

# IN SEARCH OF THE LOST AMENDMENT: CHALLENGING FEDERAL FIREARMS REGULATION THROUGH THE STATE'S RIGHT INTERPRETATION OF THE SECOND AMENDMENT

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## I. INTRODUCTION

The recent passage of the President's crime bill, which includes a ban by the federal government on the purchase or sale of certain "assault weapons,"<sup>[1]</sup> has forced the usually ignored Second Amendment into the national spotlight. While the recent Republican takeover of Congress decreases the possibility of additional federal restrictions on gun ownership in the near future, existing federal firearms legislation keeps alive the question of whether the Second Amendment guarantees to the individual a constitutional right to bear arms.<sup>[2]</sup> Also, the April 19, 1995 bombing of a federal building in Oklahoma City allegedly by individuals loosely connected with so-called "militia" groups, has served as a catalyst to bring the Second Amendment into the spotlight.<sup>[3]</sup> Adding to the attention, the academic realm has challenged the viability of the "state's right" interpretation of the Second Amendment,<sup>[4]</sup> an interpretation which has been embraced by at least six federal circuit courts.

Part II of this Comment surveys the modern Second Amendment landscape, emphasizing the all-important debate over whether the Second Amendment affords rights to individuals or to states. Part III of the Comment examines the misinterpretation of the Second Amendment by the lower

federal judiciary. It includes discussion of several key state's right decisions and offers the foundation for the premise of the Comment.

This Comment embraces the individual rights interpretation of the Second Amendment. According to that interpretation, the Second Amendment grants<sup>[5]</sup> to the citizen the right to keep and bear arms, a right now floundering between the Scylla of state police and militia powers and the Charybdis of federal regulation. The Comment argues, however, that federal firearms regulation is unconstitutional whether Second Amendment rights are interpreted as belonging to the individual *or* to the states.

The heart of this Comment is, thus, found in part IV, which proposes and explores constitutional challenges to federal firearms regulation. These arguments are unique because they do not depend upon acceptance by courts of the individual rights interpretation. Indeed, they concede the continued acceptance of the state's right interpretation of the Second Amendment by some lower federal courts. Such challenges can be viewed as a means of questioning federal firearms regulation—and as creating a more expansive interpretation of the Second Amendment—by using contemporary case law.

## II. DUELING INTERPRETATIONS OF THE SECOND AMENDMENT: A STATE'S RIGHT VS. AN INDIVIDUAL RIGHT

"That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it . . . ."<sup>[6]</sup>

With these words, Thomas Jefferson condensed into a paragraph the Lockean views of government and the individual which to this day remain particularly American. The right to keep and bear arms is in many ways the ultimate right, for it guarantees the citizenry a mechanism with which to overthrow oppressive government.<sup>[7]</sup> In the Declaration of Independence, Jefferson observed that "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce [the people] under absolute Despotism, it is [the people's right], it is their duty, to throw off such Government, and to provide new Guards for their future security."<sup>[8]</sup> When the United States emerged from the overthrow of tyrannical English domination, the founding fathers understood the danger of unfettered government and were justifiably suspicious of a "Military independent of and superior to the Civil Power."<sup>[9]</sup>

The right to keep and bear arms, put in a more universal and timeless way, is the means by which the people retain ultimate ownership and control of their government.<sup>[10]</sup> Philosophical underpinnings aside, the debate in courtrooms and legal journals today centers on the application and meaning of the Second Amendment.

### *A. The State's Right Interpretation*

The foundation of the state's right—or collective right<sup>[11]</sup>—interpretation of the Second Amendment is found in the Militia Clause of the Constitution,<sup>[12]</sup> which gives Congress the power to "provide for the calling forth of the Militia to execute the Laws of the Union, suppress

Insurrections and repel Invasions," and to "provide for the organizing, arming, and disciplining" of the Militia.<sup>[13]</sup> State's right proponents maintain that the Second Amendment was a response to the fear of states that Congress might disarm their militias through the powers granted to it by this clause, leaving the states with no means to defend themselves against federal tyranny.<sup>[14]</sup>

The courts and scholars have produced two versions of the state's right view, referred to in this Comment as the "weak-form" and the "strong-form." Under the weak-form, states and members of state militias have standing to assert Second Amendment rights against federal infringement.<sup>[15]</sup> Proponents of the strong-form argue that, while the Second Amendment did at one time protect states from federal regulation of their militias, in the modern world, the maintenance of the National Guard satisfies the purposes of the Amendment.<sup>[16]</sup> Few courts have adopted the strong-form, possibly because it requires an unapologetic policy-making most courts would rather avoid. Also, rather daunting textual, historical, and analytical obstacles face the strong-form,<sup>[17]</sup> which make it less palatable to courts bound by contrary Supreme Court precedent.<sup>[18]</sup> Implicit in the strong-form view is the notion that, since government has behaved itself so far, while possessing awesome military capability, there is no longer a need to maintain an armed citizenry as a deterrent to federal overreaching.<sup>[19]</sup> To make their arguments, strong-form proponents must prove that the United States has outgrown the need for strong civilian deterrence. In light of the history of government, politics, and revolution throughout the world, this is a heavy burden indeed.<sup>[20]</sup>

### *B. The Individual Right Interpretation*

The individual right interpretation of the Second Amendment, which asserts that citizens have a personal right to keep and bear arms, finds support among the majority of Americans.<sup>[21]</sup> The individual right view incorporates the state's right argument that the Second Amendment was motivated in part by the states' fear of a strong federal standing army.<sup>[22]</sup> However, proponents of the individual right interpretation cite other historical factors, such as the deterrence of governmental oppression and the right to personal defense, to explain why the Second Amendment affords rights to individuals.<sup>[23]</sup> In addition, individual right proponents argue that even if protection of state militias were the sole purpose of the Second Amendment, the right to keep and bear arms would remain an individual right, since this goal is best achieved by keeping firearms in the hands of the citizenry itself.<sup>[24]</sup>

The individual right interpretation is strongly supported by the text of the Second Amendment itself; that is, the phrase "the right of the people to keep and bear Arms" means exactly what it says. The preamble "A well regulated Militia, being necessary to the security of a free State" is merely an acknowledgement that an armed citizenry is necessary to prevent tyranny by government.<sup>[25]</sup> Under the individual right view, the term "the people" has the same meaning in the Second Amendment as it does throughout the Bill of Rights.<sup>[26]</sup>

If the Second Amendment protects an individual right, the question arises whether the Amendment is incorporated against the states. Opponents of such a full-incorporationist view point to *United States v. Cruikshank*<sup>[27]</sup> and *Presser v. Illinois*,<sup>[28]</sup> two Supreme Court cases which expressly held that the Second Amendment was a restriction on the powers of only the federal government, leaving states free to regulate firearms as they wished. The Northern District

of Illinois recently cited these cases in *Quilici v. Village of Morton Grove*,<sup>[29]</sup> in which the court denied a Second Amendment challenge brought by handgun owners against a local ordinance which prohibited possession and use of handguns.<sup>[30]</sup> The *Quilici* court reasoned that, since the Supreme Court has never reconsidered the holding in *Presser*, that case "stands as the most recent pronouncement on the issue of whether the Second Amendment was incorporated into the Fourteenth Amendment so as to limit the power of the states."<sup>[31]</sup>

However, the incorporation issue is far from settled. Professor Levinson points out that the first incorporation decision by the Court came eleven years after *Presser*,<sup>[32]</sup> and he poses this intriguing question: "Why . . . should *Cruikshank* and *Presser* be regarded as binding precedent any more than the other 'pre-incorporation' decisions refusing to apply given aspects of the Bill of Rights against the states?"<sup>[33]</sup>

### C. *The Discrete Collectivist*<sup>[34]</sup> or "Nebulous Entity" Interpretation

Proponents of the discrete collectivist theory maintain that "the people" in the Second Amendment refers to the collective body of citizens,<sup>[35]</sup> and not to individuals *or* to states. Dowlut and Knoop observe that "[t]he collectivists essentially claim that there is a nebulous entity that exists somewhere between the individual and the state which is so important that the Framers protected it with a constitutional right."<sup>[36]</sup> The result is that no one has standing to assert Second Amendment rights, since "the people" has been interpreted into a philosophical mist.<sup>[37]</sup>

The nebulous entity theory was first unveiled by the Kansas Supreme Court in *City of Salina v. Blaksley*,<sup>[38]</sup> but has not gained acceptance by federal courts.<sup>[39]</sup> "The collectivists' argument should not be followed by courts because it has no historical support, no case law support prior to the Kansas decision, and is illogical since the very concept of a right is individual."<sup>[40]</sup> However, some commentators argue that this theory, and not the collective right theory, is the foundation of modern federal case law.<sup>[41]</sup>

### D. *Academia: Asleep in the Ivory Tower*

While most Americans understand the right to keep and bear arms as an individual right, the state's right view has been predominant in academia.<sup>[42]</sup> In his text on the Constitution, Professor Peltason sternly concluded that the Second Amendment "provides no constitutional right for a private citizen to retain weapons."<sup>[43]</sup> One is hard-pressed to find any mention of the Second Amendment in constitutional law textbooks<sup>[44]</sup> or constitutional treatises.<sup>[45]</sup> Even the rights-oriented American Civil Liberties Union denies that the Second Amendment protects individuals, and, in fact, *supports* governmental restriction and control of gun ownership.<sup>[46]</sup>

The Second Amendment has thus been left to stand in the corner; indeed, one commentator analogizes the Second Amendment to an "embarrassing relative, whose mention brings a quick change of subject to other, more respectable family members."<sup>[47]</sup> Because of this shunning, questionable Second Amendment decisions—such as those discussed *infra* in part III—go unchallenged.

The conspicuous distance that many academics place between themselves and the Second Amendment is not so surprising because those in a position to mold and move the law have a natural tendency to do so in a manner that expands their power and influence.<sup>[48]</sup> Professor Johnson speculated that "[t]he social, political, and economic elite may have realistic expectations of substantially impacting public policy, and they are the least likely to fear collective power turned against them. They might fairly consider government to be trustworthy, benevolent, and directed in pursuit of their interests."<sup>[49]</sup> Judge Bork noted that "one would expect to see the law become less restrictive where it impinges on the intellectual class's interests. Freedom of speech is, of course, the sine qua non of the intellectual class."<sup>[50]</sup> Indeed, the intelligentsia fiercely defend the First and Fourteenth Amendments, as well as the Commerce Clause, but give an icy reception to rights which affirm the people's ownership of government. To many in academia, an armed citizenry at worst offends what they believe is in the interest of good social policy,<sup>[51]</sup> and at best is distasteful.<sup>[52]</sup>

### III. THE FEDERAL ASSAULT ON THE CITIZEN'S RIGHT TO KEEP AND BEAR ARMS

In light of the compelling historical and textual indicia supporting the individual right interpretation, the performance of the federal judiciary in construing the Second Amendment is disappointing. Even Justice Douglas, whose "opinions were marked by a fierce commitment to individual rights and distrust of government,"<sup>[53]</sup> seemed unconcerned with the erosion of Second Amendment rights.<sup>[54]</sup> Whatever the source of complacency among some federal courts, the case law is hardly watertight.

#### A. *United States v. Miller*

With *United States v. Miller* in 1939, the Supreme Court released its only modern Second Amendment decision.<sup>[55]</sup> While seemingly embracing the state's right interpretation, the Court devoted significant discussion to the purpose of the Second Amendment, and to the importance of independent state militias.<sup>[56]</sup>

Miller was charged with transporting an unregistered sawed-off shotgun across state lines in violation of the National Firearms Act.<sup>[57]</sup> Through its registration requirements, the Act imposed a prohibitive tax upon certain weapons transported in interstate commerce. The trial court voided the indictment, holding that the Second Amendment prohibited such federal regulation.<sup>[58]</sup> The Supreme Court reversed and reinstated the indictment, stressing that the defendants had attacked the indictment only, and had introduced no evidence to support the claim that sawed-off shotguns were protected under the Second Amendment.<sup>[59]</sup>

In upholding the constitutionality of the National Firearms Act as applied to Miller, the Court wrote that the Second Amendment was included in the Bill of Rights to "assure the continuation and render possible the effectiveness"<sup>[60]</sup> of the Militia described in Article I, Section 8, Clause 16.<sup>[61]</sup> The Court, through Justice McReynolds, outlined the standard courts must apply to assess the constitutionality of congressional regulation of firearms:

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 and 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.[62]

The standard established by *Miller* can be clearly understood by reversing the Court's factual finding and examining the result. If Miller had demonstrated to the Court that sawed-off shotguns were rationally related to the efficiency and preservation of the militia, then federal regulation of such weapons would be unconstitutional. This simple Gedanken experiment exposes the very heart of the *Miller* decision: weapons which are not used for ordinary militia purposes, or do not "contribute to the common defense," are not protected by the Second Amendment. A useful analogy can be made to the First Amendment; courts will not strike down regulation of unprotected classes of expression, such as obscenity or libel.

Scholars have debated the meaning of the Court's holding in *Miller*. Kates focuses on the Court's extensive discussion of the history of the militia in America[63] and categorizes *Miller* as a case which ultimately upholds the individual right view.[64] The Court's definition of who comprises the militia reinforces his reading:

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 . . . . And further, that ordinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time.[65]

The Court's definition of the militia, coupled with the fact that the Court's "reasonable relationship" test was directed to the weapon alone, casts doubt on claims that *Miller* was a state's right decision. Miller's standing to assert Second Amendment rights was never questioned by the Court. The premise of the state's right view is, after all, that the Second Amendment is not applicable to individuals. Going back to the Gedanken experiment, if Miller had produced evidence that sawed-off shotguns were reasonably related to a well-regulated militia, Second Amendment protection from federal regulation would apply.

At the same time, it cannot be said that the *Miller* Court fully embraced the individual right interpretation, since the Court did not read any other interest into the right to keep and bear arms beyond the militia interest. While this holding has implications regarding the types of weapons that may or may not be regulated by the federal government, it by no means shifts Second Amendment protections from the citizen to the state. The meaning of *Miller* will continue to be debated until the Supreme Court revisits the Second Amendment. The now fifty-six-year-old opinion unfortunately left much to the imagination, and some lower federal courts have vivid imaginations indeed.

## *B. A Tragicomedy of Errors: The Misinterpretation of Miller and the Priestcraft of the Collective Right Courts*

### *1. The First Circuit*

Some federal courts have viewed the holding of *Miller* through state's right lenses, and through time, lens upon lens, have blurred the meaning of the Second Amendment beyond recognition. The First Circuit began this process in 1942 with *Cases v. United States*,<sup>[66]</sup> the first state's right case among the federal circuit courts.

Cases was convicted under the Federal Firearms Act.<sup>[67]</sup> Unlike Miller, who was indicted for transporting a particular type of weapon through interstate commerce, Cases was convicted under the Act's prohibition against the transportation and reception of firearms and ammunition by convicted felons.<sup>[68]</sup> The *Cases* court acknowledged that under *Miller* the federal government could not "prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia."<sup>[69]</sup> However, the *Cases* court proceeded to ignore the *Miller* holding, stating that it probably was not intended to provide a general rule for all cases<sup>[70]</sup> and was "outdated," despite preceding *Cases* by only three and one half-years.<sup>[71]</sup>

The *Cases* court's refusal to apply directly the *Miller* standard reflected its concern that the *Miller* test would absolutely bar federal regulation of anything other than antiques, since almost any other weapon would bear a reasonable relationship to the efficiency and preservation of a well-regulated militia.<sup>[72]</sup> In rendering its decision, the *Cases* court was also motivated by a fear that, if the *Miller* holding were accepted as the general rule, Congress would be unable to prevent militia members from possessing or using "distinctly military arms," including machine guns, trench mortars, anti-tank guns, or anti-aircraft guns, "even though under the circumstances surrounding such possession or use it would be inconceivable that a private person could have any legitimate reason for having such a weapon."<sup>[73]</sup>

The *Cases* court relieved the inevitable tension between *Miller* and its own holding through a subtle but crucial alteration of the *Miller* reasonable relationship inquiry. While the *Miller* court scrutinized the firearm's militia utility, the *Cases* court further inquired into whether the defendant's use of the weapon bore a reasonable relationship to militia purposes. The First Circuit noted that no evidence linked Cases to a military organization or demonstrated that his use of the weapon was tied to a military career.<sup>[74]</sup> The court thus narrowed those able to raise Second Amendment defenses to those in "military organizations" whose use or possession of a firearm furthers a state's militia purposes.<sup>[75]</sup> By stretching and massaging language from *Miller* into a shape for which it was never intended, *Cases* provided future courts with the leeway to find Second Amendment protections inapplicable to individuals.<sup>[76]</sup> The *Cases* court did not, however, go so far as to adopt a strict reading of the state's right interpretation of the Second Amendment, which would deny standing to everything and everyone except the states.

The *Cases* court cemented its restriction of the individual right approach by citing the nineteenth-century Supreme Court decisions of *Cruikshank* and *Presser*,<sup>[77]</sup> both decided before the

Fourteenth Amendment incorporation era,[\[78\]](#) for the proposition that the Second Amendment does not confer rights upon the individual:

The right to keep and bear arms is not a right conferred upon the people by the federal constitution. *Whatever rights . . . the people may have depend upon local legislation*; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right.[\[79\]](#)

## 2. The Sixth Circuit

In *Stevens v. United States*,[\[80\]](#) the Sixth Circuit cited *Miller* as a state's right case, and held that "[s]ince the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right to possess a firearm."[\[81\]](#) The *Stevens* decision marked the beginning of widespread acceptance of the state's right interpretation among lower federal courts.[\[82\]](#)

The Sixth Circuit followed the *Stevens* decision with *United States v. Warin*,[\[83\]](#) a 1976 case which is a textbook weak-form state's right decision. The *Warin* court, citing its prior decision in *Stevens*, held that the Second Amendment applies only to the right of a state to maintain a militia, referring to it as a "collective right of the militia."[\[84\]](#)

Warin was convicted of willfully and knowingly possessing a 9mm prototype submachine gun which was not registered to him, in violation of federal law.[\[85\]](#) Warin, claiming to be a member of Ohio's sedentary militia,[\[86\]](#) challenged his conviction by arguing that the federal regulation infringed on his right to keep and bear arms.[\[87\]](#) An engineer and developer of firearms, Warin had built the weapon himself with the intention of offering the federal government an improved military firearm.[\[88\]](#) The Sixth Circuit did not dispute findings of fact from the trial court that submachine guns bear some reasonable relationship to the preservation or efficiency of the military forces,[\[89\]](#) that Warin was not a member of Ohio's "active militia,"[\[90\]](#) and that the weapon was not registered to him as required by federal law.[\[91\]](#)

The *Warin* court specifically analyzed, and deferred to, Ohio's constitution and regulatory scheme.[\[92\]](#) Under Ohio law, members of the organized militia are exempt from a state law making it unlawful to "acquire, have, carry, or use any dangerous ordnance" such as the automatic weapon owned by Warin.[\[93\]](#) Since Warin was only *subject to* membership in the militia under the Ohio Constitution, and was thus only a "sedentary militia" member, the statutory exemption was inapplicable.[\[94\]](#) The analysis by the Sixth Circuit in *Warin* follows the *Cases* court's holding that state constitutional and statutory provisions must be incorporated into the Second Amendment equation to determine the extent to which the federal government may regulate firearms.[\[95\]](#)

The *Warin* court, in what could be characterized as dicta,[\[96\]](#) then assessed the constitutionality of the National Firearms Act's regulation of automatic weapons. Rather than employing the Supreme Court's *Miller* test, the court simply echoed the *Cases* rebuke of *Miller* as Second Amendment precedent.[\[97\]](#) Like the *Cases* court, the Sixth Circuit dismissed *Miller* as law from



another less technologically advanced era.[\[98\]](#) The court, however, did not provide an "updated" analytical model by which to assess the relationship between a weapon and the purpose of militias; it simply held that "there is absolutely no evidence that a submachine gun *in the hands of an individual* 'sedentary militia' member would have any, much less a 'reasonable relationship' to the preservation or efficiency of a well regulated militia."[\[99\]](#)

This case-by-case approach, which emerged from *Cases*, reveals one of the weaknesses of the state's right interpretation. In explaining away the *Miller* reasonable relationship standard, courts have not offered anything in its place.[\[100\]](#) The result is that, while the *Miller* standard is still cited, state's right courts utilize no legal standard whatsoever in determining whether a firearm is reasonably related to the (now) mysterious "militia purposes."[\[101\]](#)

### 3. The Seventh Circuit

The Seventh Circuit affirmed[\[102\]](#) the district court's holding in *Quilici*[\[103\]](#) that the Second Amendment does not apply to states, but then went further to conclude that the right to keep and bear handguns is not protected under the Second Amendment.[\[104\]](#) Although the Seventh Circuit admitted its conclusion was mere dicta,[\[105\]](#) it speculated "for the sake of completeness"[\[106\]](#) that the *Miller* decision limits the Second Amendment to the militia purpose, and that handguns are not military weapons and are thus unprotected.[\[107\]](#)

The *Quilici* cases are not true collective right decisions. Once the *Quilici* courts held that the Second Amendment had not been incorporated against the states, the issues in that litigation ceased to have Second Amendment relevance.[\[108\]](#) The issues in the *Quilici* cases were whether Morton Grove's handgun ban violated the Illinois constitutional right to keep and bear arms, and whether the ban violated privacy rights.[\[109\]](#)

### 4. The Eighth Circuit

The Eighth Circuit appears to have accepted the strong-form version of the state's right theory.[\[110\]](#) In *United States v. Hale*,[\[111\]](#) a 1992 decision, Hale challenged his conviction of thirteen counts of possession of a machine gun[\[112\]](#) and three counts of possession of an unregistered firearm.[\[113\]](#) Hale argued that the statutes under which he was convicted exceeded Congress's power to regulate interstate commerce and that the indictment violated his Second Amendment rights.[\[114\]](#)

As to the second challenge, Hale argued that under *Miller*, federal regulation of weapons susceptible to military use is barred by the Second Amendment.[\[115\]](#) The court rejected this interpretation of *Miller*, citing to the First Circuit's "illuminating" *Cases* decision as the proper approach.[\[116\]](#) Though hinting that a machine gun might have militia utility, the court focused on the status of the possessor, noting that since *Miller*, "no federal court has found any individual's possession of a military weapon to be 'reasonably related to a well regulated militia.'"[\[117\]](#)

Hale cited language from Chief Justice Rehnquist's majority opinion in *United States v. Verdugo-Urquidez*,[\[118\]](#) which classified the Second Amendment right as an individual

right,[\[119\]](#) to support an argument that the Second Amendment protects individuals and not states "or collective entities like militias."[\[120\]](#) The court found Hale's argument "inapplicable to this case" and "irrelevant" given its finding that Hale's possession of the machine gun was unrelated to the preservation or efficiency of a militia.[\[121\]](#) However, the court did acknowledge that in light of *Verdugo-Urquidez*, the Second Amendment might possibly protect individual rights.[\[122\]](#)

The *Hale* court put the cart before the horse. The *Cases*-type test which the court employed to find Hale's possession of the firearm outside Second Amendment protection *is itself based on* the collective right interpretation. In explaining its use of the *Cases* test, the court stated that it could not conclude that the Second Amendment right is an individual right.[\[123\]](#) This holding undermines the court's dismissal of Hale's individual right/*Verdugo-Urquidez* argument as irrelevant and inapplicable. After all, if the Second Amendment protects an individual right, then courts should scrutinize only the weapon for its militia utility, and should return to the Supreme Court's *Miller* test. However, since courts have never developed tests to determine which weapons have militia utility, it is uncertain whether a fully automatic weapon would fall under the aegis of the Second Amendment.

Another notable aspect of *Hale* is the Eighth Circuit's apparent adoption of the strong-form state's right interpretation. The court offered the following historical analysis to support its position:

These militias were comprised of ordinary citizens who typically were required to provide their own equipment and arms. The Second Amendment prevented federal laws that would infringe upon the possession of arms by individuals and thus render the state militias impotent. Over the next 200 years, state militias first faded out of existence, and then later reemerged as more organized, semi-professional military units.[\[124\]](#)

The court added that states began providing arms and equipment to these military units, which were eventually organized into the present national guard structure.[\[125\]](#) The court then cited to *Perpich v. U.S. Department of Defense*,[\[126\]](#) a 1990 Supreme Court decision affirming an Eighth Circuit appellate decision.[\[127\]](#) In *Perpich*, the Governor of Minnesota sought to enjoin the federal government from using Minnesota's national guard to conduct military operations in Central America.[\[128\]](#) The Court examined the relationship between the militia and the National Guard, and concluded that the federal government "provides virtually all of the funding, the materiel, and the leadership for the State Guard units."[\[129\]](#) The *Hale* court recognized that *Perpich* was not a Second Amendment case, but stated in a rather cryptic fashion that "its discussion of the militia gives further dimension to our analysis."[\[130\]](#) Faced with the extensive discussion in *Miller* casting the right to bear arms as an individual right,[\[131\]](#) the Eighth Circuit declared that "[i]n *Miller*, the Court simply recognized this historical residue."[\[132\]](#) This characterization is disingenuous.[\[133\]](#)

After the *Perpich* discussion, and its own historical recount on the supposed transformation of militias into the National Guard, the Eighth Circuit held in distinctly strong-form language that "[t]echnical' membership in a state militia (e.g., membership in an 'unorganized' state militia) or

membership in a non-governmental military organization is not sufficient to satisfy the 'reasonable relationship' test."[\[134\]](#) The court then cited to *Warin*, and offered the following misreading of that decision: "Membership in a hypothetical or 'sedentary' militia is likewise insufficient."[\[135\]](#)

The Eighth Circuit's strong-form approach in *Hale* is a study in contradiction. One of the few things that the individual right and state's right camps agree on is that the Second Amendment protects states from federal interference with militias.[\[136\]](#) To define the militia as the National Guard, a professional military organization which exists at the mercy of and under the direction of the federal government, is to render the Second Amendment little more than wasted ink. The Eighth Circuit was careful not to paint itself completely into a corner, but, short of crossing one's eyes, it is hard to read the court's discussion as anything but an acceptance of the strong-form state's right interpretation.

Judge Beam concurred in the result, but disagreed with the court's collective right approach in light of the *Miller* decision.[\[137\]](#)

#### 5. Other Collective Right Federal Courts

Other federal circuits have utilized some form of the state's right view in deciding Second Amendment cases, including the Third Circuit,[\[138\]](#) the Fourth Circuit,[\[139\]](#) and the Tenth Circuit.[\[140\]](#)

The Fourth Circuit's recent decision in *Love v. Peppersack*[\[141\]](#) reaffirms that circuit's acceptance of the collective right interpretation in an interesting context. Love brought a section 1983 civil rights action against various Maryland state troopers who improperly denied her application to purchase a handgun.[\[142\]](#) Under Maryland law, if a criminal records check of an applicant is not completed within seven days, a gun dealer may legally sell the applicant a firearm.[\[143\]](#) The computer printout of Love's record indicated that she had been arrested on four occasions, but did not indicate the disposition of charges filed against her.[\[144\]](#) With the seven-day deadline approaching, the reviewing state police officers denied Love's application based solely on her arrest record.[\[145\]](#) Love, in fact, had been convicted only of a misdemeanor, for which she paid a fine.[\[146\]](#) Love sued members of the state police under section 1983 for violation of substantive due process, her "right to contract," and her Second Amendment rights.[\[147\]](#)

As to her Second Amendment claim, Love argued that the state of Maryland infringed upon her individual right to keep and bear arms.[\[148\]](#) The court disagreed, citing *Presser* and *Cruikshank* to hold that the Second Amendment does not apply to the states.[\[149\]](#) The opinion should have ended there, consistent with the collective right argument that the Second Amendment applies only to regulation by Congress. The court, however, then slid into a collective right analysis of Love's challenge to federal regulation, and concluded that Love "has . . . not identified how her possession of a handgun will preserve or insure the effectiveness of the militia."[\[150\]](#) This second holding by the court is curious, given the fact that *Love challenged no federal law*. The court's preternatural jaunt into analysis of federal regulation can thus be characterized as grand but excessive dicta, or perhaps as yet another example of the haphazard application of the undeveloped state's right interpretation.[\[151\]](#) The *Love* court did acknowledge (if only impliedly)

that the collective right approach is a creation of lower federal courts, and is not based on *Miller*.[\[152\]](#)

Appellate collective right decisions have trickled down to some federal district courts. In *United States v. Kozerski*,[\[153\]](#) the federal district court of New Hampshire held that a convicted felon who analogized himself to a "rural police officer" had no right to possess a firearm.[\[154\]](#) The court cited *Miller* for the proposition that the Second Amendment is not a conferral of a right but only a limitation of Congress, but then went beyond *Miller* by holding that "the Second Amendment is a collective right to bear arms . . . and has application only to the right of the state to maintain a militia and not to the individual's right to bear arms."[\[155\]](#)

Other district courts have held that states may regulate or prohibit the forming of private armies by citizens[\[156\]](#) and that a state may ban the use, possession, manufacture, and transfer of assault weapons without infringing on Second Amendment rights.[\[157\]](#) These cases were decided on incorporation grounds, however, and cannot be considered true state's right opinions.[\[158\]](#)

### *C. A Summary of the Emerging State's Right Analysis*

Application of the collective right interpretation in the federal courts is erratic. However, the cases do support the following three-part analysis: first, whether the person or thing has standing to assert Second Amendment rights; second, what rights the state in issue has conferred upon the person or thing asserting Second Amendment protection; and third, whether the Second Amendment protects possession of the particular firearm.

The analysis should not be viewed as a series of steps, but rather as a set of components which are blended together as part of the *Cases* test of the constitutional limitation of the Second Amendment.

The first component is whether or not the person or thing can assert Second Amendment rights. Here, the courts fill in the blank in the phrase "the right of [ ] to keep and bear arms shall not be infringed." Under the individual right interpretation, the blank will be filled with "the people" as it is used throughout the rest of the Bill of Rights. Under the state's right interpretation, the blank is of course filled with the term "the states," though no court has yet reviewed a case brought by a state, nor has any court followed a literal application of the state's right theory by denying standing outright to anyone except the states. Some commentators argue that this is because the collective right decisions are in reality decisions based on the discrete collectivist model.[\[159\]](#)

As the cases discussed *supra* illustrate, the federal courts which have adopted the state's right interpretation have—through implication—filled in the blank with a variety of things. Weak-form courts such as the First and Sixth Circuits hold that the Second Amendment protects states[\[160\]](#) and members of the state-defined militia.[\[161\]](#) The Eighth Circuit has adopted the strong-form state's right interpretation by filling the blank with the phrase "members of the National Guard."[\[162\]](#)

The second component is the regulatory and constitutional framework of the state. This inquiry emerged from the principle in *Cases* that "[w]hatever rights . . . the people may have [to keep

and bear arms] depend upon local legislation,"[\[163\]](#) and later from *Warin*, in which the court analyzed how Ohio defined its militia and what weapons it allowed militia members to own.[\[164\]](#) Regardless of the validity of its origins, the state's right premise is that the sole purpose of the Second Amendment is to protect the ability of states to maintain armed militias free from federal interference. If this premise is to remain consistent with application of the collective right interpretation, then *a fortiori* states must have a say in how their respective militias are to be organized and equipped. Strong-form courts pass over this step, consistent with their argument that state militias have over time metamorphosed into the federally-controlled National Guard.[\[165\]](#)

The third component is whether the firearm is within the protection of the Second Amendment. Under *Miller*, firearms having a militia utility are within Second Amendment protection.[\[166\]](#) Some courts, beginning with the First Circuit in *Cases*, have limited the Supreme Court's *Miller* test to the facts before the Court in its 1939 decision, and contend that the *Miller* court never reached the question of the extent to which a weapon with militia utility may be regulated.[\[167\]](#)

Courts which have so limited *Miller* point to the development of nuclear weapons, machine guns, trench mortars, and similar weaponry to support their claim that, if *Miller* is read literally, such weapons could not be federally regulated.[\[168\]](#) Faced with such a prospect, collective right courts have not only added the standing component to the original *Miller* test, but they have combined the unrelated standing and weapon inquiries into one test.

A traditional approach to deciding cases would suggest that the court would first rule on the standing question and then separately address the question of the constitutional limits of the Second Amendment as applied to the weapon at issue. With their combined test, collective right courts are able to avoid defining what and who constitutes the militia, and also to avoid serious analysis of the militia utility of a given firearm. Dowlut observed that some courts "make no attempt to come up with a test [of which weapons are reasonably related to militia purposes]; alarmist rhetoric has supplanted intellectual vigor."[\[169\]](#) The result is that the otherwise clear language of the *Miller* test has been rendered a formality, allowing collective right courts to simply rubberstamp congressional firearm regulation without explanation of their holdings.

#### IV. THE SECOND AMENDMENT AS A BAR TO FEDERAL FIREARMS REGULATION

Unless and until the Supreme Court revisits and clarifies the meaning of the Second Amendment, portions of the federal judiciary will likely continue to utilize the *Cases* test. However, this does not mean that the citizenry cannot still enjoy the right to keep and bear arms. By shifting Second Amendment rights from the individual, state's right courts must now grapple with the vexing fact that—to make an analogy to other laws of nature—the right to keep and bear arms must go somewhere. Under the collective right interpretation, it is vested in the artificial entity of the state.[\[170\]](#) Regardless of who or what asserts it, the Second Amendment loses none of its prohibitory power as against the federal government. To hold otherwise would constitute nothing less than a judicial repeal of the Second Amendment.[\[171\]](#)

Many state constitutions acknowledge an individual right of their citizens to keep and bear arms.[\[172\]](#) However, states and militia members can still protect the right to keep and bear arms

from federal regulation and interference by using existing collective right caselaw. This approach is possible only if the state at issue has the legal machinery in place to make such challenges, and is based on the idea that, since some courts have made the Second Amendment a state's right, states and state-defined militia members can assert it. Since such challenges are based on the state's right interpretation, regulation of firearms by the states themselves would not be prohibited under the Second Amendment.[\[173\]](#)

Challenges based on the weak-form state's right view will require courts to flesh out collective right jurisprudence and to fill in the significant gaps in that interpretation. Because collective right courts have expanded the Supreme Court's *Miller* inquiry to include scrutiny of both the weapon *and* the individual possessing it,[\[174\]](#) litigants should be prepared to present evidence[\[175\]](#) on both issues.

#### A. Challenges Brought by States

No state has ever asserted its collective right to keep and maintain a militia.[\[176\]](#) The crux of the state's right argument is, however, that the Second Amendment "guarantees an exclusive right of the states, which only the states have standing to invoke."[\[177\]](#) By allowing individuals in certain instances to claim Second Amendment protection, the collective right courts have refused to apply the state's right interpretation so narrowly. Collective right courts are faced with the fact that the defendant's standing in *Miller* was, after all, never questioned by the Supreme Court.

That states themselves can bring Second Amendment challenges has not been universally accepted. In their article,[\[178\]](#) Ehrman and Henigan dismiss the attacks of commentators who question the reading by state's right courts of the term "the people" in the Second Amendment as a reference to the states (when contrasted to the meaning of the term throughout the rest of the Bill of Rights), as being based on a misreading of what the courts mean by the terms "collective right" and "state's right."[\[179\]](#) They posit that "[t]he courts have not held that the second amendment right belongs to the states in the sense that only the states, not individuals, may assert it."[\[180\]](#) To support their argument, they point to the fact that no court has rejected a Second Amendment challenge by an individual on the basis that he lacked standing because he was not a state.[\[181\]](#) They conclude by stating that the Second Amendment protects a collective and public interest,[\[182\]](#) and that the decisive issue "has been whether the impact of the challenged statute on the individual's own right to own firearms adversely affects the state's militia."[\[183\]](#)

Although they share the same collectivist premise, the Ehrman/Henigan model differs from the discrete collectivist theory discussed *supra* in part II.C. Under the discrete collectivist interpretation, the right to keep and bear arms vests in the collective body which exists between the individual and the state, and which can be asserted by neither.[\[184\]](#) Thus, like Macbeth's apparitional dagger,[\[185\]](#) Second Amendment rights exist in theory but not in practice. Under the Ehrman/Henigan model, however, the prohibitory foil of the Second Amendment materializes where necessary to protect the collective public interest, and only then can be brandished by individuals (and perhaps states).

The Ehrman/Henigan approach to standing differs from the standing analysis of the state's right courts, in that it has the effect of removing the traditional adversarial process from the litigation.

The court is placed in a trustee-like role, deciding how the militias are best served and thus when standing either by an individual—or possibly a state—is appropriate. Ehrman/Henigan collectivism thus allows courts to rule essentially on the merits of the Second Amendment claim before the claimant presents its case. The fact that commentators can interpret the case law in this manner exposes the troubled and deliberately amorphous<sup>[186]</sup> state of the courts' collective right interpretation.

The most likely scenario for a state-based challenge would be a *Perpich*-type suit,<sup>[187]</sup> brought by a state governor or other official against federal law that prohibits or regulates the possession of a weapon, use of which is sanctioned by that state. Another possible scenario is a challenge by a state of the federal prosecution of one of its citizens for violation of federal law. For instance, in *Warin*, the state of Ohio could have brought suit against the federal government for an unconstitutional interference with its militia. It is unlikely that a state would be denied standing in a federal court which accepts the state's right theory, for to do so would require that court to run headlong into the analytical infirmities of the discrete collectivist (nebulous entity) theory.

Challenges to federal regulation brought by states involve the same types of arguments as those brought by individuals.<sup>[188]</sup> Under the state's right view, states must by definition be free to control and maintain their militia without federal interference.<sup>[189]</sup> States determine how their militias will be commanded and who will comprise their membership.<sup>[190]</sup> Under their inherent police powers, states also determine which weapons may or may not be possessed and whether members of the militia will be subject to such regulation. States thus can assert their Second Amendment rights<sup>[191]</sup> to challenge any federal law which hinders the ability of state militia members to be armed with weapons which are reasonably related to the efficiency or preservation of the state militia.

#### *B. The Second Front: Some Concerns of the State's Right Courts*

Those who argue that the right to keep and bear arms is still an important right are likely to encounter two common counter-arguments, both of which stress how America has changed since the Bill of Rights was first drafted. Some collective courts, including the weak-form *Cases* and *Warin* courts,<sup>[192]</sup> hint that technology has rendered the right to keep and bear arms obsolete. The second argument is that the United States has politically evolved beyond primitive, outdated notions such as violent revolution.<sup>[193]</sup> Those challenging federal regulation under the collective right interpretation should be prepared to answer these arguments.

The "technology" argument is based on false assumptions. The fear of both the *Cases* and *Warin* courts was that, under the *Miller* standard, the preservation of the states' ability to challenge federal armed forces would justify individual ownership of advanced military weaponry and even nuclear weapons.<sup>[194]</sup> It was largely this concern that prompted the *Cases* court to disregard the *Miller* decision by limiting it to the facts before the Supreme Court.<sup>[195]</sup> The problem with this argument is that weapons which are used in warfare between nations do not necessarily have *militia* utility. Indeed, a tyrannical state would not likely use nuclear weapons to oppress the citizenry, since that state would essentially be destroying itself. Thus, the citizenry would have little use for nuclear weapons as a deterrent.

Additionally, some courts imply that the militia purpose of the Second Amendment is no longer a realistic pursuit in light of the armaments possessed by the standing army,<sup>[196]</sup> thus Second Amendment protections for the individual are unnecessary. This line of reasoning, which was used by the Eighth Circuit in *Hale*,<sup>[197]</sup> is simplistic in that it does not acknowledge other interests in the right to keep and bear arms, such as the right to individual self-defense. Further, it ignores the most important benefit of an armed citizenry; that is, as a deterrent to governmental overreaching.<sup>[198]</sup> Even with advanced weaponry, the deterring effect of more than two-hundred million firearms in the hands of the citizenry—which in effect become ground troops—cannot be underestimated. Thus, oppression of an armed citizenry carries with it much greater risk than oppression of an unarmed population.<sup>[199]</sup>

The second argument is that the United States has politically evolved beyond the need for an armed citizenry. Professor Reynolds characterizes the argument this way: "Maybe we have reached such a stage of comfortable freedom and political stability that the likelihood of oppression is so low, and the need for revolution or resistance so far-fetched" that the purpose served by the Second Amendment is no longer present.<sup>[200]</sup> Reynolds suggests that the political stability that Americans have enjoyed is in part the result of the inclusion of the right to keep and bear arms in the Constitution.<sup>[201]</sup> In addressing the "political evolution" argument, Levinson states that "it is hard for me to see how one can argue that circumstances have so changed as to make mass disarmament constitutionally unproblematic."<sup>[202]</sup>

Considering the enormous power and influence that the United States presently wields throughout the world, many may view this nation as indestructible.<sup>[203]</sup> History instructs that this belief is unrealistic.<sup>[204]</sup> There is little reason to believe that it is now safe to depart from the Lockean view of the individual and government upon which the United States was founded; that is, that government exists subject to the consent of the governed.

### *C. Utilizing State Law To Protect an Individual Right To Keep and Bear Arms Under the State's Right Interpretation*

While the Eleventh Circuit has not yet embraced the state's right interpretation, the legislative framework in Florida provides a useful illustration of how a collective right challenge to federal firearms regulation might be litigated. Article X, section 2(a) of the Florida Constitution sets forth militia membership: "The militia shall be composed of all ablebodied inhabitants of the state who are or have their intention to become citizens of the United States; and no person because of religious creed or opinion shall be exempted from military duty except upon conditions provided by law."<sup>[205]</sup> Florida has no "subject to" clause, and thus no "sedentary" militia, so a court could not maneuver around the standing issue as the Sixth Circuit did in *Warin*.<sup>[206]</sup> As for litigation in strong-form courts, Florida's constitution distinguishes between the state's militia and the "federally recognized national guard," as do all other state constitutions and/or statutes.<sup>[207]</sup>

With Second Amendment standing established for virtually every citizen of Florida, the next step requires examination of the state's right to keep and bear arms provision. While collective right courts hold that the right to keep and bear arms is not a right conferred upon individuals, the First Circuit in *Cases* recognized that the federal government may not infringe upon rights conferred



to citizens by states.<sup>[208]</sup> Article I, section 8(a) of the Florida Constitution provides: "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."<sup>[209]</sup> Thus, only the bearing of arms, and not their possession, is regulated under the state's police powers. Article I, section 7 buttresses the Florida's right to bear arms provision by stating the familiar Lockean principle that "[t]he military power shall be subordinate to the civil."<sup>[210]</sup>

If the weapon at issue is banned by Congress but not by Florida, the next step is to present the trial court with evidence of the military utility of the weapon at issue through either affidavits or expert testimony. Standing will have already been established, so the court will be unable to maneuver around the original *Miller* weapons inquiry.

Also, the technological and "political evolution" arguments should be met. Those bringing the challenge should proffer ways by which the court can avoid holding that weapons of mass destruction are protected under the Second Amendment. Commentators have proposed various legal tests by which courts could hold weapons of war beyond Second Amendment protection, while still protecting handguns, hunting rifles, and other semi-automatic weapons.<sup>[211]</sup>

If the court properly and consistently applies weak-form state's right case law, every citizen in the state of Florida will essentially have an individual right to keep and bear arms, subject only to the state legislature's police powers.

## V. CONCLUSION

It is time for the Supreme Court to settle finally the individual right/state's right debate. The Court's voice has been conspicuously absent, allowing several federal appellate courts to create the elusive case-by-case collective right approach. Assuming *arguendo* the purpose of the Second Amendment is to protect the right of states to maintain militias without federal interference, it follows that federal regulation which prohibits ownership of weapons that would otherwise be legal under state laws is unconstitutional. If the state's right interpretation is to be consistent with its premise, state's right courts must first look to the constitutions and statutes of the states themselves.

The state's right interpretation has been used by some courts to chisel away the citizen's right to keep and bear arms. It is in reality a double-edged sword, sharpened on the cornerstone of its foundation—its reliance on the term "militia." Weapons which have the highest militia utility<sup>[212]</sup> should, under the state's right interpretation, receive the highest levels of protection from federal regulation. Collective right courts thus far have maneuvered around such questions by rote invocation of the odd (but no doubt convenient) *Cases* test, by which courts can deny Second Amendment protection to defendants without explanation. Avoidance by collective right courts of such troubling questions will continue to cast doubt on the validity of their Second Amendment decisions.

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[\*] J.D., 1995, Florida State University. [Return to text.](#)

[1] Congress specifically banned the following weapons: Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models); Action Arms Israeli Military Industries UZI and Galil; Beretta Ar70 (SC-70); Colt AR-15; Fabrique National FN/FAL, FN/LAR, and FNC; SWD M-10, M-11, M-11/9, and M-12; Steyr AUG; INTRATEC TEC-9, TEC-DC9, and TEC-22; and revolving cylinder shotguns. 18 U.S.C. §§ 921(a)(30)(A), 922 (1994). "Assault weapons" are defined as semi-automatic rifles (one round is fired for each pull of the trigger) that have the ability to accept two or more of the following: a folding or telescoping stock, a pistol grip that "protrudes conspicuously beneath the action of the weapon," a bayonet mount, a flash suppressor or threaded barrel designed to accommodate one, or a grenade launcher. *Id.* § 921(a)(30)(B). Such adornments have no effect on the actual mechanics of the weapon. According to some, the Supreme Court ruled that these types of weapons merit the highest constitutional protection. *See infra* part III.A.

The Supreme Court's recent decision in *United States v. Lopez* casts doubt on the constitutionality of federal regulation of the mere possession of firearms. 115 S. Ct. 1624 (1995). The *Lopez* decision is discussed *infra* at note 114. [Return to text.](#)

[2] Some excellent research and scholarship has recently emerged indicating that the Second Amendment protects an individual right, including: Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Jay R. Wagner, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right To Keep and Bear Arms?*, 37 VILL. L. REV. 1407 (1992); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992); Thomas M. Moncure, *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991).

[3] *E.g.*, *In Broad Daylight—Terrorism Hits Home: U.S. Building Bombed; Dead Include Children*, WALL ST. J., April 20, 1995, at A1; Jim Galloway, *Oklahoma Bombing: The Aftermath*, ATLANTA J. & CONST., May 3, 1995, at A11 ("Kingman, Ariz., the sometime home of bombing suspect Timothy McVeigh, sits at the desert intersection of America's two symbols of independence: cars and guns."); *Explosive Backlash: Some Citizens Disavow Extreme-Right Views in Wake of Bombing—Have 'Angry White Men' Gone Too Far? Bad News for Nation's Gun Lobby*, WALL ST. J., April 24, 1995, at A1 ("It's going to be much harder for politicians to vigorously advocate repeal of bans on assault weapons, much harder to advocate for concealed weapons,' because these issues are so closely identified with militia groups, says Daniel Levitas, an Atlanta-based expert on hate crimes and extreme-right groups."). [Return to text.](#)

[4] The state's right interpretation is discussed *infra* in part II.A. [Return to text.](#)

[5] Use of the word "grant" is perhaps inappropriate if one views the Constitution as an acknowledgment of the already existing natural rights of individuals, and not as a benefit or privilege provided by the State. In this Comment, the former view is embraced. [Return to text.](#)

[6] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). [Return to text.](#)

[7] "In other words, the people may abolish their government whenever it ceases to protect natural rights and becomes destructive to the ends for which it was established." J.W. PELTASON, CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION 5 (6th ed. 1973). In an open and free nation such as the United States, the necessity of such a revolution would be unlikely, given the efficacy of elections and free speech to address grievances against the government. *Id.* Jefferson qualified the people's right to overthrow destructive government by adding that "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). [Return to text.](#)

[8] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). [Return to text.](#)

[9] *Id.* para. 14. This was one of the many grievances Jefferson included against King George III. [Return to text.](#)

[10] Among the charges leveled against the King by Jefferson was that "He has kept among us, in times of peace, Standing Armies without the Consent of the legislature" and that "He has affected to render the Military independent of and superior to the Civil Power." *Id.* paras. 13, 14. Being armed was a condition that

"Americans possess over the people of almost every nation." The despotisms of Europe were charged with being "afraid to trust the people with arms." An armed citizenry serves as a deterrent to governmental oppression because the people have the latent and implicit power to "rise up to defend their just rights, and compel their rulers to respect the laws." Totalitarian governments of the left and right in the twentieth century consider an armed people a threat and seek to disarm them.

Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right To Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 182 (1982) (citing in part THE FEDERALIST No. 46 (James Madison) (Clinton Rossiter ed., 1961)). [Return to text.](#)

[11] Courts and many academics use the terms "collective right" and "state's right" interchangeably. Another interpretation, distinct in origin from the state's right view, is also sometimes referred to as the "collective right" or "collectivist" interpretation. This other interpretation, referred to in this Comment as the "discrete collectivist" or "nebulous entity" theory (discussed *infra* in subsection C of this part) has been rendered all but dead from desuetude.

Some commentators refuse to use the term "collective right" when referring to the state's right interpretation in order to avoid confusion with the discrete collectivist interpretation. *See* Kates, *supra* note 2, at 212 n.31. This Comment is largely based on federal case law, and given that federal courts use the term "collective right" to refer to the state's right interpretation, not mixing the terms would risk confusion of another sort; that is, the term "collective right" in federal cases

should be read as state's right language. The terms will also be used interchangeably to avoid needless repetition. [Return to text.](#)

[12] U.S. CONST. art. I, § 8, cls. 15-16. [Return to text.](#)

[13] *Id.* [Return to text.](#)

[14] Kates, *supra* note 2, at 212. "During the Revolution, and the subsequent period of the Articles of Confederation, the states loomed larger than the federal government and jealously guarded their prerogatives against it." *Id.* [Return to text.](#)

[15] *See, e.g.*, United States v. Warin, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *see infra* part III. [Return to text.](#)

[16] *E.g.*, Kates, *supra* note 2, at 213. Under a strict reading of the state's right view, only states have standing to assert the Second Amendment. Some state's right proponents argue that state challenges are no longer necessary since "any value the amendment might presently have for them is satisfied by their federally-provided National Guard structure." *Id.* Collective right courts have rejected such a literal approach, and have implicitly held that individuals can raise Second Amendment challenges under certain circumstances. *See infra* notes 17-20 and accompanying text. [Return to text.](#)

[17] The strong-form version is discussed *infra* in part III.B, where the Eighth Circuit's holding in *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993) is examined. [Return to text.](#)

[18] The Supreme Court's discussion of the militia in *United States v. Miller* contradicts the strong-form notion that the National Guard comprises the modern militia. 307 U.S. 174 (1939). For a discussion of the *Miller* decision, see *infra* part III.A. [Return to text.](#)

[19] This argument is discussed *infra* in part IV. [Return to text.](#)

[20] "The background of war, revolution, and violence against which our institutions were formed represents much more the norm of human existence than the domestic peace and stability that Americans have enjoyed in this century." Glenn Harlan Reynolds, *The Right To Keep and Bear Arms Under the Tennessee Constitution*, 61 TENN. L. REV. 647, 669 (1994). [Return to text.](#)

[21] *See, e.g.*, Kates, *supra* note 2, at 206-07 (the individual right interpretation is "accepted by a majority of the general populace who, though supporting the idea of controlling guns, increasingly oppose their prohibition"); Lund, *supra* note 2, at 115 ("The 'collective right' interpretation has become dominant among the courts and academics, while laypersons have generally favored the 'individual right' interpretation."). [Return to text.](#)

[22] "[T]he individual right advocate may accept the state's right theory and simply assert that, even though one of the amendment's purposes may have been to protect the states' militias,

another was to protect the individual right to arms." Kates, *supra* note 2, at 213 (footnotes omitted). [Return to text.](#)

[23] Dowlut & Knoop, *supra* note 10, at 180-84 (citing in part THE FEDERALIST No. 46 (James Madison) (Clinton Rossiter ed., 1961)). [Return to text.](#)

[24] "Indeed, evidence suggests it was precisely by protecting the individual that the Framers intended to protect the militia." Kates, *supra* note 2, at 213. [Return to text.](#)

[25] Judge Cooley explained the purpose of the Second Amendment preamble:

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 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 enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all . . . .

THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 289-99 (3d ed. 1898). [Return to text.](#)

[26] In a recent Supreme Court decision, Chief Justice Rehnquist noted that the term "the people" has the same meaning (a reference to individual citizens) in the First, Second, Fourth, Ninth, and Tenth Amendments. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), *reh'g denied*, 494 U.S. 1092 (1990) In *United States v. Hale*, a case discussed extensively *infra* at part III.B.4, the Eighth Circuit dismissed Chief Justice Rehnquist's words as dicta. 978 F.2d 1016, 1020 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993). [Return to text.](#)

[27] 92 U.S. 542, 553 (1875) (the Second Amendment right "means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the national government . . ."). [Return to text.](#)

[28] 116 U.S. 252, 267 (1886) (rejecting claim that Second Amendment invalidated an Illinois statute prohibiting "any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States . . . to drill or parade with arms in any city or town of this state, without the license of the governor thereof"). [Return to text.](#)

[29] 532 F. Supp. 1169 (N.D. Ill. 1981). The Seventh Circuit later affirmed the district court's holding. 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (discussed *infra* in part III.B.3). [Return to text.](#)

[30] *Quilici*, 532 F. Supp. at 1180. [Return to text.](#)

[31] *Id.* at 1181. [Return to text.](#)

[32] Levinson, *supra* note 2, at 653. [Return to text.](#)

[33] *Id.* [Return to text.](#)

[34] This interpretation will not be referred to as the "collective right" interpretation, even if the use of "collective" more appropriately describes this view. *See supra* note 11. [Return to text.](#)

[35] This collectivist approach is laced with undertones of Hegel's "abstract Universality," whereby "[t]he interest of History is detached from individuals, but these gain for themselves abstract, formal Universality. The Universal subjugates the individuals; they have to merge their own interests in it . . . ." Georg Wilhelm Friedrich Hegel, *Philosophy of History*, in ROMANTICISM AND EVOLUTION 165, 169 (Bruce Wilshire ed., 1985). Levinson points out that collectivist views of the Second Amendment, such as the discrete collectivist interpretation and the state's right interpretation, are compatible with the neo-republican notion of a collective people as contrasted with the individual. Levinson, *supra* note 2, at 650 ("one of the most interesting points in regard to the new historiography of the Second Amendment [is] its linkage to conceptions of republican political order. Contemporary admirers of republican theory use it as a source both of critiques of more individualist liberal theory and of positive insight into the way we today might reorder our political lives."). The "organic community" of the civic republicans bears striking resemblance to the discrete collectivists' body of the collective citizenry. "Civic republicanism is by nature a collectivist political theory. In other words, civic republicanism gives primary empirical and ethical significance to collective, rather than individual human endeavors." Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 811 (1993). [Return to text.](#)

[36] *See* Dowlut & Knoop, *supra* note 10, at 189. "This essentially means that the right to bear arms protects no one and guarantees nothing, for regardless of how draconian and unconstitutional a law may be, no individual would have standing to challenge such a law." *Id.* at 186-87. [Return to text.](#)

[37] *Id.* [Return to text.](#)

[38] 83 P. 619 (Kan. 1905). [Return to text.](#)

[39] *See, e.g.*, Kates, *supra* note 2, at 212 n.13. Kates dismissed the nebulous entity theory as "patently wrong." He then recited the numerous infirmities of that theory:

If the amendment was intended to guarantee a right to the people (and not to the state), it is self-contradictory to say that because the right was conferred on everyone, no single person may assert it, or indeed, to describe something that guarantees nothing to any specific person or entity as a 'right' at all. Thus, the discrete 'collective right' theory fails to meet Chief Justice Marshall's elementary test for constitutional construction: 'It cannot be presumed that any clause in the Constitution is intended to be without effect . . . .' *Marbury v. Madison*, 5 U.S. (Cranch) 137 (1803)[.]

*Id.* [Return to text.](#)

[40] Dowlut & Knoop, *supra* note 10, at 191. [Return to text.](#)

[41] See 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). This argument is discussed *infra* in part IV. [Return to text.](#)

[42] This is not so true today, as several law review articles have emerged which cast doubt on the validity of the state's right interpretation. See *supra* note 2. Many scholars who champion the individual right view are practitioners, including Stephen P. Halbrook, Don B. Kates, Jr., and Robert Dowlut. [Return to text.](#)

[43] PELTASON, *supra* note 7, at 122. [Return to text.](#)

[44] "Other than its being included in the text of the Constitution that all of the casebooks reprint, a reader would have no reason to believe that the Amendment exists or could possibly be of interest to the constitutional analyst." Levinson, *supra* note 2, at 639 n.14. [Return to text.](#)

[45] *Id.* (treatises by Tribe, and the team of Nowak, Rotunda, and Young, while at least acknowledging the existence of the Second Amendment, "marginalize [it] by relegating it to footnotes; it becomes what a deconstructionist might call a 'supplement' to the ostensibly 'real' Constitution that is privileged by discussion in the text"). [Return to text.](#)

[46] "That bastion of individual rights, the American Civil Liberties Union—a member of the organization of the National Coalition to Ban Handguns—emphatically denies that the Second Amendment has anything to do with individuals." Lund, *supra* note 2, at 121 n.45. [Return to text.](#)

[47] Levinson, *supra* note 2, at 658. Professor Levinson titled his article *The Embarrassing Second Amendment* to suggest that the Second Amendment "may be profoundly embarrassing to many who both support such regulation and view themselves as committed to zealous adherence to the Bill of Rights (such as most members of the ACLU)." *Id.* at 642. Levinson's article is a study in intellectual honesty. A proponent of gun control, Levinson removes the political blinders which would otherwise cloud his examination of the meaning and purpose of the Amendment. While addressing the certainty of the National Rifle Association of America advocates "that the Second Amendment means precisely what they assert it does," Levinson concludes that his likely audience, the "elite, liberal portion of the public" (in which he includes himself), should consider the possibility that "'our' views of the Amendment . . . might themselves be equally deserving of the 'tendentious' label." *Id.* [Return to text.](#)

[48] See *infra* note 50. [Return to text.](#)

[49] Johnson, *supra* note 2, at 72. [Return to text.](#)

[50] ROBERT BORK, THE ANTITRUST PARADOX 423-24 (1978). [Return to text.](#)

[51] See Levinson, *supra* note 2, at 642. Levinson offers the following view from inside the tower:

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

*Id.* (citations omitted).

Crime has become a major problem in the United States, and it is believed that gun control, particularly with regard to "assault weapons" and handguns, will alleviate violent crime committed with firearms. See Gordon Witkin, *Should You Own a Gun?*, U.S. NEWS & W.R., Aug. 15, 1994, at 24 (Witkin contrasts the views of gun and crime expert Gary Kleck, Professor of Criminology at Florida State University, and author of *Crime Control Through Private Use of Armed Force*, 35 SOC. PROBS. 1 (Feb. 1988), with those of a physician who advocates gun control). [Return to text.](#)

[52] Johnson points to the frequently encountered tactic of "stereotyping gun owners and dismissing any arguments supporting individual firearms ownership by personifying gun owners or advocates in condescending, pejorative terms." Johnson, *supra* note 2, at 72. As an example, he points to an article by Wendy Brown titled *Guns, Cowboys, Philadelphia Mayors and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989), in which Professor Brown recounts an encounter with a sportsman who helped her start her stalled car at a trailhead in the Sierra Nevadas:

My rescuer was wearing a cap with the words "NRA freedom" inscribed on it. This was, I thought at the time perfectly counterpoised to the injunction "Resist Illegitimate Authority" springing from my tee shirt. The slogans our bodies bore appeared to mark with elegant economy our attachment to opposite ends of the political and cultural universe—he preparing to shoot the wildlife I came to revere, he living out of his satellite-dished Winnebago and me out of my dusty backpack, he sustained by his guns and beer, me by my Nietzsche and trail mix.

Brown, *supra*, at 666. One wonders whether Brown in retrospect recognized the elegant congruity in those slogans, or that in the context of a right to bear arms for individual defense, the sportsman shared the company of Hobbes, Harrington, Sir Walter Raleigh, Blackstone, Aristotle, Montesquieu, and Sir Thomas Moore, among others. See Kates, *supra* note 2, at 232-33. [Return to text.](#)

[53] STONE ET AL., CONSTITUTIONAL LAW lxi (2d ed. 1991). [Return to text.](#)



[54] Justice Douglas offered the following view of the importance of the Fourth Amendment compared with the Second:

Critics say that proposals like [the state's rights interpretation] 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 rule of the day, I would prefer to water down the Second rather than the Fourth Amendment.

Adams v. Williams, 407 U.S. 143, 151 (1972) (Douglas, J., dissenting). [Return to text.](#)

[55] 307 U.S. 174 (1939). [Return to text.](#)

[56] "This holding has been widely misunderstood, most surprisingly by proponents of the individual right position. They have gone so far as to denigrate its authority by pointing out that it was rendered on the basis of only the Government's one-sided briefing." Kates, *supra* note 2, at 248. [Return to text.](#)

[57] *Miller*, 307 U.S. at 175. The National Firearms Act of 1934 was enacted during the violent days of Prohibition, when certain types of firearms, particularly sawed-off shotguns and machine guns, became notorious tools of gangsters. [Return to text.](#)

[58] *Miller*, 307 U.S. at 175. [Return to text.](#)

[59] *Id.* [Return to text.](#)

[60] *Id.* at 178. [Return to text.](#)

[61] Section 8 states in part that Congress shall have the power

To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. CONST. art. I, § 8. The meaning of the term "militia" as used in this section is very important to the state's right debate. Those in the weak-form state's right camp point to this section as the rationale behind the Second Amendment. Kates, *supra* note 2, at 211-12. According to this view, states were not willing to give the federal government control over their militias (that is, their armed citizenry) without assurances that the federal government would not be able to use its authority to disarm the militias. *Id.* at 212.

According to the strong-form interpretation, the § 8 militia is now the National Guard. The National Guard is a cooperative venture, with each state directing its respective National Guard

in peacetime. However, even when the National Guard is not under federal control, Congress still holds "a considerable degree of control through conditions attached to grants of money to the states for the National Guard." PELTASON, *supra* note 7, at 63. Under the strong-form, the Second Amendment is of no relevance today, since the militia has evolved over time into the National Guard. *See* Ehrman & Henigan, *supra* note 41.

If not for the *Miller* opinion, those in the individual right camp would not care what the Militia Clause meant, since individuals could assert the Second Amendment regardless. Indeed, congressional authority under § 8 would thus pose no real threat of federal oppression, since ultimate military power would always remain vested in the people. [Return to text.](#)

[62] *Miller*, 307 U.S. at 178 (citing *Aymette v. State of Tennessee*, 21 Tenn. 152, 2 Humph., Tenn., 154, 158 (Tenn. 1840)). [Return to text.](#)

[63] *Kates*, *supra* note 2, at 248-50. [Return to text.](#)

[64] *Id.* at 249. [Return to text.](#)

[65] *Miller*, 307 U.S. at 178-79 (emphasis added). Lund cites this language as indicating a clear repudiation by the Court of the state's right theory. Lund, *supra* note 2, at 110. [Return to text.](#)

[66] 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943). [Return to text.](#)

[67] *Id.* at 919. [Return to text.](#)

[68] *Id.* [Return to text.](#)

[69] *Id.* at 922. [Return to text.](#)

[70] *Id.* [Return to text.](#)

[71] *Id.* [Return to text.](#)

[72] *Id.* The court noted that, under *Miller*, Congress could regulate firearms such as "a flintlock musket or a matchlock harquebus." *Id.* This concern is discussed *infra* in part IV.C. [Return to text.](#)

[73] 131 F.2d at 922. [Return to text.](#)

[74] *Id.* at 922-23 ("[T]he only inference possible is that the appellant at the time charged in the indictment was in possession of, transporting, and using the firearm and ammunition purely and simply on a frolic of his own and without any thought or intention of contributing to the efficacy of the well regulated militia which the Second Amendment was designed to foster as necessary to the security of a free state."). [Return to text.](#)

[75] *Id.* at 922-23 ("While the weapon may be capable of military use . . . there is no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon . . . was in preparation for a military career."). [Return to text.](#)

[76] It is true that the *Miller* test includes the words "possession or use," but the Supreme Court's sole attention was directed at the relationship between the sawed-off shotgun and the militia. No mention was made of Miller's militia status. *Miller*, 307 U.S. at 178. [Return to text.](#)

[77] *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *Presser v. Illinois*, 116 U.S. 252, 265 (1886). Before portions of the Bill of Rights were incorporated against the states, all amendments were interpreted in such a manner. *See Kates*, *supra* note 2, at 253-57. [Return to text.](#)

[78] With the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Supreme Court began to construe the recently added Fourteenth Amendment. PELTASON, *supra* note 7, at 155, 157. The Court held that the Amendment "conferred no new rights upon United States citizens but merely made explicit a federal guarantee against state abridgement of already established rights." *Id.* at 157. Since the *Slaughter House Cases*, the Court has gradually held most of the rights guaranteed in the first eight amendments applicable to the states through the Fourteenth Amendment due process clause. STONE ET AL., *supra* note 53, at 778. The Second Amendment has not yet been explicitly incorporated. [Return to text.](#)

[79] *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943) (emphasis added). [Return to text.](#)

[80] 440 F.2d 144 (6th Cir. 1971). [Return to text.](#)

[81] *Id.* at 149. [Return to text.](#)

[82] With regard to the state's right interpretation among federal courts, the *Stevens* court picked up where the *Cases* court left off, ushering the state's right view into the circuits. [Return to text.](#)

[83] 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976). [Return to text.](#)

[84] *Id.* at 106. [Return to text.](#)

[85] 26 U.S.C. §§ 5861(d), 5871 (1974). [Return to text.](#)

[86] Warin did not claim membership in an organized militia such as the Ohio National Guard, but rather claimed membership in Ohio's sedentary militia, whose members included:

All citizens, resident of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law.

OHIO CONST. art. IX. The court noted that this provision "does not by its own force make adult citizens of Ohio members of the organized or active militia, but merely subjects them to enrollment in that body." *Warin*, 530 F.2d at 105 n.1. [Return to text.](#)

[87] *Id.* at 104. [Return to text.](#)

[88] *Id.* at 105. [Return to text.](#)

[89] *Id.* at 104-05. This fact was stipulated to at trial. *Id.* [Return to text.](#)

[90] *Id.* at 105. [Return to text.](#)

[91] *Id.* at 104-05. [Return to text.](#)

[92] *Id.* at 106. [Return to text.](#)

[93] *Id.* (citing OHIO REV. CODE ANN. §§ 2923.11, 2923.17 (Anderson 1975)). [Return to text.](#)

[94] *Id.* ("There is no such exemption for members of the 'sedentary militia.' "). [Return to text.](#)

[95] *See supra* note 79 and accompanying text. [Return to text.](#)

[96] The court's Second Amendment inquiry could have ended when it was determined that Ohio law did not confer upon *Warin* the right to possess his automatic weapon. [Return to text.](#)

[97] *Warin*, 530 F.2d at 106 ("Agreeing as we do with the conclusion in [*Cases*] that the Supreme Court did not lay down a general rule in *Miller*, we consider the present case on its own facts and in light of applicable authoritative decisions."). [Return to text.](#)

[98] *Id.* ("If the logical extension of the defendant's argument for the holding of *Miller* was inconceivable in 1942 [when *Cases* was decided], it is completely irrational in this time of nuclear weapons."). This argument is discussed *infra* in part IV.C. [Return to text.](#)

[99] *Id.* (emphasis added). [Return to text.](#)

[100] Without standards, the types of weapons within the scope of Second Amendment "reasonableness" depends solely upon individual determinations by each court. [Return to text.](#)

[101] In *Cody v. United States* the Eighth Circuit considered whether 18 U.S.C. § 922(a)(6) (1970), which makes it unlawful for persons acquiring or attempting to acquire firearms and ammunition to make false statements to a licensed dealer as to the lawfulness of a sale, infringed on the defendant's Second Amendment rights. 460 F.2d 34 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1972). Though the result under *Miller* would have been the same, the court announced its holding in a single sentence: "We find no evidence that the prohibition of § 922(a)(6) obstructs the maintenance of a well regulated militia." *Id.* at 37. This ambiguous phrase is, of course, not the *Miller* inquiry. It is not difficult to imagine situations where a federal regulation could

prohibit a type of firearm reasonably related to the efficiency of the militia while posing no obstruction to its maintenance and preservation. Though the *Cody* court was not dealing with the regulation of a firearm, but rather the regulation of an act, the court could simply have held that making a false statement to a licensed dealer is not reasonably related to the efficiency and preservation of the militia. [Return to text.](#)

[102] 695 F.2d 261 (1982), *cert. denied*, 464 U.S. 863 (1983). [Return to text.](#)

[103] The district court opinion, 532 F. Supp. 1169 (N.D. Ill. 1981), is discussed *supra* in part II.B. [Return to text.](#)

[104] 695 F.2d at 265. [Return to text.](#)

[105] *Id.* at 270 ("we briefly comment on what we believe to be the scope of the second amendment"). [Return to text.](#)

[106] *Id.* [Return to text.](#)

[107] *Id.* ("we do not consider individually owned handguns to be military weapons"). [Return to text.](#)

[108] In interpreting the Second Amendment as applying only to the federal government, no further discussion on Second Amendment jurisprudence was necessary. [Return to text.](#)

[109] *Quilici*, 695 F.2d at 265. [Return to text.](#)

[110] The Eighth Circuit embraced the state's right interpretation early on. *See* *United States v. Decker*, 446 F.2d 164 (8th Cir. 1971); *Cody v. United States*, 460 F.2d 34 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972); *United States v. Nelsen*, 859 F.2d 1318 (8th Cir. 1988). [Return to text.](#)

[111] 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993). [Return to text.](#)

[112] *Id.* at 1017 (possession of machine gun prohibited under 18 U.S.C. § 922(o) (1991)). [Return to text.](#)

[113] *Id.* (possession of the unregistered firearm charged under 26 U.S.C. § 5861(d) (1991)). [Return to text.](#)

[114] *Hale*, 978 F.2d at 1017. The federal commerce clause power is subject to the Bill of Rights. The federal government could no more use its interstate commerce and taxing powers to regulate firearms out of existence than it could use those same powers to regulate printing presses, newspapers, and magazines out of existence. With its recent decision in *United States v. Lopez* the Supreme Court limited the scope of the interstate commerce clause in the particularly relevant context of federal firearms regulation. 115 S. Ct. 1624 (1995). Through Justice Rehnquist, the Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V), which made illegal mere possession of a firearm within 1000 feet of a

school, exceeded Congress's commerce clause authority. *Lopez*, 115 S. Ct. at 1634. While this decision does not alter the Second Amendment analysis, it does cast doubt on federal regulation which bans the possession of certain firearms. [Return to text.](#)

[115] *Hale*, 978 F.2d at 1018. [Return to text.](#)

[116] *Id.* at 1019-20. The *Hale* court provided a succinct summary of the *Cases* test:

After carefully examining the principles and implications of the then recent *Miller* decision, the First Circuit concluded that the existence of any "reasonable relationship to the preservation of a well regulated militia" was best determined from the facts of each individual case. Thus, it is not sufficient to prove that the *weapon* in question was susceptible to military use . . . . Rather, the claimant of Second Amendment protection must prove that his or her *possession* of the weapon was reasonably related to a well regulated militia. Where such a claimant presented no evidence either that he was a member of a military organization or that his use of the weapon was "in preparation for a military career," the Second Amendment did not protect the possession of the weapon.

*Id.* at 1020 (citations omitted) (emphasis in original). [Return to text.](#)

[117] *Id.* [Return to text.](#)

[118] 494 U.S. 259 (1990). [Return to text.](#)

[119] *Id.* at 265. The *Hale* court dismissed the *Verdugo-Urquidez* language as dicta. 978 F.2d at 1020. [Return to text.](#)

[120] *Id.* [Return to text.](#)

[121] *Id.* [Return to text.](#)

[122] "Whether the 'right to bear arms' for militia purposes is 'individual' or 'collective' in nature is irrelevant where, as here, the individual's possession of arms is not related to the preservation or efficiency of a militia." *Id.* at 1020. This language is a far cry from absolutist state's right cases decided before the 1990 *Verdugo-Urquidez* decision. *Cf.* *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971) ("there can be no serious claim to any express constitutional right of an individual to possess a firearm"). [Return to text.](#)

[123] *Hale*, 978 F.2d at 1019. [Return to text.](#)

[124] *Id.* [Return to text.](#)

[125] *Id.* [Return to text.](#)

[126] 496 U.S. 334 (1990). [Return to text.](#)

[127] The Eighth Circuit's opinion is at 880 F.2d 11 (8th Cir. 1989). [Return to text.](#)

[128] *Perpich*, 496 U.S. at 338. [Return to text.](#)

[129] *Id.* at 351. [Return to text.](#)

[130] *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993). [Return to text.](#)

[131] *See supra* part III.A. for a discussion of the meaning of *Miller*. [Return to text.](#)

[132] *Hale*, 978 F.2d at 1019. [Return to text.](#)

[133] It is unlikely that the Supreme Court would devote eleven paragraphs of a seventeen paragraph opinion to "historical residue." Justice McReynolds's discussion of the militia in *Miller* contrasts the state militias with standing armies and explores the development of militias from the days of King Alfred up to the time of the decision, when the right to keep and bear arms is conferred by states upon citizens of the states. *United States v. Miller*, 307 U.S. 174, 178-82 (1939). [Return to text.](#)

[134] *Hale*, 978 F.2d at 1020. [Return to text.](#)

[135] *Id.* The court in *Warin* only held that Ohio's statutes did not exempt members of the sedentary militia (i.e., the Ohio citizenry) from the dangerous ordnance law. *See supra* subsection B.2 of this part. The Sixth Circuit was examining Ohio's arms and militia provisions (consistent with the weak-form state's right inquiry), and was not making a pronouncement of what type of militia membership is reasonably related to militia purposes. [Return to text.](#)

[136] The individual right view is that state suspicion of federal oppression is only one of several reasons for the right to bear arms. [Return to text.](#)

[137] *Hale*, 978 F.2d at 1021. While Judge Beam agreed that an automatic machine gun is not protected by the Second Amendment, he did not embrace the court's acceptance of the state's right interpretation:

I disagree, however, that *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977) and *United States v. Nelson* [sic], 859 F.2d 1318 (8th Cir. 1988) properly interpret the Constitution or the Supreme Court's holding in *United States v. Miller*, 307 U.S. 174, 59 S. Ct 816, 83 L.Ed. 1206 (1939) insofar as they say that Congress has the power to prohibit an individual from possessing any type of firearm, even when kept for lawful purposes. Judge Gibson's [majority] opinion seems to adopt that premise and with that holding, I disagree.

*Id.* [Return to text.](#)

[138] See *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943). [Return to text.](#)

[139] See *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974). [Return to text.](#)

[140] *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977). [Return to text.](#)

[141] 47 F.3d 120 (4th Cir. 1995), *cert. denied*, No. 94-1947, 1995 WL 334963 (U.S., Oct. 2, 1995).. [Return to text.](#)

[142] *Id.* at 122. [Return to text.](#)

[143] *Id.* (citing MD. CODE. 1957, ART. 27, § 442(b) (1992)). [Return to text.](#)

[144] *Id.* at 122. [Return to text.](#)

[145] *Id.* [Return to text.](#)

[146] Love was convicted of participating in an obscene show. *Id.* [Return to text.](#)

[147] *Id.* [Return to text.](#)

[148] *Id.* at 123. [Return to text.](#)

[149] *Id.* at 123-24. [Return to text.](#)

[150] *Id.* at 124. [Return to text.](#)

[151] It is more likely the former, as language in the decision indicates recognition by the court that it need go no further than the incorporation question. [Return to text.](#)

[152] The court noted that, in post-*Miller* decisions, "the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than an individual right." However, the court did not cite to *Miller* for this proposition: "This court's precedent is [the court's own 1974 decision in] *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974)." If the Fourth Circuit had viewed *Miller* as a state's right case, there is little doubt that it would cite to the higher court for that proposition. [Return to text.](#)

[153] 518 F. Supp. 1082 (D. N.H. 1981), *aff'd*, 740 F.2d 952 (1st Cir.), *cert. denied*, 469 U.S. 842 (1984). [Return to text.](#)

[154] *Id.* at 1090. [Return to text.](#)

[155] *Id.* [Return to text.](#)



[156] *Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982). [Return to text.](#)

[157] *Fresno Rifle & Pistol Club v. Van de Kamp*, 746 F. Supp. 1415 (E.D. Cal. 1990), *aff'd*, 965 F.2d 723 (1992) (reviewing challenge by state gun organizations of California's assault weapons ban under CAL. PENAL CODE §§ 12275-12290 (West 1989)). The court held that the Second Amendment has no application to states, citing to *Presser* and *Cruikshank*. *Id.* at 1418. Counsel for plaintiffs, which included noted Second Amendment scholar Stephen P. Halbrook, raised interesting preemption and privacy arguments as well. Halbrook is the author of numerous books and articles regarding the right to keep and bear arms, including STEPHEN P. HALBROOK, *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILL OF RIGHTS AND CONSTITUTIONAL GUARANTEES* (Greenwood Press 1989), and STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (University of New Mexico Press 1984; reprinted Liberty Tree Press 1989). [Return to text.](#)

[158] Since no federal regulation was at issue, analysis of the Second Amendment as a limitation on Congress was not required. [Return to text.](#)

[159] This argument is discussed *infra* in part IV. [Return to text.](#)

[160] *See Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) ("the Second Amendment right 'to keep and bear Arms' applies . . . to the right of the State to maintain a militia"). [Return to text.](#)

[161] *See United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976) (holding that defendant was not protected under the Second Amendment because Ohio law gives "no such exemption [from an Ohio statute prohibiting possession of a dangerous ordnance] for members of the 'sedentary militia' " to carry automatic firearms). [Return to text.](#)

[162] *See supra* part III.B.4. [Return to text.](#)

[163] *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943). [Return to text.](#)

[164] 530 F.2d at 106. [Return to text.](#)

[165] *See United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993). [Return to text.](#)

[166] *See Dowlut, supra* note 2, at 74 ("*Miller* holds that the Constitution protects the right to "possession or use" of arms having militia utility, e.g., shotguns, rifles, and pistols."). The *Miller* Court was presented with no evidence that sawed-off shotguns had militia utility. *United States v. Miller*, 307 U.S. 174, 178 (1939). [Return to text.](#)

[167] 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943); *see also Warin*, 530 F.2d at 105-06. [Return to text.](#)

[168] The *Warin* decision provides the most extensive discussion to date of the standing inquiry as applied to members of the militias. 530 F.2d at 105-06. [Return to text.](#)

[169] Dowlut, *supra* note 2, at 74 (footnote omitted). [Return to text.](#)

[170] *See supra* part II.A. [Return to text.](#)

[171] This is just what the Supreme Court of Kansas did when it invented the nebulous entity theory in *City of Salina v. Blaksley*, 83 P. 619 (Kansas 1905); *see* Dowlut, *supra* note 2, at 76-77 ("In Kansas . . . their guarantee to arms has been judicially repealed. . . . [S]everal generations later the Kansas Supreme Court obliquely retreated from *Blaksley*. . . ."). [Return to text.](#)

[172] *See* Dowlut, *supra* note 2, at 84-89 (Appendix; noting that, as of 1989, 43 states had constitutional guarantees to keep and bear arms). [Return to text.](#)

[173] In *Adams v. Williams*, Justice Douglas, in dissent on a Fourth Amendment question, speculated that:

[t]here 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.

407 U.S. 143, 150 (1971) (Douglas, J., dissenting). Justice Douglas was likely basing his assertion on incorporation grounds and the *Presser* and *Cruikshank* holdings, and not on the collective right interpretation. In fact, in the next paragraph he cites to the Court's *Miller* test, noting that "[t]he Second Amendment . . . 'must be interpreted and applied' with the view of maintaining a militia." *Id.* (quoting *United States v. Miller*, 307 U.S. 174, 178-79 (1939)). He then quotes Justice McReynolds' definition of the militia as "civilians primarily, soldiers on occasion." 407 U.S. 143, 151 (1971) (Douglas, J., dissenting). Regardless, as to state regulation, the result is the same under either the incorporation holdings or under the collective right interpretation; after all, there is little point in incorporating a right against the states which the states themselves own. [Return to text.](#)

[174] *See supra* part III.B. [Return to text.](#)

[175] As to the weapon prong, evidence could include affidavits or expert testimony from firearms experts, historians, Second Amendment and/or militia scholars, and experts on military affairs. As to the standing prong, evidence should include the relevant state constitution, any state statutes regulating firearms or the militia, affidavits from the governor (or person charged under the state constitution as commander of the state militia), and anything else that indicates that the state's militia is comprised of its citizens. [Return to text.](#)

[176] *Perpich v. U.S. Dep't of Defense*, involved federal control of the National Guard, not the Second Amendment. 496 U.S. 334 (1990). [Return to text.](#)

[177] *Kates*, *supra* note 2, at 213. [Return to text.](#)

[178] Ehrman & Henigan, *supra* note 41, at 47. [Return to text.](#)

[179] *Id.* at 47. [Return to text.](#)

[180] *Id.* [Return to text.](#)

[181] *Id.* at 47 n.308. [Return to text.](#)

[182] *Id.* at 47. [Return to text.](#)

[183] *Id.* at 47 n.308. [Return to text.](#)

[184] *See Kates*, *supra* note 2, at 211 n.31 ("Under this theory constitutional right to arms guarantees, whether federal or state, involve only a 'collective right' of the entire people, by which is apparently meant a right that cannot be invoked by anyone either in his own behalf or on behalf of the people as a whole.") (discussing *City of Salina v. Blaksley*, 83 P. 619 (Kansas 1905)). [Return to text.](#)

[185] WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 2, sc. 1 (Lancer Books 1968) (Is this a dagger which I see before me,/ The handle toward my hand? Come, let me clutch thee!/ I have thee not, and yet I see thee still./ Art thou not, fatal vision, sensible/ To feeling as to sight? or art thou but/ A dagger of the mind . . . ?). [Return to text.](#)

[186] As collective right courts continue to drift out of sight from *Miller*, they have employed in their decisions a guarded, and indeed pragmatic, conservatism. The state's right courts can be analogized to a table of nervous diners, each one looking to the other to see which fork should be lifted first. [Return to text.](#)

[187] *Perpich* was a case concerning the National Guard, and did not address the Second Amendment or state militias. *Perpich v. Dep't. of Defense*, 496 U.S. 334 (1990). "In [*Perpich*] the Court distinguished the 'National Guard,' the organized militia of the various states, from the 'National Guard of the United States.' In reaching its decision, the Court did not need to explore the nature of the unorganized, or constitutional, militia." Moncure, *supra* note 2, at 594 (citations omitted). [Return to text.](#)

[188] However, collective right courts will not be able to use the standing prong of the *Cases* test to avoid discussion of the militia utility of the weapon. [Return to text.](#)

[189] Otherwise, the contradiction which plagues the strong-form interpretation arises. The collective right interpretation becomes intellectually indefensible if the federal government is

permitted to control the state militias. The purpose of the Second Amendment is, under the collective right theory, to protect states from just that type of federal interference. [Return to text.](#)

[190] *Id.* [Return to text.](#)

[191] This assumes that the suit is brought in a state's right court. [Return to text.](#)

[192] *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976) (in the age of nuclear weaponry, strict reading of *Miller* is "inconceivable"); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943) (given the military weapons which emerged from the early years of World War II, *Miller* cannot be read as formulating a general approach to the Second Amendment). [Return to text.](#)

[193] *See United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993) (individual right to keep and bear arms is "historical residue," and the national guard structure has replaced the state militias). [Return to text.](#)

[194] This is a plausible reading of *Miller*:

Ironically, *Miller* can be read to support some of the most extreme anti-gun control arguments, e.g., that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that are clearly relevant to modern warfare, including, of course, assault weapons.

Levinson, *supra* note 2, at 654-55. [Return to text.](#)

[195] *Cases*, 131 F.2d at 922. [Return to text.](#)

[196] The argument is that state militias cannot hope to stand up against the sophisticated and powerful weaponry of the federal standing army. Kates addresses this assertion: "The argument that an armed citizenry cannot hope to overthrow a modern military machine flies directly in the face of the history of partisan guerilla and civil wars in the twentieth century." Kates, *supra* note 2, at 270 (citing the experience of the British in Israel and Ireland, the French in Indo-China, Algeria, and Madagascar, the Portuguese in Angola, as well as the Americans in Vietnam and the Soviets in Afghanistan). [Return to text.](#)

[197] *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993) (asserting that militias have evolved into the current National Guard structure). [Return to text.](#)

[198] "[I]n a free country like our own, the issue is not really overthrowing a tyranny but deterring its institution in the first place." Kates, *supra* note 2, at 270. [Return to text.](#)

[199] "[A] state facing a totally disarmed population is in a far better position, for good or for ill, to suppress popular demonstrations and uprisings than one that must calculate the possibilities of its soldiers and officials being injured or killed." Levinson, *supra* note 2, at 657. [Return to text.](#)

[200] Reynolds, *supra* note 20, at 668. [Return to text.](#)

[201] *Id.* at 669 ("These good results should make us rather cautious about making wholesale changes in [the Founding Fathers'] plan."). [Return to text.](#)

[202] Levinson, *supra* note 2, at 656. If the citizens of China kept arms, the massacre of Chinese students in Tianamen Square in 1989 may not have occurred. *Id.* Tianamen Square serves as a poignant example of the ability of political regimes to suppress and stamp out revolution and protest by an unarmed citizenry. [Return to text.](#)

[203] Reynolds, *supra* note 20, at 669 ("We may try to convince ourselves that something in the North American soil or climate renders us immune to these destructive forces, but it appears more likely that our relative tranquility has resulted from a combination of luck and well-crafted institutions."). [Return to text.](#)

[204] *Id.* [Return to text.](#)

[205] FLA. CONST. art. X, § 2(a). [Return to text.](#)

[206] 530 F.2d 103, 106 (6th Cir. 1976) (Ohio statute exempted only members of the organized state militia, not members of the sedentary militia). [Return to text.](#)

[207] "All states and the federal government have enacted provisions dealing with the militia independent of the National Guard." Moncure, *supra* note 2, at 594-95 n.44 (providing citations to the militia clause in each state constitution). Florida distinguishes between the National Guard and the state militia in statutorily as well as in its Constitution. FLA. STAT. ch. 250.02 (1993). [Return to text.](#)

[208] *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943) (Second Amendment not a conferral of rights but a bar to Congressional infringement of state conferred rights). *See* discussion of the *Cases* decision, *supra* part III.B.1. States can provide freedoms and rights which surpass those found in the federal Constitution. *See, e.g.,* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) ("As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law."). Whether a state's right to keep and bear arms provision clashes with federal law depends upon how the courts interpret the militia utility inquiry of the Second Amendment. The Constitution is, after all, the ultimate federal law. [Return to text.](#)

[209] FLA. CONST. art. I, § 2. [Return to text.](#)

[210] FLA. CONST. art. I, § 7. [Return to text.](#)

[211] Kates proposes a three-pronged test. To be protected under the Second Amendment, Kates would require weapons to be (1) of the kind in common use among law-abiding people today; (2) useful and appropriate not just for military purposes, but for law-enforcement and individual

self-defense as well; and (3) lineally descended from the kinds of weaponry known to the Founders. Kates, *supra* note 2, at 259. Kates's test, though somewhat restrictive, is an example of the type of legal test courts should have been developing after the *Miller* decision. [Return to text.](#)

[212] Weapons such as the semi-automatic Colt AR-15 rifle, one of the weapons banned recently by the federal government, *see supra* note 1 and accompanying text, can be considered among those weapons most useful to the preservation and efficiency of state militias. [Return to text.](#)

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