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A FEDERAL PERSPECTIVE: THE SECOND AMENDMENT AS A FUNDAMENTAL ASPECT OF LIBERTY

Mary Elizabeth Parrilla*

I. INTRODUCTION

*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*¹

In recent years, the words of the Second Amendment have polarized American society. Scholars, legislators, and members of the judiciary cannot seem to reach a consensus as to the true meaning of the Second Amendment. Yet while all of this discourse exists, most American law schools choose to exclude study of the Second Amendment in Constitutional Law courses. These educational institutions are missing a golden opportunity to bring clarity, meaning, and understanding to the Second Amendment and the inconsistent and misguided interpretations that many members of society harbor concerning it. It makes one wonder whether America's law schools are deliberately foregoing study and classroom debate aimed at interpreting and understanding the Second Amendment. If future members of the Bar remain ignorant of the history and tradition surrounding the Second Amendment, they will not discover the abundance of scholarly writings which reveal the truth, which is that these writings support the individual rights model of the Second Amendment.²

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1. 1 U.S. CONST. amend. II

2. Mike Cox, *Second Amendment Showdown* (2007), available at <http://www.opinionjournal.com/editorial/feature.tml?id=110010898> (last visited Apr. 16, 2009). There are generally three interpretations of the Second Amendment: The individual rights model; the collective rights model, and the quasi-collective rights model. The individual rights model supports the position that the Second Amendment bestows upon the people the right to bear arms. The collective rights model advances the theory that only a government organized militia has the right to bear arms. The quasi-collective rights model advances the theory

Clearly, advancement of this theory would deal a striking blow to gun control advocates who have been particularly successful in advancing their anti-individual rights interpretation of the Second Amendment. Gun control proponents have found favorable platforms from which to disseminate gun-control rhetoric to captive audiences in both classrooms and in living rooms across the country. Liberal members of the media regularly advance an anti-Second Amendment agenda.³ Moreover, the shift in Congressional power following the 2006 elections and the recent tragedy at Virginia Tech University make upholding the individual rights interpretation of the Second Amendment an even more pressing concern than it has been in recent years.⁴

In his 1989 Yale Law Journal article entitled, *The Embarrassing Second Amendment*, Sanford Levinson advances this very theory.

To put it mildly, the Second Amendment is not at the forefront of constitutional discussion, at least as registered in what the academy regards as the venues for such discussion-law reviews, casebooks, and other scholarly legal publications. . . . '[T]he second amendment is not taken seriously by most scholars.'⁵

Legal scholars, however, would be hard-pressed to argue that the Second Amendment is not an essential tool for an attorney who plans to practice in just about any aspect of the law. In the criminal law context, it is undeniable that oftentimes people charged with non-gun related crimes find themselves in the unenviable position of hav-

that only the National Guard was intended to bear arms, despite the National Guard not being in the existence at the time the Second Amendment was ratified.

3. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 641 (1989) (quoting: "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. Thus the title of this essay-The Embarrassing Second Amendment-for I want to suggest that the 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"); See also Bernard Goldberg, *Bias: A CBS Insider Exposes How the Media Distort the News*, 126 (Regenery Publishing 2002) (78% of journalists for tougher gun control).

4. Wayne LaPierre, *Standing Guard*, America's Freedom First, (April 2004) NRA OFFICIAL JOURNAL, www.nrapublications.org/SH/index.asp.html (last visited April 8, 2008) Oct. 2006 (Senators Chuck Schumer (D-NY), Hillary Clinton (D-NY), Ted Kennedy (D-MA), Dianne Feinstein (D-CA), Frank Lautenberg (D-NJ), supporting house-to-house searches and firearms confiscation in New Orleans during the aftermath of Hurricane Katrina).

5. Levison, *supra* note 3, at 639-40.

ing illegal firearms charges raised concurrently.⁶ An attorney practicing in domestic relations or family law may encounter a client alleging domestic abuse.⁷ If the alleged abuser is also an alleged firearms owner, regardless of whether such allegation is later discovered to be founded, the accused will stand by and watch his Second Amendment rights become eviscerated right before his eyes.⁸

Second Amendment issues are being raised in just about every legal practice area including: property law⁹; probate law¹⁰; and tort law¹¹. A corporate attorney may encounter a client engaged in the firearms business who is faced with excessive taxation or burdensome licensing schemes. These schemes are deliberate ploys designed to do nothing other than make the firearms business cost prohibitive. The polarizing effects of the debate over the Second Amendment are seen in virtually all aspects of American culture today. Unfortunately, many members of the unwitting public buy into gun control rhetoric without performing any independent investigation into the accuracy of media reports.

The anti-gun members of Congress are known for regularly proposing new federal gun control legislation.¹² Some of these bills have

6. See *Matter of Rose*, 1994 WL 692794 at *199 (Cal. Bar Ct. 1994) (paralegic attorney cited for traffic violation is criminally charged and disbarred for possessing handgun, despite having had a concealed weapons permit for over 20 years, being threatened by a drug addict acquaintance, and possessing a recently expired concealed weapons permit).

7. See generally *United States v. Emerson*, 46 F. Supp. 2d 598, 602 (N.D. Tex. 1999), *rev'd in part*, 270 F.3d 203 (5th Cir. 2001).

8. See Steven G. Bradbury et al., *Whether the Second Amendment Secures an Individual Right*, 2004 WL 2930974, at *105-06 (2004) (citing *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (Upholding restriction on firearm ownership for individuals under restraining order, but finding that the second Amendment is a protected individual right)).

9. JESSE DUKMINIER ET. AL., *PROPERTY* (6th Ed., Aspen Publisher 2006); citing Timothy Egan, *The Serene Fortress: Many Seek Security in Private Communities*, N.Y. Times, Sept. 3, 1995, §1, at 1., Noting that the homeowner's association in the Bear Creek community outside of Seattle, Washington, subjected residents to restrictive covenants in exchange for the privilege of residing in their gated, residential community. One of the community's covenants imposed a gun control restriction on all residents.

10. See *Rousseau v. Rousseau*, 910 So.2d 1214, 1218 (Miss. 2005) (decedent bequeaths firearms to heirs); *Craig v. Perry*, 565 So.2d 171 (Ala. 1990); *Stewart v. Douglas*, 29 S.W.2d 637 (Ky. 1930); *In re Van Valkenburgh's Will*, 113 N.Y.S. 1108, 1109 (1908).

11. See generally *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006) (relative of decedent files wrongful death suit against gun manufacturer); *Chumney v. United States Repeating Arms Co., Inc.*, 196 F.R.D. 419 (M.D. Ala. 2000).

12. See *The Assault Weapons Ban and Law Enforcement Protection Act of 2007*, H.R. 1022, 110th Cong. (2007) (Proposes to ban over 65 specifically listed firearms, and additional firearms components, including, but not limited to stocks and pistol grips).

actually been passed into law.¹³ Congress often relies on the Commerce Clause as the derivative power source for such legislation. However, several of these laws have later been found unconstitutional abuses of congressional power.¹⁴ Congress has also attempted to subvert the Constitution and flex its muscle by commandeering state governments. For example, the Brady Handgun Violence Prevention Act attempted to force states to fund and carry out federal legislation that would have required state and local police departments to perform background checks on prospective gun purchasers.¹⁵ This scheme was later found to be an unconstitutional abuse of power in violation of the Tenth Amendment.¹⁶ However, not surprisingly, the gun control proponents in Congress argue that any judicial review of gun control legislation should only be subjected to rational basis scrutiny, the lowest threshold of scrutiny the court applies when evaluating the law.

Why is the Second Amendment not worthy of academic study in our nation's law schools? One possibility is that because of the disproportionate number of liberals in academia, who publicly advocate gun control, do not wish to arm their students with the knowledge necessary to fully understand the history and tradition of the Second Amendment.¹⁷ Uneducated law students will shy away from challenging the constitutionality of gun control in this country simply because they do not fully understand the Second Amendment. This seemingly could result in the evisceration of the individual right to keep and bear arms guaranteed by the Second Amendment, but it also could result in law students failing to raise proper Second Amendment claims on behalf of their future clients.

This paper advances the theory that the Second Amendment is a fundamental aspect of Liberty under the Fifth Amendment and as

13. See *Printz v. U.S.*, 521 U.S. 898 (1997).

14. See *id.*; see also *United States v. Lopez*, 514 U.S. 549 (1995) (Wherein the Supreme Court struck down the Gun-Free School Zones Act of 1990 as an unconstitutional exercise of Congress's commerce power); *Parker v. Dist. of Columbia*, 478 F.3d 370, 401 (2007).

15. *Printz*, 521 U.S. at 903 (requiring the state police officers to perform background checks on prospective gun buyers in order to comply with the Brady Handgun Violence Prevention Act) (Scalia, J., concurring) (finding that Congress violated the Tenth Amendment's separation of powers requirement when it compelled state actors to implement the Brady Act).

16. *Id.*

17. See *Debating Party Parity in Faculty Population*, DUKE MAGAZINE, May-June 2004, at 22, stating "[a]n overwhelming number of faculty members are Democrats" and there is a "relative scarcity of Republicans in academia."; quoting political scientist Michael Munger, "statistics showing a large preponderance of Democrats among faculty in certain Duke departments could not be explained without considering the possibility of bias, even if inadvertent." Congressional votes regarding gun control and the Second Amendment are often distinguished by political party affiliation.

such, has been incorporated to the states through the Fourteenth Amendment. This conclusion was reached after performing a thorough examination of specific writings contained in *The Federalist Papers*, the Constitution, the Bill of Rights, and the writings of several respected Constitutional scholars. Some of the frequently cited court cases were examined to address the issue of whether a citizen possesses an “individual right” to keep and bear arms. Moreover, the decision recently released by the District of Columbia Court of Appeals in *Parker v. District of Columbia*. *Parker* is being called “the most important Second Amendment case in 70 years” and definitively reaches the conclusion that the Second Amendment guarantees an individual right. Finally, the opinion issued by the U.S. Attorney General John Ashcroft, which proffers additional support for the individual rights model of the Second Amendment.¹⁸

History and the tradition of gun ownership in America is used to bolster support for the Second Amendment as a fundamental aspect of Liberty under both the Fifth Amendment’s Liberty and Due Process provisions. This analytical undertaking was necessary to conclude that the Second Amendment’s right to keep and bear arms is a fundamental right. The plain language of the text of the Second Amendment is used to support this theory. The language used in the Second Amendment was compared to several other Constitutional Amendments which grant individual rights to the people.

II. THE SECOND AMENDMENT AS A FUNDAMENTAL RIGHT AND A CONSTITUTIONALLY PROTECTED ASPECT OF LIBERTY

The structure of the United States government is based on a tripartite system. Each of the three branches of government exists to serve a different function. The government of the United States was structured in this manner because our founders deemed it necessary to incorporate checks and balances into the governmental system to prevent any one branch from becoming too powerful. The first branch of government, the legislative, is tasked with making our laws. It is the job of the second branch of government, the executive, to enforce laws that are enacted by the legislative branch. Finally, the third branch of our government, the judiciary, is entrusted with the task of interpreting the laws as enacted by the legislature. The judiciary’s function is solely to interpret the law. However, a study of the Court’s opinions reveals that at times, the Court has shown a willingness to “legislate

18. *Id.*

from the bench.”¹⁹ This type of judicial activism is unequivocally prohibited by the Constitution.²⁰

Neither the legislative nor the judicial branches of our government have been friends of the Second Amendment in recent history. Since 1934, the legislature has enacted numerous laws aimed at abridging the individual right to keep and bear arms.²¹ Notably, until *District of Columbia v. Heller*,²² the Supreme Court had addressed only one case involving a challenge to the abridgement of an individual’s Second Amendment right since 1939.²³ The Supreme Court has consistently declined to provide a definitive ruling on whether the Second Amendment guarantees an individual right. Meanwhile, there is an abundance of historical writing that substantially supports the individual rights model. Because of the volume of writing on the subject, I have selected several of these writings to be discussed in greater detail.

III. THE MISGIVINGS OF *UNITED STATES V. MILLER*

United States v. Miller is the case that gun control advocates love to cite. The Brady Campaign to Prevent Gun Violence advances *Miller* because it was interpreted as adopting the militia interpretation of the Second Amendment.²⁴

Miller involved two men who were charged with unlawfully transporting an unregistered, double barreled shotgun in interstate

19. See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

20. *U.S. v. O’Brien*, 391 U.S. 367, 383 (1968) (holding that government regulation is sufficiently justified if it is within the constitutional powers of the Government; if it furthers important or substantial government interest that does not burden another constitutional right, “it is a familiar principle of Constitutional laws that this court will not strike down an otherwise Constitutional statute on the basis of an alleged illicit legislative motive.”) *Id.*

21. See The National Firearms Act of 1934, 26 U.S.C. § 53, amended by Pub. L. No. 111-5, 123 Stat. 115 (2009); (citing to Congress’s Congressional power to regulate interstate commerce and of taxation to regulate certain classes of firearms); Federal Firearms Act of 1938, 15 U.S.C. § 18, repealed by The Gun Control Act of 1968, repealed by Pub. L. No. 97-79, § 9(b)(2), 95 Stat. 1079 (1981); Undetectable Firearms Act of 1988, 18 U.S.C. § 922, invalidated by *U.S. v. Martinez*, 2009 WL 522939, at *13 (N.D. Tex. Feb. 27, 2009); Brady Handgun Violence Protection Act of 1993, 18 U.S.C. § 921-922 (1993); Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. (1994); Gun Free School Zones Act of 1990, (current version at Crime Control Act of 1990, 18 U.S.C. § 1702, Pub. L. 101-647 (1990).

22. See *Dist. of Columbia v. Heller*, 128 S. Ct. 2788 (2008) (5-4 decision) (Scalia J., plurality opinion) (holding there is a fundamental right to bear arms in the home for protection).

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

24. *The Second Amendment, Brady Campaign to Prevent Gun Violence* (2007), available at <http://www.bradycampaign.org/facts/issues/?page=second> (hereinafter “Brady Campaign”) (last visited Apr. 8, 2009).

commerce that was lacking a tax stamp.²⁵ Jack Miller and Frank Lawton were charged with violations under the National Firearms Act of 1934 (hereinafter “The Act”).²⁶ The purpose of the Act was to quell the public fear that was prevalent during the prohibition era when mob executions frequently occurred. Many of these mob executions were carried out utilizing the Thompson machine gun as the mob’s weapon of choice.²⁷

The Act required that every person possessing a firearm register the weapon in the district where he resided or where the weapon was usually kept.²⁸ The Act defined the term “firearm” to include a shotgun or rifle having a barrel of less than eighteen inches in length, “or any other weapon *except a pistol or revolver . . .* capable of being concealed on the person, or a machine gun, and include[d] a muffler or silencer for any firearm whether or not such firearm [was] included within the foregoing definition.”²⁹

The District Court held that Section 11 of The Act violated Miller and Lawton’s Second Amendment rights.³⁰ But in overturning the District Court’s decision, the Supreme Court opined:

It is not within judicial notice that a shotgun having a barrel of less than eighteen inches in length is any part of ordinary military equipment, or that its use could contribute to the common defense.³¹

Clearly, the Court erred in *Miller* when it carved out this judicially-created rule, pulled from proverbial left-field. The *Miller* Court made no inquiry into the historical evolution of firearms in this country. Nor did the Court allocate proper weight or authority to the historical writings which indicate that able-bodied men who were called upon to provide for the common defense were expected to be proficient in the use of firearms that they were required to have purchased

25. *Miller*, 307 U.S. at 175.

26. *Id.*

27. Greg S. Weaver, *Firearm Deaths, Gun availability, and Legal Regulatory Changes: Suggestions from the Data*, 92 J. CRIM. L. & CRIMINOLOGY 823 (2002) (mentioning Al Capone’s use of the Thompson machine gun to attack a rival bootlegger, launch an arms war amongst gangsters in Chicago, and killing a state prosecutor).

28. *Miller*, 307 U.S. at 175.

29. *Id.* at 175.

30. *Id.* at 177 (citing Section 11 of The Act, “It shall be unlawful for any person who is required to register as provided in section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce”).

31. *Id.* at 177, (citing *Aymette v. State of Tennessee*, 21 Tenn. 154, 158 (1840)).

using their own funds.³² Instead, the Court chose not to pay homage to the historical evidence which existed and showed that militia weapons with barrels of less than eighteen inches existed as early as the 17th century.³³

Unfortunately for proponents of the individual rights model of the Second Amendment, *Miller* did not articulate a definitive position as to whether an individual right exists to keep and bear arms. Rather, the Court's reasoning focused on the length of the barrel of the firearms "most commonly utilized by the militias of the day."³⁴ The *Miller* opinion references Adam Smith's *Wealth of Nations* Book V. Ch. I which stated: "[M]en of republican principles have been jealous of a standing army as dangerous to liberty. In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier. . ." However, the *Miller* Court did not afford this insightful observation due consideration.³⁵

Smith clearly recognized that the militia needed to be different in character than the standing army. The militia was to be comprised of ordinary men and was to outnumber and be superior in character to that of the standing army soldier.³⁶ In identifying that our military force needed to be comprised of two different factions, Smith recognized that the concept of a standing army posed a significant obstacle to ensuring the liberty of the people if such an army was directed by a tyrannical government.³⁷ This finding supports the theory that ordinary people were meant to have the right to keep and bear arms separately from the standing military. Smith's statement seemingly incorporates the checks and balances system into the concept of a standing military.

Unfortunately, the *Miller* Court missed the mark when it failed to state with clarity whether or not an individual has a personal right to keep and bear arms. Although gun control advocates cite *Miller* with regularity, they erroneously regard the Court's decision therein as advancing the position that the Constitution does not guarantee an individual right to keep and bear arms.³⁸ However, as will be discussed, history and tradition tell a different story.

32. See *id.* at 179; See also Don B. Kates and Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?*, HARV. J.L. & PUB. POL'Y, 668, 679-80 (2007).

33. Answers.com, <http://answers.com/topic/blunderbuss> (last visited Mar. 5, 2009).

34. *Miller*, 307 U.S. at 180 (muskets with barrels less than eighteen inches).

35. *Id.* at 179.

36. *Id.*

37. *Id.*

38. See *Brady Campaign*, *supra* note 24.

IV. ARE THE COURTS FINALLY BEGINNING TO UNDERSTAND THE SECOND AMENDMENT?

The Brady Campaign called the court's initial decision in *U.S. v. Emerson*, a "renegade decision."³⁹ *Emerson* involved a man who owned a Beretta nine millimeter handgun. Emerson filed all paperwork required by the Bureau of Alcohol, Tobacco, Firearms, & Explosives (BATFE), and at the time of purchase, he was not subject to any pending criminal action, nor was he subject to a restraining order for domestic violence.⁴⁰ However, subsequent to the purchase of the firearm, Emerson's wife began to carry on an extramarital affair.⁴¹ Emerson's wife testified that he had not assaulted her, but that he did threaten to kill her lover.⁴² Upon hearing the testimony of Mr. Emerson's wife, the District Court issued a temporary restraining order against Emerson.⁴³ The restraining order enjoined Emerson from engaging in twenty-two enumerated acts which included, but were not limited to, threatening any unlawful action against any person, causing injury to any person, or threatening any person with imminent bodily injury.⁴⁴

Although Emerson never carried out the threat, he was subsequently charged with possessing a firearm while being subject to a restraining order.⁴⁵ The first case against Emerson was dismissed by the U.S. District Court for the Northern District of Texas.⁴⁶ The District Court found that the domestic violence statute at issue amounted to nothing more than a boilerplate statute and reinstated Emerson's Second Amendment rights.⁴⁷

The Court of Appeals reversed the lower court's decision, but in doing so, it opined that the Second Amendment does guarantee an in-

39. *Id.* (citing *Emerson*, 46 F. Supp. at 599).

40. *U.S. v. Emerson*, 270 F.3d 203, 211, 216 (5th Cir. 2001).

41. *Id.* at 211 (citing *Emerson*, 46 F. Supp. 2d at 599).

42. *Id.*

43. *Id.* at 211.

44. *Id.* The restraining order enjoined Mr. Emerson from engaging in twenty-two enumerated acts which included, but were not limited to: threatening to take unlawful action against Emerson's wife or any person; causing bodily injury to Emerson's wife or to a child of either party; or threatening Emerson's wife or a child of either party with imminent bodily injury.

45. *Id.* at 211-12.

46. *Id.* at 212.

47. *Id.* at 260 (The District Court found that the domestic violence statute at issue amounted to nothing more than a "boilerplate order" and reinstated Emerson's Second Amendment rights).

dividual right.⁴⁸ The Court explained that it was appropriate to abridge Emerson's Second Amendment rights as long as the state could demonstrate a narrowly tailored means in abridging the right.⁴⁹ The Court's use of the words "narrowly tailored" is significant because such use indicates that the Court applied a strict scrutiny analysis to the case. The Court appears to have concluded that the state met its burden of demonstrating a compelling interest in curtailing domestic violence, and achieved its means through narrowly tailored channels.⁵⁰

In a clearly written opinion, the Court of Appeals unequivocally concluded that the Second Amendment guarantees an individual right.⁵¹ The *Emerson* Court went to great lengths in both its research and its investigation by reviewing several previously decided cases involving the Second Amendment, considering the writings of several constitutional scholars, reviewing various state ratifications, and dissecting the language used in the Second Amendment.⁵² This level of diligence is what the *Miller* decision unfortunately lacked.⁵³

The *Emerson* Court acknowledged that the individual rights interpretation of the Second Amendment has received "considerable academic endorsement" over the last two decades and paid attention to the findings therein.⁵⁴ Rejecting the collective rights model, the Court

48. *Id.* at 260-61.

49. *Emerson*, 270 F.3d at 261.

50. *Id.* at 213-14 (by abridging only Mr. Emerson's Second Amendment rights).

51. *Id.* at 260-61.

52. *Id.* at 221-60.

53. See generally CLAYTON E. CRAMER, ARMED AMERICA, THE REMARKABLE STORY OF HOW AND WHY THE GUNS BECAME AS AMERICAN AS APPLE PIE (Stetson Current 1996). As identified herein, the historical evidence supports that weapons with barrel lengths of less than eighteen inches did, in fact exist, and were used in conjunction with militia service. This historical evidence was neither investigated nor discussed by the *Miller* Court.

54. *Emerson*, 270 F.3d at 220 (acknowledging Scott Bursor, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125 (1996); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151 (1986); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992); 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); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157 (1999); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996); Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); William Van Alstyne, *The Second Amendment and the Personal Right to*

opined that *Miller* was decided in its entirety based upon the length of the barrel of the firearm.⁵⁵ Writing for the *Emerson* majority, Judge Garwood, stated:

We believe it is entirely clear that the Supreme Court decided *Miller* on the basis of the government's second argument, that a 'shotgun having a barrel of less than eighteen inches in length' as stated in the National Firearms Act is not . . . one of the 'Arms' which the Second Amendment prohibits infringement of the right of the people to keep and bear—and not on the basis of the government's first argument (that the Second Amendment protects the right of the people to keep and bear no character of 'arms' when not borne in actual, active service in the militia. . .).⁵⁶

The *Emerson* Court also reviewed *Cases v. United States*.⁵⁷ In *Cases*, the Court also determined that *Miller* was decided "entirely on the type of weapon involved not having any reasonable relationship to preservation or efficiency of a well regulated militia."⁵⁸ The *Cases* Court opined:

[W]e do not feel that the Supreme Court in this case [*Miller*] was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go.⁵⁹

Cases went on to hold:

Considering the many variable factors bearing upon the question it seems to us *impossible to formulate any general test by which to determine the limits imposed by the Second Amendment* but that *each case under it, like cases under the due process clause, must be decided on its own facts . . .*⁶⁰

Based on the foregoing, the *Cases* Court appears to acknowledge that compliance with the Fifth Amendment's due process clause requires each Second Amendment case to be considered on its own merits. *Cases* seemingly rejects the application of any general rule that would consider the character of the firearm – whether or not the firearm was of the character of weapons commonly utilized by the militia at the time our founders drafted the Constitution.

Arms, 43 DUKE L.J. 1236 (1994); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

55. *Emerson*, 270 F.3d at 224.

56. *Id.*

57. *See generally* *Cases v. United States*, 131 F.2d 916 (1942).

58. *Emerson*, 270 F.3d at 224 (*citing* *Cases*, 131 F.2d at 922).

59. *Id.*

60. *Id.*

More recently, the United States Court of Appeals for the District of Columbia announced its decision in *Parker v. The District of Columbia* (hereinafter "the District"). *Parker* involved a challenge to the District of Columbia's gun control laws.⁶¹ The case was filed by six individual residents of the District of Columbia (hereinafter "D.C.") and alleged that D.C.'s gun control laws violated their Second Amendment rights.⁶² The decision by the Court of Appeals followed the lower court's dismissal of the matter on standing grounds.⁶³

Because of the lack of binding legal precedent, the Court of Appeals began its analysis by examining the text of the Second Amendment.⁶⁴ The Court considered several of the sources cited herein and definitively reached the conclusion that the Second Amendment is an individual right guaranteed by the Constitution.⁶⁵ This holding is significant because the Constitution does give Congress the power to regulate for general welfare *only* in the District of Columbia.⁶⁶ Nonetheless, the Court of Appeals concluded that residents of the District of Columbia do not forfeit their Constitutional rights simply by residing therein.⁶⁷

The Court advances the theory that the Second Amendment is a federal right and as such, is guaranteed by the Constitution.⁶⁸ The Court dissected both the Second Amendment's prefatory and operative clauses and considered the significance of the placement of the comma which separates the two clauses.⁶⁹ Appellant Parker argued that the Amendment's operative clause guarantees the individual right to bear arms.⁷⁰ Conversely, the District argued that the prefatory clause states the Amendment's main purpose was aimed at "shield[ing] state militias from federal encroachment."⁷¹ Additionally, the District argued that the Second Amendment "protects private possession of weapons *only* in connection with performance of civic duties as part of a well-regulated citizens militia organized for the security of a free state."⁷²

61. *Parker*, 478 F.3d 370, 372 (2007).

62. *Id.* at 373.

63. *Id.* at 370, 402.

64. *Id.* at 380-381.

65. *Id.* at 381.

66. U.S. CONST. art. I, sect. 8. cls. 17.

67. *Parker*, 478 F.3d at 395.

68. *Id.*

69. *Id.* at 381-85.

70. *Id.*

71. *Id.*

72. *Id.*

The District asked that the court accept its argument that the phrase “a well regulated Militia” applied only to the organized militias which were prevalent during the time of our founders; and that because militias no longer exist, “invocation of the Second Amendment right is conditioned upon service in a defunct institution.”⁷³ During oral argument, counsel for the District argued that there is, in fact, no type of law that would violate the Second Amendment.⁷⁴ Moreover, the District’s counsel advanced the theory that it would be constitutional for D.C. to ban the fourteen firearms at issue in this case outright.⁷⁵ The Court interpreted this argument to mean that D.C. views the Second Amendment as “a dead letter.”⁷⁶

Interpreting the meaning of the words “the people,” the Court opined that the First, Second, Fourth, Ninth, and Tenth Amendments were all designed to “protect the interests of *individuals* against government intrusion, interference, or usurpation.”⁷⁷ Moreover, in concluding that the Second Amendment guarantees an individual right, the Court found that “the most important word is the one the drafters chose to describe the holders of the right: “the people”.”⁷⁸ The Court acknowledged that the individual rights model has received considerable support from the “great legal treatises of the nineteenth century,” as well as more recent support from former Attorney General John Ashcroft.⁷⁹

The *Parker* decision supports a central tenant of this paper, which is, that the rights bestowed upon “the people” through the Second Amendment are deserving of the same treatment and respect that the rights receive in the First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments. Writing for the *Parker* majority, Judge Silberman opined:

We . . . note that the Tenth Amendment—“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people”—indicates that the authors of the Bill of Rights were perfectly capable of distinguishing between “the people,” on the one hand, and “the states,” on the other. The natural reading of “the right of

73. *Parker*, 478 F.3d at 378.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 381.

78. *Id.*

79. *Parker*, 478 F.3d at 380-81.

the people” in the Second Amendment would accord with usage elsewhere in the Bill of Rights.⁸⁰

Judge Silberman also noted that the Supreme Court’s holding in *United States v. Verdugo-Urquidez*, “endorsed a uniform reading of ‘the people’ across the Bill of Rights.”⁸¹ The Court in *Verdugo-Urquidez* specifically considered both the Constitution and Bill of Rights’ use of the word “people.”⁸² Holding that the Fourth Amendment does not protect the rights of non-citizens on foreign soil, the *Verdugo-Urquidez* Court wrote:

“[T]he people” seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by “the People of the United States.” The Second Amendment protects “the right of the people to keep and bear Arms,” and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to “the people.” . . . [T]his textual exegesis . . . suggests that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community . . .⁸³

The *Parker* Court found the Supreme Court’s discussion in *Verdugo-Urquidez* to be indicative, if not definitive, that “the people” in the Second Amendment should not be “restricted to a small subset of ‘the people’ meriting protection under the other Amendments’ use of that same term.”⁸⁴ According to Judge Silberman, this finding led to the Court’s conclusion in *Parker* that the “right of the people,” when read in context and in light of Supreme Court precedent, guarantees that the Second Amendment is an individual right.⁸⁵

V. WHY THE RIGHT TO BEAR ARMS IS A FUNDAMENTAL RIGHT

Legal teachings are inconsistent with regard to whether each of the first eight Amendments has been incorporated to the states through the Fourteenth Amendment. There are writings that indicate that the Second Amendment has not been incorporated.⁸⁶ Addition-

80. *Id.* at 381.

81. *Id.* at 328 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)).

82. *Parker*, 478 F.3d at 381-82.

83. *Id.* at 382.

84. *Id.* at 382.

85. *Id.* at 395.

86. Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 Nw. U. L. REV. COLLOQUY 406, 411 (2008); Stephen P. Halbrook, *Only Law Enforcement will*

ally, the Fifth Amendment's complete incorporation is also subject to debate.⁸⁷

However, the Fifth Amendment's Liberty and Due Process clauses have been incorporated to the states through the Fourteenth Amendment.⁸⁸ Jesse Choper's, *Constitutional Law, Cases-Comments-Questions*, denotes that the "total incorporation" position received support from the dissenting justices in *Adamson v. California*, 332 U.S. 46 (1947).⁸⁹ Distinguishing *Adamson* from *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Palko v. Connecticut*, 302 U.S. 319 (1937), Justices Black and Douglas opined:

[We] cannot consider the Bill of Rights to be an outworn 18th Century 'straight jacket' as the *Twining* opinion did. It is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century whenever excessive power is sought by few at the expense of many.⁹⁰

This writing is significant because Justices Black and Douglas identified the possibility of people in power advancing ill-intentioned agendas at the expense of "the people." Justices Black and Douglas further considered the importance of the concept of liberty when they wrote:

. . . [T]he people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced, and respected so as to afford continuous pro-

be Allowed to Have Guns: Hurricane Katrina and the New Orleans Firearm Confiscations, 18 GEO. MASON U. CIV. RTS. L.J. 339, 347 (2008); George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2169 (2008).

87. CHOPER, JESSE H., CONSTITUTIONAL LAW, CASES-COMMENTS-QUESTIONS, 361 (10th ed. 2006) (*citing* *Palko v. Connecticut*, 302 U.S. 319, (1937), which held that the Fourteenth Amendment did not encompass at least certain aspects of the double jeopardy prohibition of the Fifth Amendment; the *Twining-Adamson* view that the Fifth Amendment privilege against self-incrimination is not incorporated; *Malloy v. Hogan* which rejects *Twining-Adamson*; and *Griffin v. California*, 308 U.S. 609 (1965) which rejected the "total incorporation" interpretation. See also, Choper at 302, quoting Louis Henkin, *Selective Incorporation in the Fourteenth Amendment*, 73 YALE L.J. 74, 79, 80-81 (1963) To hold that a particular provision of the Bill of Rights is not totally 'incorporated,' i.e., not binding on the states in its entirety, is not to say it is completely 'out' of the Fourteenth Amendment.

88. See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment is incorporated against the states through the Fourteenth Amendment); *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897) (holding the takings clause is incorporated to the states through the Fourteenth Amendment); see also *Palko v. State of Connecticut*, 302 U.S. 319 (1937).

89. CHOPER, *supra* note 87 at 361.

90. *Id.*

tection against old, as well as new, devices and practices which might thwart those purposes.⁹¹

Justices Black and Douglas seem to have concluded that the original purpose of the Fourteenth Amendment was to extend to all people of our nation "the *complete protection of the Bill of Rights*."⁹² (Emphasis added). With this reasoning in mind, it makes logical sense to conclude that the Fifth Amendment has been incorporated to the states through the Fourteenth Amendment. Notably, the act of incorporation prohibits the federal and state governments from abridging the fundamental rights guaranteed by the Bill of Rights without meeting the highest level of scrutiny.⁹³

There are two types of rights: enumerated and unenumerated. Enumerated rights are generally deemed to be fundamental. As such, they are considered of such great importance that these rights are to be applied against both the federal and the state governments.⁹⁴ Moreover, enumerated rights are listed in the Constitution.⁹⁵ Clearly, there can be no argument that the Second Amendment's right to keep and bear arms is listed in the Constitution.

An unenumerated right is not specifically listed in the Constitution. Unenumerated rights, however, can be elevated to fundamental status upon showing that the right is of such importance that it should be protected against government intrusion. Once an unenumerated right is determined to be fundamental, neither the federal government, nor a state government may abridge the right without showing a compelling interest in abridging the right by means that are narrowly tailored to meet a necessary government objective.⁹⁶

The dissenting opinion in *Adamson* supports the position that the Fifth Amendment has been incorporated to the states through the Fourteenth Amendment.⁹⁷ This support, albeit helpful, is not critical to the contention that the right to "keep and bear arms" may not be abridged by any branch of the government, federal or state, without meeting the most demanding level of scrutiny, which is strict scrutiny. The enumeration of the Fifth Amendment when read in context with

91. Choper, *supra* note 87, at 361.

92. *Id.*

93. *Id.* at 1605.

94. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969); see also *Palko v. State of Connecticut*, 302 U.S. 319, 323-325 (1937).

95. U.S. CONST. amend. IX; Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 901 (2008).

96. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); see also U.S. CONST. amend. V; see also U.S. CONST. amend. XIV.

97. *Adamson v. California*, 332 U.S. 46, 124 (1947).

the Second Amendment, grants fundamental status to the Second Amendment. This fundamental status makes the Second Amendment's right of "the people" to keep and bear arms an aspect of liberty. Therefore, in order to abridge the right, the government must show a compelling interest in abridging the fundamental right, and the means selected must be narrowly tailored toward accomplishing the stated objective.⁹⁸

VI. ESTABLISHING A RIGHT AS FUNDAMENTAL

To establish a right as "fundamental," one must look to history and tradition. Because the Second Amendment relates to the right of "the people" to keep and bear arms, one must consider the evolution of firearms and their use in this country.

The earliest historical accounts related to firearms credit the Chinese with inventing gunpowder in the 1200's.⁹⁹ The word "hand gun" was used for the first time in the 14th century.¹⁰⁰ The production of firearms improved and was advanced as early as the 15th and 16th centuries. And although the British do not provide an exact date as to when rifles were first used in war, there is documentation on record establishing that in as early as 1680 British troops of Life Guards were supplied with rifled carbines.¹⁰¹ Moreover, both the British Royal Navy and the pilgrims were credited with use of the blunderbuss.¹⁰²

The blunderbuss was a mid-sized weapon, smaller than a shotgun but larger than a pistol and was usually fired from the hip.¹⁰³ Significantly, the blunderbuss was a short-barreled weapon.¹⁰⁴ Its compact nature enabled it to be utilized in confined spaces. Therefore, it was a weapon commonly carried on ships to repel pirates.¹⁰⁵ Historical evidence indicates that this weapon "appeared with surprising frequency among the civilian population in the United States."¹⁰⁶

98. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (explaining strict scrutiny).

99. FREDERICK WILKINSON, *HANDGUNS: A COLLECTOR'S GUIDE TO PISTOLS AND REVOLVERS FROM 1850 TO THE PRESENT*, 10-11 (London, Greenwich ed. 1996).

100. *Id.*

101. David Minshall, *Firearms History, 1998-2007*, available at <http://inventors.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=inventors&zu=http%3A%2F%2Fwww.research.press.co.uk%2Ffirearms%2Findex.htm> (last visited Apr. 8, 2009).

102. *Cramer*, *supra* note 53, at 238-39.

103. *Id.*

104. *Miller*, 307 U.S. at 175 (This feature was especially significant because the court's decision in *Miller* focused on the length of the barrel of the gun).

105. *Cramer*, *supra* note 53, at 238.

106. *Id.*

The evolution of the firearms industry coincides with when our founding fathers labored over the contents of the Constitution. “The Colonists took from England the tradition of arming people to ensure their own safety and peacekeeping duties for the community.”¹⁰⁷ At common law there was a recognized need for men to defend themselves and they were permitted to do so.¹⁰⁸

Early historical accounts indicate that the colonists feared attacks from both the Indians and other European enemies.¹⁰⁹ Additionally, the defense of the early colony was “both prudent and built” on established English tradition.¹¹⁰ The prevailing philosophy of the time recognized that a free man was a man who was armed.¹¹¹ Moreover, many militia laws required that all freemen, and in some cases women heads of household, own guns.¹¹² For example, in the 1638 Act for Military Discipline, Maryland required:

[T]hat every house keeper . . . within this Province shall have ready continually upon all occasions within his her or their house for him or themselves and for every person within his her or their house able to bear armes [sic] one Serviceable fixed gunne [sic] or bastard musket boare [sic] along with a pound of gunpowder, four pounds of pistol or musket shot, match for matchlocks and of flints for firelocks.¹¹³

Laws existed as early as 1724 that required members of the militia to carry guns to church, while traveling, or attending public meetings.¹¹⁴ There are even earlier accounts from 1643 in Portsmouth, Rhode Island, where militia members were ordered to visit each inhabitant of Portsmouth to ensure that each man possessed powder and bullets.¹¹⁵ Documentation dating back to 1641 indicates that both Maryland and New Jersey required immigrants to bring with them, guns, powder, lead, bullets, Pistoll [sic] and Goose [sic] shot.¹¹⁶

Clearly, the abundance of documented evidence demonstrates that there is sufficient history and tradition surrounding the Second

107. Joyce Lee Malcolm, *The Second Amendment Research Center* (quoting Robert J. Cottroll), available at <http://www.secondamendmentcenter.org/debate1.asp> (last visited Apr. 8, 2009).

108. *Id.*

109. *Id.*

110. *Cramer, supra* note 102.

111. *Malcolm, supra* note 107.

112. *See Cramer, supra* note 102, at 4; *See also Kates, supra* note 32, at 679-80.

113. *Cramer, supra* note 102, at 7.

114. *Id.* at 4.

115. *Id.* at 7.

116. *Id.* at 8.

Amendment. This history and tradition are the necessary elements needed to declare the Second Amendment a “fundamental” right.

VII. WHAT DO LIBERTY AND DUE PROCESS REALLY MEAN?

Chief Justice Rehnquist writing for the majority in *Washington v. Glucksberg* accurately captured the meaning of liberty and due process when he wrote:

The Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint. *The Clause . . . provides heightened protection against government interference with certain fundamental rights and liberty interests.*¹¹⁷ (Emphasis added).

Because enumerated, incorporated rights are fundamental, any attempt to abridge these rights must be subjected to a substantive due process analysis.¹¹⁸ Chief Justice Rehnquist established the framework for interpreting a substantive due process case when he explained:

Our established method of substantive due process analysis has two primary features: First, . . . the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’ * * * Second, we have required in substantive due process cases a ‘careful description’ of the asserted fundamental liberty interest.¹¹⁹ (Emphasis added).

The importance of Chief Justice Rehnquist’s opinion was reiterated by Justice Scalia, writing for the majority in *Michael H. v. Gerald D.*, when he wrote:

“[In] an attempt to limit and guide interpretation of the [due process] clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ . . . , but also that it be an interest traditionally protected by our society. . . . [T]he Due Process Clause affords only those protections ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”¹²⁰

117. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

118. *Id.* A substantive due process analysis is the appropriate tool to utilize when the government is attempting to abridge the fundamental rights of a group of people. Procedural due process is the appropriate legal application when there is an abridgement of an individual’s rights.

119. *See Glucksberg*, 521 U.S. at 720.

120. *Id.* at 466 (*citing Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

Therefore, any substantive due process challenge to a law which abridges an individual's Second Amendment right must be evaluated after thoroughly examining the history, traditions, and practices related to firearms ownership in the United States.¹²¹ Upon considering these elements in their totality, the court must then decide if the abridgement of the right will pass strict scrutiny.¹²²

When one fully researches our nation's history and tradition, he would be hard-pressed to argue with a straight face that gun ownership is not deeply rooted in our nation's longstanding history and tradition. The framers articulated the need for the people to be armed in the *Federalist Papers*.¹²³ Moreover, if one simply stops to consider the evolution of the firearms industry, taken in conjunction with the historical accounts of firearms being an inherent part of our history and tradition, then the Second Amendment, both as an individual right and as a fundamental aspect of liberty, may not be abridged without being subjected to the highest level of scrutiny.¹²⁴

This author concedes that there have been obvious changes in society since Colonial times. However, one aspect remains constant, despite the changing times, our government must act in accordance with the mandates set forth in the Constitution at all times. Our Constitution is the supreme law of our land and is to be protected by our courts at all levels. And despite the argument by gun control proponents that the Second Amendment does not guarantee an individual right or fundamental right, our founding fathers possessed the foresight necessary to ensure that fundamental rights could not be abridged without showing the most compelling of reasons.

VIII. UNCOVERING ADDITIONAL SUPPORT FOR THE SECOND AMENDMENT AS AN INDIVIDUAL ASPECT OF LIBERTY

Looking to the language of the Preamble to the Constitution, it is clear that the founding fathers unequivocally recognized that due concern be afforded for the defense, welfare, and liberty needed to ensure that the American people lived in a free society.¹²⁵ There is no

121. *Id.* at 472 (citing *Glucksberg*, 521 U. S. at 720).

122. *Id.*

123. James Madison, Alexander Hamilton & John Jay, *The Federalist Papers*, 302 (Isaac Kramnick ed., Penguin Books, 1987) (1788) (quoting Madison, "Let us not insult the free and gallant citizens of America with the suspicion that they would be less able to defend the rights of which they would be in actual possession than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors").

124. *Cramer*, *supra* note 102.

125. U.S. CONST. pmbl.

language included in the Preamble indicative of a government demonstrating the intent to assume responsibility for providing for the common defense of the people. Rather, the words chosen by the founders indicate that “the people” were to be responsible for ensuring their own common defense.¹²⁶ And although the Preamble “cannot control the enacting part of a statute . . . if any doubt arise on the words of the enacting part, the [P]reamble may be resorted to, to explain it.”¹²⁷

Our founding fathers considered all aspects of liberty to be of the utmost importance and as essential components necessary to ensure freedom for the American people. Consequently, the liberty and due process provisions were incorporated into the Fifth Amendment, which states in relevant part:

*No person shall be held to answer for a . . . crime, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor shall be deprived of life, liberty, or property, without due process of law; . . .*¹²⁸ (Emphasis added).

Constitutional treatise writer Thomas M. Cooley, considered by legal scholars to be one of the most eminent writers of the nineteenth century, considering the right of the people to bear arms in their own defense wrote:

The right of the people to bear arms in their own defence [sic], . . . , is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people. Should the contingency ever arise when it would be necessary for the people to make use of the arms in their hands for the *protection of constitutional liberty*, the proceeding, so far from being revolutionary, would be in strict accord with popular right and duty.¹²⁹ (Emphasis added).

Cooley identified two significant principles in this writing. First, that keeping and bearing arms was a right of the people which was designed to protect against the possibility of a tyrannical government someday usurping the rights of the people. Second, and more importantly, Cooley identified that “the people” had the right to bear

126. U.S. CONST. pmbl.

127. See generally *Emerson*, 270 F.3d at 233.

128. U.S. CONST. amend. V.

129. Levinson Sandford, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 649 (1989) (quoting Thomas Cooley, *The General Principles of Constitutional Law in the United States of America*, 298 (3d ed., Little, Brown & Co. 1898)).

arms for the protection of constitutional liberty.¹³⁰ The very inclusion of the words “constitutional liberty” lends credence to the position that the right of the people to bear arms is a liberty interest and a fundamental right which may not be abridged by the government without being subjected to the highest level of scrutiny.

In his article *The Second Amendment and the Personal Right to Arms*, constitutional law professor William Van Alstyne opines that Justice Cooley “accurately recapitulated the controlling circumstances” in his nineteenth century treatise when Cooley wrote the following:¹³¹

The Second Amendment . . . was adopted with some modification . . . from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. . . The Right is General. . . The meaning of the provision undoubtedly is that *the people* from whom the militia must be taken, shall have the right to keep and bear arms; and *they need no permission or regulation of law for this purpose.*¹³²

Professor Van Alstyne also addressed the Second Amendment’s “deep historical antecedents” in his article entitled *The Culture of the Gun*.¹³³ Van Alstyne identified the writings of English jurist William Blackstone in a 1765 legal treatise wherein Blackstone identified several “primary” natural rights. According to Blackstone, “primary” rights included the “free enjoyment of personal liberty.”¹³⁴ Additionally, Blackstone identified “auxiliary” natural rights which included “*the right of having and using arms for self-preservation and defense.*”¹³⁵ (Emphasis added).

And as discussed *supra*, while the Courts in *Parker* and *Emerson* have adopted the individual rights model, there are additional court opinions which also addressed the advancement of the individual rights model in dicta. In *Printz v. U.S.*, Justice Thomas opined:

“[I]n *Miller*, we determined that the [Second Amendment] did not guarantee a citizen’s right to possess a sawed-off shotgun because that weapon had not been shown to be ‘ordinary military equip-

130. William Van Alstyne, *The Personal Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1247 (1994).

131. *Id.*

132. *See id.*; *see also* Cooley, *supra* note 129, at 298.

133. Robert Bliwise, *The Culture of the Gun*, DUKE MAGAZINE, Vol. 87, No. 3, March-April 2001, available at <http://www.dukemagazine.duke.edu/dukemag/issues/030401/culture2.html> (last visited Apr. 8, 2009).

134. *Id.*

135. *Id.*

ment' that could 'contribute to the common defense.' The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment."¹³⁶

Justice Thomas's writing is significant because it recognizes the Second Amendment as a "substantive right." Moreover, Justice Thomas's opinion is significant because it seemingly indicates that the Second Amendment right to keep and bear arms belongs with other personal rights that have been considered qualified aspects of liberty. The right to keep and bear arms is specifically the type of right that the Fifth Amendment's due process provision was designed to protect.¹³⁷

IX. STRICT SCRUTINY APPLIES TO FUNDAMENTAL RIGHTS: SO WHY IS THERE STILL DEBATE REGARDING WHETHER THE SECOND AMENDMENT IS AN INDIVIDUAL AND FUNDAMENTAL RIGHTS?

The Court has consistently held that fundamental rights must be subjected to strict scrutiny, the highest level of scrutiny. Therefore, any time the government seeks to abridge a fundamental right, it must show a compelling interest and a narrowly tailored means to meet the stated objective.¹³⁸ Once a Plaintiff alleges his fundamental rights have been abridged, he must be able to establish a *prima facie* case. Once this is accomplished, the burden shifts to the government to demonstrate a compelling interest in abridging the fundamental right. The government must also show that the means chosen to fulfill the stated interest have been narrowly tailored to meet the government's objective.

X. INTERPRETING THE SECOND AMENDMENT: THE CONSTITUTIONAL GUARANTY OF THE INDIVIDUAL RIGHT TO BEAR ARMS

To fully comprehend the meaning of the Second Amendment, all of its words must be read together. Additionally, the Second Amendment must be read within the confines of the Constitution's Preamble and the other Amendments which set forth rights retained by the people.¹³⁹

136. *Printz*, 521 U.S. 898, 946 (1997).

137. *See Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

138. Halbrook, *supra* note 86, at 185; Philip J. Prygoski, *Abortion and the Right to Die: Judicial Imposition of a Theory of Life*, 23 SETON HALL L. REV. 67, 75 (1992).

139. U.S. CONST. amend. I, IV, V, VI, IX, X, and XIV.

The Preamble “provide[s] for the common defense, promote[s] the general Welfare, and secure[s] the Blessings of Liberty to ourselves and our Posterity.” The First Amendment speaks of “. . . [t]he right of *the people* to peacefully assemble.” (Emphasis added). The Fourth Amendment speaks of “. . . [t]he right of *the people* to be secure in their persons, houses, papers, and effects. . . .” (Emphasis added). The Fifth Amendment provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .” The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by *the people*.” (Emphasis added). The Tenth Amendment holds that “Powers not delegated to the United States . . . , nor prohibited by . . . the States, are reserved to the States respectively, or to *the people*.” (Emphasis added). Finally, Section 1 of the Fourteenth Amendment reads in relevant part, “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law.”

When looking at the Constitution as a whole, why then is there so much confusion surrounding the meaning of the Second Amendment? Why would the meaning of the words “the people” taken in context with the Second Amendment bestow any lesser rights to “the people” than “the people” receive in the First, Fourth, Fifth, Ninth, Tenth or Fourteenth Amendments? The language of the Second Amendment is clear and its interpretation is commonsensical.

A well regulated Militia, being necessary to the security of a free State, the right of *the people* to keep and bear Arms, shall not be infringed. (Emphasis added).

In each of the Constitutional Amendments discussed *supra*, the meaning of “the people” is neither subject to confusion nor debate. The term is afforded its common meaning. Black’s Law Dictionary defined “people” as “[t]he citizens of a state as represented by the prosecution in a criminal case.”¹⁴⁰ Webster’s Dictionary defines “people” as: “n.pl. 1. human beings 2. a populace 3. one’s family.”¹⁴¹

The Court’s insightful observation in *Emerson* likewise accepts this commonsensical position. Writing for the Court, Judge Garwood stated:

The individual rights model, . . . *does not require that any special or unique meaning be attributed to the word “people.”* It gives the same meaning to the words “the people” as used in the Second Amendment phrase “the right of the people” as when used in the

140. BLACK’S LAW DICTIONARY, 1156, Deluxe, 7th ed., (1990).

141. WEBSTER’S NEW WORLD POCKET DICTIONARY, 2nd ed., (1993).

exact same phrase in the contemporaneously submitted and ratified First and Fourth Amendments.¹⁴² (Emphasis added).

There is no evidence in either the text of the Second Amendment, or in other parts of the Constitution, that the words “the people” have a different meaning than when used elsewhere.¹⁴³ The *Emerson* Court specifically discussed use of the words “the people” as they related to both the Ninth and Tenth Amendments:

. . . [T]he text of the Constitution, . . . strongly suggests that the words “the people” have precisely the same meaning within the Second Amendment. . . as without. . . [A]s used throughout the Constitution, “the people” have “rights” and “powers,” but federal and state governments only have “powers” or “authority”, [sic] never “rights.”¹⁴⁴

Therefore, it is hard to logically imagine any interpretation of the Second Amendment that does not vest ultimate power with the people, other than that the framers intended to have a trained militia, and ready to assemble when called upon to defend the United States.

In Federalist No. 46, James Madison, considering the breadth of power the federal and state governments, wrote:

. . . [I]nquire whether the federal government or the State governments will have the advantage with regard to the predilection and support of the people. . . [W]e must consider both of them as substantially dependent on the great body of citizens of the United States. . . They must be told that *the ultimate authority*, wherever the derivative may be found, *resides in the people alone*¹⁴⁵ (Emphasis added).

Clearly, Madison intended to grant broad powers to “the people” to ensure that interference from an overzealous government would be kept to a minimum. Moreover, Madison articulated a clear distinction between the militia and “the people.” When pondering the consequences of an overzealous federal government, Madison wrote:

. . . I would not be going too far to say that the State governments with the people on their side would be able to repel the danger. . . . To these would be opposed a militia . . . with arms in their hands, officered by men chosen from and among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence.¹⁴⁶

142. *Emerson*, 270 F.3d at 261.

143. *Id.*

144. *Id.* at 228.

145. James Madison, Alexander Hamilton & John Jay, *The Federalist Papers*, 297 (Isaac Kramnick ed., Penguin Books 1987) (1788).

146. *Id.* at 301.

In Professor Van Alstyne's article entitled *The Second Amendment and the Personal Right to Arms*, Van Alstyne writes:

. . . [t]he Bill of Rights was . . . produced by Madison, in the first Constitution to assemble under the new Constitution, in 1789. Accordingly, as with 'the freedom of the press,' the protection of 'the right of the people to keep and bear arms' was thus made doubly secure in the Bill of Rights.¹⁴⁷ (Emphasis added).

Professor Van Alstyne makes the correlation between the "rights of the people" as guaranteed by the First Amendment to the same "rights of the people" annunciated in the Second Amendment. However, as Professor Van Alstyne points out, while there is an abundance of case law interpreting the First Amendment, there is an uncontroverted lack of decisive case law interpreting the Second Amendment, or more importantly, advancing the argument that the Second Amendment is a fundamental personal right.¹⁴⁸

[I]n the case of the Second Amendment, . . . , that jurisprudence is even now not possible until something more in the case law of the Second Amendment begins finally to fall into place. That 'something more,' . . . requires one to consider . . . that . . . the NRA is not wrong, . . . in its general second amendment stance. . .¹⁴⁹

In an in-depth study of the varying interpretations of the Second Amendment, former U.S. Attorney General John Ashcroft's office reached a definitive conclusion regarding whether the Second Amendment is a personal right. The Opinion entitled, "Whether the Second Amendment Secures an Individual Right" considered the Constitution as a whole document, and examined the history surrounding the Second Amendment. The Opinion concluded that the Second Amendment "secures a personal right of individuals."¹⁵⁰

The Opinion acknowledged that "reasonable restrictions" may be imposed on *select* individuals to prevent the unfit and those with criminal propensities from possessing firearms.¹⁵¹ (Emphasis added). However, the Opinion explicitly states that any restrictions placed on an individual's right to keep and bear arms must be limited to "reasonable restrictions."¹⁵² Use of the word "reasonable" is significant

147. Van Alstyne, *William, The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236, 1247 (1994).

148. *Id.* at 1240-41.

149. *Id.* at 1241.

150. *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel, 62 (2004); available at 2004 WL 2930974.

151. *Id.* at 1.

152. *Id.* at 2.

because in a legal context, reasonableness is to be determined from an objective perspective.¹⁵³ Any test of reasonableness must be considered from the vantage point of the objective reasonable person and not the person who opposes the individual right to bear arms.

The Opinion also highlighted an Executive Directive issued by President Roosevelt as it related to the 1941 Property Requisition Act. Recognizing the fundamental right of individuals to keep and bear arms, Roosevelt's directive explicitly "prohibited requisitioning or new registration, 'of any firearms possessed by any individual for his personal protection or sport' and moreover, any impairing or infringing of 'the right of any individual to keep and bear arms'".¹⁵⁴

The Opinion highlights just when Congress and the Courts began to go astray by misinterpreting the Second Amendment following *Miller*. In 1965, former Attorney General Katzenbach endorsed the collective rights interpretation of the Second Amendment.¹⁵⁵ Thereafter, during perhaps the Court's most liberal period in history, the tables turned against the individual rights model. By 1968, Congress enacted the first major federal gun legislation since *Miller*, the Omnibus Crime Control and Safe Streets Act.¹⁵⁶ From this point forward, Circuit Courts were split on what interpretation should be applied to the Second Amendment.¹⁵⁷

However, under President Ronald Reagan's visionary leadership, the pendulum once again began to swing back in favor of the individual rights model. In the 1986 Firearm Owners' Protection Act, Reagan recognized "the right[] of citizens . . . to keep and bear arms under the second amendment."¹⁵⁸ Thereafter, some of the more conservative courts began recognizing that the Second Amendment secures an individual right. Their actions seemingly coincided with the numerous scholarly writings advanced by notable modern constitutional scholars who have researched and uncovered vast writings and historical precedent in support of the individual rights model.

Professor Van Alstyne's article was first published in 1994. Justice Thomas issued his insightful concurrence in *Printz v. United States*, recognizing that a "growing body of scholarly commentary indi-

153. *Beard v. Banks*, 542 U.S. 406, 423 (2004).

154. *Id.* at 4 (citing the Property Requisition Act, ch. 445, Sect. 1, 55 Stat. 742).

155. *Id.*

156. *Id.* at 5.

157. *Id.* (noting that the Third, Fourth, Sixth, Seventh, and Ninth Circuits thereafter adopted the collective-rights view; while the First, Eighth, Tenth, and Eleventh Circuits adopted the quasi-collective rights view).

158. *Id.* at 7.

cating that the right is a personal one” has surfaced in recent years.¹⁵⁹ And taking notice of the abundance of scholarly writing on point, Justice Thomas rightfully acknowledged that the Second Amendment “contain[s] an express limitation on the Government’s authority.”¹⁶⁰

Acknowledging that the Supreme Court has declined to address the Second Amendment since its 1939 decision in *Miller*, Justice Thomas writes:

“This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. . . . If, . . . the Second Amendment is read to confer a *personal* right to “keep and bear arms,” a colorable argument exists that the Federal Government’s regulatory scheme, . . . as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment’s protections. . . . Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms “has justly been considered, as the palladium of the liberties of a republic.”¹⁶¹

Justice Thomas’s writing is significant for several reasons. First, Justice Thomas identifies the Second Amendment as a “substantive right.” This categorization lends support to the argument that the Second Amendment is a fundamental right which may not be abridged without meeting strict scrutiny. Second, Justice Thomas recognized that the Federal Government has in recent years enacted regulatory firearms laws which have been aimed at abridging fundamental rights. Finally, but perhaps most importantly, Justice Thomas seemingly indicates that Justice Story was correct in asserting that the right to bear arms “has justly been considered, as the palladium of the liberties of a republic.”¹⁶²

Fortunately, some courts are beginning to acknowledge these insightful arguments. The Court’s 2001 decision in *Emerson*, and the 2007 decision by the D.C. Court of Appeals in *Parker*, may be an indication that the Supreme Court might be ready to reconsider putting the issue of the Second Amendment to rest.

159. *Printz*, 521 U.S. at 946 (1997).

160. *Id.* at 938.

161. *Id.* at 938-39.

162. *Id.* (Use of the words, “palladium of the liberties,” further supports the position that early legal minds determined that the Second Amendment should be considered a fundamanel right and an aspect of liberty).

XI. ATTEMPTS TO EVISCERATE THE INDIVIDUAL RIGHTS MODEL OF THE SECOND AMENDMENT

Consider that when the court issued its opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), there was noted public opposition to the court's decision not to recognize black people as citizens.¹⁶³ Contrast the public support at the time of the *Dred Scott* decision, to the modern-day gun control proponents who are well-adept at garnering public support for their constitutionally erroneous position.¹⁶⁴ If public opinion polls were conducted, and legislators bowed to public pressure as they do so often today, *Dred Scott* most certainly would have seen a different outcome. However, the judiciary does not possess the authority to take public opinion into account just because a segment of the public shares a certain viewpoint.

Congress must be reminded that the Constitution does not grant it the power to regulate for the general welfare. When the legislative branch acts, it must always point to a specific provision in the Constitution that has granted it the power to enact any proposed law.

Equally frightening is the thought that although the judiciary is not supposed to legislate from the bench, at various times during the court's history, the judiciary has crafted laws that our original founders could have never contemplated. Not surprisingly, these court-crafted innovations deviate from what is required under the Constitution, which is that the Court act as our nation's "interpreter" of laws.¹⁶⁵

Rarely, if ever, do societal views remain stagnant. While we cannot always count on our elected officials and the courts to do the right thing, one variable remains constant; the Constitution was ratified as a protective mechanism for the American people. Our

163. *Dred Scott v. Sandford*, 60 U.S. 393, 426 (1857) ("No one, we presume, supposes that any change in public opinion or feeling in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give the words of the Constitution a more liberal construction in their favor than there were intended to bear when the instrument was framed and adopted.").

164. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1450 (R-N.Y) in support of the Civil Rights Bill: "Make the colored man a citizen of the United States under the laws and the Constitution of the United States . . . a right to defend himself and his wife and his children; a right to bear arms. . . ."

165. See *U.S. v. Virginia*, 518 U.S. 515, 531 (1996) (Justice Ginsburg, for the majority, applying an "exceedingly persuasive justification" standard to an Equal Protection Challenge based on gender discrimination; as opposed to the standard of intermediate scrutiny as opined by Justice Scalia in the dissent); See also *Planned Parenthood v. Casey*, 505 U.S. 833, 837 (1992) (O'Connor, J., plurality opinion) (applying the "undue burden test" for a woman seeking an abortion).

Constitution must be defended with vigilance against any attempt to usurp the rights granted to us as Americans.

XII. CONCLUSION

Upon truly studying the history and tradition of firearms in America, there can be no doubt that firearms ownership qualifies as a fundamental aspect of liberty under the Fifth Amendment. As a fundamental right, any attempt by the federal government to abridge the right must be subject to strict scrutiny. While there are some scholarly writers who advance the position that most gun control measures could survive a strict scrutiny analysis, those accepting this position must be reminded that the Constitution does not give Congress the authority to regulate for the general welfare.¹⁶⁶ As such, any federal gun control legislation that is not narrowly tailored, and which seeks to regulate for the general welfare, will fail under a strict scrutiny analysis.

At the time the founders drafted our Constitution, they found it necessary to require all able-bodied males to be armed, trained, and ready should they be called upon to defend the country from an overzealous tyrannical government. Today, however, firearms ownership is a personal choice and an aspect of liberty. Many times, it is a form of self-protection and self-preservation.¹⁶⁷

Because the Fifth Amendment has been incorporated to the States through the Fourteenth Amendment, it is some, if not all, of the uncertainty surrounding the interpretation of the Second Amendment that stems from the fact that the Fourteenth Amendment has not defined aspects of liberty with precision. The Court recognized this unfortunate situation in *Meyer v. Nebraska*, where, in discussing how the Fourteenth Amendment does not specify all aspects of liberty, it wrote:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁶⁸ (Emphasis added).

166. Adam Winkler, *Scrutinizing the Second Amendment*, 105 M.L. L. REV. 683 (2007).

167. See Fox News, *Armed Miss America 1944 Stops Intruder* (2007) available at <http://www.foxnews.com/story/0,2933,267540,00.html>. (Balances on walker and shoots out tires with snub-nosed .38) (last visited Apr. 8, 2009).

168. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Too a woman living in today's society, the right to keep and bear a firearm gives her unparalleled freedom. Women should be liberated by the fact that they must not live in fear as so many women in today's society do. For a mother or wife that believes in the Second Amendment, our founders had the brilliant foresight to ensure that a woman could always be able to protect themselves and their family.

The Second Amendment gives the freedom to be armed in the event America ever has the misfortune of encountering a tyrannical government, as with the Soviet domination of the Ukraine. Moreover, in light of the recent tragedy at Virginia Tech University, institutions of higher learning across America must reassess their positions on prohibiting law-abiding students and teachers from carrying concealed weapons on campuses and exercising their Second Amendment rights. Many of these students and teachers have prior military training, or have otherwise demonstrated the proficiency in safety and marksmanship which is required to obtain a concealed weapons permit. In the nine minutes it took a crazed gunman to massacre over thirty people at Virginia Tech. Imagine the lives that could have been saved had a fellow student or professor been armed.

For those who oppose individual gun ownership, consider whether Hitler could have mustered the power that he did had every Jewish person been armed. Unquestionably, the notion of an armed militia comprised of ordinary people, was exactly what the founders had in mind when they drafted the Second Amendment. Hitler's rise to power would not have been as easy as it was had the people had the right to bear arms.

When considering the foregoing, every American citizen must ask the same question: What is the easiest way for a tyrannical government to control and dominate its people? The answer is unsurprisingly simple, disarm its citizens. When disarmament is accomplished, bad intentions are much easier to facilitate.

The importance of educating people on the Second Amendment becomes evident when an unarmed American citizen must face an armed foe. The Second Amendment, as a fundamental aspect of liberty, must be vehemently protected if all of our citizens desire to remain safe and free. Clarence Darrow has been credited with saying, "history repeats itself." That, chilling as it may be, is reason enough to guard at all costs the rights of "the people" to keep and bear arms.
