GUN SHY: THE SECOND AMENDMENT AS AN "UNDERENFORCED CONSTITUTIONAL NORM"

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I. INTRODUCTION

Twenty years ago, Professor Lawrence Sager wrote an influential article addressing the legal status of constitutional provisions that are not given the full range of interpretation by the Supreme Court, primarily due to what Sager termed "institutional" concerns.[1] Sager was trying to combat the "[m]odern convention" that treated "the legal scope of a constitutional norm as inevitably coterminous with the scope of its federal judicial enforcement."[2] Professor Sager argued that such norms were "valid to their conceptual limits,"[3] and that other actors in our constitutional scheme, like Congress and the President, also had a responsibility to ensure that those norms were enforced.

While Sager devoted much of his engaging article to exploring how the Fourteenth Amendment might be fully enforced,[4] he also described the following constitutional

1. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

2. *Id.* at 1213.

3. *Id.*

4. *See id.* at 1228-42; *see also* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

provisions as "likely candidates for characterization as underenforced: the fifth amendment's prohibition against takings of property without just compensation, the privileges or immunities clause of the fourteenth amendment [sic], and the due process clause of the Fourteenth Amendment."[5] The aim of this Article is to suggest an addition to Professor Sager's list: the Second Amendment.[6] In fact, it is more accurate to characterize this Amendment as *unenforced.*[7] My hope is that Professor Sager's fascinating thesis might help some who are reluctant to take the Second Amendment seriously see it in a new light and consider whether constitutional doctrine might not be better served by treating the Second Amendment, in the words of Northwestern University law professor Dan Polsby, "like normal constitutional law."[8] In addition, this Article offers some suggestions for how Congress might use its power to enforce the Fourteenth Amendment to remedy both egregious violations of the Second Amendment, and neglect of it by federal courts.

In Part II of this Article I will summarize and analyze Professor Sager's criteria for declaring a constitutional provision to be underenforced, and examine his suggestions for enforcing the provision to its full extent. Part III applies Sager's indicia of underenforcement (to which I add one of my own) to the Second Amendment. Part IV analyzes remedies for the Second Amendment's underenforcement, including congressional enforcement under Section 5 of the Fourteenth Amendment.[9] Part V concludes with a comment on the dangers to constitutional law—and to the Constitution as a whole—of continued underenforcement of the Second Amendment.

5. Sager, *supra* note 1, at 1219-20; *see also* U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."); U.S. CONST. amend. XIV, § 1 (". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .").

6. "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.

7. This point cannot be emphasized strongly enough. Throughout this Article, I will use the term "underenforced" to maintain continuity with Professor Sager's thesis. It will become apparent, though, that the Second Amendment is not "underenforced" by courts in the same way that, for example, Sager described the Takings Clause of the Fifth Amendment as "underenforced."

8. Dan Polsby, *Treating the Second Amendment Like Normal Constitutional Law,* REASON, March 1996, at 32.

9. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

Professor Sager's framework is a convenient way to encourage Second Amendment skeptics, including, I hope, judges, professors, and policymakers, to take a new view of the Amendment and the consequences of its abrogation by federal courts.

II. THE SAGER THESIS

A. *Indicia of Underenforcement*

Although cautioning that there is no "litmus test,"[10] Sager's article did suggest certain "indicia of underenforcement."[11] They were:

> [i] a disparity between the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives, [ii] the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct, and [iii] other anomalies . . . between the independent reach of the amendments and the scope of congressional authority which they confer.[12]

Sager felt that underenforcement is rooted in the Thayerian[13] doctrine of judicial restraint and deference to the legislature.[14] Sager wrote that "Thayer reappears like a Greek chorus at moments of stress in American constitutional decisionmaking"[15] to remind us that "the legislature is charged with the responsibility of measuring its own conduct against the Constitution and that the judiciary should therefore not lightly reach a judgment on the constitutionality of a legislative act contrary to the prior constitutional judgment of the legislature . . . ."[16] In the case of the Fourteenth Amendment, for example, Sager suggested that this model of judicial review has led to underenforcement because of federal courts' (particularly the Supreme Court's) reluctance to "displac[e] the judgments

10. Sager, *supra* note 1, at 1218.

11. *Id.*

12. *Id.* at 1219.

13. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (arguing that courts should not invalidate congressional acts absent a clear constitutional violation).

14. *See* Sager, *supra* note 1, at 1222-23.

15. *Id.* at 1223 n.32.

16. *Id.* at 1223.

of elected state officials"[17] and judicial doubts about "the competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them."[18] These concerns Sager terms "institutional"; they are in contrast to "analytical concerns," the term Sager uses to describe limitations of constitutional provisions that stem from a court's understanding of the provision itself.[19]

B. *Understanding Underenforced Norms*

Sager argued that the modern tendency is "to equate the existence of a constitutional norm with the possibility of its enforcement against an offending official,"[20] a view that is constantly encouraged "by the practical dominance of the Supreme Court as the final arbiter of our constitutional affairs . . . ."[21] Nevertheless, Professor Sager urged one to understand underenforced constitutional norms "to be legally valid to their full conceptual limits, and [to understand] federal judicial decisions which stop short of these limits . . . as delineating only the boundaries of the federal courts' role in enforcing the norm . . . ."[22] In the doctrine of judicial restraint, Sager found an implicit recognition of "the distinction between the scope of the norms of the Constitution and the scope of their judicial enforcement . . . ."[23] Too often, however, "we treat the absence of judicial intervention as an authoritative statement about the norm itself."[24] This is true, paradoxically, when

17. *Id.* at 1217 (footnote omitted).

18. *Id.* (footnote omitted).

19. Sager, *supra* note 1, at 1217-18.

20. *Id.* at 1221.

21. *Id.* Of course, as Sager points out, the Court itself encourages this view. *See id.* at 1221 n.26; *see also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("The federal judiciary is supreme in the exposition of the law of the Constitution.") (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")).

22. Sager, *supra* note 1, at 1221.

23. *Id.* at 1224.

24. *Id.* at 1226. This is true of other constitutional provisions popularly regarded as declaring "dead letters" because of Supreme Court underenforcement. *See, e.g.*, U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in the Union a Republican Form of Government . . . ."); U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

"institutional concerns lead . . . to limited federal enforcement of the constitutional norm in question" as opposed to judicial invocation of the "political question" doctrine.[25] Sager cited the legality of the Vietnam War and the Nixon impeachment as examples of the latter: "There was no suggestion that the improbability or impossibility of judicial intervention mooted the relevant constitutional questions . . . . [W]e understand the constitutional norm at issue to retain its legal validity."[26]

C. *Underenforced Norms: Results and Remedies*

Sager contended that the adoption of his analysis would result in "the perception that government officials have a legal obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies."[27] Officials would then be encouraged to "fashion their own conceptions of these norms and measure their conduct by reference to these conceptions."[28] "At a minimum," for Sager, this would mean officials would have an obligation to use their "'best efforts' to avoid unconstitutional conduct."[29]

Sager's thesis envisioned a positive role for the courts, including the Supreme Court, and entailed only minimal limitations on the power of judicial review. In attempting to enforce constitutional norms fully, if Congress passed a law which trammeled other constitutional values, courts would be justified in overturning the offending measure.[30] Similarly, should Congress read a constitutional norm broader than has the Supreme Court, and the more limited interpretation is "firmly rooted in analytical rather than institutional perceptions,"[31] judicial intervention would be warranted as well. Sager cites as examples of warranted intervention when the norm is "fully enforced by the Court"[32] and when the enactment "cannot be justified by any analytically defensible conception of

25. Sager, *supra* note 1, at 1225-26.
26. *Id.* at 1225.
27. *Id.* at 1227.
28. *Id.*
29. *Id.*
30. *See* Sager, *supra* note 1, at 1240-42.
31. *Id.* at 1241.
32. *See id.*

the relevant constitutional concept."[33] But, Sager argued, when refusing to enforce a constitutional norm on institutional, as opposed to analytical grounds, the courts should refrain from commenting upon the scope of such provision.[34]

Sager also endorsed state courts' enforcement of underenforced constitutional norms,[35] and criticized the Supreme Court for overturning cases in which state courts have broadly enforced provisions of the Constitution.[36] If an underenforced constitutional norm is valid to its conceptual boundaries, the decision of the state court can be understood as the enforcement of the unenforced margin of a constitutional norm, that is, as the assumption of an important constitutional role that the federal courts perceive themselves constrained to avoid because of institutional concerns. On this basis, state court decisions that voluntarily extend the application of such norms should be left intact.[37] Sager continued, "Unless competing constitutional concerns are at stake, there would seem to be no occasion for an abiding federal judicial role in policing state courts against overly generous interpretations of federal constitutional values."[38]

Sager concluded[39] that "we should not allow the prominence of the federal judiciary's part in the enforcement of the Constitution to obscure the importance of other governmental officials and bodies in that process."[40] He characterized the federal courts as "relatively powerless" against the "scattered

33. *Id.*

34. *See id.* at 1241-42. "The Supreme Court may fix an analytical limit to the reach of a constitutional concept . . . but instead of a crisp 'X clause stops here,' the Court would find that 'X clause does not extend this far, at any event.'" *Id.* at 1242. (footnote omitted). When it does so, Sager argued, the Court gets to have it both ways: invoking institutional concerns as a way to sidestep the difficult question of fashioning standards going forward, while indulging in its role as chief expositor of constitutional meaning to eliminate the possibility that another branch can step in to "gap fill." *See id.* at 1241.

35. *See* Sager, *supra* note 1, at 1242-50.

36. *See id.* at 1243-44.

37. *See id.* at 1248.

38. *Id.* at 1249.

39. Sager entertained objections to his advocacy of federal judicial deference to generous state court interpretations of the Constitution, including the need for uniformity, the danger of forum shopping, the availability of state constitutional provisions, state courts' own institutional limitations, and the existence of limits to state courts' authority. *See id.* at 1250-63. However, for reasons that will become apparent, state court enforcement of the Second Amendment is not likely. *See infra* notes 183-95 and accompanying text.

40. *Id.* at 1263.

erosion" of our "constitutional values."[41] His vision, ultimately, was one of "shared responsibility for the safeguarding of constitutional values."[42] To that end, Professor Sager "encourage[d] close scholarly and judicial attention to the principles which govern or ought to govern the collaboration."[43]

III. THE SECOND AMENDMENT AND THE "INDICIA OF UNDERENFORCEMENT"

In this Part, I will apply Sager's indicia of underenforcement to the Second Amendment to ascertain whether it is a good candidate for Sager's suggested remedies. In addition to the three indicia Sager listed in his article, I have added a fourth: lack of incorporation through the Fourteenth Amendment—a dubious distinction that the Second Amendment shares with only a handful of other provisions of the Bill of Rights (the Third and Seventh Amendments being two such examples[44]). What will emerge is a clearer picture of *why* the Second Amendment continues to receive the cold shoulder from the courts, and some members of the academy.

A. *Disparity Between Scope of Judicial Enforcement and the Amendment's "Plausible Understanding"*

1. *The Second Amendment and the Legal Academy*

For many years the Second Amendment was virtually ignored by legal scholars. It went unmentioned in the major constitutional law textbooks;[45] if mentioned in treatises, it was

41. *Id.*

42. *Id.*

43. *Id.*

44. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend VII. *See* Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916); "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III. *But see* Engblom v. Carey, 677 F.2d 957, 961 (2nd Cir. 1982) (upholding lower-court holding that the protections of the Third Amendment are incorporated into the Fourteenth Amendment's protection of "liberty"). There is no Supreme Court case law on the Third Amendment.

45. *See, e.g.*, GEOFFREY STONE ET AL., CONSTITUTIONAL LAW (3rd ed. 1991) (no mention made of the Second Amendment). Recent editions of constitutional law casebooks are beginning to take notice of the Second Amendment. *See, e.g.*, DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 1073-77 (3rd ed. 1998);

relegated to a footnote.[46] Several factors contributed to the Second Amendment's neglect: very little attention by the Supreme Court;[47] lack of interest in hearing additional Second Amendment cases by the Court;[48] and, generally, a lack of knowledge about the origins of the Second Amendment and its intent.[49] Further, and perhaps more importantly, until 1968, there had historically been no widespread efforts on the part of the government to regulate private ownership of firearms extensively; moreover, because the Second Amendment has never been held incorporated through the Due Process Clause of the Fourteenth Amendment,[50] state and local gun-control initiatives have been insulated from federal court scrutiny.[51] Thus, inaction on the part of the judiciary produced no stimulus to academic thinking about the Second Amendment. In

STONE ET AL., *supra* (1997 Supp.); *see also infra* note 185 (discussing Paul Brest and Sanford Levinson's treatment of the Amendment in the third edition of their casebook).

46. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, AMERICAN CONSTITUTIONAL LAW 340 n.4 (5th ed. 1995); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 299 n.6 (2nd ed. 1988). Tribe has elsewhere in print endorsed the view that the Second Amendment guarantees no individual right, despite the vast academic literature to the contrary. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 11 (1991); Laurence H. Tribe, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 71 (Amy Gutmann ed., 1996) [hereinafter Tribe, *Comment*].

47. In the Twentieth Century, the Supreme Court has decided only one case dealing directly with the Second Amendment. *See* United States v. Miller, 307 U.S. 174 (1939). Even those ardently opposed to meaningful enforcement of the Second Amendment concede that the opinion is less than a clear statement of support for their position. *See, e.g.*, Andrew Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 68 (1995) (admitting that the *Miller* case was less than "crystal clear").

48. The Supreme Court has denied certiorari in a number of cases with direct Second Amendment implications, most famously in the case of *Quilici v. Morton Grove*. The *Quilici* case involved an attempt by Morton Grove, Illinois, to ban possession of handguns within its city limits. The ban was upheld in the trial court and by the Seventh Circuit; the Supreme Court denied certiorari. *See* Quilici v. Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 865 (1983).

49. Don Kates, a California attorney and counsel in the *Quilici* case, was one of the first to publish a scholarly work on the Second Amendment in an "elite" law review. Though Sanford Levinson would get credit for challenging the legal academy to take a second look at the Second Amendment, Levinson relied on Kates's article, which is still widely cited today. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates, *Handgun Prohibition*]; *see also* Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

50. *See* Presser v. Illinois, 116 U.S. 252 (1886) (holding the Second Amendment inapplicable to the States); United States v. Cruikshank, 92 U.S. 542 (1875) (same).

51. State constitutional restrictions still apply, however, and in some instances, state courts have struck down gun control proposals on those grounds. *See* Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994).

addition, discomfort with the whole notion of private ownership of firearms no doubt contributed in no small part to academic and judicial disinterest.[52]

Changes in the last ten years have produced intense new interest in the Second Amendment. In 1989, Professor Sanford Levinson published his much-cited *The Embarrassing Second Amendment* in *The Yale Law Journal.* Levinson criticized academic neglect of the Amendment and hypothesized that liberals like himself were unwilling to take the Amendment seriously because of the chance "winning" interpretations of the Amendment might be put forth.[53] Levinson's article provoked much conversation among pundits about the Second Amendment and whether it should be repealed, if indeed it did (as Levinson suggested) protect an individual's right "to keep and bear arms."[54] The election of a pro-gun-control President, new federal gun-control measures like the Brady law,[55] and the Assault Weapons Ban[56] all marked a new round of federal firearms restrictions. These, in turn, spurred a new round of court challenges.[57]

When their attention was called to the Amendment, almost all scholars who studied the matter carefully agreed (if reluctantly) with Levinson that the Second Amendment protected an individual right.[58] In 1995, Professor Glenn Harlan Reynolds confidently labeled this view of the Second Amendment the "Standard Model."[59] The more that scholars have looked at the

52. *See infra* notes 161-62 and accompanying text.

53. *See* Sanford Levinson, *The Embarrassing Second Amendment,* 99 YALE L.J. 637 (1989). Levinson's title may have been influenced by an earlier article by Nelson Lund, a Professor at the George Mason School of Law. *See* Lund, *supra* note 49, at 103 ("The Second Amendment to the United States Constitution has become the most embarrassing of the Bill of Rights.").

54. *See* Michael Kinsely, *Second Thoughts,* NEW REPUBLIC, Feb. 26, 1990, at 4; George F. Will, *America's Crisis of Gunfire,* WASH. POST, March 21, 1991, at A21.

55. *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C.A. §§ 921, 921 note, 922, 922 note, 923-24, 925A (1994 & West. Supp. 1998)).

56. *See* Public Safety Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1807 (1994) (codified as amended at 18 U.S.C.A. § 921, 921 note, 922-24 (1994 & West. Supp. 1998) (adding 18 U.S.C.A. §§ 922(v)-(w) (West Supp. 1998)).

57. *See, e.g.,* Love v. Pepersack, 47 F.3d 120 (4th Cir. 1995); United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992).

58. For a complete list of scholarly publication on both sides of the issue, see Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment,* 45 EMORY L.J. 1139, 1144-45 & nn.13, 17 (1996).

59. *See* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment,* 62 TENN. L. REV. 461, 475 (1995). The term "Standard Model" is one Reynolds borrowed from

issue, the more Reynolds appears to have been correct in declaring scholarly consensus about the intent animating the Second Amendment.[60]

Of course, in so emotional an area, thesis has provoked antithesis. Opposing those scholars who endorse the Standard Model of the Second Amendment are the adherents of the "collective" or "States' rights" interpretation of the Second Amendment.[61] The States' rights model, argued forcefully by gun-control advocate Dennis Henigan, reads the Second Amendment as only protecting a State's "right" to have an armed militia free from federal control,[62] and as protecting only the "right to keep and bear arms" of the "people" who are members of the State's militia.[63] The only legitimate state militia that exists today, Henigan argues, is the National Guard,[64] which is actually a *federal* force.[65] Perhaps to cast the States' rights model of the Second Amendment as a "theory" is misleading, because its main proponents neither take it seriously nor carefully follow its logic to a reasonable conclusion. It is most often employed as a makeweight—a convenient way to read the

physics, where it is used to describe the way in which the universe was created. Although a standard model is not wholly without room for disagreement, "the overall framework for analysis . . . [is] generally agreed upon." *Id.*

60. *See, e.g.*, L.A. Powe, Jr., *Guns, Words and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997) (concluding that the Second Amendment guarantees an individual right to bear arms). Powe is a noted First Amendment scholar who draws upon his knowledge of the origin and evolution of the First Amendment in discussing analogies he perceives between the First and Second Amendments. He concludes that it does not make sense to treat the Second Amendment differently than the First. *See also* Thomas B. McAffee & Michael J. Quinland, *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).

61. *See, e.g.*, DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1995); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Lawrence Delbert Cress, *An Armed Community: The Origins and Meanings 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); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975). For another anti-Standard Model scholar whose idiosyncratic view of the Second Amendment can be described with neither the "States' rights" nor the "collective right" label, see David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

62. *See, e.g.*, HENIGAN ET AL., *supra* note 61, at 1-2; Henigan, *supra* note 61, at 107-109; Ehrman & Henigan, *supra* note 61, at 7.

63. *See* Henigan, *supra* note 61, at 108.

64. *See* HENIGAN ET AL., *supra* note 61, at 2.

65. *See* Col. Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U. S. Military*, 29 WAKE FOREST L. REV. 341 (1994).

Second Amendment out of existence under the guise of "interpretation." For their part, historians have called it anachronistic.[66]

The "collective right" model of the Second Amendment similarly arises from a fervent wish that the Second Amendment be erased from the Bill of Rights. This model reads the "people" of the Second Amendment as an undifferentiated mass, none of whom individually, conveniently enough, may invoke the protections of the Second Amendment's guarantees. This model is becoming increasingly popular with federal judges, who invoke it as a way to deny standing to Second Amendment claimants.[67] The concept makes little sense, however, for the fact that the Bill of Rights guarantees other rights to "the People" (like the right of *the people* to be free from unreasonable searches and seizures[68]) has never been interpreted to foreclose *individuals* from availing themselves of those rights.[69]

Faced with almost unanimous scholarly endorsement of the Standard Model, Henigan and other Second Amendment collectivists have responded in three ways. First, they cite the paucity of Supreme Court decisions on the matter, the near-universal rejection of Second Amendment claims by lower federal courts, and the opinions of members of the "elite" bar like the American Bar Association as "proof" that the renewed scholarship on the Second Amendment is irrelevant.[70] The law, they argue, is "settled"; the Second Amendment is no barrier to

66. *See* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 163 (1994). Professor Malcolm wrote: "The clause concerning the militia was not intended to limit ownership of arms to militia members, nor return control of the militia to the states, but rather to express the preference for a militia over a standing army. The army had been written into the Constitution." *Id.*

67. For a recent example, see Hickman v. Block, 81 F.3d 98 (9th Cir. 1996).

68. *See* U.S. CONST. amend. IV.

69. Don Kates made this point nicely in his path-breaking article on the Second Amendment. *See* Kates, *Handgun Prohibition*, *supra* note 49, at 211 n.31. Apparently, the "collective rights" model first surfaced in a state court decision that eviscerated the guarantee of a right to keep and bear arms in the Kansas constitution. *Id.* at n.31. The argument was the focal point of the United States government's argument in *United States v. Miller*, 307 U.S. 174 (1939). For a discussion of the government's arguments and the Supreme Court's implicit rejection of them in *Miller*, see Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961, 975 & nn.72-75 (1996) [hereinafter Denning, *Miller*]. For a discussion of the enforceability of rights of "the People," including the Second Amendment, see generally Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) [hereinafter Amar, *Bill of Rights as a Constitution*].

70. *See* HENIGAN ET AL., *supra* note 61, at 4-14; Henigan, *supra* note 61, at 108 n.9; Herz, *supra* note 47, at 77-84.

almost unlimited federal power to regulate private ownership of firearms. In addition to appeals to *stare decisis*, they seek to foreclose serious discussion of the Amendment by accusing Standard Model scholars of endorsing *pro tanto* a "constitutional right to revolution" that would render it impossible to prosecute violent revolutionaries like members of neomilitias presently operating around the country. Courts, they argue, would be unable simply to prosecute these groups for any criminal acts that they might commit, and would have to determine whether the groups held some sort of "good faith" belief that the government was acting tyrannically.[71] Finally, their newest strategy to avoid engaging the constitutional argument is to ignore it by declaring the problem of guns in America a public health problem, and lobbying for prohibition or increased restrictions on ownership and manufacture of weapons.[72]

Though the merits of the various academic positions have been discussed more extensively elsewhere,[73] a brief discussion is warranted in order to place the Second Amendment debate in the context of Professor Sager's thesis on underenforced constitutional norms. If the schools of thought surrounding the Second Amendment can be taken as fairly representative of current thinking (as I believe they can be), then a few observations may be made. First, it does not appear that the Standard Model stretches the Second Amendment from an analytical point of view. In fact, were one keeping score, the Standard Modelers are far ahead in the number of law-review articles endorsing that position, and can count many well-respected constitutional scholars in their numbers. Given the presence of a very plausible winning interpretation of the Second Amendment, the lack of court enforcement of the Second Amendment to its boundaries constitutes *prima facie* evidence of underenforcement.[74] Moreover, the current predilection of the Second Amendment collectivists to read the Amendment's protections as coterminous with court enforcement—or lack thereof—is further evidence of

71. *See, e.g.*, HENIGAN ET AL., *supra* note 61, at 21; Henigan, *supra* note 61, at 110.

72. *See, e.g.*, HENIGAN ET AL., *supra* note 61, at 49-50.

73. *See* sources listed in Barnett & Kates, *supra* note 58.

74. *See* Sager, *supra* note 1, at 1219 (listing "indicia of underenforcement").

under-enforcement.[75] A brief examination of the federal courts' treatment of the Second Amendment can help complete the sketch begun here, and better facilitate an analysis of the Second Amendment according to Sager's framework.

2. *The Evolution of Second Amendment Jurisprudence*

In many ways, the "collective rights" scholarship and federal courts' treatment of the Second Amendment have shadowed one another. Though the Supreme Court has interpreted the Second Amendment only once this century, and then with Delphic ambiguity,[76] lower courts have largely rejected the Standard Model (with no apparent knowledge of its scholarly consensus). In doing so, their reasoning follows that of the Second Amendment collectivists: (1) they deny that the history of the Second Amendment supports an individual right; (2) they claim that *stare decisis* dictates the conclusion that there is no individual right to be found in the Second Amendment; and (3) they claim that such a right, if it existed, would levy a social cost that far exceeds any purported benefit to society. Only one court has ever tried to take position (1), a position that is hardly tenable in light of recent scholarship to the contrary, and there the historical materials cited by the court in support of its peculiar position do not bear close scrutiny.[77] Positions (2) and (3), upon which most courts rely, express *institutional* (as opposed to *analytical*) concerns about the Amendment, and have been most responsible for its judicial underenforcement.

a. United States v. Miller *and the Supreme Court's Second Amendment Jurisprudence*

Aside from passing mention in dicta,[78] *United States v. Miller*[79] is the only guidance the Supreme Court has seen fit to provide in

75. *See* HENIGAN ET AL., *supra* note 61, at 1-2; Henigan, *supra* note 61, at 108-09; Herz, *supra* note 47, at 82.

76. *But see infra* note 405 and accompanying text (discussing a recent concurring opinion by Justice Clarence Thomas regarding the Second Amendment).

77. For a discussion, see *infra* notes 112-35 and accompanying text.

78. Interestingly, this dicta tends to support the view of the Second Amendment as protecting an individual right. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (suggesting that the use of the term "the People" in the Preamble, the First, Second, Fourth, Ninth, and Tenth Amendments should be construed as *pari materia*); Poe v. Ullman, 367 U.S. 497, 543 (1960) (Harlan, J., dissenting). Harlan wrote:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere

the Twentieth Century. Unfortunately, the guidance provided by *Miller* is ambiguous and as a result the case is often misunderstood. *Miller* arose as a result of an appeal by the government to the Supreme Court following the dismissal of an indictment against two Arkansas men accused of possessing a sawed-off shotgun in violation of the National Firearms Act.[80] The lower court sustained the defendants' demurrer, and quashed the indictment on the grounds that the National Firearms Act violated the Second Amendment.[81] The government sought direct review by the Supreme Court, and argued the case alone—no argument was presented by the defendants, Miller and Layton.[82]

In its brief, the government argued for a collective-rights interpretation of the Second Amendment with which Dennis Henigan would be very comfortable.[83] In its opinion, however, the Court did not adopt the government's position; instead, the Court appeared to adopt one of the government's fall-back positions: that the Second Amendment did not protect the right to possess the *type* of weapon the defendants were charged with possessing. Even then, the Court seemed to take pains to point out that its holding was based solely on the lack of relevant evidence in the record.[84] Both Standard Modelers[85] and Second

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provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Id.

79. 307 U.S. 174 (1939).

80. *See id.*, at 175. For a more in-depth examination of the *Miller* case and its subsequent treatment by lower federal courts, see Denning, *Miller*, *supra* note 69.

81. *See* United States v. Miller, 26 F. Supp. 1002 (W.D. Ark. 1939), *rev'd*, 307 U.S. 174 (1939).

82. *See* Denning, *Miller*, *supra* note 69, at 973.

83. *See id.* at 974-75.

84. The Court held:

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

Miller, 307 U.S. at 178 (citation omitted).

Amendment collectivists[86] claim the holding of *Miller* vindicates their respective positions. The collectivists often cite the portion of *Miller* in which Justice McReynolds wrote that the Second Amendment was framed "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces [i.e., the militia] .... It must be interpreted and applied with that end in view."[87] Standard Modelers, however, emphasize the language that follows, in which McReynolds recognized that militias "comprised all males physically capable of acting in concert for the common defense."[88] McReynolds's opinion also mentioned that in colonial times, the arms to be borne by militia members were privately-owned.[89]

Thus, depending on the portion of Justice McReynolds' opinion one quotes (and which parts one elides) the opinion can be cited in *qualified* support of both sides. However, as Professor Andrew McClurg wrote in an article on the rhetoric of gun control, "[t]o present *Miller* as standing clearly for either the collective right view or the individual right view is to commit the fallacy of one-sided assessment, because such a presentation depends on ignorance of strong competing evidence and arguments."[90] McClurg concluded that the "most accurate assessment of *Miller* is that the opinion did not clearly indicate whether the Second Amendment creates an individual right or only a collective right."[91] Moreover, in a recent concurring opinion, Justice Clarence Thomas wrote that "The Court [in *Miller*] did not... attempt to define, or otherwise construe, the substantive right protected by the Second Amendment."[92] Although admittedly some Standard Modelers have overstated the certainty of *Miller*'s endorsement of an individual right to keep and bear arms, it should be clear that, at the very least,

85. *See, e.g.*, STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 188 (1984) [hereinafter HALBROOK, EVERY MAN].

86. *See, e.g.*, HENIGAN ET AL., *supra* note 61, at 1-2.

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

88. *Id.* at 179.

89. *See id.*

90. Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 102 (1992) (footnote omitted).

91. *Id.* (footnote omitted). This is a telling concession from someone like Professor McClurg, who is an avowed proponent of gun control. *See generally* Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777 (1995) (discussing holding gun manufacturers liable for negligent marketing of weapons used to perpetrate crimes).

92. Printz v. United States, 117 S. Ct. 2365, 2368 (1997) (Thomas, J., concurring).

Miller does not, as some collectivists suggest, foreclose such an interpretation. Thus, to frame the issue in terms of Sager's analysis, there appear to be minimal analytical difficulties with the Standard Model. To be sure, the lower federal courts have adopted a crabbed analytical view of the Second Amendment, but they have often done so with reference to distinctly institutional concerns in their opinions.

b. *Lower Federal Courts and the Second Amendment*

In the years following the *Miller* decision, one might have expected lower federal courts to take the logic of McReynolds' opinion to its logical conclusion, and answer the questions left by the *Miller* opinion. For example, because the Court was unwilling to take judicial notice of a weapon's utility to the militia, if such evidence were presented, did the Second Amendment protect the individual's right to that weapon? If the Second Amendment should be interpreted with a view to sustaining a militia, and if militias were traditionally composed of all citizens, then does not the individual citizen, as opposed to the state, have her right to keep and bear arms guaranteed against government disarmament as a way to "assure the continuation and render possible the effectiveness of" a militia? Were there certain weapons that could be denied citizens, despite their military utility?

Despite the route one might have expected lower courts to take, the decisions following *Miller* in the 1940s began a trend of judicial denigration of the Second Amendment that continues in the federal courts to this day. Moreover, the lack of analytical depth in the opinions belies the institutional concerns that some courts have expressed in their opinions about the possible ramifications of taking the Second Amendment seriously.

In 1942, the United States Courts of Appeals for the First and Third Circuits had occasion to interpret the new *Miller* decision. The decisions are notable for three things: (1) their unwillingness to follow the *Miller* decision to its logical conclusion; (2) their expression of institutional concerns that the judges thought justified treating the Second Amendment *unlike* "normal constitutional law"; and (3) the fact that almost all the subsequent federal lower court case law on the Second Amendment relies not on *Miller*, but on the reasoning in these

cases. In fact, lower courts often incorrectly cite *Miller* for the propositions contained in the following cases.

In *Cases v. United States*,[93] the First Circuit presented what it saw as persuasive reasons for *not* following the Supreme Court's logic in *Miller*. The defendant in the case was convicted under the Federal Firearms Act[94] for possession of a firearm by a convicted felon; Mr. Cases challenged his conviction on Second Amendment grounds.[95] As a preliminary matter, there is historical evidence to support the position that convicted felons forfeit their right to keep and bear arms.[96] Despite the availability of a narrow ground for disposing of Cases's claim, the First Circuit thought it necessary to add its own gloss to the *Miller* decision.[97]

The *Cases* court put forth, and quickly rejected, one possible implication of *Miller*: "the federal government . . . cannot prohibit the possession or use of any weapon which has a reasonable relationship to the preservation or efficiency of a well-regulated militia."[98] The court wrote that it did not "think the Supreme Court [in *Miller*] was attempting to formulate a general rule applicable to all cases."[99] Even if it did, the *Cases* court believed that, "if intended to be comprehensive and

93. 131 F.2d 916 (1st Cir. 1942).

94. Ch. 850, 52 Stat. 1250 (1938) (repealed 1968).

95. *See Cases*, 131 F.2d at 917-18.

96. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *143-44 (listing as an "auxiliary" right the right of subjects to "hav[e] arms for defence [sic], suitable to their condition and degree, and such as are allowed by law"); 4 BLACKSTONE, *supra*, at *149 (listing as an offense against the people "riding or going armed, with dangerous or unusual weapons" on penalty of imprisonment and "upon pain of forfeiture of the arms"); MALCOLM, *supra* note 66, at 104-05; David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORD. URB. L.J. 31 (1976); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 144, 146 (1986) ("One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals) . . . ."); *see also* Lewis v. United States, 445 U.S. 55, 66 (1979) (holding Congress may prohibit a convicted felon from possessing a firearm that had moved in interstate commerce).

97. *See* CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 190 (1994) ("What could have been a straightforward statement that convicted felons lost their right to keep and bear arms, instead turned into a repudiation of the Second Amendment as protecting an individual right . . . ."); *see also* HALBROOK, EVERY MAN, *supra* note 85, at 189 ("Interestingly, most of *Cases* may be considered mere dictum because its narrow holding was that convicted violent felons (a class which traditionally had forfeited various civil rights, including militia membership) could be constitutionally disarmed."). Nevertheless, most recent federal court decisions have relied heavily on the First Circuit's reasoning in *Cases*. *See* Denning, *Miller*, *supra* note 69, at 989.

98. *Cases*, 131 F.2d at 922.

99. *Id.*

complete," the *Miller* rule "would seem to be already outdated . . . because of the well known fact that in the so-called 'Commando Units' some sort of military use seems to have been found for almost any modern lethal weapon."[100] (One might question whether this comparison between professional soldiers serving in elite commando units and individuals who make up a citizen militia is not comparing apples and oranges when attempting to ascertain what type of "arms" are protected by the Second Amendment. Moreover, "outdated" or not, the *Cases* court should have felt obligated to apply *Miller* faithfully; it was not at liberty to fashion an alternative test.)

Given these facts, and taking the *Miller* rule at face value, the court concluded that:

> the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus. But to hold that the Second Amendment limits the federal government to regulations concerning only weapons which can be classed as antiques or curiosities . . . is in effect to hold that the limitation of the Second Amendment is absolute.[101]

The problem with its conclusion, as one commentator has pointed out, is that the court ignored the traditional common-law power of a government to regulate the manner in which the right was exercised, as long as such regulation was reasonable.[102] More interesting, for purposes of this Article, are the *institutional* concerns voiced by the court in refusing to apply the logic of the *Miller* decision:

> Another objection to the rule of the *Miller* case as a full and general statement is that according to it Congress would be prevented by the Second Amendment from regulating the possession or use by private persons not present or prospective members of any military unit, of distinctly military arms, such as machine guns, trench mortars, anti-tank or anti-aircraft guns, even though under the circumstances surrounding such possession or use it would be inconceivable that a private person could have any legitimate reason for

100. *Id.*

101. *Id.*

102. *See* CRAMER, *supra* note 97, at 192; *see also* MALCOLM, *supra* note 66 (noting that Blackstone's *Commentaries* drew a distinction between the right to self-defense and going armed in public with dangerous or terrifying weapons).

> having such a weapon. It seems unlikely to us that the framers of the Amendment intended any such result.[103]

Confounded by a constitutional right that just did not seem "right" to the judges,[104] the court abandoned an attempt to fashion a general rule, and purported to examine the case with regard to its facts.[105] In the very next sentence, though, the court devised its *own* test.

Though it admitted that the weapon used by Cases had military utility,[106] the court found "no evidence that the appellant 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."[107] That being the case, the court concluded that Cases was "in possession of, transporting and using the firearm and ammunition purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of the well-regulated militia...."[108] Having abandoned *Miller*, the *Cases* court proceeded to construct this test out of whole cloth. There is nothing in the *Miller* decision that warranted engrafting the "state of mind" test imposed by the *Cases* court onto the Second Amendment. Moreover,

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103. *Cases*, 131 F.2d at 922. Again, the court assumed that arms appropriate for an army were those appropriate for a militia. Moreover, the judges refused to apply the possible textual restrictions present in the Amendment itself. In other words, can one really "keep and bear" an anti-aircraft gun? Similarly, though the court seems to say that the right to keep and bear such arms was "unlikely" to have been granted by the Founders, it does not consult any historical materials that would confirm or deny its suspicion. *Compare* Glenn H. Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1756-1757 (1995), *with* references cited therein.

104. "The First Circuit Court of Appeals, in deciding *Cases v. United States*... began what can only be described as a rebellion against the holding in *Miller* that the Second Amendment guarantees the right of every individual to keep and bear any arms suitable for militia use." HALBROOK, EVERY MAN, *supra* note 85, at 188. Although Halbrook's characterization of *Miller*'s holding might be open to question, it was certainly a possible interpretation.

105. *See Cases*, 131 F.2d at 922. The court opined:

> Considering the many variable factors bearing upon the question, it seems to us impossible to formulate any general test on which to determine the limits imposed by the Second Amendment but that each case under it, like cases under the due process clause, must be decided by its own facts and the line between what is and is not a valid federal restriction pricked out by decided cases falling on one side or the other of the line.

Id.

106. *See id.* at 922-23.

107. *Id.* at 923.

108. *Id.*

requiring a person to be a member of a military organization as a precondition for the exercise of the right ignored the language in the *Miller* decision that acknowledges militias, at the time of the Framing, were universal in their membership.[109] Further, the court's claim that Cases was not a member of any military organization is not technically correct because there was (and still is) a federal unorganized militia statute on the books,[110] and was at that time. Of course, as a convicted felon, Cases might not have been a member, but that would have given the court an alternative ground on which to uphold his conviction—it would not have had to address the Second Amendment question at all.

A legal realist might conclude that the *Cases* court was troubled by: (1) the very nature of an individual's right to keep and bear arms; (2) the reality of "total war" that seemed to make *all* weapons "military weapons"; and (3) the possibility that any judicial enforcement of the right would hamper Congress's ability to regulate the exercise of the right. Moreover, one might conclude the timing of the decision (during the Second World War) influenced the tenor of the court's decision, which undoubtedly went much further than necessary to dispose of the case before it. Nevertheless, the *Cases* decision and *United States v. Tot*[111] (discussed below), more so than *Miller*, are responsible for the Second Amendment's continued underenforcement by federal courts.

In the same year as *Cases*, the Third Circuit was asked to overturn, on Second Amendment grounds, the conviction of a defendant for possession of a gun capable of being fitted with a silencer.[112] The *Tot* court sought the support of history and

109. *See* United States v. Miller, 307 U.S. 174, 179 (1939) (observing that the militia consisted of "all males physically capable of acting in concert for the common defense"). Further, the Court notes that when ordered to muster, "these men were expected to appear bearing arms *supplied by themselves and of the kind in common use at the time*." *Id.* (emphasis added). This sort of language is inconsistent with both the government's argument in its brief and later characterizations of *Miller* as hostile to an individual rights reading of the Second Amendment.

110. *See* An Act for Making Further and More Effectual Provisions for the National Defense and for Other Purposes, ch. 134, 39 Stat. 197 (1916) (codified as amended at 10 U.S.C. § 311 (1994)). The current version reads: "The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are . . . citizens of the United States . . . ." 10 U.S.C. § 311(a) (1994).

111. *See* United States v. Tot, 131 F.2d 261 (3rd Cir. 1942).

112. *See id.* at 266.

scholarship to justify its underenforcement of the Second Amendment, and concluded that:

> It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as protection for the States in the maintenance of their militia organizations against possible encroachments by federal power.[113]

Yet the court's citations are misleading, for they do not support the conclusions for which they were cited. Although notable for being "the only federal district court or court of appeals to cite, to date, any significant original sources to buttress its claim that the amendment protects the rights of states but not those of individuals,"[114] the citations are not helpful because "not a single original source quoted in *Tot* substantiates its assertion that the Second Amendment 'was not adopted with individual rights in mind.'"[115]

The historical materials listed in a footnote accompanying the *Tot* decision cite to debates over the ratification of the Constitution (and not the Bill of Rights). The opinions of the "learned writers" to which the Court refers consist of three twentieth-century law-review articles.[116] Neither set of materials made it "abundantly clear" that the Second Amendment was not meant to guarantee an individual right.

The Court's citation of the ratification debates on the Constitution is disingenuous, at best: at that time, the Bill of Rights had not even been proposed. Various state conventions subsequently proposed amendments each wished to see become a part of the Constitution. Our Second Amendment was proposed, in part, because of fears that the federal government might use its power over the militia[117] to disarm state militias by disarming their members. Because militias were, at the time, universal in membership (at least for free, white males), this would have entailed disarming the population eligible for militia

113. *Id.* at 266 (footnotes omitted).
114. HALBROOK, EVERY MAN, *supra* note 85, at 189.
115. *Id.* at 191 (quoting *Tot*, 131 F.2d at 266).
116. *See id.* at 266 n.13.
117. U.S. CONST. art. 1, § 8, cl. 15-16.

service. Thus, when the *Tot* court quoted Luther Martin complaining to the Maryland Legislature that Congress might disarm the militia, it ignored the fact that his fear was for the *individuals* that made up that militia, as well as the organization itself.[118]

Similarly, the statements at the North Carolina ratifying convention may be seen in the same light: "When we consider the great powers of Congress, there is cause for alarm. They can disarm the militia. If they were armed, they would be a resource against great oppressions."[119] Finally, Roger Sherman's remarks at the Philadelphia Convention cited by the court voiced his fears that the federal government had too much control over the state militias.[120]

The citations by the court certainly do not support its bald assertion that the Second Amendment was not meant to protect an individual right. Other contemporaneous citations to state proposals for bills of rights, moreover, contradict the court's assertion. The States quite clearly envisioned the right to keep and bear arms as an individual one.[121] It seems unlikely that the States would have ratified the Second Amendment as written if their citizens did not think the Amendment offered at least as much protection as the proposals they submitted to the First Congress.[122] Moreover, contrary to the comments of the court, many influential nineteenth-century commentators *did* regard

118. *See* 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 372 (Jonathan Elliot ed., Ayer Co. Reprint 1987) (1833).

119. 4 *id.* at 203.

120. *See* 5 *id.* at 445 (quoting Roger Sherman, who noted that States "might want their militias for defence [sic] against invasions and insurrections, and for enforcing obedience to their laws").

121. *See* 1 DEBATE ON THE CONSTITUTION 155 (Bernard Bailyn ed., 1993) (statement of "A Citizen of America" that "[b]efore a standing army can rule, the people must be disarmed" and arguing that "[t]he supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed"); 1 *id.* at 872 (proposed amendment from the Pennsylvania convention stating that the "people have a right to bear arms for the defense of themselves and their own state, or the United States" and that "no law should be passed for disarming the people"); 2 *id.* at 537 (proposal from the New York convention that "the people have a right to keep and bear arms"); 2 *id.* at 552 (resolution of New Hampshire that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion"); 2 *id.* at 561 (proposed amendment from Virginia that "the people have a right to keep and bear arms"); 2 *id.* at 568 (resolution from the State of North Carolina convention that "the people have a right to keep and bear arms").

122. *See also* FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter, ed. 1961) (describing "the advantage of being armed" as one that "Americans possess over the people of almost every other nation").

the protections of the Second Amendment as analogous to, for example, the First Amendment[123]; several even explicitly rejected the collectivist argument of the sort the *Tot* court said was "abundantly clear."[124] Dave Kopel has recently conducted an exhaustive search of nineteenth-century commentary on the Second Amendment, and concludes that no legal commentators of any repute regarded the Second Amendment as guaranteeing anything other than an individual right.[125]

The *Tot* court's citation of three law-review articles by "learned writers" is likewise misleading, for the articles do not even support the proposition for which the court cites them. The authors' primary intent seems to be ascertaining whether state legislatures (or Congress) could prohibit the *bearing* of arms in public by passing concealed weapons statutes and similar statutes of the day aimed at outlawing certain "nonmilitary" weapons.[126]

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123. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

124. United States v. Tot, 131 F.2d 261, 266 (3rd Cir. 1942). Thomas M. Cooley, for instance, directly contradicts the *Tot* Court:

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

THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 298 (3rd ed. 1898). *See also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 646 (Melville M. Bigelow ed., Boston, Little, Brown, & Co., 5th ed. 1891) (1833) (calling the right to keep and bear arms "the palladium of liberties of a republic"); 1 THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 729 (8th ed. 1927) (noting that a militia cannot serve as an adequate alternative to a standing army unless "the people are trained to bearing arms").

125. *See* David B. Kopel, *The Second Amendment in the Nineteenth Century*, BYU L. REV. *passim* (forthcoming 1998) (copy on file with author).

126. *See* Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 477 (1915) (writing that the right may empower legislatures "to restrict and even forbid carrying weapons by individuals," but admitting that it may be unable to prohibit "the simple possessing or keeping weapons"); Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138, 143 (1928) (noting that it "would seem as if the Second Amendment only forbids Congress to disarm *citizens* so as to prevent them from functioning as state militiamen") (emphasis added); *id.* at 144 (noting that it is "a fair inference that the Constitution expects the citizens to carry such weapons only as actual *or potential* members of the local militia") (emphasis added); *see also* Emery, *supra*, at 477 (noting that "the individual may carry weapons when necessary for his personal defense or that of his family or property" and that "he may be forbidden to carry dangerous weapons except in cases where he has reason to believe and does believe that it is necessary for such defense"); McKenna, *supra*, at 145 ("A number of the [state] constitutional provisions say that a guarantee of the right to keep and bear arms is to enable a man to defend his person, property, etc. Under American legal history, clearly

Though one of the law-review articles does support the *Tot* court's position,[127] it relies on no historical sources for its conclusion that the right was intended to facilitate "common defense" rather than "private brawls."[128] This article is contradicted by the other "learned" law-review articles cited by the court, which admit a right to self-defense informs the right to keep and bear arms.[129]

Simply put, the language of the law-review articles, like the court's historical sources, does not square with the *Tot* court's claim that the Second Amendment "was not adopted with individual rights in mind."[130] Even where the authors assume that some connection must exist between arms-bearing and militia service, they constantly refer to the right as one capable of exercise by *individuals*, not by States or by some other vague group. Moreover, with one exception, the authors recognize that there is a right to self-defense lurking in the background of the Second Amendment and comparable state constitutional provisions. To the extent that any of the articles address the origin and intent of the Second Amendment, the authors' understanding of history seems tenuous.[131]

The *Tot* court went to great lengths to support its point that the right to bear arms has "always" been regulated, even at common law and under state constitutions, so that it can never be argued that the Second Amendment guaranteed an "absolute right."[132] Yet the court here is tilting at windmills: that the Second Amendment is no more absolute than the First had (and

such a right of defense exists.") McKenna even criticizes the Kansas Supreme Court opinion in *Salina v. Blakesly*, 83 P. 61 (Kan. 1905), which held that the right to keep and bear arms is a "collective right" that citizens are unable to exercise as individuals. *Salina* is the apparent origin of the "collective right" interpretation of the right to keep and bear arms. *See supra* note 69 and accompanying text. "The weakness of this argument lies in the fact that in nearly every state in the Union, there are provisions for organizing and drilling state militia in sufficient numbers to meet any emergency." McKenna, *supra*, at 145.

127. *See* George I. Haight, *The Right to Keep and Bear Arms*, 2 BILL RTS. REV. 31 (1941).

128. *See id.* at 42.

129. *See* Emery, *supra* note 126, at 477; McKenna, *supra* note 126, at 145.

130. United States v. Tot, 131 F.2d 261, 266 (3rd Cir. 1942).

131. *Compare* Emery, *supra* note 126, at 473 ("The guaranty does not appear to have been of a common-law right, like that of trial by jury") *with* MALCOLM, *supra* note 66, at 111-34 (describing the evolution of a "true, ancient and indubitable right" to arms).

132. "Weapons bearing was never treated as anything like an absolute right by the common law." United States v. Tot, 131 F.2d 261, 266 (3rd Cir. 1942). However, the court's citation to the Statute of Northampton does not mention the narrow interpretation given to it by subsequent English judges. *See* MALCOLM, *supra* note 66, at 104-05.

has) never been questioned, even by those advocating an individual rights interpretation.[133]

Despite the demonstrable flaws in both the *Cases* and the *Tot* decisions, their reasoning is relied upon more so than that in the Supreme Court's *Miller* decision.[134] In rejecting all Second Amendment claims, the lower courts since *Miller* have "almost invariably [sought] support not in any historical document, but in similarly nonsupported previous cases, traceable to the *Cases* and *Tot* precedents."[135] The appeal of *Tot* and *Cases* to later courts has not been either case's fidelity to the original holding in *Miller* or their penetrating legal analysis. Rather, contemporary courts are persuaded by both courts' *institutional* reasons for refusing to enforce the Second Amendment as an individual right.

The most explicit recent reliance of a court on purely institutional concerns for underenforcing the Second Amendment occurred in the Sixth Circuit Court of Appeals's decision in *United States v. Warin*.[136] At issue was the constitutionality of the National Firearms Act, as amended by the Gun Control Act of 1968.[137] The defendant was convicted of possessing a submachine gun that was not registered to him.[138] The defendant claimed that he was a member of the unorganized militia of the State of Ohio,[139] that machine guns are the types of weapons used by armed forces,[140] and that he had built the machine gun with the intent of offering it to the

133. *See, e.g.*, JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152-53 (4th ed. 1880). Pomeroy analogized the guarantees of the Second Amendment to those of the First: "The clause is analogous to the one securing freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libelous abuse, is protected." *Id.* at 153.

134. *See, e.g.*, United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) (describing *Cases* as "one of the most illuminating circuit opinions on the subject of 'military' weapons and the Second Amendment"); United States v. Warin, 530 F.2d 103 (6th Cir. 1976) (citing with approval both *Cases* and *Tot*), *cert. denied*, 426 U.S. 948 (1976).

135. HALBROOK, EVERY MAN, *supra* note 85, at 189 (footnote omitted). Indeed, as I have pointed out elsewhere, many of these courts have even elided the distinction between the Supreme Court's holding in *Miller* and the appeals court opinions in *Cases* and *Tot*, citing the holdings of the latter two cases as that of *Miller*. *See* Denning, *Miller*, *supra* note 69, at 989.

136. 530 F.2d 103 (6th Cir. 1976).

137. *See* Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at scattered sections of 18 U.S.C., 18 App., and 26 U.S.C. (1994)).

138. *Warin*, 530 F.2d at 104.

139. *See id.* at 105.

140. *See id.*

government "as an improvement on the military weapons presently in use."[141] The defendant Warin carefully crafted his complaint to overcome the judicially-created "state of mind" requirement invented by the *Cases* court.[142]

The Sixth Circuit flatly rejected Warin's claim. In its opinion, the court accepted the claim set forth in *Cases* that "the Supreme Court did not intend to formulate a general rule in *Miller*, but merely dealt with the facts of that case."[143] The court continued:

> The court of appeals noted the development of new weaponry during the early years of World War II and concluded that it was not the intention of the Supreme Court to hold that the Second Amendment prohibits Congress from regulating any weapons except antiques.... *If the logical extension of the defendant's argument for the holding of* Miller *was inconceivable in 1942, it is completely irrational in this time of nuclear weapons.*[144]

The court, not surprisingly, went on to hold that the Second Amendment guaranteed a "collective rather than an individual right."[145]

Though few courts have been as candid about their holdings, they seem to go out of their way to construct additional obstacles for persons attempting to assert Second Amendment rights,[146] or simply avoid the issue altogether with erroneous citations of court cases[147] and stunning examples of incorrect statements of

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141. *Id.*

142. *See, e.g.*, U.S. v. Wiley, 500 F. Supp. 141, 145 (D. Minn. 1970); Denning, *Miller*, *supra* note 69, at 989-90.

143. *Warin*, 530 F.2d at 106.

144. *Id.* (emphasis added).

145. *Id.*

146. *See, e.g.*, U.S. v. Hale, 978 F.2d 1016, 1020-21 (8th Cir. 1992). In *Hale*, Judge Gibson asserted that

> the claimant of Second Amendment protection must prove that his or her possession of the weapon was reasonably related to a well regulated militia. Where such a claimant presented no evidence either that he was a member of a military organization or that his use of the weapon was "in preparation for a military career," the Second Amendment did not protect the possession of the weapon.

Id. at 1020.

147. *See, e.g.*, Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971) (citing *Miller* for the proposition that "the Second Amendment right 'to keep and bear arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms," and concluding that "there can be no serious claim to any express constitutional right of an individual to possess a firearm"). There is nothing in the *Miller* opinion that justifies the *Stevens* court's sweeping conclusion. To the contrary, the government made such an argument, and the Supreme Court did not accept it. *See*

law. A good example of the latter occurs in *United States v. Jones*.[148] Rejecting a challenge to a law prohibiting those who have been confined to a mental institution from owning a gun, a South Carolina district court asserted that "[s]ince there is no absolute constitutional right of an individual to possess a firearm, the test of determining the constitutionality of [the statute] depends on finding a rational basis for the particular classification."[149] Not only is this an absurd misstatement of the standard of review, but were this rule followed as a matter of course with regard to constitutional rights, it is difficult to imagine that *any* successful constitutional challenges would be mounted against acts of Congress.

As those who favor a collective interpretation of the Second Amendment are fond of pointing out, no federal court in recent memory has declared an act of Congress or a state legislature invalid on Second Amendment grounds.[150] However, as I have shown in this Part, these lower court cases not only play fast and loose with the Supreme Court's actual holding in *Miller*, they are not shy about distorting facts or the law in order to block Second Amendment claims.[151] Moreover, it seems that the *Warin* court admitted what seems to be going on *in camera* as these opinions are being written: judges as a whole are not comfortable with the right *qua* right guaranteed by the Second Amendment.

Though litigants pursuing Second Amendment claims have met with a decidedly unsympathetic federal judiciary in the lower courts,[152] and have largely been ignored by the United States Supreme Court,[153] it is clear that neither the plain text of the Amendment nor the Amendment's intent warrant the outcomes of any of these cases. The sheer number of well-known

Denning, *Miller*, *supra* note 69, at 975-76 (discussing the arguments made in the government's brief in *Miller*, and the Court's rejection of the bulk of its argument).

148. 569 F. Supp. 395 (D.S.C. 1983).

149. *Id.* at 398.

150. On the other hand, as Professor Scot Powe rightfully points out, "scholars never have been in the habit of deferring to the random panels of lower courts on constitutional issues and there is no good reason why they should do so in this one area." Powe, *supra* note 60, at 1334.

151. *See* Denning, *Miller*, *supra* note 69, *passim*.

152. One is reminded of the statement by Justice Holmes about the Equal Protection Clause: "It is the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

153. *But see infra* notes 404-08 and accompanying text.

constitutional scholars who have authored articles in prestigious law reviews and journals should at least cause a judge to pause before compounding error by blithely dismissing a Second Amendment claim. Yet federal courts continue to be willfully blind to the recent literature.[154] At the very least, the individual rights position is *as* plausible as the collectivist or States'-right model forwarded by anti-Standard Modelers and adopted by most courts. Moreover, the latter theory suffers from a host of troublesome unintended consequences that are not present with the Standard Model.[155] Recent critiques of the Standard Model position simply ignore the substance of such arguments in favor of *ad hominem* attacks on the proponents, mischaracterization of their views, and unscholarly appeals to emotion.[156]

B. *The Presence of Institutional Explanations for Setting Limits on Judicial Construction*

The *Cases* and *Warin* courts, and to a lesser extent the *Tot* court, presented explicit appeals to changed circumstances in their refusal to enforce the Second Amendment against the government.[157] Collectivist scholars regularly adopt such arguments.[158] Other lower federal courts seem anxious to address Second Amendment issues, even in cases where it was unnecessary to reach the constitutional question to dispose of the case. Engagement of constitutional issues, when a case can be disposed of on narrower grounds, is something the Supreme Court has expressed an unwillingness to do,[159] yet it is as if the

154. *See, e.g,* Hickman v. Block, 81 F.3d 98 (9th Cir. 1996) (not citing any recent literature on the intent of the Second Amendment); United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) (citing Keith Ehrman and Dennis Henigan, but not Don Kates, Sanford Levinson, Joyce Lee Malcolm, or any other Standard Model scholars).

155. "The states' right interpretation appears to be employed against the individual right interpretation in much the same fashion as a chain of garlic against a vampire, pulled out and brandished at need but then hastily tossed back into the cellar lest its odor offend." Reynolds & Kates, *supra* note 103, at 1742; *see id.* at 1743 (describing the consequences of the States' right interpretation).

156. For a critique of the tone of anti-Standard Model writings, see generally Barnett & Kates, *supra* note 58; Brannon P. Denning, *Professional Discourse, The Second Amendment, and the "Talking Head Constitutionalism" Counterrevolution: A Review Essay,* 21 S. ILL. U. L.J. 227 (1997) [hereinafter Denning, *Review Essay*].

157. *See infra* notes 93-145 and accompanying text.

158. *See, e.g.,* HENIGAN ET AL., *supra* note 61, at 14; Henigan, *supra* note 61, at 110; Herz, *supra* note 47, at 150-53.

159. *See, e.g.,* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question

courts are afraid to leave claimants a single foothold in the case law.[160] Moreover, the extent to which courts read the *Miller* case broadly, cite it carelessly, and engraft additional judge-made requirements onto what some have termed the *Miller* "test" is evidence that something more than ordinary constitutional interpretation is afoot.

According to Northwestern University law professor Dan Polsby, "The fact that the Second Amendment found no champion among policy-making elites surely tells more about the social psychology of the class from which lawyers and social scientists are drawn than it does about the Constitution's text and structure."[161] In his groundbreaking article, Sanford Levinson expressed similar suspicions about attitudes towards the "embarrassing" Second Amendment:

> I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning" interpretations of the Second

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although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

160. In a recent opinion from the Ninth Circuit written by Judge Alex Kozinski, his two colleagues refused to join in a footnote suggesting that the federal statute prohibiting felons from owning firearms might be successfully challenged on Second Amendment grounds if it could be proven that such ownership was the only way someone could defend himself. Kozinski wrote:

> The Second Amendment embodies the right to defend oneself and one's home against physical attack .... In modern society, the right to armed self-defense has become attenuated as we rely almost exclusively on organized societal responses, such as the police, to protect us from harm .... The possession of firearms may be regulated, even prohibited, because we are "compensated" for the loss of that right by the availability of organized societal protection. The tradeoff becomes more dubious, however, when a citizen makes a particularized showing that the organs of government charged with providing that protection are unwilling or unable to do so .... At that point the Second Amendment might trump a statute prohibiting the ownership and possession of weapons that would be perfectly constitutional under ordinary circumstances.

United States v. Gomez, 92 F.3d 770, 774 n.7 (9th Cir. 1996). *Compare id. with id.* at 778 (Hall, C.J., concurring in all except footnote 7, because of a possible conflict with the Ninth Circuit's decision in Hickman v. Block, 81 F.3d 98 (9th Cir. 1996)), *and id.* at 779 (Hawkins, C.J., concurring in all but footnote 7) (remarking that the footnote "alludes to an interesting and difficult question I would leave for another day"). Circuit Judge Cynthia Holcomb Hall was the author of the Ninth Circuit's opinion in *Hickman v. Block*, a decision replete with factual errors regarding *United States v. Miller*, 307 U.S. 174 (1939). For a critique of *Hickman*, see Denning, *Miller*, *supra* note 69, at 997-98.

161. Polsby, *supra* note 8, at 33.

> Amendment would present real hurdles to those of us supporting prohibitory regulations.[162]

Certainly widespread attitudes about the propriety of gun ownership might explain both lower courts' reluctance to engage the Second Amendment honestly, and the presence in these opinions of similar institutional arguments why courts should resist adopting the Standard Model interpretation of the Second Amendment, even if it is warranted by the text and structure of the Constitution.

In a recent book, Dennis Henigan, the chief counsel for Handgun Control, Inc., and one of the few opponents of the Standard Model to present his views in law-review articles, argued that "a strong argument can be made, in terms of constitutional theory and constitutional policy, that it makes absolutely no sense to apply the same constitutional standards in free-speech cases to right-to-bear-arms cases because of the nature of the right,"[163] yet in the work he never makes that argument, preferring instead to throw out the "insurrectionist theory" and "public health" red herrings.[164] Henigan argues that, because courts have not been enthusiastic about enforcing the Second Amendment, we should regard the issue as settled, and quit arguing about it.[165] Henigan's and others' appeals to *stare decisis* in the name of mere stability sacrifices the Constitution and the Bill of Rights to the policy preferences of those who happen to be opposed to the idea of private gun ownership, yet who lack the political power to repeal the Second Amendment outright, through a constitutional amendment.[166]

Indeed, to the extent that anti-Standard Modelers *address* the analytical aspects of the Second Amendment, they often do so in a vacuum—neither acknowledging nor engaging recent Standard Model literature.[167] One exception is Garry Wills, who challenged the Standard Model argument in an essay in *The New*

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162. Levinson, *supra* note 53, at 642.

163. HENIGAN ET AL., *supra* note 61, at 14.

164. *Id.* at 21-22, 49-76. For a critique of Henigan's book, see Denning, *Review Essay*, *supra* note 156.

165. *See* HENIGAN ET AL, *supra* note 61, at 4-6, 13; *see also* Herz, *supra* note 47, at 77.

166. *See* HENIGAN ET AL, *supra* note 61, at 4-6, 13.; *see also* Herz, *supra* note 47, at 77.

167. *See* Denning, *Review Essay*, *supra* note 156, at 237-39 (noting that Dennis Henigan's contribution to the book fails to mention any individual-rights proponents except Sanford Levinson, whose argument Henigan distorts).

York Review of Books.[168] However, Wills's historical exegesis is suspect,[169] not only because it is at odds with other Second Amendment historians,[170] but because Wills himself has written editorials in which he described "gun nuts" as "haters of their fellow Americans," "traitors," and "anti-citizens."[171] Given Wills's announced animus towards guns and gun ownership in general, one might suspect his *New York Review* essay merely transformed his *institutional* objections to private gun ownership into *analytical* difficulties with the Standard Model argument.

C. *Gap Between Independent Reach of Amendment and Congressional Power to Enforce*

In describing this gap, Sager had in mind the ability of Congress to pass legislation to enforce the Thirteenth and Fourteenth Amendments.[172] In addition to being self-executing, these Reconstruction Amendments contained provisions for congressional enforcement.[173] Although the Second Amendment contains no such enforcement provision, one might read the Second Amendment as a modification of Congress's power to prescribe training for the militia in Article I.[174] Because a "well regulated" (well-trained) militia is *necessary* to the security of a free state,[175] a plausible reading of the Amendment places an affirmative obligation on Congress to ensure the militia remains a viable institution.

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168. Garry Wills, *To Keep and Bear Arms,* N.Y. REV. OF BOOKS, September 21, 1995, at 62.

169. Wills basically concludes that the Second Amendment was proposed as a ruse by an arch-Machiavellian James Madison in an effort to quiet the Constitution's opponents. By using the term "keep and bear," which Wills asserts had no other meaning outside a military context, Madison ensured that the Amendment would always have a narrow meaning. *See id.* at 64, 72. For a thorough critique of Wills, see Powe, *supra* note 60, at 1338-39, 1359-65.

170. *See* MALCOLM, *supra* note 66, *passim.*

171. *See* items cited in Denning, *Review Essay, supra* note 156, at 230 n.28.

172. *See* Sager, *supra* note 1, at 1219.

173. *See* U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation"); U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *see also* U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

174. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia . . . .").

175. *See* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State . . . .").

Glenn Reynolds and I have argued elsewhere[176] that much of the renewed interest in the Second Amendment and private arms-bearing in particular is in part the result of the federal government's failure to take seriously its constitutional responsibilities to "organiz[e], arm[], and disciplin[e] the Militia."[177] As Professor Robert Cottrol has noted, the militia fulfilled an important *moral* role, as well as a military role, in the lives of citizens by granting them a stake in the defense of their country, and served as a vehicle for the transmission of community ideals.[178] Failure on the government's part to maintain a militia has forced individuals to engage in constitutional self-help[179] to preserve their Second Amendment rights against encroachment, and has even resulted in the mistaken belief of some individuals that there is a constitutional basis for forming extra-governmental "neomilitias," which may be used to oppose the government prior to its degeneration into what the Founders understood as a "tyrannical" government.[180]

176. *See* Brannon P. Denning & Glenn Harlan Reynolds, *It Takes a Militia: A Communitarian Case for Compulsory Arms Bearing*, 5 WM. & MARY BILL RTS. J. 185 (1996); *see also* Brannon P. Denning, *Palladium of Liberty?: Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 OKLA. CITY U. L. REV. 191 (1996) [hereinafter Denning, *Palladium*].

177. U.S. CONST. art. I, § 8, cl. 16.

178. *See* Robert J. Cottrol, *The Second Amendment: Invitation to a Multi-Dimensional Debate*, *in* GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT xxxvi (Robert J. Cottrol ed., 1994) ("[T]here is considerable evidence that the armed population and the militia were intended to serve more than a simple military function. They were seen as fulfilling political and perhaps moral purposes as well."); *see also* Amar, *Bill of Rights as a Constitution*, *supra* note 69, at 1163-64; Kates, *Handgun Prohibition*, *supra* note 49, at 231-32.

179. *See* Denning & Reynolds, *supra* note 176, at 202-06.

180. *See* Denning, *Palladium*, *supra* note 176, at 231-34 (discussing the neomilitia movement as a way some have attempted to "recapture the militia spirit" that exists, even though the organization through which such impulses were channeled no longer exists).

On the other hand, some scholars—most notably David C. Williams—have claimed that because the militia no longer exists, at least in the sense the Founders understood it, that the conditions precedent to the Second Amendment are gone and the Amendment is now literally meaningless. *See* Williams, *supra* note 61. Such an interpretation, though, violates the canon of constitutional construction that no interpretation of a constitutional provision should have the effect of depriving that provision of meaning and rendering it a nullity. *See* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-71 (1840) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.... No word in the instrument, therefore, can be rejected as superfluous or unmeaning...."); 1 STORY, *supra* note 124, at 326 (noting that disregard of a provision's plain meaning is justifiable only where "the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application").

Could Congress promulgate legislation under the Fourteenth Amendment that guaranteed Second Amendment rights? Given judicial reluctance to incorporate the Second Amendment,[181] congressional action might be the only way, short of another constitutional amendment (possibly adding "and we really mean it" to the end of the Amendment), to secure an individual-rights interpretation—at least against the States. These are questions that I shall, with the help of Sager's underenforcement thesis, address in Part IV.[182]

D. *Lack of Incorporation by the Courts*

In applying Sager's thesis to the Second Amendment, there is an additional index of underenforcement that I include here: failure to apply the Second Amendment to the States by incorporation through the Fourteenth Amendment.[183] The fact that more courts have not even attempted to use the criteria for incorporation articulated by the Supreme Court[184] supports my claim that institutional, rather than analytical concerns lurk in the background of most court decisions on the Second Amendment.[185]

In *Quilici v. Morton Grove*,[186] the Seventh Circuit Court of Appeals, on the strength of two nineteenth-century pre-incorporation decisions, *United States v. Cruikshank*[187] and *Presser*

181. In two nineteenth-century cases, *Cruikshank* and *Presser*, the Supreme Court declined to apply the guarantees of the Second Amendment to the States. *See infra* notes 187-188 and accompanying text.

182. *See supra* Part IV.C.

183. For a list of decisions incorporating the various provisions of the Bill of Rights, see Duncan v. Louisiana, 391 U.S. 145, 147-50 (1968).

184. *See, e.g., id.* at 148-49 (1968).

185. *See also* Note, *An Incorporation Conundrum: The Second Amendment, in* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 550-54 (3rd ed. 1992).

> [I]f you read the amendment as a substantive limitation on the ability of the national government to regulate the private possession of arms, based on either the 'individualist' or 'neorepublican' themes . . . then is there any reason not to follow the 'incorporationist' logic applied to other amendments and limit the state's power to regulate and prohibit such possession?

Id. at 554.

186. 695 F.2d 261 (7th Cir. 1981).

187. 92 U.S. 542 (1875). In *Cruikshank*, the Supreme Court quashed an indictment of individuals in Louisiana accused of conspiring to prevent two African-American citizens from exercising certain "rights and privileges," including the rights to "peaceably assemble" and of "bearing arms for a lawful purpose." *Id.* at 551-53. The Court refused to interpret the Second Amendment as restraining States. According to the Court, the

v. Illinois,[188] refused to incorporate the Second Amendment against the State of Illinois and the Town of Morton Grove, which had enacted an ordinance banning handguns within the city's limits.[189] In addition, the court rather gratuitously cast aspersion on the notion that the Second Amendment, even if it was incorporated against the States, operated to guarantee an individual right.[190] According to the judges, the right guaranteed by the Second Amendment is a collective one.[191]

There was an interesting dissent, however. Circuit Judge Coffey felt that the right of self-defense was rooted firmly enough in our jurisprudence that it constituted a "fundamental right," and that the Due Process Clause of the Fourteenth Amendment demanded its application to the States.[192] He wrote that "nothing could be more fundamental to the 'concept of

Second Amendment "mean[t] no more than it shall not be infringed by Congress." *Id.* at 553.

As solid authority for allowing States to deprive citizens of their Second Amendment rights, the *Cruikshank* case leaves much to be desired. First, there was no element of state action alleged in the complaint. Only individuals were named in the indictment. Moreover, the portion of the opinion addressing the Second Amendment is limited to one paragraph. In reaching its decision, the Court merely repeated what it had already said about First Amendment rights, *viz.*, "its continuance [was not] guaranteed, except as against congressional interference." *Id.* at 552. As Robert Cottrol and Raymond Diamond wrote, it is important to read *Cruikshank* in context, as "part of a larger campaign of the Court to ignore the original purpose of the Fourteenth Amendment...." *See* Robert Cottrol & Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 347 (1991).

To the extent that the *Cruikshank* Court's First Amendment analysis is no longer good law, *see* Gitlow v. New York, 268 U.S. 652 (1924), it seems that *Cruikshank*'s "analysis" of the Second Amendment would likewise be open to challenge. This is particularly true in light of later Court decisions setting forth a methodology for determining which Amendments should be incorporated. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

188. 116 U.S. 252 (1886). In *Presser*, the defendant was charged with violating an Illinois statute that forbade the drilling or parading of arms by any group of men other than the "regular organized volunteer militia of [Illinois], and the troops of the United States" without a license issued by the Governor of Illinois. *Id.* at 253. The defendant, a member of a German nationalist organization that marched without a license, was convicted of violating the statute and fined ten dollars.

Rejecting the defendant's claim that he was deprived of his Second Amendment rights, the Court noted that gathering as a group and holding armed parades was not included in the right to keep and bear arms, and in any event "the amendment is a limitation upon the power of Congress and the National government, and not upon that of the States." *Id.* at 265. For more discussion of both *Presser* and *Cruikshank*, see Denning, *Miller*, *supra* note 69, at 977-81.

189. *See Quilici*, 695 F.2d at 264 n.1.

190. *See id.* at 270-71.

191. *See id.* at 271 ("[P]ossession of handguns by individuals is not part of the right to keep and bear arms.").

192. *See id.* at 278-79 (Coffey, J., dissenting).

ordered liberty' than the basic right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions."[193] A state court judge nearly one-hundred forty years before had made similar observations in a decision, discussed below, that invalidated a state law prohibiting the carrying of certain arms based on, *inter alia*, the principles embodied in the Second Amendment, despite the Supreme Court's holding in *Barron v Baltimore*[194] that the Bill of Rights applied only to Congress.[195]

IV. REMEDIES FOR UNDERENFORCEMENT

In his article, Professor Sager suggested a few ways other branches of government might compensate for judicial underenforcement, filling the gap between a constitutional provision's normative reach and a narrow judicial interpretation. First, Sager offered reasons that the Supreme Court should allow state courts to expand their readings of federal constitutional provisions by declining to review those cases.[196] Alternatively, Congress could attempt to influence judicial interpretation of the Second Amendment by assigning its *own* interpretation. Congress might also attempt to bridge the gap by virtue of its legislative authority under Section 5 of the Fourteenth Amendment.[197] In this Part, I will examine these suggestions for correcting underenforcement as applied to the Second Amendment. Sager's suggestions provide an opportunity to highlight alternative remedies to the judicial underenforcement I described above. Before doing so, however, allow me to make a brief case for the incorporation of the Second Amendment by courts. This remedy emerges from the addition of my fourth index of underenforcement to the three Sager set forth in his article.

193. *See id.* at 278 (Coffey, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Don Kates has argued that this right of self-defense was also firmly rooted in the minds of the framers of the Second Amendment, who regarded the political right of armed resistance to tyranny as merely an extension of the well-recognized natural right of self-preservation. *See* Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992) [hereinafter Kates, *Ideology*].

194. 32 U.S. (7 Pet.) 243 (1833) (holding that the provisions of the Bill of Rights bind only Congress, and not the States).

195. *See infra* notes 228-42 and accompanying text.

196. *See* Sager, *supra* note 1, at 1242-63.

197. *See id.* at 1228-42.

A. *Lower Court Incorporation of the Second Amendment*

Could the Second Amendment be incorporated through the Fourteenth Amendment? In light of the 1968 Supreme Court decision in *Duncan v. Louisiana,*[198] in which the Supreme Court articulated the modern test for incorporation, the answer seems to be yes.

In *Duncan,* the Supreme Court incorporated the protections of the Fifth[199] and Sixth[200] Amendments against the State of Louisiana and overturned a defendant's non-jury conviction of simple battery, for which the defendant had been sentenced to sixty days in prison.[201] Noting that the Fourteenth Amendment denies to States the ability to "deprive any person of life, liberty or property, without due process of law," the Court remarked that "[i]n resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance . . . ."[202] The question for the Court "has always been whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . [or] whether it is 'basic in our system of jurisprudence' . . . ."[203]

One way to phrase the inquiry, therefore, is whether the guarantee expressed in the Second Amendment is among "those fundamental principles of liberty and justice which lie at the base of all our civil and political liberties," or whether the right to keep and bear arms is "basic in our system of

198. 391 U.S. 145 (1968).

199. No person shall be held to answer for a capital, otherwise infamous crime, . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V.

200. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence [sic].

U.S. CONST. amend. VI.

201. *Duncan,* 391 U.S. at 147.

202. *Id.* at 147-48.

203. *Id.* at 148-49 (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932); In re Oliver, 333 U.S. 257, 273 (1948)) (internal citations omitted).

jurisprudence."[204] One answer might go something like this: "Of course it is. After all why else would it have been chosen to be an explicit provision of the Bill of Rights?" As appealing as such an answer might be, there is a circularity to such a response. However, the right was certainly important to the English; Blackstone termed it an "auxiliary" right that served "to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."[205] It was important to colonists, who enjoyed rights as Englishmen.[206] It was likewise important to the newly independent States; many of those that framed written constitutions following the Declaration of Independence protected the right to keep and bear arms.[207] Lastly, it was important enough that Madison felt it belonged in the Bill of Rights, right after what is now the First Amendment.[208] Given the importance that resistance to tyranny, through arms if necessary, and the concomitant ideological preference for an armed militia, as opposed to standing armies, played in the ideology of the Revolution, and in the early Republic,[209] it seems hard to argue that this was not regarded as a "fundamental" right.

Moreover, there is ample evidence that the right to keep and bear arms was regarded as equally "fundamental" by those who framed the Fourteenth Amendment (and by the Amendment's intended beneficiaries, the freedmen).[210] The right to keep and

204. Courts have not always engaged in such analytical rigor when incorporating provisions of the Bill of Rights. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1924) ("For present purposes we may and do assume that freedom of the speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."). That is, as they say, one way to skin a cat; however, I concede that a lower court would have to do a bit better supporting its decision than did the Supreme Court in *Gitlow*.

205. *See* 1 BLACKSTONE, *supra* note 96, at *141.

206. *See id.* at 138-40.

207. *See id.* at 146-50; *see also* CRAMER, *supra* note 97, at 30-33; HALBROOK, EVERY MAN, *supra* note 85, at 63-65; *see generally* STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHT AND CONSTITUTIONAL GUARANTEES (1989).

208. As proposed by Madison, our First and Second Amendments were in fact numbers Three and Four, respectively. *See* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 3 (Helen E. Veit et al. eds., 1991). The first two were not adopted, although Madison's Second Amendment is now the Twenty-seventh Amendment. *See* U.S. CONST. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.").

209. *See, e.g.*, Denning, *Palladium*, *supra* note 176, at 193-97.

210. For this theory of a "reconstructed" Second Amendment, I owe a debt of gratitude to the work of Professor Akhil Amar. Professor Amar's description of the

bear arms free from state interference was one of particular interest to freed blacks following the end of the Civil War.[211] During the debates on the Fourteenth Amendment, many congressmen explicitly mentioned the right to keep and bear arms as one of the "privileges and immunities" of citizenship the Amendment was intended to protect.[212] As the leading historian of Reconstruction wrote, "[I]t is abundantly clear that Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, the right to bear arms, trial by impartial jury, and protection against cruel and unusual punishment and unreasonable search and seizure."[213] Not only was this of great practical importance to the freedmen, many of whom desired the ability to protect themselves and their families from the widespread violence of

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changes the Fourteenth Amendment wrought on not only the Second Amendment, but on the entire Bill of Rights, is part of a forthcoming work that should command the attention of all serious students of constitutional history. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (forthcoming 1998) [hereinafter AMAR, CREATION AND RECONSTRUCTION] (manuscript on file with author). I thank Professor Amar for sharing his manuscript with me and allowing me to quote from it prior to its publication. *See also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-11, 1261-62 (1992).

211. Many southern state constitutions were amended during ante-bellum conventions to restrict the right to bear arms to free white men. *See* CRAMER, *supra* note 97, at 96; Reynolds, *supra* note 51, at 659-60 (discussing changes to the Tennessee Constitution).

212. *See* AMAR, CREATION AND RECONSTRUCTION, *supra* note 210, at 305-15.

> In short, between 1775 and 1866 the poster-boy of arms morphed from the Concord Minuteman to the Carolina freedman. The Founder's motto, in effect, was that if arms were outlawed, only the central government would have arms. In Reconstruction a new vision was aborning: When guns were outlawed, only the Klan would have guns.

Id. at 314.

See also MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 43 (1986); *id.* at 52 (quoting Senator Samuel Pomeroy as citing as "an essential safeguard[ ] of the Constitution," the right to keep and bear arms); *id.* at 53 (citing statements of Senator Sidney Clarke demanding the southern States respect African-Americans' right to keep and bear arms); *id.* at 56 (describing petitions to Congress from freedmen requesting constitutional protection for, *inter alia*, the right to keep and bear arms, against state infringement); *id.* at 88 (quoting Senator Jacob Howard expressing that opinion that the "privileges and immunities" of citizenship included "the right to keep and bear arms"); *id.* at 140 (quoting Judge Noah Davis, speaking before the New York ratifying convention as listing the right "to keep and bear arms" among the rights of "persons who are free"); *id.* at 141 (quoting an address critical of certain South Carolina laws "restricting the rights of blacks to . . . keep arms" and describing those laws as violating the Constitution's guarantees); *id.* at 164 (quoting Rep. Henry Dawes, speaking on behalf of a congressional enforcement bill, who enumerated the "privileges and immunities" of U.S. citizens, including the right "to bear arms").

213. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 258 (1990).

the Reconstruction South,[214] but the right to keep and bear arms was important for *political* reasons as well. In *Dred Scott v. Sanford*,[215] Chief Justice Taney had included arms bearing as one of the rights of citizens that African-Americans could never possess.[216]

Given the age and peculiar factual circumstances of both *Cruikshank* and *Presser*, one would think that lower courts would be willing to apply the contemporary incorporation tests articulated by the Supreme Court.[217] If they did so, the Second Amendment would be as good a candidate as any for incorporation, which may account for courts' reluctance to do so. In so doing, federal courts ignore history and controlling precedent from the United States Supreme Court. They instead continue to quote *Cruikshank* and *Presser*, the continued viability of which should be regarded as suspect, at best.

B. *State Court Expansion of the Second Amendment*

According to Sager, Supreme Court authority to review state court decisions sustaining federal constitutional challenges to state statutes is of relatively recent vintage, dating only from 1914.[218] The Court exercises this review through its certiorari power.[219] Sager noted that

> In reviewing state court resolutions of federal constitutional issues, the Supreme Court has not differentiated between those decisions which sustain and those which reject claims of federal constitutional right. In both instances, once having granted review, the Court has simply determined whether the state court's federal constitutional decision is "correct," meaning, in this context, whether it is the decision that the Supreme Court would independently reach.[220]

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214. *See id.* at 425-44. This armed self-help was often necessary because the violence against blacks took place with the aid or tacit consent of state officers. *See, e.g.*, Cottrol & Diamond, *supra* note 187, at 348-58.

215. 60 U.S. (19 How.) 393 (1857).

216. *See id.* at 416-17. In his opinion, Chief Justice Taney noted that, if African-Americans were regarded as citizens of the United States "and entitled to the privileges and immunities of citizens," then "[i]t would give persons of the negro race, who were recognised [sic] as citizens in any one State of the Union, the right . . . to hold public meetings upon political affairs, and to keep and carry arms wherever they went." *Id.* at 416-17.

217. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968).

218. *See* Sager, *supra* note 1, at 1243.

219. *See id.*

220. *Id.*

Sager reported that in a significant number of cases decided between 1969 and 1978, the Supreme Court reversed state court decisions involving "state judicial enforcement of the unenforced margin of an underenforced constitutional norm."[221] Although acknowledging the need for uniformity,[222] the potential for forum shopping on the part of litigants,[223] and the inherent limitations of state judicial bodies,[224] Sager believed that the Supreme Court should not undertake review of state court cases in which the state court *expands* the reach of federal provisions.[225] He wrote:

> If an underenforced constitutional norm is valid to its conceptual boundaries, the decision of the state court can be understood as the enforcement of the unenforced margin of a constitutional norm, that is, as the assumption of an important constitutional role which the federal courts perceive themselves constrained to avoid because of institutional concerns. On this basis, state court decisions which voluntarily extend the application of such norms should be left intact.[226]

However, Sager's proposal for expanded state authority is of no use if the norm in question is not incorporated—the present status of the Second Amendment.[227]

On the other hand, in 1846 the Georgia Supreme Court held that the Second Amendment operated as a restriction on the States, notwithstanding *Barron v. Baltimore*.[228] In *Nunn v. Georgia*,[229] the Georgia Supreme Court quashed an indictment brought against an individual for violation of a Georgia law prohibiting the carrying of concealed weapons.[230] In doing so, the court also invalidated part of the state law in question on constitutional grounds. The court interpreted the statute to "prohibit[] bowie-knives, dirks, spears, (and it may be,

221. *Id.* at 1244-45.

222. *See id.* at 1250.

223. *See* Sager, *supra* note 1, at 1253.

224. *See id.* at 1255. Sager also discussed other objections, including the fear that such a policy would give rise to state judicial activism, *id.* at 1257, and that state court decisions are of little importance, *id.* at 1258-59.

225. Sager does allow for a role where "competing constitutional concerns are at stake." *Id.* at 1249.

226. *Id.* at 1248.

227. *See supra* Part III.D.

228. 32 U.S. (7 Pet.) 243 (1833) (holding the Bill of Rights inapplicable to the States).

229. 1 Ga. 243 (1846).

230. *See id.* at 251.

tooth-picks), from being sold, or secretly kept about the person, or elsewhere; and it forbids, altogether, the use, or sale, or keeping, of sword-canes, and pistols, save such pistols as are known and used as horseman's pistols . . . ."[231]

Apparently the Georgia constitution of the time did not expressly guarantee the right to keep and bear arms. But, after reviewing court decisions of different States interpreting state constitutional guarantees,[232] the Georgia Supreme Court held that the statute was unconstitutional under the Second Amendment to the *federal* Constitution.[233] More correctly, the Georgia court deemed itself to be vindicating the natural right of self-defense (and owning arms therefor) that the Amendment merely guaranteed. "[T]hese instruments," the court wrote, "confer no *new rights* on the people which did not belong to them before."[234] The court then posed the following question: "When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence [sic] of themselves and their country?"[235] The court concluded that such a right, with its roots in English tradition, was inextricably interwoven with the meaning of "liberty," as understood by the colonists (now citizens of the United States).[236]

Although the opinion acknowledged decisions holding that the Bill of Rights were applicable to the federal government only, the court was of the opinion that "the article in question does extend *to all judicial tribunals*, whether constituted by the Congress of the United States or the States individually."[237] The court took its support for this conclusion from the fact that "[t]he provision is general in its nature and unrestricted in its terms,"[238] and from the Supremacy Clause.[239] In the opinion of

231. *Id.* at 247 (italics omitted).

232. *See id.* at 247-49.

233. *See id.* at 251.

234. *Nunn*, 1 Ga. at 249. This remains a perfectly sound exposition of law today. *See* Barnett & Kates, *supra* note 58, at 1172 nn.151-52.

235. *Nunn*, 1 Ga. at 249.

236. "And the Constitution of the United States, in declaring that the right of the people to keep and bear arms should not be infringed, only reiterated a truth announced a century before, in the act of 1689 [the English Bill of Rights]." *Id.*

237. *Id.* at 250.

238. *Id.*

239. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority

the court, the Second Amendment embodied a right that the People had delegated neither to the federal *nor* the state governments.[240] "If a well-regulated militia is *necessary* to the *security* of the State of Georgia and of the United States, is it competent for the General Assembly to take away this security, by disarming the people?"[241] Given that the court felt this principle restricted both state and federal governments, the court found that inasmuch as the Georgia statute prohibited the *open* carrying of weapons, that it "is in conflict with the Constitution, and *void*. . . ."[242]

Despite the vigorous opinion of the Georgia Supreme Court, its view did not take hold; the United States Supreme Court itself nearly forty years later, on the strength of *Barron v. Baltimore*,[243] refused to apply the Second Amendment to state governments.[244] Nevertheless, inasmuch as the Georgia Supreme Court appealed to natural-law principles of self-defense to validate its position, some material may exist for state courts to bolster whatever state constitutional provisions that exist on point.[245] Indeed the U.S. Supreme Court's opinion in *Presser* did indicate that, even leaving the Second Amendment aside, States were not free to regulate the ownership of arms so as to deprive the United States of the services of an armed populace which constitutes the unorganized militia.[246]

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of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

240. [D]oes it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed to rest it in the State governments? Is this a right reserved to the States or to themselves? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature.

Nunn, 1 Ga. at 250.

241. *Id.* at 251; *cf.* Presser v. Illinois, 116 U.S. 252, 265 (1886) (arguing in dicta that, although the Second Amendment does not restrict state governments, States could nevertheless not "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 [militia] duty to the general government").

242. *Nunn*, 1 Ga. at 251.

243. 32 U.S. (7 Pet.) 243 (1833) (holding that the provisions of the Bill of Rights bind only Congress, and not the States).

244. *See* United States v. Cruikshank, 92 U.S. 542 (1875).

245. *See* Kates, *Ideology*, *supra* note 193; Lund, *supra* note 49.

246. *See supra* note 241.

C. *Congressional Enforcement Through Section 5 of the Fourteenth Amendment*

Federal court incorporation of the Second Amendment against the States does not appear likely, at least in the near future. Not only have state courts been unwilling to impose the restrictions of the Second Amendment on state legislatures,[247] *Nunn* notwithstanding, the Supreme Court has expressed unequivocal hostility to the notion that state courts are free to supplement Supreme Court interpretations of constitutional provisions in state cases.[248] However, Congress might attempt to prevent significant *state* abridgment of the right to keep and bear arms through Section 5 of the Fourteenth Amendment.[249] This would provide a baseline of constitutional protection for the right against crabbed state-court interpretations of state constitutional provisions, and also provide some level of federal protection for residents in States without such constitutional protections.

The recent Supreme Court decision in *Boerne v. Flores*[250] appears to have cropped Congress's ability to provide legislatively for such floor-level protection, and seems to retreat from earlier cases that held forth the possibility of a broad congressional role in the expansion of individual rights.[251] A close reading of *Boerne*, however, reveals that the Court did not completely close the door to congressional action under Section 5 of the Fourteenth Amendment.[252] Thus, congressional action designed to remedy Second Amendment underenforcement could be crafted to comport with the limits articulated in *Boerne*. In addition, certain factors clearly troubling to the *Boerne* court would not exist with a statute seeking to enforce the Second Amendment.

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247. *See infra* note 351.

248. *Cf.* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-62 n.6 (1981) ("[W]hen a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed.").

249. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

250. 117 S. Ct. 2157 (1997).

251. *See infra* notes 273-328 and accompanying text.

252. *Boerne*, 117 S. Ct. at 2163.

1. *Congressional Authority Under Section 5*

Section 5 of the Fourteenth Amendment grants Congress the right to "enforce" the provisions of the Amendment by passing "appropriate legislation."[253] As Professor Sager noted in his article, "One perfectly plausible construction of this grant of power is that Congress can do no more than provide the machinery of enforcement for the substantive provisions of the amendment as construed by the federal courts."[254] Under such a theory, Congress would not have the authority to pass legislation giving content to the Second Amendment, because the Supreme Court and lower federal courts have refused to apply the Second Amendment to the States through the Fourteenth Amendment.[255] However, prior to *Boerne*, the Supreme Court rejected this interpretation in favor of a more expansive grant of power to Congress.

a. Katzenbach v. Morgan

In 1966, the Supreme Court decided *Katzenbach v. Morgan*,[256] which upheld a provision of the Voting Rights Act of 1965.[257] The provision in question "was enacted principally to prevent the states from using English literacy tests to deny the right to vote to natives of Puerto Rico educated in Spanish."[258] Writing for the Court, Justice Brennan characterized the argument of New York's attorney general as follows:

> [A]n exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce.[259]

New York further urged that the Voting Rights Act section at issue was not "appropriate legislation" enforcing the Equal

253. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

254. Sager, *supra* note 1, at 1228 (footnote omitted).

255. *See supra* Part III.D.

256. 384 U.S. 641 (1966).

257. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at scattered sections of 42 U.S.C. (1994)).

258. Sager, *supra* note 1, at 1229.

259. *Morgan*, 384 U.S. at 648.

Protection Clause[260] because the judiciary had not declared that a state requirement of English literacy as a prerequisite to voting violated the Equal Protection Clause.[261]

Justice Brennan rejected these arguments, holding that Congress could have found that literacy tests were used to violate the Fourteenth Amendment rights of citizens for whom Spanish was the primary language and that those findings were due deference from the Supreme Court.[262] In addition, the Court read Section 5 of the Fourteenth Amendment as a positive grant of power to the Congress that did not necessarily require a judicial determination of a violation of the Equal Protection Clause before authorizing Congress to prescribe remedies.[263] To hold otherwise, Brennan wrote, "would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of section 1 of the Amendment."[264]

Having established that Section 5 *did* authorize Congress to enact legislation to remedy violations of the Equal Protection Clause that *it* felt required action,[265] Justice Brennan articulated a test to guide Congress (and presumably the courts where such actions might be challenged).[266] The standard chosen by the Court was that articulated by Chief Justice Marshall in *McCulloch v. Maryland*,[267] when Marshall determined the scope of

260. No State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

261. *Morgan*, 384 U.S. at 648. In fact, the Court had recently upheld the constitutionality of such a provision in *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959).

262. *See Morgan*, 384 U.S. at 653.

263. "A construction of section 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Fourteenth Amendment, as a condition of sustaining the congressional enactment, would deprecate both congressional resourcefulness and congressional responsibility for implementing the Amendment." *Id.* at 648.

264. *Id.* at 648-49 (quoting Fay v. New York, 332 U.S. 261, 282 (1947)).

265. "[Section] 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651.

266. *See id.* at 649-50 (writing that the next step is for the Court to determine whether "such legislation is, as required by Section 5, appropriate legislation to enforce the Equal Protection Clause").

267. 17 U.S. (4 Wheat.) 316 (1819).

congressional power under the Necessary and Proper Clause.[268] In his grand formulation, Marshall wrote: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional . . . ."[269] Finding, as it did in this case, that Congress had a "rational basis" for making its conclusions about the English literacy laws, the Court concluded that "[i]t is not for [this Court] to review the congressional resolution of these factors."[270]

b. *Criticisms of* Katzenbach v. Morgan

Justices Harlan and Stewart dissented in an opinion that Justice Harlan authored. Harlan felt that Congress should be able to act only *after* a judicial determination that a violation of the Fourteenth Amendment had occurred.[271] Because the Court had already determined that English-language literacy tests *were* constitutional,[272] there had been a failure of a condition precedent to Congress's remedial power under Section 5.[273] "Federal authority," Justice Harlan wrote, "legislative no less than judicial, does not intrude unless there has been a denial by state action of Fourteenth Amendment limitations . . . ."[274] Under the Court's decision, Harlan feared, "Congress [will] be

268. "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8.

269. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

270. Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

271. When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by section 5 to take appropriate remedial measures to redress and prevent the wrongs. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the section 5 power into play at all.

Id. at 666 (Harlan, J., dissenting) (internal citation omitted).

272. *See supra* note 250.

273. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine.

Morgan, 384 U.S. at 667 (Harlan, J., dissenting).

274. *Id.* at 670 (Harlan, J., dissenting).

able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments, let alone under other provisions of the Constitution, by resorting to congressional power under the Necessary and Proper Clause."[275] Justice Harlan was concerned about the long-term ramifications of the Court's decision; and with the possibility of "dilution" of Court protections by Congress.[276] Simply put, what Congress giveth under the Fourteenth Amendment, Congress might later taketh away. Perhaps more than *dilution*, Harlan was expressing concern that, in Sager's terms, the majority's decision gave Congress the power to countermand the Court's *analytical* determination of the Constitution's provisions, as opposed to granting Congress power in situations where the Court has declined to act on *institutional* grounds.

Moreover, as Justice Harlan saw it, granting Congress a roving remedial power would debase principles of federalism.[277] He was unmollified by Justice Brennan's rather breezy assurances that Congress could only supplement the Court's decisions, and could not withdraw Fourteenth Amendment protection. In a footnote, Brennan had written that "Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate or dilute these guarantees."[278]

The *Morgan* decision was similarly the subject of scholarly critique as well. Professor Alexander Bickel argued that Congress should not be able to determine the scope of its own power.[279] He wrote, "*Katzenbach v. Morgan* constitutes restraint, if not abdication, beyond the wildest dreams of the majority's usual *bete noir*, James Bradley Thayer, and in fact beyond anything he intended to recommend."[280]

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275. *Id.* at 667-68 (Harlan, J., dissenting).

276. *See id.* at 668 (Harlan, J., dissenting).

277. [I]f Congress by what amounts to mere *ipse dixit* can set that otherwise permissible requirement partially at naught, I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.

Id. at 671 (Harlan, J., dissenting).

278. *Morgan*, 384 U.S. at 651 n.10 (majority opinion).

279. *See* Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 97-98 ("[Congress] does not define the limits of its own powers. It belongs, rather, to the Court, exercising the function of judicial review, to do so."). *But see* Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) (defending *Morgan*'s "one-way ratchet" theory).

280. Bickel, *supra* note 279, at 102.

Sager felt the result reached was correct as well, but is perhaps better explained by the application of his underenforcement thesis.[281] Properly understood, *Morgan* "depicts a vision of judicial and legislative cooperation in the molding of concrete standards through which elusive and complex constitutional norms . . . can be applied."[282] This cooperative venture does nothing to prevent either branch from exercising prerogatives that inure to the particular function of each: "The judiciary remains the guardian of fundamental notions of fair process and just treatment at their core, while the legislature is permitted to refine these notions beyond the capacity of the judiciary to do so."[283] Sager, too, seems to suggest that Justice Brennan overstated Congress's power; that the determination of *analytical* limits to the Constitution was properly left to the courts.

c. Oregon v. Mitchell

Morgan was not the final word from the Court on the power of Congress under Section 5 of the Fourteenth Amendment. In 1970, Congress passed amendments to the Voting Rights Act of 1965 that, *inter alia*, lowered the voting age from 21 to 18 in both state and federal elections.[284] A badly divided Court in *Oregon v. Mitchell*[285] upheld Congress's power to lower the voting age in federal, but not state, elections.[286] Though Justice Hugo Black wrote the opinion of the Court, four members of the Court dissented from each of his holdings regarding the lowering of the voting age.

In reasoning that was Justice Black's alone, the opinion drew a distinction between Congress's ability to remedy racial discrimination under the Civil War Amendments, and its use of those Amendments to remedy *other* types of equal-protection violations.

> [D]ivision of power between state and national governments, like every provision of the Constitution, was expressly qualified by the Civil War Amendments' ban on racial discrimination. When Congress attempts to remedy racial

281. *See* Sager, *supra* note 1, at 1240.
282. *Id.*
283. *Id.*
284. *See* 20 U.S.C. § 1973bb (1994) (lowering the federal voting age to 18).
285. 400 U.S. 112 (1970).
286. *See id.* at 134-35.

> discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth and Fifteenth Amendments.[287]

Relevant to Black's holding that Congress was *unable* to prescribe the voting age for state elections was the fact that the Constitution reserves to the States themselves the power to prescribe methods of holding *state* elections and establishing qualifications for voter eligibility. In contrast, the Constitution authorizes some federal control over state conduct of *federal* elections.[288] He wrote:

> Since Congress has attempted to invade an area preserved to the states by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections. On the other hand, where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race.[289]

As noted, however,[290] Justice Black's reasoning failed to command a majority in anything other than the result.[291] The issue became moot, however, for in 1971 the Twenty-sixth Amendment was ratified, thus lowering the voting age in *both* federal and state elections to eighteen.[292]

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287. *Id.* at 129.

288. *See* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."); U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

289. *Mitchell*, 400 U.S. at 130.

290. *See supra* note 286 and accompanying text.

291. *See Mitchell*, 400 U.S. at 141-152 (Douglas, J., concurring in part and dissenting in part) (dissenting from Justice Black's conclusion that Congress could not lower the voting age in state elections); *id.* at 152-229 (Harlan, J., concurring in part and dissenting in part) (same); *id.* at 229-81 (Brennan, White, & Marshall, JJ., dissenting in part and concurring in part) (dissenting from Justice Black's holding regarding state elections); *id.* at 281-96 (Stewart, J., Burger, C.J., and Blackmun, J., concurring in part and dissenting in part) (concurring with Justice Black's holding regarding state elections).

292. *See* U.S. CONST. amend. XXVI.

d. City of Boerne v. Flores

The Supreme Court has backed further away from *Morgan* in *City of Boerne v. Flores*,[293] its most recent decision addressing Congress's substantive powers under Section 5. At issue was whether Congress had exceeded its authority under Section 5 when it passed the Religious Freedom Restoration Act (RFRA).[294] RFRA was passed in response to the Supreme Court's decision in *Employment Division v. Smith*,[295] in which the Court held that the across-the-board application of neutral laws or rules alleged to burden the free exercise of religion could be upheld merely by a government showing that the rule was neutral and applied to everyone.[296] In addition to expressing a preference for what Congress saw as the "correct" interpretation of the Free Exercise Clause of the First Amendment,[297] RFRA "provid[ed] a claim or defense to persons whose religious exercise is substantially burdened by government."[298]

The statute commanded that "government," defined to include federal, state, and local governments,[299] "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,"[300] unless the government "demonstrates"[301] the application of the burden: (1) "is in furtherance of a compelling governmental interest";[302] *and* (2) "is the least restrictive means of furthering that compelling government interest."[303] This test placed a very high burden indeed on the government. Moreover, the number of "rules of

293. 117 S. Ct. 2157 (1997).

294. Pub. L. No. 90-634, 82 Stat. 345 (1993) (codified at 5 U.S.C. § 504 (1994), and 42 U.S.C.A. §§ 1988, 2000bb to 2000bb-4 (1994 & West. Supp. 1998)).

295. 494 U.S. 872 (1990).

296. *Compare* Employment Div. v. Smith, 494 U.S. 872 (1990), *with* 42 U.S.C. § 2000bb(b)(1) (1994) (listing as a purpose of RFRA "to restore the compelling interest test as set forth in [previous Supreme Court cases] and to guarantee its application in all cases where the free exercise of religion is substantially burdened").

297. "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend I.

298. 42 U.S.C. § 2000bb(b)(2) (1994).

299. *See* 42 U.S.C. § 2000bb-2 (1994) (defining "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State").

300. 42 U.S.C. § 2000bb-1(a) (1994).

301. "Demonstrates" is defined as "meet[ing] the burdens of going forward with the evidence and of persuasion . . . ." 42 U.S.C.A. § 2000bb-2(3).

302. 42 U.S.C. § 2000bb-1(b)(1) (1994).

303. 42 U.S.C. § 2000bb-1(b)(2) (1994).

general applicability" that individuals could claim burdens their "exercise" of religion was legion. Not surprisingly, inmates in federal prisons busied themselves filing claims under RFRA.[304]

Prior to the Supreme Court's decision, RFRA was the subject of a spirited debate in the academic journals.[305] Interestingly enough, Professor Sager went on record in opposition to RFRA, writing that it was unconstitutional. This may seem surprising, given his endorsement of Congress's ability to use Section 5 to remedy judicial underenforcement. In an article written with Christopher Eisgruber, Sager stated the following objections to RFRA:

> [it] upsets the appropriate division of authority between the states and the federal government. When Congress is acting in the spirit of the adjudicated Constitution to supplement or extend judicially-cognizable violations of the liberty-bearing provisions, it is acting within its authority under section 5 of the fourteenth amendment, even though it adopts an enlarged view of constitutional liberty. But where, as in RFRA, Congress sets itself against both the analytical essence of the Court's constitutional judgment and the best understanding of the Constitution, Congress cannot be understood to be in the business of enforcing the Constitution.[306]

Moreover, the authors were concerned that, as opposed to Sager's vision of cooperation in the remedying of underenforced norms, the branches were, in the case of RFRA, operating at cross-purposes.[307] "Congress is empowered to

304. *See Holly Yeager, Religious-Practice Law Struck Down*, S.F. EXAMINER, June 26, 1997, at A10 (noting that sixteen States had sought to overturn RFRA, complaining that "the law had disrupted prison life by allowing 'gangs and like-minded groups to shroud illicit activity under the cover of religious belief'").

305. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); Bonnie I. Robin-Vergeer, *Disposing of Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996).

306. Eisgruber & Sager, *supra* note 305, at 444.

307. *See id.* at 461. The authors note that Section 5 is not a blank check empowering Congress to pass any legislation connected to liberty or citizenship.

> The clause envisions that Congress can contribute effectively to the design of mechanisms to implement the ideals and objectives of the amendment.... Two limits emerge even from this rather general characterization of the enforcement power: first, the goals pursued by Congress must in fact be ones embodied in the fourteenth amendment, and second, the mechanisms designed by Congress must bear a reasonable relation to those goals.

extend or supplement the work of the Court in effectuating the liberty-bearing provisions of the Constitution and, in doing so, may reach further than would or could the Court itself."[308] By attempting to effect a change in the analytical content of the First Amendment itself, the authors argued, Congress had erred.

The *Boerne* case itself is a good example of the unintended consequences of RFRA. The petitioner, the City of Boerne, Texas, attempted to enforce zoning regulations against a Catholic church that wanted to undertake construction to increase its capacity. The church took the City to court and invoked RFRA, claiming that the zoning regulation burdened free-exercise rights. In its brief to the Supreme Court, the City of Boerne made several arguments urging the Court to strike down RFRA. First, it argued that the statute reinterpreted Supreme Court Free Exercise doctrine, and did not merely "restore" it to its pre-*Smith* position.[309] Next, the City claimed that "[u]nder the guise of creating a 'statutory' cause of action to support a legislatively-preferred reading of the Free Exercise Clause" Congress arrogated to itself "the judicial function of interpreting the Constitution in the course of adjudicating cases and controversies."[310] Moreover, the City claimed that Congress had exceeded its authority under Section 5 of the Fourteenth Amendment, and urged the Court to overrule that part of the *Morgan* holding that Section 5 of the Fourteenth Amendment granted Congress independent power to enforce the Amendment absent a judicial adjudication of a constitutional violation.[311] The City urged the Court to hold that "[t]he Act oversteps federalism boundaries inherent in Section 5 by forcing state and local governments to abide by a statutory scheme that is not required by the Constitution."[312] Finally, the city argued that "RFRA violates the Establishment Clause by privileging religion over all other forms of conscience."[313]

Id.

308. *Id.* at 462.

309. *See* Brief for Petitioner, City of Boerne v. Flores, No. 95-2014, *available in* 1996 WL 689630, at *9-*10 [hereinafter Petitioner's Brief].

310. *Id.* at *10.

311. *See id.* at *10-*11.

312. *Id.* at *11.

313. *Id.*; *see* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, ..."). *But see* 42 U.S.C. § 2000bb-4 (1994) ("Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion . . . .")

The respondent's brief, written by University of Texas law professor and RFRA enthusiast Douglas Laycock, argued that the Supreme Court had long recognized the power of Congress under Section 5 of the Fourteenth Amendment to enforce the Amendment's provisions, even in the absence of a judicial determination.[314] Laycock also emphasized that overruling RFRA would cast doubt on what had heretofore been regarded as "good law."[315] Although admitting limits to Section 5, RFRA did not approach those limits, he argued.[316] Laycock also maintained that the exercise of Section 5 power that produced RFRA is in line with the original understanding of Congress's power under the Reconstruction Amendments.[317] Moreover, he argued, RFRA did not interfere with the Court's ability to interpret the Constitution; it merely created a class of statutory rights that Congress chose to protect.[318] "By creating judicially enforceable statutory rights, Congress can call on powers of the judiciary that [the Supreme Court] was unwilling to invoke on its own."[319] Far from violating separation of powers, "[t]he resulting collaboration between the branches provides a stronger protection for liberty than either branch could provide alone. This is separation of powers at its best."[320]

In *Boerne*, the Supreme Court rejected Laycock's argument in language that, although leaving *Morgan* and *Mitchell* standing, seemed to indicate that they marked the outer boundaries of congressional power under Section 5.[321] In language that echoed the Court's decision in *United States v. Lopez*,[322] and that presaged the Court's later holding in *Printz v. United States*,[323] Justice Kennedy began the analytical portion of his opinion with the statement that "the Federal Government is one of enumerated powers," and that the written Constitution itself was a

314. Respondent's Brief, City of Boerne v. Flores, No. 95-2074, *available in* 1997 WL 10293, at *4) [hereinafter Respondent's Brief].

315. *Id.*

316. *See id.*

317. *See id.*

318. *See id.* at *5.

319. Respondent's Brief, at *4.

320. *Id.*

321. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2163-64 (1997).

322. 115 S. Ct. 1624 (1995).

323. 117 S. Ct. 2365 (1997).

monument to that fact.[324] Nothing in Section 5 of the Fourteenth Amendment, the Court concluded, was intended to change that; to the contrary, the Court found historical support for Professor Bickel's assertion that the Fourteenth Amendment was not meant to grant unlimited power to Congress.[325]

Specifically, the Court found significant the Thirty-ninth Congress's rejection of Representative John Bingham's proposed amendment, which would have given Congress affirmative power to make law for the States to ensure that privileges and immunities and other rights of national citizens were adequately protected.[326] The Court noted that when the Amendment was reconsidered in April of 1866, under its new Section 5, "Congress' power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective."[327] The Supreme Court, however, retained power to interpret the Fourteenth Amendment.[328]

Further, the Court asserted that its decisions in the *Voting Rights Cases* and *Mitchell* supported the contention that Congress's power under Section 5 is remedial and not substantive.[329] Justice Kennedy wrote: "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."[330] Indicating that *Morgan* might be regarded as *sui generis*, Justice Kennedy suggested that "[t]he new, unprecedented remedies

324. *Boerne*, 117 S. Ct. at 2162 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)); *see also* Van Alstyne, *supra* note 305, at 298-99 (calling RFRA "a breathtaking assertion of bootstrap authority, an utter trivialization of federalism and of the Tenth Amendment"); *id.* at 301 (condemning RFRA as "overreach[ing] congressional authority").

325. *See Boerne*, 117 S. Ct. at 2164 ("The design of the amendment and the text of [Section] 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.").

326. *See id.* at 2164-65. Representative Bingham's draft amendment read:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Id. at 2164 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1034 (1866)).

327. *Id.* at 2166.

328. *See id.* ("The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions.").

329. *See id.* at 2166-68.

330. *Boerne*, 117 S. Ct. at 2167.

were deemed necessary given the ineffectiveness of the existing voting rights laws . . . and the slow costly character of case-by-case litigation."[331] The Court's opinion in *Morgan*, which seemed to envision a positive role for Congress akin to that endorsed by Professor Laycock, was, according to Justice Kennedy, susceptible to varying interpretations. "There is language in our opinion in *Katzenbach v. Morgan* . . . which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in [Section] one of the Fourteenth Amendment. That is not a necessary interpretation, however, or even the best one."[332]

In enacting RFRA, the Court held, Congress was not "enforcing" the right to Free Exercise found in the First Amendment, it was attempting to effect a change in the right itself.[333] Rejecting Congress's argument that RFRA's broad sweep was intended to "avoid the difficulty of proving [deliberate] violations [of Free Exercise]," Justice Kennedy observed that, although such preventative rules are sometimes appropriate, the Fourteenth Amendment required "a congruence between the means used and the ends to be achieved."[334] In other words, "[t]he appropriateness of remedial measures must be considered in light of the evil presented."[335] In the end, RFRA demonstrated neither "congruence" nor "appropriateness." The Court noted that lack of real evidence of invidious, intentional discrimination against Free Exercise rights,[336] and the intrusive, sweeping nature of RFRA's proscriptions rendered it too blunt an instrument.[337]

331. *Id.* (citation omitted) (referring to the adjudication of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at scattered sections of 42 U.S.C. (1994)), in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

332. *Id.* at 2168.

333. *See id.* at 2164. "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.*

334. *Id.* at 2169.

335. *Boerne*, 117 S. Ct. at 2169.

336. *See id.* Justice Kennedy observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." *Id.*

337. *See id.* at 2170.

> Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.... RFRA has no termination date or termination

2. *Limits on Congressional Authority Under Section 5*

Though Justice Kennedy's vision in *Boerne* is not that of Justice Brennan in *Morgan*, that is not to say Congress is forbidden from acting pursuant to Section 5, or forbidden from enacting preventative measures to remedy violations of civil liberties that it finds. This power, however, like all powers of Congress, is circumscribed by the Constitution itself. More to the point, the *Boerne* Court emphasized repeatedly the need for congruence and proportionality between the "wrong" and a congressional attempt to "right" it.[338] The catch, which the Court recognized, is where to draw the line between enforcement and substantive enactment: "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed."[339]

Besides its "congruence" and "proportionality" benchmarks, the Court suggested *other* ways Congress could ensure that its remedial act did not cross the line into the substantive. These included restricting the act to address only discrete classes of state laws,[340] attacking only the most egregious violations,[341] terminating the act after a showing that violations had not occurred for a predetermined amount of time,[342] and geographically restricting operation of the act to those

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mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

Id.

338. *See id.* at 2164 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."); *id.* at 2169 ("[T]here must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."); *id.* at 2170 ("RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."); *id.* at 2171 ("The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."); *id.* ("The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct . . . ."); *id.* ("In addition, the Act imposes in every case a least restrictive means requirement . . . which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.").

339. *Id.* at 2164.

340. *See Boerne*, 117 S. Ct. at 2170.

341. *See id.*

342. *See id.*

jurisdictions in which widespread violations occur.[343] The Court's suggestions were meant to be illustrative, not *sine qua non*, wrote Justice Kennedy, but Congress would seem to ignore the "suggestions" at its peril.[344]

Professor Sager suggested three additional limitations on Congress's power to legislate constitutional norms under the Fourteenth Amendment that are not inconsistent with those suggested by the *Boerne* majority. One is when Congress attempts to dilute Court protections, alluded to above.[345] Other instances where the Court might intervene include cases in which Congress attempts to expand the reach of a norm, a more limited reading of which "is firmly rooted in [the Court's] analytical rather than [its] institutional perceptions."[346] Similarly, "it is appropriate for the Supreme Court to overturn a congressional enactment under Section 5 if it finds that the enactment cannot be justified by any analytically defensible conception of the relevant constitutional concept."[347] Sager admitted though, that in the final case, "the Supreme Court . . . is on its weakest ground."[348] He wrote: "Having declined, for institutional reasons, to fashion an exhaustive conception of a constitutional norm, it should not lightly reject congressional assertions about the appropriate scope of such a conception."[349]

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343. *See id.*

344. This is not to say, of course, that [Section] 5 legislation requires termination dates, geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under [Section] 5.

Id. at 2170-71.

345. "[W]here the Supreme Court would prohibit particular state conduct on any constitutional ground and the congressional enactment in question expressly permits or requires such conduct, that enactment is unconstitutional and should be invalidated by the Court." Sager, *supra* note 1, at 1240.

346. *Id.* at 1241.

347. *Id.* Although not quarreling with the majority's articulation of Section 5's limits, many of the dissenting Justices suggested that the real question was whether the *Smith* decision, which spawned RFRA, was in fact analytically indefensible. *See Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting); *id.* at 2186 (Souter, J., dissenting); *id.* (Breyer, J., dissenting).

348. Sager, *supra* note 1, at 1241.

349. *Id.* at 1241-42.

With these limitations in mind, Sager proposed the following test, which legislators might use to measure their authority to pass a particular piece of legislation pursuant to Section 5:

> Each member of Congress who is predisposed on political and policy grounds to support legislation for which there is marginal section 5 authority is obligated: (a) to determine that the enactment does not expressly require or permit state conduct which the Supreme Court or the legislator would determine to be unconstitutional, (b) to determine that the enactment is not based upon an interpretation of a norm of the fourteenth amendment with which the Supreme Court is in analytical disagreement, and (c) to determine that the proscribed state conduct is properly considered to be a violation of a norm of the fourteenth amendment under the prevailing federal judicial construct of that norm, or failing this, is properly considered to be such a violation under the legislator's own conception of the norm in question.[350]

Considering Sager's (and the Supreme Court's) limitations on congressional authority under Section 5, I turn now to two questions: (1) whether Congress could pass a law that sought to enforce the Second Amendment beyond its present judicial conception; and (2) how the *Boerne* decision would shape the content of such a law.

3. *A Second Amendment Rights Restoration Act?*

The foregoing discussion about congressional authority to promulgate is prelude to the following question: Could Congress, exercising its authority under Section 5 of the Fourteenth Amendment, set a national standard for the right to bear arms? Even conceding the limitations of that power articulated in *Morgan*, *Mitchell*, and now *Boerne*, and those suggested by Professor Sager, I believe such a statute could be crafted so as to pass constitutional muster. In fact, as I argued earlier,[351] more than either the voting age or English language literacy tests, the individual right to keep and bear arms was very much on the minds of the Framers of the Constitution and the drafters of the Bill of Rights and the Fourteenth Amendment.

To facilitate our discussion, let us presume that Congress were to pass a "Second Amendment Rights Restoration Act" (SARRA) pursuant to its Section 5 power to enforce either the Due

350. *Id.* at 1242.

351. *See supra* Part IV.A.

Process Clause or the Privileges and Immunities Clause[352] of the Fourteenth Amendment.[353] As part of its findings, Congress would determine that the right to keep and bear arms is an individual right[354] that should be guaranteed against abrogation by the States, as well as the federal government, and that many state statutes and state court decisions have operated to deprive citizens of that fundamental right. The operative part of the SARRA might find questionable state laws or local ordinances that attempt to (1) ban entire classes of weapons; (2) limit the number of guns purchased in a given month; (3) issue permits for carrying concealed weapons only at the discretion of local officials; or (4) require mandatory registration.[355] Such regulations, SARRA would provide, could not be sustained absent the showing of a "compelling state interest." Could Congress pass such a law? Would the Supreme Court be required to respect Congress's determination that the right to keep and bear arms is an individual right and is entitled to protection from abrogation by state governments?

Despite the doubt cast on the continuing viability of *Morgan* by *Boerne*, my hypothetical statute contains elements, absent

352. I believe that Congress could use either. Though the Privileges and Immunities Clause is thought to be one of those constitutional dead-letters, I side with those scholars who believe *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), were wrongly decided and await vindication for the position that the Privileges and Immunities Clause was intended to protect many rights in the Bill of Rights from state abrogation. However, I would not want my views to detract from the larger point; therefore, if the reader is more comfortable with doing so, she may presume that Congress sought to bring the "right to keep and bear arms" under the ambit of "liberty" referenced in the Due Process Clause of the Fourteenth Amendment. Congressional power under Section 5 is not restricted to the Equal Protection Clause; the "provisions" that Congress is empowered to "enforce by appropriate legislation" would include all of Section 1.

353. During the 104th Congress, the House of Representatives proposed the "Gun Crime Enforcement and Second Amendment Restoration Act of 1996," which would have repealed the assault-weapons ban, and created stiff penalties for gun crime. *See* H.R. 125, 104th Cong. (1996). H.R. 125 differs from my hypothetical in that it does not attempt to use the Fourteenth Amendment to ameliorate the Amendment's non-incorporation against the States.

354. Actually, Congress has made such a finding several times, most recently in 1986. *See* Firearms Owner's Protection Act § 1(b), Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. § 921 note (1994)); *see also* 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, 631-41 (1995) [hereinafter Halbrook, *Congress Interprets*] (discussing the Firearms Owners' Protection Act); David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1987).

355. This list of regulations that could be considered to infringe on the right is not meant to be definitive. Most of them, however, have been proposed either at the state or federal level, and all are arguable infringements on an individual's right to keep and bear arms.

from RFRA, that conform to the guidelines suggested by Justice Kennedy. Specifically, the statute demonstrates congruence and proportionality, contains limitations in the statute itself that ensure the purpose of the statute is remedial and preventative, and does not attempt to effect a substantive alteration to the Second Amendment itself. Moreover, the lack of *any* contrary Supreme Court decision, one way or the other, much less a recent one, eliminates the "Congress v. Court" conflict that lay at the heart of RFRA's passage.

First, and perhaps most importantly, Congress would not be attempting to *overturn* a recent Supreme Court decision.[356] The opinions of certain gun-control enthusiasts to the contrary,[357] the Court's decision in *Miller* is hardly an unequivocal repudiation of the individual-rights model of the Second Amendment.[358] Furthermore, the Court, in dicta, has repeatedly cited the Second Amendment along with other provisions of the Bill of Rights in lists of individual rights.[359] Therefore, the notion that Congress is trying to alter Supreme Court precedent without

356. The *Boerne* Court's opinion indicates that this is one of the more troubling parts of RFRA. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997) ("Congress does not enforce a constitutional right by changing what the right is."); *id.* at 2172 ("Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches."); *id.* ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation or powers and the federal balance."); *cf.* Van Alstyne, *supra* note 305, at 306 n.43. Professor Van Alstyne noted that although the possibility of *Smith*'s reversal "is a substantial one .... [T]he effrontery of the RFRA should make prospect of such an overruling less, rather than more, likely. For the Court to overrule *Smith* in these circumstances would itself suggest a form of judicial truckling to Congress wholly unworthy of the Court." *Id.*

357. *See supra* note 90 and accompanying text.

358. *See supra* notes 78-92 and accompanying text. Professor Van Alstyne has noted:

> Here [considering RFRA] we do not have a situation where Congress is excused by any original uncertainty. Congress did not lack for any guiding decision from the Court. Rather, it knew the Court's decision. It simply did not like that decision, and, not liking it, moved quite literally to substitute as "law" the view of the dissent in the case.

See Van Alstyne, *supra* note 305, at 306.

359. *See* Printz v. United States, 117 S. Ct. 2365, 2385-86 (1997) (Thomas, J., concurring); Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992); United States v. Verdugo-Urquidez, 259, 265 (1990) (suggesting that the use of the term "the People" in the Preamble, the First, Second, Fourth, Ninth, and Tenth Amendments should be construed as *pari materia*); Moore v. East Cleveland, 431 U.S. 494, 504 (1976) (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting) (listing "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" as part of the "full scope of liberty" guaranteed by the Constitution)).

resorting to the Article V[360] amendment process[361] will not wash. True, many district courts have interpreted the Second Amendment otherwise, but as I have demonstrated, not a single recent decision has put forth a persuasive *analytical* rationale for their position.[362]

Moreover, SARRA would not unduly alter the relationship between federal and state governments.[363] In my hypothetical, the statute could be narrowly tailored to address only certain state laws or local ordinances that, for example, ban all handguns within a city's limits,[364] or where the discretionary issuance of permits results only in the rich and powerful obtaining such permits.[365] With regard to civil liberties, the redrawing of boundaries between the state and federal governments took place, if not when the Fourteenth Amendment was ratified, then certainly during the last half century or so of "selective incorporation" of the Bill of Rights' provisions.

A statute like SARRA could be framed with a view towards the goals of proportionality and congruence that seem essential in the *Boerne* opinion. Similarly, as I have envisioned it, SARRA would incorporate some of the restrictions Justice Kennedy suggested to save a congressional enactment from overstepping *Boerne*'s bounds. Unlike the situation facing supporters of RFRA,

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360. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or other Mode of Ratification may be proposed by the Congress; . . . .

U.S. CONST. art. V.

361. *See Boerne*, 117 S. Ct. at 2168 ("Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."); *see generally* Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155 (1997) (discussing how constitutional meaning can be altered absent a constitutional amendment, but cautioning against over-reliance on these modes of informal constitutional change).

362. *See supra* Part III.A(2); Denning, *Miller*, *supra* note 69.

363. *Cf. Boerne*, 117 S. Ct. at 2170 ("RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments . . . . RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment.").

364. *See supra* note 48 (citing to a Morton Grove, Illinois, handgun ban ordinance); Citizens for a Safer Comm. v. Rochester, 627 N.Y.2d 193 (N.Y. Sup. Ct. 1994) (describing a Rochester, New York, ordinance regulating "assault weapons"); *see also* Robertson v. Denver, 874 P.2d 325 (Colo. 1994).

365. *See, e.g.*, Kates, *Handgun Prohibition*, *supra* note 49, at 208 & 208 nn. 16-17 (citation omitted); *Elite in NYC Are Packing Heat*, BOSTON GLOBE, Jan. 8, 1993, at 3.

there are myriad examples in the past five to ten years of aggressive attempts by States (and the federal government) to deprive persons of their Second Amendment rights.[366] Moreover, a narrowly drawn statute, like the one I propose, would not require government to produce a compelling state interest[367] and a narrowly tailored remedy to *any* regulation burdening the right to keep and bear arms, but only certain particularly egregious actions that either deprive qualified persons of the ability to exercise their Second Amendment rights at all, or that tend to defeat the intended purpose of the Amendment. It would not address private action (for example, the right of store owners to ban the carrying of guns in their stores), or appropriate state crime control or safety measures that prohibit, for example, the carrying of guns in places like bars or banks.

Third, the Second Amendment seems to be a good fit with Professor Sager's "underenforcement thesis." As I have shown,[368] federal courts (and importantly, the Supreme Court) have not chosen to enforce the Second Amendment to its analytical limits. Their reluctance to do so stems from institutional concerns, and certainly not because the Amendment's norms have been overenforced.[369] Congressional action recognizing the right set forth in the Second Amendment would serve as an important counterweight to those lawyers, judges, and

366. For examples of overzealous prosecution of otherwise law-abiding gun collectors and dealers (primarily by the Bureau of Alcohol, Tobacco, and Firearms), see SENATE COMM. ON THE JUDICIARY, THE RIGHT TO KEEP AND BEAR ARMS, S. Rep. No. 522-3, 97th Cong., 2d Sess. (1982).

367. Note, however, that trying to ban guns because of strong moral disapproval of them or because of claims that they are "scary" or that they may be used in crimes would not constitute a "compelling state interest" any more than an attempt to restrain publication of a book on moral grounds would be. The concept of a "compelling state interest" cannot swallow up the very right guaranteed in the first place. *See* Reynolds & Kates, *supra* note 103, at 1740 n.8 ("[T]he compelling interest must not be of a kind, or pursued in a manner, that is fundamentally inconsistent with the right."). Or as Dan Polsby put it:

> [A] public policy of simply discouraging people from owning or using firearms is not, in and of itself, a constitutionally-permissible objective, any more than discouraging people from religious observance would be permissible to some oh-so-progressive government that considered religion as hopelessly declassé as progressives nowadays consider the right to keep and bear arms . . . . And any statute or regulation that burdens the right to keep and bear arms on the ground that guns are a public health hazard should enjoy the same frosty reception in court that would be given a statute or regulation that burdened the free exercise of religion as a mental health hazard.

Polsby, *supra* note 8, at 36.

368. *See supra* Part III.A.

369. *See id.*

policymakers who would prefer the Second Amendment not be a part of the Bill of Rights. The normal lawmaking process, moreover, would likely spawn a debate that would help mold the contours of the political right. This is not to say that the core of the political right would be subject to the whims of a majority; quite the contrary, the debate would focus on the extent to which certain governmental regulations of the Second Amendment are *reasonable.*

In short, a statute like SARRA would be a better example of the sort of cooperation between the legislative and judicial branches of which Sager approved. SARRA does not offend the analytical limits of the Second Amendment. It would not be in conflict with a Supreme Court determination of the Amendment's analytical limits—if anything, it would continue the trend of incorporation begun by the Court itself. Finally, it would not require of the States something that offends some other provision of the Constitution. SARRA could thus be crafted to fit comfortably within both the limits set forth in *Boerne* and those articulated by Sager himself.

D. *Passing "Normal" Congressional Findings Regarding the Second Amendment*

Of course, if it could not muster the political will to pass something like SARRA, the Congress might still legislate findings endorsing the Standard Model of the Second Amendment, thus expressing disapproval of the narrow treatment the Second Amendment has received at the hands of federal courts.[370] The impact of such findings is doubtful, however: would (or should) courts defer to congressional interpretations of the Bill of Rights, when Congress's interpretation of those provisions are broader than that afforded by the judiciary?

Stephen P. Halbrook has examined congressional pronouncements on the Second Amendment and demonstrated in a recent article that Congress by and large has drafted its gun-control legislation with a view towards avoiding potential conflicts with the Second Amendment, and in fact largely supports an individual-rights interpretation of the

370. *See id.*

Amendment.[371] In addition, Halbrook argued that courts should defer to such broad interpretations by the legislative branch because such a declaration "is an emphatic statement from the popularly elected branch to the appointed judiciary, that the right to keep and bear arms is a fundamental, individual right, and that statutes regulating this right should be narrowly construed against the government and in favor of the people."[372]

Halbrook noted that in 1789, with the Bill of Rights;[373] in 1866, with the passage of the Freedmen's Bureau Act;[374] in 1941, during debates on the Property Requisitioning Act;[375] and in 1986, with the passage of the Firearms Owners' Protection Act,[376] Congress emphatically and undeniably sought to protect the *individual's* right to keep and bear arms.[377] Unfortunately, as Halbrook also documented, the federal judiciary has taken no notice of congressional findings, sometimes even refusing to acknowledge their existence in court opinions.[378] Halbrook cited only one federal judge, Ninth Circuit Court of Appeals Judge John T. Noonan, who has expressed an opinion that congressional findings are relevant in the application of federal firearms statutes.[379] Even then, Halbrook noted, Judge Noonan was writing in dissent from a denial of rehearing.[380]

The judiciary's decision to ignore these relevant congressional findings has, Halbrook argued, resulted in a frustration of the

371. *See* Halbrook, *Congress Interprets*, *supra* note 354, *passim.*

372. *Id.* at 641.

373. *See* U.S. CONST. amends. I-X; *see also* Halbrook, *Congress Interprets*, *supra* note 354, at 598.

374. Ch. 200, 14 Stat. 173, 176-77 (1866); *see also* Halbrook, *Congress Interprets*, *supra* note 354, at 598.

375. Ch. 445, 55 Stat. 742 (1941) (codified as amended at 50 App. §§ 721-24 (1994)); *see also* Halbrook, *Congress Interprets*, *supra* note 354, at 618-31.

376. Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at scattered sections of 18 U.S.C. (1994)); *see also* Halbrook, *Congress Interprets*, *supra* note 354, at 631-41.

377. *See, e.g.*, Firearms Owners' Protection Act § 1(b), Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. § 921 note (1984)).

> CONGRESSIONAL FINDINGS—The Congress finds that—
>
> (1) the rights of citizens—
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> . . .
>
> require additional legislation to correct existing firearms statutes and enforcement policies . . . .

Id.

378. *See* Halbrook, *Congress Interprets*, *supra* note 354, at 634.

379. *See id.* at 634-38 (citing United States v. Breier, 827 F.2d 1366 (9th Cir. 1987)).

380. *See id.* at 634 n.253.

congressional purpose motivating the passage of the holdings in the first place: as a signal to judges and executive agencies interpreting and applying laws touching on the Second Amendment that the Amendment should be interpreted broadly and that laws effecting it should be applied so as to minimize friction between the right to bear arms and those laws or regulations.[381]

Are these congressional findings due deference from the judiciary as a matter of law? Halbrook argued that they are: "In determining whether a state statute prohibiting possession of firearms is consistent with the Fourteenth Amendment, a court should certainly consider the Congressional declaration that no person should be denied 'the constitutional right to bear arms.'"[382] Likewise, "in the harder case of a federal prohibition on firearms, a court should consider Congress' statements in 1866, 1941 and 1986 and construe[] the Second Amendment broadly . . . ."[383]

Halbrook grounded the judiciary's obligation to defer to broad congressional interpretations of the Bill of Rights' provisions in the fact that, as the body of the people, Congress "reflects the interests of the people at large who influence Congress through the rights of petition and suffrage, and, in the last analysis, keeping and bearing arms."[384] That being the case, Halbrook argued, "when a Congressional declaration reflects the people's understanding of a constitutional right, a court should be loath to enforce its own narrow interpretation."[385]

Halbrook concluded his article with words reminiscent of Sager's underenforcement thesis. He noted that "the federal judiciary has often been shy about protecting certain constitutional rights," including the right to keep and bear arms.[386] He suggested that it is no surprise that an *appointed* federal judiciary has not as scrupulously protected a right that

381. "The obvious purpose of referring to these Congressional declarations is to show that, by giving an honest and expansive interpretation of a constitutional right, Congress thereby intends that other provisions of law be read in such a manner as not to interfere with that right." *Id.* at 635.

382. *Id.* at 636 (quoting Freedmen's Bureau Act, ch. 200, 14 Stat. 173, 176-77 (1866)) (footnote omitted).

383. Halbrook, *Congress Interprets*, *supra* note 354, at 636 (footnote omitted).

384. *Id.* at 639.

385. *Id.* at 640.

386. *Id.*

"prevents a state monopoly of force and resists absolute concentration of power in the hands of the few."[387] Halbrook contrasted the federal judiciary's disparagement of the Second Amendment with the actions of *elected* state judges who, when interpreting their state bills of rights, have provided much more consistent protection to their keep and bear arms provisions.[388] Halbrook, too, suspects institutional and not analytical reasons lie behind underenforcement of the Second Amendment, particularly because the Congress has so consistently supported the Standard Model interpretation of the Amendment.

Halbrook, however, shorts readers a bit on what exactly commands the judicial branch to implement a congressional interpretation of the Second, or any other, Amendment. In light of *Boerne*,[389] it no longer appears that, "Congress may expand but not contract constitutional rights recognized by the Supreme Court."[390] Moreover, it is curious that he made no mention of Congress's power to implement the Second Amendment's protections through its Section 5 enforcement power, possibly because such protections could arguably bind only state governments.

Nevertheless, Halbrook's article provides a nice complement to Sager's underenforcement thesis, and to my assertion that federal courts shy away from Second Amendment claims because of their institutional concerns about the consequences of recognizing such a right. Federal courts, unwilling for these institutional reasons to enforce the Second Amendment fully or even partially, are playing a dangerous game when they simultaneously refuse to acknowledge the contributions other co-equal branches are making to the debate.[391] As regrettable as it may be, however, it seems that judicial indifference to congressional findings is unlikely to change.[392] Similarly, it seems

387. *Id.*

388. *See* Halbrook, *Congress Interprets*, *supra* note 354, at 640-41.

389. *See supra* notes 272-322 and accompanying text.

390. Halbrook, *Congress Interprets*, *supra* note 354, at 639.

391. Sager concluded that courts were on the "weakest ground" when they interpreted a constitutional provision narrowly for institutional reasons, then denied other branches (or even state courts) the opportunity to fully enforce the measure through, for example, Section 5 of the Fourteenth Amendment. *See supra* notes 325-327 and accompanying text.

392. Here I am not fully endorsing Halbrook's conclusions. It seems that a much stronger case can be made for judicial deference to legislation passed by dint of Congress's Section 5 authority. After all, that was a provision of a constitutional amendment. Judicial deference as a matter of course seems to me to be risky business.

that legislative attempts to correct mal-interpretation of the Second Amendment are rooted on much firmer ground in appealing to congressional Fourteenth Amendment authority. Despite the circumscription of that authority in *Boerne*, I believe that a remedial statute could still be crafted to fit within the guidelines provided in Justice Kennedy's majority opinion.[393]

V. CONCLUSION

Sager concluded his article by reiterating the necessity of a "shared responsibility for the safeguarding of constitutional values" between the judicial and legislative branches of our government.[394] He warned against allowing the familiar judicial role in policing the boundaries of constitutional power to eclipse the parallel responsibilities of the other branches of government.[395] By way of conclusion, let me second Professor Sager's sentiments. Uncritical endorsement of judicial supremacy in matters of constitutional interpretation not only conflates what the Constitution says with what judges and justices *say* that it says,[396] but it allows the members of the other branches to escape their responsibility to assess the

Though Congress does act with the authority of the people as their agent, it is fallacious to assume an identity of interest between the two. Simply put, Congress is not We the People. The judiciary, by overturning acts of Congress it judges to be inconsistent with the commands of the Constitution, can be seen as acting in accord with, and not against, the "will of the People," presumably reflected in the Constitution and its Amendments.

Moreover, I believe that the now apparently discredited "one-way ratchet" theory proffered by Justice Brennan in *Katzenbach v. Morgan*, and defended by Professor Cox, *see* Cox, *supra* note 279, is more easily defended in light of the history of the Fourteenth Amendment, which, whatever else it was or was not intended to do, was meant to effect a net increase in the amount of individual liberty. Halbrook offers no support for his version of the "one-way ratchet."

Nevertheless, courts have indicated that congressional findings are "persuasive," *see* Franklin v. Massachusetts, 505 U.S. 788, 804-04 (1992), and entitled to "great respect," *see* United States v. Nixon, 418 U.S. 683, 703 (1974). Moreover, the findings of Congress are binding on governmental agencies who rely on Congress for their statutory authority to act. Those agencies, like the Bureau of Alcohol, Tobacco and Firearms, and perhaps the Federal Bureau of Investigation, should take heed of Congress's interpretation of the Second Amendment, and thus be sensitive to those rights when carrying out their duties.

393. *See supra* notes 329-343 and accompanying text.

394. Sager, *supra* note 1, at 1263.

395. "[W]e should not allow the prominence of the federal judiciary's part in the enforcement of the Constitution to obscure the importance of other governmental officials and bodies in that process." *Id.*

396. *See* South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (noting that judges take an oath to uphold the Constitution and "'not the gloss which [the Court] may have put on it'") (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)).

constitutionality of the measures they are asked to pass (in the case of Congress) or sign into law (in the case of the President).

Though some scholars disagree,[397] I believe that this division of labor among the branches of government whereby the other branches ignore questions of constitutionality and leave those for the courts has not been, in balance, a good thing. Not only has such an attitude left large portions of the Constitution underenforced or unenforced, it has allowed Presidents and Congresses to "play to the crowd," in hopes the courts would save them from folly.[398] Nor is inquiry into the status of underenforced norms merely an academic one, the legal scholar's version of the question "If a tree falls in the forest, and no one hears it, does it make a sound?" The norms are there in the Constitution for all to see. Judicial neglect does not, thus, go unnoticed.

The problem, Sager recognized, is that we often do not look beyond what the Supreme Court tells us. Moreover, we have ceased to expect, much less *demand*, that our representatives, senators, and presidents take the Constitution seriously; primarily because we have forgotten (if we ever knew) what the Constitution actually says. This constitutional illiteracy has produced a citizenry that is unable to distinguish good and bad constitutional theory. Nor is there any reason to suspect that among the elites of the legal profession constitutional literacy is significantly higher.[399]

Nowhere are the results of this situation more stark than in the case of the Second Amendment. Courts, for institutional reasons alone, have allowed the Amendment to remain unenforced. Lower courts have twisted controlling authority, misleadingly cited historical sources, and simply imposed additional requirements not present in the Amendment itself by fiat in an effort to abrogate the individual's right to bear arms. By not claiming a place at the table of constitutional discourse, the elective branches have given the courts the last word.

397. *See, e.g.*, Larry Alexander, Jr. & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

398. Moreover, even if a member of Congress or the President secretly hoped the courts would invalidate provisions for which they voted or signed into law, they are still free to complain publicly about Court subversion of "the People's will" and to decry "judicial activism."

399. In a forthcoming work, I suggest causes and consequences of this thesis and propose solutions to constitutional illiteracy.

Meanwhile, vast numbers of We the People marvel at the lengths to which the judicial branch has gone to secure important individual liberties against government, and yet remain puzzled by judicial unwillingness to enforce an explicit textual provision that large numbers of Americans (if not large numbers of judges, members of the elite bar, and some law professors) regard as important. Even those who would prefer to see the Second Amendment repealed, like Harvard law professor Alan Dershowitz, see that those pursuing the "virtual" repeal of the Amendment are apt to be hoist on their own petard at some point in the future. In a recent article he was quoted as saying that

> [f]oolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it's not an individual right or that it's too much of a public safety hazard don't see the danger in the big picture. They're courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don't like.[400]

Moreover, the thin veneer of federal judicial "unanimity" on this issue obscures an ever-widening gap between judges on the one hand, and many learned scholars and laypersons on the other. According to a recent poll, 75 percent of those asked believe that the Constitution protects their right to own guns.[401] Allowing courts both to refuse to enforce the Second Amendment *and* simultaneously forbid a coordinate branch from doing so mocks the continued existence of its text in the Constitution.

By encouraging Congress to exercise its power under the Fourteenth Amendment, I have in mind two possible results, either of which would be desirable. First, were Congress to take up a proposal like SARRA, it would be able, legislatively and

400. Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 789 (1995) (quoting Alan Dershowitz).

401. *See* Gordon Witkin et al., *The Fight to Bear Arms*, U.S. NEWS & WORLD REP., May 22, 1995, at 29. Moreover, although gun-control proponents often cite statistics that conclude the American public overwhelmingly supports "gun control," this is somewhat misleading. New gun laws and regulations designed to disarm criminals and the irresponsible are strongly endorsed, but the public has consistently rejected measures that are designed to, or will have the effect of, disarming ordinary law-abiding people or making it impossible for them to have firearms to defend themselves and their families. *See, e.g.*, GARY KLECK, TARGETING GUNS: GUNS AND VIOLENCE IN AMERICA (forthcoming 1997); David J. Bordua, *Gun Control and Opinion Measurement*, 5 L. & POL'Y Q. 345 (1983); James D. Wright, *Public Opinion and Gun Control*, 45 ANNALS AM. ACAD. OF POL. & SOC. SCI. 24 (1981).

through due deliberation, to ascertain a national consensus on how States (and the federal government) ought (and ought not) to regulate private ownership of arms. Moreover, the legislative process would enable advocates from both sides to be heard. The open lawmaking process would, one hopes, avoid domination of the debate by one side or the other. In addition, my proposal might encourage judges to reconsider their Second Amendment decisions.[402] Congressional action under Section 5 should signal to the courts a dissatisfaction with the scope of protection afforded a constitutional norm, as RFRA did with the decision in *Smith*,[403] but without the air of confrontation that accompanied such a frank challenge to a recent Supreme Court decision. Such judicial reexamination of the Second Amendment is long overdue, and every new decision ignoring the ever-increasing amount of scholarship demonstrating that the current judicial doctrine is erroneous further undermines judicial credibility.

There are some encouraging signs that members of the judiciary are beginning to take note of the flood of new scholarly work on the Second Amendment. Last term, Justice Clarence Thomas filed a concurring opinion in *Printz v. United States*[404] in which he suggested that the Second Amendment limited Congress's power to regulate intrastate firearms sales at all. Because Justice Thomas went out of his way to mention the issue (which was not raised by the parties), his words are worth quoting at length:

> The Second Amendment similarly appears to contain an express limitation on the government's authority.... This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a personal right to "keep and bear arms," a colorable argument

402. Professor Stephen L. Carter believes that this is the key to the *Morgan* "power." He wrote, "The *Morgan* power... is best understood as a tool that permits Congress to use its power to enact ordinary legislation to engage the Court in a dialogue about our fundamental rights, thereby 'forcing' the Justices to take a fresh look at their own judgments." Stephen L. Carter, *The* Morgan *"Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986).

403. This may have worked. By my count, there are three votes to rehear *Smith*, and two, possibly three, votes to overturn *Smith*. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2176-85 (1997) (O'Connor, J., dissenting) (Justices O'Connor and Breyer indicating a willingness to overturn *Smith*); *id.* at 2185-86 (Souter, J., dissenting) (indicating a willingness to revisit *Smith*, but withholding judgment whether it should be overturned).

404. 117 S. Ct. 2365 (1997).

> exists that the Federal Government's regulating scheme, at least as it pertains to the purely intrastate sale or possession of firearms runs afoul of that Amendment's protections. As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered as the palladium of the liberties of the republic."[405]

Moreover, in a recent book, Justice Antonin Scalia expressed the opinion that the Standard Model of the Second Amendment was an accurate reflection of the Founders' intent.[406] He characterized Professor Laurence Tribe's statement endorsing a States'-rights interpretation of the Second Amendment[407] as an attempt to "explain away" a right that modern constitutional-law professors no longer regard as important.[408]

Until the Court decides to take up the question squarely, however, and as long as lower federal courts perpetuate more erroneous decisions, judicial underenforcement of the Second Amendment will continue. By adopting Professor Sager's thesis, I have also attempted to refocus the debate from the now-familiar Standard Model versus States' right model. That debate has run its course; I believe that both sides have garnered all the converts they will get. As in previous works on the Second

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405. *Id.* at 2386 (Thomas, J., concurring) (quoting 3 STORY, *supra* note 124, at 746).

406. *See* SCALIA, *supra* note 46, at 43. Scalia wrote:

> So also, we value the right to bear arms less than did the Founders (who thought the right to self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may *like* the abridgement of property rights and like the elimination of the right to bear arms; *but let us not pretend that these are not* reductions *of* rights.

Id. (emphasis in last sentence added).

407. *See* Tribe, *supra* note 46, at 71 (describing the Second Amendment's guarantee of the right to keep and bear arms as "seemingly state-militia-based").

408. To Tribe's remark, *see supra* note 407, Scalia responded by citing scholarship to the contrary and concluding that

> the traveling Constitution that Professor Tribe espouses will probably give effect to that new sentiment [the States' rights reading] by effectively eliminating the Second Amendment. But there is no need to deceive ourselves as to what the original Second Amendment said and meant. Of course, properly understood, it is no limitation upon arms control by the states.

Antonin Scalia, *Response*, in SCALIA, *supra* note 46, at 136 n.13. I sincerely hope Justice Scalia's pessimistic prediction of the Second Amendment's fate does not come to pass.

Amendment, I have been interested in exploring *why* the Second Amendment continues, in the federal judiciary, to be a constitutional pariah, barred from associating with other "high caste" civil liberties our judges have labored to protect.

Professor Sager's underenforcement thesis seems a wonderful lens through which to view the Second Amendment question, and I have argued that doing so helps clarify things. In suggesting remedies, I do not pretend to have all the answers, just as I have not attempted to answer the myriad questions that would arise from full judicial enforcement of the Second Amendment. Such consensus will have to come after a challenging, but exciting and necessary, debate. I hope this Article might serve to move that debate forward, which I sincerely hope will be conducted in a reasoned, disinterested manner that befits those of us who have devoted ourselves to constitutional scholarship.[409]

409. Predictions—and pleas, too—play a crucial role in the continuing dialogue between Congress and the Supreme Court; so do the other efforts by Congress to change the Court's mind. *Katzenbach v. Morgan* may be best read as no more than an implicit judicial acknowledgment of the truth of both these propositions.

Carter, *supra* note 402, at 863.