bottom, the plurality opinion seems to rest on one fundamental misunderstanding: that the incorporation cases have somehow "substituted" the specific provisions of the Bill of Rights for the "more generalized language contained in the earlier cases construing the Fourteenth Amendment." Ante, at 7. In fact, the incorporation cases themselves rely on the very "generalized language" the Chief Justice would have them displacing. Those cases add to the liberty protected by the Due Process Clause most of the specific guarantees of the first eight Amendments, but they do not purport to take anything away; that a liberty

interest is not the subject of an incorporated provision of the Bill of Rights does not remove it from the ambit of the Due Process Clause. I cannot improve on Justice Harlan's statement of this settled proposition:

“The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.” *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion).⁷⁷

I have no doubt that an official accusation of an infamous crime constitutes a deprivation of liberty worthy of constitutional protection. The Framers of the Bill of Rights so concluded, and there is no reason to believe that the sponsors of the Fourteenth Amendment held a different view. The Due Process Clause of that Amendment should therefore be construed to require a responsible determination of probable cause before such a deprivation is effected.⁷⁸

In *Poe v. Ullman*, the second Justice Harlan construed the “liberty” protected by the Fourteenth Amendment.⁷⁹ Although Justice Harlan's words originally were written in dissent, they have been quoted in later cases as the opinion of the Court.⁸⁰ Fourteenth Amendment “liberty” of course belongs to

individuals, not to state governments. The point of the Fourteenth Amendment was to protect individual liberty from state infringement.

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

While the Harlan quote makes no direct claim about whether the individual Bill of Rights items should be incorporated in the Fourteenth Amendment, Justice Harlan was plainly saying that simply because an individual right is protected in the Bill of Rights does not mean that it is protected by the Fourteenth Amendment. (Justice Black’s view was directly opposite.⁸¹) Therefore, although the Harlan quote is not dispositive, the quote could appropriately be used to argue against incorporating the Second Amendment into the Fourteenth.

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

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

E. Planned Parenthood v. Casey

Planned Parenthood was a challenge to a Pennsylvania law imposing various restrictions on abortion.⁸² In discussing the scope of the Fourteenth Amendment, Justice Sandra Day O’Connor’s opinion for the Court approvingly quoted Justice

Harlan's earlier statement that "the right to keep and bear arms" is part of the "full scope of liberty" contained in the Bill of Rights, and made applicable to the state by the Fourteenth Amendment.⁸³ Although the *Planned Parenthood* decision was fractured, with various Justices joining only selected portions of each others' opinions, the portion where Justice O'Connor quoted Justice Harlan about the Fourteenth and Second Amendments was joined by four other Justices, and represented the official opinion of the Court.

Planned Parenthood is the second of the four Supreme Court opinions that quote the Harlan dissent in *Poe*. (The other two will be discussed *infra*.) Had the authors of those opinions chosen to delete the "right to keep and bear arms" words, by using ellipses, they certainly could have done so. As we shall see when we come to the original Harlan opinion in *Poe v. Ullman*, the full Harlan analysis of the scope of Fourteenth Amendment liberty includes important material which later Justices carefully avoided quoting.⁸⁴

F. *United States v. Verdugo-Urquidez*

*United States v. Verdugo-Urquidez*⁸⁵ involved American drug agents' warrantless search of a Mexican's homes in Mexicali and San Felipe, Mexico. When Verdugo-Urquidez was prosecuted in a United States court for distribution of marijuana, his attorney argued that the evidence seized from his homes could not be used against him.⁸⁶ If the homes in question had been located in the United States and owned by an American, the exclusionary rule clearly would have forbade the introduction of the evidence. But did the U.S. Fourth Amendment protect Mexican citizens in Mexico?

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

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

States.” The Second Amendment protects “the right of the people to keep and bear Arms,” and the Ninth and Tenth Amendment provide that certain rights and power are retained by and reserved to “the people.” See also U.S. Const., Amdt. 1 (“Congress shall make no law. . .abridging. . .*the right of the people* peaceably to assemble”)(emphasis added); Art I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year *by the People of the Several States*”)(emphasis added). While this textual exegesis is by no means conclusive, it suggests that “the People” protected by the Fourth Amendment, and by the First and Second Amendment, and to whom rights are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.⁸⁷

By implication therefore, if “the people” whose right to arms is protected by the Second Amendment are American people, then “the right of the people” in the Second Amendment does not mean “the right of the states.”⁸⁸ To adopt the Henigan/Bogus theory, and find that the Second Amendment “right of the people” belongs to state governments would require a rejection of *Verdugo’s* explication of who are “the people” of the Second Amendment and the rest of the Constitution.

The dissent by Justice Brennan would have given “the people” a broader reading: “‘The People’ are ‘the governed.’”⁸⁹ The dissent’s reading is likewise consistent only with the Standard Model, and not with the State’s Rights view. If “the people” of the Second Amendment are “the governed,” then the “right of the people” must belong to people who are governed, and not to governments.⁹⁰

Interestingly, the majority opinion’s analysis of “the people” protected by the Bill of Rights was an elaboration of a

point made by the dissenting opinion from the Ninth Circuit Court of Appeals, when the majority had held that Mr. Verdugo was entitled to Fourth Amendment protections.⁹¹ When the *Verdugo* case went to the Supreme Court, the Solicitor General's office quoted from Ninth Circuit's dissent, but used ellipses to remove the dissent's reference to the Second Amendment.⁹² The Supreme Court majority, of course, put the Second Amendment back in.

II. The Burger Court

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

A. *Lewis v. United States*

The one Supreme Court majority opinion which is fully consistent with the Henigan/Bogus state's rights theory is *Lewis v. United States*.⁹³ Interestingly, the same advocates who dismiss *Verdugo* because it was not a Second Amendment case rely heavily on *Lewis* even though it too is not a Second Amendment case. The issue in *Lewis* was primarily statutory interpretation, and secondarily the Sixth Amendment. A federal statute imposes severe penalties on persons who possess a firearm after conviction for a felony.⁹⁴ In 1961, Lewis had been convicted of burglary in Florida⁹⁵; since Lewis was not provided with counsel, his conviction was invalid under the rule of *Gideon v. Wainwright*.⁹⁶ The question for the Court was whether Congress, in enacting the 1968 law barring gun possession by a person who "has been convicted by a court of the United States or of a State. . . of a felony," meant

to include persons whose convictions had been rendered invalid by the 1963 *Gideon* case. Writing for a six-justice majority, Justice Blackmun held that the statutory language did apply to person with convictions invalid under *Gideon*.⁹⁷

Given the non-existent legislative history on the point, Justice Blackmun was forced to be rather aggressive in his reading of Congressional intent. For example, Senator Russell Long, the chief sponsor of the Gun Control Act of 1968, had explained that “every citizen could possess a gun until the commission of his first felony. Upon his conviction, however, Title VII would deny. . .the right to possess a firearm. . . .”⁹⁸ This supposedly showed Congressional intent to disarm people like Lewis, since the Senator had “stressed conviction, not a ‘valid’ conviction.”⁹⁹ By this reasoning, the Gun Control Act of 1968 would likewise apply to Scottsboro Boys; they had been tortured into confessing a crime which they did not commit, but they did indeed have a “conviction” for murder, even if not “a valid conviction.”¹⁰⁰ Justice Brennan’s dissent pointed out that the majority’s reasoning would impose the Gun Control Act even on people whose convictions had been overturned by an appellate court.¹⁰¹

Did the Gun Control Act (as interpreted by the Court) violate equal protection?

Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit possession of a firearm. See, e.g., *United States v. Ransom*, 515 F.2d 885, 891-892 (CA5 1975), cert. Denied, 424 U.S. 944 (1976). This Court has repeatedly recognized that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm. See *Richardson v. Ramirez*, 418 U.S. 24 (1974)(disenfranchisement); *De Veau v. Braisted*, 363 U.S. 144, 363 U.S. 144 (1960)(proscription against holding office in a waterfront labor organization); *Hawker v. New York*, 170 U.S. 189 (1898)(prohibition against the practice of medicine).¹⁰²

From this, it is reasonable to infer that possession of a firearm is a “right,” but a right which is far less “fundamental” than voting, serving as an officer in a union, or practicing

medicine. As to whether possessing a firearm is a constitutional right, the opinion does not say. But the opinion could certainly be cited for support that arms possession is not “fundamental” enough to be protected by the Fourteenth Amendment’s due process clause.

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

These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller*, 307 U.S. 174, 178 (the Second Amendment guarantees no right to keep and bear a firearm that does not have “some reasonable relationship to the preservation or efficiency of a well-regulated militia”); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F. 2d 1288, 1290, n. 5 (CA7 1974); *United States v. Johnson*, 497 F.2d 548 (CA4 1974); *Cody v. United States*, 460 F.2d 34 (CA8), cert. denied, 409 U.S. 1010 (1972)(the latter three cases holding, respectively, that 1202(a)(1), 922(g), and 922(a)(6) do not violate the Second Amendment).¹⁰³

Attorney Stephen Halbrook (the successful plaintiffs’ attorney in the Supreme Court gun cases of *Printz v. United States*¹⁰⁴, and *United States v. Thompson/Center*¹⁰⁵) reads *Lewis* as reflecting the principle that since a legislature may deprive a felon “of other civil liberties, and may even deprive a felon of life itself—felons have no fundamental right to keep and bear arms.”¹⁰⁶

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

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

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

Apparently at the district court level the defendant argued that 18 U.S.C. App. § 1202 was invalid as an “infringement of the second amendment’s protection of the right to bear arms, the first amendment’s prohibition of bills of attainder and ex post facto laws, and the fourteenth amendment’s due process clause.” These arguments were appropriately rejected. [citations omitted]¹⁰⁷

The *Cody*¹⁰⁸ case upheld the conviction of a felon who falsified a federal gun registration form and falsely claimed that he had no felony conviction. Regarding Cody’s Second Amendment claim, the Eighth Circuit stated:

It has been settled that the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms. The Second Amendment’s guarantee extends only to use or possession which “has some reasonable relationship to the preservation or efficiency of a well regulated militia.” *Id* [Miller]. At 178, 59 S. Ct. at 818. See *United States v. Synnes*, 438 F.2d 764, 772 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009, 92 S. Ct. 687, 30 L. Ed. 2d 657 (1972); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), cert. denied sub nom., *Velazquez v. United States*, 319 U.S. 770, 63 S. Ct. 1431, 87 L. Ed. 1718 (1943).¹⁰⁹ We find no evidence that the prohibition of § 922(a) (6) obstructs the maintenance of a well regulated militia.¹¹⁰

In *Johnson*, the Fourth Circuit upheld the Gun Control Act as applied to a convicted felon who transported a firearm in

interstate commerce.¹¹¹ Regarding Johnson's Second Amendment claim, the Circuit wrote that "The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'"¹¹²

Now a "collective right" can be read two ways: it can be like "collective property" in a Communist property; since it belongs to all the people collectively, it belongs only to the government. Alternatively, a "collective right" to arms can be a right of all the people to have a militia, and for this purpose, each person has a right to possess arms for militia purposes (but not to possess arms for other purposes, such as self-defense).¹¹³ Indeed, this is the approach taken by *Aymette*, the Tennessee Supreme Court case which is the sole citation for the rule of decision in *Miller*; *Aymette* states that the Second Amendment protects individual possession of militia-type arms, so that those individuals may collectively exercise their rights in a militia.¹¹⁴

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

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

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

B. Moore v. East Cleveland

Not only do the Rehnquist cases impede any effort to read *Lewis* as the definitive state's right case, so does a case decided four years before *Lewis*. The *Moore v. East Cleveland* litigation arose out of a zoning regulation which made it illegal for extended families to live together.¹¹⁵ The plurality opinion by Justice Powell found in the Fourteenth Amendment a general protection for families to make their own living arrangements.¹¹⁶ Thus, the East Cleveland law, which, for example, forbade two minor cousins to live with their grandmother,¹¹⁷ was unconstitutional.

In discussing the boundaries of the Fourteenth Amendment, the Powell plurality opinion for the Court quoted from Justice Harlan's dissent in *Poe v. Ullman*. This was the same language that was later quoted by Justice O'Connor's majority opinion in *Planned Parenthood v. Casey*,¹¹⁸ and by Justice Stevens' dissent in *Albright v. Oliver*¹¹⁹:

But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.

Understanding those reasons requires careful attention to this Court's function under the Due Process clause. Mr. Justice Harlan described it eloquently:

Due process cannot be reduced to any formula; its content cannot be determined by reference to any code. . . The balance of which I speak is the balance struck by this country, having regard to what

history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . .

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints” *Poe v. Ullman, supra*, at 542-543 (dissenting opinion).¹²⁰

In dissent, Justice White also quoted from Justice Harlan’s words in *Poe*. While Justice White included the language about the Second Amendment, he did not include the preceding paragraph about tradition.¹²¹

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

The “tradition” paragraph from Justice Harlan, quoted by Justice Powell, strengthens an argument for incorporating the Second Amendment. The right to arms had roots as one of the “rights of Englishmen” recognized by the English 1689 Bill of Rights,¹²² and was adopted in nine of the first fifteen states’ constitutions.¹²³ When the Constitution was proposed, five state ratifying conventions called for a right to arms—more than for any other single right that became part of the Bill of Rights.¹²⁴ With the exception of a single concurring opinion by an Arkansas judge in 1842,¹²⁵ every known judicial opinion and scholarly commentary from the nineteenth century treated the Second Amendment as an individual right.¹²⁶

Justice Harlan’s “tradition is a living thing” analysis also looks at whether the right in question is supported by modern

“tradition.” The right to arms fares well under this analysis too. Between a third and a half of all American households choose to own firearms,¹²⁷ and many others own other types of “arms” (such as edged weapons) which might fall within the scope of protected “arms.”¹²⁸ Today, forty-four state constitutions guarantee a right to arms¹²⁹; in 15 states in the last three decades, voters have added or strengthened an arms right to their state constitution, always by a very large majority.¹³⁰ Twenty years ago, only a few states allowed ordinary citizens to obtain a permit carry a concealed handgun for protection; now twenty-nine states have “shall issue” laws, and two states require no permit at all.¹³¹

Contrast all the “traditional” support for the right to arms with the absence of such support for the Fifth Amendment’s guarantee against the taking of property without due process and just compensation. No state ratifying convention had demanded such a clause, and no such right was recognized in the English Bill of Rights.¹³² If the just compensation is “traditional” enough to have been incorporated, as it has been,¹³³ the argument for incorporating the Second Amendment is all the stronger.

But while the Harlan language quoted in *East Cleveland* has favorable implications for Second Amendment incorporation, *East Cleveland* does not itself perform the incorporation.¹³⁴

And while *East Cleveland*’s implication for the Second Amendment as an individual right seems clear enough under its own terms, Justice Powell’s personal views appear to have changed after 1976. After retiring from the Court, in 1988 he gave a speech to the American Bar Association in which he said that the Constitution should not be construed to guarantee a right to own handguns¹³⁵; this speech was not necessarily inconsistent with *East Cleveland*, since a Second Amendment right to arms might exclude some types of arms. But in 1993, Justice Powell went even further, suggesting in a television interview that the Constitution should not be read to as guaranteeing a right to own even sporting guns.¹³⁶

Whatever the evolution of Justice Powell's thoughts about gun rights, the only words he ever put in the United States Reports treat the Second Amendment as an individual right.

C. Adams v. Williams

The only written opinion from a Supreme Court Justice which plainly rejects an individual right came from Justice Douglas, dissenting in the 1972 case of *Adams v. Williams*.¹³⁷ Acting on a tip, a police officer stopped a motorist for questioning, and then grabbed a revolver hidden in the driver's waistband.¹³⁸ The Supreme Court majority upheld the officer's actions as a reasonable effort to protect his safety.¹³⁹

Justice Douglas, a strong defender of the Fourth Amendment right to be free from unreasonable searches, dissented.¹⁴⁰ After discussing Fourth Amendment issues, Justice Douglas then editorialized in favor of handgun control and prohibition, and asserted that the Second Amendment posed no barrier to severe gun laws:

The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police. The leading case is *United States v. Miller*, 307 U.S. 174, upholding a federal law making criminal

the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence that a sawed-off shotgun had “some reasonable relationship to the preservation or efficiency of a well regulated militia.” *Id.*, at 178. The Second Amendment, it was held, “must be interpreted and applied” with the view of maintaining a “militia.”

“The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia - civilians primarily, soldiers on occasion.” *Id.*, at 178-179.

Critics say that proposals like this water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia. But if watering-down is the mood of the day, I would prefer to water down the Second rather than the Fourth Amendment. I share with Judge Friendly a concern that the easy extension of *Terry v. Ohio*, 392 U.S. 1, to “possessory offenses” is a serious intrusion on Fourth Amendment safeguards. “If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows ‘that criminal activity may be afoot.’” 436 F.2d, at 39, quoting *Terry v. Ohio*, *supra*, at 30.¹⁴¹

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

Amendment can be forestalled by watering down the Second Amendment.

Justice Brennan did not join the Douglas dissent, but instead wrote his own. Justice Brennan presciently noted that the Court's loose standard for "stop and frisk" would become a tool for police officers to search people at will, with officer safety often serving as a mere pretext.¹⁴² (*Adams v. Williams* is one of the key cases opening the door to the broad variety of warrantless searches which are now allowed.) Justice Brennan also noted the illogic of allowing stop-and-frisk for guns in a state which allows citizens to carry concealed handguns.¹⁴³ (Connecticut was one of the first states to adopt "shall issue" laws for concealed handgun permits; now, thirty-one states have such laws.¹⁴⁴)

Justice Marshall's dissent made a similar point, noting that after the officer discovered the gun, he immediately arrested Williams, without asking if Williams had a permit.¹⁴⁵

D. *Roe v. Wade*

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

The majority opinion in *Roe v. Wade*,¹⁴⁶ written by Justice Harry Blackmun, has been justly criticized for having no connection with the text of the Constitution, and only a tenuous connection with the prior precedents of the Supreme Court.¹⁴⁷ Justice Potter Stewart, perhaps recognizing the weakness of the Blackmun opinion, authored a concurring opinion coming to the same result as Justice Blackmun, but attempting to ground the result more firmly in precedent.¹⁴⁸ As part of the analysis arguing that the right to abortion was part of the "liberty" protected by the Fourteenth Amendment, Justice Stewart quoted Justice Harlan's dissenting opinion in *Poe v. Ullman*¹⁴⁹, which had listed the right to keep and bear arms as among the liberties guaranteed by the Fourteenth Amendment:

As Mr. Justice Harlan once wrote: "[T]he full

scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.” *Poe v. Ullman*, 367 U.S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, “Great concepts like . . . ‘liberty’ . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.” *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (dissenting opinion).¹⁵⁰

Thus, the Harlan dissenting language about the Second Amendment, from *Poe v. Ullman*, has been quoted in one majority opinion (*Planned Parenthood v. Casey*¹⁵¹), one plurality opinion (*Moore v. East Cleveland*¹⁵²), two dissents (*Albright v. Oliver* and *Moore v. East*¹⁵³), and one concurrence (*Roe v. Wade*¹⁵⁴). In contrast, the Douglas dissenting language about the Second Amendment, from *Adams v. Williams*,¹⁵⁵ has never been quoted in an opinion by any Justice.

E. Laird v. Tatum

During the Cold War and the Vietnam War, the United States Army illegally spied on American anti-war critics.¹⁵⁶ When the Army's conduct was discovered, a group of individuals who had been spied upon brought suit in federal court.¹⁵⁷ In a sharply divided five-four decision, the Supreme Court majority held that the suit was not justiciable.¹⁵⁸ The plaintiffs could not show that they had been harmed by the Army, or that there was a realistic prospect of future harm, and hence there was no genuine controversy for a federal court to hear.¹⁵⁹ Justice Douglas (joined by Justice Marshall) penned a fiery dissent, invoking the long struggle to free civil life from military domination.¹⁶⁰

Justice Douglas began by examining the power which the Constitution grants Congress over the standing army and over the militia.¹⁶¹ Since Congress is not granted any power to use the army or militia for domestic surveillance, it necessarily follows that the army has no power on its own to begin a program of domestic surveillance.¹⁶²

Moving onto a broader discussion of the dangers of military dictatorship, Justice Douglas quoted an article which Chief Justice Earl Warren had written in the *New York University Law Review*, which mentioned the Second Amendment as one of the safeguards intended to protect America from rule by a standing army.¹⁶³

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

“They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any house in time of peace without the consent of the owner. Other Amendments guarantee the right of the

people to assemble, to be secure in their homes against unreasonable searches and seizures, and in criminal cases to be accorded a speedy and public trial by an impartial jury after indictment in the district and state wherein the crime was committed. The only exceptions made to these civilian trial procedures are for cases arising in the land and naval forces. Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe that our Founders' determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights."¹⁶⁴

The Earl Warren law review language is, on its face, consistent with individual rights. He listed the right to arms among other individual rights, and he treated the Second Amendment's subordinate clause (about the importance of well-regulated militia) as protecting something distinct from the Second Amendment's main clause (the right of the people to keep and bear arms).¹⁶⁵

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

III. The Warren, Vinson, and Hughes Courts

During the tenure of Chief Justices Earl Warren (1953-69) and Fred Vinson (1946-53), opinions in nine cases addressed the Second Amendment. Seven of those opinions (majority opinions by Justices Brennan, Frankfurter, Harlan, and Jackson; a concurrence by Justice Black; and dissents by Justices Black and Harlan) recognized an individual right in the Second Amendment. The eighth case, an "appeal

dismissed” contained no explanation, and thus was consistent with both the Standard Model individual right and the Henigan/Bogus state’s right. The earliest case in this period was a 1934 decision that used the Second Amendment to support a state’s right to control its militia.¹⁶⁶

A. **Burton v. Sills**

Burton v. Sills involved a challenge to the then-new gun licensing law in New Jersey.¹⁶⁷ The law did not ban any guns, but established a licensing system intended to screen out people with serious criminal convictions, substance abusers, and the like. After the New Jersey Supreme Court rejected a Second Amendment challenge to the law¹⁶⁸, the plaintiffs asked the Supreme Court to review the case; the request came in the form of an “appeal,” rather than a petition for a *writ of certiorari*.¹⁶⁹

The United States Supreme Court declined to hear the case.¹⁷⁰ Since the case had come by appeal, rather than petition for a writ, the Court wrote the standard phrase used at the time in denying an appeal: “The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.”¹⁷¹

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

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

applying principles established by prior decisions to the particular facts involved.¹⁷²

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

The appeal dismissal does *not* necessarily endorse the reasoning of the state court against which the appeal was taken. (The New Jersey Supreme Court had said that the Second Amendment is not an individual right.¹⁷³)

The plaintiffs in *Burton* had conceded that prior Supreme Court cases (particularly the 1886 *Presser* case) had said that the Second Amendment limits only the federal government, and not state governments.¹⁷⁴ The plaintiffs invited the courts to use the *Burton* case as an opportunity to reverse prior precedent.¹⁷⁵ The appeal dismissal in *Burton* may be read as the Court's declining the invitation to re-open the issue decided by *Presser*.

Justice Thomas's concurrence in *Printz*,¹⁷⁶ suggesting that the Brady Act waiting period may violate the Second Amendment, implies he would not read *Burton* as asserting that a New Jersey-style gun licensing system would be constitutional if enacted by the Congress. Reading *Burton* as an authorization for sweeping *federal* gun licensing would be inconsistent with the Supreme Court's teaching that appeal dismissals "should not be understood as breaking new ground."¹⁷⁷

Given the plaintiffs' requested grounds for Supreme Court review (to overturn *Presser*) it is logical to view *Burton* as a re-affirmance of *Presser*.¹⁷⁸

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

B. *Duncan v. Louisiana*

In this case, the Supreme Court incorporated the Sixth Amendment right to jury trial, as part of the Fourteenth Amendment's "due process" guarantee.¹⁷⁹ Justice Black,

joined by Justice Douglas, concurred, and restated his argument from *Adamson v. California*¹⁸⁰ (*infra*) that the Fourteenth Amendment's "privileges and immunities" clause should be read to include everything in the first eight Amendments.¹⁸¹ He quoted a statement made on the Senate floor by Senator Jacob Howard, one of the lead sponsors of the Fourteenth Amendment:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. . . To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added *the personal rights guaranteed and secured by the first eight amendments of the Constitution*; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and bear arms*; the right to be exempted from the quartering of soldiers in a house without consent of the owner. . . .¹⁸²

Justice Black's use in *Duncan* of the quote describing "the right to keep and bear arms" as one of "the personal rights guaranteed and secured by the first eight amendments" is fully consistent with his writing on the bench and in legal scholarship that the Second Amendment right to arms was one of the individual rights which the Fourteenth Amendment (properly interpreted) makes into a limit on state action.¹⁸³

C. *Malloy v. Hogan*

This 1964 case used the Fourteenth Amendment's due process clause to incorporate the Fifth Amendment's privilege against self-incrimination.¹⁸⁴ Discussing the history of Fourteenth Amendment jurisprudence, Justice Brennan listed

various “Decisions that particular guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment.”¹⁸⁵ Among these were “*Presser v. Illinois*, 116 U.S. 252, 265 (Second Amendment),”¹⁸⁶ along with various other cases, almost of which had been, or would be, repudiated by later decisions on incorporation.¹⁸⁷

As discussed above, any discussion of the Second Amendment as something which *could* be incorporated, even if no incorporation has been performed, necessarily presumes that the Second Amendment is an individual right. Justice Brennan’s explication of *Presser* as a case which rejects privileges and immunities incorporation is of some significance as a modern interpretation of *Presser*, since, as we shall discuss *infra*, the years after the 1886 *Presser* decision generated a variety of opinions about whether *Presser* actually had rejected incorporation.

D. *Konigsberg v. State Bar of California*

In *Konigsberg*, the Court majority upheld the state of California’s refusal to admit to the practice of law an applicant who refused answer questions about his beliefs regarding communism.¹⁸⁸ In dissent, Justice Black argued that First Amendment rights were absolute and that the inquiry into the prospective lawyer’s political beliefs was therefore a violation of the First Amendment.¹⁸⁹

Justice Harlan’s majority opinion rejected Justice Black’s standard of constitutional absolutism.¹⁹⁰ The Harlan majority opinion is one of the classic examples of the “balancing” methodology of jurisprudence.¹⁹¹ Justice Harlan pointed to libel laws as laws which restrict speech, but which do not infringe the First Amendment.¹⁹² Similarly, he pointed to the Supreme Court’s ruling in *United States v. Miller* as an example of a law which restricted the absolute exercise of rights, but which had been held not to be unconstitutional.¹⁹³ Justice Harlan thereby treated the First and Second Amendment as constitutionally identical: guaranteeing an individual right, but not an absolute right.

n. 10. That view, which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: “Congress shall make no law . . . abridging the freedom speech, or of the press; or the right of the people peaceably to assemble” But as Mr. Justice Holmes once said: “[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.” *Gompers v. United States*, 233 U.S. 604, 610. In this connection also *compare the equally unqualified command of the Second Amendment: “the right of the people to keep and bear arms shall not be infringed.”* And see *United States v. Miller*, 307 U.S. 174.¹⁹⁴

The year before Justice Black’s absolutist interpretative model was rejected by the majority of the Court, Justice Black had detailed the absolutist theory in the first annual James Madison lecture at the New York University School of Law.¹⁹⁵ Discussing each part of the Bill of Rights, Justice Black explained how each guarantee was unequivocal and absolute. For example, under the Sixth Amendment, a defendant had a “definite and absolute” right to confront the witnesses against him.¹⁹⁶ Regarding the Second Amendment, Justice Black explained:

Amendment Two provides that:

A well regulated Militia being necessary to the security of a free State, the right of the people to

keep and bear Arms, shall not be infringed.

Although the Supreme Court has held this Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute.¹⁹⁷

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

Throughout the New York University speech, Justice Black referred exclusively to individual rights, and never to state's rights. For example, he began his speech by explaining "I prefer to think of our Bill of Rights as including all provisions of the original Constitution and Amendments that protect individual liberty. . ."¹⁹⁸ If Justice Black thought that the Second Amendment protected state power, rather than individual liberty, he would not have included the Second Amendment in his litany of "absolute" guarantees in the Bill of Rights. In the discussion of *Adamson v. California*, *infra*, we will see "definite and absolute" proof that Justice Black considered the Second Amendment an individual right.

E. *Poe v. Ullman*

In the 1961 case *Poe v. Ullman*, the Court considered whether married persons had a right to use contraceptives.¹⁹⁹ The majority said "no," but the second Justice Harlan, in a dissent (which gained ascendancy a few years later in *Griswold v. Connecticut*), wrote that the Fourteenth Amendment did guarantee a right of privacy. In developing a theory of exactly what the Fourteenth Amendment due process clause did protect, Justice Harlan wrote that the clause was not limited exclusively to "the precise terms of *the specific guarantees elsewhere provided in the Constitution*," such as "the freedom of speech, press, and religion; *the right to keep*

and bear arms; the freedom from unreasonable searches and seizures.”²⁰⁰

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

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

Some parts of the Harlan dissent, however, have not been quoted by future courts. For example, even though later opinions have quoted approvingly the Harlan language that the Fourteenth Amendment forbids “all substantial arbitrary impositions,”²⁰¹ those quotations omit the list of cases that Justice Harlan cited for the proposition. That list included *Allgeyer v. Louisiana*²⁰² and *Nebbia v. New York*,²⁰³ both of which used the Fourteenth Amendment in defense of economic liberty. But Justice Harlan was certainly right that modern use of the Fourteenth Amendment to protect non-enumerated rights has its roots in the liberty of contract due process cases from the turn of the century. Although it is not currently respectable to say so in a Supreme Court opinion, cases such as *Allgeyer* and its progeny have as much a logical claim to be part of the Fourteenth Amendment as do *Griswold*²⁰⁴ and its progeny; both lines of cases protect personal freedom from “substantial arbitrary impositions.”

But the fact that *Allgeyer* and *Nebbia* end up trimmed in later quotations of Justice Harlan's words shows that the Justices who used the quote later (Stevens, O'Connor, Powell, and Stewart) were not just quoting without thought; they knew

how to excise parts of Harlan's language that they did not agree with, such as the references to economic liberty. That economic liberty was excised, while the Second Amendment stayed in, may, therefore, be plausibly considered as the writer's decision.

Also unquoted by later Courts has been Justice Harlan's statement, "Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights."²⁰⁵ In support of this proposition, he cited, *inter alia*, *Presser v. Illinois*, a nineteenth century case which will be discussed *infra*.

Interestingly, Justice Douglas wrote his own dissent, in which he stated that the Fourteenth Amendment must protect "all" the Bill of Rights.²⁰⁶ This implies that the Second Amendment is an individual right, if it can be protected by the Fourteenth Amendment. But Justice Douglas later rejected this view, in his *Adams v. Williams* dissent.²⁰⁷

F. Knapp v. Schweitzer

Knapp involved the applicability of the Fifth Amendment's self-incrimination clause to the states.²⁰⁸ Justice Frankfurter's majority opinion refused to enforce the clause against the states. In support of his position, the Justice reeled off a list of nineteenth century cases, including *Cruikshank* (discussed *infra*) which he cited for the proposition that it was well-settled almost all of the individual rights guarantees in the Bill of Rights were not applicable to the states:

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

and bear arms); Article IV: *Smith v. Maryland*, 18 How. 71, 76 (no warrant except on probable cause); *Spies v. Illinois*, 123 U.S. 131, 166 (security against unreasonable searches and seizures); Article V: *Barron v. Baltimore*, note 2, *supra*, at 247 (taking without just compensation); *Fox v. Ohio*, 5 How. 410, 434 (former jeopardy); *Twitchell v. Pennsylvania*, 7 Wall. 321, 325-327 (deprivation of life without due process of law); *Spies v. Illinois*, *supra*, at 166 (compulsory self-incrimination); *Eilenbecker v. Plymouth County*, 134 U.S. 31, 34-35 (presentment or indictment by grand jury); Article VI: *Twitchell v. Pennsylvania*, *supra*, at 325-327 (right to be informed of nature and cause of accusation); *Spies v. Illinois*, *supra*, at 166 (speedy and public trial by impartial jury); *In re Sawyer*, 124 U.S. 200, 219 (compulsory process); *Eilenbecker v. Plymouth County*, *supra*, at 34-35 (confrontation of witnesses); Article VII: *Livingston's Lessee v. Moore*, 7 Pet. 469, 551-552 (right of jury trial in civil cases); *Justices v. Murray*, 9 Wall. 274, 278 (re-examination of facts tried by jury); Article VIII: *Pervear v. Massachusetts*, 5 Wall. 475, 479-480 (excessive fines, cruel and unusual punishments).²⁰⁹

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

G. Johnson v. Eisentrager

After the surrender of Germany during World War II, some German soldiers in China aided the Japanese army, in the months that Japan continued to fight alone.²¹⁰ The American army captured them, and tried them by court-martial in China as war criminals.²¹¹ The Germans argued that the trial violated their Fifth Amendment rights, and pointed out that the

Fifth Amendment is not by its terms limited to American citizens.²¹²

Justice Jackson's majority opinion held that Germans had no Fifth Amendment rights.²¹³ He pointed out that if Germans could invoke the Fifth Amendment, they could invoke the rest of the Bill of Rights.²¹⁴ This would lead to the absurd result of American soldiers, in obedience to the Second Amendment, being forbidden to disarm the enemy:

If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it,²¹⁵ the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "were-wolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, *right to bear arms as in the Second*, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.²¹⁶

The "irreconcilable enemy elements, guerrilla fighters, and 'were-wolves'" in Justice Jackson's hypothetical are obviously not American state governments. Instead they are individuals and as individuals would have Second Amendment rights, if the Second Amendment were to apply to non-Americans.²¹⁷ Interestingly, Justice Jackson's reasoning echoed an argument made in *Ex Parte Milligan* by the Attorney General: the Fifth Amendment must contain implicit exceptions, which allow trial of civilians under martial law; the whole Bill of Rights contains implicit exceptions, for without such exceptions, it would be a violation of the Second Amendment to disarm rebels, and the former slave states' forbidding the slaves to own guns would likewise have been unconstitutional.²¹⁸

H. *Adamson v. California*

In the *Adamson* case, the defendant was convicted after a trial in a California state court; California law allowed the judge to instruct the jury that the jury could draw adverse inferences from a defendant's failure to testify.²¹⁹ This jury instruction was plainly inconsistent with established Fifth Amendment doctrine;²²⁰ but did the Fifth Amendment apply in state courts, or only in federal courts?

The *Adamson* majority held that the Fifth Amendment's protection against compelled self-incrimination was *not* made enforceable in state courts by the Fourteenth Amendment's command that states not deprive a person of life, liberty, or property without "due process of law."²²¹

In dissent, Justice Black (joined by Justice Douglas) argued that the Fourteenth Amendment made *all* of the Bill of Rights enforceable against the states, via the Amendment's mandate: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."²²² Listing a series of 19th century cases in which the Supreme Court had refused to make certain individual rights from the Bill of Rights enforceable against the states (including *Presser*, involving the right to keep and bear arms), Justice Black argued that the Court's prior cases had not been so explicit as to foreclose the current Court from considering the issue:

Later, but prior to the *Twining* case, this Court decided that the following were not "privileges or immunities" of national citizenship, so as to make them immune against state invasion: the Eighth Amendment's prohibition against cruel and unusual punishment, *In re Kemmler*, 136 U.S. 436; the Seventh Amendment's guarantee of a jury trial in civil cases, *Walker v. Sauvinet*, 92 U.S. 90; the Second Amendment's 'right of the people to keep and bear arms. . .,' *Presser v. Illinois*, 116 U.S. 252, 584; the Fifth and Sixth Amendments' requirements for indictment in capital or other

infamous crimes, and for trial by jury in criminal prosecutions, *Maxwell v. Dow*, 176 U.S. 581. While it can be argued that these cases implied that no one of the provisions of the Bill of Rights was made applicable to the states as attributes of national citizenship, no one of them expressly so decided. In fact, the Court in *Maxwell v. Dow*, supra, 176 U.S. at pages 597, 598, 20 S.Ct. at page 455, concluded no more than that ‘the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal government.’ Cf. *Palko v. Connecticut*, 302 U.S. 319, 329, 153.²²³

Thus, Justice Black put the Second Amendment in the same boat as Amendments Five, Six, Seven, and Eight: individual rights which prior Courts had declined to enforce against the states, but which the present Court still had the choice to incorporate.

In a lengthy Appendix, Justice Black set forth the history of the creation of the Fourteenth Amendment, quoting at length from congressional proponents of the Amendment, who indicated that the Amendment was intended to make all of the rights in the first eight amendments of the Bill of Rights enforceable against the states.²²⁴ This view, held by Justice Black and many of the backers of the Fourteenth Amendment, is of course inconsistent with the idea that the Second Amendment guarantees only a right of state governments. The point of the Fourteenth Amendment is to make individual rights enforceable against state governments.

First, the Appendix set forth the background to the Fourteenth Amendment. Congress had enacted the Civil Rights Bill in response to problems in states such as Mississippi, where, Senator Trumbull (Chairman of the Senate Judiciary Committee) explained, there was a statute to “prohibit any negro or mulatto from having firearms. . .”²²⁵ When the Civil Rights Bill went to the House, Rep. Raymond,

who opposed the Bill “conceded that it would guarantee to the negro ‘the right of free passage. . .He has a defined status. . . a right to defend himself. . .to bear arms. . .to testify in the Federal courts.’”²²⁶

Then, on May 23, 1866, Senator Howard introduced the proposed amendment to the Senate in the absence of Senator Fessenden who was sick. Senator Howard prefaced his remarks by stating:

“I . . . present to the Senate . . . the views and the motives [of the Reconstruction Committee]. . . One result of their investigation has been the joint resolution for the amendment of the Constitution of the United States now under consideration. . . .

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

. . .

“Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added *the personal rights guaranteed and secured by the first eight amendments of the Constitution*; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms*; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or

seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.²²⁷

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

“secured the free exercise of his religious belief, and freedom of speech and of the press. *Then again he had secured to him the right to keep and bear arms in his defense.* Then, after that, his home was secured in time of peace from the presence of a soldier. . . .”²²⁸

. . . .

“It is all these, Mr. Speaker, which are comprehended in the words ‘American citizen,’ and it is to protect and to secure him in these rights, privileges, and immunities this bill is before the House. And the question to be settled is, whether by the Constitution, in which these provisions are inserted, there is also power to guard, protect, and enforce these rights of the citizens; whether they are more, indeed, than a mere declaration of rights, carrying with it no power of enforcement. . . .” Cong. Globe, 42d Cong., 1st Sess. Part I (1871) 475, 476.²²⁹

Also dissenting, Justice Murphy wrote “that the specific guarantees of the Bill of Rights should be carried over intact into the first Section of the Fourteenth Amendment.”²³⁰ The Second Amendment implications of his statement are the same as for Justice Black's longer exposition, although Justice Murphy did not enumerate the Second Amendment, or any other right.

Senator Howard, quoted by Justice Black, listed the individual right to arms in its natural order among the other individual rights listed in the Bill of Rights.²³¹ The Henigan/Bogus state's right theory, however, requires us to believe that when Congress sent the Bill of Rights to the states, Congress first listed four individual rights (in the First Amendment), then created a state's right (in the Second Amendment), and then reverted to a litany of individual rights (Amendments Three through Eight).²³² Finally, Congress explicitly guaranteed a state's right in the Tenth Amendment.²³³ While Congress used "the people" to refer to people in the First, Fourth, and Ninth Amendments, Congress used "the people" to mean "state governments" in the Second Amendment.²³⁴ Finally, even though Congress had used "the people" in the Second Amendment to mean "the states," Congress in the Tenth Amendment explicitly distinguished "the people" from "the states," reserving powers "to the States respectively, or to the people."²³⁵

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

I. Hamilton v. Regents

This case has been almost entirely overlooked by Second Amendment scholarship.²³⁶ *Hamilton's* obscurity is especially surprising, since it is the one Supreme Court case which actually uses the Second Amendment in the way that we would expect the Amendment to be used if it were a state's right: to bolster state authority over the militia.

Two University of California students, the sons of pacifist ministers, sued to obtain an exemption from participation in the University of California's mandatory military training program.²³⁷ The two students did not contest the state of

California's authority to force them to participate in state militia exercises, but they argued, in part, that the university's training program was so closely connected with the U.S. War Department as to not really be a militia program.²³⁸ A unanimous Court disagreed, and stated that California's acceptance of federal assistance in militia training did not transform the training program into an arm of the standing army. States had the authority to make their own judgments about training:

So long as [the state's] action is within retained powers and not inconsistent with any exertion of the authority of the national government, and transgresses no right safeguarded to the citizen by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends. Second Amendment. *Houston v. Moore*, 5 Wheat. 1, 16-17, *Dunne v. People*, (1879) 94 Ill. 120, 129. 1 Kent's Commentaries 265, 389. Cf. *Presser v. Illinois*, 116 U.S. 252.²³⁹

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

This usage was not consistent with a meaningful state's right theory. A state's right Second Amendment, to have any legal content, would have to give the state some exemption from the exercise of federal powers.²⁴⁰ But the Court wrote that the state's discretion in militia training must be "not inconsistent with any exertion of the authority of the national government."²⁴¹

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

The authorities cited along with "Second Amendment" by the *Hamilton* Court do not support a reading of the Second

Amendment as guaranteeing a state's right, but instead support an individual right.

Houston v. Moore (to be discussed in more detail below), involved the state of Pennsylvania's authority to punish a man for evading service in the federal militia, which had been called to fight the war of 1812.²⁴² The report of the attorneys' arguments, on both sides, shows that the Second Amendment was not raised as an issue.²⁴³ The *Houston* pages which were cited by the *Hamilton* Court contain the statement, spanning the two pages, that "[A]s state militia, the power of the state governments to legislate on the same subjects [organizing, arming, disciplining, training, and officering the militia], having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the states, subordinate nevertheless to the paramount law of the general government, operating on the same subject."²⁴⁴ In other words, state militia powers were inherent in the nature of state sovereignty, and continue to exist except to the extent limited by Congress under its Constitutional militia powers.

In *Dunne v. People*, the Illinois Supreme Court affirmed the centrality of state power over the militia, citing the Tenth Amendment and the *Houston v. Moore* precedent.²⁴⁵ The *Dunne* court also explained how a state's constitutional duty to operate a militia was complemented by the right of the state's citizens to have arms:

"A well regulated militia being necessary to the security of a free State," the States, by an amendment to the constitution, have imposed a restriction that Congress shall not infringe the right of the "people to keep and bear arms." The chief executive officer of the State is given power by the constitution to call out the militia "to execute the laws, suppress insurrection and repel invasion."²⁴⁶ This would be a mere barren grant of power unless the State had power to organize its own militia for its own purposes. Unorganized, the militia would be of no practical aid to the executive in maintaining order and in protecting life and

property within the limits of the State. These are duties that devolve on the State, and unless these rights are secured to the citizen, of what worth is the State government?²⁴⁷

The cited pages of Kent's Commentaries discuss state versus federal powers over the militia. Chancellor Kent uses *Martin v. Mott*²⁴⁸ to show that a President's decision that there is a need to call out the militia is final. *Houston v. Moore*²⁴⁹ (state authority to prosecute a person for refusing a federal militia call) is used to show that if the federal government neglects its constitutional duty to organize, arm, and discipline the militia, the states have the inherent authority to do so. The Second Amendment was not used by Kent or by Kent's cited cases to support his propositions.

Presser v. Illinois will be discussed below; the case affirmed a state's authority to make a gun control law (a ban on armed parades in public) which contained an exemption for the state's organized militia.²⁵⁰

Later in the opinion, the *Hamilton* Court quoted *United States v. Schwimmer*, a 1929 decision which held that an immigrant pacifist's refusal to bear arms in the army or in the Second Amendment's well-regulated militia proved that the immigrant was not fit for citizenship.²⁵¹

IV. The Taft, Fuller, and Waite Courts

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

A. United States v. Schwimmer

A divided Supreme Court held that a female pacifist who wished to become a United States citizen could be denied citizenship because of her energetic advocacy of pacifism.²⁵² The Court majority found the promotion of pacifism inconsistent with good citizenship because it dissuaded people from performing their civic duties, including the duty to bear arms in a well regulated militia.²⁵³ Since it is agreed by Standard Modelers and their critics alike that the federal and state governments have the authority to compel citizens to perform militia service, the *Schwimmer* opinion does not help resolve the individual rights controversy:

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

The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming, and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several states when called into the service of the United States; it declares that, a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws, by armed citizens. This court, in the Selective Draft Law Cases, 245 U.S. 366, page 378, 38 S. Ct. 159, 161 (62 L. Ed.

349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856), speaking through Chief Justice White, said that “the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. . . .”

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country’s defense detracts from the strength and safety of the Government. . . .The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. . .her objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms.²⁵⁴

Schwimmer illustrates two points about which the Standard Model authors agree with Bogus and Henigan: first, the phrase “bear arms” in the Second Amendment can have militia service connotations. The Standard Modelers (and Justice Ginsburg)²⁵⁵, however, disagree with Bogus and Henigan’s claim that “bear arms” always has a militia/military meaning, and never any other. Second, *Schwimmer* illustrates that bearing arms can be a duty of citizenship which the government can impose on the citizen. While opponents of the standard model use this fact to argue that the Second Amendment is about a duty, and not about an individual right,²⁵⁶ the Standard Model professors respond by pointing to jury service, to show that an individual constitutional right (the right to be eligible for jury service²⁵⁷) can also be a duty.

B. Stearns v. Wood

This case came to the Court after World War I had broken out in Europe.²⁵⁸ The U.S. War Department had sent “Circular 8” to the various National Guards, putting restrictions on promotion. Plaintiff Stearns, a Major in the Ohio National Guard, was thereby deprived of any opportunity to win

promotion above the rank of Lieutenant Colonel.²⁵⁹ Stearns argued that Circular 8 violated the Preamble to the Constitution, Article One's specification of Congressional powers over the militia, Article One's grant of army powers to the Congress, Article Two's making the President the Commander in Chief of the militia when called into federal service, the Second Amendment, and the Tenth Amendment.²⁶⁰

Writing for a unanimous Court, Justice McReynolds contemptuously dismissed Stearns' claim without reaching the merits.²⁶¹ Since Stearns' present rank of Major was undisturbed, there was no genuine controversy for the Court to consider, and the Court would not render advisory opinions.²⁶²

Even though the Court never reached the merits of the Second Amendment argument, it is possible to draw some inferences simply from the fact that the Second Amendment argument was made in the case. First of all, Major Stearns' argument shows that using the Second Amendment to criticize federal control of the National Guard was not an absurd argument—or at least no more absurd than using the Preamble to the Constitution for the same purpose. And after the 1905 Kansas Supreme Court case *Salina v. Blaksley* ruled that the Kansas constitution's right to arms (and, by analogy, the U.S. Second Amendment) protected the state government, and not the citizen of Kansas,²⁶³ Stearns' attorney's argument did have some foundation in case law.

C. *Twining v. New Jersey*

In *Twining*, the Supreme Court (with the first Harlan in dissent) refused to make the Fifth Amendment self-incrimination guarantee in the Bill of Rights applicable to state trials, via the Fourteenth Amendment.²⁶⁴ In support of this result, the majority listed other individual rights which had not been made enforceable against the states, under the Privileges and Immunities clause:

The right to trial by jury in civil cases, guaranteed by the Seventh Amendment (*Walker v. Sauvinet*,

92 U.S. 90), and the right to bear arms guaranteed by the Second Amendment (*Presser v. Illinois*, 116 U.S. 252) have been distinctly held not to be privileges and immunities of citizens of the United States guaranteed by the Fourteenth Amendment against abridgement by the States, and in effect the same decision was made in respect of the guarantee against prosecution, except by indictment of a grand jury, contained in the Fifth Amendment (*Hurtado v. California*, 110 U.S. 516), and in respect to the right to be confronted with witnesses, contained in the Sixth Amendment. *West v. Louisiana*, 194 U.S. 258. In *Maxwell v. Dow*, supra. . . it was held that indictment, made indispensable by the Fifth Amendment, and the trial by jury guaranteed by the Sixth Amendment, were not privileges and immunities of citizens of the United States.²⁶⁵

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

D. Maxwell v. Dow

Maxwell was the majority’s decision (again, over Harlan’s dissent) not to make the right to a jury in a criminal case into one of the Privileges or Immunities protected by the Fourteenth Amendment.²⁶⁶ Regarding the Second Amendment and *Presser*, the Court wrote:

In *Presser v. Illinois*, 116 U.S. 252, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of the Congress and the National Government, and not of the States. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the National Government, the States could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.²⁶⁷

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

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

After the United States won the Spanish-American War, the Philippines were ceded to the United States. American control was successfully imposed only after several years of hard warfare suppressed Filipinos fighting for independence.²⁶⁸ Congress in 1902 enacted legislation imposing most, but not all of the Bill of Rights on the Territorial Government of the Philippines. The 1905 *Trono*²⁶⁹ case and the 1904 *Kepner*²⁷⁰ case both grew out of criminal prosecutions in the Philippines in which the defendant claimed his rights had been violated.

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

The whole language [of the Act] is substantially taken from the Bill of Rights set forth in the amendments to the Constitution of the United States, omitting the provisions in regard to the right of trial by jury and the right of the people to bear arms, and containing the prohibition of the 13th Amendment, and also prohibiting the passage of bills of attainder and ex post facto laws.²⁷¹

As with other cases, the “right of the people” to arms is listed in a litany of other rights which are universally acknowledged to be individual rights, not state’s rights.²⁷²

It could be argued that the Second Amendment was omitted from the Congressional Act because the Amendment *is* a state’s right, and there was no point in putting a state’s right item into laws governing a territory. Indeed, the omission of the Tenth Amendment from the Congressional 1902 Act is perfectly explicable on the grounds that the Tenth Amendment protects federalism, but does not control a territorial or state government’s dealings with its citizens.²⁷³

And thus, when the Supreme Court listed the individual rights which were not included in the 1902 Act, the Court did not note the omission of the Tenth Amendment; there was no possibility that Congress could have included the Tenth Amendment, since it would have no application to the territorial government’s actions against the Filipino people.²⁷⁴

In contrast, the Court did note the omission of “the right of trial by jury and the right of the people to bear arms.”²⁷⁵ The logical implication, then, is that jury trial and the right to arms (unlike the Tenth Amendment) are individual rights which Congress *could* have required the Territorial Government to respect in the Philippines.²⁷⁶

The 1904 *United States v. Kepner* case involved a similar issue.²⁷⁷ There, the Court described the 1902 Act in more detail. The description of items omitted from the Act was nearly identical to the *Trono* language.²⁷⁸

F. Robertson v. Baldwin

In 1897, the Court refused to apply the Thirteenth Amendment to merchant seamen who had jumped ship, been caught, and been impressed back into maritime service without due process.²⁷⁹ The Court explained that Thirteenth Amendment's ban on involuntary servitude, even though absolute on its face, contained various implicit exceptions.²⁸⁰ In support of the finding of an exception to the Thirteenth Amendment, the Court argued that the Bill of Rights also contained unstated exceptions:

The law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by law prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or the verdict was set aside upon the defendant's motion. . . .²⁸¹

Likewise, the self-incrimination clause did not bar a person from being compelled to testify against himself if he

were immune from prosecution; and the confrontation clause did not bar the admission of dying declarations.²⁸²

In 1897, state laws which barred individuals from carrying concealed weapons were common, and usually upheld by state supreme courts²⁸³; the laws did not forbid state militias from carrying concealed weapons. The prohibitions on concealed carry are the exceptions that prove the rule. Only if the Second Amendment is an individual right does the Court's invocation of a concealed carry exception make any sense.

G. Brown v. Walker

When a witness before an Interstate Commerce Commission investigation invoked the Fifth Amendment to refuse to answer questions under oath, the majority of the Supreme Court ruled against his invocation of the privilege against self-incrimination.²⁸⁴ The majority pointed out that a Congressional statute protected the witness from any criminal prosecution growing out of the testimony.²⁸⁵

Dissenting, Justice Stephen Field (perhaps the strongest civil liberties advocate on the Court during the nineteenth century) contended that the "infamy and disgrace" which might result from the testimony was justification enough not to testify, even if there could be no criminal prosecution.²⁸⁶ Justice Field's opinion carefully analyzed English and early American precedent, reflecting Field's vivid appreciation of the long Anglo-American struggle for liberty against arbitrary government.²⁸⁷ Law and order was less important than Constitutional law, he continued, for the claim that "the proof of offenses like those prescribed by the interstate commerce act will be difficult and probably impossible, ought not to have a feather's weight against the abuses which would follow necessarily the enforcement of incriminating testimony."²⁸⁸ All Constitutional rights ought to be liberally construed, for:

As said by counsel for the appellant: "The freedom of thought, of speech, and of the press; *the right to bear arms*; exemption from military dictation; security of the person and of the home; the right to

speedy and public trial by jury; protection against oppressive bail and cruel punishment,—are, together with exemption from self-crimination, *the essential and inseparable features of English liberty*. Each one of these features had been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the constitution, and the contests were fresh in the memories and traditions of the people at that time.”²⁸⁹

This is just the opposite of Dennis Henigan’s assertion that the Second Amendment is written so as to be less fundamental than the first.²⁹⁰ Justice Field’s paragraph is not a list of state powers, it is a list of personal rights won at great cost—rights which may never be trumped by the legislature’s perceived needs of the moment.

H. Miller v. Texas

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

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

Appealing to the Supreme Court in 1894, Miller alleged violations of his Second Amendment,

Fourth Amendment, Fifth Amendment, and Fourteenth Amendment rights.²⁹¹ Regarding the Second Amendment, Miller claimed that it negated the Texas statute against concealed carrying of a weapon.²⁹² A unanimous Court rejected Miller's contentions: A "state law forbidding the carrying of dangerous weapons on the person. . . does not abridge the privileges or immunities of citizens of the United States."²⁹³ This statement about concealed weapons laws was consistent with what the Court would say about such laws three years later, in the *Robertson* case.²⁹⁴

Moreover, the Second Amendment, like the rest of the Bill of Rights, only operated directly on the federal government, and not on the states: "the restrictions of these amendments [Second, Fourth, and Fifth] operate only upon the Federal power."²⁹⁵ But did the Fourteenth Amendment makes the Second, Fourth, and Fifth Amendments applicable to the states? Here, the *Miller* Court was agnostic: "If the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to the citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court."²⁹⁶

Just eight years before, in *Presser* the Court had said that the Second Amendment does not apply directly to the states; *Miller* reaffirmed this part of the *Presser*. Another part of *Presser* had implied that the right to arms was not one of the "privileges or immunities" of American citizenship, although the *Presser* Court did not explicitly mention the Fourteenth Amendment.

In *Miller v. Texas*, the Court suggested that Miller might have had a Fourteenth Amendment argument, if he had raised the issue properly at trial.²⁹⁷ If *Presser* foreclosed any possibility that Second Amendment rights could be enforced via the Fourteenth Amendment, then the *Miller* Court's statement would make no sense. Was *Miller* an early hint that

the Fourteenth Amendment's due process clause might protect substantive elements of the Bill of Rights? Three years later, the Court used the Fourteenth Amendment's due process clause for the first time to apply part of the Bill of Rights against a state.²⁹⁸

A decade after *Miller*, *Twining* in 1908 did claim that *Presser* stood for the Second Amendment not being a Fourteenth Amendment privilege or immunity. But between *Presser* in 1886 and *Twining* in 1908, other readings were permissible. Not only does *Miller* in 1894 appear to invite such readings, but so does the 1887 case *Spies v. Illinois*, which involved the murder prosecutions arising out of the Haymarket Riot.²⁹⁹ John Randolph Tucker represented the defendants. Tucker, an eminent Congressman, author of an important treatise on constitutional law, a future President of the American Bar Association, and a leading law professor at Washington and Lee³⁰⁰—argued that the whole Bill of Rights was enforceable against the states, including the right to arms.³⁰¹

Tucker argued that all “these ten Amendments” were “privileges and immunities of citizens of the United States, which the Fourteenth Amendment forbids every State to abridge,” and cited *Cruikshank* in support.³⁰² As for *Presser*, that case “did not decide that the right to keep and bear arms was not a privilege of a citizen of the United States which a State might therefore abridge, but that a State could under its police power forbid organizations of armed men, dangerous to the public peace.”³⁰³

Chief Justice Waite's majority opinion in *Spies* cited *Cruikshank* and *Presser* (along with many other cases) only for the proposition that the first ten Amendments do not apply directly to the states.³⁰⁴ (An 1890 opinion, *Eilenbecker*, again cited *Cruikshank* and *Presser* as holding that the Bill of Rights does not apply directly to the states.³⁰⁵) The *Spies*' defendants' substantive claims (relating to the criminal procedure and jury portions of the Bill of Rights) were rejected as either incorrect (e.g., the jury was not biased) or as not properly raised at trial, and thus not appropriate for appeal.³⁰⁶

Tucker's reading of *Presser* is not the only possible one, but Tucker—one of the most distinguished lawyers of his time—was far too competent to make an argument in a capital case before the Supreme Court that was contrary to Supreme Court precedent from only a year before. It may be permissible to read *Presser* the same way that John Randolph Tucker did (as upholding a particular gun control law), or as *Spies*, *Maxwell*, and *Eilenbecker* did (as stating that the Second Amendment does not by its own power apply to the states), or as *Twining* and *Malloy v. Hogan* did (as rejecting incorporation of the Second Amendment via the Privileges and Immunities clause). We will get to *Presser* soon, so that the reader can supply her own interpretations.³⁰⁷

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

I. Logan v. United States

This case arose out of a prosecution under the Enforcement Act, a Congressional statute outlawing private conspiracies against the exercise of civil rights.³⁰⁸ The Enforcement Act was also as issue in *Cruikshank*, *infra*. In

Logan, a mob had kidnapped a group of prisoners who were being held in the custody of federal law enforcement.³⁰⁹ The issue before the Court was whether the prisoners, by action of the mob, had been deprived of any of their federal civil rights.

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

In *U. S. v. Cruikshank*, 92 *U.S.* 542, as the same term, in which also the opinion was delivered by the chief justice, the indictment was on section 6 of the enforcement act of 1870, (re-enacted in Rev. St. 5508, under which the present conviction was had,) and the points adjudged on the construction of the constitution and the extent of the powers of congress were as follows:

(1) It was held that the first amendment of the constitution, by which it was ordained that congress should make no law abridging the right of the people peaceably to assemble and to petition the government for redress of grievances, did not grant to the people the right peaceably to assemble for lawful purposes, but recognized that right as already existing, and did not guaranty its continuance except as against acts of congress; and therefore the general right was not a right secured by the constitution of the United States. But the court added: "The right of the people peaceably to assemble for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guarantied by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably

for consultation in respect to public affairs, and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the cause would have been within the statute, and within the scope of the sovereignty of the United States.” 92 U.S. 552, 553.

(2) It was held that the second amendment of the constitution, declaring that “the right of the people to keep and bear arms shall not be infringed,” was equally limited in its scope. 92 U.S. 553.

(3) It was held that a conspiracy of individuals to injure, oppress, and intimidate citizens of the United States, with intent to deprive them of life and liberty without due process of law, did not come within the statute, nor under the power of congress, because the rights of life and liberty were not granted by the constitution, but were natural and inalienable rights of man; and that the fourteenth amendment of the constitution, declaring that no state shall deprive any person of life, liberty, or property, without due process of law, added nothing to the rights of one citizen as against another, but simply furnished an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. It was of these fundamental rights of life and liberty, not created by or dependent on the constitution, that the court said: “Sovereignty, for this purpose, rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment or murder itself.” 92 U.S. 553, 554.

4th. It was held that the provision of the Fourteenth Amendment forbidding any State to deny to any person within its jurisdiction the equal protection of the laws, gave no greater power to Congress. 92

U.S. 555.

5th. It was held, in accordance with *United States v. Reese*, above cited, that the counts for conspiracy to prevent and hinder citizens of the African race in the free exercise and enjoyment of the right to vote at state elections, or to injure and oppress them for having voted at such election, not alleging that this was on account of their race, or color, or previous condition of servitude, could not be maintained; that court stating: “The right to vote in the States comes from the States; but the right of exemption from prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.” 92 U.S. 556

Nothing else was decided in *United States v. Cruikshank*, except questions of the technical sufficiency of the indictment, having no bearing upon the larger questions.³¹⁰

Thus, to the *Logan* Court, the First Amendment right to assemble and the Second Amendment right to arms are identical: both are individual rights; both pre-exist the Constitution; both are protected by the Constitution, rather than created by the Constitution; both rights are protected only against government interference, not against the interference of private conspirators.

J. Presser v. Illinois

In the late 19th century, many state governments violently suppressed peaceful attempts by workingmen to exercise their economic and collective bargaining rights. In response to the violent state action, some workers created self-defense organizations. In response to the self-defense organizations, some state governments, such as Illinois's, enacted laws against armed public parades.³¹¹

Defying the Illinois Statue, a self-defense organization composed of German working-class immigrants defied the law, and held a parade in which one of the leaders carried an

unloaded rifle. At trial, the leader—Herman Presser—argued that the Illinois law violated the Second Amendment.

The Supreme Court ruled against him unanimously. First, the Court held that the Illinois ban on armed parades “does not infringe the right of the people to keep and bear arms.”³¹² This holding was consistent with traditional common law boundaries on the right to arms, which prohibited terrifyingly large assemblies of armed men.³¹³

Further, the Second Amendment by its own force “is a limitation only upon the power of Congress and the National Government, and not upon that of the States.”³¹⁴

Did some other part of the Constitution make the Second Amendment enforceable against the states? The Court added that the Illinois law did not appear to interfere with any of the “privileges or immunities” of citizens of the United States.³¹⁵ Although the Court never actually used the words “Fourteenth Amendment,” it is reasonable to read *Presser* as holding that the Fourteenth Amendment’s Privileges and Immunities clause does not restrict state interference with keeping and bearing arms. This reading is consistent with all the other Fourteenth Amendment cases from the Supreme Court in the 1870s and 1880s, which consistently reject the proposition that any part of the Bill of Rights is among the “Privileges and Immunities” protected by the Fourteenth Amendment.³¹⁶

As to whether the Second Amendment might be protected by another part of the Fourteenth Amendment—the clause forbidding states to deprive a person of life, liberty, or property without due process of law³¹⁷—the Court had nothing to say. The theory that the Due Process clause of the Fourteenth Amendment might protect substantive constitutional rights had not yet been invented. Most of what the Waite Court had to say about Bill of Rights incorporation has long since been repudiated (although not always formally overruled) by subsequent courts, via the Due Process clause.

It is true that some modern lower courts cling to *Presser* and claim that *Presser* prevents them from addressing a litigant’s claim that a state statute violates the Second Amendment.³¹⁸ It is hard to take such judicial arguments seriously. An 1886 decision about Privileges and Immunities

is hardly binding precedent for 1990s Due Process. The *dicta* from the modern Supreme Court about the Second Amendment as a possible Fourteenth Amendment liberty interest is incompatible with the claim that *Presser* forecloses any possible theory of incorporating the Second Amendment. At most, *Presser* rejects Privileges and Immunities incorporation, but the case cannot be read to address a legal theory (Due Process incorporation) which did not exist at the time the case was decided.

Interestingly, *Presser* does offer another theory on which the United States Constitution might restrict state anti-gun laws. Article I, section 8, clauses 15 and 16 give Congress various powers over the militia.³¹⁹ States may not interfere with these Congressional militia powers; so in *dicta*, the *Presser* Court stated that the states could not disarm the public so as to deprive the federal government of its militia:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States, and, in view of this prerogative of the general government. . .the States cannot, even laying the Constitutional provision in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.³²⁰

So according to *Presser*, the constitutional militia includes “all citizens capable of bearing arms.”³²¹ But this statement is not directly about the Second Amendment; it is about Congressional powers to use the militia under Article I, section 8, clauses 15 and 16.

V. The Chase, Taney, and Marshall Courts

The majority of the Chase Court was just as hostile to a broad reading of the Fourteenth Amendment as was the Waite Court; unsurprisingly, the Chase Court rejected the idea that Congress could use the Fourteenth Amendment to legislate

against private interference with First or Second Amendment rights. At the same time, the Chase Court described the First Amendment assembly right and the Second Amendment arms rights as fundamental human rights which pre-existed the Constitution.

One of the most notable cases of the nineteenth century, *Dred Scott*, used the Second Amendment to support arguments about other subjects; the arguments recognized the Second Amendment right as an individual one.

And the very first Supreme Court opinion to mention the Second Amendment—Justice Story’s dissent in *Houston v. Moore*—is so obscure that even most Second Amendment specialists are unfamiliar with it. It is analogous to the *Hamilton* case, in that it uses the Second Amendment to underscore state militia powers.

A. United States v. Cruikshank

An important part of Congress’s work during Reconstruction was the Enforcement Acts, which criminalized private conspiracies to violate civil rights.³²² Among the civil rights violations which especially concerned Congress was the disarmament of Freedmen by the Ku Klux Klan and similar gangs.³²³

After a rioting band of whites burned down a Louisiana courthouse which was occupied by group of armed blacks (following the disputed 1872 elections), the whites and their leader, Klansman William Cruikshank, were prosecuted under the Enforcement Acts. Cruikshank was convicted of conspiring to deprive the blacks of the rights they had been granted by the Constitution, including the right peaceably to assemble and the right to bear arms.³²⁴

In *United States v. Cruikshank*, the Supreme Court held the Enforcement Acts unconstitutional. The Fourteenth Amendment did give Congress the power to prevent interference with rights granted by the Constitution, said the Court. But the right to assemble and the right to arms were not rights granted or created by the Constitution, because they

were fundamental human rights that pre-existed the Constitution:

The right of the people peaceably to assemble for lawful purposes *existed long before* the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It “derives its source,” to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, “from those laws whose authority is acknowledged by civilized man throughout the world.” It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.³²⁵

A few pages later, the Court made the same point about the right to arms as a fundamental human right:

The right... of bearing arms for a lawful purpose... is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence. The second amendment declares that it shall not be infringed; but this... means no more than it shall not be infringed by Congress... leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called...the “powers which relate to merely municipal legislation. . . .”³²⁶

According to *Cruikshank*, the individual's right to arms is protected by the Second Amendment, but not created by it, because the right derives from natural law. The Court's statement that the freedmen must “look for their protection against any violation by their fellow citizens of the rights” that the Second Amendment recognizes is comprehensible only under the individual rights view. If individuals have a right to

own a gun, then individuals can ask local governments to protect them against “fellow citizens” who attempt to disarm them. In contrast, if the Second Amendment right belongs to the state governments as protection against federal interference, then mere “fellow citizens” could not infringe that right by disarming mere individuals.

Cruikshank has occasionally been cited (without explanation) for the proposition that the Second Amendment right belongs only to the state militias, although *Cruikshank* has nothing to say about states or militias.³²⁷

Cruikshank was also cited in *dicta* in later cases as supporting the theory that the Second Amendment and the rest of Bill of Rights are not enforceable against the states³²⁸ (even though the facts of *Cruikshank* involve private actors, not state actors). That theory, obviously, has long since been abandoned by the Supreme Court. Among the earlier cases to reject non-incorporation was *DeJonge v. Oregon*, holding that the right peaceably to assemble (one of the two rights at issue in *Cruikshank*) was guaranteed by the 14th Amendment.³²⁹ And as discussed above, *Cruikshank's dicta* about the Fourteenth Amendment “Privileges and Immunities” is no more binding on modern courts than is *Presser's* statement on the same subject several years later.

B. *Scott v. Sandford*

Holding that a free black could not be an American citizen,³³⁰ the *Dred Scott* majority opinion listed the unacceptable consequences of black citizenship: Black citizens would have the right to enter any state, to stay there as long as they pleased, and within that state they could go where they wanted at any hour of the day or night, unless they committed some act for which a white person could be punished.³³¹ Further, black citizens would have “the right to . . . full liberty of speech in public and private upon all subjects which [a state's] own citizens might meet; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”³³²

Thus, Chief Justice Taney claimed that the “right to . . . keep and carry arms” (like “the right to . . . full liberty of speech,” and like the right to interstate travel without molestation, and like the “the right to . . . hold public meetings on political affairs”) was a right of American citizenship. The only logical source of these rights is the United States Constitution. While the right to travel is not textually stated in the Constitution, it has been found there by implication.³³³ As for the rest of the rights mentioned by the Taney majority, they appear to be rephrasings of explicit rights contained in the Bill of Rights. Instead of “freedom of speech,” Justice Taney discussed “liberty of speech”; instead of the right “peaceably to assemble”, he discussed the right “to hold meetings”, and instead of the right to “keep and bear arms,” he discussed the right to “keep and carry arms.”³³⁴

Although resolution of the citizenship issue was sufficient to end the *Dred Scott* case, the Taney majority decided to address what it considered to be an error in the opinion of the circuit court. Much more than the citizenship holding, the part of *Dred Scott* that created a firestorm of opposition among the northern white population was *Dred Scott's* conclusion that Congress had no power to outlaw slavery in a territory, as Congress had done in the 1820 Missouri Compromise, for the future Territory of Nebraska.³³⁵ Chief Justice Taney's treatment of the question began with the universal assumption that the Bill of Rights constrained Congressional legislation in the territories.

No one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the territory peaceably to assemble and to petition the government for redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against itself in a criminal proceeding.³³⁶

From the universal assumption that Congress could not infringe the Bill of Rights in the territories, Taney concluded that Congress could not infringe the property rights of slave-owners by abolishing slavery in the territories.³³⁷

The Taney Court obviously considered the Second Amendment as one of the constitutional rights belonging to individual Americans. The Henigan “state’s rights” Second Amendment could have no application in a territory, since a territorial government is by definition not a state government. And since Chief Justice Taney was discussing individual rights which Congress could not infringe, the only reasonable way to read the Chief Justice’s reference to the Second Amendment is as a reference to an individual right. Nor can the opinion of Chief Justice Taney (which was shared by six members of the Court on the citizenship issue, and by five on the Territories issue) be dismissed as casual dicta. The Court knew that *Dred Scott* would be one the most momentous cases ever decided, as the Court deliberately thrust itself in the raging national controversy over slavery. The case was argued in two different terms, and the Chief Justice’s opinion began by noting that “the questions in controversy are of the highest importance.”³³⁸

And unlike most Supreme Court cases, *Dred Scott* became widely known among the general population. The majority’s statement listing the right to arms as one of several individual constitutional rights which Congress could not infringe was widely quoted during antebellum debates regarding Congressional power over slavery.³³⁹

Dred Scott’s holding about black citizenship was overruled by the first sentence of the Fourteenth Amendment, which states that all persons born in the United States are citizens of the United States.³⁴⁰ *Dred Scott*, which had exacerbated rather than cooled the North-South anger which eventually caused the Civil War, became so universally despised that many people forgot the details of what the case actually said. After the Spanish-American War, the United States acquired the new territories of Cuba, Puerto Rico, and the Philippines, and acquired Hawaii after that nation’s

government was overthrown in a coup orchestrated by American farming interests. Thus, the Supreme Court, in *The Insular Cases*, was forced to determine the constitutional status of the new imperial territories.³⁴¹ In *Downes v. Bidwell*, the Court majority held that, despite the constitutional requirement that taxes imposed by Congress be uniform throughout the United States, Puerto Rico could be taxed at a different rate; Justice Henry Billings Brown's five-man majority explicitly worried that a contrary result would force the Bill of Rights to be applied in the new territories. Writing to Justice John Harlan to applaud Harlan's dissenting opinion,³⁴² a New York attorney exclaimed that the majority opinion was "the *Dred Scott* of Imperialism!"³⁴³ But if the *Insular Cases* Court had followed *Dred Scott*, then Justice Harlan and the other three dissenters would have been in the majority; for *Dred Scott* stated that the Bill of Rights did apply in the territories.

Although the citizenship holding in *Dred Scott* was so controversial that it was repudiated by a constitutional amendment, the case's treatment of the Second Amendment as an individual right was not; in each of the six times that the Court addressed the Second Amendment in the rest of the nineteenth century, the Court always treated the Second Amendment as an individual right.

C. Houston v. Moore

The very first case in which a Supreme Court opinion mentioned the Second Amendment was *Houston v. Moore*, an 1821 case so obscure that even modern scholars of the Second Amendment are often unaware of it.³⁴⁴ Part of the reason is that, thanks to a small error, the case cannot be discovered via a Lexis or Westlaw search for "Second Amendment."

The *Houston* case grew out of a Pennsylvania man's refusal to appear for federal militia duty during the War of 1812. The failure to appear violated a federal statute, as well as a Pennsylvania statute that was a direct copy of the federal statute. When Mr. Houston was prosecuted and convicted in a Pennsylvania court martial for violating the Pennsylvania

statute, his attorney argued that only the federal government, not Pennsylvania, had the authority to bring a prosecution; the Pennsylvania statute was alleged to be a state infringement of the federal powers over the militia.

When the case reached the Supreme Court, both sides offered extensive arguments over Article I, section 8, clauses 15 and 16, in the Constitution, which grant Congress certain powers over the militia.³⁴⁵ Responding to Houston's argument that Congressional power over the national militia is plenary (and therefore Pennsylvania had no authority to punish someone for failing to perform federal militia service), the State of Pennsylvania lawyers retorted that Congressional power over the militia was concurrent with state power, not exclusive.³⁴⁶ In support of this theory, they pointed to the Tenth Amendment, which reserves to states all powers not granted to the federal government.³⁴⁷

If, as Henigan, Bogus, and some other modern writers claim, the only purpose of the Second Amendment was to guard state government control over the militia, then the Second Amendment ought to have been the heart of the State of Pennsylvania's argument. But instead, Pennsylvania resorted to the Tenth Amendment to make the "state's right" argument. There are two possibilities to explain the State of Pennsylvania's lawyering. First, the Pennsylvania attorneys committed malpractice, by failing to cite the Constitutional provision that was directly on point (the Second Amendment's supposed guarantee of state government control of the militia). Instead, the Pennsylvania lawyers cited a Constitutional provision which made the state's right argument only in a general sense, rather than in relation to the militia. The other possibility is that the State of Pennsylvania lawyers were competent, and they relied on the Tenth Amendment, rather than the Second, because the Tenth guarantees state's rights, and the Second guarantees an individual right.

Justice Bushrod Washington delivered the opinion of the Court, holding that the Pennsylvania law was constitutional, because Congress had not forbidden the states to enact such laws enforcing the federal militia statute.³⁴⁸ Moreover, because Houston had never showed up for the militia muster, he had

never entered federal service; thus, Houston was still under the jurisdiction of the State of Pennsylvania.³⁴⁹ Justice William Johnson concurred; he argued that Houston could not be prosecuted for violating the federal law; accordingly, he could be prosecuted for violating the state law.³⁵⁰

The Washington and Johnson opinions, therefore, upheld a state's authority over militiaman Houston. Like the attorneys on both sides of the case, neither Justice Washington nor Justice Johnson suggested that the Second Amendment had anything to do with the case.

Justice Joseph Story, a consistent supporter of federal government authority, dissented.³⁵¹ He argued that the Congressional legislation punishing militia resisters was exclusive, and left the states no room to act.³⁵²

Deep in the lengthy dissent, Justice Story raised a hypothetical: What if Congress had not used its militia powers? If Congress were inert, and ignored the militia, could the states act? "Yes," he answered:

If, therefore, the present case turned upon the question, whether a state might organize, arm and discipline its own militia, in the absence of, or subordinate to, the regulations of congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of a like paramount authority to congress; and if not, then it is retained by the states. The fifth [sic] amendment to the constitution, declaring that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns, the reasoning already suggested.³⁵³

After acknowledging that the Second Amendment (mis)labeled the "fifth" amendment in a typo) was probably

irrelevant, Justice Story suggested that to the extent the Second Amendment did matter, it supported his position.

Justice Story's dissent is inconsistent with the Henigan/Bogus theory that Second Amendment somehow reduces Congress's militia powers. Immediately, after the Second Amendment hypothetical, Justice Story stated that if Congress actually did use its Article I powers over the militia, then Congressional power was exclusive. There could be no state control, "however small."³⁵⁴ If federal militia powers, when exercised, are absolute, then the Henigan/Bogus theory that the Second Amendment limits federal militia powers is incorrect.

The Story dissent in *Houston* does not address the issue of individual Second Amendment rights. Justice Story laid out a fuller explication of the Second Amendment in his *Commentaries on the Constitution of the United States*, and his *Familiar Exposition of the Constitution of the United States*. The *Familiar Exposition* has the longest analysis of the Second Amendment:

The next amendment is, "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.

The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a

free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.³⁵⁵

The Justice's Second Amendment is obviously an individual right, intended to prevent the tyrannical tactic of "making it an offence to keep arms." The purpose of arms possession is to facilitate a militia, and the purpose of the militia is to suppress disorder from below (in the form of riots) and from above (in the form of tyranny). In contrast to some twentieth century commentators,³⁵⁶ Justice Story shared the conventional wisdom of the nineteenth century³⁵⁷: removing a tyrannical government would not be "insurrection" but instead would be the restoration of constitutional law and order.

Conclusion

In addition to the oft-debated case of *United States v. Miller*,³⁵⁸ the Supreme Court has mentioned or quoted the Second Amendment in thirty-seven opinions in thirty-five other cases, almost always in *dicta*. One of the opinions, Justice Douglas's dissent in *Adams v. Williams*, explicitly claims that the Second Amendment is not an individual right.³⁵⁹ Three majority opinions of the Court (the 1980 *Lewis* case,³⁶⁰ the 1934 *Hamilton* case,³⁶¹ and the 1929 *Schwimmer* case³⁶²), plus one appeal dismissal (*Burton v. Sills*, 1969³⁶³), and one dissent (Douglas in *Laird*³⁶⁴) are consistent with either the individual rights or the states rights theory, although *Lewis* is better read as not supportive of an individual right, or not supportive of an individual right worthy of any serious protection. (And knowing of Justice Douglas's later dissent in *Adams*, his *Laird* dissent should not be construed as supportive of an individual right.) *Spencer v. Kemna* refers to right to bear arms as an individual right, but the opinion does not specifically mention the Second Amendment, and so the reference could, perhaps, be to the right established by state constitutions.³⁶⁵

Two other cases are complicated by off-the-bench statements of the Justices. The 1976 *Moore v. East Cleveland* plurality opinion supports the individual right,³⁶⁶ but in 1989 the opinion's author, retired Justice Powell, told a television interviewer that there was no right to own a firearm. In an 1820 dissent, Justice Story pointed to the Second Amendment to make a point about state authority over the militia (although this would not necessarily be to the exclusion of an individual right).³⁶⁷ Justice Story's later scholarly commentaries on the Second Amendment only addressed the individual right, and did not investigate the Amendment as a basis of state authority.³⁶⁸

Concurring in *Printz*, Justice Thomas stated that *United States v. Miller* had not resolved the individual rights question; the tone of the concurrence suggested that Justice Thomas considered the Second Amendment to be an important individual right.³⁶⁹

Twenty-eight opinions remain, including nineteen majority opinions. Each of these opinions treats the Second Amendment a right of individual American citizens. Of these twenty-eight opinions, five come from the present Rehnquist Court, and on the Rehnquist Court there has been no disagreement that the Second Amendment is an individual right.

Of course that fact that a right exists does not mean that every proposed gun control would violate that right; indeed, many of the opinions explicitly or implicitly endorse various controls, and, except for Justice Black, none of the authors of the opinions claim that the right is absolute.³⁷⁰

In the face of this Supreme Court record, is it accurate for gun control advocates to claim that the non-individual nature of the Second Amendment is “perhaps the most well-settled” point in all of American constitutional law?³⁷¹ The extravagant claim cannot survive a reading of what the Supreme Court has actually said about the Second Amendment. In the written opinions of the Justices of the United States Supreme Court, the Second Amendment does appear to be reasonably well-settled—as an individual right. The argument that a particular Supreme Court opinion’s language about the Second Amendment does not reflect what the author “really” thought about the Second Amendment cannot be used to ignore all these written opinions—unless we presume that Supreme Court Justices throughout the Republic’s history have written things about the Second Amendment that they did not mean.

While the Warren Court and the Burger Court offered mixed records on the Second Amendment, the opinions from the Rehnquist Court (including from the Court’s “liberals” Ginsburg and Stevens) are just as clear as were the opinions from the Supreme Court Justices of the nineteenth century: “the right of the people to keep and bear arms” is a right that belongs to individual American citizens. Although the boundaries of the Second Amendment have only partially been addressed by Supreme Court jurisprudence, the core of the Second Amendment is clear: the Second Amendment—like the First, Third, Fourth, Fifth, Sixth, and Fourteenth Amendments—belongs to “the people”, not the government.

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1. See, e.g., Sanford Lewinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts*, 1998 B.Y.U. Rev. 12

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

3. Dennis Henigan, *The Right to Be Armed: A Constitutional Illusion*, S.F. Barrister, Dec. 1989, 19, available online at <http://www.handguncontrol.org/legalaction/C2/c2rtarms.htm>. The late Dean Griswold of Harvard, who was a member of the board of Henigan's group, expressed a nearly identical thought: "that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law." Erwin N. Griswold, *Phantom Second Amendment 'Rights'*, Wash. Post, Nov. 4, 1990, at C7

4. Dennis A. Henigan et al., *Guns and the Constitution: The Myth of Second Amendment Protection for Firearms in America* (1995); 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 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107 (1991) [hereinafter Henigan, *Arms, Anarchy*]

5. Mark Polston, *Obscuring the Second Amendment*, 34 Virginia Resolves, No. 32 (Spring 1994), <http://www.handguncontrol.org/legalaction/dockets/A1/obscure.htm>.

6. Carl T. Bogus, *Race, Riots, and Guns*, 66 S. Cal. L. Rev. 1365 (1993); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998). For a response to the latter article, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU. L. Rev. 1359, 1515-29. Some other scholarly sources rejecting individual rights are: Robert J. Spitzer, *The Politics of Gun Control* (1995); George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 Loy. U.

Chi. L.J. 631, 687-93 (1992); Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 *J. Am. Hist.* 425 (1996); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 *J. Am. Hist.* 22 (1984); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 *N. Ky. L. Rev.* 141 (1982); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 *B.U. L. Rev.* 57 (1995); Michael J. Palmiotto, *The Misconception of the American Citizen's Right to Keep and Bear Arms*, 4 *J. on Firearms & Pub. Pol'y* 85 (1992); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 *Hamline L. Rev.* 383 (1983).

7. For an effort to trace the potential contours of a State's Rights Second Amendment, see Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 *Wm. & Mary L. Rev.* 1737 (1995) (arguing that a State's Rights Second Amendment would give each state legislature the power to arm its militia as it saw best, and thus the power to negate—within the borders of that state—federal bans on particular types of weapons).

8. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 *Tenn. L. Rev.* 461, 463 (1995):

Perhaps surprisingly, what distinguishes the Second Amendment scholarship from that relating to other constitutional rights, such as privacy or free speech, is that there appears to be far more agreement on the general outlines of Second Amendment theory than exists in those other areas. Indeed, there is sufficient consensus on many issues that one can properly speak of a "Standard Model" in Second Amendment theory, much as physicists and cosmologists speak of a "Standard Model" in terms of the creation and evolution of the Universe. In both cases, the agreement is not complete: within both Standard Models are parts that are subject to disagreement. But the overall framework for analysis, the questions regarded as being clearly resolved, and those regarded as still open, are all generally agreed upon. This is certainly the case with regard to Second Amendment scholarship.

9. See, e.g., Senate Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2d Sess., *The Right To Keep and Bear Arms* (Comm. Print 1982); Akhil Amar, *The Bill of Rights* (1998); Robert J. Cottrol, *Introduction to 1 Gun Control and the Constitution: Sources and Explorations on the Second Amendment* at ix (Robert J. Cottrol ed., 1993); Robert J. Cottrol &

Raymond T. Diamond, Public Safety and the Right to Bear Arms, in *The Bill of Rights in Modern America: After 200 Years* 72 (David J. Bodenhamer & James W. Ely, Jr., eds., 1993); Robert J. Cottrol, Second Amendment, in *The Oxford Companion to the Supreme Court of the United States* 763 (Kermit L. Hall et al. eds., 1992); Clayton Cramer, For the Defense of Themselves and the State at xv (1994); 4 *Encyclopedia of the American Constitution* 1639-40 (Leonard W. Levy et al. eds., 1986); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1876* (1989); Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms: 1866-1876* (1998); Stephen Halbrook, *A Right To Bear Arms: State And Federal Bills Of Rights And Constitutional Guarantees* (1989); Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984); Edward F. Leddy, Guns and Gun Control, in *Reader's Companion to American History* 477-78 (Eric Foner & John A. Garraty eds., 1991); Leonard W. Levy, Original Intent and the Framers' Constitution 341 (1988); Leonard Levy, *Origins of the Bill of Rights* (1999); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994); Laurence H. Tribe, *I American Constitutional Law* 894-903 (3d ed. 2000). Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 *Yale L.J.* 1193 (1992); Akhil Reed Amar, The Bill of Rights as a Constitution, 100 *Yale L.J.* 1131, 1164 (1991); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 *Emory L.J.* 1139, 1141 (1996); Bernard J. Bordenet, The Right to Possess Arms: The Intent of the Framers of the Second Amendment, 21 *U. West L.A. L. Rev.* 1, 28 (1990); David I. Caplan, The Right of the Individual to Bear Arms: A Recent Judicial Trend, 1982 *Det. C.L. Rev.* 789, 790; David I. Caplan, The Right to Have Arms and Use Deadly Force Under the Second and Third Amendments, 2.1 *J. on Firearms & Pub. Pol'y* 165 (1990); Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 *Geo. L.J.* 309 (1991); Brannon P. Denning, Can the Simple Cite Be Trusted?: Lower Court Interpretations of *United States v. Miller* and the Second Amendment, 26 *Cumb. L. Rev.* 961 (1995-96) [hereinafter Denning, Simple Cite]; Brannon P. Denning, Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm", 21 *Harv. J.L. & Pub. Pol'y* 719 (1998); Anthony J. Dennis, Clearing the Smoke From the Right to Bear Arms and the Second Amendment, 29 *Akron L. Rev.* 57 (1995); Robert Dowlut, Federal and State Constitutional Guarantees to Arms, 15 *U. Dayton L. Rev.* 59 (1989); Robert Dowlut, The Current

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Commonplace Second Amendment, 73 N.Y.U. L. Rev. 793 (1998); Scott Bursor, Note, Toward a Functional Framework for Interpreting the Second Amendment, 74 Tex. L. Rev. 1125 (1996); Robert J. Cottrol & Raymond T. Diamond, The Fifth Auxiliary Right, 104 Yale L.J. 995 (1995) (reviewing Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994)); Brannon P. Denning, Professional Discourse, The Second Amendment, and the “Talking Head Constitutionalism” Counterrevolution: A Review Essay, 21 S. Ill. U. L.J. 227 (1997) (reviewing Dennis A. Henigan et al., *Guns and the Constitution: The Myth of Second Amendment Protection for Firearms in America* (1996)); T. Markus Funk, Is the True Meaning of the Second Amendment Really Such a Riddle? Tracing the Historical “Origins of an Anglo-American Right”, 39 How. L.J. 411 (1995) (reviewing Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994)); David B. Kopel, It Isn't About Duck Hunting: The British Origins of the Right to Arms, 93 Mich. L. Rev. 1333 (1995) (reviewing Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994)); F. Smith Fussner, Book Review, 3 Const. Commentary 582 (1986) (reviewing Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984)); Joyce Lee Malcolm, Book Review, 54 Geo. Wash. L. Rev. 452 (1986) (reviewing Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984)); cf. Nicholas J. Johnson, Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment, 24 Rutgers L.J. 1 (1992) (arguing that the Ninth Amendment supports an individual right to arms). For a list of all law review articles of firearms policy or the Second Amendment, See David B. Kopel, Comprehensive Bibliography of the Second Amendment in Law Review, 11 J. Firearms & Pub. Pol. 5 (1999), <http://www.Saf.org/ALLLawReviews.htm>.

10. The nineteenth century scholars were (in roughly chronological order): St. George Tucker; William Rawle; Joseph Story (see *infra* text at note 354); Henry St. George Tucker; Benjamin Oliver; James Bayard; Francis Lieber; Thomas Cooley (see note 25 *infra*); Joel Tiffany; Timothy Farrar; George W. Paschal; Joel Bishop; John Norton Pomeroy; Oliver Wendell Holmes, Jr.; Herbert Broom; Edward A. Hadley; Hermann von Holst; John Hare; George Ticknor Curtis; John C. Ordronaux; Samuel F. Miller; J.C. Bancroft Davis; Henry Campbell Black; George S. Boutwell; James Schouler; John Randolph Tucker; and William Draper Lewis. They are discussed in

detail in David B. Kopel, *The Second Amendment in the 19th Century*, 1998 *BYU. L. Rev.* 1359.

11. Garry Wills, *Why We Have No Right to Bear Arms*, N.Y. Rev. Books, Sept. 21, 1995 at 62, 72.

12. See David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *Yale L.J.* 551 (1991); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 *Cornell L. Rev.* 879 (1996); David C. Williams, *The Unitary Second Amendment*, 73 *N.Y.U. L. Rev.* 822 (1998).

13. *See, e.g.*, *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) (“the Second Amendment is a right held by the states”); *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988) (“Later cases have analyzed the Second Amendment purely in terms of protecting state militias, rather than individual rights.”); *Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (upholding city’s ban on handguns; “the debate surrounding the adoption of the Second and Fourteenth Amendments. . . has no relevance to the resolution of the controversy before us”); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (“it is clear that the Second Amendment guarantees a collective rather than an individual right”); *Eckert v. Philadelphia*, 477 F.2d 610 (3d Cir. 1973); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971) (“the Second Amendment only confers a collective right of keeping and bearing arms”); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (“not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations”), *rev’d on other grounds*, 319 U.S. 463 (1943).

14. *See, e.g.*, *Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156 n. 8 (4th Cir. 1997) (en banc, plurality opinion) (“Neither gathering in a group nor carrying a firearm are one of the major life activities under the ADA [Americans with Disabilities Act], though individuals have the constitutional right to peaceably assemble, *see* U.S. CONST. amend. I; and to ‘keep and bear Arms,’ U.S. CONST. amend. II.”); *United States v. Atlas*, 94 F.3d 447, 452 (8th Cir. 1996) (Arnold, C.J., dissenting) (“possession of a gun, in itself, is not a crime. [Indeed, though the right to bear arms is not absolute, it finds explicit protection in the Bill of Rights.]”); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942) (federal law restricting gun possession by persons under indictment “undoubtedly curtails to some extent the right of individuals to keep and bear arms.” *Miller* test rejected because it would prevent federal government from

restricting possession of machine guns by “private persons.”); *United States v. Emerson*, 46 F. Supp.2d 598 (N.D. Tex. 1999) (dismissing criminal prosecution of defendant for violation of 18 U.S.C. 922(g)(8) because the provision violates the Second Amendment; case presents the most thorough exposition of the competing views of the Second Amendment ever presented in a federal court decision); *Zappa v. Cruz*, 30 F. Supp. 2d 123, 138 (D. P.R. 1998):

These individual liberties, aside from abridging the governments’ ability to impose upon individual citizens—e.g., by protecting freedom of religion, prohibiting the quartering of troops and the taking [of] property for public use without compensation, and guaranteeing due process of law—enhance the citizenry’s ability to police the government—e.g., by protecting speech, press, the right to assemble, and the right to bear arms.

See also *United States v. Gambill*, 912 F. Supp. 287, 290 (S.D. Ohio 1996) (“an activity, such as keeping and bearing arms, that arguably implicates the Bill of Rights.”); *Gilbert Equipment Co. v. Higgins*, 709 F. Supp. 1071, 1090 (S.D. Ala. 1989) (Second Amendment “guarantees to all Americans ‘the right to keep and bear arms’”, but the right is not absolute and it does not include right to import arms), *aff’d* 894 F.2d 412 (11th Cir. 1990) (mem.).

15. *See* Denning, *Simple Cite*, *supra* note 9.

16. *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939) (sustaining demurrer to prosecution, because “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 providing, ‘A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.’”)

17. Since a federal statute had been found unconstitutional, the federal government was allowed to take the case directly to the Supreme Court, under the law of the time.

18. *See* L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1331 (1997), *supra* note 10.

19. *Miller*, 307 U.S. at 177.

20. *See, e.g.*, *English v. State*, 24 Tex. 394, 397 (1859); *Cockrum v. State*, 24 Tex. 394, 397 (1859). A typical formulation is found in the West Virginia case *State v. Workman*, which construed the Second Amendment to protect an individual’s right to own:

the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State.

State v. Workman, 35 W. Va. 367, 372 (1891).

21. Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840).

22. *Id.* at 158.

23. *Miller*, 307 U.S. at 182.

24. *Presser v. Illinois*, 116 U.S. 252 (1886) (Second Amendment not violated by ban on armed parade; *see infra* text at notes 310-20); *Robertson v. Baldwin*, 165 U.S. 275 (1897) (Second Amendment not violated by ban on carrying concealed weapons, *see infra* text at notes 290-96); *Fife v. State*, 31 Ark. 455 (Second Amendment does not apply to the states; state right to arms not violated by ban on brass knuckles); *People v. Brown*, 253 Mich. 537, 235 N.W. 245 (1931) (Michigan state constitution right to arms applies to all citizens, not just militiamen; right is not violated by ban on carrying blackjacks); *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840) (Tennessee state constitution right to arms and U.S. Second Amendment right belong to individual citizens, but right includes only the types of arms useful for militia service); *State v. Duke*, 42 Tex. 455 (1874) (Second Amendment does not directly apply to the states; Texas constitution protects “arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State.”); *State v. Workman*, *supra* note 20.

25. “COOLEY’S CONSTITUTIONAL LIMITATIONS, VOL. 1, p. 729”:

Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms. A standing army is particularly obnoxious in any free government, and the jealousy of one has at times been demonstrated so strongly in England as almost to lead to the belief that a standing army recruited from among themselves was more dreaded as an instrument of oppression than a tyrannical king, or any foreign power. So impatient did the English people become of the very army which liberated them from the tyranny of James II, that they demanded its reduction, even before the liberation could be felt to be complete; and to this day, the British Parliament renders a standing army practically impossible by only passing a mutiny bill from session to session. The alternative to

a standing army is “a well-regulated militia,” but this cannot exist unless the people are trained to bear arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been little occasion to discuss that subject by the courts.

In a later treatise, Cooley elaborated on how the right to arms ensures the existence of the militia:

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

THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 281-82 (Boston, Little, Brown 2d ed. 1891).

The other scholar cited in the *Miller* footnote is “Story on The Constitution, 5th Ed., Vol. 2, p. 646”:

The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong

disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed, without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.

For more on Justice Story, see text at notes 351 to 355, *infra*.

26. *Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905) (right to arms in Kansas Bill of Rights is only an affirmation of the state government's supremacy over the militia; the Second Amendment means the same). Another cited case, *Jeffers v. Fair*, 33 Ga. 347 (1862), is a Confederate draft case.

27. *Infra* text at note 280.

28. One reason for the neglect of the cases may be mistaken claims that the cases do not exist. "Issue Brief" on the Handgun Control, Inc. website claims, "Since *Miller*, the Supreme Court has addressed the Second Amendment in two cases." Actually, there have been 19 such cases after *Miller*. *The Second Amendment*, <http://www.handguncontrol.org/myth.htm>.

29. That the Court has discussed the Second Amendment relatively rarely, compared to the First or Fourth Amendments, does not necessarily mean that the Second Amendment is unimportant. Until recent decades, there was almost no federal gun control to speak of (except for the 1934 National Firearms Act, which was upheld in *Miller*). That Congress hardly ever passed legislation which arguably infringed the Second Amendment (and which would generate a challenge invoking judicial review) is itself proof of the Second Amendment's influence. "A principle of law is not unimportant because we never hear of it; indeed we may say that the most efficient rules are those of which we hear least, they are so efficient that they are not broken." FREDERIC W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 481-82 (11th ed.) (Cambridge: Cambridge Univ. Pr., 1948).

Similarly, the Third Amendment has received little attention from the Court, but that is not because the Third Amendment can be violated with impunity; to the contrary, the Third Amendment has needed little discussion because it has been universally respected, and, except in one case, never violated. *Engblom v. Carey*, 677 F. 2d 957 (2d Cir. 1982), *on remand*, 572 F. Supp. 44 (S.D. N.Y. 1983), *aff'd. per curiam*, 724 F.2d 28 (2d Cir. 1983).

30. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2050 (1994) ("All the words used by a court to explain its result

contribute to its justification, and parsing the opinion into holding and dictum attributes a degree to precision to the enterprise of judicial decision-making that it lacks in actual practice.”)

31. *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) (“These decisions do not justify today’s decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum, and finally elevated to a decision.”).

32. The technique of using broader context to understand isolated statements is not unique to analysis of Supreme Court cases. Biblical scholars, for example, often refer to many different parts of the Bible in order to explain a passage which is confusing or ambiguous in isolation.

Because this article is only about the Second Amendment, it does not analyze Supreme Court cases involving gun control or the militia in which the Second Amendment was not mentioned

33. Handgun Control, Inc., *The Second Amendment Myth & Meaning* <<http://www.handguncontrol.org/legalactiona/C2/C2ambro.htm>>:

How many times have you heard an opponent of gun control cite the “right to keep and bear arms” without mentioning the introductory phrase “A well regulated Militia, being necessary to the security of a free state. . .”? In fact, some years ago, when the NRA placed the words of the Second Amendment near the front door of its national headquarters in Washington, D.C., it omitted that phrase entirely!

The NRA’s convenient editing is not surprising; the omitted phrase is the key to understanding that the Second Amendment guarantees only a limited right that is not violated by laws affecting the private ownership of firearms.

34. See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

35. R.I. CONST. art. I, § 20 (1842).

36. N.H. CONST. pt. I, art. XXXVI (1784).

37. Volokh, *supra* note 35, at 810.

38. *Spencer v. Kemna*, 523 U.S. 1, 4 (1998).

39. *Id.* at 5.

40. *Id.* at 10.

41. *Id.* at 36. (Stevens, J., dissenting).

42. *Id.* (emphasis added). Numerous state and federal statutes outlaw firearms possession by persons convicted of felonies or certain misdemeanors. Generally speaking, the federal prohibitions are broader than their state counterparts.

43. Alabama: "That every citizen has a right to bear arms in defense of himself and the state." ALA. CONST. art. 1, § 26.

Alaska: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." ALASKA CONST. art. 1, § 19.

Arizona: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." ARIZ. CONST. art. II, § 26.

Arkansas: "The citizens of this State shall have the right to keep and bear arms for their common defense." ARK. CONST. art. II, § 5.

Colorado: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." COLO. CONST. art. II, § 13.

Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." CONN. CONST. art. I, § 15.

Florida: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." FLA. CONST. art. I, § 8.

Georgia: "The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § 1, para. 5.

Hawaii: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." HAWAII CONST. art. 1, § 15.

Idaho: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the

confiscation of firearms, except those actually used in the commission of a felony.” IDAHO CONST. art. 1, § 11.

Illinois: “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.

Indiana: “The people shall have a right to bear arms, for the defense of themselves and the State.” IND. CONST. art. I, § 32.

Kansas: “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.” KAN. CONST., Bill of Rights, § 4.

Kentucky: “All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.” KY. CONST. § I, para. 7.

Louisiana: “The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.” LA. CONST. art. 1, § 11.

Maine: “Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned.” ME. CONST. art. I, § 16.

Massachusetts: “The people have a right to keep and bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.” MASS. CONST. Pt. I, art. xvii.

Michigan: “Every person has a right to keep or bear arms for the defense of himself and the State.” MICH. CONST. art. I, § 6.

Mississippi: “The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.” MISS. CONST. art. III, § 12.

Missouri: “That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this

shall not justify the wearing of concealed Weapons.” MO. CONST. art. 1, § 23.

Montana: “The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.” MONT. CONST. art. II, § 12.

Nebraska: “All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.” NEB. CONST. Art. I, § 1.

Nevada: “Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.” NEV. CONST. art. 1, § 11(1).

New Hampshire: “All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the State.” N.H. CONST. Pt. I, art. 2a.

New Mexico: “No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons.” N.M. CONST. art. II, § 6.

North Carolina: “A well regulated militia being necessary to be the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.” N.C. CONST. art. I, § 30.

North Dakota: “All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for

lawful hunting, recreational, and other lawful purposes, which shall not be infringed.” N.D. CONST. Art. I, § 1.

Ohio: “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.” OHIO CONST. art. I, § 4.

Oklahoma: “The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.” OKLA. CONST. art. 11, § 26.

Oregon: “The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.” OR. CONST. art. I, § 27.

Pennsylvania: “The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.” PA. CONST. art. I, § 21.

Rhode Island: “The right of the people to keep and bear arms shall not be infringed.” R.I. CONST. art. 1, § 22.

South Carolina: “A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. 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 the manner prescribed by law.” S.C. CONST. art. I, § 20.

South Dakota: “The right of the citizens to bear arms in defense of themselves and the state shall not be denied.” S.D. CONST. art. VI, § 24.

Tennessee: “That the citizens of this State have a right to keep and bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.” TENN. CONST. art. I, § 26.

Texas: “Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.” TEX. CONST. art. 1, § 23.

Utah: “The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing

herein shall prevent the legislature from defining the lawful use of arms.” UTAH CONST. art. 1, § 6.

Vermont: “That the people have a right to bear arms for the defence of themselves and the State-and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.” VT. CONST. Ch. I, art. 16.

Virginia: “That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.” VA. CONST. art. I, § 13.

Washington: “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of Men.” WASH. CONST. art. I, § 24.

West Virginia: “A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.” W. VA. Art. III, § 22.

Wisconsin: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” WIS. CONST. Art. I, § 25.

Wyoming: “The right of citizens to bear arms in defense of themselves and of the state shall not be denied.” WYO. CONST. art. I, § 24.

In addition, New York State’s Civil Right Law has a statutory provision which is a word for word copy of the Second Amendment. N.Y. CIV. RIGHTS § 4.

44See *United States v. Thompson/Center Arms Co.*, 504 U.S. 505,526 (1992); *Printz v. United States*, 521 U.S. 898 (1997) (Stevens, J., dissenting); *United States v. Lopez*, 512 U.S. 1286 (1994) (Stevens, J., dissenting).

45. Contrast Justice Stevens’ view with that of Justice Blackmun in the *Lewis* case, *infra* notes 94-113; the Blackmun opinion suggests that the right to arms is so unimportant that a person may be imprisoned for the exercise of that right after conviction of a crime—even if the conviction is concededly unconstitutional.

46. 18 U.S.C. § 924(c)(1).

47. *United States v. Muscarello*, 524 U.S. 125 (1998).

48. Justice Scalia has not written an opinion on the Second Amendment, but he has expressed his views out of court:

So also, we value the right to bear arms less than did the Founders (who thought the right to self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may . . .like elimination of the right to bear arms; but let us not pretend that these are not reductions of rights.

ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 43 (1997).

49. *Muscarello*, 524 U.S. at 139-50 (Ginsburg, J., dissenting).

50. *Id.* (footnotes omitted).

51. First: “[t]o support; to sustain; as, to *bear* a weight or burden”
Second: “To carry; to convey; to support and remove from place to place”. 3: “[t]o wear; to bear as a mark of authority or distinction; as, to *bear* a sword, a badge, a name; to *bear* arms in a coat.” NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828) (emphasis in original).

52. Volokh, *supra* note 35, at 810.

53. *Id.*

54. Garry Wills, *Why We Have No Right to Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62.

55. *Id.*

56. *Id.* at 64.

57. During the Senate Judiciary Committee hearings on Ruth Bader Ginsburg’s nomination to the Supreme Court, Senator Dianne Feinstein (a strong supporter of gun prohibition) asked Mrs. Ginsburg about the Second Amendment. Mrs. Ginsburg politely refused to say anything, except that the Amendment had not been incorporated.

Sen. Feinstein:

Let me begin with the Second Amendment. I first became concerned about what does the Second Amendment mean with respect to guns in 1962 [sic] when President Kennedy was assassinated. . .

Judge Ginsburg:

Senator Feinstein, I can say on the Second Amendment only what I said earlier, the one thing that the court has held, that it is not

incorporated in the Bill of Rights [sic, 14th Amendment], it does not apply to the states. The last time the Supreme Court spoke to this question is in 1939. You summarized what that was and you also summarized the state of law in the lower courts. But this is a question that may well be before again, and all I can do is to acknowledge what I understand to be the current case law, that this is not incorporated in—that this is not one of the provisions binding on the states. The last time the Supreme Court spoke to it is in 1939, and because of where I sit, it would be inappropriate for me to say anything more than that. I would have to consider, as I've said many times today, the specific case, the briefs and the arguments that would be made, and it would be injudicious for me to say anything more with respect to the Second Amendment.

. . . .

Sen. Feinstein:

[C]ould you talk at all about the methodology you might apply, what factors you might look at in discussing Second Amendment cases should Congress, say, pass a ban on assault weapons?

Judge Ginsburg:

I wish I could, Senator, but all I can tell you is that this is an amendment that has not been looked at the by the Supreme Court since 1939, and it—apart from the specific context, I can't—I really can't expound on it. It's an area of law in which my court has had no business and one I had no acquaintance as a law teacher. So really feel that I'm not equipped beyond what I already told you, that it isn't an incorporated amendment. The Supreme Court has not dealt with it since 1939. And I would proceed with the care I would give to any serious constitutional question.

At Justice Breyer's confirmation hearing, Senator Feinstein raised similar issues. He answered:

As you recognize, Senator, the Second Amendment does—is in the Constitution. It provides a protection. As you also have recognized, the Supreme Court law on the subject is very, very, very few cases. This really hasn't been gone into in any depth by the Supreme Court at all. Like you, I've never heard anyone even argue that there's some kind of constitutional right to have guns in a school. And I know that every day—not every day; I don't want to exaggerate—but every week or every month for the last 14 years I've sat on case after case in which Congress has legislated rules, regulations, restrictions of all kinds on weapons.

That is to say there are many, many circumstances in which carrying weapons of all kinds is punishable by very, very, very severe

penalties. And Congress often—I mean by overwhelming majorities—has passed legislation imposing very severe additional penalties on people who commit all kinds of crimes with guns, even various people just possessing guns under certain circumstances.

And in all those 14 years, I've never heard anyone seriously argue that any of those was unconstitutional in a serious way. I shouldn't say never, because I don't remember every case in 14 years.

So, obviously, it's fairly well conceded across the whole range of society, whatever their views about gun control legislatively and so forth that there's a very, very large area for government to act. At the same time, as you concede and others, there's some kind of protection given in the Second Amendment.

Now that's, it seems to me, where I have to stop, and the reason that I have to stop is we're in a void in terms of what the Supreme Court has said. There is legislation likely to pass or has recently passed that will be challenged, and therefore I, if I am on that Court, have to listen with an open mind to the arguments that are made in the particular context.

Sen. Feinstein:

Well, would you hold that the 1939 decision [*Miller*] is good law?

Justice Breyer:

I've not heard it argued that it's not, but I haven't reviewed the case and I don't know the argument that would really come up. I know that it's been fairly limited, what the Supreme Court has said. And I know that it's been fairly narrow. I also know that other people make an argument for a somewhat more expanded view. But nobody that I've heard makes the argument going into these areas where there is quite a lot of regulation already. I shouldn't really underline no one, because you can find, you know, people who make different arguments. But it seems there's a pretty broad consensus there.

Sen. Feinstein:

Would you attach any significance to the framers of the Second Amendment, where it puts certain things in capital letters?

Justice Breyer:

I'm sure when you interpret this you do go back from the text to the history and try to get an idea of what they had in mind. And if there is a capital letter there, you ask why is there this capital letter there, somebody had an idea, and you read and try to figure out what the importance of that was viewed at the time and if that's changed over time.

Sen. Judiciary Comm., Confirmation Hearing for Stephen Breyer, July 13, 1994, Federal News Service Lexis library.

58. *Printz v. United States*, 521 U.S. 898 (1997)

59. *Id.* at 937 (Thomas, J., concurring).

60. The Civil Rights Act of 1964 used the interstate commerce power to regulate parties to commercial transactions, such as hotel or restaurant guests and owners. But the Brady Act attempted to expand the interstate commerce power even further, by forcing third parties to become involved in the commercial transaction. The Brady Act commandeered local sheriffs and police to perform background checks on a commercial act—the retail sale of a handgun. It was as if the Civil Rights Act had compelled state and local government employees to serve as race sensitivity mediators in hotel and restaurants. It was one thing to use the interstate commerce power to regulate commerce. It is another thing use that power to force people who are stranger to the commercial transaction to get involved. See David B. Kopel, *The Brady Bill Comes Due: The Printz Case and State Autonomy*, GEO. MASON UNIV. CIV. RIGHTS L.J. 189 (1999).

61. *Printz*, 521 U.S. at 937-38 (Thomas, J., concurring).

62. *Id.*

63. In contrast to the suggestion that the Bill of Rights might “confer” the right to bear arms, the Supreme Court in the 1875 case of *United States v. Cruikshank* stated that the Second Amendment, like the First Amendment, does not confer rights on anyone. Rather, those Amendments simply *recognized* and protected pre-existing human rights. See text at notes 321 to 328.

64. *Printz*, 521 U.S. at 938-39 (Thomas, J., concurring).

65. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

66. *Printz*, 521 U.S. at 938 (Thomas, J., concurring).

67. See *Robertson v. Denver*, 874 P.2d 325 (Colo. 1994); *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993). For a discussion of these cases, see David Kopel, Clayton Cramer & Scott Hattrup, *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177 (1995).

68. *Printz*, 521 U.S. at 938-39 (Thomas, J., concurring).

69. *Id.*

70. *Id.* at 939 (citing 3 J. STORY, COMMENTARIES § 1890, p. 746 (1833)).

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

72. *Printz*, 521 U.S. at 939 (Thomas, J., concurring). See note 9 *supra*.

73. See *Adamson v. California*, 332 U.S. 46, 78 (Black, J., dissenting).

74. See Levinson, *supra* note 9.

75. *Albright v. Oliver*, 510 U.S. 266 (1994). The only evidence against the person falsely accused came from a paid informant who had provided false information more than 50 times before. *Id.* at 292 (Stevens, J., dissenting). For more on the degradation of law enforcement caused by over-reliance on informants, especially in drug and gun cases, see generally David B. Kopel and Paul H. Blackman, *The Unwarranted Warrant: The Waco Warrant and the Decline of Law Enforcement*, 18 *HAMLIN J. PUB. L. & POL.* 1 (1999).

76. *Albright*, 510 U.S. at 274-275.

77. *Id.* at 306-08 (Stevens, J., dissenting).

78. *Id.* at 307 (Stevens, J., dissenting) (footnote marker omitted) (emphasis added).

79. *Poe v. Ullman*, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting).

80. See discussions of *Planned Parenthood v. Casey*, *infra* text at notes 82-84; *Moore v. East Cleveland*, *infra* text at notes 115-36; *Roe v. Wade*, *infra* text at notes 146-53.

81. *Infra* note 180.

82. *Planned Parenthood v. Casey*, 505 U.S. 833, 848-49 (1992).

83. *Id.* at 841.

84. *Infra* at notes 200 to 204.

85. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

86. The evidence was some of Verdugo-Urquidez's personal papers. Under the original intent of the Fourth and Fifth Amendments, the seizure of such papers would be seen as particularly inappropriate. The English government's use of diaries and other personal papers in prosecution of dissidents was widely regarded in America as one of the great outrages of British despotism. See AKHIL AMAR, *THE BILL OF RIGHTS* 65-67 (1998). Under *Boyd v. United States*, the Court affirmed that private papers could not be introduced against a defendant, because the use of such papers would violate the Fourth and Fifth Amendments. *Boyd v. United States*, 116 U.S. 616 (1886). Unfortunately, a later Supreme Court abandoned this rule; thus, Independent Counsel Kenneth Starr was well within the letter of the law when his staff subpoenaed and read the diaries of Monica Lewinsky and her friends.

87. *Verdugo-Urquidez*, 494 U.S. at 265.

88. *Verdugo* is of course a Fourth Amendment case, not a Second Amendment case. But there is no reason to believe that the Court did not mean what it said about the Second Amendment in *Verdugo*.

Oddly, some of the same persons who want the public to ignore what the Supreme Court said about the Second Amendment in the *Verdugo* case instead want the public to rely on what a retired justice said about the Second Amendment in a forum with much less precedential value than a Supreme Court decision or a law journal: an article in *Parade* magazine.

While on the Supreme Court, Chief Justice Warren Burger never wrote a word about the Second Amendment. After retirement, he wrote an article for *Parade* magazine that is the only extended analysis by any Supreme Court Justice of why the Second Amendment does not guarantee an individual right. Warren Burger, *The Right to Bear Arms*, *PARADE*, Jan. 14, 1990, at 4-6.

Chief Justice Burger argued that the Second Amendment is obsolete because we “need” a large standing army, rather than a well-armed citizenry. But the notion that constitutional rights can be discarded because someone thinks they are obsolete is anathema to a written Constitution. If a right is thought “obsolete,” the proper approach is to amend the Constitution and remove it. After all, the Seventh Amendment guarantees a right to a jury trial in all cases involving more than twenty dollars. U.S. CONST. amend. VII. In 1791, twenty dollars was a lot of money; today it is little more than pocket change. Nevertheless, courts must (and do) enforce the Seventh Amendment fully.

And while the Second Amendment certainly drew much of its original support from fear of standing armies, its language is not limited to that issue. “Legislation, both statutory and constitutional, is enacted, . . . from an experience of evils. . . its general language should not, therefore, be necessarily confined to the form that evil had heretofore taken. . . [A] principle to be vital must be capable of wider application than the mischief which gave it birth.” *Weems v. United States*, 217 U.S. 349, 373 (1910).

Yet after attacking the Second Amendment as obsolete, Chief Justice Burger’s essay affirmed that “Americans have a right to defend their homes.” If this right does not derive from the Second Amendment, does it come from the Ninth Amendment, as Nicholas Johnson has argued? See Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 *RUTGERS L.J.* 1, 49 (1992). The Burger essay does not say.

Next comes the real shocker: “Nor does anyone seriously question that the Constitution protects the right of hunters to own and keep sporting guns for hunting game any more than anyone would challenge the right to own and keep fishing rods and other equipment for fishing—or to own automobiles.”

In a single sentence, the former Chief Justice asserts that three “Constitutional rights”—hunting, fishing, and buying cars—are so firmly guaranteed as to be beyond question. Yet no Supreme Court case has ever held any of these activities to be Constitutionally protected.

What part of the Constitution protects the right to fish? The 1776 Pennsylvania Constitution guaranteed a right to fish and hunt, and the minority report from the 1789 Pennsylvania ratifying convention made a similar call. Various common law sources (such as St. George Tucker’s enormously influential American edition of Blackstone) likewise support hunting rights. 3 WILLIAM BLACKSTONE, COMMENTARIES 414 n.3 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803). And some state Constitutions guarantee a right to arms for hunting, among other purposes. *See, e.g.*, the state constitutions of New Mexico, Nevada, West Virginia, and Wisconsin, *supra* note 43.

But the Supreme Court has never recognized such a right, and its lone decision on the subject is to the contrary. *Patson v. Pennsylvania*, 232 U.S. 138 (1914) (ban on possession of hunting guns by aliens is legitimate, because the ban does not interfere with gun possession for self-defense; the Court did not discuss the Second Amendment).

Similarly, the “right” to own automobiles could, arguably, be derived from the right to interstate travel but it is hardly a settled matter of law, despite what the Chief Justice seemed to say.

Chief Justice Burger contrasted “recreational hunting” guns with “Saturday Night Specials” and “machine guns,” implying that the latter two are beyond the pale of the Constitution. Thus, according to the *Parade* essay, some unidentified part of the Constitution (but not the Second Amendment) guarantees a right to own guns for home defense, a right to own hunting guns, a right to fishing equipment, and a right to buy automobiles. But the Constitution does not guarantee the right to own inexpensive handguns or machine guns.

Chief Justice Burger’s “machine gun” comment was particularly odd in light of what he was pictured holding on the front cover of *Parade*: an assault weapon. The Chief Justice displayed his grandfather’s rifled musket, with which his grandfather had killed or

attempted to kill people during the Civil War. While the musket seems quaint and non-threatening today, it was a state of the art assault weapon in its time. Under the *Miller* test (arms suitable for militia use; see *supra* text at note 19), the nineteenth century rifled musket and the twentieth century machine gun would seem to be much closer to the core of the Second Amendment than would “recreational hunting guns.”

After writing the *Parade* essay, Chief Justice Burger participated in an advertising campaign for Handgun Control, Inc., in which he called the NRA’s view of the Second Amendment “a fraud.” Given that the Chief Justice *agreed* with the NRA that the Constitution protects a right to own home defense guns and recreational sporting guns, and disagreed with the NRA about “Saturday Night Specials,” the “fraud” rhetoric was rather extreme. Was it reasonable to call the NRA fraudulent for locating the right in the Second Amendment, as opposed to the other (unknown) part of the Constitution that the Chief Justice would prefer?

89. *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J., dissenting).

90. Handgun Control explains *Verdugo* thusly:

But the issue of whether the right to bear arms is granted to “the people” only in connection with militia service is not even addressed in the *Verdugo-Urquidez* decision. At most, the decision implies that the Second Amendment right extends only to U.S. citizens; it does not address the precise scope of the right granted. In no way does the Court’s ruling contradict the idea that the right of the people to bear arms is exercised only through membership in a “well regulated Militia.”

Handgun Control, *Exploding the NRA’s Second Amendment Ideology: A Guide for Gun Control Advocates*, <http://www.handguncontrol.org/legalaction/C2/C2myth.htm>. Here, Henigan is apparently adopting an alternative theory of the Second Amendment. Rather than the Second Amendment guaranteeing a right to state governments (as Henigan claimed in his law review articles), the Second Amendment is now a right that does belong to people (rather than to state governments), but this right only applies to people in a well-regulated militia. This is also the view of Herz. See generally Herz, *supra* note 6. But neither Henigan nor Herz explain what this right might mean. Does a National Guardsman have a legal cause of action when the federal government takes away his rifle? Even though the rifle is owned by the federal government? See 32 U.S.C. § 105(a)(1).

If a disarmed National Guardsman does not have a cause of action, then who else could exercise the Second Amendment right to be armed in “a well-regulated militia”? The fundamental problem with Henigan’s theories (and with those of his followers) is that the theories are not meant as an actual explanation of anything. They are meant to convince people that the Second Amendment places no restraint on gun control, but the theories are not meant to describe what the Second Amendment *does* protect.

91. *United States v. Verdugo-Urquidez*, 856 F. 2d 1214, 1239 (9th Cir. 1988) (Wallace, J., dissenting), *rev’d* 494 U.S. 259 (1990) (“Besides the fourth amendment, the name of ‘the people’ is specifically invoked in the first, second, ninth, and tenth amendment. Presumably, ‘the people’ identified in each amendment is coextensive with ‘the people’ cited in the other amendments.”)

92. 494 U.S. 259 (1990).

93. *Lewis v. United States*, 445 U.S. 55 (1980).

94. 18 U.S.C. App. § 1202(a)(1).

95. *Lewis*, 445 U.S. at 57-58.

96. *Id.* (citing *Gideon v. Wainright*, 372 U.S. 335 (1963)).

97. *Gideon v. Wainright*, 372 U.S. 335, 345 (1963).

98. *Lewis*, 445 U.S. at 62-63 (citing 114 CONG. REC. 14773 (1968)).

99. *Id.* at 62.

100. *Powell v. Alabama*, 287 U.S. 45 (1932).

101. *Lewis*, 445 U.S. at 69 (Brennan, J., dissenting).

102. *Id.* at 66.

103. *Id.* at 65-66, n. 8

104. *Printz v. United States*, 521 U.S. 898 (1997)

105. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (statutory interpretation case holding that a handgun and rifle kit was not subject to a National Firearms Act tax applicable to short rifles; that a buyer could illegally assemble certain parts to create a short rifle did not bring the lawful sale of rifle and handgun components within the terms of the tax statute).

106. STEPHEN HALBROOK, FIREARMS LAW DESKBOOK 1-11 to 1-12 (1999 ed.)

107. *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 363 F. Supp. 322, 323 (E.D. Wis. 1973).

108. *Cody v. United States*, 460 F.2d 34 (8th Cir. 1972).

109. As in this quote from *Cody*, the First Circuit’s 1943 *Cases* decision is sometimes cited as a lower court following *Miller*. See

Cases v. United States, 131 F.2d 916 (1st Cir. 1942). To the contrary, *Cases* limits *Miller* to its facts, and refuses to apply the *Miller* relationship-to-the-militia test. The *Miller* test, explained the *Cases* judges, would allow “private citizens” to possess machine guns and other destructive weapons. *Cases* upholds a federal gun control law while acknowledging that the law limits the exercise of Second Amendment rights.

110. *Cody*, 460 F.2d at 36.

111. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

112. *See, e.g., Miller*, 307 U.S. at 178.

113. *See, e.g., Cockrum v. State*, 24 Tex. 394, 397 (1859).

114. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840) (right to arms is for defense against tyranny, not for “private” defense; while “The citizens have the unqualified right to *keep* the weapon”, the legislature can restrict the carrying of firearms) (emphasis in original).

115. *Moore v. East Cleveland*, 431 U.S. 494, 495-96 (1976).

116. *Id.* at 505-06.

117. *Id.* at 496-97.

118. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

119. *Albright v. Oliver*, 510 U.S. 266, 306-08 (1994) (Stevens, J., dissenting).

120. *Moore*, 431 U.S. at 502.

121. *Id.* at 542 (White, J., dissenting).

122.1 Wm. & Mary sess. 2, ch. 2 (1689); see also MALCOLM, *supra* note 9.

123. EUGENE VOLOKH, SOURCES ON THE SECOND AMENDMENT AND RIGHTS TO KEEP AND BEAR ARMS IN STATE CONSTITUTIONS, pt. I <<http://www.law.ucla.edu/faculty/volokh/2amteach/sources.htm#TOCI>>; DAVID YOUNG, THE ORIGIN OF THE SECOND AMENDMENT (1991).

124. *See* YOUNG, *supra* note 123.

125. *Buzzard v. State*, 20 Ark. 106 (1842).

126. Kopel, *The Second Amendment in the 19th Century*, *supra* note 10.

127. GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL (1997).

128. The dominant line of traditional cases limits the scope of “arms” protected by the Second Amendment to arms which an individual could use in a militia; in the nineteenth century, rifles and

swords were the paradigm of such weapons. Kopel, *The Second Amendment in the 19th Century*, *supra* note 10. A minority line of cases goes further, and protects weapons which could be useful for personal defense, even if not useful for militia service. *See, e.g.*, *State v. Kessler*, 614 P.2d 94 (Or. 1980) (billy club); *State v. Delgado*, 692 P.2d 610 (Or. 1984) (switchblade knife).

129. In one state, Massachusetts, the highest court has construed the right as belonging to the state government, rather than to individuals. *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (1976). But see *Commonwealth v. Murphy* 166 Mass. 171, 44 N.E. 138 (1896). In Kansas, a 1905 case held that the right in the state constitution belonged to the state government, and not to the people. *City of Salinas v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905) This holding was implicitly rejected in a later case. *Junction City v. Mevis*, 226 Kan. 526, 601 P.2d 1145 (1979).

130. JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS*. (Univ. of Chicago Press, 1998).

131. Vermont and Idaho (outside Boise, where a permit is required and readily obtainable).

132. AKHIL AMAR, *THE BILL OF RIGHTS 77-78* (1998).

133. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

134. *Moore*, 431 U.S. at 502.

135. "With respect to handguns . . . it is not easy to understand why the Second Amendment, or the notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking numbers of murders in the United States." American Bar Association Speech, Toronto, Canada, Aug. 7, 1988.

136. *The MacNeil/Lehrer NewsHour*, Mar.16, 1989, trans. no. #3389, Lexis Transcripts library:

MR. LEHRER: Another issue that was before the court and is still before the nation as we go into a new year is the subject of gun control. You have said that the constitution does not guarantee the right to bear arms. Explain that.

JUSTICE POWELL: Have you read the second amendment?

MR. LEHRER: Well, I think I have but be my guest.

JUSTICE POWELL: Well, it talks about militia. In the days that the amendment was adopted in 1791, each state had an organized militia. The states distrusted the national government, didn't believe a national government had the authority or the ability to protect their liberties, so the militia was a very important factor to the states. This court decided a case that I haven't seen decided, I'm not a hundred

percent sure, I think it was the United States against Miller decided back in the late 30's, in which the question involved a sawed off shot gun. I won't go into the details of the opinion, but in essence, there's language in that that suggests what I believe, and that is that the second amendment was never intended to apply to hand guns or, indeed to sporting rifles and shot guns. I've had a shot gun since I was 12 years old and I still occasionally like to shoot birds, but hand guns certainly were not even dreamed of in the sense that they now exist at the time the second amendment was adopted.

Actually, handguns had been invented and were well known by 1789. See IAN V. HOGG, THE ILLUSTRATED ENCYCLOPEDIA OF FIREARMS (1978). Handguns were common enough in the early sixteenth century so that proposed legislation as early as 1518 addressed them. *Id.* at 16-17. By the latter part of the 1500s, handguns had become standard cavalry weapons. *Id.* at 17. When the Second Amendment was ratified, state militia laws requiring most men to supply their own firearms required officers to supply their own pistols.

137. *Adams v. Williams*, 407 U.S. 143 (1972).

138. *Id.* at 144-45.

139. *Id.* at 149.

140. *Id.* at 149 (Douglas, J., dissenting).

141. *Id.* at 150-51. Justice Douglas was a newly-appointed member of the Court that decided *Miller*, but he did not participate in the case, having joined the Court after the case was argued. Justice Black (whose views on the Second Amendment are found *infra* at notes 179-82, 194-96, 221-28) did serve on the Miller Court, and joined in the unanimous decision.

142. *Id.* at 153 (Brennan, J., dissenting).

143. *Id.* at 151-52.

144. See Lott, *supra* note 130.

145. *Adams*, at 153 (Marshall, J., dissenting).

146. *Roe v. Wade*, 410 U.S. 113 (1973).

147. See, e.g., William Van Alstyne, *Closing The Circle Of Constitutional Review from Griswold v. Connecticut To Roe v. Wade: An Outline Of A Decision Merely Overruling Roe*, 1989 DUKE L.J. 1677.

148. *Roe*, 410 U.S. at 167-68 (Stewart, J., concurring).

149. *Poe v. Ullman*, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting).

150. *Id.* at 167. *Roe*, 410 U.S. 113.
151. *Planned Parenthood v. Casey*, 505 U.S. 833, 848-49 (1992).
152. *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976).
153. *Albright v. Oliver*, 510 U.S. 266 (1994); *Moore*, 410 U.S. at 542.
154. *Roe v. Wade*, 410 U.S. 113, 169 (1973).
155. *Adams v. Williams*, 407 U.S. 143 (1972).
156. *Laird v. Tatum*, 408 U.S. 1, 2-3 (1972).
157. *Id.* at 3.
158. *Id.* at 15-16.
159. *Id.*
160. *Id.* at 16-17 (Douglas, J., dissenting).
161. *Id.*
162. *Id.* at 17-18.
163. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 185 (1962).
164. *Laird*, 408 U.S. at 22-23, quoting Earl Warren, *The Bill of Rights and the Military*, *supra* note 163. (emphasis added).
165. For the best analysis of how Madison synthesized two different traditions in the Second Amendment (the republican militia theory in the purpose clause, and the human rights theory in the main clause), see Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, *supra* note 9.
166. *Hamilton v. Regents of the Univ. of California*, 293 U.S. 245 (1934).
167. *Burton v. Sills*, 394 U.S. 812 (1969).
168. *Burton v. Sills*, 248 A.2d 521 (N.J. 1968).
169. *Burton*, 394 U.S. at 812.
170. *Id.*
171. *Id.* The decision was per curiam, with Justice Brennan not participating.
172. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).
173. The New Jersey court in *Burton* could never be charged with excessive regard for individual rights, for the court wrote, “the common good takes precedence over private rights. . . Our basic freedoms may be curtailed if sufficient reason exists therefor. Only in a very limited sense is a person free to do as he pleases in our modern American society.” *Burton v. Sills*, 240 A.2d 432, 434 (N.J. 1968). In contrast, the New Jersey Supreme Court in 1925 had

recognized “The right of a citizen to bear arms,” but had explained that the right “is not unrestricted.” Hence, a law requiring a license to carry a concealed revolver was not unconstitutional. State *evangel*, 3 N.J. Misc. 1014 (Sup. Ct. 1925). Since New Jersey is one of the few states without a state constitutional right to arms, the court’s reference to the “right of the citizen” must have been a reference to the Second Amendment.

174. For *Presser* see *infra* text at notes 310-20.

175. *Id.*

176. *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring).

177. *Mandel*, 432 U.S. at 176.

178. *Presser v. Illinois*, 116 U.S. 252 (1886).

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

180. *Adamson v. California*, 332 U.S. 46, 68-78 (1947) (Black, J., dissenting).

181. *Duncan*, 391 U.S. at 164-65 (Black, J., concurring).

182. *Id.* at 166-67 (quoting CONG. GLOBE, 39th Cong., 1st Sess., at 2765-66 (1866)) (emphasis added).

183. *Infra* notes 194-97, 221-28.

184. *Malloy v. Hogan*, 378 U.S. 1 (1964).

185. *Id.* at 5 n. 2.

186. *Id.*

187. See *United States v. Cruikshank*, 92 U.S. 542, 551 (1875) (right to assemble); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (1922) (First Amendment); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (Fourth Amendment); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (Fifth Amendment requirement of grand jury indictments); *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (Fifth Amendment double jeopardy); *Maxwell v. Dow*, 176 U.S. 581, 595 (1900) (Sixth Amendment jury trial); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (Seventh Amendment jury trial); *In re Kemmler*, 136 U.S. 436 (1890) (Eighth Amendment cruel and unusual punishment, electrocution); *McElvaine v. Brush*, 142 U.S. 155 (1891); *O’Neil v. Vermont*, 144 U.S. 323, 332 (1892) (Eighth Amendment prohibition against cruel and unusual punishment). Except for *Hurtado* and *Walker*, of these cases have been undone by later cases.

188. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961)

189. *Id.* at 57-58 (Black, J., dissenting).

190. *Id.* at 44.

191. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 433 (1985).
192. *Konigsberg*, 366 U.S. at 49-50.
193. *Id.* at 51.
194. *Id.* at 49-50 (emphasis added).
195. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).
196. *Id.* at 872.
197. *Id.* at 873.
198. *Id.* at 865.
199. *Poe v. Ullman*, 367 U.S. 497 (1961).
200. *Id.* at 542-43 (Harlan, J., dissenting) (emphasis added).
201. *Albright v. Oliver*, *supra* note 78; *Planned Parenthood v. Casey*, *supra* note 83; *Moore v. East Cleveland*, *supra* notes 120-21.
202. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).
203. *Nebbia v. New York*, 291 U.S. 502 (1934).
204. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
205. *Poe*, 367 U.S. at 541.
206. *Id.* at 516 (Douglas, J., dissenting):
When the Framers wrote the Bill of Rights they enshrined in the form of constitutional guarantees those rights—in part substantive, in part procedural—which experience indicated were indispensable to a free society. . . . [T]he constitutional conception of “due process” must, in my view, include them all until and unless there are amendments that remove them. That has indeed been the view of a full court of nine Justices, though the members who make up that court unfortunately did not sit at the same time.
Justice Douglas’s list of Justices who favored full incorporation of the Bill of Rights named Bradley, Swayne, Field, Clifford, the first Harlan, Brewer, Black, Murphy, Rutledge, and Douglas. *Id.* at 516 n.8.
207. *Adams v. Williams*, 407 U.S. 143, 149 (1972) (Douglas, J., dissenting).
208. *Knapp v. Schweitzer*, 357 U.S. 371 (1958).
209. *Id.* at 378-79.
210. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
211. *Id.* at 765-66.
212. *Id.* at 776.
213. *Id.* at 782.

214. *Id.*

215. The Fifth Amendment's prohibition on trial by court martial does not, by its own terms, apply to soldiers in the standing army (or to militiamen engaged in militia duty).

216. *Id.* at 784 (emphasis added).

217. The characters in the hypothetical are not militia members either. A militia is an organized force under government control. In contrast, "guerrilla fighters" or "were-wolves" are small groups or individuals functioning in enemy territory beyond the reach of any friendly government. The legal distinction was of great importance during World War II. Switzerland, for example, made extensive plans for its militia forces (consisting of almost the entire able-bodied adult male population) to resist a German invasion to the last man. But the Swiss government also warned its citizens *not* to engage in guerrilla warfare on their own; the militiamen fighting the Germans would be entitled to the protection of the rules of war and international conventions, but guerrillas would not. *See* STEPHEN HALBROOK, *TARGET SWITZERLAND* (1998). Having served as a judge of the Nuremberg Trials, Justice Jackson was presumably familiar with the distinctions in the international law of war between guerillas and soldiers/militia.

218. During the Civil War, in 1864, an Indiana man Lambdin P. Milligan was charged with aiding the southern rebellion against the national government. Although Indiana was under full union control, and courts in Indiana were functioning, Milligan was tried before a military court martial and sentenced to death. In 1866, a unanimous Supreme Court overturned Milligan's conviction, holding that martial law can only be applied in theaters of war, and not in areas where the civil courts were functioning. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

The Court did not discuss the Second Amendment, but in argument to the Court, the Attorney General of the United States did. During the argument before the Court, Milligan's lawyers had claimed that Congress could never impose martial law. They pointed out that the Fourth Amendment (no searches without warrants), the Fifth Amendment (no criminal trials without due process), and the Sixth Amendment (criminal defendants always have a right to a jury trial) do not contain any exceptions for wartime.

The Attorney General, who was defending the legality of Milligan's having been sentenced to death by court martial, retorted that under conditions of war, the protections of the Bill of Rights do not apply. Thus, the federal government could disarm a rebel, without violating

his Second Amendment right to keep and bear arms. The Attorney General urged the Court to construe the Second, Third, Fourth, Fifth and Sixth Amendments *in pari materia*:

After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration. . . .

Much of the argument on the side of the petitioner will rest, perhaps, upon certain provisions not in the Constitution itself, and as originally made, but now seen in the Amendments made in 1789: the fourth, fifth, and sixth amendments. They may as well be here set out:

4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

5. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

6. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

In addition to these, there are two preceding amendments which we may also mention, to wit: the second and third. They are thus:

2. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

3. 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.

It will be argued that the fourth, fifth, and sixth articles, as above given, are restraints upon the war-making power; but we deny this. All these amendments are in *pari materia*, and if either is a restraint upon the President in carrying on war, in favor of the citizen, it is difficult to see why all of them are not. Yet will it be argued that the fifth article would be violated in “depriving if life, liberty, or property, without due process of law,” armed rebels marching to attack the capital? Or that the fourth would be violated by searching and seizing the papers and houses of persons in open insurrection and war against the government? It cannot properly be so argued, any more than it could be that it was intended by the second article (declaring that “the right of the people to keep and bear arms shall not be infringed”) to hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them.

These, in truth, are all peace provisions of the Constitution and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law.

By the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President; and after discussion, and after the attention of the country was called to the subject, no other limitation by subsequent amendment has been made, except by the Third Article, which prescribes that “no soldier shall be quartered in any house in time of peace without consent of the owner, or in time of war, except in a manner prescribed by law.”

This, then, is the only expressed constitutional restraint upon the President as to the manner of carrying on war. There would seem to be no implied one; on the contrary, while carefully providing for the privilege of the writ of habeas corpus in time of peace, the Constitution takes it for granted that it will be suspended “in case of rebellion or invasion (i.e., in time of war), when the public safety requires it.”

Id. at 29-33. Thus, the Attorney General explained, the Second Amendment belongs to individuals, but if a Confederate rebel were disarmed, his Second Amendment right would not be violated, since the Second Amendment would not apply to him—even though the Second Amendment has no explicit exception for wartime. Likewise,

if Congress declared martial law in a region, a civilian would be subjected to a court martial, rather than trial by jury, even though the Sixth Amendment (which guarantees jury trials) has no explicit exception for wartime. The Attorney General plainly saw the Second Amendment as guaranteeing an individual right.

The United States government also made another argument showing that the Second Amendment belongs to individuals. On behalf of Milligan, attorney David Dudley Field had presented a passionate and superb argument, explaining that the ultimate issue at bar was the supremacy of the civil power over the military, a principle at the very heart of Anglo-American liberty and republican government.

Field had made much of the fact that the Fifth Amendment's requirement that persons could only be tried if they had first been indicted by a grand jury had an explicit exception for military circumstances ("except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger"). Field pointed out that Milligan (an Indiana civilian with Confederate sympathies) was obviously not within the terms of the exception.

In response, the Attorney General turned the argument over to Benjamin Franklin Butler. A very successful lawyer, Butler had been one of the most prominent Union Generals during the Civil War; a few months after his Supreme Court argument, Butler would be elected to Congress from Massachusetts, and would become one of the leading Radical Republicans.

Butler told the Supreme Court that the whole Bill of Rights contained implicit exceptions which were not stated in the text. For example, despite the literal language of the Fifth Amendment and the Second Amendment, slaves in antebellum America had been deprived of liberty without due process and had been forbidden to possess arms:

...the constitution provides that "no person" shall be deprived of liberty without due process of law. And yet, as we know, whole generations of people in this land—as many as four millions of them at one time—people described in the Constitution by this same word, "persons," have been till lately deprived of liberty ever since the adoption of the Constitution, without any process of law whatever.

The Constitution provides, also, that no "person's" right to bear arms shall be infringed; yet these same people, described elsewhere in the Constitutions as "persons," have been deprived of their arms whenever they had them."

Id. at 178-79. Butler's point, presented on behalf of the Attorney General, was that the right to arms and the right not to be deprived of liberty without due process were individual rights guaranteed to all "persons." Yet despite the literal guarantee to all "persons," slaves had been deprived of their liberty without a fair trial, and had not been allowed to own or carry guns. Thus, there must an implicit "slavery exception" in the Second Amendment and the Fifth Amendment. And if there could be an unstated "slavery exception," there could also be an unstated "in time of war" exception.

Butler's argument is totally incompatible with the claim that the Second Amendment right does not belong to individuals. According to Henigan and Bogus, the Second Amendment can only be violated when the federal government interferes with state militias. But there were no federal laws forbidding states to enroll slaves in the state militias. (The federal Militia Act of 1792 enrolled whites only, but the Act did not prevent the states from structuring their own militias as they saw fit.) Although there were no federal law interfering with state militias, there were state laws forbidding individual blacks to possess arms. So Butler's argument assumed that the Second Amendment right to arms inhered in individuals (including slaves, if the Amendment were read literally, with no implied exception for slavery).

219. *Adamson v. California*, 332 U.S. 46, 48 (1947).

220. U.S. CONST. amend. V.

221. *Adamson*, 332 U.S. at 58-59. (*Adamson* was overruled by the Supreme Court in the 1964 decision *Malloy v. Hogan*, *infra* note 183).

222. U.S. CONST. amend. XIV.

223. *Adamson*, 332 U.S. at 70-71 (Black, J., dissenting).

224. *Id.* at 92-124.

225. *Id.* at 93(citing Cong. Globe, 39th Cong., 1st Sess. (1865) 474).

226. *Id.* (citing Cong. Globe, 39th Cong., 1st Sess. (1865) 474).

227. *Id.* at 104-07 (emphasis added).

228. *Id.* at 119 (emphasis added).

229. *Id.* at 120.

230. *Id.* at 124 (Murphy, J., dissenting).

231. *Supra* note 228.

232. *Id.* at 73.

233. *Id.* at 74.

234. *Id.* at 76.

235. *Id.* at 77.

236. Stephen Halbrook cites the case, but for another point. *See* STEPHEN HALBROOK, FIREARMS LAW DESKBOOK, *supra* note 106, at 8-44 n.131.

237. *Hamilton v. Regents of the Univ. of California*, 293 U.S. 245 (1934).

238. *Id.* at 250-51.

239. *Id.* at 260-61.

240. For a discussion of this point, *see* Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, *supra* note 7.

241. *Hamilton*, 293 U.S. at 260.

242. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820). *See infra* text at notes 343-53.

243. *Id.*

244. *Id.* at 16-17.

245. *Dunne v. People*, 94 Ill. 120 (1879).

246. The court was quoting language from Article I, Section 8 of the Constitution, which gives such authority to Congress. This grant is not inconsistent with pre-existent state authority, so long as the state authority is not used in conflict with the federal authority.

247. *Dunne*, 94 Ill. at 132-33.

248. *Martin v. Mott*, 25 U.S. 19 (1827).

249. *Infra* notes 343-53.

250. *Infra* notes 310-20.

251. *Infra* notes 251-56.

252. *United States v. Schwimmer*, 279 U.S. 644 (1929).

253. *Id.* at 652-53.

254. *Id.* at 650-52.

255. *United States v. Muscarello*, 524 U.S. 125 (1998) (Ginsburg, J., dissenting), *supra* text at note 57.

256. *See, e.g.*, sources cited at *supra* note 6.

257. *See, e.g.*, Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, *supra* note 8.

258. *Stearns v. Wood*, 236 U.S. 75 (1915).

259. *Id.* at 76. Colonel would be the next rank up.

260. *Id.* at 78.

261. *Id.*

262. *Id.*
263. *Salina v. Blaksley*, 83 P. 619 (Kan. 1905).
264. *Twining v. New Jersey*, 211 U.S. 78 (1908)(*overruled by Malloy v. Hogan*, 378 U.S. 1 (1964)).
265. *Id.* at 98-99.
266. *Maxwell v. Dow*, 176 U.S. 581 (1899).
267. *Id.* at 597.
268. The war led to the development of the Colt .45 self-loading pistols, since smaller pistol rounds often had insufficient stopping power against the Filipino warriors.
269. *Trono v. United States*, 199 U.S. 521 (1905).
270. *Kepner v. United States*, 195 U.S. 100 (1904).
271. *Trono*, 199 U.S. at 528.
272. *Id.*
273. 32 Stat. 691 (1902).
274. *Trono*, 199 U.S. at 528.
275. *Id.*
276. *See id.*
277. *Kepner*, 195 U.S. at 123-24.
278. *Id.* They are the familiar language of the Bill of Rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving the right of trial by jury and the right of the people to bear arms, and adding the prohibition of the 13th Amendment against slavery or involuntary servitude except as punishment for crime, and that of Article I, Section 9, to the passage of bills of attainder and ex post facto laws.
279. *Robertson v. Baldwin*, 165 U.S. 275, 277 (1897).
280. *Id.* at 281.
281. *Id.* at 281-82.
282. *Id.* at 282.
283. *See, e.g., State v. Workman*, 35 W. Va. 367 (1891). *See generally*, Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 9; Cramer, *For the Defense of Themselves and the State*, *supra* note 9.
284. *Brown v. Walker*, 161 U.S. 591 (1896).
285. The *Presser* case, discussed *infra* at notes 310-20, appears in the Justice Brown's majority opinion, as part of a string cite for the proposition, "the first eight amendments are limitations only upon

the powers of congress and the federal courts, and are not applicable to the several states, except so far as the fourteenth amendment may have made them applicable.” *Id.* at 606.

286. *Id.* at 631 (Field, J., dissenting).

287. *Id.* at 632.

288. *Id.* at 635.

289. *Id.* (emphases added).

290. Henigan, Guns and the Constitution, *supra* note 4.

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

292. *Id.* at 538.

293. *Id.* at 539.

294. *Robertson*, 165 U.S. at 281-82, *supra* text at notes 280-82.

295. *Id.* at 538.

296. *Id.*

297. *Miller*, 153 U.S. at 538.

298. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897) (takings clause).

299. *Spies v. Illinois*, 123 U.S. 131 (1887). See generally PAUL AVRICH, *THE HAYMARKET TRAGEDY* (1986).

300. JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES* (Fred B. Rothman & Co. 1981) (1899); William G. Bean, *John Randolph Tucker*, in *THE DICTIONARY OF AMERICAN BIOGRAPHY* (CD-Rom ed. 1997).

301. I hold the privilege and immunity of a citizen of the United States to be such as have their recognition in or guaranty from the Constitution of the United States. Take then the declared object of the Preamble, “to secure the blessings of liberty to ourselves and our posterity,” we ordain this Constitution—that is, we grant powers, declare rights, and create a Union of States. See the provisions as to personal liberty in the States guarded by provision as to ex post facto laws, &c.; as to contract rights—against States’ power to impair them, and as to legal tender; the security for habeas corpus; the limits imposed on Federal power in the Amendments and in the original Constitution as to trial by jury, &c.; the Declaration of Rights—the privilege of freedom of speech and press—of peaceable assemblages of the people—of keeping and bearing arms—of immunity from search and seizure—immunity from self-accusation, from second trial—and privilege of trial by due process of law. In these last we find the privileges and immunities secured to the citizen by the Constitution. It may have been that the States did not

secure them to all men. It is true that they did not. Being secured by the Constitution of the United States to all, when they were not, and were not required to be, secured by every State, they are, as said in the Slaughter-House Cases, privileges and immunities of citizens of the United States.

The position I take is this: Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.

302. *Id.*

303. *Id.*

304. *Spies*, 123 U.S. at 166.

305. *Eilenbecker v. District Court of Plymouth County*, 134 U.S. 131 (1890):

The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States. *Livingston v. Moore*, 7 Pet. 469; *The Justices v. Murray*, 9 Wall. 274; *Edwards v. Elliott*, 21 Wall. 532; *United States v. Cruikshank*, 92 U.S. 542; *Walker v. Sauvinet*, 92 U.S. 90; *Fox v. Ohio*, 5 How. 410; *Holmes v. Jennison*, 14 Pet. 540; *Presser v. Illinois*, 116 U.S. 252.

306. *Spies*, 123 U.S. at 168.

307. During the nineteenth century, the official Supreme Court reports included summaries of counsels' arguments. Besides Tucker's argument in *Spies*, there are two other nineteenth century cases which record use by counsel of the Second Amendment; both uses were by the Attorney General's office, and both regarded the Second Amendment as an individual right. In the argument for *In re Rapier*, Assistant Attorney General Maury defended a federal ban on the mailing of lottery tickets: "Freedom of the press, like freedom of

speech, and ‘the right to keep and bear arms,’ admits of and requires regulation, which is the law of liberty that prevents these rights from running into license.” In *re* Rapier, 143 U.S. 110, 131 (1892). The other argument came from the Attorney General in *Ex Parte Milligan*. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *supra* note 217.

308. *Logan v. United States*, 144 U.S. 263, 281-82 (1892).

309. *Id.* at 285-86.

310. *Id.* at 286-88.

311. See Levinson, *supra* note 9; Stephen Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, Last Holdout Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. (1999, forthcoming).

312. *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

313. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 126 (Garland Publ. 1978) (1716) (A Justice of the Peace may require surety from persons who “go about with unusual Weapons or Attendants, to the Terror of the People.”)

314. *Presser*, 116 U.S. at 265.

315. *Id.* at 266.

316. *Id.*

317. U.S. Const., amend. XIV, § 1.

318. *E.g.*, *Fresno Rifle Club v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992).

319. *Id.* at 265.

320. *Id.* at 265-66.

321. *Id.* For the subsequent interpretation of *Presser*, see *Malloy v. Hogan*, *supra* note 184 (Second Amendment is not a Fourteenth Amendment Privilege or Immunity); *Poe v. Ullman*, *supra* note 204 (Harlan, J., dissenting) (Fourteenth Amendment liberty is not co-extensive with Bill of Rights); *Adamson v. California*, *supra* note 222 (Black, J., dissenting) (Second Amendment not directly applicable against states); *Twining v. New Jersey*, *supra* note 264 (Second Amendment not a Fourteenth Amendment Privilege or Immunity); *Maxwell v. Dow*, *supra* note 266 (Second Amendment not directly applicable to states); *Brown v. Walker*, *supra* note 284 (same); *Miller v. Texas*, *supra* notes 291-96 (Second Amendment not directly applicable, not a Privilege or Immunity) but enforcement against states via Fourteenth Amendment is an open question; *Spies v. Illinois*, *supra* note 303 (Second Amendment not directly applicable against states); *Eilenbecker*, *supra* note 304 (same).

322. 16 Stat. 140 § 6 (1870); 18 U.S.C. §§ 241, 242: “That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another. . .or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege secured or granted him by the Constitution or laws of the United States. . . .”

323. STEPHEN HALBROOK, *FREEDMEN, FIREARMS, AND THE FOURTEENTH AMENDMENT* (1998); ERIC FONER, *RECONSTRUCTION* 258-59 (1988); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993).

324. GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* 125-29 (Athens Univ. of Georgia Pr., 1984).

325. *United States v. Cruikshank*, 92 U.S. 542, 551 (1875) (emphasis added).

326. *Id.* at 553 quoting *New York v. Miln*, 36 U.S. (11 Pet.) 125, 139 (1837). *Cf.* *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 92, 13 Am. Dec. 251, 253 (“The right [to arms in the Kentucky Constitution] existed at the adoption of the constitution; it had no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but the liberty of the citizens to bear arms.”).

327. “The Second Amendment protects only the right of the states to maintain and equip a militia and does not guarantee individuals the right to bear arms; *United States v. Cruikshank* (1875).” C. HERMAN PRITCHETT, *THE AMERICAN CONSTITUTION* 397 n. 1 (2d ed. McGraw-Hill, 1968).

328. *Malloy v. Hogan*, *supra* note 186; *Knapp v. Schweitzer*, *supra* note 208. For different interpretations of *Cruikshank*, see *Spies v. Illinois*, *supra* note 303 (Second Amendment not directly applicable to states); *Eilenbecker*, *supra* note 304 (same); *Logon v. United States*, *supra* note 309 (First Amendment assembly right and Second Amendment arms right are similar; Bill of Rights protects neither against private interference).

329. *DeJonge v. Oregon*, 299 U.S. 353 (1937).

330. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Among Chief Justice Taney’s proofs that free blacks were not citizens was the fact that blacks were often excluded from militia service. The Taney opinion explained that the parties to the original American social compact were only those “who, at that time [American independence], were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English

Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.” *Id.* at 407. The new nation’s federal militia law of 1792 had enrolled only free white males in the militia of the United States, and blacks had been excluded from the New Hampshire militia. *Id.* at 420. These facts suggested to Chief Justice Taney that free blacks were not recognized as citizens, since they were not in the militia.

Justice Curtis retorted by pointing to the language of the 1792 Militia Act, which enrolled “every free, able-bodied, white male citizen.” Justice Curtis pointed out the implication of the language that “citizens” included people who were not able-bodied, were not male, or were not white; otherwise, there would have been no need to limit militia membership of able-bodied white males. *Id.* at 442 (Curtis, J., dissenting). But Justice Curtis’s argument had one problem: the use of the word “free” in the Militia Act. It was undisputed that slaves were not citizens, since they were deprived of all rights of citizenship. The Militia Act enrolled only “free, able-bodied, white male citizens.” If we follow Justice Curtis’s logic to conclude that the Militia Act proves that non-whites could be citizens, then the same logic would show that unfree persons could be citizens.

The stronger part of the Curtis dissent was his evidence showing that many of the thirteen original states did recognize blacks as citizens. The Taney majority never directly addressed this part of the Curtis argument, except by listing various disabilities (such as prohibitions on racial intermarriage, or bans on operating schools for blacks) which even anti-slavery states like Massachusetts and Connecticut imposed on free blacks. Thus, in a bizarre way, the Taney majority (despite its pro-slavery taint) pre-figures twentieth century Supreme Court jurisprudence that there can be no second-class citizens in the United States. The Curtis opinion argues that various civil disabilities (including exclusion from the militia) are consistent with citizenship. For the Taney majority, citizenship is all or nothing; exclusion from education, from intermarriage with whites, or from the militia are all incompatible with citizenship. Thus, once a constitutional amendment conclusively declared that blacks are citizens, the logic of the *Dred Scott* majority leads to the results in *Brown v. Board*, 349 U.S. 294 (1955) (racial discrimination in schooling is incompatible with citizenship rights); *Loving v. Virginia*, 388 U.S. 1 (1967) (laws against intermarriage are incompatible with citizenship rights); and *Bell v. Maryland*, 378 U.S. 226, 260 (1964) (segregation in restaurants and lunch counters “is a badge of second-class citizenship.”); *Id.* at 288 (Douglas, J.,

concurring) (“The Thirteenth, Fourteenth, and Fifteenth Amendments do not permit Negroes to be considered as second-class citizens in any aspect of our public life.”). In contrast, the Curtis dissent (while laudably humane in its anti-slavery sentiments) allows for second-class citizenship on the basis of race.

331. *Id.* at 417.

332. *Id.*

333. *See, e.g.*, *Edwards v. California*, 314 U.S. 160, 168 (1994) (Douglas, J., concurring); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

334. *Scott*, 60 U.S. at 417.

335. Act of Mar. 6, 1820, ch. 22, § 3 Stat. 545, 548.

336. *Scott*, 60 U.S. at 450.

337. *Id.* at 450-51.

338. *Id.* at 399.

339. *See, e.g.*, Stephen Douglas, *The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories*, HARPER’S (Sept. 1859) 519, 530.

340. U.S. Const., amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”)

341. *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (Sixth Amendment requirement for unanimous jury not applicable in territory of Hawaii; only “fundamental” constitutional rights apply in the territories); *De Lima v. Bidwell* 182 U.S. 1 (1901) (Puerto Rican goods imported to the states are not subject to the tariff applicable to foreign imports); *Dooley v. United States*, 182 U.S. 222 (1901) (goods transported from the states to Puerto Rico not subject to tariff applicable to foreign imports to Puerto Rico); *Downes v. Bidwell*, 182 U.S. 244 (1901) (In taxing imports from Puerto Rico to the states, Congress need not obey the constitutional requirement that taxes imposed by Congress be uniform throughout the United States).

342. *Downes*, 182 U.S. at 379 (Harlan, J., dissenting).

343. Richard Warren Barkley, letter of May 28, 1901, to John Marshall Harlan, *quoted in* TINSLEY E. YARBOROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* 197 (1995)

344. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).

345. “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” “To provide

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

346. *Houston*, 18 U.S. at 6.

347. U.S. CONST. amend. X.

348. *Houston*, 18 U.S. at 46-47.

349. *Id.*

350. *Id.*

351. This was the only time that Justice Story dissented from a constitutional decision in which Chief Justice Marshall was in the majority. JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 311 n. 161 (2d ed. 1990).

352. *Houston*, 18 U.S. at 46-47.

353. *Id.* at 47-48 (Story, J., dissenting)..

354. The Supreme Court decided one other militia case during this period. Writing for a unanimous Court, Justice Story held that the President's determination of the need for a militia call-out was not subject to judicial review. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).

355. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264-65 (1842) For more on Justice Story's thoughts about the Second Amendment, *see* Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 4, at 119-20.

356. *See, e.g.,* Henigan, *Arms, Anarchy*, *supra* note 5.

357. *See* Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 7, at 1388-97.

358. *United States v. Miller*, 307 U.S. 174 (1939), *supra* notes 16-27.

359. *Adams v. Williams*, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting), *supra* note 141.

360. *Lewis v. United States*, 445 U.S. 55, 65-66 (1980), *supra* note 103.

361. *Hamilton v. Regents of the Univ. of California*, 293 U.S. 245, 260-61 (1934), *supra* note 238.

362. *United States v. Schwimmer*, 279 U.S. 644, 650-52 (1929), *supra* note 253.

363. *Burton v. Sills*, 394 U.S. 812 (1969), *supra* note 170.

364. *Laird v. Tatum*, 408 U.S. 1, 22-23 (1972), *supra* note 163.

365. *Spencer v. Kemna*, 523 U.S. 1, 36 (1998) (Stevens, J., dissenting), *supra* note 42.
366. *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976), *supra* note 120.
367. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 47-48 (1820) (Story, J., dissenting), *supra* note 352.
368. See STORY, *supra* note 354.
369. *Printz v. United States*, 521 U.S. 898, 938-39 (1997) (Thomas, J., concurring), *supra* note 64.
370. Justice Black did view the entire Bill of Rights as absolute within its terms. He explicitly so stated with regard to the Second Amendment in his James Madison lecture at New York University. It might be reasonable to read Justice Black's Supreme Court opinions which mention the Second Amendment as reflecting his absolutist view. See *supra* text at notes 179-82, 194-96, 221-34.
371. *Supra* note 3.

The Emperor Has No Clothes: Using Interrupted Time Series Designs to Evaluate Social Policy Impact

By Gary Kleck, Chester L. Britt & David J. Bordua

The most popular quasi-experimental strategy for evaluating the aggregate impact of changes in law and other social policies is the univariate interrupted time series design (ITSD). In practice, the internal validity of this approach has been greatly exaggerated and its users have largely ignored or minimized its flaws, including: (1) its general inability to rule out alternative explanations, (2) the use of a single or small number of arbitrarily chosen “control” or comparison jurisdictions, (3) arbitrary definition of the endpoints of the time series evaluated, (4) an inability to specify exactly when the intervention’s impact is supposed to be felt, raising problems of the falsifiability of the efficacy hypothesis, and (5) an atheoretical specification of the ARIMA impact model.

Data pertaining to the 1976 Washington, D.C., handgun ban are analyzed to illustrate these problems. Authors of a previous evaluation concluded that the ban reduced homicides; this conclusion collapses when any one of several valid changes in analytic strategy are made. Further, when “bogus intervention” points are specified, corresponding to nonexistent policy interventions, results as strong as those obtained by the original authors are obtained. Finally, when the same ITSD strategy is applied to an example of gun “decontrol,” a gun law repeal exactly opposite in character to that of the D.C. law, the same appearance of a homicide-reducing impact is generated. It is concluded that the univariate ITSD approach is of little value for policy assessment, because it can so easily be manipulated to generate results compatible with a researcher’s preconceived biases.

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One of the most common general research designs used to assess whether a new law or change in public policy has affected the frequency of some behavior or outcome is the interrupted time series design (ITSD). In a typical application of this design, multiple observations of the target (dependent) variable (e.g., a count or rate of crime or violence) are analyzed to determine whether there was a shift in the level of the time series at the point when the new law or policy (labeled the “intervention” or the “treatment”) went into effect. Observations can be based on almost any unit of time, from hourly observations to annual ones, but past applications to crime most commonly have been based on monthly observations. Although not a necessary element of the basic research design itself, the data analytic methods most commonly applied to the resulting observations have been versions of the Autoregressive Integrated Moving Average (ARIMA) time series methods developed by Box, Jenkins, and Tiao (Box and Tiao 1965; Box and Jenkins 1976). The analyses are almost always univariate, i.e. the only measured variable is the target variable.

This design is regarded by some as the strongest strategy for assessing the aggregate (population-wide) impact of policy interventions where, as is commonly the case, true experimentation is impossible or impractical (see, e.g., Campbell and Stanley, 1966; Cook and Campbell, 1979). The design has been applied to a variety of legal and policy issues, such as, the impact of changes in welfare policies (Hedrick and Shipman, 1981), drunk driving legislation (Ross et al., 1970, 1990), hotel room taxes (Bonham et al., 1992), child

restraint laws (Rock, 1996), oil prices (on property crime) (Chamlin and Cochran 1998), and police patrol (Zimring, 1978; Cook, 1980).

The purpose of this paper is to show that the widespread faith in this design is unwarranted, and that it is a design prone to abuse when used for purposes of assessing the impact of policy interventions. To illustrate these problems, the literature on gun control impacts will be closely critiqued. The focus on gun control impacts serves a useful limiting purpose, since many of the more sophisticated applications of the design have been carried out in this area. If these more refined applications of the design have been misleading, then less skillful applications in other areas are likely to have generated even less reliable results. Thus, the paper's purposes are both methodological, with respect to the utility of the ITSD, and substantive, with respect to the validity of the findings of the gun control impact studies.

I. Applications of ITSD to Gun Control Impact

Table 1 lists the important studies using ITSD to evaluate the impact of gun control laws on crime and violence. [Note: all tables are printed at the end of this article.] These studies will be used to illustrate the key problems in applying ITSD to evaluate the hypothesis that a given policy change reduced the frequency or rate of some problematic behavior (e.g. crimes) or increased the frequency or rate of some desirable ones (e.g. police arrests). Two important patterns are evident in the table. First, only two types of gun control laws have received any significant attention, out of the dozens or hundreds of existing types of gun controls: laws providing mandatory penalties for unlawful carrying of weapons, and laws providing mandatory additional penalties when violent felonies are committed with guns. Second, the interventions evaluated were nearly all concentrated in a very brief segment of history, from 1974 to 1982. Both patterns suggest that any unique aspects or peculiarities of either the interventions or the time period may

sharply restrict generalizability and distort findings, a suspicion that will be confirmed later.

II. Methodological Issues

A. The Inability to Rule Out Rival Explanations

The central problem in assessing the impact of policy changes on aggregates like cities or states is ruling out rival explanations of observed trends in the target variable and thereby isolating the impact of the policy change (see, e.g., Lieberman, 1985). The simple interrupted time series design only allows the researcher to determine whether there was a systematic shift in the target variable time series around a given time point. It cannot identify the cause of that shift. There are innumerable confounding factors that could shift trends in a given target variable, and most of these are likely to be changing to at least some degree at the same time the policy change was implemented. While it is unlikely that large changes in the target variable are solely attributable to any one confounding factor, there is nothing implausible about even the largest changes in the target variable being due to modest changes in a combination of multiple rival factors.

Although multivariate time series methods are available (e.g., Tiao and Box 1981), ITSD applications to policy impact evaluation are almost invariably univariate (for an exception, see Ross et al.'s [1990] analysis of drunk driving behavior). Hence, there are no explicit controls for any other determinants of trends in the target variable other than the policy being evaluated. Simple ARIMA modeling of a time series cannot magically control for the influence of extraneous factors and thereby isolate the effect of the policy being studied. In a passage widely quoted but also widely ignored in practice, Hibbs (1977, p. 172) observed that "Box-Tiao or Box-Jenkins models are essentially models of ignorance that are not based in theory and, in this sense, are devoid of explanatory power." A group of analysts who approvingly quoted this passage and later applied the univariate ARIMA

methods to crime data elaborated this observation as follows: “A univariate ARIMA model is a stochastic or probabilistic description of the outcome of a process operating through time. It provides no information about the inputs generating that process.... As in other areas of the social sciences, inference of a causal relationship in time series analysis can only be made through assessment of covariation between one or more explanatory variables and a dependent variable” (McCleary and Hay, with Meidinger and McDowall 1980, p. 111).

David McDowall has been coauthor to many of the applications of ARIMA models to gun law evaluations (see Table 1), so this caveat is especially noteworthy in light of the strongly worded causal inferences later drawn in those impact evaluations. For example, after evaluating one gun law, McDowall and colleagues flatly stated that “the law reduced gun-related suicides and homicides substantially and abruptly” (Loftin, McDowall, Wiersema and Cottey 1991, p. 1620). And in another ITSD study, the authors asserted that “The *only* plausible interpretation of the results is that the reductions in gun homicides are due to the announcement of the laws” (McDowall, Loftin, and Wiersema 1992, p. 390).

Given the extremely erratic shifts routinely observed for monthly crime counts for local areas like cities or counties, it would seem to be a reasonable working assumption that a large share of the causal determinants of these trends would also frequently exhibit similarly erratic shifts. If so, changes in laws or other public policies at any one point would generally be accompanied by nonsystematic changes in a large, though unknown, number of other factors that affected the target problem. Without explicit controls for these competing factors, the conclusion that the evaluated policy was responsible for an observed reduction in the problem amounts to little more than a guess.

B. Use of Control Series

The most common ITSD strategy for ruling out alternative explanations has been to use control series, which most

commonly come in two varieties. First, trends in the intervention area (the area or jurisdiction where the evaluated policy change was implemented) may be compared with trends in some other area where no such intervention occurred. Second, trends in the targeted behavior in the intervention area may be compared with trends in a behavior which is similar (in some way) to that targeted by the intervention, but is not supposed to be affected by the intervention. In gun control studies, trends in counts or rates of gun crimes (e.g. homicides committed with guns) are compared with trends in the corresponding nongun version of the same crime (e.g. homicides committed without guns). Table 1 indicates that five of the nine major studies of gun laws used control series - four used only the gun/nongun comparison, and one used both kinds of control series.

1. Comparing Control Areas.

It is commonly hinted that the control area is similar enough to the intervention area to serve as a control analogous to control cases used in true experiments. However, the underlying logic for the selection of control areas is rarely made explicit. If one is comparing trends in the intervention and control areas, the necessary underlying assumption is this: "Trends in the intervention area would have been identical or similar to trends in the control area, had there been no intervention. Therefore, if the problematic target phenomenon (such as crime) decreases more (or increases less) in the intervention area than in the control area, it supports the claim that the intervention suppressed the problem, either reducing it or preventing a larger increase."

It is similarity of *trends* in the target variable between the intervention and control areas, not merely similarity in static *levels* of confounding factors, which should be especially pertinent to the adequacy of the comparison series as a control series. If two matched cities were identical in every respect at the 1980 Census, yet the intervention city was trending downward in crime before the intervention while the control city was trending upward, it would obviously not be

particularly meaningful that the intervention city enjoyed a post-intervention drop in crime while the control city experienced an increase. For another area to be useful as a control, it must show preintervention *trends* similar to those in the intervention area, and not just similarity in demographic characteristics. Yet, most applications of ITSD to social policy evaluation routinely cite only static cross-sectional similarity between intervention and control areas, or say nothing on the matter at all, allowing unwary readers to assume the similarity.

Pierce and Bowers (1981) did not report ARIMA results for any control areas, but they did report percentage changes in crime rates in a number of “control” cities before and after a new gun law was implemented in Boston. The cities were selected solely on the basis of being similar in population size and/or being located in the same region. Loftin, McDowall, Wiersema and Cottey (1991) compared homicide trends in Washington, D.C. with trends in the counties and independent cities in Maryland and Virginia surrounding the District. They did not explicitly justify this choice of a control area on the basis of either cross-sectional or cross-temporal similarity between D.C. and its suburbs.

In fact, there was neither kind of similarity. There are few pairs of areas less similar than these two in a cross-sectional comparison. D.C. is a high violence city, with a very poor, predominantly black, and obviously exclusively urban population, while its suburbs constitute one of the nation’s wealthiest areas, with low violence rates, and an overwhelmingly white, largely suburban or rural population. More importantly, preintervention trends in homicide were not similar in D.C. and in its suburbs. In the two years preceding the D.C. gun law, from 1974 to 1976, the homicide rate in D.C. decreased by 30%, while dropping less than 10% in the rest of the D.C. Standard Metropolitan Statistical Area (SMSA). From 1968 to 1976, the correlation of annual homicide rates between Washington and the rest of the D.C. metropolitan area was a statistically nonsignificant 0.31 (based on statistics in Table 2.)

None of the scholars applying ITSD to gun law evaluations has justified the selection of a control area based on similarity of its preintervention trends with those of the

intervention area. Thus, the choices were made on arbitrary grounds unrelated to the logic underlying use of a control series. An alternative procedure would have been to systematically examine trend data in all cities (or states, counties, etc.), to identify those areas with the most similar preintervention trends in the target variable(s).

Further, although the results from an ITSD analysis with a single control area are stronger than those without any control areas at all, the results will nevertheless be inherently unstable, and can change radically with use of a different area, no matter how carefully the control area is chosen, due to eccentricities in trends in the control area. The use of multiple control areas, on the other hand, would permit inferences which would be more defensible than those based on use of a single comparison area. Nevertheless, the logical problems of not explicitly controlling for confounding factors would remain, since one still could not be confident that there were not other confounding factors operating just in the intervention area (or operating more strongly there) which caused the observed trends in the target variable.

2. Comparing Gun and Nongun Violence.

Perhaps in recognition of the difficulties of locating areas sufficiently similar to use as control jurisdictions, some authors have applied an alternative control strategy which uses a time series of events or behaviors similar to those targeted by the intervention, but which are not expected to be influenced (or at least not as much) by the intervention. For example, five of the ten studies in Table 1 compared trends in crimes committed with guns to trends in crimes committed without guns. If gun violence decreases more (or increases less) than nongun violence after a new gun law is implemented, this pattern is supposed to be strongly supportive of the hypothesis that the gun law suppressed violence. The underlying, usually unstated, rationale is that gun violence and nongun violence share the same set of causes (other than gun control policies), and are influenced by these causes to the same degree, so that gun violence would trend

the same way as nongun violence, were it not for changes in gun control policies.

Advocates of the gun/nongun comparison strategy have argued that its value lies in somehow narrowing the set of rival explanations for observed violence trends, hinting that there are few (and perhaps no) other likely explanations for a greater drop (or smaller increase) in gun violence than nongun violence, other than effective gun controls (e.g. Loftin, McDowall, Wiersema, and Cottey 1991, pp. 1618-9). That is, they assume that few other factors, besides gun control laws, could selectively affect gun violence (Loftin et al 1983, p. 290). Putting it another way, McDowall, Loftin and Wiersema (1992, p. 381) stated that “Another causal variable would be confounded with the law only if it influenced gun and non-gun crimes differently, and if it changed markedly at the intervention point.” There are two problems with the phrasing of this statement. First, the reference to “variable” in the singular is potentially misleading because it is unlikely that a *single* variable of any kind is responsible for most very large changes in crime rates. Second, if multiple variables were indeed responsible, it would not be necessary for any one of them to change “markedly” at the intervention point to produce large changes in the target variable, since modest changes in multiple variables would be sufficient.

The assumption that few or no other factors besides new gun laws could produce more decrease (or less increase) in gun violence than in nongun violence is implausible. First, trends in nongun violence cannot be used as a “control” in analyses of trends in gun violence because the two do not behave similarly in the absence of changes in gun control policies. One of the most conspicuous patterns evident in comparisons of gun and nongun homicide is that the former is far more volatile than the latter. For the period 1961-1990, national rates of gun homicide had a coefficient of relative variation of 25.8, compared to 18.2 for nongun homicide (computed from data in Table 3). By this measure, gun homicide rates were 42% more variable than nongun rates. When overall homicide is going down, gun homicide usually declines proportionally far more than nongun homicide. Conversely, when overall

homicide is going up, gun homicide increases proportionally more than nongun violence. Consequently, by selectively studying interventions in periods of generally declining homicide, analysts can routinely expect to find bigger drops in gun homicide than in nongun homicide, regardless of whether they were accompanied by any new gun laws or other changes in gun-related public policies. Patterns of larger declines in gun violence than in nongun violence were the dominant national trend from around 1973 through 1987. These patterns are documented in Table 3, which also shows that they were characteristic of all forms of crime involving guns, not just homicide. One simple way to detect a greater decline in gun violence than in nongun violence is to note trends in the percent of violent events which involved guns. When “percent gun” declines, it indicates a larger decline (or smaller increase) in gun violence than in the corresponding nongun violence category. For the U.S., the percent of violent crimes involving guns decreased from 1974 to 1983 for homicide (monotonically, if one excludes 1977), from 1975 to 1987 for robbery (monotonically, if one excludes 1979), and from 1973 to 1983 for aggravated assault.

The differences in gun and nongun trends can be even more extreme in the smaller local areas that typically are evaluated in ITSD studies than for the nation as a whole. For example, from 1975 to 1978, Baltimore experienced a 35% decrease in gun homicides, contrasted with only a 7% decrease in nongun homicides (analysis of FBI Supplementary Homicide Report computer tapes -ICPSR 1991). However, Baltimore did not have any new gun laws during this period; the restrictiveness of its gun laws remained unchanged and thus could not have caused the observed trends. At minimum, it is obvious that even enormous proportional drops in gun violence, accompanied by weaker or nonexistent drops in nongun violence, can occur in U.S. cities without new gun laws being even partially responsible.

The reasons for these patterns need not concern us, beyond noting that they cannot be attributed to changes in gun control policy. One cannot argue that larger national declines in gun violence than in nongun violence were due to an

increase in nationwide gun control strictness since there was no such increase during the 1973-1987 period.

In fact, no significant new federal gun laws were passed between the 1968 Gun Control Act and the 1986 Firearms Owners' Protection Act, the latter being an NRA-sponsored bill widely interpreted as a weakening of federal gun laws. The trend was the same in states and in local areas. During the 1973-1978 period, few new state gun restrictions were passed and these were often just minor revisions of existing controls (Jones and Reay 1980, Appendix III). For the period 1978-1987, the most important gun control trend was the passage, in nearly two-thirds of the states, of state preemption laws. These measures declare that the state government preempts some or all of the field of gun regulation, typically repealing existing local gun ordinances and/or forbidding future passage of new gun controls at the municipal or county level (*U.S. News and World Report* 4-25-88; Kleck 1991, pp. 332-3). Thus, if there was any noteworthy trend at all in gun control restrictiveness during this period, it was in a downward direction, opposite to that which could produce the observed trends in gun and nongun violence.

The trends in gun and nongun violence indicate that there obviously *are* other variables which routinely cause gun crime rates to decrease more than nongun crimes. Second, given the national prevalence of these patterns during this era, these covariates were clearly not minor factors which operated only under rare circumstances; instead, one could routinely expect them to be operating in most areas most of the time, including those times when a given legal jurisdiction happened to be implementing a new gun control policy. Given that gun and nongun violence trends so routinely diverge in the absence of new gun laws, it may well be that many or even most causes of violence have effects of different size on gun and nongun violence. ARIMA methods address "drift," and thus would deal with gradual drops in percent gun which began before a given intervention. This is not the problem at issue here. Rather, the problem is that the relatively smooth national trends we have noted reflect widely scattered and very erratic local shifts which were often not at all gradual (e.g. trends in Baltimore and Louisville discussed later). These abrupt and

seemingly erratic shifts in percent gun frequently occurred in places and at times where they could not have been due to new gun restrictions, since there were none.

The comparison of gun homicide with a nongun homicide “control” series does not allow the researcher to rule out any competing explanations of observed trends. Like the use of arbitrarily chosen control areas, the use of nongun violence trends for control purposes does not provide an adequate test of a gun policy’s impact on the targeted behavior.

C. The Difficulties of Case Study Research

Policy impact studies using the ITSD approach are almost always case studies, assessing a single intervention in a single locale, or occasionally studying a small number (six or fewer) of similar interventions in a handful of different locales. Either variety suffers from the obvious problem of generalizability. Even if one believes that a given intervention really produced a desirable impact in a given set of circumstances, there is no assurance that it would do so in another locale or at another time. This highlights the poor research efficiency of this approach: by applying a case study approach to single instances of a few types of gun control, it could take many decades before a large enough number of cases have been studied to permit generalizable conclusions about the effectiveness of any given type of gun control.

Another problem with evaluating a single instance (or small number of instances) of a type of intervention is identifying how it produces its effects. Even seemingly simple interventions are usually a complex bundle of elements, some very different from others. For example, many analysts evaluated the Bartley-Fox law as if it only established mandatory penalties for unlawful carrying (e.g. Deutsch and Alt 1977; Hay and McCleary 1979; Pierce and Bowers 1981), a measure opposed by the National Rifle Association (NRA), but it also established add-on penalties for committing crimes with a gun, a measure *supported* by the NRA. Therefore, ITSD analysts using a case study approach usually cannot

answer simple policy-relevant questions like “why or how did the intervention work?” or “what elements of the intervention worked?” Policy makers almost never adopt other jurisdictions’ policies *in toto*, unmodified in any way. Consequently, they run the risk of adopting a policy which worked elsewhere, yet omitting or distorting the key elements responsible for its success. Or, they run the risk of including the effective elements, but also needlessly including numerous other costly and ineffective or counterproductive elements as well, reducing the policy’s net effectiveness and efficiency. Thus, knowing exactly which elements really work is important.

The mechanisms by which the D.C. gun law supposedly reduced gun homicides are especially mysterious. The law mandated a ban on further handgun sales, a freeze on registering any more handguns, and a continuation of the existing ban on possession of unregistered handguns. Since existing registered guns could not be transferred, this effectively constituted a ban on handgun possession, but with already registered handguns “grandfathered” in as legal weapons. Thus, registered handguns continued to be legal and unregistered handguns continued to be illegal. The measure should have had little or no short-term impact on the supply of lawfully owned handguns, but should have eventually produced a gradual decrease in legal handguns, as lawful owners died or left the District. Nevertheless, Loftin et al. (1991) asserted that the law somehow produced an *abrupt* 25% reduction in gun homicides.

Even if one were willing to assume that the law somehow produced an abrupt rather than gradual drop in registered handguns, this could not have produced a 25% decline in gun homicides. The D.C. police chief reported that his department’s statistics for 1975 indicated that “less than 0.5% of the guns seized by police in connection with crimes were registered” (*Washington Post* 7-24-76, p. E3). If homicide guns were even approximately like other crime guns, even the instantaneous elimination of *all* registered handguns, never mind a mere freeze on additions to the registered handgun stock, could not have produced an abrupt 25% drop in gun

homicides, since registered handguns simply were not used to commit any significant number of gun crimes in D.C.

The authors speculated that perhaps, for unstated reasons, “people voluntarily disposed of guns,” presumably including in this category violence-prone people getting rid of the *unregistered* handguns that actually predominated among D.C. gun crimes (p. 1619). Local history, however, indicates that this is highly unlikely. Just one year before the handgun ban was passed, from April 6 to July 3, 1975, the D.C. police conducted an amnesty program in which residents could voluntarily turn in unregistered guns without fear of prosecution (*Washington Post* 4-3-75, p. D3). The first 17 days of the 90 day program yielded a grand total of 35 guns, evidently including long guns as well as handguns (*Baltimore Sun* 4-23-75). Even if this pace was maintained for the rest of the period, the program would have yielded only 185 guns, in a city where the police estimated there were 100,000 unregistered handguns (*Washington Post* 4-9-75, p. B3), plus an unknown additional number of unregistered rifles and shotguns. If this voluntary turn-in program yielded less than 0.2% of the stock of unregistered handguns, it is implausible that just one year later enough D.C. residents voluntarily disposed of their unregistered handguns to produce a 25% reduction in gun homicides, or any significant share thereof. Thus, neither the total elimination of registered handguns nor voluntary disposal of unregistered handguns is a plausible explanation of the drop in gun homicides.

Case studies also have the simple problem of being studies of a single case or a very small sample. The smaller the sample, the more likely it is that some local confounding factors could be responsible for whatever patterns are observed. For example, regarding the D.C. gun law study, even if one could have faith in the utility of the gun/nongun comparison, ignored the problems of using an unsuitable control area, and were willing to conclude that something gun-related was responsible for D.C.’s homicide trends, it would still be impossible to determine whether the new gun law was effective. As was pointed out over a decade before the Loftin et al. evaluation (in an article they cited), there were at least

three other gun-related “interventions” going on in Washington at the same time its handgun ban ordinance was being debated and implemented (Jones 1981, pp. 144-5), none of which Loftin et al. mentioned to their readers. The federal Bureau of Alcohol, Tobacco and Firearms (BATF) conducted Operation CUE (Concentrated Urban Enforcement), a policy of intensified enforcement of existing federal gun laws, in the D.C. area and two other urban areas, from February 16, 1976 through 1977. It was devised with the express purpose of reducing illegal gun trafficking and thereby reducing gun violence (U.S. BATF, no date). Meanwhile, the D.C. handgun ban was approved in committee on 4-15-76, was passed by the D.C. City Council on 6-29-76, first went into effect on 9-24-76, and then, after legal challenges, went permanently into effect on 2-21-77 (*Washington Post* 4-16-76, p. C5; 6-30-76, p. 1A; Jones 1981). Thus Operation CUE completely overlapped the period in which the D.C. law was passed and implemented. Further, in February 1976, the first of several undercover fencing operations in D.C. was announced to the public, operations which were responsible for, among other things, seizures of illegal guns and arrests of hundreds of criminals. Finally, the D.C. police, in cooperation with the U.S. Attorney for D.C., improved their efficiency in handling major criminal offenders (Jones 1981), who are disproportionately likely to use guns in their crimes (Kleck 1991, Chapter 5). Thus, even if one wanted to attribute homicide reductions to either gun control of some sort, or other criminal justice system activity, it would be impossible to confidently attribute it to the new D.C. gun law.

Oddly enough, the sponsors of Operation CUE cited some of the very same crime data used by Loftin et al. to support the D.C. law, to support their claims that *Operation CUE* was responsible for violence reductions (U.S. BATF, no date; *Washington Post* 3-25-77, p. C1)! Thus, BATF and Loftin et al. were each implicitly in the peculiar position of having to assume that the other’s preferred policy failed, in order to conclude that their own preferred policy succeeded. None of this prevented Loftin et al. from flatly stating that all alternative explanations of the gun homicide drop, other than

attributing it to the local handgun ban, were “implausible” (p. 1618). It would be nice to think that these sorts of confounding changes in the causal processes affecting crime trends were unique to Washington, but it is more realistic, and certainly more prudent, to assume that similar “unique” events or local disturbances are a routine feature of life in almost any large intervention area. Indeed, a critical problem in using any longitudinal approach to evaluating the impact of public policy changes is that such changes are more or less continuous and omnipresent - governments are nearly always doing something intended to affect the frequency or severity of a given social problem. This is not merely true as a generalization about all policy-making, considered indiscriminately in the aggregate, but also applies specifically to as narrow a category of policy as gun control; governments are nearly always modifying, or attempting to modify, gun policy in at least some minor ways. Tamryn Etten’s (1993) exhaustive examination of gun law making in Florida revealed that from 1949 to 1992, the Florida legislature considered a total of 641 gun control bills, passing 70 of them into law. Thus, an average of 14.6 were proposed and 1.6 were passed per year; better than one bill a month was introduced, and one became law about every seven months. Given that years can pass between a bill’s initial introduction and its passage into law, this means that, even if one ignored bills that failed, the citizens of Florida and their elected representatives were virtually continually in the process of passing gun laws.

When Loftin and McDowall (1984) evaluated a Florida law which enhanced sentences for committing crimes with a gun, they did not note this near-continuous process of gun law-making, instead implicitly treating the passage of this particular law as an isolated event whose effects, if any, could not be confused with the effects of other gun laws being passed. However, even confining attention to a single narrow category of law, there were no less than *eight* sentence enhancement laws passed between 1961 and 1990, six of them between 1975 and 1990 (Etten 1993). Thus, the making of gun laws was virtually continuous. Given the possibility of anticipation or “announcement” effects before a law’s

effective date, and of lagged effects after that date, every month in Florida was subject to the overlapping effects of multiple gun laws passed around the same time. How, under such circumstances, can one realistically expect to separate the effects of one particular gun law from those of other gun laws, never mind the effects of other laws and thousands of other variables influencing violence trends?

D. Selection of Intervention Sites

Even if more than one intervention site were evaluated, another problem which afflicts single-site case studies would still persist: the possibility of bias in the selection of sites. For example, Loftin, McDowall and Wiersema (1991) evaluated mandatory add-on penalties for committing crime with guns in six cities, but noted that their six-city sample was selected because “there was publicity suggesting that [the gun laws these cities were subject to] had successfully reduced violent gun crime” (p. 17; see also McDowall, Loftin and Wiersema 1992, p. 391). Thus, the sample was biased to include cities with some *a priori* evidence that the policies were effective, so we should not be surprised by their finding significant reductions in gun homicides in four of the six cities.

E. Is There an Advantage for Determining Causal Order?

Longitudinal designs in general, including ITSD, use time-ordered observations, which can help in establishing causal order. When one is evaluating the impact of a discrete event, such as implementation of a new law or other public policy, time order is easy to establish: the policy’s implementation usually begins at a single known date and is then followed (or not) by a later change in the frequency of the targeted behavior.

Thus, one clear, potentially significant advantage of the univariate ITSD strategy over cross-sectional approaches is the former’s potential advantages in establishing causal order and disentangling possible reciprocal effects. With regard to

policy impact evaluation, one might generally hypothesize that the magnitude of the target problem has a positive causal effect on the probability of any given potential public policy solution being adopted in the first place. Once adopted, the policy may then have the intended negative effect on the magnitude of the problem. Thus, with gun control, one might suppose that as gun violence increases, public and political support for stricter gun laws will rise, increasing the probability of a new law being passed. Then, once it is implemented, the law could reduce gun violence. Using time-ordered data could help address this possible reciprocal relationship.

This, however, is only an advantage when and where there actually is a two-way causal relationship to deal with. Regarding gun control, causal order is problematic only if violence rates have a net causal effect on passage of new gun laws. In fact, there is no empirical evidence this is true, and considerable evidence that it is not. Survey evidence indicates that public support for gun control is unrelated to crime rates in the cities where respondents live, to their own prior victimization experiences, or to their expressed level of fear of crime. Generally, public support for gun control is unrelated to crime (Kleck 1996). Further, survey evidence has indicated that nearly half of gun control supporters favor stricter gun laws even though they believe they will have no impact on crime or violence, suggesting that their support is not primarily based on concerns about crime (Kleck 1991, Chapter 9). Aggregate national survey data also indicate that crime rate increases in the 1960s and 1970s did not translate into increases in the level of support for gun control, because people who responded to crime trends by supporting gun control were balanced out by people who responded by getting a gun for self-defense, and consequently opposing gun control (Stinchcombe et al. 1980). Finally, historical evidence indicates that American gun laws, most of them tracing back to measures passed in the 19th and early 20th century, were passed primarily in response to concerns about racial and ethnic minorities, foreigners, labor organizers, political dissidents, and other groups unpopular with political elites and

perceived to be dangerous, rather than concerns about ordinary crime (Kennett and Anderson 1975; Kates 1979)

The overt rationale for gun control is the reduction of crime and violence. Certainly legislators sponsoring gun laws will frequently cite crime statistics or individual violent incidents to justify the need for gun laws. However, even if one accepts the utilitarian premise that gun control, being a proposed solution for these problems, will become more popular as the perceptions of the seriousness of the problem increases, it still would not follow that increases in actual or measured violent crime rates make it more likely that new gun laws will be passed. Members of the general public do not have accurate perceptions of whether crime is going up or down. Increases in fear and the perception of crime and violence as serious problems are as likely to occur when violence is decreasing, as it did during the 1981-1986 period, as when violence is increasing, as it did in the 1964-1974 period (U.S. Bureau of Justice Statistics 1989). These public perceptions may be driven instead by trends in news media coverage of violence and perhaps fictional mass media materials as well. The volume of news media coverage of crime, however, is largely unrelated to actual rates of crime (see reviews in Garafolo 1981 and Marsh 1989). Consequently, there is again no empirical basis for expecting measured or actual trends in crime or violence to affect the probability of gun laws being passed, and hence no basis for expecting a causal order problem in assessing the impact of gun laws on crime and violence rates. The usual advantage of longitudinal designs for helping address causal order problems appears to be irrelevant to this issue.

F. Arbitrary Definition of the Set of Time Points Analyzed

Another sampling issue pertains to the set of time points examined rather than the intervention or control sites evaluated. By definition, a time series is a continuous set of consecutive time points, and thus not a probability sample of all time points. In practice, the time series assessed in ITSD

studies are arbitrarily defined segments of history, chosen primarily on the basis of data availability. It has routinely been observed that the results of time series regression studies can vary sharply, depending on exactly which set of time points is used, especially when, as is usually the case, the sample size is fairly small (Kleck 1979; Cantor and Cohen 1980). Yet, in applications of ITSD to policy impact assessments, this issue is rarely empirically addressed by re-estimating models based on differing sets of time points. Instead, analysts commonly adopt the simplistic statistical stance that the longest time series, using all available time points, will yield the most stable parameter estimates (assuming the data are of constant quality). Since any other series would be shorter and thus statistically inferior, it is implied, only estimates based on the full series need be produced and reported. The longest time series also will not be influenced by short-term changes in the target variable and is more likely to detect cycles in the behavior that would be missed in a shorter series. These observations do not, however, dispose of the broader logical issue of whether findings will differ if a different series were used. If results change radically when varying subsets of time points are used, this lack of robustness is something which readers, not to mention the analysts themselves, ought to know about.

The impact of even small changes in the time series can be simply illustrated with analyses of the District of Columbia's handgun ban. Loftin et al. reported that gun homicides averaged 13.0 per month in the 105 months before D.C.'s handgun ban and 9.7 per month in the first 135 months after the ban (p. 1616), the post-intervention period ending in December 1987. However, if one adds 2 more years of data, covering 1988 and 1989, the post-intervention mean rises to 13.3, completely eliminating the apparent reduction in gun homicides. Adding in 1990 data boosts the post-intervention monthly mean to 15.1, implying a 16% *increase* in gun homicides after the law went into effect (computed from data in ICPSR 1991).

It should be stressed that since the D.C. law was a sort of "slow-motion" handgun ban, one would expect its impact to

be most apparent a number of years after its effective date. Thus, the years most crucial to an assessment of this particular law's impact would be *later* years, including 1988-1990, rather than those immediately following the effective date.

Determination of the end point of a time series to be studied is often arbitrarily determined simply by when analysts choose to study a given intervention. Some analysts of a Massachusetts gun law rushed to study it within months of its implementation, so they had only 18 post-intervention data points to analyze, and could assess only short-term effects (Deutsch and Alt 1977). Others waited until more time had passed and they therefore had a longer and later series to work with (Pierce and Bowers 1981). Leaving aside why particular analysts timed their research as they did, it is possible for research outcomes to be manipulated merely by the timing of the study. For example, pro-control analysts could hurry to begin analysis of a law which was followed by crime drops the analysts suspected would be short-lived, or, if the law was followed by crime increases, could delay analysis until violence trends turned around and showed a decline. Anti-control researchers could do the reverse.

Even the choice of data sources to use, when multiple sources are available, can affect the finishing point of the time period studied in significant ways. The most common crime studied in ITSD gun control studies is homicide, which is counted by both the vital statistics system and the police. The national vital statistics system is far slower in generating usable statistics, with published and computer-readable data being released two to three years after police counts are available. In effect, this means that time series analysts can omit, on seemingly legitimate grounds of data availability, two or three years worth of data hostile to their preferred hypothesis simply by choosing to use vital statistics data rather than police data. Conversely, if the most recent time points favor their preferred hypothesis, they can include them by using the police counts.

G. The Intervention

1. Biased Selection of Interventions by Era

A similar but nevertheless distinct problem is the selection of interventions with respect to historical period. Not only can a given intervention be evaluated using an arbitrarily and possibly biased set of time points, but analysts can also choose to assess a biased sample of interventions which all occurred in the same unrepresentative historical period. Consider once again Table 1. Of 18 intervention-assessments (counting multiple assessments of the same intervention multiple times), 15 occurred in the brief period between 1974 and 1977, and all 18 occurred between 1974 and 1987. Were this period like any other, this would be of no consequence, but the data in Table 3 show that this period was not just like any other. As we noted above, it was an era when every variety of gun violence was declining, and these declines were almost always greater than declines in nongun violence. In short, this was an era which favored pro-control conclusions regardless of the actual impact of gun control.

Loftin, McDowall and Wiersema's study of gun laws in six cities (1991; see also McDowall et al., 1992) provides an illustration of how results can be biased by the historical period of the intervention. They asserted that it was remarkable and highly significant that four of the six cities showed significant declines in gun homicide when gun laws were implemented, each larger than declines in nongun homicide, arguing that this "consistency" strongly buttressed their conclusion that the gun laws they were evaluating were responsible for these trends. However, in light of the national homicide trends presented in Table 3, it is quite possible that most any random sample of six cities examined for the 1975-1982 period would have shown the same gun/nongun patterns observed by Loftin et al. for at least four of the cities. Such consistency is neither remarkable nor necessarily a product of effective gun laws. Instead it was a commonplace pattern which was at least partly, and possibly entirely, attributable to

other causal forces besides gun control, operating across the nation during this era.

The problems with Loftin et al.'s (1991) analysis also helps to reiterate a point we made above -- the need for multiple control sites that are similar to the intervention site both in terms of its demographic characteristics and its trends in crime. Had Loftin et al. used an appropriate group of control sites, their results likely would have called into question the effectiveness of the six gun laws, since cities without these laws experienced similar declines in gun homicides over the same period.

2. When Does the Intervention's Impact Begin?

One of the theoretical strengths of the interrupted time series design is the ability to test for differences in the level of the target variable before and after a *well defined intervention* occurred. In practice, however, this is much more difficult to specify in evaluating a legal or policy change. For example, when Massachusetts passed its law providing mandatory minimum sentences for illegal weapons carrying, most analysts simply assumed its impact would begin at its official effective date (e.g., Deutsch and Alt 1977; Hay and McCleary 1979). However, after Pierce and Bowers' (1981) ARIMA analysis failed to reveal any drop in gun violence in the month of the effective date, they searched for, and found, a drop in the month *preceding* the effective date. While one might criticize them for *ex post facto* hypothesis testing, their rationale for looking for this pattern was perfectly reasonable. They argued that they had discovered an "announcement effect," and that prospective gun carriers had responded to publicity announcing the coming of the law, refraining from carrying before the law actually went into effect. Of course, it would be arbitrary to anticipate such an effect only for the month immediately preceding the effective data, since similar arguments could be made for almost any month between the law's initial legislative introduction through its effective date. Note, however, that if one concedes that laws not yet legally in effect can influence crime rates, what would prevent bills not

yet passed from also affecting crime? And if these bills can have an impact, why not bills which are introduced (perhaps to much fanfare), but which will never be passed?

Conversely, one could also anticipate lagged effects of an intervention, on the assumption that people targeted by the law responded only after enough time has passed for news of the intervention to be communicated, or only after enough violators had been punished for “word to get out on the street.” There are many points, often accompanied by a burst of publicity, at which a new law’s impact might plausibly begin. These would include the time when:

- (1) the law is first publicly proposed or introduced,
- (2) the law is passed by a legislative committee,
- (3) the law is passed by each house of the legislature,
- (4) the law is signed into law,
- (5) the law’s effective date arrives,
- (6) the first violator is arrested, convicted, or sentenced,
- (7) a large enough number of violators are punished so “word gets out on the streets,”
- (8) publicity about the law begins in earnest, or
- (9) publicity about the law peaks.

Indeed, there would seem to be few time points anywhere near the “intervention point” which would *not* be plausible as points at which the intervention’s impact could begin. The term “effective date” is just a legalism; it has no special claim to being the point at which new laws will actually begin to have an effect. Use of this date as the intervention point is therefore arbitrary. Nevertheless, the traditional ITSD analysis almost never considers any of these alternatives or tests for apparent “effects” when differing intervention points are used.

The peculiarities of D.C.’s handgun freeze highlight the difficulties of determining when an intervention’s impact is supposed to begin. Loftin et al. (1991) assumed that the law’s impact began at the law’s effective date of 9-24-76. However, even the effective date for this law was ambiguous

because it took effect temporarily on 9-24-76, but then the deadline for owners of registered handguns to re-register their guns was extended, followed by legal challenges which resulted in the law being suspended for two months, with the law finally becoming fully effective on 2-21-77, five months after the initial effective date. Complicating matters further, the D.C. law did not necessarily immediately change the legal status of *any* handguns — the illegal (unregistered) handguns remained illegal, and the legal ones, due to the grandfather clause, could be re-registered under the new law and thus remain legal. In the long run, all legal handgun ownership in the District would disappear as legal owners died or moved away, but it was unknown how long it would be before this could exert an impact on gun homicides. It was only clear that any effects on the level of legal handgun ownership would have to be gradual.

Unfortunately, if analysts tested for all the more plausible impact points, they would run into the problem of “dredging the data” for supportive results through the use of multiple *ex post facto* hypothesis tests. This would artificially increase the chances of obtaining results indicating an apparent successful impact of the intervention, merely by increasing the number of tests performed (Selvin and Stuart 1966). Once it is realized how numerous the plausible alternative versions of the impact hypothesis are, the policy efficacy hypothesis begins to increasingly look like it is unfalsifiable through interrupted time series tests.

3. Specification of the Impact Model

If an intervention is going to have an effect on the targeted behavior, it is likely to take one of four forms:

(1) abrupt and permanent, where there is an immediate effect of the policy change that has a long-term impact on behavior, (2) abrupt and temporary, where there is an immediate impact of the policy change, but its effect is short-lived, (3) gradual and permanent, where the policy change has only a minor effect on behavior shortly after it went into effect, but as time passes, there is an increasing impact on the

target behavior, and (4) gradual and temporary, where the policy is slow to take effect, and then gradually diminishes in having any effect on the target behavior.

Unfortunately, much of the literature on the statistical modeling of the impact emphasizes the empirical results to the exclusion of any meaningful theoretical argument that calls for a specific type of intervention (see, e.g., Loftin et al., 1991).

The importance of this issue is related to how one interprets the statistical results. For example, if theory suggests that a law's effect on the target behavior will be gradual (e.g., as in any law with a "grandfather" clause), but the gradual impact model did not fit the data very well, then in light of the nature of the intervention, one reasonable interpretation would be to conclude that the intervention did not have any impact, on the theoretically-based assumption that, if the law was effective, its impact had to be gradual.

Loftin et al. (1991) again provide an illustration of this problem in gun control research. They concluded that the D.C. law had an abrupt and permanent impact on gun homicides, since the ARIMA model specifying an abrupt impact fit the data better than one specifying a gradual impact. On *a priori* theoretical grounds, however, it would be hard to imagine an intervention whose impact (if any) was more likely to be gradual. By effectively banning future legal handgun acquisitions but allowing existing legal handguns to remain legal, the D.C. law was virtually designed to have only a gradual effect. The authors were clearly aware of this, since they noted that "observers expected the gun-licensing law to have limited or gradual effects because it 'grandfathered' previously registered handguns and did not directly remove existing guns from their owners" (p. 1619). Few policy interventions will allow such a clear-cut theoretically based choice of intervention impact patterns, yet Loftin et al. made a purely *ex post facto* choice of a less theoretically appropriate model solely because it fit the sample data better. This represents the triumph of technique over substance. If *a priori* theory (or common sense) could play no role whatsoever in model specification in such a clear-cut case, it is hard to see how it could ever do so in any ITSD evaluation.

III. An Empirical Demonstration

So far, we have described problems that are inherent in almost any use of the ITSD, stressing especially flaws in the logic of the design. Logical argumentation alone, however, cannot indicate just how seriously astray the analyst can be lead by this approach. In the following sections we illustrate these problems by replicating one of the more sophisticated applications of the strategy (i.e., Loftin et al., 1991) and then demonstrating how the conclusions reached by its users collapse when each of several features of the analysis is altered. Loftin et al. used both ARIMA methods and a simple before-after comparison of mean violence counts. Our analysis uses only the more sophisticated ARIMA methods commonly applied in ITSD studies.

The Loftin et al. study of Washington's handgun ban is arguably the most sophisticated of the ITSD analyses of gun laws. It certainly was the most highly publicized, as its publication in the *New England Journal of Medicine* was accompanied by a national press release and front page stories in newspapers across the nation. Though the article addressed suicides as well as homicides, it is sufficient for our purposes to confine the reanalysis to homicides. The ARIMA models used in the following interrupted time series analyses were identified using standard model development procedures (e.g., McDowall et al. 1980; Wei 1990). In addition to visual inspection of the autocorrelations and partial autocorrelations, we used tests for the normality of the residuals and the Akaike Information Criteria (AIC) to assist our selection of the most appropriate time series model. Following the identification of the univariate ARIMA model, we then added the intervention parameter to test for a change in behavior that reflected a change in criminal law. Tables 4 through 9 present our results from this exercise.

The original D.C. study used vital statistics data on homicides. We used police-based data, derived from the FBI's Supplementary Homicide Reports program (ICPSR 1991),

instead, for two reasons. First, Loftin and McDowall refused to provide us with a copy of their data, making a direct reanalysis of their published work impossible. Without their exact dataset, it would be impossible to determine whether any differences in results were due to differences in analytic procedures or to differences in the datasets produced in transferring data from vital statistics computer files to the files actually used for analysis. Further, we believe that police-based local homicide counts are in any case superior to vital statistics data, for several reasons. First, the former properly exclude many justifiable civilian homicides which the latter do not (Kleck 1991). Second, the latter often erroneously includes negligent vehicular homicides which, being accidental, should not be grouped with intentional killings (Reidel 1990, p. 200). Because medical examiners and coroners rarely would know about homicides unknown to police (who are virtually the sole source of their caseload), this means that when vital statistics counts are higher than police counts, it is ordinarily attributable to this sort of vital statistics system classification error, rather than to superior coverage of homicide events.

Third, vital statistics data do not actually count the number of homicide attacks that occur in a given area, as police data do, but rather the number of homicide *deaths* that occurred there. Thus, a victim who was shot outside the District of Columbia but who died at a hospital just the inside the border would be wrongly counted as a D.C. homicide and hence as a “failure” of the D.C. gun laws. This would be erroneous since there is no strong reason for D.C. laws to prevent shootings in areas not subject to its laws. And of course, the reverse error could also occur if the victim of a D.C. attack died in a nearby Virginia or Maryland hospital. For large areas like states this would often be a minor concern, since only a small fraction of assaults occur close to the area’s borders. D.C., however, covers only 61 square miles, and no point is more than five miles from the nearest border with Virginia or Maryland. Seven of the District’s 14 highest homicide census tracts were within one mile of its Southeast border (Harries 1990, p. 111). All but one of D.C.’s certified hospital trauma centers are within three miles of the border (at most a six minute

ambulance ride, even at 30 miles per hour), including Washington Hospital Center, which handles 30-40% of the city's gunshot wound patients treated at trauma centers. Four others in Virginia and Maryland are also this close to the border (American Hospital Association 1990, pp. A88, A89; Webster et al. 1992). Consequently one cannot tell from vital statistics data how many homicide attacks occurred in D.C., or in any other city, county or similarly small area. (See Table 4.)

As it turns out, these flaws in the vital statistics homicide were apparently substantial enough to alter the evaluation of D.C. homicide trends. Loftin et al. based their favorable assessment of the law's impact on homicides on two ARIMA findings: the "impact" parameter estimate was significant for gun homicides, and was not significant for nongun homicides, supposedly suggesting that there was something gun-related responsible for the pattern. Table 4 shows that analysis of D.C. Supplementary Homicide Report-based counts yields an "impact" estimate of -3.2321 in the gun homicide model, within 5% of the -3.4068 estimate produced by Loftin et al. using vital statistics. The SHR-based analysis, however, also finds a significant "impact" estimate for nongun homicides. These findings do not fit the gun/nongun comparison of Loftin et al. as well as their own findings, since they seem to suggest that something that affected nongun homicides as well as gun homicides was driving D.C. homicide trends during this period. (See Table 5.)

Instead of using the very dissimilar D.C. suburbs as a control area, we used the very similar Baltimore. Table 5 displays estimates from an analysis of Baltimore gun and nongun homicides over the 1968-1987 period, using an "intervention" point of October 1, 1976, the same as that used by Loftin et al. They show a negative, significant "impact" estimate for Baltimore gun homicides which is nearly as large (87%) as the corresponding estimate for D.C. Further, they show a far smaller, though significant, drop in nongun homicides, again the same as we found in D.C. The problem with applying the Loftin et al. inferential logic here is that Baltimore had no new gun laws in or around October 1976. This demonstrates three points. First, it is certain that

something other than new gun laws caused this pattern of ARIMA results in Baltimore, and that larger drops in gun violence than in nongun violence can be entirely due to causes other than new gun laws. Second, it is indisputable that using a more appropriate control area can alter and even reverse the conclusions implied by the analysis. If a similar area without a new gun law enjoyed a large drop in gun homicides, and a smaller drop in nongun homicides, it is perfectly possible that the identical D.C. pattern was also entirely due to factors other than its new gun law. Third, the gun/nongun comparison cannot establish whether a new gun control policy caused drops in Baltimore's homicide, since this inferential logic would imply that Baltimore's homicide drops were due to such a legal change, an interpretation we know is impossible.

Table 6 makes explicit what Loftin et al. merely hinted at (1991, p. 1620). When the time series is extended to include just two more years' worth of time points, support for the gun law efficacy conclusion disappears. When the series covers 1968-1989 instead of 1968-1987, the impact estimate in the gun homicide equation is not significantly different from zero, nor significantly larger than the estimate in the nongun homicide model. Very likely, conflict linked with crack cocaine trafficking was an important confounding factor in 1988-1989, but then other confounding factors were also operating throughout the 1968-1987 period as well. If the univariate ARIMA model fails to deal with the effects of the crack combat during the later years, it also has the same flaw for other confounding factors in earlier years. The Loftin et al. results were extremely fragile, strongly dependent on use of a sharply, and (given availability of police-based homicide data for 1988-1989) needlessly limited set of time points.

When did the supposed "effect" of the D.C. handgun freeze begin? A univariate longitudinal impact assessment of any kind leans its case for an impact heavily on the temporal correspondence between the intervention and shifts in the target variable. Unfortunately, neither the D.C. study, nor any of the ITSD studies in Table 1, could actually establish when the favorable shifts in violence occurred. Instead, ITSD ARIMA analysts simply specify intervention models that

assume that an intervention's impact, whether abrupt or gradual, began at a single particular time point (nearly always a law's "effective date"), comparing time points after this point with those before.

Table 7 shows that if one assumes that the intervention occurred in D.C. two years before the handgun law actually went into effect, one obtains the exact same combination of results as were obtained in the original analysis: a large significant drop in gun homicides and no significant change in nongun homicides. There was no new gun law introduced in D.C. in October of 1974 to produce this pattern of trends. Again, a nonexistent, or "bogus" intervention, generated as much apparent support for the policy efficacy hypothesis as the actual intervention. This exercise is a variation on the bogus intervention analysis of James Baron and Peter Reiss (1985, pp. 355-7).

We expanded this exercise by trying out many other bogus intervention points, at six month intervals before and after the actual intervention. The results, shown in Figure 1, indicate that *every one* of the bogus intervention points tested anywhere within four years of the actual intervention generated a significant negative impact estimate in the gun homicide equation. Indeed, the strongest estimated "effects" did not even coincide with the handgun ban. The largest estimates were for points 6-18 months *before* the ban. In this respect, the ARIMA analyses merely confirmed what was evident from a cursory visual examination of the simple gun homicides trend diagram in the original article — a decline in gun homicides was already underway well before the law went into effect or was even proposed (see Fig. 1, p. 1616 in Loftin et al. 1991). It is clear that the D.C. law simply did not correspond in time with the beginning of the decline in gun homicides, regardless of whether one uses ARIMA methods or simple visual inspection of the trends.

Thus, bogus intervention points, corresponding to nonexistent gun law changes, generate as much or more evidence of a supposed "impact" as the actual intervention point. One could choose any of nearly a hundred different months as the "intervention" point, apply the Loftin et al.

methods, and discover a policy “impact.” The tremendous flexibility of the method is disturbingly apparent. An incautious analyst could seize upon virtually any arguably violence-related development in D.C. occurring or beginning anytime during the 1972-1980 period, test for an impact using these methods, and come up with evidence indicating, according to the ITSD logic, that the policy caused a reduction in gun homicide.

Loftin and his colleagues specified an intervention model that assumed that the handgun ban exerted an abrupt impact, despite their knowledge that observers expected a gradual impact. Table 8 shows that it was necessary to specify an abrupt impact, however implausible, in order to obtain results supporting the efficacy hypothesis, since the more theoretically plausible specification of a gradual impact results in a gun homicide impact estimate not significantly different from zero. If the authors knew that the abrupt model fit the data better than the gradual model, this necessarily implies that they did estimate the gradual impact model and presumably obtained results very similar to those we obtained. They did not, however, report these unsupportive results to their readers. Instead, they flatly stated that the handgun ban had “truly preventive” effects (p. 1619) and that they had provided “strong evidence” that the law reduced homicides (p. 1620).

One further exercise is informative with regard to the utility of any ITSD evaluation of gun laws. The problems with the approach can be demonstrated by showing that interventions exactly opposite in character can yield precisely the same appearance of a beneficial “impact.” Scholars dispute whether the generally moderate existing gun controls reduce violence, but few have concluded that they increase violence. Empirical evidence instead generally indicates that existing moderate regulatory measures are merely ineffective (Kleck 1991, Chapter 10).

Therefore, *repealing* gun laws should either increase violence (if one assumes they suppressed violence while in effect) or have no impact (if one assumes they had no impact while in effect). There are many examples of gun laws being

repealed in recent years. The NRA's success in getting "state preemption" laws passed was arguably the dominant gun control trend of the 1980s. By passing such a law, the state preempts the field of gun control, accomplishing either or both of two things: it repeals existing local (municipal or county) gun controls, and forbids passage of other local controls in the future. Thus, passage of such a law is a sort of "anti-gun-control" or gun decontrol. Louisville, Kentucky, a city with about 300,000 people in 1980, is illustrative. Before 1984 it had an extensive array of local gun controls, including: (1) a ban on handgun sales to members of various high-risk groups (criminals, minors, fugitives, etc.), (2) a ban on possession of handguns by such persons, (3) local gun dealer licensing, (4) a waiting period on handgun sales, and (5) local police registration of handgun sales and transfers. The last control was especially noteworthy because it covered private transfers as well as those involving licensed dealers, an uncommonly comprehensive feature (U.S. BATF 1984, pp. 55-6).

In 1984, however, Kentucky passed a state preemption bill that wiped out all local gun regulations, including Louisville's. The relevant part of the Kentucky statutes reads: "Local firearms control ordinances prohibited. No city, county or urban-county government may occupy any part of the field of regulation of the transfer, ownership, possession, carrying or transportation of firearms, ammunition, or components of firearms or combination thereof" (Kentucky 1990, p. 38 [Kentucky Revised Statutes 65.870]). The law's effective date was July 13, 1984.

Table 9 shows the results of a univariate ITSD analysis of Louisville monthly gun and nongun homicide counts from January, 1976 to December, 1986, assuming the gun decontrol intervention began on July 1, 1984. The impact estimates are significant and negative for the gun homicide model and insignificant for the nongun homicide model. Thus, following the methods and inferential logic of Loftin and his colleagues, one would have to conclude that *repealing* Louisville's gun controls saved lives.

We do not believe that this is actually what happened. We suspect that it is more likely that the repeal of these controls

had little or no impact, for good or ill. The point to this exercise is merely to demonstrate how easily the research design yields seemingly absurd results. Interventions exactly opposite in character can yield identical patterns of findings, leading to the unlikely conclusion that both passing handgun restrictions and repealing them reduces violence. We are not recommending a new round of ITSD analyses of state preemption laws to balance out the existing studies of new gun laws. Rather, we conclude that it is pointless to apply so dubious a methodology to the evaluation of any kind of intervention, no matter what its character.

In sum, three different kinds of “bogus” interventions all generated findings which appear to indicate an “impact” of policies, if one follows the methods and logic of ITSD approaches to gun control impact evaluation. There was a spurious appearance of an impact when the analysis assumed gun-related policy interventions for time points where there were no such interventions (the “bogus” intervention points), when the analysis was applied to an area (Baltimore) that had no such interventions, and when the analysis was applied to an actual intervention (state preemption in Kentucky) that was exactly opposite in character to laws restricting guns.

The authors of the ITSD studies summarized in Table 1 did not perform any of the tests for robustness that we have applied to the D.C. data. In the absence of information to the contrary, we believe the prudent assumption at this point is that these very similar studies, using methods either identical or inferior to those applied to the D.C. data, are afflicted by the same flaws as the Loftin et al. D.C. study. Consequently, we believe that their results should be regarded, at least until these robustness tests are performed, as being at least as unreliable as those generated in the Loftin et al. D.C. study.

IV. Discussion

If the ITSD approach is so obviously inadequate, what accounts for its popularity? One explanation would be that if one is committed to determining whether one particular intervention in one particular site was effective, there often is

no practical alternative to an ITSD case study. Rather than simply admitting that there are no sound, feasible methods for assessing whether a specific policy had an aggregate impact in a given city or state, many scholars would rather do the best they can, no matter how misleading their results might be, based on the dubious faith that some information is bound to be better than none.

Another explanation is simply that the approach is so easy. The univariate ITSD analyst does not have to learn anything about the causes of a phenomenon to apply univariate ARIMA analysis to it, since one does not have to devise an explanatory model. More importantly, one does not have to devote the hundreds or thousands of hours in tedious data gathering which multivariate researchers spend in measuring possible confounding factors (e.g. Kleck and Patterson 1993). There is always an attraction to getting something for nothing. ARIMA analysis is arguably the last major category of social science inquiry where univariate research is still considered respectable. This presumably is due to the faith that ARIMA modeling somehow “controls” for the “systematic” sources of variation in the series, leaving only a few sources of “nonsystematic” variation uncontrolled. Of course, if this were true, advocates of the approach would have little reason for bothering to analyze control series or developing multivariate ARIMA methods.

Finally, with respect to assessments of politically charged interventions, there is a strong ideological attraction to the ITSD approach. It is so flexible, so manipulable, that one can obtain almost any results one likes, merely by being careful in one’s selection of intervention type, historical era, intervention site, time series endpoints, intervention impact model, and control areas. The U.S. has thousands of legal jurisdictions, each with a different array of laws. One may choose from among hundreds of possible types of gun control, and for any given type, can often choose from among dozens or hundreds of different sites where the measures have been implemented. If one is opposed to gun control, one can simply select the weakest forms of control to assess, nonrandomly select sites where crime increased after the measures were implemented,

or study time periods when gun and nongun violence trends were generally inconsistent with the gun control efficacy hypothesis. Conversely, if one were pro-control, one could make the opposite choices.

One can also vary the design details and inferential logic to suit one's policy preferences. If a crude ITSD analysis without any control series yields the desired results, the analyst can stop there. If not, the analyst can add a control area which showed even worse (or better) trends in the target variable than the intervention area. Thus, if there is a decrease in gun violence around the time a law went into effect, one can conclude a gun law worked. However, even if there was an increase, or no change, in gun violence, one can then search for a comparison series which showed an even bigger increase and argue that the gun law had a "dampening" effect on violence, preventing it from being even worse than it otherwise would have been (for an example of this very line of reasoning, see O'Carroll, Loftin, Waller, McDowall, Bukoff, Scott, Mercy, and Wiersema 1991).

All of this would matter very little if ITSD studies yielded the same results as those generated by other approaches. In the gun control area, this is clearly not true. The results of ITSD studies stand out as anomalies. In general, the technically strongest research in the area indicates that all but a few types of gun control have no impact on the frequency of any form of violence, including homicide. Most of the exceptions to this generalization, however, used the ITSD approach. One review covering the pre-1990 research indicated that of 29 studies on gun control impact on crime, only three generally supported the hypothesis that gun laws reduced violence, with another eight providing some mixed or partial support, while 18 were consistently unresponsive. Among studies using non-ITSD methods, only 4 of 17 yielded results even partially supportive, while 7 of 12 studies using ITSD methods generated supportive results (Kleck 1991, p. 417). The choice of research designs apparently does make a difference.

V. Conclusions

The ITSD approach is so deficient for purposes of policy impact assessment and hypothesis testing that it would not be an overstatement to describe it as “subscientific.” If one cannot rule out *any* rival explanations of trends in the target variable, then attributing them to an intervention amounts to little more than an idle guess, based on a very rough temporal coincidence. The Washington, D.C., study by Loftin et al. illustrates that ITSD findings are often so fragile that even the slightest changes in study design can completely overturn the conclusions. The appearance of a beneficial impact on homicide disappeared once any one of the following changes were made:

(1) using a different source of homicide data, (2) using a more comparable control jurisdiction, (3) extending the time series by just two years, or (4) using a more theoretically appropriate impact model.

It is something of a mystery how univariate nonexperimental analysis of any kind, no matter how dressed up in statistical finery, can still be considered respectable at this late date. Perhaps ITSD studies enjoy a certain amount of unearned prestige from being labeled “quasi-experimental,” even though they are actually nonexperimental. This unfortunate label hints that the design has some of the significant features that make the internal validity of experiments so strong. However, the key feature of experimentation responsible for this strength is the ability of researchers to randomly assign or control treatments, i.e. to manipulate the cause or independent variable. The ITSD researcher does not enjoy this advantage. Scholars in general cannot do this with evaluations of new laws, and only rarely can do it with other public policies affecting large populations. Further, the fact that two groups, loosely labeled “experimental” and “control,” are sometimes used in ITSD studies does not make the research experimental in any sense. Even the use of time-ordered data is a minor secondary feature

of experiments, usually unnecessary for drawing strong causal inferences. It is time to acknowledge what should have been obvious, and recognize that this emperor has no clothes. What then is the alternative? Are we stuck with the ITSD approach on the premise that it is better than nothing? We would suggest that the approach can in practice be considerably worse than nothing, being so subject to illegitimate manipulation, so easily used to confirm a researcher's preconceived biases, that use of the approach can be worse than no research at all. Sometimes it is better to simply say "we do not know" than to suggest that we can know, using methods which are prone to distortion and systematic error. More specifically, in cases like evaluation of the impact of new laws, where true policy experimentation is impossible, it may be best to say we simply have no sound way to assess whether a specific intervention worked in a particular locale.

This does not, however, imply that we cannot come to stronger conclusions about whether a *category* of interventions, such as a type of law, implemented in many different areas, has had an impact. One can, for example, assess whether laws requiring a waiting period before buying a gun, operating in dozens or hundreds of cities, have, on average, reduced crime. Once one shifts to a cross-sectional approach, comparing areas having a policy with areas lacking the policy, it is possible to use data from the Census and many other sources to measure and explicitly control for dozens or hundreds of possible confounding factors, and to estimate more realistic multivariate models (see Kleck and Patterson 1993 for an example). One will still be constrained by limits on both data and credible theory, but these same problems also afflict ITSD approaches, whether acknowledged or not. The main difference is that with a cross-sectional approach, the data constraints are much weaker and the analyst can explicitly rule out hundreds of specific rival explanations for observed associations between policies and target variables, while the univariate ITSD approach allows one to explicitly rule out none of them. Furthermore, as an empirical matter, it turns out that, in cross-sectional studies, specification of which control variables to include in the model is less consequential

than analysts assumed. In contrast to the strong cross-temporal correlations found in time series studies, the presence or absence of gun laws has little or no correlation, across legal jurisdictions, with other known determinants of violence rates. Consequently, cross-sectional estimates of gun law impact are not substantially influenced by control variable specification decisions (Kleck and Patterson 1993).

Before-and-after comparisons are an essential part of how humans learn about how the world works. Often, our own personal experiences suggest the value of this general methodology for learning about our immediate environment; we take an action (the “intervention”) and observe the changes which immediately follow (the “impact”), and reasonably infer a connection between the two. Unfortunately, when one extends this same methodology to the evaluation of public policy impact, it is easy to overlook how drastically the application situation differs. Evaluating public policy impact involves assessing very remote causal effects on the “behavior” of aggregates composed of thousands or millions of individual persons, not the immediate impact of an individual action on a very constricted personal environment. In this light, the intuitive “common-sense” appeal of before-and-after comparisons becomes a danger because it short-circuits critical thinking.

Many of our criticisms have been stated in the scattered technical literature before (e.g. Cook and Campbell 1979). These prior statements, however, have evidently not been sufficiently influential on research practice, since these methods continue to be applied without users attempting to deal with the criticisms, and researchers continue to draw extremely strong conclusions that would not follow if the criticisms had been taken seriously. Consequently, we feel fully justified in our efforts, even if we have run the risk of going over some of the same ground as others have.

Skepticism about the long-accepted virtues of longitudinal research has been growing in recent years. For example, Gottfredson and Hirschi (1987) have questioned the value of longitudinal studies of delinquency causation, while Isaac and Griffin (1989) have challenged time series analyses of

historical processes. It is time that this skepticism was extended to the use of ITSD for assessing public policy impact. The problems with ITSD research are both so serious and so inherent in the logic of the research design (and in the severe, uncorrectable limits on availability of subnational time series data) that the approach appears to be unsalvageable. For now at least, the best course may be to abandon use of univariate time series analysis for hypothesis-testing purposes and confine its use to simple descriptive applications.

In any case, a superior alternative approach has recently become popular. The pooled cross-sections or multiple time series approaches exploit both cross-sectional and cross-temporal variation in the target variable, for large numbers of cross-sectional units. Marvell and Moody (1995) and Lott and Mustard (1997) have both used these designs to evaluate the impact of gun laws. Although these designs share with the ITSD design a limited ability to explicitly rule out rival explanations of trends in the target variable, they are far less subject to problems like biased selection of intervention and control areas and small sample size, since all relevant areas are typically studied.

Table 1. Major Interrupted Time Series Evaluations of the Impact of Gun Control Laws^a

Study	Location of Intervention	Date of Intervention	Control Nongun Series?	Control Other Areas Series?	Type of Intervention
Deutsch and Alt (1977)	Boston	-	No	No	Mandatory penalty for unlawful carrying
Hay and McCleary (1979)	Boston	4-1-75	No	No	Mandatory penalty for unlawful carrying
Deutsch (1981)	Boston	4-1-75	No	No	Mandatory penalty for unlawful carrying
Pierce and Bowers (1981)	Boston	4-1-75	No ^c	No ^c	Mandatory penalty for unlawful carrying
Loftin et al. (1983)	Detroit	1-1-77	Yes	No	Mandatory 2 year add-on penalty for felony w. gun
Loftin & McDowall (1984)	3 Florida cities	10-1-75	Yes	No	Mandatory minimum 3 years for gun possession during felonies
McPheters et al. (1984)	2 Arizona counties	8-1-74	No	No ^d	Mandatory minimum sentence for robbery with a deadly weapon
O'Carroll et al. (1991)	Detroit	1-10-87	Yes	No	Mandatory penalty for unlawful carrying
Loftin, McDowall, Wiersema and Cottey (1991)	Washington, D.C.	9-24-76	Yes	Yes	Ban on handgun possession, with "grandfather clause"
McDowall, Loftin and Wiersema (1992)	Detroit, Jacksonville, Tampa, Miami, Pittsburgh, Philadelphia	1-1-77, 10-1-75, 10-1-75, 10-1-75, 6-1-82, 6-1-82	Yes	No	Mandatory add-on penalties for committing crimes with guns

Notes:

- a. Table covers published studies using ARIMA analytic methods. Simple before-and-after comparisons (e.g. Zimring 1975; Lucas and Ledgerwood 1978; Fife and Abrams 1989) are not covered. Also, where overlapping studies reported the same basic data twice (e.g. Loftin and McDowall 1981 and Loftin et al. 1983), only one is listed.
- b. Was gun crime series compared with corresponding nongun series (e.g. gun homicides compared with nongun homicides)? Was series in intervention area compared with series in nonintervention area?
- c. No ARIMA estimates were reported for nongun crime or for control areas; only simple before-and-after percentage changes. d. Control area was used for paired t-tests, but not for ARIMA analyses.

Table 2. Homicide Trends in Washington, D.C. its Suburbs, and Baltimore, 1968-1990.

Year	Number of DC Homicides	DC Homicide Rate	Number of Homicides in SMSA for DC, excluding DC	Homicide Rate for DC suburbs	Number of Baltimore Homicides	Baltimore Homicide Rate
1968	178	22.19	52	2.76	200	22.23
1969	287	36.82	62	3.07	236	26.14
1970	221	29.21	105	4.99	231	25.50
1971	275	36.54	82	3.81	323	35.78
1972	245	32.58	122	5.54	330	37.12
1973	268	35.93	131	5.74	280	32.14
1974	277	38.43	131	5.65	293	33.63
1975	235	33.08	130	5.61	259	30.65
1976	188	26.85	121	5.10	200	24.43
Before and after division for DC handgun law						
1977	192	28.03	121	5.13	171	21.18
1978	189	28.19	106	4.48	197	24.87
1979	180	27.44	101	4.29	245	30.98
1980	200	31.33	126	5.24	216	27.46
1981	223	35.06	127	5.19	228	29.17
1982	194	30.74	140	5.68	227	29.44
1983	183	29.38	115	4.29	201	26.31
1984	178	28.58	107	3.87	215	28.33
1985	147	23.48	96	3.38	213	28.19
1986	194	30.99	104	3.61	240	30.63
1987	225	36.17	142	4.75	226	30.30
1988	369	59.81	178	5.76	234	31.14
1989	434	71.85	206	6.51	262	34.33
1990	472	77.77	212	6.39	305	41.44

Source: U.S. FBI, *Uniform Crime Reports*, annual issues for 1968-1990.

Notes: Figures for the remainder of the D.C. metropolitan area were obtained by subtracting D.C. figures from the D.C. SMSA crime and population counts.

D.C. gun law first became effective on 9-24-76.

Bivariate correlations of annual homicide rates, 1968-1976:

D.C. and rest of D.C. metro area: 0.313 (p .10)

D.C. and Baltimore: 0.708 (p < .05)

Table 3. Trends in Gun and Nongun Violent Crime, U.S., 1961-1990.

Year	Murder & non-negl. Man-slaughter Rate	% with guns	Rate of Murder & non-negal. Manstr with guns	Rob. Rate	Rob. % with Guns	Gun Rob. Rate	Agg. Assault Rate	Assault % with Guns	Gun Assault Rate
1961	4.8	52.5	2.52	58.3			85.7		
1962	4.6	54.2	2.49	59.7			88.6		
1963	4.6	56.0	2.58	61.8			92.4		
1964	4.9	55.0	2.70	68.2			106.2	15	15.9
1965	5.1	57.2	2.92	71.7			111.3	17	18.9
1966	5.6	60.0	3.36	80.8			120.0	18.8	22.6
1967	6.2	63.6	3.94	102.8			130.2	20.9	27.2
1968	6.9	65.4	4.53	131.8			143.8	23.1	33.2
1969	7.3	64.5	4.73	148.4			154.5	23.8	36.8
1970	7.9	65.4	5.15	172.1			164.8	24.3	40.0
1971	8.6	65.1	5.61	188.0			178.8	25.1	44.9
1972	9.0	66.2	5.94	180.7			188.8	25.3	47.8
1973	9.4	67.0	6.27	183.1			200.5	25.7	51.5
1974	9.8	67.9	6.65	209.3	44.7	93.6	215.8	25.4	54.8
1975	9.6	65.8	6.33	218.2	44.8	97.8	227.4	24.9	56.6
1976	8.8	63.8	5.58	195.	42.78	83.6	228.7	23.6	54.0

Year	Murder & non-negl. Man-slaughter Rate	% with guns	Rate of Murder & non-negal. Manstr with guns	Rob. Rate	Rob. % with Guns	Gun Rob. Rate	Agg. Assault Rate	Assault % with Guns	Gun Assault Rate
1977	8.8	62.5	5.52	187	41.6	77.8	241.5	23.2	56.0
1978	9.0	63.6	5.70	191.3	40.8	78.1	255.9	22.4	57.3
1979	9.7	63.3	6.17	212.1	39.7	84.2	279.1	23.0	66.7
1980	10.2	62.4	6.38	243.5	40.3	98.1	290.6	23.9	69.5
1981	9.8	62.4	6.13	258.7	40.1	103.7	289.7	23.6	68.4
1982	9.1	60.2	5.46	238.9	39.9	95.3	289.2	22.4	64.8
1983	8.3	58.3	4.81	216.5	36.7	79.5	279.2	21.2	59.2

1984	7.9	58.8	4.65	205.4	35.8	73.5	290.2	21.2	61.2
1985	7.9	58.7	4.67	208.5	35.3	73.6	302.9	21.3	64.5
1986	8.6	59.1	5.05	225.1	34.3	77.2	346.1	21.3	73.7
1987	8.3	59.1	4.88	212.7	33.0	70.2	351.3	21.4	75.2
1988	8.4	60.7	5.11	220.9	33.4	73.8	370.2	21.1	78.1
1989	8.7	62.4	5.40	233.0	33.2	77.4	383.4	21.5	82.4
1990	9.4	64.1	6.04	257.0	36.6	94.1	424.1	23.1	98.0

Sources: Total crime rates, 1961-1975: 1975 issue of *Uniform Crime Reports* (UCR), p. 49. Total crime rates, 1976-90, % gun, all years: each annual UCR issue for the corresponding year.

Notes: Gun rates were computed by multiplying the total crime rates (e.g. total robbery rate) by the corresponding % gun (e.g. % gun in robberies). Blank entries indicate that relevant data were not available.

Table 4. Replication With Police Data: D.C. Homicides, 1968-1987.

Panel A: District of Columbia Gun Homicides

Replication Loftin et al.

(FBI Data)				(Vital Statistics Data)			
Parameter	Coefficient Estimate	Standard Error	Ratio	Parameter	Coefficient Estimate	Standard Error	Ratio
α	12.570	.4989	25.2	α	13.125	.5032	26.09
	6		0		6		
ϕ_1	.1367	.0649	2.11	ϕ_1	.1641	.0641	2.56
ϕ_2	.1357	.0651	2.08	ϕ_2	.1274	.0639	1.99
ω_0	-	.6649	-	ω_0	-	.6650	-5.12
	3.2321		4.86		3.4068		
Q = 21.50, 22 df							

Panel B: District of Columbia Non-Gun Homicides

Replication Loftin et al.

(FBI Data)				(Vital Statistics Data)			
Parameter	Coefficient Estimate	Standard Error	Ratio	Parameter	Coefficient Estimate	Standard Error	Ratio
α	7.7429	.2754	28.11	α	7.3615	.3105	23.71
ϕ_1	.0587	.0656	.90	ϕ_1	.1288	.0645	2.00
ω_0	-1.1197	.3670	-3.05	ω_0	-.3915	.4126	-.95
Q = 23.68, 24 df							

Table 5. Use of a More Appropriate Control Area: Baltimore Homicides, 1968-1987.

Panel A: Baltimore Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	13.7050	.7979	17.18
ϕ_1	.2842	.0603	4.71
ϕ_4	.2427	.0605	4.01
ω_0	-2.8114	1.0532	-2.67
Q = 26.55, 22 df			

Panel B: Baltimore Non-Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	8.4670	.2900	28.36
ω_0	-1.1930	.3870	-3.08
Q = 22.20, 24 df			

Table 6. Time Series Extended By Two Years: D.C. Homicides, 1968-1989.

Panel A: District of Columbia Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	11.096	1.978	5.61
ϕ_1	.351	.060	5.85
ϕ_2	.271	.061	4.44
ϕ_3	.221	.060	3.67
ω_0	1.525	2.458	.62
Q = 24.33, 21 df			

Panel B: District of Columbia Non-Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	7.7180	.5351	14.42
ϕ_1	.2357	.0606	3.89
ϕ_2	.2116	.0606	3.49
ω_0	-.5034	.6869	-.73
Q = 24.81, 22 df			

Table 7: "Bogus Intervention" at October 1974: District of Columbia Homicides, 1968-1987.

Panel A: District of Columbia Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	12.5986	.6235	20.21
ϕ_1	.1683	.0645	2.61
ϕ_2	.1645	.0646	2.55
ω_0	-2.7948	.7649	-3.65
Q = 19.26, 22 df			

Panel B: District of Columbia Non-Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	7.8272	.3146	24.88
ω_0	-1.0787	.3865	-2.79
Q = 26.27, 24 df			

Table 8. A Theoretically More Appropriate Gradual Impact Model: District of Columbia Homicides, 1968-1987.

Panel A: District of Columbia Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	12.6795	.5009	25.32
ϕ_1	.1315	.0652	2.02
ϕ_2	.1427	.0658	2.17
ω_0	-1.4005	1.1702	-.65
δ	.5880	.6382	.92
Q = 22.08, 22 df			

Panel B: District of Columbia Non-Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	7.7829	.2757	28.22
ω_0	-2.0855	.7640	-2.73
δ	-.7981	.4227	-1.89
Q = 22.11, 24 df			

Table 9. "Impact" of Gun Deregulation (July 1984) on Louisville Homicides, 1976-1986.

Panel A: Louisville Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	3.4024	.2740	12.42
ϕ_2	.2607	.0854	3.05
ω_0	-1.5529	.5632	-2.76
Q = 22.92, 23 df			

Panel B: Louisville Non-Gun Homicides

Parameter	Coefficient Estimate	Standard Error	Ratio
α	1.2255	.1200	10.21
ω_0	-.1745	.2518	-.69
Q = 26.64, 24 df			

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