A JUDICIAL STRAIGHT JACKET

by Larry Rybka
yrkba@aol.com

"I know of no safe depository of the ultimate powers of society, but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion..."

~~ Thomas Jefferson, 1821

INTRODUCTION

In the 1999 case of United States of America v. Emerson, the federal District Court for the Northern District of Texas concluded that the Second Amendment to the United States Constitution protects an individual right to firearms ownership. Emerson is now before the Fifth Circuit Court of Appeals which, in the 1993 case of United States v. Lopez, found the federal Gun Free School Zones Act to exceed the commerce power of Congress. Later, the Supreme Court affirmed the Fifth Circuit's decision.

The Circuit Court remarked that the Second Amendment was "something of a brooding omnipresence" during the Lopez deliberations. Consequently, in its heavily glossed Emerson case brief, the government is literally "throwing the book" at the Second Amendment's individual rights interpretation. If the District Court's decision somehow survives, the Supreme Court will be revisiting an issue they have successfully skirted for the last half century. During this period, federal appellate courts have nearly misconstructed the constitutional right to keep and bear arms out of existence. For example, in the western states, no individual has standing to raise a Second Amendment claim, since in 1996 the Ninth Circuit Court of Appeals ruled that the Second Amendment only addresses a state's right. Although it's possible to plead the Second in the other circuits, no one has yet unraveled the straight jacket into which mid level federal courts have harnessed the amendment, where it seems that the right to keep and bear arms only belongs to an active National Guardsman.

If a private right to arms is eventually declared to exist in the language of the Second Amendment, a future Supreme Court would not only have to unmask 6 decades of judicial sophistry, but also explain how an individual right that "shall not be infringed" is unimpaired by a cobbled patchwork of repressive federal, state, and local regulations. At the least, the Second Amendment ought to protect the right of a law abiding American to own a military-style rifle, the very weapon whose possession is being criminalized today.

Controversy over the Second Amendment exists, in part, because there has never been a definitive nationwide ruling on what the amendment protects. Although favorably mentioning "the right of the people to keep and bear arms" in over a score of opinions throughout the years, only once in the entire 20th century was the Supreme Court forced to decide a Second Amendment issue. Thus the 1939 case of United States v. Miller, denying Second Amendment protection to possession of a sawed-off shotgun, has been commandeered to establish a "state's right," and to deny an "individual right" to arms.

However, key words like "state's right, collective right, National Guard" appear nowhere in the text of the Miller decision.

Since Miller is cited by all federal courts, it is frequently summoned to support antigun rhetoric. A common ruse is to claim, first, that the Supreme Court has consistently ruled against an individual right to keep and bear arms; then, to mix in unidentified anti-individual rights quotes, like those from the ACLU. Unless the reader is sufficiently familiar with antigun literature to recognize the source of the quote, or has access to the entire text of a particular case, he is likely to think that the Supreme Court is on the record for rejecting an individual rights interpretation. This has never occurred. In 1960 Justice Hugo Black, a member of the 1939 Miller Supreme Court, authored an article on the Bill of Rights, in which the Second Amendment was treated as protecting individual liberty, rather than as a right of states. He could not have categorized the Second Amendment in such a way if the Miller court had truly set a precedent denying an individual right to arms.

In the 1997 case of Printz v. United States, where the Supreme Court invalidated sections of the Brady law, Justice Clarence Thomas explained that

> "This Court has not had recent occasion to consider the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a personal (court's emphasis) right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections...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.'"

In a footnote referring to the 1939 Miller decision, Justice Thomas indicated that the Miller Court

> "...did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment."

THE MILLER LEGACY

One can better understand the Miller legacy by exploring the case's background. Frank Miller and Jack Layton were arrested for transporting a sawed off shotgun across state lines without the required government paperwork, a violation of the National Firearms Act. In 1934, during congressional hearings on the proposed act (passed solely as a revenue measure), U.S. Attorney General Homer Cummings stated that the federal government could not ban weapons outright, because it had:

> "no inherent police power to go into certain localities and deal with local crime."

Consequently, an Arkansas Federal District court held that section 11 of the NFA violated the Second Amendment, and agreed with defendants Miller and Layton that since the government failed to state a justiciable claim, they were not compelled to answer the charges against them. The District court quashed their indictment, and they were free to go. Accordingly, they both disappeared from the scene. Meanwhile, the government directly appealed to the Supreme Court, which did not select the case on its own merits.

It's often said that bad cases make bad case law, and the anomalous Miller certainly falls into that category. As a controlling authority, its rule was extracted from a case which was never tried in any court. Neither the defendants nor their attorneys appeared before the Supreme Court, forcing the Justices to hear only the government's side. Thus the ruling was essentially a statement on the part of the government. The Justices were unaware that short barreled shotguns were widely used in World War One, since the Court said it could not take "judicial notice" that a short barreled shotgun had any military utility. So they ruled that

> "in the absence of any evidence" presented from the other side, the Court could "...not say that the Second Amendment guarantees the right to keep and bear such an instrument."

Since it was not unreasonable for civilians to own militia weapons, it was unnecessary for the Court to say who had the Second Amendment right to possess them, but we can infer their belief with a high degree of confidence.

The Justices must have implicitly believed that the Second Amendment protected an individual right of all Americans. If they thought the right only belonged to members of a well-regulated militia, they would not grant standing to a couple of bootleggers, and could have vacated the District court on those grounds alone. Moreover, the Supreme Court was not persuaded by the government's collective rights case theme: that the Second Amendment did not encompass keeping firearms for personal reasons. If the Justices were truly hostile to the concept of individually armed citizens, they would have said that the founders only intended to secure state militias, and that a personal right to arms did not exist. No lower court judge would ever have to put words in their mouth. After the Court's detailed discussion of the early history of the militias, they could have concluded that now, with the modern National Guard, the founder's goals of assuring the continuation of the militia had finally been achieved, and the nation no longer needed to guarantee private firearms ownership. A foundation for this line of reasoning had already existed, in reports on the National Guard Bill of 1933. Indeed, various firearm registration and prohibition schemes were debated in the early 1930's.

Instead, the Supreme Court chose to characterize the intent of the declaration and guarantee of the Second Amendment, as one which was meant to continue, in an ongoing effort, to render effectivity to "all males physically capable of acting in concert for the common defense," who were familiar with "arms supplied by themselves and of the kind in common use at the time." The 1840 Tennessee case of Aymette v. State is twice cited by the Court to define the "common defense" aspects of the right to keep and bear arms. The Aymette court defined "common" not as collective or exclusive, but "belonging equally to more than one, or to many indefinitely;" and stated that if:

> "the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority."

One can deduce that if the Miller Supreme Court had evidence of a militia nexus to the weapon in question, they would probably have ruled that it's possession was protected by the Second Amendment, and the taxing and registration aspects of the 1934 NFA would not apply. In fact, the case was remanded to the District court to explore that very possibility. Unfortunately, the investigation never materialized.

The Miller rule evolved into a tool of judicial deconstruction, but it made no impression on Congress in the years to come. In 1940 Robert Jackson, who personally argued the collective right's case theme rejected in Miller, was before Congress as the new Attorney General, pleading for civilian gun registration in the interest of national security. However, in the Property Requisition Act of 1941, not only did the Congress reject his registration proposal, but inserted language specifically reaffirming the Second Amendment right of individual Americans to possess firearms for personal reasons, which the government was forbidden to infringe upon.

In 1942, the First Circuit Court of Appeals, in Cases v. United States, took the lead in rebelling against the Miller rationale, which supported firearms ownership as a matter of public policy. Miller's previous test, of a weapon's "reasonable relationship," was altered by qualifying that the "claimant of Second Amendment protection must prove that his or her possession of the weapon was reasonably related to a well regulated militia." Thus, the path was cleared to comfortably mold future Second Amendment doctrine as if it were common law. In turn, federal appellate courts have successfully crafted their reasonableness criteria to distort the amendment's original understanding, and their apparent foundation in the bedrock of Miller is merely a cover to justify outcome-based decision making. A wall of precedent was erected upon consecutive narrow holdings, the crux of which stated that criminals can not possess firearms. However, judge's remarks incidental to these holdings, but which do not normally determine case law, were used in subsequent opinions to further advance the federal government's monopoly of force.

Similar to the circular logic displayed in the movie "Catch-22", what one could call modern Second Amendment "Catch-2" reasoning goes something like this: 1. only the use of a military-style weapon can reasonably contribute to the efficiency of well-regulated militia, 2. but since only an active military member can reasonably have a right to possess such a weapon, the citizen's claim of Second Amendment protection is denied. Even if one is an inactive Guardsman, in the reserves, or in a military academy, he still has to comply with federal firearms law. Any potential infringement of his Second Amendment rights has already been found reasonable under the "rational relationship" test for Equal Protection, under the Fifth Amendment's Due Process clause, which has become the judiciary's rubber stamp for gun control.

Since the function of the organized constitutional militia has been taken over by the federally armed and controlled National Guard, the practical meaning of a Second Amendment right, as defined by federal courts, is that Congress can not disarm it's own soldiers. In this light, it is unnecessary to distinguish whether the right is individual or collective, since no one can claim it. Any arguments to the contrary are tossed out as irrelevant historical residue. As authority for their rulings, federal courts bounce opinions off each other like rebounding pin balls, eventually coming to rest on Miller. Their approach is that since the Second Amendment right to keep and bear arms is not absolute, it's fair

game for judicial dismembering. The result has been that use or possession of any weapon by any individual has never been found, at least by the mid level federal judiciary, to contribute to the preservation of any lawfully organized militia.

Two corresponding assumptions, either of which is sufficient, must be present for a court to invoke the "Catch." First assumption: the declaratory clause, "A well-regulated militia, being necessary to the security of a free state," is really an escape clause for government revocation of the right. Although a fraudulent distortion of original understanding, this approach was used in the 1992 case of United States v. Hale. Citing a research paper written by chief counsel for Handgun Control Inc., the Eighth Circuit Court of Appeals wrote that at one time, "the Second Amendment prevented federal laws that would infringe upon the possession of arms by individuals and thus render the state militias impotent. Over the next 200 years, state militias first faded out of existence and then later reemerged as more organized, semiprofessional military units." Because Hale was not a member of one of these units, he had his Second Amendment rights revoked.

The second assumption needed to invoke the "Catch": in the operative clause, "the right of the people to keep and bear arms, shall not be infringed," the word "people," taken as the collective people, really means "states." This argument has been cleverly forged into an exclusive right of state governments, which no individual can invoke. But if the language of the Second Amendment only protected a right of states to form militias, why would state constitutions also contain the same language in their right to arms guarantees? How could a state infringe on its own right to keep and bear arms? To answer that the amendment guarantees a right to everyone which no one can assert is a contradiction, as the concept of a right requires the capability of independent action. Moreover, a personal attribute can not exist in the whole people, and be impossible to find in any one person. This idea, of government holding fundamental personal rights as being nominal rights "in the collective," was one of the grievances which led to the American Revolution. The Crown and its supporters argued that all Englishmen were "virtually" represented in Parliament, regardless of their ability to actually partake in choosing its members (no taxation without representation).

Anti gunners proclaim the ambiguous Miller ruling, and its disingenuous spin-offs, as proof that individuals have no right to keep and bear arms. Some argue that the right is limited to the "collective people" of each state, intended solely for the maintenance of an effective state militia, and furthermore, that this was the intent of the framers. If true, then the collective "state's right" explanation of the Second Amendment, adopted by federal courts, must have been one of the most closely guarded secrets of the eighteenth century. According to Stephen P. Halbrook, a recognized authority on the subject, no written evidence from the period between 1787 and 1791, when the Bill of Rights was debated and adopted, directly states such a thesis. The idea is solely a twentieth century concoction.

Others ignore intent and say that any individual nature of the right ceases to exist once the necessity for a well-regulated militia is no longer apparent. However, constructing the Second Amendment's guarantee exclusively in the context of the militia is a fallacy. Suppose the founders wanted to establish an arms guarantee for the people. They could propose that "if a well-regulated militia is necessary for the security of a free state, then the right of the people to keep and bear arms shall not be infringed." But in an argument which proceeds from a supposition, assumed to be true for the sake of analysis, the premise need not be true in order to establish the argument's conclusion. Thus even if a militia is unnecessary for a free state, the people will still retain the right to arms, as the conclusion

(the arms guarantee) is framed in the operative clause's universal language. [KABA Note, in support of author's flow: See The Command in the Second Amendment of the Bill of Rights.]

Another variation of the anti-rights theme is one which states that modern citizens of the republic no longer possess the tradition of civic virtue to be trusted with arms. However, if citizens have lost virtue, perhaps they should not be allowed to sit on juries. Also, since ideas precede action, perhaps it is too dangerous to allow citizens to speak freely.

NO RIGHT OF STATES

In Federalist 15, Alexander Hamilton explains

> "The great and radical vice in the construction of the existing [Articles of] Confederation is in the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of whom they consist."

In "The Antifederalist Papers and the Constitutional Convention Debates," Ralph Ketchum recollects another of Hamilton's observations, that

> "As states are a collection of individual men which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition? Nothing could be more preposterous or absurd than to sacrifice the former to the latter."

Also during the debates, James Wilson asked his fellow delegates

> "Can we forget for whom we are forming a government? Is it for men, or for the imaginary beings called states? Will our honest constituents be satisfied with metaphysical distinctions?"

In Federalist 45, James Madison asked

> "...was the blood of thousands split, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual states, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?"

Even when officially disarmed of militia weapons by royal decree, seventeenth century Englishmen were frequently allowed to keep arms of personal defense. The Glorious Revolution of 1688, which abolished the standing army of James II, relocated the militia power in the people, not the crown. The English Bill of Rights of 1689 guaranteed that

subjects had the right to possess arms, not as a political duty, but "for their own defense." Constitutional authority William Blackstone described the English right as an embodiment of the natural rights of resistance and self-preservation. The U.S. Supreme Court later recognized this legacy of arms bearing in the 1897 case of Robertson v. Baldwin, in stating that

> "...the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors..."

In light of this heritage, why would the Founding Fathers, having just fought a war to rid themselves of tyrannical government, secretly intend that the right to keep and bear arms be only guaranteed to government, and not to themselves and their descendants?

It was universally accepted by the people who adopted the Constitution, that the militia and army existed on opposite ends of the military spectrum. Alexander Hamilton, among other Federalists, believed that if an army of the United States ever turned into a standing army, freedom would have already been extinguished and the people, without virtue, would be "ripe for the most corrupt government." Thomas Jefferson believed that "none but an armed nation could dispense with a standing army." Discussing the militia during ratification debates on the proposed Constitution, George Mason explained that they consisted of "the whole people, except for a few public officers." Elbridge Gerry, speaking to the House Committee on Amendments in 1789, described the militia's purpose as one which would "prevent the establishment of a standing army, the bane of liberty." Comparing proposed amendments for a Bill of Rights, more were submitted to guarantee a people's right to arms than for a right to free speech. James Madison, who presented the amendments to Congress, intended to insert them in the body of the Constitution. The right to arms amendment was to go in Article 1, Section 9, along with other personal rights, and not with the Section 8 militia clauses.

In 1783 George Washington, after conferring with his war generals, submitted a plan to the Continental Congress for a "well organized militia," a highly trained fraction of the regular militia, to "pervade all the states." His plan was rejected. Eventually, the Militia Act of 1792 was adopted. This act prevented the formation of a select militia, which was seen as the prelude to a government monopoly on the possession of arms, exactly what the "state's right" interpretation seeks to achieve. Influential patriots like Richard Henry Lee believed that a select militia would produce "an inattention to the general militia," and eventually men with families and property would be "without arms, without knowing the use of them, and defenseless." He also foresaw a select militia weakening the posse comitatus, resulting in military officers, instead of the sheriff, being called out to "introduce an entire military execution of the laws." Thus gun controllers are wrong in asserting that the National Guard is the "well-regulated militia" of the Second Amendment. Today's Guard is a select militia, a hybrid of state militias and the federal army, created when the National Guard Bill of 1933 was adopted. House report 141 of May 16, 1933 reveals how the constitutional militia would be reorganized into a select militia under the Constitution's Army clause. The Congressional Record of June 5th, 1933 voices opposition to the tactic of ramming the bill through Congress under a suspension of the rules. In 1990, a unanimous Supreme Court found that the Constitution's militia clauses did not limit federal authority over these reorganized select militias.

The Second Amendment's militia declaration, a mini-preamble common to rights declarations of the founding era, was not intended to trump the operative clause. As an eighteenth century classical republican political statement, it merely expressed a preference for the militia over the regular army. In the nineteenth century, a few state courts used militia declarations to derive a "civilized warfare" test, by which civilians had a constitutional right to possess only those arms suitable for military use. However, not every state constitution mentioned the militia in its own right to arms guarantee, and citizens of these states had an equal right to possess military arms.

Since the Second Amendment's militia clause is often seized upon to deny an individual rights reading, the Second Amendment itself must be read in pari materia, as observed by the Texas District court in the Emerson case. This is a rule of statutory construction which requires that when a section is ambiguous, intent is best understood by reading the statute in the whole, and not parsing out in sections whatever meaning one is predisposed to desire. Jefferson wrote that in future constitutional questions, instead of trying to squeeze out certain meanings from the text, we should recollect the spirit of the debates, and conform the textual meaning to the probable one in which it was adopted. In the words of Thomas Cooley, the most influential constitutional authority of the late 19th century, and noted by the Supreme Court in the Miller case,

> "It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent...the meaning of the provision undoubtedly is that the people from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose."

The Virginia ratifying convention proposed a separate amendment to the Constitution, in addition to one which guaranteed the people's right to keep and bear arms. This would have guaranteed to each state the same militia powers delegated to Congress. In their "state's right" argument, gun-grabbers have attempted to use this Virginia proposal as evidence that the Second Amendment was only meant to protect the interests of state governments (forbidden to keep troops), in maintaining an armed force to insure survival against a hostile central government. However, when Congress debated the amendments, Virginia's proposal to grant each state explicit militia powers was rejected. In the 1886 case of Presser v. Illinois (cited in Miller footnotes), the U.S. Attorney General pointed out in a case brief to the Supreme Court, that the power of state governments to provide for the organization of their militias was not derived from the Constitution, since that authority existed before the Constitution was drafted, and was not prohibited by its adoption. By forbidding Congress to disarm the people, the Second Amendment guaranteed that an armed citizenry would always be available to form state militias, and more important, that the Federal government would never possess a monopoly of destructive force over the American people, as the King of England once had over the colonists.

FALLACY OF STATE'S RIGHT

Supporters of the proposed Constitution took the position that through the authority of the people, the colonies had declared their independence united; they had always been parts of one whole, and never separate from one another. Therefore, interests of the nation, and not

the states, must bind any future union. This view was later endorsed by Chief Justice John Marshall in the landmark case of McCulloch v. Maryland, which interpreted Congress' implied powers under the "necessary and proper" clause. According to Marshall, the Federal government emanates from the people and not from the states, thereby drawing its authority directly from the people. So if congressional authority could not be derived from the states, neither could authority under the Second Amendment be found there. Any institution like a "state's right" militia, artificially crafted to resist legitimate federal power under the guise of upholding state power; indeed the very language which attempted to construct such a mechanism in each state, would be in conflict with the Constitution's "supremacy" clause. Even the Anti-Federalists knew this.

It was obvious that the proposed Constitution was not merely a compact among sovereign states. Samuel Adams wrote that someone under this assumption should "stumble at the threshold," upon reading the Constitution's opening words. In its operation, the Constitution would create a powerful national government in which a Bill of Rights was needed as a bulwark against gradual encroachment of the legislature. Many agreed with Madison that the greatest danger to private rights came from government becoming the mere instrument of the majority. The "gun rights lobby," in their support of the politically incorrect Second Amendment, is one of the factions described by Madison in Federalist 10, as inherently requisite to preserve liberty in a geographically large republic.

Remarking that it was impossible for dual sovereignties (state and federal) to peacefully coexist in the same location, Anti-Federalists warned that through the "necessary and proper" and "supremacy" clauses; combined with taxing, commerce, and militia authority, the national government would some day be empowered to seize control of the militias as if they were a standing army, or worse yet, to totally immobilize them, and then attempt to disarm the people. A government with the purse in one hand and the sword in the other would not differ much from that of a King. However, in pronouncing that the right of the people to keep and bear arms shall not be infringed, the Second Amendment was structured to be the final safeguard against an internal consolidation of political power and military force. When the Federalist papers (# 26, 28, 46, 60) describe ultimate checks on federal power, it is in reference to this defense, by the people, of their own rights.

In Federalist 46, James Madison criticized those who were ignoring the role of the people, by miring themselves in the controversy between state and federal divisions of power, in the quest to prevent usurpation of each other's authority. Wondering how potential rivals could possibly think they would be "uncontrolled by any common superior," he reminded his audience that ultimate authority resides in the people alone. Later in the same essay, using a hypothetical example of a federal attempt to tyrannize, he described how it could be successfully resisted by force of arms, organized through the state governments, but only if the people were on their side.

Were the "people" of the Second Amendment an undifferentiated mass, the collective "body of the people," as the anti-gunners claim? In reaching the final form of the right to arms guarantee, collective language such as "body of the people," "trained to arms," and "for the common defense," were all removed from the text of what became the Second Amendment. In 1990, the Supreme Court explained that "the people" was a term of art used in select parts of the Constitution to mean a class of persons who are part of the national community. According to the high Court's previously established guidelines, the first 10 amendments should also be read in pari materia. Thus the "people" in the Second Amendment must be the same as those in the Preamble, Article 1, and in Amendments 1, 4, 9, and 10. Anything less would imply a conspiracy of equivocation on the part of the

founders, by secretly shifting the meaning of words to render meaningless a people's right to arms. Chief Justice Marshall, declaring that the patriots meant what they said, deduced an elementary test of constitutional construction: that it could not be presumed that any clause in the Constitution was intended to be without effect. Thus no interpretation of a constitutional provision should nullify its plain meaning. But this is the effect of a "state's right" construction.

A further distinction must be drawn whether "the people" in the Second Amendment are defined as the whole people of the entire nation, wherever they are found; or whether they are defined as those people solely within each of the several states, each state's numbers added together. This understanding is crucial because of its implications underlying the concept of "the people" as the sovereign, those on whose authority the government was established. In the 1995 case of U.S. Term Limits, Inc. v. Thornton, a majority of the Supreme Court made clear that "the people" of the United States are all the people, who together exercise the attributes of sovereignty, and where each person, wherever he resides, has an interest in any legislation which affects his share of sovereign power. Under this line of reasoning, the right of the people to keep and bear arms can not be compartmentalized within each state, because the sovereign people did not delegate authority from such a base, but from the whole. Not only is a right of "states only" to keep and bear arms implausible in this light, but attempts to restrict firearms ownership to police and military would undoubtedly be unconstitutional. As constitutional authority William Rawle has put it,

> "No clause in the Constitution could by any rule of construction, be conceived to give Congress a power to disarm the people."

THE FUTURE

Advocates of a gun free America know that a national policy of civilian disarmament (a single sentence amendment giving Congress the authority to regulate all firearms, or a Supreme Court interpretation of the Second Amendment to that effect) would constitutionally override any of the 44 state right to arms guarantees. This is why they are tirelessly working to destroy anything resembling a national right to keep and bear arms; and why they look to Washington, instead of their own state government, for more gun control. Individual ownership of firearms is intolerable in a culture which holds that freedom is something which ought to be artificially engineered.

Collectivist philosophy has many branches: progressive, pragmatic, utilitarian, and communitarian. Their root lies in the secular religion of Statism, which is literally, the selfless adulation of government. The "Hegelian Dialectic," a vehicle designed to subvert constitutional protocol, is the Statist's weapon of choice in the planned destruction of the Second Amendment. Setting the stage for change is the Thesis: that a people's right to arms, once justified to protect against tyranny, has been responsible for a proliferation of gun ownership. Creating fear and opposition is the Antithesis: that no political system should allow people access to the tools of criminals, or give them the force needed to resist the government. Enter the Hegelian Synthesis: that in today's diverse society, a right to arms can only exist in the service of government, because after all, "we the people" are the government. Wilhelm Friedrich Hegel, the 18th Century German philosopher, wrote that it's a dangerous belief that "the people" alone have sufficient insight to understand justice, because no one can know who "the people" really are, and which interests they represent.

So the State, as an End in Itself, unaffected by popular consensus, must always possess sufficient rights against the individual citizen.

The doctrine that only the State is entitled to effective self-protection is better suited to the dictators following Hegel, than to an impartial judiciary in a constitutional republic, which prides itself on explicit guarantees of individual rights. The Dialectic, or antagonistic process of change, is meant for socializing the masses, for tearing down traditional rights, and for reconstructing them in the image of the State. It denies fixed notions of right and wrong, and rejects the founder's belief that natural rights could supersede the general welfare. For the people who adopted the Second Amendment, unalienable rights were self-evident truths arising out of man's duty to his Creator, and political theories were best proven through the experience of history. In contrast, Statism demands unquestioned submission to the moral supremacy of government. The rational self-interest inherent in individuals being their own moral agents is condemned, and the rule of law is infected with an altruistic ethic of social justice. Liberty becomes not an end, but merely a means whereby each person exercises his duty to embrace the State. Thus, only through the politics of the collective can any individual act have value.

About every 70 years since the founding, certain events, namely the War between the States and the Great Depression, have dramatically expanded federal powers. Will the Second Amendment survive the next cycle, or has it already been nullified by the courts? Can an international treaty overrule a watered-down article in the Bill of Rights? Does a natural right to arms exist under the Ninth Amendment? Will the Fifth Amendment insulate citizens who refuse to register firearms? Can a series of quasi-lawful acts spread over a period of time usher in a type of democratic-fascism, ultimately leading to absolute rule? If not, what protection now exists to prevent it? Hamilton warns in Federalist 28, that

> "if the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government...the citizens must rush tumultuously to arms, without concert, without system, without resource..."

Does an armed society provide a halo of immunization from martial law, or will its existence hasten the onset of a police state? Does the government so mistrust the people that militarized police will become the guardians of domestic tranquility?

The American experiment broke away from the English tradition of a Constitution being the image of law. In eighteenth century England, something could be thought of as legal and unconstitutional at the same time. Not so in America, where a Constitution was the law itself. In Federalist 78, Hamilton explains that for a legislative act contrary to the Constitution to be valid, the representatives must become greater than the people themselves;

> "...a Constitution is, in fact, and must be regarded by the judges as, fundamental law...until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually..."

The Second Amendment is still part of our Constitution.

The ridiculous "state's right" theory is not shared by all judges, since there have been strong dissents to the usual lock step opinions. Today's dissent can emerge as tomorrow's ruling. The individual rights interpretation of the Second Amendment is so favorably accepted among legal scholars that it's referred to as the "standard model." Even Supreme Court Justice Antonin Scalia wonders why, in the midst of a catalog of individual rights, one would find a provision securing a right of states?

In 1928 Justice Oliver Wendell Holmes wrote that "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other." Holmes believed that Constitutional provisions have extensions of uncertainty, directly related to their text, which are used by courts to help define and secure the provision's core meaning. This has serious implications for the Second Amendment, for without any recognized periphery related to natural law and the universal right of self-preservation, the individual nature of a constitutional right to be armed is non-existent.

In his new edition of American Constitutional Law, Harvard professor Laurence Tribe concludes that the core meaning of the Second Amendment, that of arming the people, does not directly protect a right of states or other collectives. He reasons that mistaken interpretation by both sides in the gun debate has been largely responsible for the Second Amendment's underdeveloped jurisprudence, resulting in a right of uncertain scope, and believes that careful arguments from both text and history will help define its future role.

A personal right to arms was undoubtedly considered fundamental to our forefathers, and is so ingrained in our cultural history, that it is still an essential ingredient in our concept of civil liberty. Why then, have federal courts hijacked the Second Amendment, and put it in a box which they are now attempting to nail shut? Why has it never been allowed to develop a reasonable jurisprudence via the Fourteenth Amendment, contrary to the expressed intent of Reconstruction era civil rights legislators? The answers are, of course, that the Second Amendment can never be judged to have any peripheral areas of uncertainty. There can not be any comingling of personal liberty, especially the right of privacy, between it and the rest of the Bill of Rights. If this were allowed to occur, the individual's relationship with his fellow citizens, and especially with his government, would be subject to profound reexamination, and ultimately, reappraisal.

Some argue from the premise (that they are absolutely certain of) that since there are no absolutes, none can exist in the Bill of Rights. Therefore the government may break down fences erected by the Founding Fathers. The people of the United States, through the Second Amendment, created an armed nation. Today, government courts say there can be no such thing. But the people who adopted the Second Amendment understood human nature, and the nature of government. The issue had already been well debated. They knew what the words meant, and why they were put there, because those words were the mortal enemy of tyranny. They took the risk, and did not fear that men should live free.

> *"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."*
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> ~ ~ Learned Hand, 1944