

**THE UNITED STATES SUPREME COURT
AND THE SECOND AMENDMENT**

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The Intent of the Framers

The Second Amendment guarantees as follows:

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

The framers of the Second Amendment had two separate objectives in mind. One purpose was to recognize in general terms the importance of a militia to a free state, ergo the subordinate clause. The main purpose of the Second Amendment, as stated in the primary clause, was to guarantee a right to keep and bear arms for all traditional purposes, including the private individual's ownership of firearms. Thus, the intent of the drafters of the Second Amendment was that the people's right to obtain, keep, and carry arms be guaranteed, so that the people could exercise their right of self-preservation and defense, as well as to join and serve effectively in the militia. This view is supported by the writings of the drafters of the bill of rights and the writings of political writers at the time.

This view is further bolstered by various proposals in the state ratifying conventions which mentioned a clearly individual right to bear arms. For example, in the Pennsylvania convention a proposal for the federal amendment would have guaranteed: "That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game" ² The Federal Gazette and Philadelphia Evening Post of June 18, 1789, advised its readers, after the House of Representatives enacted what became the Second Amendment, that "the people

¹ U.S. CONST. Amend. II.

² *Pennsylvania and the Federal Constitution 1787-1788*, 422 (J. McMaster & F. Stone eds. 1888). The Pennsylvania minority was the first to propose an extensive Bill of Rights and their seminal ideas found their way into the Bill of Rights and became the First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Amendments. E. Dumbauld, *The Bill of Rights and What It Means Today*, 50-56 (1957).

are confirmed by the next article in their right to keep and bear their private arms."³ Attempts to limit the right to one that was coterminous with the duty were defeated. For instance, on Wednesday, September 9, 1789, a motion in the Senate to insert "for the common defense" next to the words "bear arms" was defeated, thus rejecting a clause that could be used theoretically to limit the right to one that necessarily involved the defense of the state and emphasizing that this right also protected an individual's right to self defense.⁴

While the twentieth century proponents of gun prohibition have argued (based upon the subordinate "militia" clause) that the primary "right to keep and bear arms" clause in the Second Amendment refers exclusively to "collective" and not individual rights, the drafters of the Second Amendment intended it to guarantee a private individual right to the citizen, which would also further the objectives of, and, in fact, make capable, the militia (which was envisioned as the whole people in arms).

In fact, the same Congress that drafted and enacted the Bill of Rights defined the term "militia" as consisting of the population at large. That Congress enacted the first U.S. "militia" statute, which mandated that every man be armed. The federal Militia Act of May 8, 1792, required every "free able bodied white male citizen" aged eighteen through forty-five to "provide himself with a good musket or firelock," bayonet and ammunition or a pair of pistols, ammunition, and saber.⁵

The same statute still exists today, though it has been amended, as Section 311 of US Code Title 10, entitled, "Militia: composition and classes." It now reads in its entirety as follows:

³ *Federal Gazette* and *Philadelphia Evening Post*, June 18, 1789, No. 68 of Vol. II, at 2, col. 1. Tench Coxe in a letter to Madison admitted being the author. 12 Papers of James Madison 241 n.1 (1979).

⁴ *History of the Supreme Court of the United States*, 450 (J. Goebel, Jr. ed. 1971). See also 2 B. Schwartz, *The Bill of Rights: A Documentary History*, 1153-54 (1971).

⁵ 1 Stat. 271 (1792).

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b) The classes of the militia are

- (1) the organized militia, which consists of the National Guard and the Naval Militia; and
- (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.⁶

Thus, as in the days of the Founding Fathers, the militia comprises the entire body of the people, and includes both the organized militia (often referred to as the "select militia" by then-contemporary writers) and the unorganized militia (everybody else).

The intent of the drafters was made clear in the Congressional debates; the goal was an armed populace, with arms of their own, that could be called upon in time of need.

One of America's foremost constitutional scholars, Lawrence Tribe of Harvard University, has said regarding the Second Amendment:

Its central object is to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit. Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes . . . a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action.⁷

⁶ 10 U.S.C. § 311.

⁷ Laurence H. Tribe, *I American Constitutional Law*, 901-02 n.221 (Foundation Press 2000).

The majority of constitutional legal commentators agree that the Second Amendment guarantees an individual right to bear arms. Professor Robert E. Shalhope summed up the history of the Second Amendment with the admonishment that "advocates of the control of firearms should not argue that the Second Amendment did not intend for Americans of the late eighteenth century to possess arms for their own personal defense, for the defense of their states and their nation, and for the purpose of keeping their rulers sensitive to the rights of the people."⁸

Thus, while the Second Amendment certainly recognizes the importance of a militia, it also commands that "the right of the people" to keep as well as to bear arms shall not be infringed.

The Second Amendment and the United States Supreme Court

Gun prohibitionists often claim that the United States Supreme Court has held that the Second Amendment does not guarantee an individual right to keep and bear arms, but offers only a "collective right" for the organized military forces of the states to have governmentally owned arms. This "Collective Rights" approach is a newcomer to theories of constitutional law and made its first appearance only in the Twentieth Century. Not only does the "Collective Rights" approach run counter to overwhelming textual and historical evidence, but the Supreme Court has never held such a theory applicable to the Second Amendment.

Dred Scott v. Sandford was the first case in which the United States Supreme Court mentioned the right to keep and bear arms.⁹ The issue before this pre-Civil War and pre-emancipation Court was whether African-Americans were "citizens."¹⁰ Among

⁸ Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599, 614 (1982).

⁹ *Dred Scott v. Sandford*, 60 U.S. 393 (How.) (1857).

¹⁰ *Id.* at 403.

other things, the Court found that if African Americans were “citizens,” they would have “the right to keep and carry arms wherever they went.”¹¹

Chief Justice Taney, who wrote the infamous *Dred Scott* opinion, argued that if African-Americans were citizens, they would have the same constitutional protections afforded to white citizens, which included the right to keep and bear arms.¹² Therefore, he concluded, the Constitution could not have intended that free African-Americans be citizens.

[I]t cannot be believed that the large slaveholding states regarded them as included in the word “citizens” or would have consented to a constitution which might compel them to receive them in that character from another state. For if they were so received, and entitled to the privileges and immunities of citizens . . . [i]t would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went.*¹³

The Supreme Court specifically placed the right to keep and bear arms in the same category as the other fundamental individual rights that are protected from governmental infringement by the Bill of Rights:

[N]o one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances. *Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.* These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have

¹¹ *Id.* at 417.

¹² *Id.*

¹³ *Id.* (emphasis added).

been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the Fifth Amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this - if it is beyond the powers conferred on the Federal Government - it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.¹⁴

Nowhere in this opinion does the Supreme Court suggest that the right to keep and bear arms differs from other fundamental rights and protects only the state government's organized military. Clearly, the Court considered the right to keep and bear arms as a fundamental individual right of every "citizen."

United States v. Cruikshank was the first case in which the Supreme Court had the opportunity to address a claim under the Second Amendment.¹⁵ After the Civil War and emancipation, the 14th Amendment and various civil rights laws were enacted. Federal

¹⁴ Id. at 450 - 451(emphasis added).

¹⁵ *United States v. Cruikshank*, 92 U.S. 542 (1876).

prosecutors, invoking the new civil rights laws, brought cases against Klu Klux Klan members and others who had violated the civil rights of newly freed African-Americans. Many of these prosecutions involved charges that the defendants violated the Second Amendment rights of freedmen by confiscating the freedmen's firearms.¹⁶

One of these cases, *United States v. Cruikshank*, went to the United States Supreme Court. *United States v. Cruikshank* arose out of the disarmament and murder of freed blacks in the Colfax courthouse in Louisiana (this incident is also commonly known as the "Colfax Massacre" and the "Grand Parish Massacre"). Certain Klu Klux Klansmen were subsequently charged by a federal prosecutor, under the Enforcement Acts, with a conspiracy to prevent African-Americans from exercising their civil rights, including the right of peaceful assembly and the right to keep and bear arms.¹⁷

¹⁶ See Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 Emory L.J. 921 (1984).

¹⁷ See 16 Stat. 140 § 6 (1870); see also 18 U.S.C. §§ 241-242 (1994).

In the trial court, Judge William Woods (who would later become a United States Supreme Court Justice) gave the following jury instruction:

The right of peaceable assembly is one of the rights secured by the constitution and laws of the United States. . . . The fact that they assemble with arms, provided these arms are to be used not for aggression, but for their protection, does not make the assemblage any the less a peaceable one. . . . The right to bear arms is also a right secured by the constitution and laws of the United States. *Every citizen of the United States has the right to bear arms, provided it is done for a lawful purpose and in a lawful manner.*

"The Grant Parish Prisoners," *New Orleans Republican*, March 14, 1874, at 1 (emphasis added).

The convictions were appealed to the United States Circuit Court. Circuit Justice J. S. Bradley overturned the convictions. Even though he acknowledged that the right to assemble and the right to bear arms were protected even from state government action, he concluded, that, "[i]n none of these counts is there any averment that the state had, by its laws interfered with any of the rights referred to"*United States v. Cruikshank*, 25 Fed.Cas. 707, 714-15 (C.C.D.La. 1874).

The Supreme Court recognized that the right to peacefully assemble and the right of the people to keep and bear arms were natural rights which even preexisted the Constitution.¹⁸ The Court stated, however, that the First and Second Amendment rights were protections against the federal government only, and that these rights did not restrict state government action.¹⁹ The Court held that because these fundamental rights existed independently of the Constitution, and because the First and Second Amendments guaranteed only that these rights shall not be infringed by the federal Congress, the federal government had no power to punish a violation of these rights by the Klansmen, who were private individuals.²⁰ In other words, while the Second Amendment protected a citizen from having his right to keep and bear arms violated by the federal government, the Second Amendment did not protect a citizen from the acts of other private persons. Incidentally, the Court treated the First Amendment claim the same way, holding that the First Amendment “was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.”²¹

Clearly, the Supreme Court considered the right to keep and bear arms (and the right to peaceably assemble) as a fundamental individual civil right of each citizen, which the federal government could not infringe. And again, nowhere in the opinion does the Court state that these rights protected only the state government, as opposed to individual citizens. The Court never even suggested that the Second Amendment guaranteed only a state’s right to maintain militias rather than an individual citizen’s right to keep and bear arms.

Presser v. Illinois involved an Illinois statute which did not prohibit the possession of arms, but merely prohibited “bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law

¹⁸ Id. at 551 and 553.

¹⁹ Id. at 552-553.

²⁰ Id. at 553.

²¹ Id. at 552.

... .”²² Herman Presser was indicted for parading a private military unit of 400 armed men through the streets of Chicago without obtaining the required license. The Court concluded that the Illinois statute did not infringe the Second Amendment since the statute did not prohibit the keeping and bearing of arms but rather prohibited the forming of private military organizations and the performance of military exercises in town by groups of armed men without a license to do so. The Supreme Court found that laws prohibiting the formation of private military organizations simply “do not infringe the right of the people to keep and bear arms.”²³

The Supreme Court seemed to affirm the holding in *Cruikshank* that the Second Amendment protected individuals only against action by the federal government.²⁴ “The amendment is a limitation only upon the power of Congress and the National Government, and not upon the States. It was held so by this Court in *United States v. Cruickshank*.”²⁵ However, in the very next paragraph, the Court suggests that state governments can not forbid individuals to keep and bear arms.²⁶ After stating that “[i]t is undoubtably true that *all citizens capable of bearing arms constitute the . . . reserve militia*,” the Court held that the “States cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government.”²⁷

As the Court had already held that the substantive right to keep and bear arms was not infringed by the Illinois statute since that statute did not prohibit the keeping and bearing of arms but rather prohibited military-like exercises by armed men, the Court

²² *Presser v. Illinois*, 116 U.S. 252, 264-265 (1886).

²³ *Id.* at 265.

²⁴ *Id.* at 265.

²⁵ *Id.* at 265.

²⁶ *Id.* at 265.

²⁷ *Id.* at 265 (emphasis added).

concluded that it did not need to address the question of whether the state law violated the Second Amendment as applied to the states by the Fourteenth Amendment.

Once again, the Supreme Court never held or even suggested that the Second Amendment guaranteed a state's right to maintain militias rather than an individual citizen's right to keep and bear arms.

In *Miller v. Texas*, the United States Supreme Court confirmed that it had never addressed the issue of the Second Amendment applying to the states through the Fourteenth Amendment.²⁸ This case remains the latest word on this subject by the Supreme Court.

In this case, the defendant challenged a Texas statute on the bearing of pistols as violative of the Second, Fourth, and Fourteenth Amendments. The problem for Miller was that he failed to timely raise these defenses in the state trial and appellate courts, raising these issues for the first time in the U.S. Supreme Court, after his conviction had been affirmed by a state appellate court. While the Court held that the Second and Fourth Amendment (prohibiting warrantless searches), of themselves, did not limit state action (as opposed to federal action), the Court did not address the defendant's claim that these constitutional protections were made effective against state government action by the Fourteenth Amendment, because Miller did not raise these issues in a timely manner. Reiterating *Cruikshank* and *Presser*, the Supreme Court first found that the Second and Fourth Amendments, of themselves, did not limit state action. The Court then turned to the claim that the Texas statute violated the rights to bear arms and against warrantless searches as incorporated in the Fourteenth Amendment. But because the Court would not hear objections not made in timely fashion, the Court refused to consider Miller's contentions. Thus, rather than reject incorporation of the Second and Fourth Amendments in the Fourteenth, the Supreme Court merely refused to decide the

²⁸ *Miller v. Texas*, 153 U.S. 535 (1894).

defendant's claim because its powers of adjudication were limited to the review of errors timely assigned in the trial court. The Court, thus, left open the possibility that these constitutional rights were made effective against state governments by the Fourteenth Amendment.

Again, it should be noted that in this case, as in the other Supreme Court cases, the defendant was not a member of the Armed Forces, and yet the Supreme Court did not dismiss Miller's claim on that ground; thus, Miller, as a private citizen, did enjoy individual Second Amendment protection, even if he was not enrolled in the National Guard or Armed Forces.

Robertson v. Baldwin did not involve a Second Amendment claim, but in discussing the Thirteenth Amendment, the Court again recognized the Second Amendment as a "fundamental" individual right of citizens; which, like the other fundamental rights, is not absolute.²⁹

The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. . . . Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons³⁰

Once again, nowhere in the opinion does the Court suggest that these fundamental rights protect only a state government, as opposed to the individual citizen. Furthermore, the reference to state laws that prohibited the carrying of concealed weapons by individuals suggests that the Supreme Court viewed the Second Amendment as being a

²⁹ *Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897).

³⁰ *Id.* at 281-282.

protection for individual citizens against not only interference by the federal government but also against interference by state governments.

United States v. Miller was the first case in which the Supreme Court addressed a federal firearms statute which was being challenged on Second Amendment grounds.³¹ The defendants, who had been charged with interstate transportation of an unregistered sawed off shotgun, challenged the constitutionality of the federal government's National Firearms Act of 1934 ("NFA"). The NFA, a tax statute, did not ban any firearms, but required the registration of, and imposed a \$200 transfer tax upon, fully automatic firearms and short barreled rifles and shotguns. The federal trial court held that the NFA violated the defendants' Second Amendment rights. After their victory in the trial court, defendant Miller was murdered and defendant Layton disappeared. Thus, when the U.S. government appealed the case to the Supreme Court, no written or oral argument on behalf of the defendants was presented to the Supreme Court.

Gun prohibitionists often cite this case for the proposition that the Court held that the Second Amendment only protected the right of the states' National Guard to have government issued arms (i.e., the "Collective Rights" theory). This is an untruth. In fact, the Court held that the entire populace constituted the "militia," and that the Second Amendment protected the right of the individual to keep and bear militia-type arms. Recounting the long history of the "militia" in the colonies and the states, and the Constitutional Convention, the Court stated that these "show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense."³² The Court also made clear that it was the private arms of these men that were protected. "[O]rdinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."³³

³¹ *U.S. v. Miller*, 307 U.S. 174 (1939)

³² *Id.* at 179.

³³ *Id.*

Recounting the origins of this all inclusive “militia,” the court quoted historian H. L. Osgood: “In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms”³⁴ The Court referred to various colonial militia statutes which required the individual ownership of arms and ammunition by its citizens. In setting forth this definition of the militia, the Court implicitly rejected the “Collective Rights” view that the Second Amendment guarantees a right only to the organized military forces of the states.

The Court held that the defendant’s right to possess arms was limited to those arms that had a “militia” purpose. In that regard, it remanded the case to the trial court for an evidentiary hearing on whether or not a short barreled shotgun has some reasonable relationship to the preservation or efficiency of the militia.

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.³⁵

Thus, in order for a firearm to be constitutionally protected, the Court held, the firearm should be a militia-type arm.

Most importantly, the Court did not require that Miller and Layton (neither of whom were members of the National Guard or Armed Forces) be members of the National Guard or Armed Forces in order to claim Second Amendment protection. Nor did the Supreme Court remand the case for the trial court to determine whether Miller and Layton were members of the National Guard or Armed Forces. Clearly, under the Court’s ruling, Miller and Layton had a right to claim individual Second Amendment protection,

³⁴ Id. (quoting Osgood).

³⁵ Id. at 178.

even if they were not members of the National Guard or Armed Forces. Thus, the case stands for the proposition that “the people,” as individuals (not the states), had the constitutionally protected Second Amendment right to keep and bear any arms that could be appropriate for militia-type use.

The bottom line is that the Supreme Court did not hold that Miller and Layton had no Second Amendment protection, even though they were not members of the Armed Forces. The Court recognized that these defendants had such Second Amendment rights, and remanded the case to the trial court simply for a finding as to whether the particular firearm (a sawed off shotgun) was constitutionally protected. The test thus focuses on the status of the firearm, not the status of the individual, requiring that the firearm show “some reasonable relationship to the preservation or efficiency” of the militia, which militia comprised all citizens capable of bearing arms.

Lewis v. United States involved a Fifth Amendment challenge to the federal law prohibiting the possession of firearms by convicted felons.³⁶ The defendant Lewis had been charged under that provision of the Omnibus Crime Control and Safe Streets Act of 1968 which prohibits the possession of firearms by convicted felons.³⁷

The Supreme Court noted that convicted felons are subject to the loss of numerous fundamental rights, including the right to vote, hold office, etc.³⁸

Thus, the Court found that the federal prohibition at issue was not violative of the Fifth Amendment. “The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment . . .”³⁹ In a footnote to this statement, the Court, noted that “[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they

³⁶ *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915 (1980).

³⁷ 18 U.S.C. § 922(g).

³⁸ 445 U.S. at 66, 100 S.Ct. at 921.

³⁹ 445 U.S. at 65, 100 S.Ct. at 921.

trench upon any constitutionally protected liberties.”⁴⁰ The Supreme Court then, citing *United States v. Miller*, reaffirmed that a firearm, in order to be constitutionally protected, must have a militia-type purpose.⁴¹ As in the *Miller* case, the Court did not hold that a person must be a member of the Armed Forces in order to assert Second Amendment protections.

In 1997, in *Printz v. United States*, the Supreme Court struck down as unconstitutional parts of the Brady gun control law on Tenth Amendment grounds.⁴² Specifically, the Court held that the law’s requirement that local law enforcement officials conduct background checks on handgun purchasers violated the States’ powers under the Tenth Amendment.⁴³ Although the Second Amendment was not at issue, in a concurring opinion, stated the following:

In *Miller*, we determined that the Second Amendment did not guarantee a citizen’s right to possess a sawed-off shotgun because that weapon had not been shown to be “ordinary military equipment” that could “contribute to the common defense.” . . . The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment. . . . Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.”⁴⁴

A number of recent United States Supreme Court cases that did not involve Second Amendment or firearm issues have nevertheless referred to the Second Amendment as a fundamental individual right. In 1977, in *Moore v. City of East Cleveland*, a Fourteenth Amendment due process case, the Supreme Court put the right to keep and bear arms in company with other individual rights guaranteed by the Bill of

⁴⁰ *Id.*, n. 8.

⁴¹ *Id.*

⁴² *Printz v. United States*, 521 U.S. 898 (1997).

⁴³ *Id.*

⁴⁴ 521 U.S. at 938, n.1 and n.2.

Rights: “the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures . . .”⁴⁵

In *Planned Parenthood of Southeastern Pa. v. Casey*, a 1992 abortion case, the Supreme Court again quoted Justice Harlan’s above noted list of individual rights.⁴⁶

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. As the second Justice Harlan recognized: “[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”⁴⁷

Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. . . The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights.⁴⁸

In *United States v. Verdugo-Urquidez*, a 1990 Fourth Amendment case, the Supreme Court interpreted the meaning of the term “the people” in the Bill of Rights.⁴⁹ The Court stated that the term “the people” in the Second Amendment had the same

⁴⁵ *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (quoting Justice Harlan’s dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 543).

⁴⁶ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992).

⁴⁷ 505 U.S. at 848 (emphasis added) (quoting Justice Harlan’s dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 543).

⁴⁸ 505 U.S. at 847.

⁴⁹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056 (1990) (holding the Fourth Amendment warrant requirement inapplicable to the search of a home in a foreign country).

meaning as in the Preamble to the Constitution and in the First, Fourth, and Ninth Amendments.⁵⁰

. . . “[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.” See also U.S. Const., Amdt. 1 (“Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble”) (emphasis added); Art. I, 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year *by the people of the several States*”) (emphasis added). While this textual exegesis is by no means conclusive, it suggests that “the people” protected by the Fourth Amendment, and by the First and Second 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 or who have otherwise developed sufficient connection with this country to be considered part of that community.⁵¹

In other words, the term “the people” means at least all citizens and legal aliens in the United States. This case thus makes clear that the Second Amendment is an individual right that applies to individual law-abiding Americans.

This, of course, is entirely in keeping with the intent of the drafters of the Bill of Rights and also the Supreme Court’s interpretation of the rights guaranteed in the Bill of Rights. The First Amendment’s “right of the people peaceably to assemble, and to petition . . .” has been repeatedly held by the Supreme Court to guarantee an individual and not merely a collective right.⁵² The Fourth Amendment’s “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” has likewise been held to guarantee an individual right.⁵³ The Ninth Amendment’s “rights . . . retained by the people” has also been held to refer to individual

⁵⁰ 494 U.S. at 265, 110 S.Ct. at 1061.

⁵¹ 494 U.S. at 265, 110 S.Ct. at 1060-1061.

⁵² U.S. CONST. Amend. I. See, e.g., *Schneider v. Smith*, 390 U.S. 17, 25 (1968); *Shelton v. Tucker*, 364 U.S. 479 (1960).

⁵³ U.S. CONST. Amend. IV. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Boyd v. United States*, 116 U.S. 616 (1886).

rights.⁵⁴ In these uses of the phrase “right of the people” in the Bill of Rights’ reference to individual rights and not to states’ rights has repeatedly been upheld. Indeed, the Tenth Amendment reiterates the distinction between individual rights and states’ rights: “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.”⁵⁵ Lastly, the United States Supreme Court, in *Valley Forge College v. Americans United*, rejected the theory that some Bill of Rights freedoms “are in some way less ‘fundamental’ than” others.⁵⁶ “[W]e know of no principled basis on which to create a hierarchy of constitutional values”⁵⁷

Contrary to the assertion of the gun prohibitionists, the Second Amendment protects the same “people” as the other rights guaranteed in the Bill of Rights; namely you and me. This, of course, is entirely in keeping with the intent of the drafters of the Bill of Rights and also the Supreme Court’s interpretation of the individual rights guaranteed in the Bill of Rights.

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⁵⁴ U.S. CONST. Amend. IX. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94-95 (1947)

⁵⁵ U.S. CONST. Amend. X.

⁵⁶ *Valley Forge College v. Americans United*, 454 U.S. 464, 484 (1982).

⁵⁷ *Id.*

