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LOST AND FOUND: RESEARCHING THE SECOND AMENDMENT

ROBERT J. SPITZER*

INTRODUCTION

A large and increasingly influential body of writing argues for a new and very different interpretation of the Second Amendment—different, that is, from the verdict delivered by the Constitution’s founders, history, and the courts. This emerging discourse, which I will refer to generally as the individualist view, shares three key traits. First, this new theory of the Second Amendment has emerged and proliferated almost entirely from lawyers writing in law journals. Second, this emergent body of writing is exerting progressively more influence over Second Amendment interpretation, writings in the public press, and perhaps public policy. Third, this new theory of the Second Amendment is stunningly and fatally defective.

In other writing, I discuss in considerable detail the substance of the arguments concerning the basis for, and meaning of, the Second Amendment.¹ I will therefore raise them much more briefly here. The primary purpose of this Article is not to retread the usual arguments, but rather to examine the provenance of Second Amendment writings in law journals, compare this provenance with claims made about it, and to discuss the unique traits of this literature’s development. By focusing almost entirely on law journal writing, I will also advance an argument that may incur some ire from my colleagues in the legal community. Specifically, I argue that law journals provide a uniquely fertile breeding ground for the development of defective constitutional analysis, a phenomenon by no means unique to the realm of the Second Amendment. In another publication dealing with a different area of constitutional law, I offer

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1. See ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* (1998).

the same argument.² To be sure, abundant and excellent scholarship appears in legal publications, and I do not mean to minimize these numerous important contributions. Nevertheless, the body of analysis that is the focus of this Article is, I believe, uniquely and inextricably linked to the size, nature, and functioning of law journals.

This Article proceeds, first, with a brief explication of the meaning of the Second Amendment. It then examines the manner in which the debate over this Amendment has been depicted in recent news accounts and proceeds to the two chief emergent critiques of Second Amendment analysis: the individualist view and the so-called right of revolution. Following that, four collateral claims arising from and connected with the individualist and revolutionist perspectives are examined in light of an assessment of the provenance of Second Amendment writings in law journals, as is the reputed role of the Fourteenth Amendment. Finally, three explanations are offered for the emergence of this new body of writing on the Second Amendment.

I. THE MEANING OF THE SECOND AMENDMENT

Few parts of the Constitution are so often invoked, yet so misunderstood, as the Second Amendment. Polemic aside, the meaning of the Second Amendment is relatively clear. As the text itself says, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."³ Supreme Court Chief Justice Warren Burger wrote that the Second Amendment "must be read as though the word 'because' was the opening word,"⁴ as in "[because a] well-regulated Militia [is] necessary to the security of a free State . . ."⁵ As debate

2. I have previously examined another instance where law journals have provided the breeding ground for an extensive and, briefly, influential, body of literature that argued that Article I, Section 7 of the Constitution provided the president with an item veto (referred to as an inherent item veto). This startling proposition, which otherwise would have been met with dismissive scorn by presidential scholars, spawned and flourished in the fertile turf of law journals, reaching its apex in 1989 when President George Bush announced that he planned to exercise an item veto based on this very theory (Bush repudiated this theory in 1992). That a sitting president would contemplate such a move attests to the sway of law reviews, as well as to the extent to which these publications might serve as a breeding ground for wayward constitutional theories. The analysis of the Second Amendment in this Article will make a similar argument. See Robert J. Spitzer, *The Constitutionality of the Presidential Line-Item Veto*, 112 POL. SCI. Q. 261 (1997).

3. U.S. CONST. amend. II.

4. Warren E. Burger, *The Right to Keep and Bear Arms*, PARADE MAG., Jan. 14, 1990, at 5.

5. *Id.*

concerning the Second Amendment preceding and during the First Congress made clear, the Second Amendment was added to allay the concerns of Antifederalists and others who feared that state sovereignty, and more specifically the ability of states to meet military emergencies on their own, would be impinged or neglected by the new federal government, which had been given vast new powers, particularly and alarmingly over the use of military force.⁶ In other words, the inclusion of the Second Amendment embodied the Federalist assurance that the state militias would be allowed to continue as a viable military and political supplement to the national army at a time when military tensions within and between the states ran high, suspicions of a national standing army ran even higher, and military takeovers were the norm in world affairs.⁷ Debate concerning what became the Second Amendment during the First Congress dealt entirely with several narrow military questions: the need to maintain civilian government control over the military, the military unreliability of militias as compared with professional armies, possible threats to liberties from armies versus militias, and whether to codify the right of conscientious objectors to opt out of military service.⁸

As four Supreme Court cases and nearly twenty lower federal court rulings have made clear, the Second Amendment pertains only to citizen service in a government-organized and regulated militia (remembering that militiamen were expected to bring their own firearms), the regulation of which specifically appertains to Congress in Article I, Section 8.⁹ The abysmal performance of civilian militias¹⁰ in the War of 1812 essentially ended the government's use of such forces to meet military emergencies. Millett and Maslowski noted that "[a]fter the War of 1812 military planners realized that no matter how often politicians glorified citizen-soldiers . . . reliance on the common militia to reinforce the regular Army was chimerical."¹¹ As

6. See THE FEDERALIST NOS. 24, 25, 28, 29, 46 (Alexander Hamilton).

7. See CREATING THE BILL OF RIGHTS 182-84, 198-99 (1991); GARRY WILLS, A NECESSARY EVIL 119-21 (1999).

8. *Id.*

9. See *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894); *United States v. Miller*, 307 U.S. 174 (1939). The Court acknowledged this line of cases in *Lewis v. United States*, 445 U.S. 90 (1980). A list of the pertinent federal court rulings appears *infra* note 111. See SPITZER, *supra* note 1, at 17-42, for a fuller discussion of these cases.

10. Also referred to as unorganized or general.

11. ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES 129 (1984). The authors quote Representative

Ehrman and Henigan observed, the “history of the state militias between 1800 and the 1870s is one of total abandonment, disorganization, and degeneration.”¹² Instead, the government came to rely on professional military forces that were expanded in times of emergency by the military draft. The select or volunteer militias used in the Civil War, which date to colonial times, were institutionalized and brought under federal military authority as the National Guard early in the twentieth century.¹³ Further, even if the Second Amendment did pertain to personal weapon ownership or use outside of militia service, the Court has refused to incorporate it via the Fourteenth Amendment,¹⁴ unlike most of the rest of the Bill of Rights, thereby limiting its relevance only to federal action. In any case, the Second Amendment provides no protection for personal weapons use, including hunting, sporting, collecting, or even personal self-protection.

Despite the definitive nature of constitutional reading, historical lessons, and court rulings, some legal writers, publishing primarily in law journals, have sought to spin out other interpretations of the Second Amendment.¹⁵ These authors have succeeded in finding legitimacy for a variety of erroneous and even nonsensical arguments concerning the meaning of the Second Amendment through publication in law journals. Arguments advanced in these publications have, in turn, seeped into the public press. When this happens, it may easily magnify what might otherwise be a minor distortion. To take one example, an article in the *Wall Street Journal* reported in late 1999 that one of the key factors leading to new

Jabez Upham, who observed in 1808 during debate in the House of Representatives that reliance on citizen militias

will do very well on paper; it sounds well in the war speeches on this floor. To talk about every soldier being a citizen, and every citizen being a soldier, and to declaim that the militia of our country is the bulwark of our liberty is very captivating. All this will figure to advantage in history. But it will not do at all in practice.

Id.

12. Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 36 (1989); see also JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 317 (1988); WILLIAM RIKER, *SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY* 21-40 (1957).

13. See 39 Stat. 166 (1916); MILLETT & MASLOWSKI, *supra* note 11, at 247-49; RIKER, *supra* note 12, at 21; JERRY COOPER, *THE RISE OF THE NATIONAL GUARD* 1 (1997).

14. See RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* 279 (1981).

15. I decline to use the term “standard modelers” or “standard model” to refer to those who advocate alternate views of the Second Amendment, as this term implies something standard, orthodox, or historically mainstream about this point of view, which, in my view is not the case.

academic interest in the Second Amendment was “a recently unearthed series of clues to the Framers’ intentions.”¹⁶ Two examples are cited in the article. One is an allegedly recently discovered “early draft” of the Second Amendment authored by James Madison where “he made ‘The right of the people’ the first clause [of the Second Amendment]”¹⁷ The second is a letter written by Thomas Jefferson to an English scholar, John Cartwright, in which “Jefferson wrote that ‘the constitutions of most of our states assert, that all power is inherent in the people; . . . that it is their right and duty to be at all times armed.’”¹⁸ Despite the article’s claim to the contrary, neither of these quotes is “recently unearthed,” nor are they “clues” to the meaning of the Second Amendment. The first of these quotes has been known to constitutional scholars for decades, as it was part of Madison’s original Bill of Rights resolution, offered in the House of Representatives on June 7, 1789 and has been a part of publicly available congressional records from that day to this. It has also been cited in past writings on the Second Amendment and the Bill of Rights.¹⁹ It is thus no new discovery, nor does it alter what is already known about the Second Amendment.²⁰

The Jefferson letter to Cartwright was reprinted in *The Writings of Thomas Jefferson*,²¹ published in 1904. Leaving aside the facts that Jefferson did not attend the Constitutional Convention of 1787, was not a member of the First Congress, and penned the letter in question in 1824, the full quotation from which the brief excerpt above was drawn makes clear what Jefferson was writing about:

The constitutions of most of our States assert, that all power is inherent in the people; that they may exercise it by themselves, in all cases to which they think themselves competent (as in electing functionaries executive and legislative, and deciding by a jury of themselves, in all judiciary cases in which any fact is involved,) or they may act by representatives, freely and equally chosen; that it is their right and duty to be at all times armed; that they are entitled

16. Collin Levey, *Liberals Have Second Thoughts on the Second Amendment*, WALL ST. J., Nov. 22, 1999, § A, at 23.

17. *Id.*

18. *Id.* No citations or attributions are provided in the article as to who made these “discoveries,” or who claimed that they are new or significant.

19. Recent cites of this early version of Madison are included in SPITZER, *supra* note 1, at 34, which in turn appeared in CREATING THE BILL OF RIGHTS, *supra* note 7, at 10.

20. See SPITZER, *supra* note 1, at 25-27.

21. Letter from Thomas Jefferson to John Cartwright (1824), reprinted in 16 THE WRITINGS OF THOMAS JEFFERSON, MEMORIAL EDITION 45 (Lipson & Bergh, eds. 1903-04).

to freedom of person, freedom of religion, freedom of property, and freedom of the press.²²

Jefferson was referring to state constitutions and offering a seat-of-the-pants listing of Bill of Rights freedoms, therefore including the reference to being armed as a right and duty (remembering that federal and state laws then required men of militia age to be so armed for militia service). Nothing Jefferson said in this letter amounts to a new contribution to the understanding of the Second Amendment, nor does it contradict existing meaning. Yet a reader of the *Wall Street Journal* might reasonably conclude that these so-called new “clues” to Second Amendment are both, when in fact, they are neither. Before addressing the substance of the arguments raised by individualist writers in law journals, brief additional attention to how these arguments have been framed in recent news and opinion articles sheds further light on how this debate has been promoted.

II. LIBERAL, LIBERAL, LIBERAL

Two particular claims have surfaced with increasing regularity in the media pertaining to new interpretations of the Second Amendment in what is generally described as the “individualist” view.²³ One is the claim, offered with considerable rhetorical flourish, that the individualist view has recently been embraced by liberals. For example, the *New York Times* noted with much ballyhoo that “the influential liberal constitutional law expert”²⁴ Laurence Tribe now believes that the Second Amendment might protect an individual right to own firearms.²⁵ Columnist William Safire also noted that some liberals seemed to be shifting positions on the issue,²⁶ an observation made as well by newspaper columnist Walter Shapiro and writer Daniel Lazare.²⁷ A recent headline in the *Wall Street Journal* summed up this alleged tidal shift in liberal thought this way: “Liberals Have Second Thoughts on the Second Amendment.”²⁸ The effort to assert that the individualist view, as well as generalized

22. *Id.*

23. See *infra* notes 35-50 and accompanying text.

24. William Glaberson, *Right to Bear Arms: A Second Look*, N.Y. TIMES, May 30, 1999, § 4, at 3.

25. *Id.*

26. See William Safire, *An Appeal for Repeal*, N.Y. TIMES, June 10, 1999, at A31.

27. See Daniel Lazare, *Your Constitution Is Killing You*, HARPER'S MAG., Oct. 1999, at 57-65; Walter Shapiro, *It's High Time to Gun Down the 2nd Amendment*, USA TODAY, Sept. 17, 1999, at 14A.

28. See Levey, *supra* note 16, at 23.

opposition to gun control, is not limited to political conservatives is not a new phenomenon; it has percolated up from the arguments of several legal and academic writers who oppose stronger gun laws.²⁹ Some think, therefore, or would like others to think, that the personal ideological leanings of those who write on the Second Amendment offer some insight into the debate itself.

Yet, this recent debate over whether some liberals now embrace the individualist view is a red herring, precisely because the focus on ideological pedigree becomes a substitute for a substantive debate of the actual merits of the individualist claims. Indeed, the merits of the claims concerning the meaning of the Second Amendment are not even raised in most of the press articles just cited. The facts of the case are irrelevant if the debate over this, or any legal or public policy issue becomes one of the ideological pedigrees of those on each side. As a political tactic, there may be some gain to be had in trying to legitimate an argument by extolling the people who hold it or by noting that the position is held by people of multiple ideological stripes (assuming, of course, that one can accept such claims at face value). I argue in this Article, however, that such claims are, at best, an irrelevant distraction to determining what the Second Amendment actually means.³⁰ At worst, such claims represent a shoddy effort to give legitimacy to a claim that cannot stand purely on its merits.

29. For example, legal writer and individualist architect Don B. Kates edited a book which was consciously compiled to marshal "liberal skepticism about 'gun control.'" *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 1-2 (1979). Similarly, criminologist Gary Kleck, who argues in his writings against stronger gun controls, contends strenuously, even vehemently, that he is a good liberal. At the start of two books, he provides an "Author's Voluntary Disclosure Notice" that trumpets his devotion to liberal causes and organizations. In his book *Targeting Guns* (1997) he writes of himself:

The author is a member of the American Civil Liberties Union, Amnesty International USA, Independent Action, Democrats 2000, and Common Cause, among other politically liberal organizations. He is a lifelong registered Democrat, as well as a contributor to liberal Democratic candidates. He is not now, nor has he ever been, a member of, or contributor to, the National Rifle Association, Handgun Control, Inc. nor any other advocacy organization, nor has he received funding for research from any such organization.

Id. at vi. One presumes this is offered somehow to enhance his credibility, although it is difficult to see how such an exuberant embrace of partisan political organizations, and rejection of others, can be considered a sign of objectivity. Unintentional hilarity aside, Kleck's personal proclamation does provide a diversion from an assessment of Kleck's work based on its objective merit.

30. Andrew Jay McClurg refers to this as the fallacy of diversion, defined as, "distorting the reasoning process in ways intended to make the audience lose track of or ignore the real point." Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 81 (1992).

III. "WE WIN"

The second rhetorical device raised in recent media accounts—one that also percolates up from academic writings³¹—is the unilateral declaration that the individualist view represents a new academic consensus. For example, Lazare asserts that the debate over the Second Amendment is simply over: "The amendment *does* confer an individual right to bear arms"³² Historian Joyce Lee Malcolm is quoted as saying that "[i]t is very hard . . . to find a historian who now believes that it is only a collective right There is no one for me to argue against anymore"³³ *USA Today* reports that "[m]ost constitutional scholars agree with" the individualist view.³⁴

While one of the purposes of this Article is to examine the extent to which this claim is actually grounded in the academic literature, this unilateralist claim is, on its face, roughly akin to a participant in a contest who suddenly stops competing, declares victory, and leaves in the hope that the declaration may become fact. Like the focus on the ideology of those who participate in the debate on the Second Amendment, the declaration of victory is a rhetorical device that, whether by intent or simple effect, draws attention away from the facts of the case. It is to those facts that we now turn.

IV. THE "INDIVIDUALIST" CRITIQUE

The central critique of the court view of the Second Amendment is that this Amendment conferred an "individual" right to bear arms, aside or apart from any government-based militia activity.³⁵ That is, some argue, the ownership of firearms is a constitutionally based protection that applies to all individuals, without any attachment to militias or the government, just as free speech and the right to counsel apply to all individuals. Although many variations of the individualist critique have been spun out, the core argument is usually supported by plucking key phrases from court cases and colonial or federal debate that refer to a right of Americans to own and carry guns.³⁶

31. See Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1139-1259 (1995). As the subtitle says, the authors seek to assert that the individualist view has become the new academic consensus.

32. Lazare, *supra* note 27, at 58.

33. *Id.* at 59.

34. Shapiro, *supra* note 27, at 14A.

35. See SPITZER, *supra* note 1, at 166 n.72.

36. Much of this line of analysis relies on supporting quotes accidentally or willfully pulled out of context that, when examined in context, support the Court's view. To pick an example,

This line of analysis has three problems. First, as a matter of constitutional law, the issue of bearing arms as it pertained to the Bill of Rights always came back to service in a government-organized and regulated military unit and the balance of power between the states and the federal government. This is reflected in the two most important historical sources of constitutional interpretation: the records of the Constitutional Convention and those of the First Congress when the Bill of Rights was formulated. Gun ownership was undeniably an important component of colonial and early federal life, but practical necessity did not and does not equal constitutional protection. Moreover, as historian Michael Bellesiles has found, actual firearms ownership in America has been greatly exaggerated and mythologized.³⁷ He reports that, from colonial times to 1850, gun ownership never exceeded ten percent of the population, owing in large measure to the scarcity of guns, which were difficult and expensive to produce, and the considerable difficulty of maintaining those that existed in working condition.³⁸ Even though state and federal laws required men of militia age to keep and maintain firearms, these laws were simply not followed or enforced.³⁹

Second, the definition of the citizen militias at the center of this debate was always limited to men roughly between the ages of

Stephen P. Halbrook quotes Patrick Henry's words during the Virginia Ratifying Convention as saying, "The great object is, that every man be armed . . . Every one who is able may have a gun." Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 24, 25 (1982). This quote would seem to support the view that at least some early leaders advocated general popular armament aside from militia purposes. Yet here is the full quote from the original debates:

May we not discipline and arm them [the states], as well as Congress, if the power be concurrent? so that our militia shall have two sets of arms, double sets of regimentals, &c; and thus, at a very great cost, we shall be doubly armed. *The great object is, that every man be armed.* But can the people afford to pay for double sets of arms, &c? *Every one who is able may have a gun.* But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case.

3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 386 (1836) (emphasis added). It is perfectly obvious that Henry's comments are in the context of a discussion of the militia and the power balance between the states and Congress. Numerous other such examples as this can be found; space limits constrain the presentation of additional illustrations. Garry Wills's conclusion about this literature is less charitable. Speaking about the individualist writers, he says that "it is the quality of their arguments that makes them hard to take seriously." Garry Wills, *Why We Have No Right to Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62.

37. See Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 J. AM. HIST. 426, 428 (1996).

38. *Id.*

39. See SPITZER, *supra* note 1, at 28.

eighteen and forty-five.⁴⁰ That is, it always excluded a majority of the country's adult citizens—men over forty-five, the infirm of all ages, and women, who, of course, did not enjoy comparable political rights to men until the twentieth century. Even among those males who were eligible to serve, actual service in the militias was significantly less than universal. As historian John Shy notes, the composition and organization of American militias fluctuated according to military necessity of place and time,⁴¹ underscoring the fact that militia's *raison d'être* was collective defense or internal security,⁴² not individual protection (while understanding that individuals might, and surely did, obtain protection through militia action) or other private purposes. Moreover, those who actually served “were not the men who bore a military obligation as part of their freedom.”⁴³ That is, freedmen and property owners could and would opt out of militia service,⁴⁴ while vagrants, vagabonds, and the unemployed more often filled the ranks.⁴⁵ Even African Americans served in early militias.⁴⁶ In the Yamasee War, in South Carolina from 1715 to 1716, a militia force of 600 white men and 400 black men defeated Native Americans.⁴⁷ By the 1730s, escalating fears of slave revolts ended the practice.⁴⁸ Therefore, “universal” citizen militia service and the right to bear arms is not, and never has been, a right enjoyed by all citizens, unlike other Bill of Rights protections such as free speech, religious freedom, or right to counsel. This also puts to rest the idea that the phrase “the people” in the Second Amendment somehow means all of the people.⁴⁹

40. See 10 U.S.C. § 311 (1983).

41. See JOHN SHY, *A PEOPLE NUMEROUS AND ARMED* 31 (1990).

42. Shy cites as a telling example of the problem of internal security the fact that militias in the South increasingly were used as “an agency to control slaves, and less [as] an effective means of defense.” *Id.* at 37. Carl T. Bogus argues persuasively that the Second Amendment was supported by the Southern states precisely because they were seeking a guarantee to continue to use militias for this purpose. See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 375 (1998).

43. See SHY, *supra* note 41, at 37-38.

44. See Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 235 (1999).

45. *Id.*

46. See SHY, *supra* note 41, at 31-38.

47. *Id.*

48. See SHY, *supra* note 41, at 30.

49. Obviously, the Second Amendment is talking about only those people who could serve in a militia, as the Supreme Court made clear in *Presser v. Illinois*, 116 U.S. 252 (1886). This argument is raised in Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 93-94 (1983). In *Fresno Rifle & Pistol Club*

Third, the matter of personal or individual self-defense, whether from wild animals or modern-day predators, does not fall within, nor is it dependent on, the Second Amendment rubric. Nothing in the history, construction, or interpretation of the Amendment applies or infers such a protection. Rather, legal protection for personal self-defense arises from the British common law tradition and modern criminal law; not from constitutional law.⁵⁰

V. THE "RIGHT OF REVOLUTION"

An additional challenge to the court view that extends the individualist view even further is that the Second Amendment does or should protect the ownership of arms for everyone because of an innate "right of revolution," or as a mechanism to keep the country's rulers responsive to the citizens. This theory, whether emphasizing revolutionary overthrow of a regime or an "insurrectionist" use of violence to change personnel within a regime, poses interesting intellectual questions about natural law and the relationship between citizens and the state. However, it does not find support anywhere in the text, background, or court interpretation of the Second Amendment.

The Constitution clearly and forcefully disdains anything resembling a right of revolution, as it gives Congress the powers "to provide for calling forth the Militia to execute the Laws of the Union,

v. Van De Kamp, the court of appeals rejected the idea that the phrase "the people" had the same, uniform meaning throughout the Bill of Rights. See 965 F.2d 723 (9th Cir. 1992). Some law journal articles have asserted that a 1990 Supreme Court case, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), ruled that the phrase "the people" in the Second Amendment meant all citizens. See, e.g., William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1243 n.19 (1994); G.L. Shelton, *In Search of the Lost Amendment: Challenging Federal Firearms Regulation Through the "State's Right" Interpretation of the Second Amendment*, 23 FLA. ST. U. L. REV. 105 (1995); R.J. Larizza, *Paranoia, Patriotism, and the Citizen Militia Movement: Constitutional Right or Criminal Conduct?*, 47 MERCER L. REV. 581, 605 (1996). Such interpretations are false, as the *Verdugo-Urquidez* case has nothing to do with interpreting the Second Amendment. In fact, the case deals with the Fourth Amendment issue of whether an illegal alien from Mexico was entitled to constitutional protection regarding searches. In the majority decision, Chief Justice Rehnquist discussed the meaning of the phrase "the people"—given that the phrase appears not only in several parts of the Bill of Rights, but also in the Constitution's Preamble in order to determine its applicability to a noncitizen. Rehnquist speculated that the phrase "seems to have been a term of art," *Verdugo-Urquidez*, 494 U.S. at 265, that probably pertains to people who have developed a connection with the national community. Rehnquist's speculations about whether the meaning of "the people" could be extended to a noncitizen, and his two passing mentions of the Second Amendment in that discussion, shed no light, much less legal meaning, on this Amendment.

50. See JOEL SAMAHA, CRIMINAL LAW 230-76 (1993); AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, pt. 1, Comment to § 2.09, at 380-81 (1985); BLACK'S LAW DICTIONARY 707 (6th ed. 1990).

suppress Insurrections and repel Invasions”⁵¹ in Article I, Section 8; to suspend habeas corpus “in Cases of Rebellion or Invasion” in Section 9;⁵² and to protect individual states “against domestic Violence”⁵³ if requested to do so by a state legislature or governor in Article IV, Section 4.⁵⁴ Further, the Constitution defines treason in Article III, Section 3: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies.”⁵⁵ Finally, those suspected of treason may not avoid prosecution by fleeing to another state, as the Constitution says in Article IV, Section 2, that “[a] Person charged in any State with Treason . . . and found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up”⁵⁶ In other words, the Constitution specifically and explicitly gives the government the power to forcefully suppress anything even vaguely resembling revolution. Such revolt or revolution is by constitutional definition an act of treason against the United States. The militias are thus to be used to *suppress*, not *cause*, revolution or insurrection.

These powers were further detailed and expanded in the Calling Forth Act of 1792,⁵⁷ which gave the president broad powers to use state militias to enforce both state and federal laws in instances where the law is ignored or in cases of open insurrection. The Second Congress passed this Act shortly after the passage of the Bill of Rights. In current law, these powers are further elaborated in the United States Code sections on “Insurrection.”⁵⁸ As Roscoe Pound noted,

a legal right of the citizen to wage war on the government is something that cannot be admitted In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which would defeat the whole Bill of Rights.⁵⁹

Beschle observed: “History and logic do not permit one to take the right of armed revolution as a serious proposition of positive

51. U.S. CONST. art. I, § 8.

52. *Id.* § 9.

53. *Id.* art. IV, § 4.

54. *Id.*

55. *Id.* art. III, § 3.

56. *Id.* art. IV, § 2.

57. 1 Stat. 264 (1792).

58. See 10 U.S.C. §§ 331-34 (1956).

59. ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 90-91 (1957).

constitutional law. Only the legal revolutions provided by the political process are recognized by the Constitution.”⁶⁰ Cornell elaborates on the relationship between the American Revolution and subsequent American governance by noting, “Americans did accept a right of revolution. Such a right, however, was not a constitutional check, but a natural right that one could not exercise under a functional constitutional government.”⁶¹

Any so-called right of insurrection or revolution is carried out against the government, which means against that government’s Constitution as well; including the Bill of Rights and the Second Amendment. One cannot carry out a right of revolution against the government while at the same time claiming protections within it.⁶² Even though the truth of this conclusion is clear enough, Akhil Amar and Alan Hirsch do not accept it, arguing that “the Framers did envision the militia playing precisely this double role”⁶³ of both suppressing revolt and fomenting it. They offer this argument without providing any sources or documentation to support the claim that the framers endorsed this insurrectionist purpose of the militias. Then, even more puzzling, they retreat from their argument that some portion of the Constitution or Bill of Rights supports armed revolt against the government by saying that the case for violent revolution made by the Declaration of Independence was changed by the Constitution, which “endorsed a new kind of revolution, a peaceful means of altering or abolishing the government” by “ballots rather than bullets”⁶⁴ They conclude with, “it may be a mistake to think of the right to armed revolt as a ‘constitutional’ right”⁶⁵ At last, they get it right.

One of the most startling qualities of the individualist law review literature is the rapidity and enthusiasm with which some teachers of law embrace the virtues of armed American insurrection.⁶⁶ Sanford

60. Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 *HAMLIN L. REV.* 69, 95 (1986).

61. Cornell, *supra* note 44, at 238.

62. As Justice Robert Jackson noted in *Terminiello v. Chicago*, “The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” 337 U.S. 1, 37 (1949).

63. AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE 174 (1998). Amar and Hirsch seek to rebut the arguments of Dennis Henigan, *Arms, Anarchy, and the Second Amendment*, 26 *VAL. U. L. REV.* 107 (1991).

64. AMAR & HIRSCH, *supra* note 63, at 175.

65. *Id.* at 176.

66. See, e.g., Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the*

Levinson, for example, states in a widely cited article published in the *Yale Law Journal* that “[i]t is not my style to offer ‘correct’ or ‘incorrect’ interpretations of the Constitution.”⁶⁷ Yet he then proceeds to do just that, calling into question the conventional (court) understanding of the Second Amendment. In the process, he asserts that the Second Amendment is an expression of republicanism that does and should take citizen participation beyond peaceful, constitutional means:

[J]ust as ordinary citizens should participate actively in governmental decision-making through offering their own deliberative insights, rather than be confined to casting ballots once every two or four years for those very few individuals who will actually make decisions, *so should ordinary citizens participate in the process of law enforcement and defense of liberty rather than rely on professionalized peacekeepers, whether we call them standing armies or police.*⁶⁸

In short, Levinson offers a bona fide constitutional argument proposing that vigilantism and citizen violence, including armed insurrection, against the government are legal, proper, and even beneficial activities within the Second Amendment umbrella. The idea that vigilantism and armed insurrection are as constitutionally sanctioned as voting is a proposition of such absurdity that one is struck more by its boldness than by its pretensions to seriousness. Yet it appears repeatedly in the individualist literature.⁶⁹

Finally, in none of this writing is there any actual, specific, scholarship-based consideration of what real revolution entails.⁷⁰ Groups and individuals in modern America who most closely adhere to a violence-based revolutionary ethos—the Silver Shirts, the Branch Davidians, the Ku Klux Klan, the Los Angeles rioters, Lee Harvey Oswald, John Wilkes Booth—win no admirers from the Second

Tennessee Constitution: A Case Study in Civic Republican Thought, 61 TENN. L. REV. 647, 669 (1994); David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007, 1009 (1994); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 886 n.13 (1996).

67. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

68. *Id.* at 650-51 (emphasis added).

69. See, e.g., Larizza, *supra* note 49, at 581-636; Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Reynolds, *supra* note 66, at 647-73; Van Alstyne, *supra* note 49, at 1236-55. A particularly egregious example of this is David C. Williams, who says flatly that the Second Amendment “guarantees to citizens the right to own arms, so as to be ready to make a revolution.” Williams, *supra* note 66, at 886 n.13.

70. For an extended, classic discussion of the meaning and origins of the modern concept of revolution, see HANNAH ARENDT, *ON REVOLUTION* 13-52 (1963).

Amendment writers discussed here. As Carl Bogus aptly observes, “Timothy McVeigh understands insurrectionist theory.”⁷¹ Academics who toy with any serious notions about revolutions would be well advised to consult the voluminous scholarly literature on the subject found in political science and related fields, which details and underscores the extent to which violence (especially including, but not limited to, the murder of top governmental leaders), societal dislocation, and disruption of a nation’s economic, social, and political fabric make revolution or armed insurrection anything but a simple, reasoned, desirable, or commensurate alternative to peaceful methods of societal change.⁷² The great truism of the American political system has been its ability to effect political change through non violent, routinized, and orderly means. To question this profound precept is to strike at the very root of that which makes America virtuous.

VI. COLLATERAL CLAIMS AND THE RESEARCH RECORD

The law journal articles that advance these arguments make a series of related, supporting claims. The articles assert that: (1) little to nothing of any consequential scholarly nature has been published on the Second Amendment, especially before the 1980s;⁷³ (2) the individualist view was the prevalent view until recent critics started saying otherwise (i.e., what I have identified here as the “court” view);⁷⁴ (3) the courts have committed a kind of dereliction of duty insofar as they have been all but silent or indifferent on the matter, to the point of neglect or willful avoidance;⁷⁵ and (4) alternately, that

71. Bogus, *supra* note 42, at 386.

72. A few classics in the field include ARENDT, *supra* note 70; JOHN DUNN, *MODERN REVOLUTIONS* (1972); ERIC R. WOLF, *PEASANT WARS OF THE TWENTIETH CENTURY* (1969). One commentator who offers meaningful and valuable analysis of the military consequences of revolutions and peasant uprisings is Colonel Charles J. Dunlap, *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643 (1995).

73. See Barnett & Kates, *supra* note 31, at 1141; R.G. Cottrol & R.T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 311 (1991); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 72 (1992); Levinson, *supra* note 67, at 658; Lund, *supra* note 69, at 104; Reynolds, *supra* note 66, at 647; Shelton, *supra* note 49, at 108-10.

74. See Barnett & Kates, *supra* note 31, at 1141; Scott Bursor, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125, 1126 (1996); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992).

75. See Cottrol & Diamond, *supra* note 73, at 310; Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.

since three of the four Supreme Court rulings on the Second Amendment came in the nineteenth century, court doctrine is somehow defective, irrelevant, outdated, unclear, emaciated, or “embarrassing,” in particular because the three are pre-incorporation.⁷⁶ Each of these claims is false.⁷⁷

In order to assess these claims and to simultaneously understand the provenance of Second Amendment writings as they have unfolded in the law literature, I examined nearly 300 law journal articles dealing with gun control and the Second Amendment, published from 1912 to 1999, as cited in, and culled from, the *Index to Legal Periodicals*. I began my search of the *Index* from its beginning with the first volume, published in 1888, through the October 1999 *Index* under the subject headings “weapons” and “right to bear arms.”⁷⁸ Book reviews were omitted, as were articles that discussed, but did not take any clear position on, the meaning of the Second Amendment. Of the nearly 300 cited articles that I examined, 164 articles offered significant comment or assessment concerning interpretation of the Second Amendment. All of these articles are listed chronologically in the Appendix to this Article, and are categorized according to whether they argue for the court or individualist view.

The first article I encountered was published in 1912 in the *American Law Review*.⁷⁹ It discusses a case arising from the Supreme

L. & PUB. POL’Y 559 (1986); Levinson, *supra* note 67, at 641; Lund, *supra* note 69, at 104; Van Alstyne, *supra* note 49, at 1239-40.

76. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1264 (1992); Hardy, *supra* note 75, at 559-60; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 214, 218 (1983); Levinson, *supra* note 67, at 654; Lund, *supra* note 69, at 103; Thomas M. Moncure, *The Second Amendment Ain’t About Hunting*, 34 HOW. L.J. 589, 592 (1991); Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 498 (1995); Jay R. Wagner, *Comments, Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407, 1410 (1992).

77. See *infra* Table I.

78. I conducted my search at the Cornell University Law Library. The earliest printed edition of the *Index to Legal Periodicals* in the library was titled AN INDEX TO LEGAL PERIODICAL LITERATURE, by Leonard A. Jones (1888). It indexed articles from 158 law journals and reviews written prior to 1887. I excluded from my search books as well as articles on the Second Amendment appearing in the publications of other disciplines, such as history, since my deliberate purpose is to chronicle publications on this subject within the law journal community, where virtually all of this writing has taken place. In my search, I used the *Index* cites to identify articles that likely considered Second Amendment issues, and to weed out those that did not. Based on a list of likely candidates drawn from the *Index*, I then went to the bound volumes of law journals to personally examine each article, to see if it did in fact analyze the Second Amendment, and to then discern the article’s spin, which then constituted the bibliographic data found in this Article’s Appendix.

79. See *The Constitutional Right to Keep and Bear Arms and Statutes Against Carrying*

Court of Georgia involving a challenge to a state law that required persons wishing to carry a handgun to first obtain a license to do so from the state.⁸⁰ Challenged as a violation of the Constitution's Second Amendment and as a violation of a comparable provision in the Georgia State Constitution, the court ruled in favor of the restriction.⁸¹ Discussing the broader principle of the meaning of the Second Amendment, the article stated that

[t]he many decisions which have already been made as to statutes against carrying concealed weapons or weapons of a certain character show two general lines of reasoning; first, that such provisions should be construed in the light of the origin of the constitutional declarations and the necessity for an efficient militia or for the common defense; second, that they should be construed in connection with the general police power of the state and as subject to legislative regulation thereunder.⁸²

A second, brief article appeared in *Law Notes* in 1913, speculating on a legal challenge to a New York state gun law and citing *Presser v. Illinois*.⁸³

Two years later, the first full-blown treatment of the Second Amendment appeared in the *Harvard Law Review*.⁸⁴ Authored by noted constitutional scholar Lucilius Emery, the article discusses the British tradition behind the Second Amendment, pertinent American history, and various comparable state constitutional provisions. Emery quotes *Presser*, and concludes that “[o]nly persons of military capacity to bear arms in military organizations are within the spirit of the guaranty [i.e., the Second Amendment].”⁸⁵ Emery ends by saying that “the carrying of weapons by individuals may be regulated, restricted, and even prohibited according as conditions and circumstances may make it necessary for the protection of the people.”⁸⁶ Emery’s article was widely reprinted.⁸⁷

Weapons, 46 AM. L. REV. 777, 777-79 (1912) [hereinafter *The Constitutional Right to Keep and Bear Arms and Statutes Against Carrying Weapons*].

80. *Id.*

81. *Id.*

82. *The Constitutional Right to Keep and Bear Arms and Statutes Against Carrying Weapons*, *supra* note 79, at 778.

83. *Right to Bear Arms*, 16 LAW NOTES 207-08 (1913) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).

84. See Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 473-77 (1915).

85. *Id.* at 476.

86. *Id.* at 477.

87. These reprints were cited in the *Index of Legal Periodicals*, but are not included in the Appendix to this Article.

Including these three early articles, a total of eleven articles on the Second Amendment appeared in law journals from 1912 to 1959. All of them reflected what is here labeled the “court” view of the Second Amendment—namely, that the Second Amendment affects citizens only in connection with citizen service in a government-organized and regulated militia. Then in 1960, an article published by Stuart R. Hays⁸⁸ raised two new Second Amendment arguments that would appear often in subsequent articles. One argument asserted that the Second Amendment supported an individual or personal right to have firearms (notably for personal self-defense), separate and apart from citizen service in a government militia. The second novel argument was that the Second Amendment created a citizen “right of revolution,” one that, in Hays’s opinion, was properly exercised by the American South during the Civil War. In Hays’s words, “The Southern States . . . were engaged in a lawful revolution.”⁸⁹ Hays rested these two arguments primarily on his assertion that the English tradition defined the “right to bear arms” as incorporating both a right of revolution and a right of personal self-defense.⁹⁰

The Hays article incorporated an array of errors and omissions. First and foremost, his analysis of Second Amendment meaning failed to consider key primary evidence on the meaning of the Bill of Rights, namely the debate at the First Congress. Hays’s article based much of its analysis on a misreading of prior British history.⁹¹ It incorrectly cited *Dred Scott v. Sandford*⁹² as applicable to Second Amendment interpretation and misspelled Chief Justice Roger Taney as “Tanney”,⁹³ it incorrectly labeled the court’s opinion in *Presser v. Illinois*,⁹⁴ written by Justice Woods, as a “dissent”,⁹⁵ it miscited and misspelled the case of *United States v. Cruikshank*⁹⁶ as *Cruickshank v. United States*,⁹⁷ and it cited the wrong years for the cases of *Miller v.*

88. See Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960).

89. *Id.* at 403.

90. See Hays, *supra* note 88, at 381-82.

91. *Id.* Compare *id.*, with Bogus, *supra* note 42, at 375-85.

92. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (concerning whether a slave living in a free state was entitled to citizenship rights; decision later overturned by the passage of the Thirteenth and Fourteenth Amendments).

93. See Hays, *supra* note 88, at 397.

94. 116 U.S. 252 (1886).

95. See Hays, *supra* note 88, at 401 (there was no dissent in *Presser*).

96. 92 U.S. 542 (1876).

97. See Hays, *supra* note 88, at 399.

*Texas*⁹⁸ (1894, not 1893), *Presser* (1886, not 1885), and *Robertson v. Baldwin*⁹⁹ (1897, not 1899).¹⁰⁰ While some of these errors are minor, when added together they summarize an article whose scholarship, produced by the author while he was a student,¹⁰¹ was less than reliable. On this broken reed, subsequent individualist analysis was built.

Turning to Table I of this Article and the light it sheds on the various collateral claims arising from individualist writings pertaining to the first claim that little or nothing of a scholarly nature has been published on the meaning of the Second Amendment, thirty-nine law journal articles, all referenced in the *Index to Legal Periodicals*, were published on the Second Amendment from 1912 to 1980. Interestingly, only nine of these took the individualist position. If any criticism can be leveled at these thirty-nine articles, it is that they cover the ground too well, to the point of redundancy. This assertion of little scholarly writing also carries within it a second, implicit, assertion—that any relative handful of articles, by virtue of their small number, ipso facto cannot have adequately examined and discussed the issue in question. Obviously, this judgment is false, absent a content analysis of the articles, since a single, careful article might indeed examine with adequate depth and care any given subject. Beyond this, to say that few articles have been written on this subject is, in and of itself, false. In any case, the focus on simple numbers of articles says nothing about whether this, or any, subject has received adequate, proper, or appropriate treatment.

The second assertion, that the individualist view was the dominant one, is also contradicted by Table I of this Article and by the existence of twenty-two articles taking the court view published over the span of fifty-eight years, from 1912 to 1970, compared with just three articles taking the individualist view, with all three published in the 1960s. In fact, the Table reveals that the individualist position has proliferated only since the 1980s, with twenty-one individualist articles published from 1980 to 1989, compared to

98. 153 U.S. 535 (1894).

99. 165 U.S. 275 (1897).

100. See Hays, *supra* note 88, at 400 nn.82 & 84, 402 n.88.

101. According to the Alumni Office at the College of William and Mary School of Law, Hays received his undergraduate B.A. degree from William and Mary in 1957, and a B.C.L. degree from the law school in 1960. Hays also served as an editor of the *William and Mary Law Review*, had been a hunter and gun collector since before his law school days, and also had become a life member of the National Rifle Association before law school. Interview with Stuart R. Hays (Dec. 15 1999).

seventeen taking the court view.¹⁰² The numbers jumped again in the 1990s, with fifty-eight articles taking the individualist view, and twenty-nine taking the court view. The assertion that the individualist view has been the dominant one is also contradicted by standard reference works. For example, in his standard work on the Constitution, Jack Peltason says that the Second Amendment “was designed to prevent Congress from disarming the state militias, not to prevent it from regulating private ownership of firearms.”¹⁰³ In his classic book on the Bill of Rights, Irving Brant says that “[t]he Second Amendment, popularly misread, comes to life chiefly on the parade floats of rifle associations and in the propaganda of mail-order houses selling pistols to teenage gangsters.”¹⁰⁴ Similar, less sarcastic sentiments are found in other standard works.¹⁰⁵

The third assertion—that the courts have committed a kind of dereliction of duty with respect to the Second Amendment—is also false, given the existence of four Supreme Court cases—*United States v. Cruikshank*,¹⁰⁶ *Presser v. Illinois*,¹⁰⁷ *Miller v. Texas*,¹⁰⁸ and *United States v. Miller*,¹⁰⁹ including a brief acknowledgment of this line of cases in *Lewis v. United States*¹¹⁰—all of which explicate and support the aforementioned court interpretation that the Second Amendment

102. Don B. Kates has been quick to mischaracterize the literature, saying that before the 1980s there was “scant historical support” for the court/collective view (an assertion contradicted by the bibliographic data presented here), and as seen also in his false assertion that “thirty-six law review articles” addressed the Second Amendment from 1980 to the early 1990s, and that “only four” take the court/collectivist view. Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 359 (1994). According to Table I of this Article, thirty-eight articles dealt with the subject from 1980 to 1989, with another twenty-four published from 1990 to 1993 (the year before the publication of Kates’s article); totaling sixty-two articles. Of the sixty-two, twenty-six take the court/collectivist view, not four.

103. JACK PELTASON, CORWIN AND PELTASON’S UNDERSTANDING THE CONSTITUTION 168 (1988).

104. IRVING BRANT, THE BILL OF RIGHTS 486 (1965).

105. Edward Dumbauld says that “[t]he Second and Third Amendments stand simply as the empty symbol of what remains a living American ideal: the supremacy of the civil power over the military.” He also notes that “these amendments are defunct in practice.” THE BILL OF RIGHTS 62-3 (1957); see also JOHN SEXTON & NAT BRANDT, HOW FREE ARE WE? 209-10 (1986). In the words of Robert A. Rutland, the Second Amendment (along with the Third, having to do with the quartering of troops in peoples’ homes) has become “obsolete.” THE BIRTH OF THE BILL OF RIGHTS 229 (1955). Standard legal reference works used by lawyers and judges parallel this perspective. See AMERICAN LAW REPORTS 700-29 (1983). In 1975, the American Bar Association endorsed the understanding that the Second Amendment is connected with militia service, as has the ACLU. See Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 65 n.29 (1995).

106. 92 U.S. 542 (1876).

107. 116 U.S. 252 (1886).

108. 153 U.S. 535 (1894).

109. 307 U.S. 174 (1939).

110. 445 U.S. 90 (1980).

comes into play only in connection with citizen service in a government-organized and regulated militia and that this Amendment has not been incorporated under the Fourteenth Amendment, despite the opportunity to do so afforded by numerous lower-court appeals spanning the last fifty years. Further, these recent lower federal court opinions have been even more emphatic and detailed in asserting that, as the Ninth Circuit noted in 1996, "We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen."¹¹¹ The inescapable conclusion is that the Supreme Court, especially as amplified by lower federal courts, has settled this matter and has no interest in crowding its docket with cases that merely repeat what has already been decided. The high court may, of course, change its mind on the matter, and there is reason to believe that two justices are interested in revisiting the subject. Justice Clarence Thomas noted in his concurring opinion in *Printz v. United States* that:

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 exists that the Federal Government's regulatory scheme . . . runs afoul of that Amendment's protection. As the parties did not raise this argument, however, we need not consider it here.¹¹²

Justice Antonin Scalia raised similar suggestions.¹¹³ Be that as it may, federal court rulings up until the present are uniform in their

111. *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996); *see also* *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988). Other federal court rulings making the same point include: *Cases v. United States*, 131 F.2d 916, 922-23 (1st Cir. 1942), *cert. denied sub nom. Velazquez v. United States*, 319 U.S. 770 (1943); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971); *United States v. McCutcheon*, 446 F.2d 133, 135-36 (7th Cir. 1971); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *Cody v. United States*, 460 F.2d 34, 36-37 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1972); *Eckert v. Philadelphia*, 477 F.2d 610 (3d Cir. 1973); *United States v. Day*, 476 F.2d 562, 568 (6th Cir. 1973); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); *United States v. Graves*, 554 F.2d 65, 66-67 (3d Cir. 1977); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984); *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 753 (1991); *Fresno Rifle & Pistol Club, Inc. v. Van de Camp*, 965 F.2d 723 (9th Cir. 1992); *Hickman v. Block*, 81 F.3d 168 (9th Cir. 1996); *see also* *Burton v. Sills*, 394 U.S. 812, 812 (1969), where a Second Amendment appeal was "dismissed for want of a substantial federal question."

112. 521 U.S. 898, 938-39 (1997).

113. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 43 (1997).

interpretation. The one exception to this is the recent case of *United States v. Emerson*¹¹⁴ in which a federal district court judge ruled that a man who was charged with violating a restraining order that included a gun ownership restriction (after the man brandished a handgun in the presence of his estranged wife and child) did, in fact, have a Second Amendment right to own the gun. As of this writing, the case is on appeal.¹¹⁵

The fourth assertion—that three of the four key Supreme Court cases on the Second Amendment came in the nineteenth century and are therefore somehow irrelevant or deficient—is transparently false, since no legal doctrine imposes a statute of limitations or expiration date on binding court precedent unless the precedent is ignored or overturned, neither of which has occurred for Second Amendment law.¹¹⁶ While it is true that the three earlier cases were decided before the Supreme Court began the piecemeal incorporation of the Bill of Rights in 1897, the process has never been extended by the Court to the entire Bill of Rights.¹¹⁷ The last incorporation case came in 1969, and the process is generally considered to be at an end, with the possible exception of the Excessive Fines and Bails Clause of the Eighth Amendment.¹¹⁸ Since then, the Third Amendment, the Grand Jury Clause of the Fifth Amendment, the Seventh Amendment, the Fines and Bails Clause, as well as the Ninth and Tenth Amendments,

114. 46 F. Supp. 2d 598 (N.D. Tex. 1999).

115. The case raises a host of questions, not the least of which that it relies almost exclusively on the individualist law journal literature, and ignores the three nineteenth-century Supreme Court cases on the Second Amendment, saying simply that they are not “modern.” *Emerson*, 46 F. Supp. 2d at 608. Since this case is on appeal as of this writing, it is not analyzed here.

116. Thomas M. Moncure says that the three nineteenth-century cases “are as unillustrative as they are unpleasant.” Moncure, *supra* note 76, at 592. Whether true or not, I know of no legal doctrine that invalidates cases because of these traits.

117. The late Supreme Court Justices John Marshall Harlan, William O. Douglas, and Hugo Black argued for total incorporation of the Bill of Rights, but no one else on the court has since embraced such an argument. The first incorporation case applied the Fifth Amendment protection to the states pertaining to just compensation in cases of eminent domain in *Chicago, Burlington, and Quincy Railroad v. Chicago*, 166 U.S. 226 (1897). Other significant incorporation cases included First Amendment free speech in *Gitlow v. New York*, 268 U.S. 652 (1925); First Amendment press freedom in *Near v. Minnesota*, 283 U.S. 697 (1931); First Amendment religious freedom in *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934); First Amendment freedom of assembly and petitioning the government for redress of grievances in *De Jonge v. Oregon*, 299 U.S. 353 (1937); Fourth Amendment search and seizure in *Mapp v. Ohio*, 367 U.S. 643 (1961); Sixth Amendment right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963); and Fifth Amendment protection against double jeopardy in *Benton v. Maryland*, 395 U.S. 784 (1969). For an excellent summary of incorporation, see HENRY J. ABRAHAM, FREEDOM AND THE COURT 28-91 (1972).

118. See RICHARD C. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS 279 (1981).

have not been incorporated. The pre-incorporation Second Amendment cases thus continue to stand as good law.¹¹⁹

VII. SEEKING SHELTER UNDER THE FOURTEENTH AMENDMENT

This discussion of incorporation raises an additional, related argument offered by a few—namely, that the Fourteenth Amendment somehow created, enhanced, or validated a constitutionally-based individual right to bear arms aside or apart from citizen militia service. To support this claim, advocates generally cite post-Civil War debate in Congress that referenced the Second Amendment or the bearing of arms. Typical of these claims is that of Stephen Halbrook, who quotes Senator Jacob M. Howard’s (R-MI) comments during debate over the Fourteenth Amendment in 1866, “When he introduced the Fourteenth Amendment in Congress, Senator Jacob M. Howard . . . referred to ‘the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . *the right to keep and bear arms.*’”¹²⁰ Halbrook makes two claims from this and related quotes. One is that the reference to “personal rights,” apparently offered in the same context as mention of the right to bear arms, means that this “personal right” is an “individual right.”¹²¹ The second claim is to argue for total incorporation—i.e., application of all of the Bill of Rights to the states.¹²² While even this abbreviated quote suggests that Senator Howard was merely listing the parts of the Bill of Rights, the full quote from Senate debate clarifies the point further:

To these privileges and immunities [spoken of in Article IV of the Constitution], whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press [First Amendment]; the right of the people peaceably to assemble and petition the Government for redress of grievances, a right appertaining to each and all the people [First

119. The Courts of Appeal have repeatedly recognized the validity of the earlier Supreme Court cases dealing with the Second Amendment. Some individualist writers misconstrue incorporation entirely. Halbrook, for example, claims that the *Presser* case “plainly suggests that the Second Amendment applies to the States through the fourteenth amendment” when in fact the court said precisely the opposite. Halbrook, *supra* note 36, at 85.

120. STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED* 112 (1984).

121. *Id.*

122. *Id.*

Amendment]; the right to keep and bear arms [Second Amendment]; the right to be exempted from the quartering of soldiers in a house without the consent of the owner [Third Amendment]; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon formal oath or affidavit [Fourth Amendment]; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage [Sixth Amendment]; and also the right to be secure against excessive bail and against cruel and unusual punishments [Eighth Amendment].¹²³

It is clear from the full quote that the Senator's reference to "personal rights" was simply a synonym for all of the rights of the Bill of Rights. There is no reason to believe that this reference articulates, or implies, an individual right to bear arms aside or apart from the conventional understanding of citizen participation in a government-organized and regulated militia. As for the question of full incorporation of the Bill of Rights under the Fourteenth Amendment, one may argue that this quote supports the contention. While the argument that the Fourteenth Amendment was designed to provide for total incorporation is a minority viewpoint among constitutional scholars (and it has been rejected by the courts), it is at least a bona fide argument. The claim that the Fourteenth Amendment somehow created, elevated, or ratified an individual right to bear arms, either as part of the Second or Fourteenth Amendments, is not.¹²⁴ In any case, to make such an argument about the Fourteenth Amendment is also to argue implicitly that the Second Amendment, as originally drafted, did not create such an individual right in the first place. Otherwise, there would be no reason to resort to the Fourteenth to support such a line of reasoning. Amar, in fact, makes this argument explicitly when he says that "[c]reation-era arms bearing was collective . . . Reconstruction gun-toting was individualistic . . ." ¹²⁵

Quinlan offers the same kind of analysis when, for example, he

123. ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS' DEBATES* 219 (1967).

124. Michael J. Quinlan makes the same error in *Is There a Neutral Justification for Refusing to Implement the Second Amendment or Is the Supreme Court Just "Gun Shy"?*, 22 *CAP. U. L. REV.* 661 (1993).

125. AKHIL REED AMAR, *THE BILL OF RIGHTS* 259 (1998). Amar concludes that the Second Amendment "was reglossed by a later constitutional text [i.e., the Fourteenth Amendment]." *Id.* at 297. Amar cites the same kind of sources as Halbrook to support his "floor wax" theory of this supposed relationship between the two amendments. In his analysis, Amar confuses politics and law, citing congressional debate over southern turmoil to support his argument, yet he never cites, or even mentions, the *Cruikshank* or *Presser* cases (or for that matter *Miller v. United States*), which falsify his argument.

quotes Representative Roswell Hart (R-NY) during a House debate in 1866, who said citizens:

[S]hall be entitled to all privileges and immunities of other citizens; [where] no law shall be made prohibiting the free exercise of religion; [where] the right of the people to keep and bear arms shall not be infringed; [where] the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.¹²⁶

From this quote, Quinlan concludes that “[a]pparently, several commentators in the Reconstruction Congress considered the Second Amendment’s right to keep and bear arms an individual right.”¹²⁷ Once again, the speaker is simply reciting Bill of Rights protections, as demarcated by the use of quotation marks. The quote does nothing to support the individualist view, as even Quinlan’s use of the modifier “apparently” suggests.

Halbrook expands this Fourteenth Amendment analysis when he attempts to link together the Fourteenth Amendment with the Freedman’s Bureau Act of 1866 and the Civil Rights Act of 1866, so he can draw on the debate and text of these bills to argue that, when taken together, they provide “the rights to personal security and personal liberty [and] include the ‘constitutional right to bear arms.’”¹²⁸ Again, Halbrook culls congressional and state debate for any and all references to firearms, the bearing of arms, and the like. Not only is Halbrook seeking to argue that “the Fourteenth Amendment was intended to incorporate the Second Amendment,” but further to argue that the

Fourteenth Amendment protects the rights to personal security and personal liberty, which its authors declared in the Freedmen’s Bureau Act to include “the constitutional right to bear arms.” To the members of the Thirty-Ninth Congress, possession of arms was a fundamental, individual right worthy of protection from both federal and state violation.¹²⁹

In other words, beyond arguing for total incorporation, Halbrook argues that the Fourteenth Amendment itself protects the bearing of arms.

This line of reasoning has several obvious problems. First and foremost, while it is true that the same Congress sought to extend

126. Quinlan, *supra* note 124, at 662.

127. *Id.*

128. STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at viii (1998).

129. *Id.* at 43.

similar, basic rights through the trio of enactments, including the Fourteenth Amendment, the Fourteenth Amendment simply does not stipulate anything like a right to bear arms. No court has ever found, or suggested, that the Second Amendment was somehow repeated, amplified, or elevated by the Fourteenth. And while similar, each of these three enactments is, as a matter of law, different, and to attempt to draw out legislative intent behind one enactment (the Fourteenth Amendment) by bringing in others (the Civil Rights Act and the Freedmen's Bureau Act) is both desperate and erroneous.¹³⁰

Second, the discussion of arms, personal security, and militias in Congress during this time is by no means a discussion that revolves solely around the Second Amendment. Remember that the American South was in a state of near-total destruction and utter chaos, a fact heightened by the race hatred found in the region in the aftermath of the freeing of millions of former slaves and by the presence of thousands of former Confederate soldiers who were allowed to keep their arms. Little wonder that there was so much discussion in Congress of security and safety issues.

Third, as an interpretation of the Second Amendment, the congressional debates of the 1860s deserve no special, if any, consideration. These debates were not debates over the meaning of that Amendment per se, occurring as they did over seventy years after adoption of the Bill of Rights. They were political debates over how best to extend hard-won rights, restore order, and reconfigure governance in the American South.

Fourth, the yearning for total incorporation, or any kind of elevation of the Second Amendment, was rejected by political contemporaries. Eight years after adoption of the Fourteenth Amendment, the Supreme Court explicitly rejected the idea in *United States v. Cruikshank*.¹³¹ Speaking for the court, Chief Justice Waite wrote:

130. Akhil Reed Amar also wants to argue for a kind of total incorporation by saying that the Second Amendment right to bear arms—and presumably all other rights and freedoms in the Bill of Rights—were encompassed by both the Freedman's Bureau Act and its companion Civil Rights Act. (Of course, adoption of both Acts presupposed congressional power to impose the general requirements of the Bill of Rights on states. [Rep.] Bingham . . . denied that Congress had such power, and therefore argued that a constitutional amendment was required to validate the Civil Rights Act.)

Amar, *supra* note 76, at 1245 n.228. Amar does note the key difference between the two bills and the Fourteenth Amendment. *Id.*

131. 92 U.S. 542, 553 (1876).

The second and tenth counts are equally defective. The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the Amendments that has no other effect than to restrict the powers of the national government.¹³²

In 1873, the Supreme Court dealt total incorporation what constitutional scholar Henry J. Abraham has called "a crushing defeat" in *The Slaughterhouse Cases*.¹³³ The thinking of most constitutional scholars on this subject is summarized by Andrea L. Bonnicksen this way: "A look at the debates surrounding the framing of the Fourteenth Amendment reveals some evidence that the members of Congress did intend the Amendment's due process clause to incorporate the Bill of Rights, but the more compelling evidence shows otherwise."¹³⁴ As discussed earlier, the Court did not incorporate any part of the Bill of Rights until 1897. This fact alone puts to rest Halbrook's assertions.

The research tactic applied to attempting to find a connection between the Fourteenth and Second Amendments follows that described by Garry Wills in characterizing individualist research on the Second Amendment: "The tactic . . . is to ransack any document, no matter how distant from the . . . debates, in the hope that someone, somewhere, ever used 'bear arms' in a non-military way . . ."¹³⁵ In the case of incorporation, this search extends, fruitlessly, to eight decades after the writing of the Second Amendment.

Despite this array of chimerical claims, the law journal article count in Table I shows an explosion of individualist articles, such that a recent article has dubbed its individualist view as "The New Consensus on the Second Amendment."¹³⁶ The key prop of the claim is the sheer number of such articles, as though the weight of numbers creates a kind of intellectual precedent. Yet given the parade of bad

132. *Id.* Halbrook erroneously asserts that, in the *Cruikshank* case, "the Supreme Court did not consider whether the Fourteenth Amendment incorporated the rights to assemble and keep and bear arms against the states." HALBROOK, *supra* note 128, at 172.

133. ABRAHAM, *supra* note 117, at 43; *see also* *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 62 (1872).

134. ANDREA L. BONNICKSEN, *CIVIL RIGHTS AND LIBERTIES* 2 (1982).

135. Wills, *supra* note 36, at 257-58.

136. *See generally* BARNETT & KATES, *supra* note 31, at 1139-1260; *see also* Bursor, *supra* note 74, at 1125-51.

analysis these articles represent, how can this phenomenon be explained? Three considerations help explain the presence of this body of analysis: the law journal breeding ground, the presence of the state in law, and partisan support.

VIII. THE LAW JOURNAL BREEDING GROUND

The discipline of law is unique among academic disciplines in that its professional journals are governed mostly by student-run law review boards, and with a few exceptions, submissions are not subject to the process of peer review, or even faculty oversight.¹³⁷ The consequences of these facts for law review content have been extensively discussed and debated within the law school community, and have at least two particular effects pertinent to this analysis. First, while the peer review process found in every other discipline is subject to legitimate criticisms, including cronyism and institutional conservatism, law review student editors simply do not possess, and cannot be expected to possess, the knowledge and expertise of those who have researched and published in a field. Second, law reviews seek and reward, through publication of articles that are, by the field's own admission, highly duplicative and unnecessarily packed with footnotes, phenomena that are readily apparent when reading these articles. This occurs in a contemporary atmosphere where there is a proliferation, even glut of law reviews—more than 800 by one count.¹³⁸ Given such a huge publishing hole, these characteristics have increasingly produced a contrary editorial drive to publish articles for their distinctiveness rather than their scholarly soundness. These and other criticisms emerge from the legal profession itself.¹³⁹

137. See Rosa Ehrenreich, *Look Who's Editing*, LINGUA FRANCA, Jan./Feb. 1996, at 58-63; Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615-88 (1996); Christopher Shea, *Students v. Professors*, 2 CHRON. HIGHER EDUC. A33-34 (1995). Faculty oversight has actually declined since 1970, although there has been a recent revival of the call for greater faculty control. See Roger C. Cramton, "The Most Remarkable Institution": *The American Law Review*, 35 J.L. EDUC. 6 (1986).

138. See Ehrenreich, *supra* note 137, at 60.

Having taught students, and graded student papers, for over 20 years, I am struck by the fact that students would typically identify two traits of writing, commonly found in law journals, as signs of excellence: length (the longer a work is, the better it must be) and the number of footnotes (more equalling better).

Id.

139. The law school community has engaged in much soul-searching and self-criticism on this matter, going back many decades. See *Special Issue*, 30 AKRON L. REV. (1996); *Special Issue*, 47 STAN. L. REV. (1995); *Symposium on Law Review Editing: The Struggle Between Author and Editor over Control of the Text*, 70 CHI.-KENT L. REV. 71 (1994). Oliver Wendell

In the words of one member of the legal community, law reviews are “dominated by rather exotic offerings.”¹⁴⁰ Another critic notes the simultaneous drives that produce both duplication and distinctiveness: “Student editors prefer pieces that recite prior developments at great length, contain voluminous and largely meaningless citations for every proposition, and deal with topics that are either safe and standard on the one hand, or currently faddish on the other.”¹⁴¹ The matter of redundancy also sets legal publications apart from the scholarly literature of virtually every other discipline. It is almost unimaginable that so many repetitive publications would find their way into print in political science or other disciplines, because redundancy is an obvious and typical ground for rejection. These unique publishing conditions help explain the trends described in this Article.¹⁴² In addition, the sheer volume of publishing possibilities provides a uniquely wide opportunity for the cultivation and propagation of particular legal theories, since even a tiny percentage of law review articles devoted to a particular argument could easily amount to dozens of published articles.

Much modern constitutional and legal analysis has fallen primarily, if not entirely, to the legal community and its scholarly mouthpiece, law reviews. This fact is not offered as a criticism of the legal community, which indisputably produces a great deal of fine scholarship, including in the realm of the Second Amendment. Yet, while law reviews produce important and valuable scholarship, the unique review and publishing characteristics of these journals, as they reflect their discipline, have opened the door to highly suspect bodies of analysis. As Garry Wills noted in his analysis of the individualist school of Second Amendment writing, “It seems as if our law journals were being composed by Lewis Carroll using various other pseudonyms.”¹⁴³ The case of the new interpretations of the Second Amendment discussed here support the proposition that law reviews

Holmes, Jr., brushed law reviews aside as the “work of boys.” Hibbitts, *supra* note 137, at 631.

140. See Hibbitts, *supra* note 137, at 647-48. Despite continued, even growing criticism of student control of law reviews, students continue to control an ever-growing number of such publications.

141. Cramton, *supra* note 137, at 8.

142. It may also be that intellectual traits stemming from legal training contribute to the trends described here, such as the adversarial principle, and the reasonable doubt standard, but these questions are beyond the scope of this Article.

143. Wills, *supra* note 36, at 71.

can be a breeding ground for defective analysis and wayward public policy.¹⁴⁴

IX. THE STATE IN LAW

A second explanation for the proliferation of Second Amendment articles is predicted by political scientist Theodore J. Lowi, who notes of his discipline that "U.S. political science is itself a political phenomenon and, as such, is a product of the state."¹⁴⁵ It should come as little surprise that the same concept applies to law. Almost without exception, the very earliest articles on the Second Amendment paralleled and discussed changes in state public policy concerning gun laws. These articles begin with the enactment of New York's strict gun law, the so-called Sullivan law, in 1911, to the Supreme Court's 1939 ruling in *United States v. Miller*.¹⁴⁶ Second Amendment publications lapsed, along with federal regulatory efforts, until the mid-1960s when renewed focus on gun issues culminated in the passage of the Gun Control Act of 1968.¹⁴⁷ The next important wave of gun legislation emerged during the Reagan administration, culminating with the enactment of the Firearm Owners Protection Act of 1986.¹⁴⁸ Coinciding with these legislative changes was the country's turn to the right, and the National Rifle Association's hard right and more politicized turn of the late 1970s and 1980s. In the wake of this anti-gun control tide, it is logical that supporting writings appeared in law journals and other publications. In the last decade, unprecedented focus on the 1993 Brady Law and the 1994 assault weapons ban and other gun policy controversies further fanned law review writing.¹⁴⁹ That these political phenomena helped drive gun scholarship is clearly seen in the text of these writings, a phenomenon of particular predictive significance in the legal community, where law journal writings are extremely sensitive to breaking legislative and judicial decisions.

144. For more on the argument that the legal profession's norms encourage modes of thought that are uniquely different from other professions, and that encourage some of the problems described here, see generally MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS* (1995).

145. Theodore J. Lowi, *The State in Political Science: How We Become What We Study*, 86 AM. POL. SCI. REV. 1, 1 (1992).

146. 307 U.S. 174 (1939).

147. See SPITZER, *supra* note 1, at 105-26.

148. See *id.*

149. *Id.*

X. PARTISAN SUPPORT

A third explanation for the expanding body of individualist scholarship pertaining to the Second Amendment is more predictably and strictly political, in that gun advocacy groups have a vested interest in promoting academic writing to buttress and legitimize their political agendas. A group formed in 1992 by individuals seeking to promote other interpretations of the Second Amendment, called Academics for the Second Amendment (“ASA”), asserted in an open letter that “[t]he Second Amendment does not guarantee merely a ‘right of the states,’ but rather a ‘right of the people,’ a term which . . . is widely understood to encompass a personal right of citizens.”¹⁵⁰ The organization further stated that “[o]ur primary goal is to give the ‘right to bear arms’ enshrined in the Bill of Rights its proper, prominent place in Constitutional discourse and analysis.”¹⁵¹ This group received \$6,000 from the NRA, out of a total of \$90,000 raised by the group.¹⁵² The ASA’s president, Joseph Olson, has served on the NRA’s governing board. In 1992, the NRA’s Firearms Civil Rights Legal Defense Fund contributed \$5,000 to cover the expenses for academics that attended the ASA conference that year.¹⁵³ In 1993, the NRA’s Legal Defense Fund contributed \$99,000 “for undisclosed ‘right to bear arms research and education.’”¹⁵⁴ Further, the NRA offered a first prize of \$25,000 (a considerable amount of money in academic circles for academic work) for its 1994–1995 essay contest titled “Stand Up for the Second Amendment.” The annual contest “seeks publication-quality law review pieces on gun-rights issues.”¹⁵⁵ Another group, formed in 1994, the Lawyer’s Second Amendment Society, similarly seeks to advance the individualist view through its activities and publications.¹⁵⁶ Further, a number of individualist writers have ties to gun groups.¹⁵⁷

150. *See id.* at 166 n.70.

151. *Id.*

152. Scott Heller, *The Right to Bear Arms*, CHRON. HIGHER EDUC., July 21, 1995, at A8, 12.

153. *Id.*

154. *Id.*

155. A.D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 138 n.358 (1995).

156. Lawyers for the Second Amendment publishes “The Liberty Pole” six times a year, a newsletter that advances its constitutional arguments.

157. In particular, individualist authors including Caplan, Dowlut, Gardiner, Halbrook, Kates, Moncure, and Tahmassebi are employed by, or have worked for, the NRA or other gun groups. These seven individuals alone account for twenty-seven of the articles listed in this Article’s Appendix (this count does not include other articles pertaining to gun control authored or co-authored by these individuals that do not appear on this list by virtue of the fact

According to one critic, these activities have a very specific public policy purpose—namely, they are

part of a concerted campaign to persuade the courts to reconsider the Second Amendment, to reject what has long been a judicial consensus, and to adopt a different interpretation—one that would give the Amendment judicial as well as political vitality and would erect constitutional barriers to gun control legislation.¹⁵⁸

Aside from the now-large number of individualist articles, there is reason to believe that these efforts have borne other fruit, given the 1999 Texas case of *United States v. Emerson*¹⁵⁹ mentioned earlier, and given the fact that Justice Thomas raised the individualist perspective (as dicta) in his concurring opinion in *Printz v. United States*.¹⁶⁰ Although the constitutional challenge to the background check requirement of the Brady Law¹⁶¹ in *Printz* was based on the Tenth Amendment, not the Second Amendment, in a footnote Thomas cited individualist law review articles by Halbrook, Van Alstyne, Amar, Cottrol and Diamond, Levinson, and Kates.¹⁶²

This is certainly not the first time that interest groups have sought to push particular arguments in law journals as a preparatory move to advance litigation. In 1959, political scientist Clement E.

that they do not dwell on the Second Amendment). Caplan has served on the governing board of the NRA and as counsel to two New York State gun groups. See *Constitutional Rights in Jeopardy: The Push for Gun Control* (NRA), 1998. Dowlut, Gardiner, Moncure, and Tahmassebi have all worked for the Office of the General Counsel of the NRA. See Senate Subcommittee on the Constitution, Judiciary Committee, *The Right to Keep and Bear Arms*, 97th Cong., 2d sess. iii; T.M. Moncure, *Who Is the Militia*, 19 LINCOLN L. REV. 1 (1990); S.B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67 (1990). Halbrook is a leading lawyer for the NRA cause, having argued such cases as *Printz v. United States*. For example, during hearings held before the Subcommittee on the Constitution, Judiciary Committee, U.S. Senate, held in Washington, D.C. on September 23, 1998, Halbrook advised NRA President Charlton Heston during Heston's testimony before the committee. Oddly, Halbrook does not mention his long association with the NRA when identifying himself. In his book, *FREEDMEN*, *supra* note 128, he identifies himself as having argued *Printz* before the Supreme Court, but beyond that says only that he "practices law in Fairfax, Virginia." Fairfax is the home of the NRA. Kates is a long-time gun activist who is a regular contributor to anti-gun control publications and advisor to anti-control activists. See, e.g., *Readers Write*, AM. RIFLEMAN, Feb. 1994, at 10. He authors a regular column called "Gun Rights" that appears in the magazine *HANDGUNS*. Dennis A. Henigan is chief counsel for Handgun Control, Inc., and is the author of two collectivist articles listed in the Appendix. No other court/collectivist author listed has authored more than two articles. I do not attach particular significance to these interest group associations, however, because the key issue is the willingness of law journals to accept and print these articles, rather than the occupational backgrounds or ideological predilections of the authors.

158. Bogus, *supra* note 42, at 316.

159. 46 F. Supp. 2d 598 (N.D. Tex. 1999).

160. 521 U.S. 898 (1997).

161. A law passed by Congress in 1993 that imposed a five business day waiting period on the purchase of a handgun.

162. *Printz*, 521 U.S. at 946-47.

Vose chronicled the efforts of the NAACP and sympathetic legal scholars to “blast the constitutional log jam” that thwarted efforts to end racial segregation (in particular, the restrictive covenant cases) by generating sympathetic and supportive law journal articles.¹⁶³ Efforts to dovetail academic writing with public policy advocacy are certainly legitimate. They lose their legitimacy, however, when they sacrifice academic standards of sound research in the process.

CONCLUSION

In the mad scramble to win legitimacy for their arguments, individualist authors have produced an ever-growing stack of articles sculpted to buttress their position. This near-obsessive focus on numbers of publications has allowed them to turn the focus of the debate away from the merits of the arguments themselves, and toward the number of articles, and the pedigrees of the articles’ authors. In this Article, I, too, have played the numbers game—but not to declare any winner by virtue of who publishes more. Rather, it is to point out that many of the basic claims made about the Second Amendment literature by individualist writers are simply and demonstrably wrong. Contrary to individualist claims, an extensive body of writing on the Second Amendment has been published well before 1980, extending back more than seven decades; the individualist view of the Second Amendment was never the dominant view, unless one uses the arithmetic-based standard of whoever publishes more is, ipso facto, dominant, in which case that “dominance” only asserted itself in the 1990s; the Supreme Court has committed no dereliction of duty for not accepting recent appeals based on the Second Amendment, although the Court may well do so at some point in the future and Supreme Court rulings do not somehow expire or lapse into non-existence simply because they predate the twentieth century.

As a visitor from another discipline, I have been most forcefully struck by three interrelated observations arising from my research. One is the ease with which some individualist writers have misrepresented or ignored a considerable portion of the body of writing on the Second Amendment within their own profession. The proper and accurate summarization and assimilation of past literature is such a bedrock of scholarly writing in this or any discipline that the

163. CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 68 (1959); *see also id.* at 69-71, 161, 175-76.

failure of these writers to do so is little less than shocking. Second, and related to the first observation, is the hugeness and vastness of the law journal publishing realm. Surely no other academic discipline cranks out such a prodigious volume of writing. This alone makes it more likely that (even in a subfield as small as that of the Second Amendment, relative to the total publication hole of law journals) an ever-smaller percentage of its publications is actually read. The third observation is the nearly unbelievable degree of repetition to be found in that writing. As mentioned earlier, repetition of material is a typical basis for manuscript rejection in most disciplines, on the grounds that knowledge is not being advanced when it is merely being repeated. Yes, some degree of repetition is necessary to recap and synthesize arguments and facts previously published. For myself, I simply found the degree of repetition, including numerous whole articles that did nothing more than repeat the claims of others, to be little less than mind-numbing, and little more than unnecessary. Ultimately, the sheer mass of this writing is more likely to obfuscate than clarify.

I offer these observations in conjunction with one other. Like those trained in the legal profession, as a political scientist I share an abiding love and respect for the law, and especially for constitutional law, a connection underscored by the long and intimate relationship between the fields of law and political science. It is no coincidence that the foremost constitutional scholar of the first half of the twentieth century, Edward S. Corwin, was in fact a political scientist.¹⁶⁴ Moreover, Corwin's intellectual stride spanned both legal and academic worlds. As Supreme Court Justice Benjamin Cardozo wrote to Corwin, "I find I have frequent occasion to draw upon your learning."¹⁶⁵ The combination of the two is, or should be, a high calling. In political science, one finds an increasing disdain for research and writing that is designed, at least in part, to either reach a wide public audience or seek to influence public policy. To its credit, the legal community does not seem to labor under the same kind of academic snobbery. On the other hand, the problems with the body

164. Corwin actually received his doctoral degree in history from the University of Pennsylvania in 1905, but this came at a time when political science was not yet a fully formed discipline. As a faculty member at Princeton, Corwin was a founding member of the Politics Department, of which he was the first chair, and where he was later named the McCormick Professor of Jurisprudence. Political science can thus rightly claim Corwin for itself. See AMERICAN POLITICAL SCIENTISTS: A DICTIONARY 51-52 (Glenn H. Utter & Charles Lockhart, eds., 1993).

165. E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION at ix (1976).

of writing examined in this Article surely suggest that defective analysis, and wayward public policy, may too easily arise from the pages of law journals.

TABLE I

LAW JOURNAL ARTICLES TAKING "COURT" OR "INDIVIDUALIST"
VIEWS OF THE SECOND AMENDMENT*

	<u>Court</u>	<u>Individualist</u>
1912-1959	11	0
1960-1969	11	3
1970-1979	8	6
1980-1989	17	21
1990-1999	<u>29</u>	<u>58</u>
Total	76	88

* Data compiled from volumes 1 through 93 of the *Index of Legal Periodicals* (1887-1999).

APPENDIX

CHRONOLOGICAL CODING OF “COURT” (C) AND “INDIVIDUALIST”
(I) LAW JOURNAL ARTICLES1912

- C *The Constitutional Right to Keep and Bear Arms and Statutes Against Carrying Weapons*, 46 AM. L. REV. 777 (1912).

1913

- C *Right to Bear Arms*, 16 LAW NOTES 207 (1913).

1915

- C Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915).

1928

- C Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138 (1928).

1934

- C John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400 (1934).

1939

- C Willimina Montague, *Second Amendment, National Firearms Act*, 13 S. CAL. L. REV. 129 (1939).

- C A.S.V., *Second Amendment*, 14 ST. JOHN'S L. REV. 167 (1939).

1940

- C V. Breen et al., *Federal Revenue As Limitation on State Police Power and the Right to Bear Arms—Purpose of Legislation As Affecting Its Validity*, 9 J. B. ASS'N KAN. 178 (1940).

- C Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

1941

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

1950

- C F.J.K., *Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation*, 98 U. PA. L. REV. 905 (1950).

1960

- I Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960).

1965

- C John G. Fletcher, *The Corresponding Duty to the Right of Bearing Arms*, 39 FLA. B. REV. 167 (1965).
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1966

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