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A Lawyer's Guide to the Second Amendment

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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.

—*U.S. CONST. amend. II.*

I. INTRODUCTION

Few subjects in American jurisprudence have produced as much work by legal scholars, so little of which is of use to practicing attorneys, as the Second Amendment to the U.S. Constitution. The author learned first-hand of the volume of scholarly works on the Second Amendment when he spent an entire Saturday reading law review articles devoted to the subject only to find when the lights were turned out that he had perused less than a third of the articles written on the subject since 1980. And yet, as a practical matter, the author has never had a case in which the Second Amendment was remotely relevant and is personally acquainted with only one attorney in the State of Utah who has ever had such a case.

The few attorneys who will ever see a Second Amendment case will likely fall into one of the following categories: criminal attorneys in cases where the possession of a firearm is prohibited[1] or acts as a penalty enhancer; government attorneys whose "clients" seek guidance in the drafting of gun control legislation or ordinances;[2] attorneys whose clients sell or import firearms;[3]

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1. *See, e.g.*, United States v. Wright, 117 F.3d 1265, 1267 (11th Cir. 1997) (criminal prosecution for possession of machine gun).

2. *See, e.g.*, Ark. Op. Att'y Gen. No. 94-093 (July 6, 1994) (stating that use of a

and attorneys representing gun rights groups whose clients wish to participate in cases testing the validity of gun control statutes and ordinances.[4] This Article is intended as a brief overview for practitioners embarking on their maiden voyage aboard the U.S.S. Second Amendment. Part II of the Article outlines the debate over the individual right and collective right interpretations of the Second Amendment. Part III discusses the landmark case of *United States v. Miller*. Part IV examines the future of *Miller* in light of recent Supreme Court cases. It also considers the Fourteenth Amendment as it relates to the Second Amendment and the probable analysis the Supreme Court would use if it were in fact to adopt an individual rights interpretation of the Second Amendment. The Article's message can be summed up by the advice that any attorney whose client seeks invalidation of a statute on Second Amendment grounds, should be careful to avoid a contingent fee arrangement. Legal academics can pontificate endlessly, but for nearly a century the courts have shown no signs of altering a very limited Second Amendment jurisprudence.

II. THE INDIVIDUAL VS. COLLECTIVE RIGHT CONTROVERSY

The amount of articles and treatises dealing with the Second Amendment is testimony to the fact that its meaning is subject to disagreement. The Amendment is not a model of clarity. It is unclear what relationship the first clause—"a well regulated Militia being necessary to the security of a free State"[5]—has to

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provision in a lease agreement for public housing authority prohibiting possession of firearms would not violate the Second Amendment, but might violate the Arkansas Constitution); Kan. Op. Att'y Gen. No. 97-17 (Feb. 7, 1997) (advising that the existing state statute restricting the places where concealed weapons can be carried does not violate the Second Amendment); Neb. Op. Att'y Gen. No. 96089 (Dec. 23, 1996) (opining that proposed legislation prohibiting purchase or possession of firearms by certain misdemeanants does not violate the Second Amendment or the state constitution).

3. *See, e.g.*, Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1314-15 (E.D.N.Y. 1996) (tort action against gun marketers and manufacturers by representatives of people who were shot and killed by individuals who illegally obtained firearms).

4. Perhaps the best example of such an attorney is Stephen P. Halbrook, an attorney in Fairfax, Virginia, who often represents gun rights groups in Second Amendment cases. For cases in which Mr. Halbrook represented parties who sought invalidation of gun control statutes or ordinances, see *Printz v. United States*, 117 S. Ct. 2365 (1997); *Peoples Rights Org. v. City of Columbus*, 925 F. Supp. 1254 (S.D. Ohio 1996); *Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276 (E.D.N.Y. 1995).

5. U.S. CONST. amend. II.

the second clause—"the right of the people to keep and bear Arms, shall not be infringed."[6] Indeed, the words within the clauses are also ambiguous: What do the expressions "well regulated," "Militia," "free State," and "keep and bear Arms" mean? Virtually every law review article written on the Second Amendment devotes considerable space to discussion of one or more of these expressions.[7] In general, there are two major, mutually exclusive views of the Second Amendment: (1) that it guarantees an individual right to bear arms; and (2) that it protects the states from interference with their militias by the federal government (the collective right argument). Manning the barricades in the individual right camp are a majority of the contributors to Second Amendment literature, while the collective right forces consist of all judges who have written Second Amendment opinions in the last sixty years[8] and a minority of the authors of books and articles on the subject.[9]

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6. *Id.*

7. Illustrative of this point are two articles appearing in this volume. *See* Marguerite A. Driessen, *Private Organizations and the Militia Status: They Don't Make Militias Like They Used To*, 1998 BYU L. REV. 1 (analyzing the meaning of "militia"); Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of* Thornton: *The People and Essential Attributes of Sovereignty*, 1998 BYU L. REV 137 (analyzing the meaning of "the people").

8. *See infra* note 13 (giving a partial list of such opinions).

9. The following is a partial list of books and articles which adopt the individual right analysis: STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); David I. Caplan, *The Right of the Individual To Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789 (1982); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Anthony J. Dennis, *Clearing the Smoke From the Right To Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right To Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right To Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91 (1989); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second*

Given the large number of authors and publications that have dealt with the Second Amendment, it is not possible to summarize in a few sentences the shades of meaning and understanding that each author brings to the subject. Consequently, Don B. Kates and the team of Keith A. Ehrman and Dennis A. Henigan have been somewhat arbitrarily chosen to act as spokesmen for, respectively, the individual rights and the collective right views. In his important article, *Handgun Prohibition and the Original Meaning of the Second Amendment*,[10] Kates provides the following description of the individual right interpretation:

Amendment, 9 HARV. J.L. & PUB. POL'Y 559 (1986); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates, *Handgun Prohibition*]; Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Joyce Lee Malcolm, *The Right of the People To Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, *in* FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY 417 (Don B. Kates, Jr. ed., 1984); Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV 781 (1997); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Robert E. Salhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right To Bear Arms*, 139 U. PA. L. REV. 1257 (1991); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995) (book review).

The following articles support the collective right analysis: Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488 (1992); George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631 (1992); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right To Bear Arms*, 71 J. AM. HIST. 22 (1984); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983); Gary Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, Sept. 21, 1995, at 62.

For a more complete list of articles and books on this subject, see Barnett and Kates's article, *supra*.

10. Kates, *Handgun Prohibition*, *supra* note 9.

> The second amendment's language and historical and philosophical background demonstrate that it was designed to guarantee individuals the possession of certain kinds of arms for three purposes: (1) crime prevention, or what we would today describe as individual self-defense; (2) national defense; and (3) preservation of individual liberty and popular institutions against domestic despotism.[11]

By contrast, in their article, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, Ehrman and Henigan state:

> First, the second amendment was passed as an assurance to the states that they would have the right to maintain their own militias. . . . Second, the second amendment does not operate as a restraint on the states. It acts as a restraint on the federal government. Third, there is no substantial historical evidence for the claim that the second amendment guarantees an individual right to have arms for any purpose other than participation in a state-regulated militia. Fourth, as long as federal gun laws do not adversely affect the organized state militias, these laws should encounter no second amendment problems. Fifth, because the state militias no longer rely on the use of privately-owned firearms by their active members, federal regulation of private gun ownership poses no threat to state militias, and therefore raises no constitutional issue.[12]

If attorneys advised their clients based on law review articles, an attorney's advice to his or her client in a Second Amendment case might well be to risk violating the gun control statute or refuse to plea bargain in a case in which a gun-related crime is at issue. But no attorney would give such advice based on law review articles alone. Courts, not the authors of law review articles, decide what the Second Amendment means, and in the last sixty years, the courts have uniformly adopted the collective right view.[13]

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11. *Id.* at 267-68.

12. Ehrman & Henigan, *supra* note 9, at 57.

13. Several lower court decisions adopt the collective right view, either in holdings or dicta. *See, e.g.*, United States v. Wright, 117 F.3d 1265, 1273 (11th Cir.), *cert. denied*, 118 S. Ct. 584 (1997); United States v. Ryber, 103 F.3d 273, 286 (3d Cir. 1996), *cert. denied*, 118 S. Ct. 466 (1997); Hickman v. Block, 81 F.3d 98, 102 (9th Cir.), *cert. denied*, 117 S. Ct. 276 (1996); Love v. Pepersack, 47 F.3d 120, 123-24 (4th Cir. 1995); Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982); United States v.

III. *UNITED STATES V. MILLER*

The landmark case in the individual-versus-collective right debate is *United States v. Miller*.[14] In *Miller*, two defendants were charged with transporting a sawed-off shotgun in interstate commerce in violation of the National Firearms Act of 1934.[15] The defendants successfully moved the trial court to void their indictment on the ground that the prohibition against carrying sawed-off shotguns violated the Second Amendment. The case was appealed directly to the U.S. Supreme Court. Before the appeal could be heard, the defendants (perhaps betraying a lack of conviction in the strength of their legal argument) disappeared. The Court nonetheless heard the appeal and reversed the decision of the trial court. In explaining its decision, the Court stated:

> 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

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Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Graves, 554 F.2d 65, 66 n.2 (3d Cir. 1977); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974); United States v. Day, 476 F.2d 562, 568 (6th Cir. 1973); Cody v. United States, 460 F.2d 34, 36-37 (8th Cir. 1972); United States v. McCutcheon, 446 F.2d 133, 135-36 (7th Cir. 1971); United States v. Johnson, 441 F.2d 1134, 1136 (5th Cir. 1971); Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971); Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942); United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); Thompson v. Dereta, 549 F. Supp. 297, 299 (D. Utah 1982); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 210 (S.D. Tex. 1982); Sandidge v. United States, 520 A.2d 1057, 1058 (D.C. 1987); Brown v. City of Chicago, 250 N.E.2d 129, 131 (Ill. 1969); Commonwealth v. Davis, 343 N.E.2d 847, 850 (Mass. 1976); *In re* Atkinson, 291 N.W.2d 396, 398 n.1 (Minn. 1980); Harris v. State, 432 P.2d 929, 930 (Nev. 1967); Burton v. Sills, 248 A.2d 521, 525-26 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969); State v. Fennell, 382 S.E.2d 231, 232 (N.C. Ct. App. 1989); City of East Cleveland v. Scales, 460 N.E.2d 1126, 1130 (Ohio Ct. App. 1983); Masters v. State, 653 S.W.2d 944, 945 (Tex. Ct. App. 1983); State v. Vlacil, 645 P.2d 677, 679 (Utah 1982); Carfield v. State, 649 P.2d 865, 871 (Wyo. 1982); *cf.* United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) (noting that individual/collective right distinction is irrelevant when possession of arms is not related to the preservation or efficiency of a militia); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984) ("[T]he right to possess a gun is clearly not a fundamental right.").

14. 307 U.S. 174 (1939).

15. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (now found at 26 U.S.C. §§ 5845, 5861 (1989)).

> judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.
>
> . . . With obvious purpose to assure the continuation and render possible the effectiveness of such forces [i.e., the Militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.[16]

Although proponents of the individual right view argue that *Miller* is consistent with their interpretation of the Amendment,[17] virtually every Second Amendment decision—be it by state or federal court—cites *Miller* or one of its progeny in support of the collective right view of the Amendment.[18] Indeed, it seems unlikely that any attempt to convince a lower court that *Miller* supports or permits an individual rights interpretation would be successful.[19] If that conclusion is correct, a Second

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16. *Miller*, 307 U.S. at 178 (citations omitted).

17. *See* Kates, *Handgun Prohibition*, *supra* note 9, at 249 (arguing that the Court in *Miller* "clearly recognized that defendants could claim the amendment's protection as individuals, and that, in doing so, they need not prove themselves members of some formal military unit like the National Guard"); Levinson, *supra* note 9, at 654-55 ("Ironically, *Miller* can be read te support some of the most extreme anti-gun control arguments, e.g., that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that are clearly relevant to modern warfare, including, of course, assault weapons."); Lund, *supra* note 9, at 109 ("*Miller* can be read as standing primarily for the proposition that 'it is not within *judicial notice* that [a sawed-off shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense.' This holding means little by itself because commentators have since demonstrated that sawed-off or short-barreled shotguns are commonly used as military weapons." (quoting Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840))).

18. The individual right interpretation of *Miller* consistently has been rejected by the courts. *See, e.g.*, Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996) ("Consulting the text and history of the amendment, the Court [in *Miller*] found that the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia."); Love v. Peporsack, 47 F.3d 120, 124 (4th Cir. 1995) ("Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right."); United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) ("Since the *Miller* decision, no federal ceurt has found any individual's possession of a military weapon to be 'reasonably related to a well regulated militia.'" (quoting United States v. Oakes, 564 F.2d 384 (10th Cir. 1977))).

19. One way of "plowing around" *Miller* has been to argue that the "well-regulated militia" referred to in the Amendment consists of all adult citizens of the United States. *See, e.g.*, Hardy, *supra* note 9, at 626 n.328 ("To the Framers, creation of a 'well-regulated militia' did not mean establishment of a small, government-controlled one, but rather involved furnishing training to the citizenry at large."); Levinson, *supra* note 9, at 648-47 ("There is strong evidence that 'militia' refers to all of the people, or at least all of those treated as full citizens of the community."); Lund, *supra* note 9, at 106

Amendment-based attack is unlikely to succeed unless *Miller* is repudiated by the Supreme Court.[20]

Furthermore, getting to the Supreme Court for an attack on *Miller* is no easy task. The Court has consistently denied certiorari in Second Amendment cases,[21] and there is no dispute among the nine circuits that have thus far rendered opinions in Second Amendment cases.[22] However, if the Supreme Court did grant certiorari in a Second Amendment case and either interpreted *Miller* as supporting an individual right to bear arms or repudiated *Miller* based on recent scholarship, existing Second Amendment case law would be wiped out in a single stroke. Despite strong precedent, there are some signs that the court might be ready to revisit *Miller*.

IV. THE FUTURE OF *MILLER*

A. *Recent Supreme Court Cases*

In *United States v. Verdugo-Urquidez*,[23] a case dealing with an alleged illegal search under the Fourth Amendment, the Supreme Court stated in dictum that the expression "the people"

(stating that in the eighteenth century the term "'militia' included all citizens who qualified for military service (i.e., most adult males)").

This argument, too, has been rejected by the courts. *See, e.g.*, United States v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997) (stating that the drafters of the Second Amendment intended by the use of the expression "'well-regulated militia' . . . to refer only to governmental militias that are actively maintained and used for the common defense"); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) ("To apply the amendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy."); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) ("The fact that the defendant Warin, in common with all adult residents and citizens of Ohio, is subject to enrollment in the militia of the State confers upon him no right to possess the submachine gun in question."); Cases v. United States, 131 F.2d 916, 932 (1st Cir. 1942) (holding defendant was not protected by Second Amendment because there was "no evidence that [he] was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career").

20. The Court has not considered the validity of any statute under the Second Amendment since *Miller*. However, in *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980), the court, citing *Miller*, stated: "These legislative restrictions [of the Omnibus Crime Control and Safe Streets Act of 1968] on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Id.*

21. *See* circuit court decisions cited *supra* note 13.

22. *See supra* note 9.

23. 494 U.S. 259 (1990).

that is found in the First, Second, Fourth, Ninth and Tenth Amendments "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[24] The quoted statement arguably implies that the Court viewed the Second Amendment's reference to "the right of the people to keep and bear arms" as protecting individuals, not states.[25]

In addition, as noted by Professor Levinson elsewhere in this volume[26], Justice Thomas, in *Printz v. United States*,[27] recently demonstrated interest in the individual right view: "Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."[28] Moreover, as noted by Professor Levinson,[29] Justice Scalia has recently stated:

> It would also be strange to find in the midst of a catalog of the rights of *individuals* a provision securing *to the states* the right to maintain a designated "Militia." Dispassionate scholarship suggests quite strongly that the right of the people to keep and bear arms meant just that.[30]

Thus, for an attorney considering an attack on a federal statute based upon the Second Amendment, there is a glimmer of hope. But a practitioner rarely can rely on a glimmer and expect to survive. And, as noted in the following section, if the statute in question comes from a state, the glimmer is fainter still.

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24. *Id.* at 265.

25. *Cf.* United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) (noting that dicta in *Verdugo* was irrelevant in case involving prosecution of defendant accused of possessing firearms banned by federal law).

26. *See* Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts*, 1998 BYU L. Rev. 127.

27. 117 S. Ct. 2365 (1997).

28. *Id.* at 2386 n.2 (Thomas, J., concurring).

29. *See* Levinson, *supra* note 26, at 132.

30. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 137 n.13 (Amy Gutmann ed., 1997).

B. The Fourteenth Amendment Problem

The glimmer of hope is faint for any state law case attacking *Miller*, because, under current case law, the only laws which are subject to scrutiny under the Second Amendment are federal statutes. Without exception, both federal and state courts hold that the Second Amendment applies only to federal statutes and that unlike most of the other rights found in the Bill of Rights, the right to keep and bear arms is not made applicable to the states by incorporation into the Due Process Clause of the Fourteenth Amendment.[31] Consequently, an attorney who is considering an attack on a state statute or ordinance faces a nearly impossible task: first, he must convince the trial and appellate courts in the face of unanimous authority to the contrary that the Second Amendment applies to the states; then, he must persuade the courts that all of the judges who have interpreted *Miller* have misunderstood the opinion or that *Miller* was decided incorrectly. Only the bravest of attorneys and the wealthiest of clients are likely to undertake such a quest.

C. Police Power Analysis

Even if the right case could be found to somehow navigate around the certiorari Scylla and *Miller* Charybdis, there is still the problem of convincing the courts that the newly discovered individual right of the Second Amendment is violated by a particular statute or ordinance. The experience of the state courts in interpreting state constitutional right-to-bear-arms provisions suggests that most statutes will withstand scrutiny under an individual right analysis.[32]

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31. Some of the cases that hold that the Second Amendment applies only to federal statutes, not to state statutes or local ordinances, are as follows: Miller v. Texas, 153 U.S. 535, 538 (1894); Presser v. Illinois, 116 U.S. 252, 265 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1875); Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 730-31 (9th Cir. 1992); Quilici v. Village of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982); Cases v. United States, 131 F.2d 916, 921-22 (1st Cir. 1942); United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1318 (E.D.N.Y. 1996); State v. Mendoza, 920 P.2d 357, 360 (Haw. 1996); Kellogg v. City of Gary, 562 N.E.2d 685, 692 (Ind. 1990); Hardison v. State, 437 P.2d 868, 871 (Nev. 1968); Arnold v. City of Cleveland, 616 N.E.2d 163, 168 (Ohio 1993); State v. Kessler, 614 P.2d 94, 95 (Or. 1980); State v. Beorchia, 530 P.2d 813, 814 (Utah 1974).

32. *See infra* Appendix. The Appendix summarizes state court decisions in most states in which a reported case has been found that interprets the right-to-bear-arms provision of that state's constitution. What is significant about these cases is that they

Nearly every state in the union has a constitutional provision relating to the right to bear arms.[33] Most state courts interpreting this type of provision adopt a balancing test, and for the most part reject constitutional attacks on gun control statutes and ordinances. Thus, even if the Supreme Court could be persuaded to repudiate *Miller* and to adopt an individual rights analysis of the Second Amendment, the experience of state courts dealing with right-to-bear-arms provisions of their state constitutions suggests that such a right, even if it is an individual right, is not absolute and will seldom limit the ability of legislative bodies to restrict the ownership, possession, or sale of firearms.[34] Based on state court decisions interpreting state constitutions, it is likely that if the Supreme Court were to adopt an individual right interpretation of the Second Amendment, it would apply a balancing test analysis like that used in state police power cases.[35]

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deal with constitutional provisions that often describe an individual right to bear arms more clearly than does the Second Amendment.

33. For a list of the right-to-bear-arms provisions of all state constitutions, see McAffee & Quinlan, *supra* note 9, at 893-99.

34. Most proponents of an individual right interpretation of the Second Amendment concede that the right is not an absolute one. *See* David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55 (arguing that weapons capable of storage in a home or of being carried by one person are protected); Kates, *Handgun Prohibition*, *supra* note 9, at 260-62 (stating that Saturday night specials, sawed-off shotguns, switchblades, machine guns, grenades, rocket launchers, artillery pieces and tanks are not protected under the Second Amendment); Levinson, *supra* note 9, at 655 (recognizing that a ban on assault weapons probably does not violate Second Amendment); Lund, *supra* note 9, at 122-23 (stating that handguns are not protected); Reynolds, *A Critical Guide*, *supra* note 9, at 478-79 (stating that weapons portable by an individual are protected; crew-served weapons are not.); Worthen, *supra* note 7, at 166 (stating that under the Second Amendment weapons cannot be stockpiled "in such quantity or quality (e.g. nuclear weapons)" as to allow a group "to resist the people acting through their authorized agents").

35. For examples of such an analysis, see *State v. Owenby*, 826 P.2d 51, 53 (Or. Ct. App. 1992) ("Limitation on the right to bear arms is permissible when the unrestricted exercise of the right poses a threat to the public and the means chosen to protect the public does not unreasonably interfere with that right."), and *State v. Spencer*, 876 P.2d 939, 941 (Wash. Ct. App. 1994) (stating "the right to bear arms is subject to reasonable regulation by the state under its police power," and "regulation must be reasonably necessary to protect the public safety, health, morals, and general welfare and must be substantially related to the legitimate ends sought"). A similar balancing test is used in measuring the validity of federal legislation under the Commerce Clause. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 291 (1981); *see also Cruikshank*, 92 U.S. at 553 (holding the right of the people to bear arms is subject to the police power of the states); People v. Morrill, 475 N.Y.S.2d 648, 649 (N.Y. App. Div. 1984) ("[T]he power to regulate weapons is within the police powers of the State.").

It is, of course, a matter of conjecture what directions gun control legislation may take in the future. However, at present, the experience of state courts suggests that restrictions on the ownership and possession of automatic and semi-automatic weapons and handguns and the licensing of guns will likely withstand scrutiny under a balancing test.[36]

V. CONCLUSION

For the scholar or political theorist, the Second Amendment provides a boundless source of food for thought and debate. For the practitioner, however, the Second Amendment is what the courts say it is: a constitutional provision that protects state militias from interference by the federal government and applies only to federal legislation. Perhaps someday in the future the Supreme Court will reinvent (or revive) the Second Amendment by finding in it an individual right to bear arms and applying it to the states by incorporation through the Fourteenth Amendment. Until such a time, however, the Amendment is a "done deal" in most circuits and in all state courts. Clients should be warned that its usefulness as an instrument for invalidating offensive statutes and ordinances is highly doubtful.

The practitioner's duty is to face reality. That reality is a judicial rejection of the individual right view of the Second Amendment and a limitation of its application to federal statutes. Thus, when dealing with a state statute or ordinance, an attorney will have a better chance of success if the attack is based on the right-to-bear-arms provision of the state constitution—at least in states where an individual right is recognized.[37]

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36. *See* Robertson v. City & County of Denver, 874 P.2d 325, 328-29 (Colo. 1994) (holding ban on assault weapons does not violate constitutional provision guaranteeing the right to bear arms in self-defense); Benjamin v. Bailey, 662 A.2d 1226, 1231 (Conn. 1995) (holding ban on possession or sale of assault weapons does not violate state constitutional provision); Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 272-73 (Ill. 1984) (holding ban on handguns doesn't violate state constitution guarantee of individual right to keep and bear arms); Schubert v. DeBard, 398 N.E.2d 1339, 1340 (Ind. Ct. App. 1980) (holding licensing of handguns does not infringe on right of the people to bear arms for themselves and the state); *see also* Danny R. Veilleux, Annotation, *Validity of State Gun Control Legislation Under State Constitutional Provisions Securing the Right to Bear Arms*, 86 A.L.R. 4th 931, 940 (1991) ("With a few exceptions, gun control laws that restrict, rather than prohibit, the possession or carrying of guns, have withstood challenges based on state constitutions granting the right to bear arms.").

37. Attorneys involved in a potential Second Amendment case may be able to

APPENDIX [38]

State	Language of State Constitution	Questioned Regulation	Citation	Holding/Ruling
AZ	"The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." ARIZ. CONST. art. II, § 26.	Statute establishing the offense of misconduct involving weapons	State v. Moerman, 895 P.2d 1018, 1021-22 (Ariz. Ct. App. 1994).	State Constitution provides qualified, not absolute, right of citizens to bear arms in defense of themselves or of the state.
CO	"The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall he construed to justify the practice of carrying concealed weapons." COLO. CONST. art. II, § 13.	Ordinance banning manufacture, sale, or possession of assault weapons	Robertson v. City & County of Denver, 874 P.2d 325, 328-29 (Colo. 1994).	Ordinance is reasonably related to legitimate governmental interest in preventing crime, is valid exercise of police power, and does not violate right to bear arms in self-defense.

obtain advice and legal research from the following:

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38. Only the most recent decision of tbe highest state court which has rendered a written opinion on the issue is listed.

CT	"Every citizen has a right to bear arms in defense of himself and the state." CONN. CONST. art. I, § 15.	Ban on assault weapons	Benjamin v. Bailey, 662 A.2d 1226, 1233-35 (Conn. 1995).	Restricting ability to possess particular types of dangerous weapons does not frustrate purpose of state constitutional right to bear arms, but is subject to "rule of reason."
FL	"The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." FLA. CONST. Declaration of Rights, art. I, § 8(a).	Ban on possession of machine gun	Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972).	"[T]he right to keep and bear arms is not an absolute right, but is one which is subject to . . . police regulations."
GA	"The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § 1, para. VIII.	Ban on possession of sawed-off shotgun	Carson v. State, 247 S.E.2d 68, 73 (Ga. 1978).	The statute "can be sustained as a legitimate exercise of the police power of the state."
HI	"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." HAW. CONST. art. I, § 17.	Permit required for purchase of firearm	State v. Mendoza, 920 P.2d 357, 368 (Haw. 1996).	"[T]he right to bear arms may be regulated by the state in a reasonable manner." (The court declined to decide whether Art. I, § 17 creates an individual or a collective right to bear arms.)

ID	"The people have the right te bear arms for their security and defense; hut the legislature shall regulate the exercise of this right by law." IDAHO CONST. art. I, § 11 (amended 1978).	Prohibition on carrying of concealed weapons without permit	State v. Hart, 157 P.2d 72, 73 (Idaho 1945).	"[I]t is generally held to be a reasonable exercise of the police power of a municipality to prohibit the carrying of concealed dangerous or deadly weapons."
IL	"Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." ILL. CONST. art. I, § 22.	Village ordinance, which prohibited possession of operable handguns	Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 269 (Ill. 1984).	The right to arms secured by the Illinois Constitution is subject to substantial infringement in the exercise of the police power, even though it operates on the individual level.
IN	"The people shall have a right to bear arms, for the defense of themselves and the State." IND. CONST. art. I, § 32.	Licensing of handguns	Schubert v. DeBard, 398 N.E.2d 1339, 1340 (Ind. Ct. App. 1980).	"Establishing such a licensing procedure for handguns is not violative of the right to bear arms as guaranteed by the Second Amendment or Art. I, Sec. 32 of the Indiana Constitution."
KS	"The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." KAN. CONST., Bill of Rights § 4.	Ordinance prohibiting carrying on one's person a dangerous knife or firearm	Junction City v. Lee, 532 P.2d 1292, 1295 (Kan. 1975).	State constitutional provision "refers to the people as a collective body. . . . [it] is not a limitation on legislative power to enact laws prohibiting and punishing the promiscuous carrying of arms or other deadly weapons."

LA	"The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." LA. CONST. art. I, § 11.	Ban on concealed weapons	State v. Hamlin, 497 So. 2d 1369, 1371 (La. 1986).	"[R]ight to keep and bear arms guaranteed by our state Constitution is not absolute. The right may be regulated in order to protect the public health, safety, morals, or general welfare so long as that regulation is a reasonable one."
ME	"Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned." ME. CONST. art. I, § 16.	Concealed firearm statute	Hilly v. City of Portland, 582 A.2d 1213, 1215 (Me. 1990).	Right to bear arms not absolute; statute was reasonable response to justifiable public safety concern.
MA	"The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it." MASS. CONST. pt. 1, art. XVII.	Statute prohibiting sawed-off shotgun	Commonwealth v. Davis, 343 N.E.2d 847, 848-49 (Mass. 1976).	Provision in State Constitution providing that the people have a right to keep and to bear arms for the common defense was not directed to guaranteeing individual ownership of possession of weapons other than in the state militia; the common law right to bear arms was never absolute.
MI	"Every person has a right to keep and bear arms for the defense of himself and the state." MICH. CONST. art. I, § 6.	Prohibition of stun guns	People v. Smelter, 437 N.W.2d 341, 342 (Mich. Ct. App. 1989).	Prohibition of stun guns was reasonable and did not violate constitutional rights given that such weapons could not only temporarily incapacitate someone but could result in temporary paralysis.

MN	"The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people." MINN. CONST. art. I, § 16 (interpreted to uphold common law right to bear arms for self defense).	Requirement of permit in order to carry pistol	*In re* Atkinson, 291 N.W.2d 396, 399 (Minn. 1980).	"Whatever the scope of any common-law or constitutional right to bear arms, we hold that it is not absolute and does not guarantee to individuals the right to carry loaded weapons abroad at all times and in all circumstances."
MO	"That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons." MO. CONST. art. I, § 23.	Open carrying of a firearm readily capable of lethal use prohibited	City of Cape Girardeau v. Joyce, 884 S.W.2d 33, 34 (Mo. Ct. App. 1994).	"[S]uch constitutional provisions have never been held to deprive the General Assembly of authority to enact laws which regulate the time, place and manner of bearing firearms."
NE	"All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are . . . the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof." NEB. CONST. art. I, § 1.	Possession of firearm with barrel less than 18 inches in length prohibited	Stete v. Harrington, 461 N.W.2d 752, 753-54 (Neb. 1990).	Statute does not violate constitutional right to bear arms.

NH	"All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. CONST. pt. 1, art. 2-a.	Prohibition of possession of firearm by felon	State v. Smith, 571 A.2d 279, 281 (N.H. 1990).	"[S]tate constitutional right to bear arms is not absolute and may be subject to restriction and regulation;" restriction may be sustained if it narrowly serves significant governmental interest.
NM	"No law shall abridge the right of the citizen to keep and bear arms for security and defense, for . . . lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons." N.M. CONST. art. II, § 6.	Possession of firearm in an establishment licensed to dispense alcoholic beverages prohibited	State v. Lake, 918 P.2d 380, 383 (N.M. Ct. App. 1996).	"[T]he statute is reasonably related to the public health, safety, and welfare."
ND	All individuals have the right "to keep and bear arms for the defense of their person, family, property, and the state." N. D. CONST. art. I, § I.	Prohibition on possession of firearms by convicted felons	State v. Ricehill, 415 N.W.2d 481, 483 (N.D. 1987)	Right to bear arms is not absolute, but is subject to reasonable regulation under the state's police power.
OH	"The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.	Citywide ban on assault weapons	Arnold v. City of Cleveland, 616 N.E.2d 163, 172-73 (Ohio 1993).	Constitutional right to bear arms in Ohio is not absolute and is subject to reasonable regulation; statute was proper exercise of police power.

OR	"The people shall have the right to bear arms for the defence [sic] of themselves, and the State." OR. CONST. art. I, § 27.	Ban on "Slugging weapons"	State v. Kessler, 614 P.2d 94, 99 (Or. 1980).	Art. I, § 27 does not guarantee "that all individuals have an unrestricted right to carry or use personal weapons in all circumstances;" defendant's possession of a billy club in his home is a protected right.
PA	"The right of the citizens to bear arms in defence [sic] of themselves and the State shall not be questioned." PA. CONST. art. I, § 21.	License required to carry concealed weapon	Commonwealth v. Ray, 272 A.2d 275, 279 (Pa. Super. Ct. 1970).	"[A] reasonable regulation in a gun control law is a valid exercise of the police power."
TX	"Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." TEX. CONST. art. I, § 23.	Ban on possession of machine gun	Morrison v. State, 339 S.W.2d 529, 532 (Tex. Crim. App. 1960).	Statute is a valid exercise of police power designed to prevent crime.
UT	"The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law." UTAH CONST. art. I, § 6 (amended 1984).	Firearms prohibited to noncitizens	State v. Vlacil, 645 P.2d 677, 680 (Utah 1982).	Legislature bas power to enact statuta in question. Right to bear arms is subject to police power of the states.
VT	People have the right "to bear arms for the defence [sic] of themselves and the State." VT. CONST. ch. 1, art. 16.	Ban on carrying of a loaded rifle or shotgun in vehicle on a public highway	State v. Duranleau, 260 A.2d 383, 386 (Vt. 1969).	Statute is not in violation of constitutional right of citizens to bear arms in defense of themselves and the state.

WA	"The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." WASH CONST. art. I, § 24.	Municipal ordinance banning the sale or possession of switchblade knives	City of Seattle v. Montana, 919 P.2d 1218, 1223 (Wash. 1996).	Even if knives are arms within the meaning of Art. I, § 24, the right to bear arms "is not absolute, but instead is subject to 'reasonable regulation' by the State under its police power."
WV	"A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. VA. CONST. art. III, § 22.	Carrying concealed weapon prohibited	*In re* Metheney, 391 S.E.2d 635, 638 (W. Va. 1990).	Statute upheld as valid exercise of police power.
WY	"The right of citizens to bear arms in defense of themselves and of the state shall not be denied." WYO. CONST. art. I, § 24.	Proscription on carrying of concealed deadly weapon	State v. McAdams, 714 P.2d 1236, 1238 (Wyo. 1986).	Applying balancing test under police power, statute does not unduly restrain right to bear arms.