The Second Amendment as Teaching Tool in Constitutional Law Classes

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Introduction

Basic con law classes are meant to teach students some fundamental legal skills: Considering contentious moral questions from all sides, even those sides for which one has a visceral revulsion. Using the various modalities of interpretive argument -- interpretation focused on text, original meaning, the interplay of political structures, changed circumstances, precedent, and the the implications of "fundamental," though unwritten, values within the American ethos. Thinking about how law can check power. Arguing articulately about the clash between solemn constitutional guarantees and eminently worthy countervailing government interests.

Few of our students will go on to spend much time litigating separation of powers cases, or even equal protection or due process cases. We cannot plausibly claim to choose the contents of our course based on the direct utility of certain constitutional doctrines to a lawyer's everyday life, or even their likely appearance on the bar exam. Rather, we try to find topics that help sharpen students' habits of constitutional thought and, more broadly, legal thought, and perhaps even help make them better citizens. 1

The Second Amendment turns out to be a surprisingly useful tool for all these purposes. This is not because "Second Amendment Law" is particularly important -- in fact, if "law" is defined in its all too common conventional con law class sense of "Supreme Court cases," then there's next to no Second Amendment law to be taught. Rather, incorporating the Amendment as a small part of the con law syllabus 2 helps serve -- in a way that students will probably find immediately interesting -- some important broader goals:

1. *Teaching Students to See Things from the Other Side.* Second Amendment arguments tend to run counter to traditional political divides. Liberals who usually try to read

individual rights as broadly as possible strain mightily to read this one narrowly. Conservatives who generally defer to claims of government need are much more likely to resist such claims here.

Perhaps the experience of making what is usually "the other side's" argument might make students more open to the other side's argument in other cases. At least, it might remind them that not everyone who resists Individual Rights is a closet fascist, and that not everyone who is skeptical of Government Interests is a loony hippie.

2. *Teaching Students Different Modalities of Constitutional Argument.* Con law classes, like con law cases, aren't mostly about the Constitution; they're about the U.S. Reports. Most of the time is spent parsing cases. Most of the remainder is spent making policy arguments.

Rarely do we focus predominantly on the text, on original meaning, on tradition, on constitutional structure, on claims of changed circumstances, and on other forms of interpretive argument. 3 We know that in reality, to practicing lawyers, the Constitution is indeed what the Court says it is. And influenced by this reality, we mostly teach and critique the Court's pronouncements. Even when we ask our students to set aside the caselaw and return to first principles, they often find it hard to put the famous precedents out of their minds.

And yet the lawyers we train will often have to deal with statutes and even constitutional provisions -- especially state constitutional provisions -- that have not yet been thoroughly glossed by the courts. They have to be able to make arguments that rest on more than policy and precedent. 4 The Second Amendment, unburdened as it is with much Supreme Court baggage, is a particularly good tool for discussing the entire range of interpretive modalities.

3. *Deepening Students' Understanding of Checks on Government Power.* The Framers' conception of "checks and balances" and "divided powers" includes more than just each federal branch checking the others, the states checking the federal government, and the Senate checking the House and vice versa. Chairman Mao wasn't the first to think that all power flows from the barrel of a gun -- the revolutionaries who founded this nation took a similar view.

The armed citizenry was for many of them the ultimate check on government excess. The Second Amendment was aimed at preserving this armed citizenry; the Militia Clauses set up a complex web of state and federal control over it. Whether one reads the Second Amendment as creating an individual right or a states' right, it has a huge importance for *the* con law issue: the allocation of power.

4. *Teaching Students How to Debate Clashes Between Constitutional Guarantees and Powerful Government Interests.* Likewise, the clash between constitutional rights and government interests is rarely presented more starkly than in the Second Amendment. The government interests (or, even more to the point, public interests) are profound, and are clearly implicated by the private conduct. And yet, whether we like it or not, the constitutional text protects at least some sorts of conduct that inherently jeopardizes these interests. (Even if one believes that the Second Amendment protects only a states' right, one still has to consider what

would happen if a state in fact insists on arming its citizens and the federal government claims a countervailing interest in disarming them. 5)

How does one "weigh" this sort of right against the government interests? Does it make sense to talk about, for instance, "strict scrutiny" when the most obvious compelling government interest seems so directly in conflict with the very essence of the right?

5. *Enriching Understanding of Other Provisions.* The Second Amendment also casts extra light on the general matter of protection for subversive activities, whether it's First Amendment protection for subversive speech, or the barriers that the Fourth and Fifth Amendments place in the way of suppression of antigovernment conspiracies.

Many have argued that constitutional protections can't extend to those who would subvert constitutional government: In the words of one of the World War I free speech cases, how could the Constitution, "that great ordinance of government and orderly liberty," be "invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts [be] adduced against itself"? 6 In evaluating this argument, it's surely worth considering that Justice Joseph Story, no wild-eyed revolutionary, described the "right of the citizens to keep and bear arms" as "the palladium of the liberties of a republic[,] since it offers a strong moral check against the usurpations and arbitrary power of rulers[,] and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." 7 Likewise, Blackstone described even the more limited English right as a means "of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 8 Perhaps the Bill of Rights is more radical -- and more dangerous -- than people might at first believe.

6. Reminding Students That Constitutional Protections Needn't Be All Good: Much public debate seems to take the view that all is for the best under this, the best of all possible Constitutions. This veneration of the Constitution and especially the Bill of Rights may have some social utility, but it's not conducive to clear legal thinking. Sometimes it's helpful to rub students' noses in the fact that the Bill of Rights might have some provisions that are unsound or downright bad.

Obviously, many people believe the Second Amendment is actually quite a good idea: Since 1970, 14 states enacted their own state constitutional rights to keep and bear arms for the first time, or strengthened their existing rights; a fifteenth state will vote on the matter in November 1998. 9 But our sense is that many of the students who most revere the Bill of Rights take a very different view of the Second Amendment (whether they conceive of it as securing an individual right or as a states' right one). Confronting this problem of possible "constitutional stupidity" 10 or even "constitutional evil" 11 can be generally valuable to such students; and it can shed light on specific arguments, such as the notion that the Bill of Rights should never be amended. 12

In the following pages, we will briefly describe our own approaches to using the Second Amendment for all these pedagogical purposes; each of us has written one of the following sections. We've also tried to gather, on a Web site that should be easily accessible to any reader,

some materials that could help people use the Second Amendment as a tool in their own classes. None of these materials aim to dispose of the hot questions about the Second Amendment's True Meaning; they all raise more questions than they settle. But of course that's one of the things that con law classes are supposed to do.

I. Intertwining the First and the Second *(Scot Powe)*

For almost two decades I have taught an upper level Con Law II class, The First Amendment. I noticed that as time wore on I had been introducing Second Amendment asides into the class with increasing frequency, attempting to jar the students into thinking about rights generally and whether it was appropriate to embrace one, while simultaneously ignoring another. Eventually, a few years ago, I changed the course name to The First Two Amendments and added a two-week section on the Second Amendment. I assign five short cases: *United States v. Miller*, 13 *Presser v. Illinois*, 14 *Quilici v. Village of Morton Grove*, 15 *City of Salinas v. Blakesly*, 16 and *Watson v. Stone*. 17 My rather lengthy *Guns, Words, and Constitutional Interpretation* 18 lays out much of what I am trying to accomplish in the six classes. While I use the Second Amendment to go over modalities of constitutional interpretation, that is secondary since students have a Con Law I course under their belts and already saw a brief review with the First Amendment.

What does the Second Amendment mean? Students, like judges, always assume that what a judge has said about a text is more authoritative than the text itself, so I start with *Miller*. Did it kill the text as Erwin Griswold and others claim 19 or did it implicitly suggest that if the sawed-off shotgun had been a militia weapon, then Miller and Layton would have had a constitutional right to possess it? Once a close reading of *Miller* is over, it is time to go to text, and the individual rights v. group rights positions come out depending on one's predilections and one's interpretation of the relationship between the two clauses. At this point I bring history in for the first time with *Salinas*, because that is the first holding in favor of the group rights theory.

I also bring out my favorite piece of history, which is St. George Tucker's explanation of the Second Amendment in his Blackstone's Commentaries. 20 In his discussion of the First Amendment, Tucker offered the first clean, unambiguous statement from a legal source that the First Amendment was intended to go beyond the prior restraint/subsequent punishment dichotomy and to wholly bar a federal seditious libel statute. 21 This places Tucker on the side of the angels and gives him some credibility. In that same first American edition of the Commentaries, Tucker, after quoting the Second Amendment, writes: "This may be considered the true palladium of liberty." 22 As with the First Amendment, Tucker contrasts the situation in the United States with that in Great Britain where he believed that "the right of keeping arms is effectually taken away from the people." 23 This could not happen in America because the people could bear arms "without any qualification as to their condition or degree, as it the case in the British government." 24 Americans, accordingly, could exercise the "right of self-defence, the first law of nature" 25 and also protect their "liberty" which, in lands with standing armies but no individual right to bear arms, "if not already annihilated, [was] on the brink of destruction." 26 It is hard to be more explicit on the supposed relationship between guns and liberty.

Even more than the speech materials, the Second Amendment materials generate a full panoply of responses, many of which are intensely felt. The dominant response is the well-known liberal reflex that speech is good and guns are bad, though this view is probably less pervasively held in Texas than many other venues. The second most likely response is that both speech and guns are good. Some students, however, will prefer guns to speech on the grounds that the latter necessarily inflicts harms. Finally, at least when political correctness was flourishing, there were a few students who had little use for either open debate or armed conservatives.

Once the possible interpretations are available, I turn to incorporation. When doing the First Amendment I slight the issue, just as the Court did, so that I can use *Presser* and *Morton Grove* to flush out selective incorporation. This also allows a return to history, since the Second Amendment claim to Fourteenth Amendment protection is historically stronger than any other federal right save speech and jury trial. 27

Finally I open the question of why restrict weapons, but again I do so historically. Why in 1840? 1866? 1876? 1900? 1933? Now? Of the cases assigned only *Salinas* offers no help -- maybe it is just Marshal Matt Dillon cleaning up Dodge City. But the others are terrific: *Presser*, with gun controls targeting organized labor; *Stone v. Watson*, African-Americans; *Miller*, gangsters; *Morton Grove*, post Kennedy-King America.

An incidental benefit from both the incorporation and the policy discussions is that the Kansas, Florida, and Illinois cases open up twin issues of why state constitutions so consistently protect some right as well as the actual varying interpretations of those constitutions. For me, at least, this is the only time in any of my courses where I say anything about a state constitution save for expressly assuming they are always irrelevant (with appropriate apologies to Hans Linde 28).

II. The Second Amendment as a Window on the Framers' Worldview *(Glenn Harlan Reynolds)*

I won't waste readers' time by revisiting the points offered by my coauthors here: I too find it beneficial to teach the Second Amendment as a way of focusing on the Constitution without dwelling on what the Court said about it last week or last year, and of addressing a subject that is of considerable popular interest. Instead, I'd like to talk about some things I do that are different.

I teach the Second Amendment as part of a fairly typical "Bill of Rights" course in constitutional law. The course traditionally emphasizes First Amendment free speech and press, free exercise, and establishment clause issues, as well as rights to privacy and equal protection. I devote three or four class sessions to the Second Amendment, and assign excerpts from historical and legal commentary, 29 as well as the leading federal cases of *United States v. Cruikshank*, 30 *Presser v. Illinois*, 31 and *United States v. Miller*. 32 I also assign two leading cases decided under the Tennessee Constitution's right-to-bear-arms clause, *Aymette v. State* 33 and *Andrews v. State*, 34 because the *Aymette* case was relied on by the U.S. Supreme Court in *Miller*, and the *Andrews* case answers some questions that *Aymette* (and *Miller*) leave open. 35 (I admit, I also

do it because I think that state constitutional law is an underemphasized subject in law school curricula, and this gives me an excuse to sneak some in camouflaged as local color.)

One of the major themes I emphasize in teaching constitutional law is the difference between the Framers' whiggish suspicion of powerful elites (both governmental and nongovernmental) and the much more favorable view of elites that has characterized American constitutional thought since World War One. The Second Amendment provides an excellent tool for examining this issue because it embodies the Framers' suspicion of elites in the most inescapable of ways, by proposing that it is necessary for the body of the people to be armed against governmental power that might be deployed against the interest of the people. This division of power not only within the federal government, but also among the federal government, the states, and the people -- with the armed populace serving as an ultimate check against tyranny -- strikes a dissonant note when set beside contemporary European-influenced ideas of government and society.

I find that a useful point. An important aspect of teaching the Second Amendment in class is that it tends to upset preconceptions, and to cause students to revisit things that "everyone knows." Many come to law school from undergraduate political science courses that seem to teach the federal constitution as a gloss on Max Weber, with any difference between the two to be resolved in Weber's favor. 36 To see that the Framers very arguably rejected as basic a Weberian notion as the state's monopoly on legitimate violence encourages students to recognize what I regard as an important point in teaching constitutional law: that the Framers weren't late-twentieth-century Americans (much less late-twentieth-century Europeans) and that their political philosophy and worldview were in many ways very different.

This realization is every bit as difficult for Borkian conservatives as traditional liberals to accept, though naturally the Second Amendment engages them in different ways. This is made more striking through the use of the Tennessee cases. Discussion of the Second Amendment and the role of an armed populace as a check on potential tyranny inevitably produces discussion about whether -- and if so when -- armed revolution is appropriate. Tennessee's constitution, unlike the federal constitution, specifically addresses this question in two provisions, which we also study:

> *Art. I sec. I:* That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.
>
> *Art. I sec. 2:* That government being instituted for the common benefit, the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

The Tennessee courts have interpreted these provisions as having real significance, using them as the underpinning of a right of privacy that has resulted in striking down the state's sodomy law, 37 recognizing a man's right not to be forced into parenthood, 38 and so on. The

reasoning, in essence, is that a Constitution that recognizes the right of a populace to revolt against arbitrary power and oppression cannot be interpreted to grant the state government authority to pass arbitrary and oppressive legislation. Thus, the right of revolution -- a key Second Amendment concept as well -- also works to forbid a Borkian majority's outlawing, say, contraception or sodomy merely because such practices cause (in Bork's words) "moral anguish" among the electorate. 39

The connection between these two provides a good deal of interesting class discussion, and serves to confound the usual, sterile "liberal vs. conservative" split in constitutional debate. It brings home the point that the Framers were neither liberal nor conservative in modern terms, but rather a peculiar sort of traditionalist quasi-libertarian that has no real modern analog. And -- as is all too often forgotten -- they were a bunch of revolutionaries, not a collection of conventional-wisdom-spouting graybeards. Thus, to the extent that one cares about how the Framers viewed things, one must look at the world in a different way than television shows like "Crossfire" tend to encourage.

One way in which the Second Amendment isn't as helpful in the classroom as I had hoped is in focusing a debate on originalist versus nonoriginalist methodologies. For some reason, virtually everyone on both sides of the pro- and anti-gun Second Amendment debate tends to focus on text and history: Only David Williams is willing to say that text and history point one way, but he prefers to go another. 40 Although I try to prod students on this point, I find that it is rather difficult to get them to step outside. Perhaps that is because other modern frameworks don't work very well: Is an armed populace a "representation reinforcing" technique? Or perhaps it is because, as Jeff Rosen has said, 41 we are all originalists now: To judge by the Supreme Court's recent output, and especially that of the Court's more liberal members, arguments based on text and history are very much part of the *zeitgeist* today.

While I don't revisit the Second Amendment *per se* that often later in the semester, some of the notions behind it, such as distrust of powerful elites and a belief in the right of revolution, do come up in a number of other circumstances (for example, free speech and sedition): Many students, for example, wonder how -- if there's a right to revolution, even only under some circumstances -- the concept of sedition can possibly have any meaning given that people must talk about *whether* circumstances justify a revolt or not; thus, a Second Amendment argument for free speech? I find that teaching the Second Amendment enriches the entire course by helping students to look at issues from a perspective that gets less attention today than it should.

III. The Second Amendment as Course Summary *(Sanford Levinson)*

I spend less time on the Second Amendment than I would like to, but, then again, that is the way I feel about every aspect of my course. Two weeks on *McCulloch v. Maryland*, 42 for example, is scarcely enough to do justice to the issues it raises. What I have done is assigned the Amendment at the very end of the course as a way of summarizing what I think to be its central issues.

Probably more than anyone else in this group, I emphasize, from literally the very first day, that the Constitution -- if it has ascertainable meaning at all -- can be understood by any

conscientious member of the constitutional community (including ordinary citizens), and not only by courts. I thus begin my course by asking whether there really is a Twenty-Seventh Amendment to the Constitution, or whether it is simply a pretender. 43 I want students from the first day of the course to engage in what might be termed "first-order" constitutional interpretation, rather than assuming that the Constitution is simply whatever the Supreme Court says it is.

Ascertaining the validity of the purported Twenty-Seventh Amendment requires paying close attention to constitutional text, history, and the other "modalities" of constitutional analysis, including, of course, judicial doctrine. Thus, part of what is assigned for the first day includes paragraphs from the Supreme Court's opinion in *Dillon v. Gloss*, 44 which strongly suggested that an amendment proposed by Congress can "die" if it does not gain ratification within a sufficiently short time to be deemed "contemporaneous" with the proposal. Whatever "contemporaneous ratification" might mean, no one can plausibly believe that the 203-year-long interval between proposal and ratification of the purported Twenty-Seventh Amendment is it.

What I always find interesting is that few students seem to feel bound to the Court's view, so almost literally their very first experience is to exhibit interpretive independence vis-a-vis the Court. I usually point out that, unlike William Van Alstyne, for example, they don't seem to be giving much deference to an opinion joined by Holmes and Brandeis; 45 and most say, perhaps correctly, that they are more persuaded by Laurence Tribe's Wall Street Journal essay defending the legitimacy of the 1992 ratification of an amendment first proposed in 1789. 46

Given my overriding interest in making my students understand, and feel comfortable using, all of the modalities, I find it especially useful to end the course by returning to an issue that calls upon students to engage in the same basic first-order interpretation as at the beginning of the course. My hope, of course, is that they will demonstrate added sophistication garnered from our semester together in regard to such issues as the relevance of text, history, sensitivity to political structure, doctrine, political tradition, and, last but not least, the practical consequences for the polity.

The Second Amendment is a professorial godsend for such purposes, in part because there are so few Supreme Court utterances to blind the students to the independent importance of the other modalities. Also, most students actually care about the issue of the role of guns in american society. No serious adult could really care about state regulation of mudflaps or, for that matter, whether Congress can add to the original jurisdiction of the supreme court. This is obviously not the case with the availability of firearms. Given my own view that a constitutional law course ought to be about morally and politically serious issues, there are few better "closers" than the Second Amendment.

Even more particularly, I also use this as the opportunity to focus on the "incorporation" debate, itself a standard part of most constitutional law courses. The Court has, in this century, incorporated most of the various requirements of the Bill of Rights into the Fourteenth Amendment as limits on state governments. The Second Amendment, of course, stands, with the Seventh, outside of the incorporationist embrace. Why?

The answer seems deceptively easy if the Amendment is only, as some argue, a protection of state governments themselves. But an obvious embarrassment, for some, is that one can easily argue that the original meaning of the First Amendment's Establishment Clause was a similar protection of state establishment, even as it rigorously forbade any national establishment. 47 Few scholars today, though, reject the incorporation of the Establishment Clause on such grounds -- so why should this argument work in regard to the Second Amendment? It should be clear, incidentally, that the argument about incorporation is independent of the extent to which one reads the Amendment as a significant limit on governmental regulation of firearms, at least if one rejects the view that the Amendment is just a simple federalism provision.

I am also tempted to teach the Second Amendment in the context of the free speech provisions of the First Amendment, given my own view that the two should be read together as protections for dissenters. I have not, however, actually done so, though I commend those, like Scot Powe, who have.

Finally, I bring up the Second Amendment in my second-year course on the constitution and the welfare state, within the context of affirmative rights. That is, if one views the right to possess arms as a "fundamental right" -- and if it isn't, what is it doing in the Bill of Rights? -- then does this imply any duty of the state to make firearms available to those who cannot afford to purchase them through the market? The issue of affirmative rights is, after all, presented by such cases as *Gideon v. Wainwright*, involving the supply of legal services to the indigent, or *Maher v. Roe*, in which several Justices (and many students) argue that the Constitution requires subsidized abortions for women who cannot otherwise afford them. So why not subsidized guns?

The question also can resonate in regard to the *DeShaney* case: If one views guns as a practical way of protecting oneself from criminal violence, and if, as a practical matter, one cannot always rely on public police forces to offer such protection, then why doesn't the state have a duty to provide this form of protection to those who would otherwise remain vulnerable, such as those honest citizens unfortunate enough to be living in high-crime areas who are too poor to buy firearms? I confess that most students laugh when I present such an argument, though I'm not sure why this is a laughing matter, whatever one's views are about the overall legitimacy of widespread availability of guns. In any event, I hope all this makes clear why I find the Second Amendment useful for a variety of important exercises in constitutional exegesis.

IV. Using the Second Amendment in Teaching Various Modalities of Constitutional Interpretation *(Eugene Volokh)*

Throughout my first-year con law class, I focus on the various modalities of constitutional interpretation. One of my goals is to teach students how to argue from text, from original meaning, from precedent, from changed circumstances, from constitutional structure, and so on, and how to respond to such arguments. This focus helps students understand existing federal constitutional law, and teaches them how to make such arguments for other state and

federal constitutional provisions and even statutes, many of which aren't as encrusted with case law as are the constitutional provisions we generally teach.

For the first day of class, I tell students that we will discuss whether a hypothetical federal statute -- "It shall be a felony for anyone to own a handgun without having a handgun license" -- violates the Second Amendment. I assign them a bit of background reading material; in the past, it's been just an excerpt from *United States v. Miller*, the main 20th-century case dealing with the Second Amendment, though the next time I teach this I'll also include some other materials, such as related early state constitutional provisions or excerpts from early treatises. 48 I also assign a handout that briefly lays out the various modalities of constitutional interpretation, and gives examples of each. 49

I then ask students to give arguments for and against the constitutionality of the statute. As they give the arguments, I point out what sorts of arguments they are making. I then ask other students to make counter-arguments using that very same kind of argument, just to show how the same modality can often be used to support opposite conclusions. This also highlights to people that there are certain standard responses to, say, textual arguments or changed circumstances arguments, responses that I list on my handout and that we return to throughout the semester.

Why do I use the Second Amendment for this?

1. It's rich in the ingredients needed for the various kinds of arguments. It's relatively textually complex, so students can easily make even purely textual arguments that go both ways. Because "militia" means something different to many students today than it did in 1787 (and than it still does in modern technical usage), 50 the Second Amendment lends itself well to a discussion about original meaning. People quickly make "changed circumstances" arguments with regard to the Second Amendment, more so than for most other constitutional provisions. Even the main precedent (*Miller*) is deliciously and usefully ambiguous; at the same time, because there is no dispositive Supreme Court precedent, the discussion doesn't turn into a solely doctrinal debate. Of course, all constitutional provisions are susceptible to all these sorts of arguments -- that's the very point I try to convey to the students. The mix of arguments just seems to come particularly easily with the Second Amendment.

2. The Second Amendment is sexy; people like to discuss it, and tend to have strong opinions about it -- the class discussion is always lively. At the same time, the students are unlikely to have investigated the Amendment in depth in a college political science class, or to have talked about it much with friends (at least in Los Angeles). This makes it easier for students to take a fresh look at the matter.

3. I also do find, as I expected, that students who later prove to be broad constructionists for most other constitutional rights try to read this one narrowly, and vice versa. I hope, though I obviously can't tell for sure, that this experience of sincerely arguing "the other side" will make the students more open to understanding that side when the tables are turned.

I try to foster this by explicitly getting students to come up with counterarguments for each point, so students can't get away with just saying "Sure I read the Second Amendment narrowly [or broadly], because it's written narrowly [or broadly]; the Equal Protection Clause is an entirely different story." The existence of facially plausible readings of the Amendment that go either way should show students that this is far from an easy call, and that their impulsive reaction one way or the other was likely based on political preconceptions at least as much as on "objective" interpretation.

I generally take the first two class sessions to talk about all this. In the second and third sessions I also use *Miller* to teach another skill -- extracting as many propositions of potential precedential value as possible out of each case, something I find many students have a hard time doing. *Miller,* as I mentioned, is a complex and ambiguous case, with several holdings and some more implications, all of them tied to the interpretive points that I began with. The case held, for instance, that "militia" must be interpreted to have a particular meaning -- the adult able-bodied male citizenry. In the process, though, it also held that original meaning is a proper tool for constitutional interpretation, and a number of other things that most students would at first miss. I list all these propositions in a handout that I distribute to the students, and that I have made available online. 51

I don't return much to the Second Amendment as such throughout the semester; I instead focus on more traditional elements of the con law curriculum. But I constantly return to the interpretive and analytic lessons that (I hope) the students began to learn in the first few class sessions.

V. Using the Second Amendment to Teach Lawyering Skills *(Bob Cottrol)*

Despite all that my coauthors say above, many con law teachers might see the Second Amendment as just too far away from the practical business of training lawyers. I want to suggest that the Second Amendment might prove quite valuable in an unexpected venue -- by providing an important case study for those who teach and write on subjects related to practical lawyering skills.

The Second Amendment reminds us that legal history, which tells us about the strategic choices and blunders made by lawyers in the past, can do much to inform the business of training lawyers for the future. And the history of the Second Amendment in the twentieth century can also provide an excellent case study on the sociology of public interest litigation, the role a movement's constituencies can have in shaping and constraining litigation -- a valuable lesson for future litigators.

In order to see these lessons, we have to expand our discussion of the legal history of the Second Amendment away from the familiar debate over late eighteenth century intentions. If I could encapsulate the twentieth century history of the Second Amendment and its interpretation it would go something like this: There was generally widespread agreement as Americans entered the twentieth century that the Second Amendment prevented the federal government from infringing on the right of individuals to keep and bear arms. There was further agreement that this right was an important one. Americans, including American jurists and legal scholars,

were in essential agreement with their forebears in the late eighteenth century who saw the right as one that helped guarantee individual liberty. 52 Insofar as people viewed the amendment as having a connection to the militia, it was a connection to the militia of the whole, staffed by individuals who would bear their own arms. Michigan jurist Thomas Cooley's 1898 commentary captures what was the received wisdom concerning the Amendment:

> *The Right is General.* -- It may be supposed from the phraseology of the provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people from who the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order. 53

But though Cooley's discussion reflected the common understanding of the Second Amendment at the beginning of the twentieth century, that understanding came under increasing challenge among legal and later media elites during the course of the century. Even as late as the early 1960s, Supreme Court Justices 54 and an article selected by the American Bar Foundation as the winner of its Constitutional Law Essay competition 55 were willing to acknowledge the essentially individual nature of the right protected by the Second Amendment, but that changed by the end of the 1960s. With the closing of the decade that had included traumatic assassinations and explosive urban unrest, the national gun control movement was launched. With it came the passage of the 1968 Gun Control Act, far-reaching legislation by American standards. The national gun control movement also brought with it an effort to alter the previous common understanding of the meaning of the Second Amendment, an effort to interpret the provision as only protecting a right of states to organize militias and not a right of individuals to keep and bear arms. 56

It is fair to say that by the 1970s the collective or states' rights theory had won the day with most jurists and legal and lay commentators who opined on the issue. A number of lower federal court cases, brought in response to the provision in the 1968 Gun Control Act making it a crime for felons to possess firearms, rejected the individual rights view of the Second Amendment. 57 Throughout the 1970s and 1980s, expressed opinion on the part of the elite bar, the bench and the legal academy was firmly on the side of those who denied the existence of an individual right to arms. The National Rifle Association, 58 of course, continued to maintain that the Second Amendment protected an individual right; interestingly enough, public opinion

polls indicated that this continued to be the view of the majority of Americans, 59 and Congress also adhered to the individual rights view. 60 Still it is safe to say that throughout the 1970s and 1980s, the kind of opinionmakers likely to influence Supreme Court decisionmaking were firmly on the side of the collective rights interpretation.

By the beginning of the 1990s the collective rights interpretation was coming under increasing attack in an unexpected venue, the legal academy. Starting with Sanford Levinson's *The Embarrassing Second Amendment* in 1989, the last decade has been witness to a steady stream of law review literature, much of it from somewhat chagrined liberals, 61 rediscovering the case for the individual rights view of the Second Amendment. 62 It should be noted that the intellectual reconsideration of the issue really began in the 1980s with the work of practicing attorneys involved in the gun owners' rights movement, 63 and with the writings of historians Joyce Lee Malcolm and Robert Shallope. 64 The scholarship supporting the individual rights view of the amendment has to date dominated the literature. 65

With this new scholarly consensus has also come a renewed recognition, at times reluctant, that the Second Amendment must be taken into account in the gun control debate. It has not been uncommon in recent years for writers, even those who have supported far-reaching gun control measures, to reluctantly acknowledge the validity of the individual rights position. 66 Even an increasing number of federal jurists seem persuaded that the individual rights view of the Second Amendment cannot be easily dismissed. 67 While this view is probably still a minority view in the intellectual and judicial communities, the developments stand in marked contrast to the conventional wisdom less than a generation ago. Today, it might be fairly said that neither side of the Second Amendment debate could approach the Supreme Court with great confidence in the outcome.

This thumbnail intellectual history of the Second Amendment in the twentieth century might prove useful both for those concerned with the teaching of lawyering skills and for those who teach about public interest litigation. This history illustrates the relative roles of felt deprivations and strategic choices in shaping not only litigation strategies but also resulting legal, or in this case constitutional, doctrine.

Briefly put, it is reasonable to hypothesize that at several key points during the course of this century the protagonists on both sides of the debate missed major opportunities to get the Supreme Court to make definitive, favorable pronouncements concerning the meaning and scope of the amendment. If we accept this hypothesis, then the history of the Second Amendment in the twentieth century might be seen as a history of strategic miscalculations, miscalculations that may ultimately play a major role in the fashioning of constitutional doctrine.

We might start such a line of pedagogical inquiry with a look at *Miller*. If the McReynolds opinion is better read as supportive of the individual rights view -- and it is 68 -- the opinion has nonetheless left enough room for lower federal courts to essentially eviscerate the individual rights component of the Second Amendment. 69 This may have happened in part because the *Miller* Court conducted an essentially ex parte hearing -- only the federal government was represented. 70

From a teaching perspective, *Miller* raises two fascinating questions. First, what might have happened if the National Rifle Association had filed an amicus brief in the case? Second, and perhaps more important for these purposes, why didn't the NRA do so? The first question is the more difficult to answer. Certainly our intuitive assumption would be that the failure to vigorously champion the individual rights view of the amendment was a costly omission, particularly since the government's representative, Solicitor General Robert Jackson, did argue the collective rights position. 71 It is an open and interesting question whether intervention by the National Rifle Association, or some other entity, would have created a different result. The *Miller* Court did not adopt Jackson's proffered collective rights reasoning, and it did seem open to an overturning or narrowing of the 1934 Act in the event a sawed-off shotgun could be shown to be a suitable militia weapon. 72 Still, a more vigorous challenge to the 1934 legislation might have led to a decision that was more clearly protective of individual rights, and that would have been harder for lower courts to misread or overread.

If our hypothetical counterfactual history of *Miller* yields somewhat unclear lessons, an examination of why the NRA did not mount a serious challenge to the 1934 Act could prove quite valuable. Briefly stated, because before the Second World War there was little in the way of a serious challenge to either gun ownership or the notion of a constitutional right to arms, neither the NRA nor any other group was seriously concerned with the Second Amendment as a constitutional issue. 73 While the NRA had played a role in preventing the adoption of a provision in the 1934 Act that would have required the registration and licensing of pistols, 74 the organization was primarily a nonpolitical group of sportsmen, and interestingly enough one that had historically had a close working relationship with the U.S. Army. 75 The organization had little ongoing interest in legislative affairs, and even less of a tendency to consider litigation strategy.

This stands in marked contrast to the histories of the National Association for the Advancement of Colored People and the American Civil Liberties Union. By the 1930s, both groups were home to highly sophisticated strategists and tacticians of the art of litigation. 76 Both groups would, of course, reap the fruits of previously developed litigation skills and institutional memories in their advocacies before the post-war Warren and Burger Courts. By way of contrast the NRA did not even have an in-house general counsel's office until 1975. 77

So in part the underdevelopment of Second Amendment doctrine and judicially enforced Second Amendment protection might be seen as a lesson in the role of relative deprivation or felt need in the development of both litigation efforts and resulting court doctrine. The kinds of civil rights and civil liberties issues that have traditionally concerned the NAACP and the ACLU were in far worse shape than the right to arms before the Second World War. The Fourteenth and Fifteenth Amendments were dead letters in huge sections of the nation, a fact that was approvingly admitted by the courts and even a federal commission. 78 Restrictions on free speech were routine, and the procedural protections of the Fourth, Fifth, and Sixth Amendments were regularly denied criminal defendants in state courts. With that background it is no mystery why the NAACP and the ACLU honed litigation skills at a time when the NRA scarcely considered the notion of judicial definition and clarification of the Second Amendment.

This neglect would continue in the immediate postwar era. Although the Supreme Court in the nineteenth century had used the Second Amendment as a vehicle to reject the view that the Fourteenth Amendment applied the Bill of Rights to the states, 79 the NRA would remain silent during the incorporation controversy of the 1950s. Thus, while the Hugo Black dissent in *Adamson v. California* implicitly offered strong support for the individual rights view of the Second Amendment as well as the view that the amendment limited state as well as federal action, the issue was not buttressed by supporting arguments from the NRA. 80 The total incorporation argument was largely made by those concerned with incorporation as a more general matter. 81 Again the lack of a perceived threat insured the continued underdevelopment of the Amendment doctrine.

It would take the development of a national gun control movement in the 1960s and the attempt to redefine the right to arms, or perhaps more accurately to read it out of the Constitution, to transform the NRA from an almost purely hobbyist organization into a political entity, and one that would be forced into the unaccustomed role of civil liberties and civil rights advocate. 82 Although the NRA's political strength coupled with the sheer ubiquity of firearms in American society would by and large prevent outright prohibitions of firearms, by the 1980s there were a few jurisdictions where such prohibitions existed, providing a potential occasion for a possible definitive Supreme Court decision on the Second Amendment.

Here the history of Second Amendment advocacy took yet another ironic turn. Beginning with the passage of an ordinance in Morton Grove (Illinois) in 1981 prohibiting the possession of handguns, 83 some supporters of the individual rights view have been eager to bring a case before the Supreme Court. This happened with the Morton Grove restriction, 84 and responses arguing for a denial of certiorari were filed by gun control advocacy groups. 85 Ironically, though, it was quite likely that the Court in 1984 would have ruled in favor of the collective rights view, which means the individual rights advocates were probably courting judicial disaster while the collective rights advocates probably avoided a definitive victory.

Similarly, in the 1992 case *United States v. Hale*, 86 the Eighth Circuit rejected a Second Amendment challenge to a ban on the sale of automatic weapons manufactured after 1986. Again the NRA sought certiorari, and the gun control groups -- most notably Handgun Control, Inc. -- argued against the Court's hearing the case. 87 Even in 1993, though, the Court would probably have been likely to rule against the Second Amendment claim, whereas today it would probably be fair to say that the odds are more even.

So then we end the twentieth century with very much an open question as to what the Supreme Court would do if squarely presented with a Second Amendment case. Each side in the debate missed strong opportunities to fashion favorable precedents in this area earlier in the century. Are there any lawyering lessons to be learned from this history?

The history can tell us much about the role of error and misperception in the development of legal doctrine. It can also inform us of the importance of both complacency and desperation in fashioning legal strategy. For teachers concerned with lawyering it might be instructive to treat the Second Amendment as an exercise in the comparative sociologies of litigation movements. To what extent are litigation strategies constrained by dependent and

supporting constituencies? Was the NAACP, for example, able to develop a sophisticated, long range strategy that would ultimately destroy *Plessy* 88 precisely because of its dependent constituency, the largely poor, disenfranchised black population of the South? Did that constituency dictate the need for litigation precisely because electoral remedies were unavailable? And was the NAACP able to formulate effective litigation strategies because it could pick the best postured cases free from concern that its constituency might create bad precedents with poorly postured ones?

Similarly, has the NRA been hampered in developing effective litigation strategies precisely because it represents large, powerful, and in many communities majority constituencies? Has that made electoral strategies more attractive? Has it made litigation harder to control? Has it been harder for the NRA to stop the poorly postured case from arriving in court precisely because its constituencies are less dependent?

These questions could provide an interesting lens from which to view public interest litigation. Such litigation may ultimately owe as much to the sociologies of the movements that have produced a particular lawsuit as it does to the lawyering skills of selected advocates. If a study of the fate of the Second Amendment in the twentieth century teaches our students that, then it will have taught them a great deal.

Conclusion

A lecture, the old joke goes, is the process by which the teacher's notes become the student's notes, without passing through the mind of either. We law teachers try hard to avoid this. We try to teach our students to think critically, to struggle with the material, to challenge preconceptions and conventional wisdom -- the courts', the students' own, and (unfortunately rarest of all) the Framers'.

The Second Amendment, with its odd political valences, with its sparse and inconclusive Supreme Court case law, with its connections to both the structural provisions and other rights provisions, and with its downright scary implications, is a powerful tool for this purpose. Some call it a "palladium of liberty," 89 others a "dangerous anachronism." 90 Some see it as protection for a "fundamental right," 91 others as a "nulli[ty]," 92 a provision with "no real meaning" that Madison used to "do[] in the Antifederalists with sweet talk." 93 It arouses passionate debate even among the general public, probably even more than the Free Speech Clause or the Free Exercise Clause do. It should arouse similar passions among your students. Better yet, it might even arouse thought.

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1. *See* Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 977 (1998).

2. Some con law casebooks have in fact begun to include the Second Amendment, mostly in the last few years. *See, e.g.*, Paul Brest & Sanford Levinson, Processes of Constitutional Decisionmaking 550-54 (3d ed. 1992); David Crump, Eugene Gressman & David S. Day, Cases and Materials on Constitutional Law 1073-77 (3d ed. 1988); Daniel A. Farber, William N. Eskridge, Jr. & Philip P. Frickey, Constitutional Law 416-18 (2d ed. 1998); Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, Constitutional Law 38, 53-54 (3d ed. Supp. 1997).

3. *See* Philip Bobbitt, Constitutional Interpretation (1991) (giving a morphology of interpretive "modalities").

4. *See, e.g.*, State v. Gunwall, 106 Wash. 2d 54, 58 (1986) (stating that litigants who want to argue that a state constitutional provision provides more protection than the corresponding federal provision must discuss "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern").

5. *Cf.* N.H. Proposed House Joint Resolution 3 (proposing "That the [New Hampshire] attorney general be required to bring suit against the United States Government for violations of the United States Constitution and the New Hampshire constitution in enacting the assault weapons ban, which prevents United States citizens from owning military firearms.").

6. Schaefer v. United States, 251 U.S. 466, 477 (1920) (holding that the First Amendment didn't protect publication of false war reports).

7. Joseph Story, Familiar Exposition of the Constitution of the United States § 451 (1840); *see also id.* § 450 (discussing the right as a "powerful check upon the designs of ambitious men," and a means of preventing "tyrants [from] accomplish[ing] their purposes").

8. 1 Sir William Blackstone, Commentaries on the Laws of England §§ 143-144, at 93 (Thomas M. Cooley ed. 1884).

9. *New:* Ill. Const. art. I, § 22 (1970); Va. Const. art. I, § 13 (1971); Nev. Const. art. I, § 11(1) (1982); N.H. Const. pt. 1, art. 2-a (1982); N.D. Const. art. I, § 1 (1984); W. Va. Const. art. III, § 22 (1986); Del. Const. art. I, § 20 (1987); Neb. Const. art. I, § 1 (1988).

Strengthened: N.M. Const. art. II, § 6 (1971 and 1986); La. Const. art. I, § 11 (1974); Idaho Const. art. I, § 11 (1978); Utah Const. art. I, § 6 (1984); Maine Const. art. I, § 16 (1987); Alaska Const. art. I, § 19 (1994).

In November 1998, Wisconsin voters will decide whether to add an individual-right-to-keep-and-bear-arms amendment to their state constitution, which is now one of only seven that doesn't contain such a provision. The proposal was placed on the ballot by an overwhelming vote of both houses of the state legislature. *Voters Will Decide in November Whether to Add . . .*, AP, Apr. 29, 1998 (27-5 Senate); *Assembly OKs Gun Amendment*, Ariz. Republic, Jan. 30, 1997 (84-13 Assembly).

10. *See* Constitutional Stupidities, Constitutional Tragedies (William Eskridge & Sanford Levinson, eds. 1998).

11. *See, e.g.*, J.M. Balkin, *Agreements With Hell and Other Objects of Our Faith*, 65 Fordham L. Rev. 1703, 1706 (1997) (discussing problems created by the possibility of "constitutional evil"); Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 Const. Comment. 271, 274 (1997) (discussing "constitutional evils"); Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 Fordham L. Rev. 1739 (1997) (discussing how courts avoid constitutional evil by interpreting vague provisions in accordance with their own predilections); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981) (discussing the common assumption that the Constitution is supposed to provide the just answer to all significant legal problems).

12. *See, e.g.*, Statement of Sen. George Mitchell, 136 Cong. Rec. S8212 (daily ed. June 19, 1990) ("I do not believe we should ever, under any circumstances, for any reason, amend the Bill of Rights. The Bill of Rights is so effective in protecting individual liberty of Americans precisely because of its unchanging nature. Once that is unraveled, its effectiveness will be forever diminished. If the Constitution is amended to prohibit the burning of a flag, where do we stop?"); Louis Lusky, Our Nine Tribunes: The Supreme Court in Modern America 65 (1993) (condemning the proposed anti-flag-burning amendment because it would begin "the dismal enterprise of amending the Bill of Rights -- which by definition, is the least popular, and therefore the most vulnerable, part of the Constitution because it restricts majority rule"); Robert H. Giles, *Don't Amend Bill of Rights to Protect Flag*, Detroit News, Jan. 19, 1997 (condemning the proposed anti-flag-burning amendment because "it would establish a precedent for tinkering with the Bill of Rights"); Editorial, *Peoria J. Star*, Jan. 5, 1997 (quoting Sen. Paul Simon as saying "Because I disagree with an unpopular decision of the Supreme Court [upholding the First Amendment right to burn a flag] doesn't mean that we ought to rush in and for the first time in 200 years amend the Bill of Rights").

13. 307 U.S. 174 (1939).

14. 116 U.S. 252, 264-66 (1886).

15. 695 F.2d 261 (7th Cir. 1981).

16. 72 Kan. 230 (1905).

17. 4 So. 2d 700 (Fla. 1941).

18. 38 Wm. & Mary L. Rev. 1311 (1997).

19. *See, e.g.*, Erwin Griswold, *Phantom Second Amendment `Rights'*, Wash. Post, Nov. 4, 1990, at C7.

20. St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia (1803), available at http://www.law.ucla.edu/faculty/volokh/2amteach/sources.htm#TOC7.

21. 1 *id.* at App. 297.

22. *Id.* at App. 300.

23. 2. *id.* at 143 n.41.

24. *Id.* at 143 n.40.

25. 1 *id.* at App. 300.

26. *Id.*

27. Powe, *supra* note 18, at 371.

28. *Symposium on the Work of Justice Hans Linde*, 70 Ore. L. Rev. 679 (1991).

29. Since, alas, no constitutional law casebook discusses the Second Amendment at any length, I use photocopied materials. The content of these varies from year to year but typically includes excerpts from Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994); Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro- Americanist Reconsideration*, 80 Geo. L.J. 309 (1991); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107 (1991); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People* 81 Cornell L. Rev. 879 (1996); David C. Williams, *The Constitutional Right to "Conservative" Revolution*, 32 Harv. C.R.-C.L. L. Rev. 413 (1997); Brannon Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 Cumb. L. Rev. 961 (1996).

30. 92 U.S. 542 (1875).

31. 116 U.S. 252 (1886).

32. 307 U.S. 174 (1939).

33. 21 Tenn. 152 (1840).

34. 50 Tenn. 141 (1871).

35. In *Andrews*, for example, Tennessee's Attorney General argued that the right to bear arms was a mere "political" right that existed for the benefit of the state and hence could not be asserted by individuals against the state. This argument was rejected by the Tennessee Supreme Court. *Andrews* also held that the type of weapon protected by the right to bear arms was determined by its purpose -- arming the citizenry to enforce the law and protect against state tyranny -- meaning that weapons not suited for such purposes (brass knuckles, derringers, *etc.*) were not protected. 50 Tenn. at 156-57, 159-60. For more on the Tennessee constitutional issues see Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 Tenn. L. Rev. 647 (1994). For a discussion of how *Miller* relates to *Aymette*, see Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 496-504 (1995). For a suggestion that I may read too much into *Miller*'s discussion of *Aymette*, see Powe, *supra* 29, at 1329-32.

36. For an excellent and provocative discussion of this topic, going far beyond the Second Amendment, see Brannon Denning, Constitutional Decadence (unpublished work in progress). The point regarding Weber, however, was originally raised by Sandy Levinson in his *The Embarrassing Second Amendment*, *supra* note 29, at 650.

37. Campbell v. Sundquist, 926 S.W.2d 250, 261 (Tenn. App. 1996), *quoting* Davis v. Davis, 842 S.W.2d 588, 599 (Tenn. 1992) ("Indeed, the notion of individual liberty is so deeply imbedded in the Tennessee Constitution" as to grant "the people, in the face of governmental oppression, the right to resist that oppression even to the extent of overthrowing the government.").

38. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

39. Robert Bork, The Tempting of America: The Political Seduction of the Law 257-58 (1990). For an extensive critical view of Bork's characterization see Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork,* Griswold, *and the Philosophy of Original Understanding*, 24 Ga. L. Rev. 1045 (1990).

40. *See* David C. Williams, *Civic Republicanism and the Citizen Militia, supra* note 29.

41. Jeffrey Rosen, *Original Sin*, New Republic, May 5, 1997, at 26.

42. 17 U.S. 316 (1819).

43. *See* Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 Const. Comm. 101 (1994).

44. 256 U.S. 368 (1921).

45. William Van Alstyne, *What Do You Think About the Twenty-Seventh Amendment?*, 10 Const. Comment. 9 (1993).

46. Laurence H. Tribe, *Rule of the 27th Amendment Joins the Constitution*, Wall St. J., May 13, 1992, at A15.

47. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1157-58 (1991); Chris Bartolomucci, Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 Harv. L. Rev. 1700 (1992).

48. *See* http://www.law.ucla.edu/faculty/volokh/2amteach/sources.htm.

49. *See* http://www.law.ucla.edu/faculty/volokh/2amteach/interp.htm.

50. "Militia" in the 1790s quite clearly referred to pretty much the entire adult male white citizenry (age 18 to 45). *See* United States v. Miller, 307 U.S. 174 (1939). This is still the definition under the Militia Act of 1956, 10 U.S.C. § 311, though of course extended beyond whites (and probably extended to women by the Court's recent equal protection cases); and it's one of the definitions given in the dictionary, *see, e.g.*, Random House Dictionary 1220 defn. 3 (2d ed. unabridged 1987). Of course, most students first interpret the word in the more common modern meaning of a National Guard-like body.

51. *See* http://www.law.ucla.edu/faculty/volokh/2amteach/miller.htm.

52. *See* David B. Kopel, *The Second Amendment in the 19th Century* (manuscript) (concluding that before 1900, the collective rights view made no appearance in any constitutional law treatises, and appeared only once in a judicial opinion, a concurrence in an 1842 Arkansas Supreme Court case).

53. Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 298 (1898).

54. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Hugo Black also seems to have rejected the states' rights view: His 1860 *The Bill of Rights*, he stated that "Although the Supreme Court has held [the Second] Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute," 35 N.Y.U. L. Rev. 865, 873 (1960), and he had earlier suggested that all the first eight Amendments are binding on the states, which is inconsistent with the notion that the Second Amendment only protects states. *See* Adamson v. California, 332 U.S. 46, 71-72, 78 (1947) (concluding that the Fourteenth Amendment was meant "to make the Bill of Rights applicable to the states," citing *Presser v. Illinois* -- which refused to incorporate "the Second Amendment's `right of the people

to keep and bear arms * * *´" -- as expressing the opposite view, and approvingly quoting many late 1860s sources that spoke of the Fourteenth Amendment making "the first eight amendments" applicable to the states).

55. *See, e.g.*, Robert Strecher, *The Lost Amendment*, 57 ABA J. 554, 665 (1965).

56. It should, of course, be noted that the states' right or collective right view of the Second Amendment existed before the 1960s. Thomas Cooley's discussion, *see supra* text accompanying note 53, was clearly in response to people who suggested such a view, and in 1905 the Kansas Supreme Court interpreted the right to keep and bear arms of the state constitution as a collective right. *See* City of Salinas v. Blaksley, 72 Kan. 230 (1905). When Solicitor General argued the government's case in *United States v. Miller*, he offered the collective rights theory of the Second Amendment as one possible theory that might make the 1934 Federal Firearms Act constitutional. Cottrol, *Invitation to a Multi-Dimensional Debate, supra* note 62, at xxvii. But despite this, the individual rights view prevailed even among the elite bar well into the early 1960s, *see supra* notes 54 and 55. *See also* Cottrol, *Invitation to a Multi-Dimensional Debate, supra* note 62, at xxxviii-xxix. Also instructive in this regard is the casual way Justice Harlan assumed a constitutional right to arms in *Poe v. Ullman* in 1961.

57. For a good discussion of the lower federal courts and their treatment of the *Miller* precedent, see Denning, *supra* note 29.

58. Throughout this section, the National Rifle Association will be discussed as if it were the most logical body to either bring a Second Amendment case before the Supreme Court, or to file an amicus curiae brief in a case where Second Amendment interests are implicated. There is no inherent reason why this should be the case. Certainly it would not be hard to envision other groups championing a Second Amendment claim earlier in the century. We might, for example, imagine the American Civil Liberties Union having argued for incorporation of the Second Amendment as part of an overall argument in favor of total incorporation. Or we might imagine the National Association for the Advancement of Colored People having made a Second Amendment claim in a case contesting discriminatory application of laws restricting the carrying of concealed firearms, see Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity -- The Redeemed South's Legacy to a National Jurisprudence*, 70 Chi. Kent. L. Rev. 1307 (1995). Similarly we might imagine an alternative twentieth century history where the NRA, despite a sporting interest in shooting, never mobilized as a political or legal entity to fight gun control legislation -- by and large the story of the British shooting sports community.

In any event, the history of the century unfolded in the way it did, and the NRA has become a political and to a lesser extent litigation community mobilized to fight gun control measures. I thus use the NRA as a proxy in this discussion for those likely to be interested in contesting restrictive firearms regulation through Second Amendment claims.

59. *See, e.g.*, Gordon Witkin, Katia Hetter, Michael Barone & Dorian Friedman, *The Fight to Bear Arms*, U.S. News & World Rep., May 22, 1995 ("A new U.S. News poll shows that 75

percent of all American voters believe the Constitution guarantees them the right to own a gun.").

60. *See, e.g.*, The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2nd sess. (1982).

61. As a case in point, of the five coauthors of this article, two are Democrats (not a perfect proxy for liberalism, of course, but at least a fairly simple and objective one), two are independents, and one is a Republican.

62. *See, e.g.*, Glenn Harlan Reynolds & Don B. Kates, Jr., *The Second Amendment and State's Rights: A Thought Experiment*, 36 Wm. & M. L. Rev. 1737 (1995); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. L. & Pol. 1 (1987); Nelson Lund, *The Second Amendment, Political Liberty and the Right of Self Preservation*, 39 Ala. L. Rev. 103 (1987); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. Dayton L. Rev. 91 (1989); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment*, 24 Rutgers L.J. 1 (1992); Don B. Kates Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comment. 87 (1992); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & M. L. Rev. 1311 (1997); David E. Vandercoy, *The History of the Second Amendment*, 28 Val. U. L. Rev. 1007 (1994); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599 (1982); Robert J. Cottrol, *The Second Amendment: Invitation to a Multi-Dimensional Debate*, in Gun Control and the Constitution: Sources and Explorations on the Second Amendment ix (1994); Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995 (1995) (reviewing Malcolm's book).

For views hostile to the individual rights theory, *see* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22 (1984); 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); *cf.* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991) (concluding that the Second Amendment was originally a strong restraint on government power, but that changed circumstances should lead us to read it today as essentially a nullity).

63. See, e.g., Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983); Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (1984); Hardy, *supra* note 62.

64. *See, e.g.*, Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Con. L.Q. 285 (1983); Shalhope, *The Ideological Origins of the Second Amendment*, *supra* note ?.

65. *See* Reynolds, *A Critical Guide to the Second Amendment*, *supra* note 35.

66. *See, e.g.*, Michael Kinsley, *Slicing Up the Second Amendment*, Wash. Post, Feb. 8, 1990, at A25; George Will, *Oh That Annoying Second Amendment*, Phila. Inq., Mar. 22, 1991; Nat Hentoff, *A Second Look at the Second Amendment*, Wash. Post, Mar. 9, 1996, at A21.

67. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2386 (1997) (Thomas, J., concurring); United States v. Verdugo-Urquidez, 490 U.S. 259, 264 (1989) (Rehnquist, J.) (majority opinion); Antonin Scalia et. al., A Matter of Interpretation: Federal Courts and the Law (1997); United States v. Lopez, 2 F.3d 1347, 1364 n.46 (5th Cir. 1994), *aff'd on other grounds*, 514 U.S. 549 (1995); *see* Sanford Levinson, *Is the Second Amendment Becoming Recognized as Part of the Constitution? Voices from the Supreme Court*, 1998 BYU L. Rev. 127.

68. *See* Cottrol, *Invitation to a Multi-Dimensional Debate*, *supra* note 62, at xxvi-xxix; Kates, *supra* note 29, at 249-50; Reynolds, *supra* note 35, at 499-500.

69. *See* Denning, *supra* note 29.

70. *Miller*, 307 U.S. at 175; Powe, *supra* note 18, at 1331 (discussing this).

71. *See* Cottrol, *Invitation to a Multi-Dimensional Debate*, *supra* note 62, at xxvii. Jackson offered the collective or state's right view of the Second Amendment as one of three alternative theories as to why the 1934 Firearms Act did not violate the guarantees of the Second Amendment. Jackson's brief also argued (1) that the Second Amendment simply provided constitutional recognition of the common law right to have arms -- a right that was always subject to regulation and limitations -- and (2) that even, granting a right to arms, the government still had the right to control those weapons that were peculiarly usable for criminal purposes. Powe, *supra* note 18, at 1330-31. The *Miller* case involved unlicensed transportation of an unregistered sawed-off shotgun.

72. *Miller*, 307 U.S. at 178.

73. There were of course state and local regulations concerning firearms ownership, but even these rarely rose to the levels of prohibitions, the New York Sullivan law being one of the more glaring exceptions. *See* Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in The Bill of Rights in Modern America: After 200 Years 81 (David J. Bodenhamer & James W. Ely, Jr. eds. 1993). Local regulations were not perceived as a threat to the protections provided by the Second Amendment in part because even local regulations were

relatively mild and because the process of the incorporation of the Bill of Rights had really not picked up steam.

74. Cottrol, *Invitation to a Multi-Dimensional Debate, supra* note 62, at xxvi.

75. *See, e.g.*, Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979) (discussing 10 U.S.C. § 4308(a), a then-existing statute which gave preferential treatment to NRA members in sales of surplus Army rifles).

76. *See, e.g.*, Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961 (1994).

77. Conversation with Robert Dowlut, Deputy General Counsel, National Rifle Association.

78. *See* Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. Dayton L. Rev. 59, 83 n.169 (1989).

79. *See, e.g.*, Presser v. Illinois, 116 U.S. 252 (1886).

80. Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

81. *See, e.g.*, William Crosskey, Politics and the Constitution in the History of the United States (1953).

82. An important hallmark of civil rights and civil liberties organizations is the felt need to vindicate constitutional and legal principle beyond the simple support of one's core constituency. Thus, the ACLU has traditionally had a policy of supporting First Amendment free speech, press, and assembly rights for a wide variety of groups right, left, and center, even those that they may sharply disagree with. Similarly, the NAACP and the Legal Defense Fund has supported challenges to the death penalty even when the individuals condemned to death have been white, even whites hostile to blacks. In recent decades the NRA has also fought to vindicate the principle of a right to arms that went beyond its core constituency of rural, working-class and middle-class white men. Thus, since the late 1960s the group has fought efforts to ban so-called Saturday Night Specials, essentially most inexpensive handguns, although the stereotypical customers for that type of firearm are allegedly inner city blacks. Also, within the last decade the NRA has led the fight against bans on guns in public housing, *see, e.g., Doe v. Portland Housing Authority*, 656 A. 2d 1200 (Me. 1995), even though such measures are not targeted at the NRA's core constituency, because it felt that such measures violated its notion of a constitutional right to arms. One might also ask why such measures have not been attacked with equal vigor by more conventional civil rights and civil liberties organizations on the theory that, regardless of one's views concerning the Second Amendment, measures designed to single out largely poor and minority communities for gun prohibition represent a threat to the principle of equal protection.

It should also be noted that the National Rifle Association's expanded constitutional interest extended beyond the Second Amendment. The organization has for example filed

amicus briefs in cases where it perceives potential damage to first amendment principle that might impinge on its ability to organize politically, *see, e.g.*, Brief for the National Riffle Association of America as Amicus Curiae, *Federal Election Commission v. Massachusetts Citizens for Life Inc.* (1986).

83. Morton Grove, Ill., ord. 81-11 (June 8, 1981).

84. [Cite to be filled in.]

85. *See* Brief of Amicus Curiae, Handgun Control, Inc., In Opposition to Certiorari, *Quilici v. Village of Morton Grove*, No. 82-1822, 464 U.S. 863 (1983).

86. 978 F.2d 1016 (8th Cir. 1992).

87. [Cite to be filled in.]

88. Plessy v. Ferguson, 163 U.S. 537 (1896).

89. *See, e.g.*, Printz v. United States, 117 S.Ct. 2365, 2386 (1997) (Thomas, J., concurring) (suggesting this without entirely endorsing it -- "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´"); Betty Howard, *2nd Amendment; The True Intent*, Orlando Sentinel, Dec. 19, 1997, at A23.

90. *See, e.g.*, Thomas J. Baldino, *Time to Repeal 2nd Amendment*, Arizona Republic, Dec. 30, 1993, at B5.

91. *See, e.g.*, *The 1997 Elections*, N.Y. Times, Oct. 25, 1997, at B4 (quoting Libertarian Party gubernatorial candidate).

92. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551, 555 (1991) (contending that the Second Amendment has been "effective[ly] nullifi[ed]" by changing circumstances).

93. Garry Wills, *To Keep and Bear Arms*, The New York Review of Books, Sept. 21, 1995, at 62, 72.