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## ARTICLES

### THE SECOND AMENDMENT "RIGHT TO BEAR ARMS" AND *UNITED STATES V. EMERSON*

ROBERT J. SPITZER†

#### INTRODUCTION

In a decision that received considerable national attention, a majority of a three-judge panel of the United States Court of Appeals for the Fifth Circuit ruled in October of 2001 in *United States v. Emerson*<sup>1</sup> that the Second Amendment of the Constitution, the fabled "right to bear arms," "protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms."<sup>2</sup> The significance of the court's rejection of the Second Amendment's stated link between the bearing of arms and citizen service in a government militia rests, first, with the ongoing political debate over the meaning of the Second Amendment,<sup>3</sup> and second, with the fact that the *Emerson* majority opinion embraced a view

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<sup>1</sup> 270 F.3d 203 (5th Cir. 2001).

<sup>2</sup> *Id.* at 260.

<sup>3</sup> The genesis and evolution of that debate is found in Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 *CHI.-KENT L. REV.* 349 (2000).

squarely at odds with Supreme Court and lower federal court rulings dating back to the nineteenth century.

Both the political and legal importance of this decision was underscored by the response of the United States Justice Department (the "Justice Department"). Shortly after the decision, Attorney General John Ashcroft embraced the views expressed in *Emerson* as the policy of the Justice Department when he sent a memo to all ninety-three United States Attorneys in November 2001, directing them to adopt the *Emerson* court's view as the policy of the Justice Department and as the law of the United States.<sup>4</sup> This abrupt decision was made without the usual vetting process that is normally followed whenever the Justice Department considers a change in policy. In fact, it was produced by the "political echelon" of the Justice Department. The Solicitor General's Office was not consulted nor were career Justice Department attorneys who had specific authority over the government's position concerning the Second Amendment.<sup>5</sup>

Ashcroft's directive of November 2001 was followed in May 2002 with a more formal embrace of the Fifth Circuit's *Emerson* view. In connection with the *Emerson* petition to the Supreme Court for a writ of certiorari<sup>6</sup> and in a separate petition in *Haney v. United States*,<sup>7</sup> Solicitor General Theodore B. Olson filed briefs on behalf of the government, arguing that the individuals charged in those two cases had been properly prosecuted and convicted for their respective gun-related violations. The defendant in *Haney* appealed a conviction on charges of owning two machine guns in violation of a 1934 federal law on the

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<sup>4</sup> See Brief for the United States in Opposition at Appendix, *Emerson v. United States*, 122 S. Ct. 2362 (2002) (No. 01-8780) (Memorandum to all United States Attorneys from the Office of the Attorney General).

<sup>5</sup> Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 766 (2002) ("[W]hen [Attorney General Ashcroft] decided last spring to reverse the Justice Department's long-standing legal opinion on the Second Amendment . . . he did it in a letter to the National Rifle Association drafted by a senior advisor. Key Justice Department prosecutors . . . were not consulted . . ." (quoting Dan Eggen, *Ashcroft Undaunted As Criticism Grows*, WASH. POST, Nov. 29, 2001, at A1)).

<sup>6</sup> Brief for the United States in Opposition, *Emerson* (No. 01-8780).

<sup>7</sup> Brief for the United States in Opposition, *Haney v. United States*, 122 S. Ct. 2362 (2002) (No. 01-8272).

ground that such ownership was protected under the Second Amendment.<sup>8</sup>

In support of the convictions in question, Olson's briefs contained a footnote stating that the government's current position on the Second Amendment was that it "more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions."<sup>9</sup> One news account observed that critics were troubled not only by "the policy change" but also by "the offhand manner in which the administration expressed such a major policy change, in footnotes in briefs filed without public announcement."<sup>10</sup> In both instances, the Supreme Court declined to hear the cases in question, thereby permitting the convictions to stand without comment and declining to address the proper interpretation of the Second Amendment.<sup>11</sup>

The purpose of this Article is to examine the core legal basis of the Fifth Circuit's *Emerson* decision by scrutinizing its analysis and assertions regarding Second Amendment case law and especially its treatment of the most important Second Amendment case, *United States v. Miller*.<sup>12</sup> This Article will summarize the existing understanding of the meaning of the Second Amendment, including a summary of past Supreme Court and lower federal court rulings. It will analyze the *Emerson* decision, especially with regard to its extended treatment of *Miller*, earlier Court rulings on the Second Amendment, and its detailed analysis of the federal government's brief to the Supreme Court in *Miller*. In the process, this Article argues that the *Emerson* decision offers a defective analysis which, even in its own terms, fails to support the new view of the Second Amendment it sought to promote. Therefore, *Emerson* offers a poor model not only for other courts hearing Second Amendment cases but also for policy-makers and

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<sup>8</sup> *Id.* at 4.

<sup>9</sup> Brief for the United States in Opposition at 19–20 n.3, *Emerson* (No. 01-8780); Brief for the United States in Opposition at 5 n.2, *Haney* (No. 01-8272).

<sup>10</sup> Linda Greenhouse, *Justices Reject Cases on Right to Bear Arms*, N.Y. TIMES, June 11, 2002, at A24.

<sup>11</sup> *Emerson v. United States*, 122 S. Ct. 2362 (2002); *Haney v. United States*, 122 S. Ct. 2362 (2002).

<sup>12</sup> 307 U.S. 174 (1939).

all those interested in the law, politics, and history of the right to bear arms.

### I. THE MEANING OF THE SECOND AMENDMENT

Few parts of the Constitution are invoked as often as the Second Amendment. Politics aside, the meaning of the Second Amendment is relatively clear. As the text itself says, "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."<sup>13</sup> Supreme Court Chief Justice Warren Burger wrote that the Second Amendment "must be read as though the word 'because' was the opening word,"<sup>14</sup> as in "[Because] a well-regulated Militia [is] necessary to the security of a free State." As debate concerning the Second Amendment both preceding and during the first session of Congress made clear, the amendment was added to allay the concerns of anti-Federalists who feared that state sovereignty, and more specifically the ability of states to meet military emergencies on their own, would be impinged or neglected by a new federal government with vast new powers, particularly over the organization and use of military force.<sup>15</sup>

The Second Amendment embodied the Federalist assurance that the state militias would be allowed to continue as a viable military and political supplement to the national army at a time when military tensions within and between the states ran high, suspicions of a national standing army persisted, and military takeovers were the norm in world affairs. Debate concerning what eventually became the Second Amendment during Congress's first session dealt entirely with the narrow military questions of the need to maintain civilian governmental control over the military, the unreliability of militias as compared with professional armies, possible threats to liberties from armies versus militias, and whether to codify the right of conscientious

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<sup>13</sup> U.S. CONST. amend. II.

<sup>14</sup> Warren Burger, *The Right to Bear Arms*, PARADE, Jan. 14, 1990, at 5.

<sup>15</sup> Carl Bogus argues that southern states in particular championed inclusion of the Second Amendment because they feared that the federal government, influenced by the northern non-slave states, would decline to make federal troops or supplies available to suppress much-feared slave revolts. This increased the southern states' desire to organize and maintain their own state militias. Carl Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 369-75 (1998).

objectors to opt out of military service (an early version of the amendment included such language).<sup>16</sup>

As several Supreme Court cases<sup>17</sup> and over forty lower federal court rulings<sup>18</sup> have held, the Second Amendment pertains only to citizen service in a government-organized and regulated militia—what is typically referred to as the collective or militia-based understanding of the amendment. Further, militia practices in the eighteenth and early nineteenth centuries required eligible militiamen to obtain and bring their own firearms if called into service,<sup>19</sup> as the government generally lacked the resources to properly arm the militia.<sup>20</sup>

The abysmal performance of civilian, also referred to as unorganized or general, militias in the War of 1812 essentially ended the government's use of such forces to meet military emergencies. Millett and Maslowski noted that “[a]fter the War of 1812 military planners realized that no matter how often politicians glorified citizen-soldiers . . . reliance on the common militia to reinforce the regular Army was chimerical.”<sup>21</sup> Further, between 1800 and the 1870s, state militias were subject to “total abandonment, disorganization, and degeneration.”<sup>22</sup> Skowronek

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<sup>16</sup> CREATING THE BILL OF RIGHTS 182–84, 198–99 (Helen E. Veit et al. eds., 1991); THE FEDERALIST NOS. 24, 25, 28, 29 (Alexander Hamilton), NO. 46 (James Madison); ROBERT J. SPITZER, THE RIGHT TO BEAR ARMS 15–28 (2001); GARRY WILLS, A NECESSARY EVIL 119–21(1999).

<sup>17</sup> See *United States v. Miller*, 307 U.S. 174 (1939); *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876). The Court acknowledged this line of cases in *Lewis v. United States*, 445 U.S. 55 (1980). See ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL ch. 2 (2003) for a full discussion of these cases and the nature of early militias.

<sup>18</sup> See *infra* note 60.

<sup>19</sup> This requirement was codified by Congress in the Uniform Militia Act of 1792, ch. 33, 1 Stat. 271.

<sup>20</sup> The power to regulate the militias is specifically granted to Congress by the Constitution in Article I, section 8.

<sup>21</sup> ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES 129 (1984). The authors quote Rep. Jabez Upham, who observed in 1808 during debate in the House of Representatives, that reliance on citizen militias “will do very well on paper; it sounds well in the war speeches on this floor. To talk about every soldier being a citizen, and every citizen being a soldier, and to declaim that the militia of our country is the bulwark of our liberty is very captivating. All this will figure to advantage in history. But it will not do at all in practice.” *Id.*; see also DONALD M. SNOW & DENNIS M. DREW, FROM LEXINGTON TO DESERT STORM: WAR AND POLITICS IN THE AMERICAN EXPERIENCE 260–72 (1994).

<sup>22</sup> 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, 36

noted, "By the 1840's the militia system envisioned in the early days of the republic was a dead letter. Universal military training fell victim to a general lack of interest and administrative incompetence at both the federal and state levels."<sup>23</sup> The government came to rely on professional military forces that were expanded in times of emergency by the military draft. The other type of militia forces, the select or volunteer militias, were used in the Civil War and colonial times and became institutionalized and brought under federal military authority as the National Guard under the Militia Act of 1903.<sup>24</sup>

The meaning of the Second Amendment is additionally shaped by the fact that the Court has refused to incorporate the Second Amendment via the Fourteenth Amendment, unlike most of the rest of the Bill of Rights, thereby limiting its relevance only to federal action. The Second Amendment provides no protection for personal weapons uses, including hunting, sporting, collecting, or even personal self-protection (the latter is covered under criminal law and the common law tradition).<sup>25</sup>

The foregoing account of the Second Amendment has been challenged in recent years by another view, referred to as the "individualist" view.<sup>26</sup> Developed mostly in the pages of law

(1989); see also JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 317 (1988); WILLIAM RIKER, *SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY* ch. 3 (1957).

<sup>23</sup> STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* 315 n.17 (1982).

<sup>24</sup> Ch. 196, 32 Stat. 775, 775-80 (1903). The Act stated that the "organized militia [was] to be known as the National Guard," and was separate from the "Reserve Militia," also known as the unorganized or general militia; no further provision for the latter was made in the law. See *The National Defense Act*, ch. 134, 39 Stat. 166 (1916); MILLETT & MASLOWSKI, *supra* note 21, at 247-49.

<sup>25</sup> SPITZER, *supra* note 16, at 58-59. That the right to personal self-defense has existed apart from and independent of the Second Amendment—indeed as a natural right—has been well understood since at least the nineteenth century. See *The Right to Keep and Bear Arms for Private and Public Defense*, 1 CENT. L.J. 285-87 (1874).

<sup>26</sup> I decline to use the recently coined term "Standard Modelers" or "Standard Model" to refer to those who advocate alternate views of the Second Amendment, as this term implies something standard, orthodox, or historically mainstream about this point of view, when in fact these assertions are unsupported by the history of writings on the Second Amendment. This term was coined in 1995 by Glenn H. Reynolds in *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995). Reynolds and a coauthor infer falsely in a subsequent article, Brandon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to Yassky*, 65 LAW & CONTEMP. PROBS. 113 (2002), that views other than the individualist view have appeared "[o]nly in recent years," when in fact the reverse is true; the individualist view dates only to 1960. See Stuart R. Hays, *The Right to Bear Arms: A Study in*

journals, it argues that the Second Amendment protects a personal right to own guns independent of militia service. It is this view which was embraced by the *Emerson* court. In order to understand the *Emerson* decision, however, it is essential to examine prior case law.

## II. SUPREME COURT RULINGS

The Second Amendment has generated relatively little constitutional law litigation as compared with other parts of the Bill of Rights. In a few instances, however, the Supreme Court has ruled directly on the meaning of this amendment. In the first case, *United States v. Cruikshank*,<sup>27</sup> Cruikshank and two other defendants were charged with thirty-two counts of depriving black citizens of their constitutional rights, including two counts of depriving them of their right to possess firearms in violation of the Enforcement Act of 1870. Speaking for the Court, Chief Justice Waite wrote:

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other

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*Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 381 (1960). In contrast, the collective or militia view long predates the individualist view, both in numerous court decisions dating back to the nineteenth century, as discussed in this Article, and also in numerous law journal articles dating back decades. *Id.* Articles accepting the collective view published before 1960 include: S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471, 474-80 (1917); John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400, 409-412 (1934); Victor Breen et al., *Federal Revenue as a Limitation on State Police Power and the Right to Bear Arms—Purpose of Legislation as Affecting Its Validity*, 9 J. B. ASS'N KAN. 178, 181-82 (1940); Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 475-77 (1915); George I. Haight, *The Right to Keep and Bear Arms*, 2 BILL RTS. REV. 31, 33-35 (1941); Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138, 145 (1928); *The Right to Keep and Bear Arms for Private and Public Defence*, *supra* note 25; F.B. Weiner, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940); William Montague, Case Note, *National Firearms Act*, 13 S. CAL. L. REV. 129, 130 (1939); Note, *Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation*, 98 U. PA. L. REV. 905, 906 (1950); Recent Decision, 14 ST. JOHN'S L. REV. 167, 168-69 (1939). For a list of the numerous articles taking the same point of view published since 1960, see Spitzer, *supra* note 3, at 386-401.

<sup>27</sup> 92 U.S. 542 (1876).



effect than to restrict the powers of the national government . . . .<sup>28</sup>

The Court in this case established two principles which it and lower federal courts have consistently upheld: first, that the Second Amendment poses no obstacle to at least some regulation of firearms,<sup>29</sup> and second, that the Second Amendment is not "incorporated," meaning that it pertains only to federal power, not state power—this is what the Court meant when it referred to the Second Amendment not being "infringed by Congress."<sup>30</sup> Admittedly, the Supreme Court did not begin to incorporate parts of the first ten amendments until 1897. Yet the Court has never accepted the idea of incorporating the entire Bill of Rights,<sup>31</sup> and it has never incorporated the Second Amendment despite numerous opportunities to do so. Also left unincorporated up to the present day are the Third Amendment, the grand jury clause of the Fifth Amendment, the Seventh Amendment, the excessive fines and bail clause of the Eighth Amendment, and the Ninth and Tenth Amendments.<sup>32</sup>

Ten years after *Cruikshank*, the Court ruled in *Presser v. Illinois*<sup>33</sup> that an Illinois law that barred paramilitary organizations from drilling or parading in cities or towns without a license from the governor was constitutional and did not violate the Second Amendment. Herman Presser challenged the law, partly on Second Amendment grounds, after he was arrested for marching and drilling his armed fringe group, *Lehr und Wehr Verein*, through Chicago streets. In upholding the Illinois law, the Court reaffirmed the *Cruikshank* holding that the Second Amendment did not apply to the states.<sup>34</sup> Speaking for a unanimous court, Justice Woods also went on to discuss the relationship between the citizen, the militia, and the government in paragraphs that explained why the Second Amendment, in the Court's view, did not protect Presser's actions:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this

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<sup>28</sup> *Id.* at 553 (emphasis added).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW 398 (1993).

<sup>32</sup> LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 428-29 (1999).

<sup>33</sup> 116 U.S. 252 (1886).

<sup>34</sup> *See id.* at 265-69.

prerogative . . . the States cannot, even laying the constitutional provision in question out of view, 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. But, as already stated, we think it clear that the sections under consideration do not have this effect.<sup>35</sup>

The Court then went on to ask whether Presser and his associates had a right to organize with others as a self-proclaimed and armed military organization against state law. The Court answered “no” since such activity “is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law.”<sup>36</sup> In other words, militias exist only as defined and regulated by the state or federal government, which in Illinois at the time was the 8,000 member Illinois National Guard, as the Court noted in its decision. To deny the government the power to define and regulate militias would, according to the Court, “be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.”<sup>37</sup> Thus, the *Presser* case confirmed the understanding that the right to bear arms came into play only in connection with citizen service in a militia, as formed and regulated by the government. The Court emphatically rejected the idea that citizens could create their own militias, much less that the Second Amendment protected citizens’ rights to own weapons for their own private purposes.

In 1894, the Supreme Court ruled in *Miller v. Texas*<sup>38</sup> that a Texas law “prohibiting the carrying of dangerous weapons”<sup>39</sup> did not violate the Second Amendment. Again, the Court held that the right to bear arms did not apply against the states. In *Patsone v. Pennsylvania*,<sup>40</sup> the Court implicitly recognized a state’s right to regulate firearms by upholding a statute

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<sup>35</sup> *Id.* at 265–66.

<sup>36</sup> *Id.* at 267.

<sup>37</sup> *Id.* at 268.

<sup>38</sup> 153 U.S. 535 (1894).

<sup>39</sup> *Id.*

<sup>40</sup> 232 U.S. 138 (1914).

prohibiting unnaturalized foreign-born residents from possessing a shot gun or rifle against a claim that the statute violated the equal protection clause.

The most important Supreme Court case in this sequence is *United States v. Miller*.<sup>41</sup> The 1939 *Miller* case was founded on a challenge to the National Firearms Act of 1934,<sup>42</sup> which regulated the interstate transport of various weapons. Defendants Jack Miller and Frank Layton were convicted of transporting an unregistered twelve-gauge sawed-off shotgun—having a barrel less than eighteen inches long—across state lines in violation of the Act. They challenged the Act's constitutionality by claiming that it violated their Second Amendment rights and that it represented an improper use of the federal government's commerce power. The district court sided with Miller and Layton, holding that the law did indeed violate the Second Amendment, although Judge Heartsill Ragon provided no explanation or justification for this conclusion in his very brief opinion.<sup>43</sup>

On appeal, the Supreme Court reversed the lower court ruling and turned the petitioners' Second Amendment claim aside. The unanimous Court ruled that the federal taxing power could be used to regulate firearms and that firearm registration was constitutional, as was the 1934 law.<sup>44</sup> Beyond this, the Court was unequivocal in saying that the Second Amendment must be interpreted by its "obvious purpose" of assuring an effective militia as described in Article I, section 8 of the Constitution (to which the court referred in its decision). Speaking for the Court, Justice McReynolds wrote:

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

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<sup>41</sup> 307 U.S. 174 (1939).

<sup>42</sup> Ch. 757, 48 Stat. 1236 (1934).

<sup>43</sup> See *United State v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).

<sup>44</sup> *Miller*, 307 U.S. at 177, 183.

equipment or that its use could contribute to the common defense.<sup>45</sup>

Thus, the Court stated that citizens could only possess a Second Amendment-based constitutional right to bear arms in connection with service in a militia.<sup>46</sup> In addition, it affirmed the constitutional right of the Congress, as well as the states, to regulate firearms. Most of the rest of the decision is an extended discussion of the antecedents of the Second Amendment. Justice McReynolds cited various classic writings, colonial practices, early state laws, and constitutions to demonstrate the importance of militias and citizen-armies to early America as the explanation for the presence and meaning of the Second Amendment.<sup>47</sup>

Critics of this case, on occasion, have taken the wording quoted above to mean that the Court would protect, under the Second Amendment, the private ownership of the type of weapons that *do* bear some connection with national defense.<sup>48</sup> Such an interpretation is mistaken for two reasons.

First, the Court is stating that private ownership of guns would only be allowed if that possession was connected with militia service, regardless of the type of gun. Since the two men charged with violating the 1934 law obviously did not possess guns while serving in the military, the government could prosecute them without running afoul of the Second Amendment. Further, as the *Presser* case established, citizens may not create their own militias; militia service can only occur through government-organized and regulated militias.<sup>49</sup>

Second, to protect the ownership of weapons based on their military utility alone—ignoring the question of whether individuals who owned firearms were doing so as part of their militia service—would justify the private ownership of a vast array of militarily useful weapons manageable by an individual, from bazookas and howitzers to tactical nuclear weapons, all of which are subject to extremely tight government restrictions. No serious argument can be made that the Second Amendment or

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<sup>45</sup> *Id.* at 178.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.* at 179–82.

<sup>48</sup> *See, e.g.,* Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719, 732–34 (1998).

<sup>49</sup> *Presser v. Illinois*, 116 U.S. 252, 265–69 (1886).

the *Miller* decision protects the right of citizens to possess such weapons when they are not in actual military service.<sup>50</sup> Because the Court's judgment in *Miller* arose from a challenge to the National Firearms Act of 1934—from which it drew and quoted the definition of a sawed-off shotgun—its holding rested on the failure of Miller and Layton to claim any credible connection to Second Amendment-based militia activities.

The Second Amendment has received brief mention in two other, more recent Supreme Court cases. In *Adams v. Williams*,<sup>51</sup> a case dealing with the search and seizure of a suspect, Justices Douglas and Marshall commented in their dissenting opinion that the Second Amendment posed no obstacle whatsoever to extremely strict gun regulations, including those banning possession of weapons entirely.<sup>52</sup> Similarly, in *Lewis v. United States*,<sup>53</sup> the Court upheld the constitutionality of a 1968 law that barred felons from owning guns, ruling that the law did not violate the Second Amendment.<sup>54</sup> In this challenge to the Omnibus Crime Control & Safe Streets Act of 1968,<sup>55</sup> the Court stated that gun regulations were allowable as long as there was some "rational basis"<sup>56</sup> for them. In other words, the regulations merely had to serve some legitimate governmental purpose, and according to the Court, the 1968 law satisfied this requirement. This standard is significant because it is one that is easily met, especially compared to the higher standard the Court has set for laws that might conflict with other Bill of Rights freedoms, such as free speech or free press. In a footnote, Justice Blackmun wrote:

These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench

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<sup>50</sup> Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMMENT. 41, 161 (2002).

<sup>51</sup> 407 U.S. 143 (1972).

<sup>52</sup> *Id.* at 150–51 (Douglas, J., dissenting).

<sup>53</sup> 445 U.S. 55 (1980).

<sup>54</sup> *See id.* at 65–67 ("This Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm.").

<sup>55</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 197, 236 (repealed at Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 449, 459 (1986)).

<sup>56</sup> *See Lewis*, 445 U.S. at 65.

upon any constitutionally protected liberties. . . . [T]he Second Amendment guarantees no right to keep and bear a firearm that does not have “some reasonable relationship to the preservation or efficiency of a well regulated militia” . . . .<sup>57</sup>

Thus, the *Lewis* case made clear that the Second Amendment was not accorded the same importance as other parts of the Bill of Rights and that the Court viewed the Second Amendment in the collective/militia sense articulated in *Miller*.

None of this means that gun ownership is somehow illegal or unrecognized by the law. As the Supreme Court noted in *Staples v. United States*,<sup>58</sup> “[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country.”<sup>59</sup> On the other hand, this does not mean, nor did the Court say, that private firearms ownership is protected by the Second Amendment. All of the Court’s decisions make clear that the Second Amendment is invoked only in connection with citizen service in a government organized and regulated militia. None of these cases endorses, protects, or implies any Second Amendment-based individual right of citizens to own firearms for their own uses or purposes.

### III. LOWER COURT DECISIONS

These Supreme Court cases represent an unbroken line to current Court thinking. Lower federal courts have followed the Supreme Court’s reasoning on the meaning of the Second Amendment in numerous cases.<sup>60</sup> Challenges to gun regulations

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<sup>57</sup> *Id.* at 65 n.8 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)).

<sup>58</sup> 511 U.S. 600 (1994).

<sup>59</sup> *Id.* at 610.

<sup>60</sup> See, e.g., *United States v. Bayles*, 310 F.3d 1302, 1307 (10th Cir. 2002); *Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2002); *United States v. Lewis*, 236 F.3d 948, 950 (8th Cir. 2001); *United States v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710–11 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273–74 (11th Cir. 1997), *vacated in part on reh’g on other grounds*, 133 F.3d 1412 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984); *Thomas v. Members of City Council*, 730 F.2d 41, 42 (1st Cir. 1984); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971).

In *Burton v. Sills*, a New Jersey case appealed to the Supreme Court in 1969, a challenge to a gun law alleging a violation of the Second Amendment was “dismissed for want of a substantial federal question.” *Burton v. Sills*, 394 U.S. 812 (1969). *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), handed down in December 2002, offered a Second Amendment analysis as lengthy and detailed as that found

and related efforts to win a broader interpretation of the Second Amendment, including efforts to incorporate the Second Amendment, have been uniformly turned aside. In over forty cases since *Miller*, federal courts of appeal "have analyzed the [S]econd [A]mendment purely in terms of protecting state militias, rather than individual rights."<sup>61</sup> The Supreme Court has denied certiorari in over a dozen of these cases, thereby letting the lower court rulings stand. The inescapable conclusion is that the Supreme Court considers the matter settled and has no interest in crowding its docket with cases that merely repeat what has already been decided.<sup>62</sup>

In the most famous of these federal appeals court cases, the Supreme Court declined to hear an appeal of two lower federal court rulings upholding the constitutionality of a strict gun control law passed in Morton Grove, Illinois, in 1981.<sup>63</sup> The ordinance banned the ownership of working handguns, except for peace officers, prison officials, members of the armed forces and National Guard, and security guards, as long as such possession was in accordance with their official duties.<sup>64</sup> The ordinance also exempted antique firearms and possession by licensed gun collectors. Residents who owned handguns could actually continue to own them, but they were required to keep them at a local gun club instead of in the home.<sup>65</sup>

Brushing aside the arguments of those opposing the law, the court of appeals confirmed that possession of handguns by individuals is not part of the right to keep and bear arms, that this right pertains only to militia service, that the local law was a reasonable exercise of police power, and that the Second

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in *Emerson*. It concluded, consistent with the arguments in this Article, that the collective or militia interpretation was correct and that *Emerson's* analysis was wrong. *See id.* at 60-66.

<sup>61</sup> *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988).

<sup>62</sup> *See* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1229 (1979) (stating that satisfaction with lower court rulings is at least one important reason for denials). *But see* *Bethley v. Louisiana*, 520 U.S. 1259 (1997) ("It is well settled that our decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought.").

<sup>63</sup> *See* *Quilici v. Vill. of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

<sup>64</sup> *Id.* at 264 n.1.

<sup>65</sup> *Id.*

Amendment does not apply to the states.<sup>66</sup> Stating the matter succinctly, the federal appeals court concluded, “Construing [the language of the Second Amendment] according to its plain meaning, it seems clear that the right to bear arms is inextricably connected to the preservation of a militia.”<sup>67</sup>

These decisions from lower federal courts are consistent with the little-known fact that, in the twentieth century, no gun law has ever been declared unconstitutional as a violation of the Second Amendment.<sup>68</sup> The same is true of nineteenth century decisions, including dozens of state court rulings.<sup>69</sup> One exception is *Nunn v. State*,<sup>70</sup> where a Georgia state court voided part of a state gun law partly on Second Amendment grounds.

Several observations about the Second Amendment arise from this discussion. First, the amendment reflected concerns vital to the country’s founders relating to the type of military force that would defend the country from manifold threats within and outside its borders, the desire to protect state power and sovereignty as distinct from that of the federal government, and the expectation that eligible militiamen would have to bring their own weapons, given the uncertainty about whether the government could or would supply adequate arms.

Second, like some other elements of the Constitution, such as the Third Amendment prohibition against the quartering of troops in private homes during peacetime, the concerns that gave rise to the Second Amendment evaporated as reality changed—that is, as the country turned away from unorganized or general citizen militias, the Second Amendment was rendered obsolete. The surviving element of the old militia system—the organized or volunteer militia—was brought mostly under federal government control through a series of federal laws enacted in the early twentieth century.<sup>71</sup> Therefore, government control of what remained of the old militia system shifted mostly to the national government. While this arrangement was a departure from the militia system contemplated by the Constitution’s founders and the authors of the Bill of Rights, it

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<sup>66</sup> *Id.* at 270.

<sup>67</sup> *Id.*

<sup>68</sup> *See supra* note 60.

<sup>69</sup> *See, e.g.*, *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (stating that the Second Amendment acts as a check only on the power of Congress).

<sup>70</sup> 1 Ga. 243, 245 (1846).

<sup>71</sup> SPITZER, *supra* note 16, at 28–32.



reflected the nation's shifting military priorities and was ruled constitutional by the Supreme Court.<sup>72</sup>

Third, recognizing these new military and political realities, the Court has not incorporated the Second Amendment, as it has with most of the Bill of Rights. The consensus of constitutional law scholars is that the incorporation process is at an end—since the last incorporation decision was in 1969—with the possible exception of the fines and bail clause.<sup>73</sup> Thus, even if the Second Amendment did protect an individual right to bear arms outside of service in a militia, it would still not restrict the states and so would not be a right citizens could claim in their daily lives. Conversely, even if the Court incorporated the Second Amendment, it would apply only to the old concept of universal militia service, a practice abandoned before the Civil War. This brings us to the 2001 decision of the Fifth Circuit in *United States v. Emerson*.<sup>74</sup>

#### IV. THE ANOMALOUS *EMERSON* CASE

*Emerson* arose from charges filed against Timothy Joe Emerson, a Texas doctor indicted for carrying a pistol while subject to a restraining order issued by a Texas state court.<sup>75</sup> The fact that Emerson was carrying the gun put him in violation of a federal law making it a crime for persons subject to domestic violence restraining orders to possess a firearm.<sup>76</sup> In a ruling that departed from every related federal case up until that time, the district court voided the gun-possession ban as a violation of the Second Amendment.<sup>77</sup> On appeal, the Fifth Circuit unanimously reversed the district court's decision.<sup>78</sup> A two-member majority, consisting of Judges William L. Garwood and Harold R. DeMoss, Jr., went on, however, to assert that the

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<sup>72</sup> See *Perpich v. Dep't of Def.*, 496 U.S. 334, 340–46 (1990) (detailing history of national control of militia policy); *Maryland v. United States*, 381 U.S. 41, 46–47 (1965) (same).

<sup>73</sup> See RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* 279 (1981).

<sup>74</sup> 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

<sup>75</sup> See *United States v. Emerson*, 46 F. Supp. 2d 598, 599 (N.D. Tex. 1999), *rev'd*, 270 F.3d 203 (5th Cir. 2001).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 600–12. For discussion and critique of this case, see Hardaway et al., *supra* note 50, at 129–38.

<sup>78</sup> *Emerson*, 270 F.3d at 264–65 (5th Cir. 2001).

Second Amendment did, in fact, protect individual rights of citizens to own guns apart from militia service.<sup>79</sup> The third judge, Robert M. Parker, while concurring in the result, labeled the majority's interpretation as dicta, irrelevant to the outcome of the case.<sup>80</sup> This assertion was strengthened by the obvious fact that the reputed existence of such a Second Amendment right bore no connection to the court's judgment sustaining Emerson's prosecution and repudiating his Second Amendment-based claim. The Supreme Court refused to hear Emerson's appeal,<sup>81</sup> and in October 2002, Emerson was convicted of three counts of unlawful firearms possession.<sup>82</sup>

Even if Judge Parker's concurring opinion is correct—that the majority's lengthy analysis of the Second Amendment and its embrace of the individualist view are nothing more than meaningless dicta<sup>83</sup>—it nevertheless warrants careful examination, both because the majority offered it as law and because of its consequences for the political and legal debate over the meaning of the Second Amendment.

The core of the Fifth Circuit majority's analysis asserting an individualist interpretation of the Second Amendment arose from the discussion of possible interpretations of the Second Amendment, the important 1939 Supreme Court case *United States v. Miller*,<sup>84</sup> the Justice Department's brief in that case, and other related cases that the court claimed supported its point of view.<sup>85</sup> The subsequent text of the majority opinion provides an extended discussion of parts of the Second Amendment itself and a lengthy discussion of history.<sup>86</sup> The

<sup>79</sup> *Id.* at 260.

<sup>80</sup> *Id.* at 272 (Parker, J., concurring).

<sup>81</sup> *Emerson v. United States*, 122 S.Ct. 2362 (2002).

<sup>82</sup> *San Angelo Man Convicted of Criminal Charges in Second Amendment Case*, ABILENE REP.-NEWS, Oct. 8, 2002, [http://www.texnews.com/1998/2002/texas/texas\\_san\\_angel108.html](http://www.texnews.com/1998/2002/texas/texas_san_angel108.html). (last visited Mar. 15, 2003).

<sup>83</sup> As one author observed:

Judge Garwood had no need first to conclude that the Second Amendment protects an individual right in order to hold that Emerson did not have one. It would have been much easier—and appropriate to the judicial role—to conclude that under any interpretation of the Second Amendment, Emerson had no protected right to possess firearms, making it unnecessary to reach the individual rights claim to decide the case.

Mathew S. Nosanchuk, *supra* note 5, at 775.

<sup>84</sup> 307 U.S. 174 (1939).

<sup>85</sup> *Emerson*, 270 F.3d at 203, 218–27.

<sup>86</sup> *Id.* at 227–61.

fatal flaws repeated in the historical portions of the majority decision are thoroughly refuted elsewhere<sup>87</sup> and are less central to the *Emerson* outcome than the decision's interpretation and application of past court rulings. It is this latter analysis that will be the focus of the balance of this Article.

## V. REINVENTING *MILLER*

Arguably the single most startling observation to be found in the *Emerson* decision is the majority's assertion that *United States v. Miller*<sup>88</sup> has been consistently and grossly misunderstood by courts and commentators for over sixty years.<sup>89</sup> As Judge Garwood noted repeatedly throughout the decision,<sup>90</sup> the federal courts have uniformly embraced the collective interpretation of the Second Amendment as the central conclusion of *Miller*. Given the time and space turned over to consideration of *Miller*,<sup>91</sup> the *Emerson* majority evidently found it important, even essential, to argue that *Miller* in fact supported the *Emerson* conclusion despite the *Emerson* court's statement that "we do not proceed on the assumption that *Miller* actually accepted an individual rights . . . interpretation of the Second Amendment."<sup>92</sup>

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<sup>87</sup> See SAUL CORNELL, WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? (2000); SPITZER, *supra* note 16, at 13–43; Ehrman & Henigan, *supra* note 22, at 5; Nosanchuk, *supra* note 5, at 705. See generally Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2001); Peter Buck Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46 (1966); Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2001); John Levin, *The Right to Keep and Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53 (1967); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L. Q. 961 (1975).

<sup>88</sup> 307 U.S. 174 (1939); see *supra* notes 41–47 and accompanying text.

<sup>89</sup> *Emerson*, 270 F.3d at 227.

<sup>90</sup> *Id.* at 218, 220, 227.

<sup>91</sup> *Id.* at 221–27.

<sup>92</sup> *Id.* at 226–27. *Emerson* actually posits that there are three views of the Second Amendment: the collective rights (also militia) view, the "sophisticated" collective rights view, and the individualist view. The distinction between the first two, according to *Emerson*, is that the former "merely recognizes the right of a state to arm its militia"; whereas, the latter refers to a right that can only be exercised by individuals when they are involved in a militia. See *id.* at 218–19. These two

At the outset of its discussion, the *Emerson* court posited that *Miller* is the only Supreme Court case that has offered any ruling on the Second Amendment “as applied to the federal government.”<sup>93</sup> This assertion is at best misleading and at worst wrong, as the court itself implicitly concedes.<sup>94</sup> In a footnote to that comment,<sup>95</sup> the *Emerson* court mentioned the three earlier Supreme Court cases discussed in a previous section of this Article—*Cruikshank*, *Presser*, and *Miller*.<sup>96</sup> The court dismissed the relevance of all three, however, finding that “these holdings all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment,” meaning that “none of them establishes any principle governing any of the issues now before us.”<sup>97</sup>

This assertion is flawed for three reasons. First, as the earlier discussion of these three cases establishes, they all directly address the meaning of the Second Amendment—a fact which by itself contradicts the court’s claim regarding their irrelevance. Second, although *Cruikshank* dealt with alleged violations of the Federal Enforcement Act of 1870, whereas *Presser* and *Miller* pertained to violations of state laws in Illinois and Texas, respectively, all three asserted that the Second Amendment pertained only to the federal government.<sup>98</sup> Third, to argue that these three cases are irrelevant because they were decided before the Supreme Court began the process of incorporation ignores or misunderstands how incorporation has occurred—that is, as discussed earlier,<sup>99</sup> courts have incorporated portions of the Bill of Rights selectively and on a piecemeal basis. The fact that the Supreme Court has refused to extend the incorporation principle to the Second Amendment means simply and clearly that it continues to uphold its

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perspectives are entirely consistent with each other, and the court gives no justification for drawing out this difference; therefore, the proffered distinction between collective and sophisticated collective is not examined further here. Rather, the analysis of this Article is concerned with the court’s individualist view.

<sup>93</sup> *Id.* at 221.

<sup>94</sup> *Id.* at 228.

<sup>95</sup> *Id.* at 221 n.13.

<sup>96</sup> See *supra* notes 27–39 and accompanying text.

<sup>97</sup> *Emerson*, 270 F.3d at 221 n.13.

<sup>98</sup> See *supra* notes 27–39 and accompanying text.

<sup>99</sup> See *supra* notes 31–32 and accompanying text.

decisions in *Cruikshank*, *Presser*, and *Miller* regarding this subject. The mere fact that these three cases occurred before the incorporation process began is not, in and of itself, a reason to dismiss them. In fact, the Supreme Court expressly affirmed the continued pertinence of these cases in the 1964 case of *Malloy v. Hogan*.<sup>100</sup> There the Court listed decisions where "particular [Bill of Rights] guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment"<sup>101</sup> and noted that the Second Amendment is not incorporated.<sup>102</sup> This list included both *Cruikshank* and *Presser*, affirming the conclusion that, at least as of 1964, by which time the incorporation process had largely occurred,<sup>103</sup> these two cases continued to be good law.

All of this takes on added importance when one considers in particular the Supreme Court's decision in *Presser*, which analyzed the Second Amendment purely as a right that connects gun ownership with service in a government-organized and regulated militia. In other words, the *Presser* decision flatly contradicted the individualist interpretation of the Second Amendment that the *Emerson* court attempted to advance. By dismissing *Presser* as irrelevant, the *Emerson* court simply dodged a case that squarely contradicted its assertions.

Further, the *Emerson* decision dwelled at length on the federal government's brief in *Miller*.<sup>104</sup> This itself is an odd turn, since a court's authoritative voice and judgment is its rendered opinion, not a brief presented by one party. Although courts obviously draw on materials submitted in briefs to formulate their conclusions, the *Emerson* court offered no reason why it felt compelled to view *Miller* through the lens of the government's brief.

Leaving this point aside, however, the *Emerson* court asserted that the government's *Miller* brief consisted of two arguments. The first argument asserted by the government endorsed the militia-based or collective view of the Second Amendment in opposition to the *Emerson* holding by

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<sup>100</sup> 378 U.S. 1 (1964).

<sup>101</sup> *Id.* at 4 n.2.

<sup>102</sup> *Id.*

<sup>103</sup> FISHER, *supra* note 32, at 428-29.

<sup>104</sup> *United States v. Emerson*, 270 F.3d 203, 221-24 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

interpreting its language to secure the right to bear arms only “‘where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.’”<sup>105</sup> The second argument advanced by the government, according to the *Emerson* court, was that the sawed-off shotgun, the possession of which ran afoul of the 1934 National Firearms Act, was not “one of the ‘Arms’ that the Second Amendment prohibits infringement of the right of the people to keep and bear.”<sup>106</sup> The *Emerson* court asserted that the Supreme Court upheld *Miller*’s and *Layton*’s convictions because of this so-called second argument<sup>107</sup>—that the weapon was not one that would normally be used by a member of a militia, not because the possessors were not part of a militia. According to this argument, then, *Miller* “does not support the government’s collective rights . . . approach to the Second Amendment.”<sup>108</sup> The *Emerson* majority continued: “Nor do we believe that any other portion of the *Miller* opinion supports the . . . collective rights model.”<sup>109</sup> In a final convolution, the *Emerson* court stated, “[W]e do not proceed on the assumption that *Miller* actually accepted an individual rights . . . interpretation of the Second Amendment.”<sup>110</sup> Thus, after laboring to sever *Miller* from the collective view that has been ascribed to it by over forty federal courts and by dozens of law journal articles,<sup>111</sup> the majority decision betrayed its faith in its own analysis by saying that the interpretation was irrelevant to its argument that the Second Amendment supports an individual rights view. Such an assertion is surprising because the argument the court made about *Miller* would support the direction in which the *Emerson* majority tried to move the Second Amendment, although the opinion later dragged *Miller* back in when it said that its individualist holding was “consistent with *Miller*.”<sup>112</sup> Even so, the very fact that this interpretation appeared in the text of a federal court decision dealing with the highly charged subject of gun control and the right to bear arms underscores that it is far

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<sup>105</sup> *Id.* at 222 (quoting brief in *United States v. Miller*, 307 U.S. 174 (1939)).

<sup>106</sup> *Id.* at 224.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 226.

<sup>109</sup> *Id.* at 225.

<sup>110</sup> *Id.* at 226–27.

<sup>111</sup> See Spitzer, *supra* note 3, at 384–401; see also *supra* note 60.

<sup>112</sup> *Emerson*, 270 F.3d at 260.

from irrelevant. For if the *Emerson* court is right in its interpretation of *Miller* and everyone else is wrong it portends an important readjustment in the thinking of courts and court watchers that must arise in future Second Amendment cases. If the analysis is defective, however, its defects warrant airing in order to discourage their perpetuation.

## VI. THE EMERSON ANALYSIS IS DEFECTIVE

Nowhere in the federal government's brief in the *Miller* case does it say or imply that it is making two different arguments about the meaning of the Second Amendment. Instead, what the *Emerson* court refers to as two arguments is actually two parts of a single argument designed to rebut the defendants' claims to Second Amendment protections in order to vindicate the constitutionality of the National Firearms Act of 1934.<sup>113</sup>

In its "Summary of Argument," the Justice Department brief unequivocally states that:

The Second Amendment does not grant to the people the right to keep and bear arms, but merely recognizes the prior existence of that right and prohibits its infringement by Congress. . . . the right to keep and bear arms has been generally restricted to the keeping and bearing of arms by the people collectively for their common defense and security. Indeed, the very language of the Second Amendment discloses that this right has reference only to the keeping and bearing of arms by the people as members of the state militia or other similar military organization provided by law.<sup>114</sup>

After thus articulating the militia-based understanding of the Second Amendment, in the next sentence the government specified the issue giving rise to the case—the regulation of weapons used by criminals:

The "arms" referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes, and the cases unanimously hold that weapons peculiarly adaptable to use by criminals are not within the protection of the Amendment.<sup>115</sup>

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<sup>113</sup> *Id.* at 221–23.

<sup>114</sup> Brief for the United States, *United States v. Miller*.

<sup>115</sup> *Id.*

The next sentence addressed the Act:

The firearms referred to in the National Firearms Act, i.e. sawed-off shotguns . . . clearly have no legitimate use in the hands of private individuals but, on the contrary, frequently constitute the arsenal of the gangster and the desperado.<sup>116</sup>

The succeeding and final sentence in the Summary of Argument linked the Second Amendment expressly to the National Firearms Act of 1934 in order to argue that the latter does not run afoul of the former:

Section 11, upon which the indictment was based, places restrictions upon the transportation in interstate commerce of weapons of this character only, and clearly, therefore, constitutes no infringement of “the right of the people to keep and bear arms,” as that term is used in the Second Amendment.<sup>117</sup>

Thus, the government’s brief did not make two different arguments, as the *Emerson* court asserted, but instead made a single four-step argument: (1) the Second Amendment only protects an individual’s right to own a gun when that gun ownership is related to collective defense and security as part of militia service; (2) weapons to which criminals are especially partial have long been recognized as beyond any Second Amendment protection;<sup>118</sup> (3) the National Firearms Act of 1934 was expressly designed to regulate such “gangster weapons”; and therefore, (4) the Act does not infringe on the Second Amendment’s right to bear arms.

The *Emerson* majority’s desire to divorce the collective militia view from the non-militia weapon argument is further evinced by its observation that “nowhere in the Court’s *Miller* opinion is there any reference to the fact that the indictment does not remotely suggest that either of the two defendants was

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> This argument was made several decades before *Miller* by Lucilius Emery in the first extended analysis of the Second Amendment:

The constitutional guaranty of a right to bear arms does not include weapons not usual or suitable for use in organized civilized warfare . . . and the carrying of such weapons may be prohibited. Only persons of military capacity to bear arms in military organizations are within the spirit of the guaranty.

Emery, *supra* note 26, at 476.



ever a member of any organized, active militia."<sup>119</sup> The *Emerson* court's inference is that this non-reference means that *Miller* did not accept, or at least declined to endorse, the collective or militia view of the Second Amendment.

Yet the *Miller* decision itself rebuts this assertion. First, neither *Miller* nor *Layton* ever argued that they were members of a militia, so there was no reason for the Court to note what they did not argue. Second, the whole point of *Miller* and *Layton's* defense was that the Second Amendment protected their right to have the gun in question as civilians. Refutation of this claim is the obvious reason why both the government's brief and the Court's opinion devoted most of their text to analysis related to government militias in the Constitution, history, and law.

The *Emerson* decision found more broadly that no part of *Miller* supported the collective or militia meaning of the Second Amendment, stating that the *Miller* opinion "referred to the generality of the civilian male inhabitants throughout their lives from teenage years until old age and to their personally keeping their own arms, and not merely to individuals during the time (if any) they might be actively engaged in actual military service."<sup>120</sup> Again, the *Emerson* court misunderstood the *Miller* decision, as well as colonial and federal-era militias.

As the Court in *Miller* expressly provided, "[T]he 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, and, with certain exceptions, to cooperate in the work of defence."<sup>121</sup> Yes, male inhabitants were obliged to obtain weapons, but this did not somehow translate into a right of gun ownership for personal purposes because the assertion of this obligation was linked expressly to militia service.<sup>122</sup> The

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<sup>119</sup> *United States v. Emerson*, 270 F.3d 203, 224 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).

<sup>120</sup> *Id.* at 226.

<sup>121</sup> *United States v. Miller*, 307 U.S. 174, 179–80 (1939).

<sup>122</sup> The early American government was indeed deeply concerned about militia-eligible citizens getting and keeping guns for collective defense purposes, given the absence of a large standing American army and the government's difficulty in funding the arming of its militias. The clearest statement of this concern was the Uniform Militia Act of 1792, ch. 33, 1 Stat 271 (1792), which required enrolled militia members to provide their own weapons (therefore presupposing that they obtain them on their own first) when called into service. Yet the law, along with similar state measures, lacked mechanisms to enforce their terms. As a

*Emerson* court's misleading reference to "personally keeping their own arms"<sup>123</sup> struggled to imply that personal gun ownership was not necessarily linked to militias because citizens might have guns and therefore have a Second-Amendment-based right to have guns when they were not actually in the militia. This assertion ignored the whole point—that the *raison d'être* was militia service, not personal or individual ownership for any personal or individual purpose. If gun-owning citizens are not a part of a militia or a contemplated militia—a contemplation that must arise from the government, not from private citizens<sup>124</sup>—then there is no Second Amendment protection for such citizens to claim.

Further, to say that the Second Amendment extends to a citizen's right to own a gun, perhaps kept in the home or in some other location so that the citizen will then be able to readily fetch the weapon in an emergency necessitating militia call-up, is essentially a variant of the collective/militia interpretation—albeit an obsolete one. In the eighteenth and early nineteenth centuries, this was indeed a means by which the general or unorganized militia was designed to function. Yet, because this system functioned so badly,<sup>125</sup> it was abandoned by the government and eventually replaced with a nationwide military draft whereby young men were funneled into an expanded standing army instead of the general militia.<sup>126</sup> In the modern American military, a soldier might also have occasion to "personally keep" a gun, even though it would be military issue. Yet such "personal keeping" would not somehow translate into a personal right to own the gun for any personal purpose under the Second Amendment. And as modern courts have noted, Second Amendment rights come in to play only in the process of "actual, as opposed to potential, organization, training, and

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consequence, the laws were widely ignored. See SPITZER, *supra* note 16, at 28–32.

<sup>123</sup> *Emerson*, 270 F.3d at 226.

<sup>124</sup> See *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886).

<sup>125</sup> The effective death knell of the old-style militia system was the disastrous War of 1812, in which militias performed abysmally. See LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS* 172–77 (1982); MILLETT & MASLOWSKI, *supra* note 21, at 129–130; Weiner, *supra* note 26, at 188–89.

<sup>126</sup> For more on the shift from militia to draft, beginning with the Civil War, see David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000).

equipping of the . . . unorganized militia."<sup>127</sup> The old militia system's insistence that citizens obtain guns for militia use brought together two behaviors—gun acquisition and militia service—that the *Emerson* majority wished to pretend were entirely separate for purposes of the Second Amendment. Yet that wish is unsupported in the *Emerson* case and it is at odds with the actual history of militias in America. Since Americans are no longer obliged to keep firearms for militia service, given that such service no longer occurs, the *Emerson* court failed to establish an individualist Second Amendment-based right grounded in *Miller* or elsewhere.

In a final stab at buttressing its claim, the *Emerson* court provided a quote from the 1980 Supreme Court case *Lewis v. United States*<sup>128</sup> which, as discussed earlier, embraced the militia-based understanding of the Second Amendment, specifically citing *Miller* in the process.<sup>129</sup> After quoting the relevant portion of the government's brief cited in *Lewis*, the *Emerson* court stated, "This does not suggest a collective rights . . . approach to the Second Amendment any more than does *Miller* itself."<sup>130</sup> Nowhere is this assertion explained, other than to assert that it is so and that it is consistent with *Miller*. Yet the wording cited in *Lewis*, as previously quoted, plainly articulated and embraced the collective or militia view in its express declaration that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"<sup>131</sup> These words express the antithesis of the individualist view expounded in *Emerson*. The *Emerson* court's defective reading of *Miller* hardly excuses its misrepresentation of *Lewis*.

#### CONCLUSION

The majority opinion in *Emerson* is paradoxical not only for its misreading of the *Miller* decision and the federal

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<sup>127</sup> *United States v. Wright*, 117 F.3d 1265, 1274 (11th Cir. 1997), *aff'd in part on reh'g and vacated in part on other grounds*, 133 F.3d 1412 (11th Cir. 1998).

<sup>128</sup> 445 U.S. 55 (1980).

<sup>129</sup> *Emerson*, 270 F.3d at 226 n.21.

<sup>130</sup> *Id.*

<sup>131</sup> *Lewis*, 445 U.S. at 65 n.8 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

government's brief in *Miller* but also for the very fact that it chose to venture into this territory. If one fact is clear from the opinion, it is that the *Emerson* majority's ill-conceived foray into Second Amendment interpretation was irrelevant to the court's holding. Moreover, the *Emerson* court's treatment of the Second Amendment is singular for its distorted view of the right to bear arms. This Article's conclusion is unequivocal: in prior rulings on the meaning of the Second Amendment, the Supreme Court and over forty lower federal court rulings are correct in embracing the collective or militia view of the amendment. The *Emerson* majority, by comparison, fails to dislodge the formers' reasoning or conclusions. Despite this conclusion, however, the political and legal forces bent on remaking the Second Amendment will no doubt persist.

