

Stephen P. Halbrook, “The Second Amendment in the Supreme Court: Where It’s Been and Where It’s Going,” 29 *Hamline Law Review*, No. 3, 449-59 (Summer 2006).

## THE SECOND AMENDMENT IN THE SUPREME COURT: WHERE IT’S BEEN AND WHERE IT’S GOING

Stephen P. Halbrook<sup>1</sup>

1939 Mar. 28. Clerk Supreme Court of the United States –  
*US v. Miller et al Number 696 – Suggest case be submitted on Appellants  
Brief. Unable to obtain any money from clients to be present & argue case. – Paul  
Gutensohn.*<sup>2</sup>

The above telegram from unpaid criminal defense counsel suggested that the Supreme Court decide his case on the basis of the government’s brief. The Court had no choice but to hear only one side in deciding its most detailed – albeit still skimpy – decision on the Second Amendment.<sup>3</sup> It is a tribute to the Court that it decided this and other cases before it touching on the Amendment reasonably well given the abysmal presentations (or lack thereof) by sundry litigants.

The Court has not developed a rich jurisprudence of the Second Amendment as it has done with the First Amendment and other Bill of Rights guarantees. The Court has, nonetheless, made clear that the Second Amendment recognizes a fundamental, individual right on which the Federal government may not infringe. The Court has not decided whether the Fourteenth Amendment incorporates the right to keep and bear arms so as to bar State action violative of the right.

The Court has never asserted that the Second Amendment does not protect any individual right, and instead guarantees an illusive “collective right” of states to maintain militias, or a “right” of a person to bear arms in a militia. This Article addresses the major cases in which the Court has discussed the Amendment and how the Amendment was presented to the Court by the parties.

*Scott v. Sanford* (1857) held that recognition of African Americans as citizens would exempt them from “the special laws and from the police regulations” – the slave codes which were imposed

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<sup>2</sup>Telegram, *United States v. Miller*, Case No. 696, Oct. Term 1938, in Civil Reference Branch, U.S. National Archives. Courtesy of Eric Archer, Esq.

<sup>3</sup>*United States v. Miller*, 307 U.S. 174 (1939). “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const., Amend. II.

by the States – and would give them “the full liberty of speech . . . ; and to keep and carry arms wherever they went.”<sup>4</sup> While the meaning of specific guarantees was not an issue, the Court recognized the individual character of First and Second Amendment rights, and implied that they applied to the States.

The Fourteenth Amendment was intended to protect Bill of Rights guarantees from State abridgment, and the right to keep and bear arms figured prominently in Reconstruction debates and enactments.<sup>5</sup> Not only were the Southern Black Codes, which deprived freedmen of arms possession and other rights, invalidated, but also United States Attorneys brought criminal indictments against private individuals under the federal Enforcement Act for violation of the First, Second, and Fourteenth Amendment rights of blacks.<sup>6</sup>

A tragic racial conflict in Louisiana, the “Grant Parish Massacre,” led to the decision in *United States v. Cruikshank* (1876).<sup>7</sup> The indictment alleged that a body of whites broke up the assembly of, disarmed, and murdered a number of blacks, and the theory of the case was that such violation of constitutional rights could be prosecuted under the Enforcement Act. In the jury charge, Judge (later Justice) William Woods instructed concerning the First and Second Amendment counts:

The right of peaceable assembly is one of the rights secured by the constitution and laws of the United States. . . . The fact that they assemble with arms, provided these arms are to be used not for aggression, but for their protection, does not make the assemblage any the less a peaceable one. . . .

The right to bear arms is also a right secured by the constitution and laws of the United States. Every citizen of the United States has the right to bear arms, provided it is done for a lawful purpose and in a lawful manner.<sup>8</sup>

The resulting convictions were overturned by Justice J. S. Bradley, sitting as circuit judge. He stated of the Fourteenth Amendment: “Grant that this prohibition now prevents the states from interfering with the right to assemble,” but stated of that issue and of the “conspiracy to interfere with certain citizens in their right to bear arms”: “In none of these counts is there any averment that the state had, by its laws interfered with any of the rights referred to . . . .”<sup>9</sup>

When the case reached the Supreme Court, a new Attorney General had been appointed, and his brief abandoned any mention of the right to assemble or the right to bear arms, or whether private

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<sup>4</sup> *Scott v. Sanford*, 60 U.S. 393, 416-17 (1857).

<sup>5</sup> See generally Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (Westport, Conn.: Praeger Publishers, 1998).

<sup>6</sup> See *id.*, chs. 6 & 7.

<sup>7</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876). For details, see Halbrook, *Freedmen*, ch. 7.

<sup>8</sup> “The Grant Parish Prisoners,” *New Orleans Republican*, March 14, 1874, at 1.

<sup>9</sup> *United States v. Cruikshank*, 25 Fed.Cas. 707, 714-15 (C.C.D.La. 1874).

violation of these rights were federally prosecutable.<sup>10</sup> The Supreme Court affirmed the dismissal of the indictment, concluding that all rights that are not “granted or secured” by the Constitution or laws--terms of art in the Enforcement Act--“are left under the protection of the States.”<sup>11</sup>

Since no State action was involved, *Cruikshank* did not consider whether the Fourteenth Amendment protected First and Second Amendment freedoms. It noted that the rights “peaceably to assemble” and “of bearing arms for a lawful purpose” long antedated the Constitution, but that the First and Second Amendments protected those rights from “encroachment” by or from “be[ing] infringed by Congress,” not by private individuals.<sup>12</sup> For protection of these and other rights from private violence, citizens must rely on the States.<sup>13</sup>

*Cruikshank*’s only mention of the Fourteenth Amendment was the rejection of a due process right against false imprisonment and murder by private citizens, for the Amendment’s due process clause “adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society.”<sup>14</sup>

*Cruikshank* did not suggest that the Second Amendment is not an individual right or that States may infringe on the right to bear arms, consistent with its statement that the right predated the Constitution. The Court held no more than that private individuals cannot be prosecuted under a federal criminal law for violation of the First and Second Amendment rights of other private individuals.

In *Presser v. Illinois* (1886), the Supreme Court considered the direct applicability of the First and Second Amendments to State action.<sup>15</sup> On horseback with a sword, Herman Presser led 400 workers with unloaded rifles through Chicago’s streets to protest alleged police violence. He was convicted under an Illinois act prohibiting armed parades in cities without a license.

*Presser* was a test case set up to obtain rulings on the Constitution’s Militia Clause, the Second Amendment, and other provisions.<sup>16</sup> The litigants argued for a right to assemble in large groups in arms in a historical period of tragic labor struggles and violence. Illinois argued against

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<sup>10</sup>See Halbrook, *Freedmen*, at 168-69.

<sup>11</sup> 92 U.S. at 551.

<sup>12</sup>92 U.S. at 552-53.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 554.

<sup>15</sup> *Presser v. Illinois*, 116 U.S. 252 (1886).

<sup>16</sup>For details, see Halbrook, “The Right of Workers to Assemble and to Bear Arms: *Presser v. Illinois*, One of the Last Holdouts Against Application of the Bill of Rights to the States,” 76 *University of Detroit Mercy Law Review* 943, 957-59, 972-73 (Summer 1999), available at [http://www.stephenhalbrook.com/law\\_review\\_articles/presser.pdf](http://www.stephenhalbrook.com/law_review_articles/presser.pdf).

such a right but never questioned that the Second Amendment protected individuals having their own arms at home or bearing them as individuals.<sup>17</sup>

The *Presser* opinion was written by Justice Woods, who as a circuit judge had written that the “rights enumerated in the first eight articles of amendment” are “expressly recognized, and both congress and the states are forbidden to abridge them.”<sup>18</sup> In *Cruikshank*, Woods – sitting as a trial judge – instructed the jury that “every citizen of the United States has the right to bear arms.”<sup>19</sup> As noted above, his opinion that the rights to assemble and to bear arms were federally-protected from private conspiracy, contrary to Justice Bradley’s opinion, sent *Cruikshank* to the Supreme Court.

In *Presser*, Justice Woods opined for the Court that a license requirement for urban armed marches did “not infringe the right of the people to keep and bear arms.” He added that the Second Amendment limits the federal government but not the States.<sup>20</sup> Among the authorities cited was an antebellum North Carolina opinion upholding a law prohibiting free blacks from carrying firearms<sup>21</sup> on the basis that “the free people of color cannot be considered as citizens”<sup>22</sup> and that the States are not mentioned in the Second Amendment, which “is therefore only restrictive of the powers of the Federal Government.”<sup>23</sup> The Court’s reliance such antebellum cases highlights that it did not consider whether the postwar Fourteenth Amendment protects Bill of Rights guarantees.

*Presser* did, however, recognize that “the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.” But the provisions at issue did not do so.<sup>24</sup>

*Miller v. Texas* (1894) confirmed that the Court had never addressed whether the Fourteenth Amendment protects the right to keep and bear arms.<sup>25</sup> After his conviction was affirmed on appeal,

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<sup>17</sup>*Id.* at 975-76

<sup>18</sup> *United States v. Hall*, 26 F.Cas. 79, 81-82 (C.C.S.D. Ala. 1871).

<sup>19</sup> “The Grant Parish Prisoners,” *New Orleans Republican*, March 14, 1874, at 1.

<sup>20</sup> 116 U.S. at 265.

<sup>21</sup> *Id.*, citing *North Carolina v. Newsom*, 5 Iredell 250, 27 N.C. 203 (1844).

<sup>22</sup> 27 N.C. at 204.

<sup>23</sup> *Id.* at 207.

<sup>24</sup> 116 U.S. at 265 (emphasis added).

<sup>25</sup> *Miller v. Texas*, 153 U.S. 535 (1894). For the intriguing background of this case, see Cynthia Leonardatos, David Kopel, & Stephen Halbrook, “*Miller versus Texas: Police Violence, Race Relations, Capital Punishment, and Gun-toting*,” 9 *Journal of Law and Policy* (Brooklyn Law School), No. 3, 737-66 (2001), available at

Miller's attorneys raised the new argument that a Texas law at issue was violative of the Second, Fourth, and Fourteenth Amendments. The Supreme Court found that the Second and Fourth Amendments did not directly limit state action.<sup>26</sup> The Court refused to consider whether the statute violated the Second and Fourth Amendments as incorporated into the Fourteenth:

And if the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. . . . A privilege or immunity under the Constitution of the United States cannot be set up here . . . when suggested for the first time in a petition for rehearing after judgment.<sup>27</sup>

Those words were a stinging indictment of Miller's attorneys. Had they been competently aware of Second and Fourth Amendment defenses to the charges, they would have raised them in the trial court. Instead, they threw in the arguments in a last ditch effort in the appellate court.

Just three years after *Miller*, the Court opined that the first ten amendments "embody certain guarantees and immunities which we had inherited from our English ancestors" and incorporated "those principles into the fundamental law," with exceptions – such as "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . ."<sup>28</sup> The Court also began the incorporation of Bill of Rights guarantees into the Fourteenth Amendment which continues to date.<sup>29</sup>

That brings us to *United States v. Miller* (1939),<sup>30</sup> the Court's bare-bone's attempt to render a square holding on the Second Amendment. As noted in the quote at the beginning of this article, defendant's unpaid attorney telegraphed the Court that the Court could just rely on the brief of the United States – an act of legal malpractice. The government obliged, arguing alternatively that the shotgun in question was not constitutionally protected and that the Second Amendment protected only a "collective" right.<sup>31</sup>

In deciding *Miller*, the Court ignored the "collective" right argument and avoided determining whether a shotgun with a barrel less than 18 inches may be registered and taxed under the National Firearms Act consistent with the Second Amendment. The district court had declared

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[http://www.stephenhalbrook.com/law\\_review\\_articles/miller\\_v\\_texas.htm](http://www.stephenhalbrook.com/law_review_articles/miller_v_texas.htm).

<sup>26</sup> *Id.* at 538.

<sup>27</sup> *Id.* at 538-39.

<sup>28</sup> *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

<sup>29</sup> *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897) (Just Compensation Clause). See *United States v. Bajakajian*, 524 U.S. 321 (1998) (Excessive Fines Clause).

<sup>30</sup> *United States v. Miller*, 307 U.S. 174 (1939).

<sup>31</sup> See discussion in *United States v. Emerson*, 270 F.3d 203, 222-24 (5<sup>th</sup> Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

the Act facially violative of the Second Amendment,<sup>32</sup> and thus no evidence was in the record that such a shotgun was an ordinary military arm. The Supreme Court remanded the case for fact-finding based on the following:

In the *absence of any evidence* tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is *not within judicial notice* that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>33</sup>

*Miller* did not suggest that the person in possession of the arm must be a member of the militia, asking only whether the arm could have militia use. Historically, “the Militia comprised all males physically capable of acting in concert for the common defense,” and “these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”<sup>34</sup> State arms guarantees varied, leading State courts to be divided over whether all arms or only militia-type arms are protected.<sup>35</sup>

*Miller* cites approvingly the commentaries of Joseph Story and Thomas M. Cooley.<sup>36</sup> Justice Story called “the right of the citizens to keep and bear arms” the “palladium of the liberties of the republic,” as it “offers a strong moral check against usurpation and arbitrary power of the rulers.”<sup>37</sup> Judge Cooley noted: “The alternative to a standing army is ‘a well-regulated militia’; but this cannot exist unless the people are trained to bearing arms.”<sup>38</sup>

In sum, while *Miller* held that the “arms” protected by the Second Amendment are arms suitable for militia use, it did not question that the right is held by the individual. Nor did the Court suggest that one must be in the National Guard to exercise the right.<sup>39</sup>

*Miller* was cited in *Lewis v. United States* (1980), which held that a convicted burglar may be convicted of possessing a firearm even though the felony may be subject to collateral attack based

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<sup>32</sup> *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).

<sup>33</sup> 307 U.S. at 178 (emphasis added).

<sup>34</sup> *Id.* at 179.

<sup>35</sup> *Id.* at 182 & n.3.

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

<sup>37</sup> 2 J. Story, *Commentaries on the Constitution* 646 (5th ed. 1891).

<sup>38</sup> T. Cooley, *Constitutional Limitations* 729.

<sup>39</sup> *See Perpich v. Department of Defense*, 496 U.S. 334 (1990) (finding National Guard to be part of U.S. Armed Forces and discussing State militia powers with no mention of Second Amendment).

on lack of counsel.<sup>40</sup> While holding that “these legislative restrictions” on felons did not “trench upon any constitutionally protected liberties,” it cited *Miller* as having held that “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia’ . . . .”<sup>41</sup> Second Amendment arguments are rarely likely to find favor in reference to felons.

*Lewis* added in dictum that “a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm.”<sup>42</sup> This suggested no criteria by which degrees of fundamentalness may be calculated for non-felons. However, *Valley Forge College v. Americans United* (1982) denied that some Bill of Rights freedoms “are in some way less ‘fundamental’ than” others.<sup>43</sup> “[W]e know of no principled basis on which to create a hierarchy of constitutional values . . . .”<sup>44</sup>

*United States v. Verdugo-Urquidez* (1990), a Fourth Amendment case holding that the Bill of Rights protects the rights of the citizenry at large, held in pertinent part:

“The people” seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects “the right of the people to keep and bear Arms,” and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to “the people.” See also U.S. Const., Amdt. 1, (“Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble”); Art. I, § 2, cl. 1 . . . . While this textual exegesis is by no means conclusive, it suggests that “*the people*” protected by the Fourth Amendment, and by the First and *Second Amendments*, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.<sup>45</sup>

This textual analysis was suggested in the dissenting opinion from the Ninth Circuit.<sup>46</sup> Not repeated in the briefs by the litigants, the Court expanded on its phraseology in words which could not be clearer. For an even more expansive meaning, Justice Brennan wrote in dissent:

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<sup>40</sup> *Lewis v. United States*, 445 U.S. 55 (1980).

<sup>41</sup> *Id.* at 65 n.8.

<sup>42</sup> *Id.* at 65.

<sup>43</sup> *Valley Forge College v. Americans United*, 454 U.S. 464, 484 (1982).

<sup>44</sup> *Id.*

<sup>45</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), *rev'g*, 856 F.2d 1214 (9<sup>th</sup> Cir. 1988).

<sup>46</sup>“Besides the fourth amendment, the name of ‘the people’ is specifically invoked in the first, second, ninth, and tenth amendments. Presumably, ‘the people’ identified in each amendment is coextensive with ‘the people’ cited in the above amendments.” 856 F.2d at 1239 (Wallace, J., dissenting).

[T]he term “the people” is better understood as a rhetorical counterpoint to “the Government,” such that rights that were reserved to the “the people” were to protect all those subject to “the Government.” . . . “The people” are “the governed.”<sup>47</sup>

That was followed by *Planned Parenthood v. Casey* (1992), which noted that “all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.”<sup>48</sup> The Fourteenth Amendment extends its protection to, but is not limited by, “those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution.”<sup>49</sup> The Court continued:

“[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . . [such as] the freedom of speech, press, and religion; the right to keep and bear arms. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .”<sup>50</sup>

*Printz v. United States* (1997) held that the Brady Act’s command that local law enforcement officers conduct background checks on handgun purchasers violated State powers under the Tenth Amendment.<sup>51</sup> Concurring, Justice Clarence Thomas noted:

In *Miller*, we determined that the Second Amendment did not guarantee a citizen’s right to possess a sawed-off shotgun because that weapon had not been shown to be “ordinary military equipment” that could “contribute to the common defense.” . . . The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.<sup>52</sup>

More precisely, *Miller* only stated that the nature of the arm at issue was not within judicial notice. Whether it met the test of being a militia arm would have been subject to fact finding on remand.

Justice Thomas continued: “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, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment’s protections.”<sup>53</sup> He added that, “Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the

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<sup>47</sup> 494 U.S. at 287 (Brennan, J., dissenting).

<sup>48</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (citation omitted).

<sup>49</sup> *Id.*

<sup>50</sup> 505 U.S. at 841 (citation omitted).

<sup>51</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>52</sup> *Id.* at 938 n.1.

<sup>53</sup> *Id.* at 938.



Amendment’s text suggests, a personal right.”<sup>54</sup>

Noting that the parties did not raise the Second Amendment and it thus was not considered by the Court, Justice Thomas concluded: “Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms ‘has justly been considered, as the palladium of the liberties of a republic.’”<sup>55</sup>

It has been suggested that the right to “bear arms” refers only to a soldier, not a civilian, carrying arms.<sup>56</sup> However, *Muscarello v. United States* (1998) squarely held about the meaning of “carries a firearm” in certain crimes: “No one doubts that one who bears arms on his person ‘carries a weapon.’”<sup>57</sup> In her dissenting opinion, Justice Ruth Bader Ginsburg wrote: “Surely a most familiar meaning is . . . the Constitution’s Second Amendment (‘keep and bear Arms’) . . . .”<sup>58</sup> Similarly, in a habeas corpus case, Justice John Paul Stevens noted the continuing injury of a criminal conviction, including “loss of the right to vote or to bear arms . . . .”<sup>59</sup>

The appellate courts muddled along for decades without contributing any substantial Second Amendment jurisprudence, some of them finding in *Miller* a non-existent “collective right” holding. That ended with the comprehensive ruling in *United States v. Emerson* (5<sup>th</sup> Cir. 2001), which held the right to be individual.<sup>60</sup> While the United States opposed certiorari, it conceded that the Amendment guarantees individual rights. That was followed by a major Justice Department study on the subject.<sup>61</sup>

*Silveira v. Lockyer* (9th Cir. 2003) seized upon a purported challenge to all of California’s firearm laws as an opportunity to reestablish the collective right view.<sup>62</sup> The ill-advised petition for

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<sup>54</sup> *Id.* at 938 & n.2, citing, *inter alia*, J. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 162 (1994); S. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984).

<sup>55</sup> *Id.* at 938.

<sup>56</sup> There is no “right” to join or bear arms in a militia. “The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments . . . .” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

<sup>57</sup> *Id.* at 130.

<sup>58</sup> *Id.* at 143 (Ginsburg, J., dissenting).

<sup>59</sup> *Spencer v. Kemna*, 523 U.S. 1, 22 (1998) (Stevens, J., dissenting).

<sup>60</sup> *United States v. Emerson*, 270 F.3d 203 (5<sup>th</sup> Cir. 2001), *cert denied*, 536 U.S. 907 (2002).

<sup>61</sup> Office of Legal Counsel, U.S. Dep’t. of Justice, “Whether the Second Amendment Secures an Individual Right,” at <http://www.usdoj.gov/olc/secondamendment2.htm>.

<sup>62</sup> *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003), *reh. denied*, 328 F.3d 567 (9th Cir. 2003) (*see* dissents), *cert. denied*, 540 U.S. 1046 (2003).

certiorari featured such gems as “*Cruikshank* freed the Klansmen to ride again,” accused Justice McReynolds (author of *Miller*) of “anti-Semitism,” and demanded interim attorney’s fees.<sup>63</sup>

A sea change in judicial awareness has emerged. At his Senate confirmation hearing, now-Chief Justice John Roberts expressed awareness of the conflicting holdings in *Emerson* and *Silveira*, adding:

[T]he *Miller* case side-stepped that issue. An argument was made back in 1939 that this provides only a collective right. And the court didn’t address that. They said, instead, that the firearm at issue there -- I think it was a sawed-off shotgun -- is not the type of weapon protected under the militia aspect of the Second Amendment. So people try to read the tea leaves about *Miller* and what would come out on this issue. But that’s still very much an open issue.<sup>64</sup>

Roberts would not express an opinion because of the circuit conflict, and “the job of the Supreme Court is to resolve circuit conflicts. So I do think that issue is one that’s likely to come before the court.”<sup>65</sup>

More recently, in a speech critical of the use of foreign law in American judicial opinions, Justice Scalia stated:

In number 46 of *The Federalist*, James Madison speaks contemptuously of the governments of Europe which are, quote, “*afraid to trust the people with arms*,” close quote. Should we revise the Second Amendment because of what these other countries think?<sup>66</sup>

While there is room for optimism, one presents a Second Amendment case before the Supreme Court with great risk. New rights are discovered with extra-legal phraseology like “liberty of the person both in its spatial and more transcendent dimensions,”<sup>67</sup> and explicit rights – to include core political speech<sup>68</sup> – are swept away. The first case the Supreme Court takes on the merits of the individual-collective rights issue will be critical. This area of the law is no exception to the precept that the Court’s door should be knocked only with the utmost seriousness and preparation.

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<sup>63</sup>Petition for Certiorari, *Silveira v. Lockyer*, No. 03-51 (July 3, 2003), at 30, 32.

<sup>64</sup> Senate Judiciary Committee Hearing, Sept. 15, 2005, found at <http://www.gunnewsdaily.com/rw727.html>.

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

<sup>66</sup> Speech at American Enterprise Institute on Feb. 21, 2006, [rtsp://video.c-span.org/15days/e022106\\_scalia.rm](rtsp://video.c-span.org/15days/e022106_scalia.rm).

<sup>67</sup>*Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>68</sup>*McConnell v. FEC*, 540 U.S. 93 (2003).