

1996

## The Second, Fifth, and Ninth Amendments—The Precarious Protectors of the American Gun Collector

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### Recommended Citation

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# FLORIDA STATE UNIVERSITY LAW REVIEW



THE SECOND, FIFTH, AND NINTH AMENDMENTS—  
THE PRECARIOUS PROTECTORS OF THE  
AMERICAN GUN COLLECTOR

*Roland Docal*

VOLUME 23

SPRING 1996

NUMBER 4

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Recommended citation: Roland Docal, Comment, *The Second, Fifth, and Ninth Amendments--The Precarious Protectors of the American Gun Collector*, 23 FLA. ST. U. L. REV. 1101 (1996).

# THE SECOND, FIFTH, AND NINTH AMENDMENTS— THE PRECARIOUS PROTECTORS OF THE AMERICAN GUN COLLECTOR\*

ROLAND DOCAL\*\*

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## I. INTRODUCTION

The right of the people to bear arms in their own defen[s]e, and to form and drill military organizations in defen[s]e of the State . . . is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurp[ati]on, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the [C]onstitution and substitute their own rule for that of the people. Should the contingency ever arise when it would be necessary for the people to make use

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\*\* The author wishes to express his gratitude to Lori Docal for her encouragement and helpful insights.

of the arms in their hands for the protection of constitutional liberty, the proceeding, so far from being revolutionary, would be in strict accord with popular right and duty.<sup>1</sup>

The average American gun collector does not accumulate weaponry for so lofty a purpose as to protect his constitutional form of government or his constitutional liberties. He is not fanatical. The collector may not keep a weapon for personal protection. He has no pathological or greed-based desire to use his firearms for criminal purposes. His focus is on the beauty, craftsmanship, rarity, and profit potential that accompany the possession of firearms. While the collector usually sides with pro-gun forces, he does so to ensure the continued legality of his activity and to protect the value of his investment.

In the film *Wall Street*, inside-trader Gordon Gekko (portrayed by Michael Douglas) enjoyed a display of power when he attempted to impress his arch-rival Sir Lawrence Wildman (portrayed by Terence Stamp) with his gun collection.<sup>2</sup> Mr. Gekko reached into a glass case, removed a handgun, and proclaimed, "The rarest pistol in the world, Larry—the .45 Luger. Only six of them were ever manufactured."<sup>3</sup> Michael Zomber of Culver City, California, owns the .45 Luger used in the movie, personally valued in excess of \$1,000,000.<sup>4</sup> Although he receives many offers for the gun, Mr. Zomber claims the Luger is not for sale.<sup>5</sup>

Harry L. Coe, IV, like Mr. Zomber, collects firearms.<sup>6</sup> He recently completed the restoration of a mass-produced 1954 Russian SKS semi-automatic rifle, for which he paid only \$105.<sup>7</sup> In restored condition, the firearm is worth a bantam \$175;<sup>8</sup> however, like Mr. Zomber, Mr. Coe would not sell his weapon at fair market value—"It's simply not for sale."<sup>9</sup>

Mr. Coe does not play in the same league as Mr. Zomber. An immense gulf, indeed an ocean, lies between the monetarily appraised values of their collections. Nonetheless, both Mr. Zomber and Mr. Coe rely

1. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 298 (3d ed. 1898).

2. *WALL STREET* (Twentieth Century Fox Film Corp. 1987).

3. *Id.*

4. Garry James, *We Shoot the Million \$\$ Luger*, 38 *GUNS & AMMO MAGAZINE* 30 (1994). Indeed, "[t]he rarity and historical importance of this pistol to collectors makes it literally priceless." *Id.* at 31 (quoting CHARLES KENYON, JR., *LUGERS AT RANDOM*).

5. *Id.* at 30.

6. Interview with Harry L. Coe, IV, in Tampa, Fla. (June 15, 1995).

7. *Id.*

8. *Id.* (personally valued by Mr. Coe); Telephone Interview with Wain Roberts, President, Wain Roberts Firearms, Inc. (May 8, 1996) (Mr. Roberts is a self-described former pro-gun lobbyist and a licensed firearms dealer through Wain Roberts Firearms, Inc.).

9. *Id.*

upon the Second,<sup>10</sup> Fifth,<sup>11</sup> and Ninth<sup>12</sup> Amendments to protect the legality of their status as gun collectors and to secure the value of their investments.

This Comment argues that the listed amendments should be legally sufficient to guarantee Americans the right to bear arms and the right to receive compensation for the diminution in value of those arms subjected to use or resale restrictions pursuant to gun control legislation.<sup>13</sup> To the strict constructionist, the plain meaning of the enumerated amendments favors the American gun collector. However, strict construction is not the vogue in modern American jurisprudence.<sup>14</sup> Consequently, this Comment issues a “call to arms” for American gun collectors by highlighting the serious threat posed to their legitimate endeavors through the combined forces of popular sentiment, a vociferous anti-gun lobby, a compliant Congress, and a complacent judiciary.

Part I reviews the historical and common law foundation for a constitutionally endorsed right to bear arms. Part II discusses the congressional “arms race”—the increasingly frequent legislative enactments aimed at the unqualified regulation, if not the outright elimination, of firearms in American society—and anticipates a possible course of future federal legislation. Part III examines the United States Supreme Court’s silence on the issue of gun rights and the consequent failure to enforce the Second and Ninth Amendments. Part IV predicts continued success for gun control forces to culminate in a series of statutory measures eliminating firearm transactions or confiscating guns outright. Part V reviews the Court’s confusing and inconsistent adjudication of Fifth Amendment “takings” cases. Part VI considers the viability of applying the Fifth Amendment to the potential outcomes explored in part IV. Finally, part VII explains the jurisprudential principles that the Supreme Court must apply in order to fulfill the Court’s constitutional role as protector of the Bill of Rights. In conclusion, this Comment challenges the Supreme Court to bypass the

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10. The Second Amendment to the Constitution of the United States proclaims that “[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.

11. The Fifth Amendment states that “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V.

12. The Ninth Amendment asserts that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

13. This Comment, unlike the majority of articles addressing the Second Amendment, does not directly address gun-related violence. Rather, the focus of this Comment is on firearms collecting as an investment vehicle and hobby. The Comment’s primary concerns are with basic American values—wealth preservation and the pursuit of happiness. Undoubtedly, the focus of federal gun control legislation has been to reduce gun-related violence. While this is an admirable goal, congressional methodologies improperly deprive law-abiding citizens, including gun collectors, of their fundamental constitutional rights.

14. See discussion *infra* part VIII.

popular sentiment contradicting gun rights and defend the Bill of Rights through strict adherence to the express provisions of the Constitution.

## II. HISTORICAL PERSPECTIVE

### A. *In the Olde Country*

The roots of the Constitution found fertile soil in English history and common law. The Second and Ninth Amendments are not exceptions to this rule.

William Blackstone, an eighteenth-century commentator on the development of English jurisprudence, noted a widespread and inveterate societal distrust of standing armies.<sup>15</sup> Blackstone attributed this popular attitude to a fear that standing armies would firmly establish the sovereign's authority with a concomitant endangerment of individual liberties.<sup>16</sup> In response to this public perception, Alfred, King of England from 871 to 899,<sup>17</sup> ordained that the defense of England would be the responsibility of a people's army.<sup>18</sup> All English males capable of bearing arms were required to purchase and possess weapons sufficient to fulfill their obligation to defend the realm.<sup>19</sup> During the reign of Elizabeth I, Queen of England from 1558 to 1603, this people's army came to be known as the "militia."<sup>20</sup>

Some historians believe that national armament and the accompanying threat of physical force contributed to the moderation of government power and promoted individual liberties.<sup>21</sup> Unfortunately, Charles II derailed the growth of English individual liberties during his reign as King of England from 1660 to 1685.<sup>22</sup>

Charles II, assisted by Parliament's Militia Act of 1661, assumed control over the militia and discharged those members perceived as disloyal to the throne.<sup>23</sup> In 1662, having assembled and molded the equivalent of a personal standing army, Charles II directed his newly constituted military

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15. 2 WILLIAM BLACKSTONE, COMMENTARIES 408-10 (St. George Tucker ed.) (1803) ("In a land of liberty, it is extremely dangerous to make a distinct order of the profession of arms.").

16. *Id.*

17. 1 THE NEW ENCYCLOPAEDIA BRITANNICA 259 (Robert McHenry ed., 15th ed. 1992) [hereinafter ENCYCLOPAEDIA BRITANNICA].

18. BLACKSTONE, *supra* note 15, at 410.

19. David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007, 1010 (1994); cf. Robert A. O'Hare, Jr. & Jorge Pedreira, Note, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHN'S L. REV. 179, 185 n.22 (1992) (indicating that the affirmative requirement to own guns was carried over from England to colonial Georgia, Massachusetts, and Virginia).

20. Vandercoy, *supra* note 19, at 1011.

21. *Id.*

22. *Id.* at 1016; 3 ENCYCLOPAEDIA BRITANNICA, *supra* note 17, at 113.

23. Vandercoy, *supra* note 19, at 1016; BLACKSTONE, *supra* note 15, at 412-14.

force to disarm all subjects considered a threat to his rule.<sup>24</sup> The importation of guns was prohibited and gunsmiths were required to report any firearms manufactured and sold.<sup>25</sup> Parliament further assisted Charles's dictatorial scheme by enacting the Game Act of 1671, which was intended to disarm the general population by limiting the right to possess firearms to those persons entitled to hunt; the Game Act decreed that persons permitted to hunt would be limited to those earning substantial annual incomes from the land.<sup>26</sup>

Charles II was succeeded on the throne by James II, King of England from 1685 to 1688.<sup>27</sup> James II continued the oppression, and sought to establish totalitarian control over Parliament and to rule by divine right.<sup>28</sup> Snubbing Parliamentary law, James II quartered his troops in private residences.<sup>29</sup> James II suspended the Habeas Corpus Act and appointed judges who would "find that the laws of England were the King's laws and the King could dispense with them."<sup>30</sup> He extended the policy of popular disarmament to Ireland and used his private army to enforce his laws.<sup>31</sup>

Despite efforts to maintain dominion through disarmament, James II's tyrannical rule was ended by force of arms in the Glorious Revolution.<sup>32</sup> William III, Prince of Orange, ruler of Holland and son-in-law of James II, responded to an invitation from Parliament to invade England and claim the throne jointly with his wife, Mary.<sup>33</sup> Upon successfully wresting the monarchy from James II in 1689, William and Mary's powers were restricted by Parliament's adoption of the Declaration of Rights.<sup>34</sup> The Declaration recognized the historical existence of an individual right to bear arms.<sup>35</sup> Furthermore, Parliament replaced the Game Act with provisions that firearms be restricted only to the wealthy and be taken by the government only if used for poaching.<sup>36</sup> Accordingly, England established the legal principle that the possession of firearms was a matter of individual right subject only to confiscation for illegal use.

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24. Vandercoy, *supra* note 19, at 1016.

25. *Id.*

26. *Id.*

27. 6 ENCYCLOPAEDIA BRITANNICA, *supra* note 17, at 482-83.

28. Vandercoy, *supra* note 19, at 1016.

29. *Id.*

30. *Id.* at 1017.

31. *Id.*

32. 6 ENCYCLOPAEDIA BRITANNICA, *supra* note 17, at 482-83; 10 ENCYCLOPAEDIA BRITANNICA, *supra* note 17, at 854-55.

33. Vandercoy, *supra* note 19, at 1017.

34. *Id.*

35. *Id.*; see also David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995) (reviewing JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994)) (noting that the "British Bill of Rights includ[ed] an explicit right to arms.").

36. Vandercoy, *supra* note 19, at 1019.

Blackstone described the rights of individual English subjects as falling into two distinct categories: absolute or relative.<sup>37</sup> Absolute rights were possessed by individuals regardless of any other consideration.<sup>38</sup> Relative rights were incidental to the individual's membership in English society.<sup>39</sup> Blackstone opined that the right to bear arms was absolute and that the individual could wield that right for private purposes such as self-preservation, hunting, and marksmanship or for public purposes to contradict actual or threatened violence by an oppressive government.<sup>40</sup> From Blackstone's perspective, the right to bear arms, whether exercised for private or public purposes, was essential to the individual's protection at times when the protections afforded by law could not be timely had or were otherwise unavailable due to despotic governmental action.<sup>41</sup>

James Harrington, a seventeenth-century English philosopher best known for his views on ideal government, was a major contributor to the development of "republican" thought in England.<sup>42</sup> Harrington believed that the people were capable of self-rule, that the English monarchy was therefore superfluous, and that an armed populace represented a popular government's best defense against either foreign or domestic enemies.<sup>43</sup> Harrington not only refuted the necessity of a standing army but also feared that such an army could be used to impose tyranny.<sup>44</sup>

During the eighteenth century, the English political theorist Henry Neville extended Harrington's argument by propounding the concept that an armed populace represented an exceptional advantage to democratic governments.<sup>45</sup> Neville noted that other regimes would not risk losing control by permitting the existence of an armed populace.<sup>46</sup> Since democracy

37. BLACKSTONE, *supra* note 15, at 123.

38. *Id.*

39. *Id.*

40. *Id.* at 143-44, 144 n.41; see also Kopel, *supra* note 35, at 1351 (noting that "[t]he right to arms became . . . commonly regarded as sacrosanct").

41. BLACKSTONE, *supra* note 15, at 140-41.

42. 5 ENCYCLOPAEDIA BRITANNICA, *supra* note 17, at 718-19; see generally THE POLITICAL WORKS OF JAMES HARRINGTON (John G.A. Pocock ed., 1977).

43. Vandercoy, *supra* note 19, at 1020-21 (discussing the views of James Harrington); see also Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 647 (1989) (restating Harrington's thesis that the "independent yeoman should also bear arms").

44. Levinson, *supra* note 43, at 647.

45. Vandercoy, *supra* note 19, at 1021.

46. *Id.* Henry Neville's theory regarding arms control in societies dominated by despotic forms of government proved to be accurate. For example:

Four days after Hitler's triumphant Anschluss of Austria in March 1938, the Nazis finally enacted their own firearms laws. Additional controls were layered on the 1928 Weimar law: Persons under eighteen were forbidden to buy firearms or ammunition; a special permit was introduced for handguns; Jews were barred from businesses involving firearms; Nazi officials were exempted from the firearms permit system; silencers were outlawed; twenty-two caliber cartridges with hollow points were banned; and firearms which could fold or break down "beyond the common limits of hunting and sporting activities" became illegal.

is, by definition, “government of the people, by the people, [and] for the people,”<sup>47</sup> Neville argued that democratic government could be strengthened only by arming the nation’s most vital members.<sup>48</sup>

### B. *Something Old, Something New*

Blackstone’s views, as well as those of the English republican theorists, strongly influenced contemporary American political thought.<sup>49</sup> “It has become almost a cliché of contemporary American historiography to link the development of American political thought, including its constitutional aspects, to republican thought in England . . . .”<sup>50</sup> Indeed, the republican philosophy adopted by the natal United States was founded on English and classical history which included a belief that popular possession of firearms was essential to the preservation of liberty and a republican form of government.<sup>51</sup>

While early Americans were polarized between the Federalists’ desire for a strong central government and the Anti-federalist view that local autonomy was the key to self-rule, both factions agreed that popular fire-

On November 9, 1938 and into the next morning, the Nazis unleashed a nationwide race riot. Mobs inspired by the government attacked Jews in their homes, looted Jewish businesses, and burned synagogues, with no interference from the police. The riot became known as “Kristallnacht” (“night of broken glass”). On November 11, Hitler issued a decree forbidding Jews to possess firearms, knives, or truncheons under any circumstances, and to surrender them immediately.

Nazi mass murders of Jews began [less than three years later].

David B. Kopel, *Symposium: Guns at Home, Guns on the Street: An International Perspective Book Review*, 15 N.Y.L. SCH. J. INT’L & COMP. L. 355, 361-62 (1995) (reviewing JAY SIMKIN ET AL., *LETHAL LAWS* (1994)).

The Nazis gave America the Volkswagen and the idea for the interstate highway system. Did Hitler give us the Gun Control Act of 1968 as well?

And if he did? That was 25 years ago. Does it still matter? It very much matters to Aaron Zelman . . . whose research demonstrates that the GCA of 1968 has very much in common with the Nazi Weapons Law of 18 March, 1938.

This week marks the 50th anniversary of the Warsaw Ghetto uprising. Zelman thinks there’s no better time to recall how the Nazis used gun control laws to disarm Jews.

Jim Strang, *Hitler’s Influence on U.S. Gun Law*, *THE PLAIN DEALER*, Apr. 18, 1993, at C1.

47. Abraham Lincoln, *Address at Gettysburg Field* (Nov. 19, 1863), *reprinted in* 2 Carl Sandburg, *ABRAHAM LINCOLN: THE WAR YEARS* 469 (1939).

48. Vandercoy, *supra* note 19, at 1021 (arguing “that by arming the people, democracies could obtain incomparable advantage over neighboring aristocracies because the aristocracies could not arm their populace for fear they would seize the government”).

49. *Id.* at 1020-22; *see also* JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994) (describing the evolution of the English right to arms into the American Second Amendment); O’Hare & Pedreira, *supra* note 19, at 185 (noting that an American “tendency to adopt the basic precepts of English law . . . resulted in the approval of individual gun ownership”).

50. Levinson, *supra* note 43, at 647; *see also* Kopel, *supra* note 35, at 1333 (stating that “as long as Americans have been discussing guns and government restrictions on guns, they have been looking to the example set by Great Britain”).

51. Vandercoy, *supra* note 19, at 1022 n.122.

arms possession was a *sine qua non* to the preservation of liberty.<sup>52</sup> James Madison, the quintessential Federalist, reflected Neville's hypothesis when, *sub nom de plume Publius*, he proclaimed that "the advantage of being armed, which the Americans possess over the people of almost every other nation . . . forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of."<sup>53</sup> Madison recognized this advantage in relation to the national defense and, more importantly, emphasized the utility in preserving political freedom from domestic threats.<sup>54</sup> Thomas Jefferson, John Adams, and Patrick Henry concurred with Madison.<sup>55</sup> The Antifederalist position was expressed by the Federal Farmer, an anonymous author.<sup>56</sup> Favoring revision of the Constitution by the inclusion of a Bill of Rights, the Federal Farmer claimed that "to preserve liberty, it is essential that the whole body of the people always possess arms . . . ."<sup>57</sup>

The unanimity with which Federalists and Antifederalists supported an individual right to bear arms is a reflection of their shared philosophical and historical heritage. The unanimity in the contemporary understanding of the Second Amendment helps explain the relative absence of recorded debate over it. What little debate there [was] . . . relate[d] to James Madison's proposal that the amendment provide that "no person religiously scrupulous shall be compelled to bear arms."<sup>58</sup>

The recorded debates do provide evidence that the Framers of the Constitution, following Harrington's thinking, were far more concerned about the dangers of a standing army and congressional power over the militia than they were about limiting the individual right to bear arms.<sup>59</sup> While the Framers were satisfied that an armed populace would suffice to protect against internal abuses of power, they found themselves on the horns of a dilemma with respect to matters of national defense.<sup>60</sup> Although they shared Harrington's distrust of a standing army, the Framers generally perceived that an army would be required for purposes of national de-

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52. *Id.* at 1022.

53. THE FEDERALIST No. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

54. *See id.*

55. *See* Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 64 n.17 (1995).

56. *See* LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (Walter H. Bennett ed., 1978).

57. *Id.*

58. Vandercoy, *supra* note 19, at 1022 n.123.

59. *Id.* at 1022 (noting the Framers' objections to the absence of safeguards against peacetime standing armies); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 299 n.6 (2d ed. 1988) (indicating that the Framers' sole concern was "to prevent . . . the establishment of a standing national army and the consequent destruction of local autonomy").

60. Vandercoy, *supra* note 19, at 1022.

fense, since the absence of a trained militia at the outbreak of war would leave the country improperly protected.<sup>61</sup>

The Framers agreed that Congress should have the power to declare war and to maintain land and naval forces.<sup>62</sup> While the President was granted the powers of Commander in Chief of the armed forces,<sup>63</sup> the people were to elect both the Senate and the House of Representatives.<sup>64</sup> Since Congress was granted plenary power over the federal budget,<sup>65</sup> the people, acting indirectly through their elected representatives, could theoretically do away with the federal armed forces by eliminating the requisite funding.

With this compromise in place, the Framers concluded that the militia provided an effective constitutional check on all forms of government. The Framers recognized that the public's ability to counteract tyranny is promoted by individual empowerment recognized through a liberal right to bear arms.<sup>66</sup>

### C. *Something Borrowed, Something Blue*

While the Framers intended to provide an individual right to bear arms through the Second Amendment, such a right may also be derived from the Ninth Amendment.<sup>67</sup>

The Framers resolved to protect for posterity a vast array of constitutionally unenumerated rights enjoyed by the American people in 1791.<sup>68</sup> The Framers recognized that these "common" rights, while perhaps somewhat homespun in nature, were nonetheless inalienable and worthy

61. *Id.*

62. See U.S. CONST. art. I, § 8, cl. 11.

63. U.S. CONST. art. II, § 2, cl. 1.

64. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII, § 1.

65. See U.S. CONST. art. I, § 8.

66. Vandercoy, *supra* note 19, at 1038; see also David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 551-52 (1991); Kopel, *supra* note 35, at 1353 ("Congress intended the Second Amendment to recognize an individual right of all free Americans to possess firearms. Congress designed the Amendment to permit a militia drawn from the whole body of the people, thus ensuring that a uniformed standing army would not be the sole defense of the nation.") (providing extensive authority in support of this proposition).

67. Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 3 (1992) (noting that "basic beliefs about [the] Constitution and the role of government" would have to be abandoned if the existence of a Ninth Amendment-based right to arms is denied).

68. John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 970-72 (1993) ("[T]he Ninth Amendment declares a constitutional structure designed to protect the people from an abusive central government by securing majoritarian rights . . . . Of course, this does not mean that the Ninth Amendment protects only majoritarian rights. Certainly the term 'right' as employed in 1791 also referred to individual rights.").

of preservation.<sup>69</sup> The question considered by the Framers, and James Madison in particular, was how to achieve this objective.

In the debates over ratification of the Bill of Rights, delegates commonly objected that it was impossible to list the rights of free men. Speakers made reference to various common activities, questioning whether the right to wear the hat of one's choosing would be guaranteed, whether one could eat at the time one chooses, or whether one could undertake various other individual activities without interference from or regulation by government.<sup>70</sup>

Regardless of the label applied—homespun, natural,<sup>71</sup> common law,<sup>72</sup> individual,<sup>73</sup> or fundamental<sup>74</sup>—the Framers intended the “common” rights to be “retained by the people”<sup>75</sup> and be incapable of alienation, even through the democratic process.<sup>76</sup> These “common” rights, including an individual right to bear arms,<sup>77</sup> eventually found their constitutional niche in the Ninth Amendment.<sup>78</sup>

Despite the Ninth Amendment's magnitude, Madison's valiant effort to protect the “common” rights has not received an appropriate measure of legal acclaim.<sup>79</sup> Nonetheless, the Ninth Amendment must be recognized as a cornerstone of American freedom.<sup>80</sup>

69. *Id.* at 983 (“The Framers deemed these individual rights important enough to enshrine explicitly in the Bill of Rights. They included the Ninth Amendment primarily to protect the inalienable rights not included in the Bill of Rights’ enumeration . . .”).

70. Johnson, *supra* note 67, at 7.

71. *Id.* at 4.

72. *Id.* at 8.

73. *Id.*

74. *Id.* at 6.

75. U.S. CONST. amend. IX.

76. Johnson, *supra* note 67, at 68 (“[T]he right to defense of self cannot be surrendered; it is indefeasible.”); Yoo, *supra* note 68, at 985 (“These rights are retained precisely because the people could not surrender them to the government, even if they so desired.”).

77. Johnson, *supra* note 67, at 7, 11. Johnson notes that

[o]wnership of firearms was commonplace during the revolutionary period . . . . Once we recognize . . . and appreciate that for many Americans, firearms still are commonplace, useful tools with unmatched utility for self-defense, we might view possession of arms for individual defense to be as basic as the right to choose a heavy coat against the cold.

*Id.* at 4-5.

78. Yoo, *supra* note 68, at 979.

The attached phrase, “to deny or disparage,” confirms that the Ninth protects rights outside the Constitution's four corners. The very meaning of the words assumes the existence of rights to be protected from denial or disparagement. Moreover, “disparage” implies that the rights left unenumerated operate of their own force; they are not defined residually by the interpretation of the government's enumerated powers.

*Id.*

79. See discussion *infra* part VIII.

80. Johnson has recognized that the individual right to bear arms, anchored in the Constitution by the Ninth Amendment, is essential to American liberty.

A practical rationale supporting disarmament is that some citizens cannot be trusted to act wisely or prudently in their use of firearms. This justification, though, raises

### III. FROM THE HALLS OF CONGRESS

The Framers, having provided the legislature with budgetary control over the federal armed forces, expected Congress to safeguard popular rights and liberties from encroachment by a despotic executive branch supported by a national army.<sup>81</sup> Given the opportunity to travel forward through time, the Framers undoubtedly would have been flabbergasted to find that Congress, the hoped-for staunch defender of American freedoms, instead had repeatedly attempted to limit the people's right to bear arms. Despite the clear constitutional reservation of the popular right to arms<sup>82</sup> and the limitation of federal powers,<sup>83</sup> the modern Congress frequently turned to the Commerce Clause<sup>84</sup> in pursuit of a gun-restrictive agenda.<sup>85</sup>

#### A. Taking the First Step

From 1791 until 1934, the popular right to arms in America remained unimpinged by the federal government. While no federal gun control legislation emerged until 1934, attempts to enact such legislation, often racially motivated, were made at the state and federal levels.<sup>86</sup> Congress's opening salvo in the battle to control the American right to bear arms was

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the related question: can such a population be entrusted to make informed democratic decisions? Once we reach the stage where we advocate individual disarmament, we may have departed substantially from the framers' design—so substantially that, perhaps, we will no longer seriously be able to contend that government is either controlled by and serves citizens in a way that is responsive and accountable, or that citizens possess the capacity to meet their responsibility as masters of their agents in government.

Johnson, *supra* note 67, at 37.

81. See discussion *supra* part II.B.

82. U.S. CONST. amend. II.; see also discussion *supra* part II.

83. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 551 (1875) (recognizing that “[t]he government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people.”).

84. U.S. CONST. art. I, § 8.

85. See, e.g., James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 *FORDHAM L. REV.* 1795, 1796 (1994) (mentioning the recent use of the Commerce Clause to expand federal jurisdiction).

86. See, e.g., Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right To Keep and Bear Arms*, 62 *TENN. L. REV.* 597, 601 (1995) (citing 65 *CONG. REC.* 3946 (1924)).

Senator John K. Shields, a Tennessee Democrat, introduced a bill in the United States Congress designed to prohibit the shipment of pistols in interstate commerce. With racism again at the forefront, Shields inserted into the record a report in support of his bill: “Can not we, the dominant race, upon whom depends the enforcement of the law, so enforce the law that we will prevent the colored people from preying upon each other?”

*Id.*

unlike subsequent measures based on the Commerce Clause. Rather, Congress fired its second “big gun”—the taxing power.<sup>87</sup> Responding to the wave of violence that erupted in the United States during Prohibition and the Great Depression,<sup>88</sup> the National Firearms Act of 1934 imposed an excise tax on the trade or transfer of machine guns, “sawed-off”<sup>89</sup> shotguns, “sawed-off” rifles, and silencers.<sup>90</sup> The National Firearms Act also required the registration of such weapons, dealers, and transactions.<sup>91</sup>

### B. Taking the Second Step

Heartened by the successful attempt to control a limited range of weapons, Congress proceeded to assert legislative authority to control all firearms by enacting the Federal Firearms Act of 1938.<sup>92</sup> This far-reaching statute was grounded on congressional power to regulate interstate commerce.<sup>93</sup>

The Federal Firearms Act of 1938 prohibited any manufacturer or dealer from transporting, shipping, or receiving any firearm or ammunition in interstate commerce without a federal license.<sup>94</sup> Moreover, no person could receive any firearm or ammunition transported or shipped in interstate commerce in violation of the federal licensing requirement.<sup>95</sup> Licensed manufacturers and dealers were required to maintain records of all firearms transactions.<sup>96</sup> The Act prohibited shipping or transporting in interstate commerce any stolen firearm or ammunition,<sup>97</sup> and shipping, transporting, or knowingly receiving in interstate commerce any firearm with an altered or removed serial number.<sup>98</sup> The Act also forbade shipping

87. U.S. CONST. art. I, § 8.

88. Kopel, *supra* note 35, at 390 (noting that “America’s first major gun control law, the National Firearms Act of 1934, was a direct result of the violence engendered by alcohol prohibition”).

89. The term “sawed-off,” while not used in the statute, is a popular expression used to abbreviate the National Firearms Act’s more precise and extensive definition:

(1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length . . . .

National Firearms Act of 1934, 26 U.S.C. § 5845(a) (1994); *see also* United States v. Lopez, 2 F.3d 1342, 1348 (5th Cir. 1993), *aff’d*, 115 S. Ct. 1624 (1995) (noting that the National Firearms Act applies to “machine guns, ‘sawed-off’ shotguns and rifles, [and] silencers”).

90. National Firearms Act of 1934, 26 U.S.C. §§ 5801-72 (1994).

91. *Id.* § 5802.

92. Federal Firearms Act of 1938, formerly 15 U.S.C. §§ 901-10 (repealed in 1968).

93. *Id.* § 902(a).

94. *Id.*

95. *Id.* § 902(b).

96. *Id.* § 903(d).

97. *Id.* § 902(g).

98. *Id.* § 902(i).

or transporting in interstate commerce any firearm or ammunition to felons, persons under indictment for a felony offense, or fugitives from justice.<sup>99</sup> Felons, indicttees, and fugitives also could not ship or transport firearms or ammunition in interstate commerce,<sup>100</sup> nor could they receive such materials.<sup>101</sup>

### C. *Sweeping Prophylaxis*

During the succeeding thirty years, congressional gun control efforts entered a period of dormancy. Americans were evidently occupied with more important tasks—recovering from the Depression, fighting in World War II, and tackling a perceived threat of communism. However, gun control resumed in June, 1968 when Congress, responding to the riots and political assassinations that engulfed the nation from 1963 to 1968,<sup>102</sup> repealed the Federal Firearms Act and enacted the Omnibus Crime Control and Safe Streets Act of 1968.<sup>103</sup>

Senator Huey Long of Louisiana, having introduced and directed the legislation, summarized Congress's position on the right to bear arms and the main thrust of the Act by asserting that "every citizen could possess a gun until the commission of his first felony. Upon his conviction, however, [this legislation] would deny every assassin, murderer, thief and burglar . . . the right to possess a firearm . . . ."<sup>104</sup>

Four months after the enactment of the Omnibus Crime Control and Safe Streets Act, Congress passed the Gun Control Act of 1968.<sup>105</sup> Dissatisfied

99. *Id.* § 902(d).

100. *Id.* § 902(e).

101. *Id.* § 902(f).

102. 114 CONG. REC. 14773 (1968).

103. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 921-28 (1994). The Act reincorporated almost all of the provisions of the Federal Firearms Act of 1938 and banned the transfer of firearms (other than rifles and shotguns by licensed dealers or manufacturers) to persons under the age of 21 or unlicensed residents of other states. *Id.* § 922(b). Under the Act, licensed dealers and manufacturers were forbidden to transact in "destructive devices" (such as bombs or missiles), machine guns, "sawed-off" shotguns, or "sawed-off" rifles with the general public. *Id.* This legislation also prohibited any business from importing, manufacturing, or dealing in firearms or ammunition without a federal license. *Id.* § 922(a)(1). Similarly, the Act prohibited licensed dealers or manufacturers from selling firearms or ammunition to felons, regardless of whether the transaction had a nexus to interstate commerce. See *id.* § 922(d)(1). The federal regulation of firearms dealers and manufacturers was needed to control the flow of firearms and ammunition affecting interstate commerce at the national level. *United States v. Nelson*, 458 F.2d 556, 559 (5th Cir. 1972).

104. 114 CONG. REC. 14773 (1968).

105. Gun Control Act of 1968, 18 U.S.C. §§ 921-30 (1994). This legislation made minor modifications to the Omnibus Crime Control and Safe Streets Act. The Gun Control Act added the following to the list of individuals prohibited from transacting in firearms through interstate commerce channels: unlawful users of federally regulated narcotics, those adjudicated as suffering from mental illness, illegal aliens, the dishonorably discharged, and such individuals as may have renounced their United States citizenship. *Id.* § 922(d). The Act also restricted the types of ammunition that could be used with firearms restricted under prior legislation and re-

with the limited scope of prior legislation, Congress amended numerous provisions of the Omnibus Crime Control and Safe Streets Act and the National Firearms Act to create a new federal criminal offense: the use of a firearm to commit, or the unlawful carrying of a firearm during the commission of, “any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States.”<sup>106</sup> The Gun Control Act recognized the significance of the firearms trade among gun collectors and introduced the concept of a licensed collector defined as any licensed person “who acquires, holds, or disposes of firearms as curios or relics. . . .”<sup>107</sup> Rather than providing exceptions favoring gun collectors, the concept of a licensed collector restricted interstate trading in collectible firearms<sup>108</sup> to those collectors licensed by the federal government.<sup>109</sup>

#### D. Gaining Momentum

The rate of enactment of gun-restrictive legislation escalated dramatically during the 1980s and 1990s. Congress sought to respond to the at-

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quired the notification of local law enforcement officials prior to the delivery or shipment of firearms in a transaction involving a licensed firearms dealer and an unlicensed purchaser who either fails to appear in person on the licensee’s premises or does not furnish a sworn statement of eligibility to acquire firearms. *Id.* § 922(a). Licensed dealers were prohibited from selling rifles, shotguns, or the ammunition therefor, to persons under the age of eighteen and from selling handguns or handgun ammunition to persons under the age of twenty-one. *Id.* § 922(b)(1).

106. *Id.* § 924(c)(1).

107. *Id.* § 921(a)(13). The Gun Control Act amended the National Firearms Act by providing exceptions from registration requirements for antique firearms and unserviceable firearms. 26 U.S.C. § 5845(a), (g), (h) (1994). The Act defined an antique firearm as

any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

*Id.* § 5845(g). Unserviceable firearms were recognized as “incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition.” *Id.* § 5845(h). While these exceptions could be interpreted as concessions to American gun collectors, the exceptions are of little practical value. Unserviceable weapons, having been deprived of their functionality, are viewed as less than desirable and generally have significantly lower market values than their functional counterparts. *See, e.g.,* S.P. Fjestad, *BLUE BOOK OF GUN VALUES* 31 (16th ed. 1995) (noting that antique firearms that are mechanically inoperative “are generally undesirable as a collections firearm”) (referencing the National Rifle Association’s standards of conditions for antique firearms). Antique firearms, confined by their legal definition to those firearms available up to the Spanish-American War, *see* 26 U.S.C. § 5845(h) (1994), fail to include the majority of collectible weapons measured in terms of both value and transactions.

108. Antique firearms were exempted from the definition of “firearm” and thus were not subject to the interstate trading restrictions. 18 U.S.C. § 921(a)(3) (1994).

109. *Id.* § 922(b).

tempted assassinations of former Presidents Ford and Reagan, “skyjackings,” gun-related violence in schools, and the trade in controlled substances. In 1986, Congress enacted the Firearms Owner’s Protection Act.<sup>110</sup> The Undetectable Firearms Act<sup>111</sup> and the Anti-Drug Abuse Amendments Act<sup>112</sup> followed soon in 1988. The turn of the decade ushered in the Crime Control Act of 1990<sup>13</sup> and the Gun-Free School Zones Act of 1990.<sup>14</sup> In 1993, Congress enacted the Brady Handgun Violence

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110. *Id.* § 922(d) (extending a prohibition that originally applied only to federally licensed parties, the new language also prohibited *private* parties from transferring firearms to felons, fugitives, indictées, drug addicts, and the mentally defective). This legislation closed a loophole whereby qualified private parties were legally purchasing firearms on behalf of prohibited persons, and it was intended to prevent firearm transfers to drug addicts.

111. *Id.* § 922(p) (declaring illegal the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of any firearms not detectable by airport security devices). The Undetectable Firearms Act was intended to eliminate “the threat posed by firearms which could avoid detection at security checkpoints: airports, government buildings, prisons, court-houses, [and] the White House.” H.R. REP. NO. 100-612, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5359. While this legislation did not include an express requirement of an interstate commerce nexus for the prohibition of such a firearm, the relationship between the Undetectable Firearms Act’s applicability to airport passenger processing and interstate commerce is undeniable and has never been challenged.

112. 18 U.S.C. § 924(h) (1994) (making unlawful the transfer of a firearm with knowledge “that such firearm will be used to commit a crime of violence . . . or drug trafficking”). This statute, like the Undetectable Firearms Act, is infirm because of the absence of an express interstate commerce nexus requirement. While the drug-trafficking crimes addressed by the statute are all federal crimes, the crimes of violence are not so limited. *Id.* For example, under the Anti-Drug Abuse Amendments Act, a person transferring intrastate a firearm that was not previously in interstate commerce and knowing that such firearm would be used in a robbery within that same state would commit a federal crime. This is a bold stroke, even by congressional standards. Congress should have known that any legislative finding regarding an interstate commerce nexus would foreclose a Tenth Amendment challenge, since the Supreme Court would defer to the legislative mandate so long as any rational basis existed for the legislation. *Cf.*, *Preseault v. ICC*, 494 U.S. 1, 17 (1990); *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964). Any rational nexus would support the constitutionality of the statute, yet Congress did not provide one. Accordingly, the Anti-Drug Abuse Amendments Act appears to be unconstitutional, given the glaring absence of either a factual nexus to interstate commerce or a congressional finding of such a nexus.

113. 18 U.S.C. §§ 921-30 (1994) (evinced the resumption of grounding gun control legislation on the commerce power). While this legislation contained no bold gun control initiatives, the technical amendments to Title 18, chapter 44 of the United States Code served to restrict further the ability of Americans to assemble their own weapons from imported parts. *See id.* § 922(r). The Crime Control Act enhanced the penalty for the unlawful possession of firearms in a federal facility, making the punishment a possible two-year prison term and fine. *Id.* § 930(e)(1). Additionally, the Crime Control Act expanded the definition of “moving as . . . interstate or foreign commerce” to include any firearms that had, “at any time, been shipped or transported in interstate or foreign commerce.” *Id.* § 922(k). Prior to this expansion, “moving as . . . interstate or foreign commerce” was interpreted as applying only to firearms transactions with attendant contemporaneous movement in interstate or foreign commerce. H.R. REP. NO. 681, 101st Cong., 2d Sess., at 106 (1990) (explaining that the Crime Control Act would “permit prosecution . . . where the firearms have already moved in interstate or foreign commerce”).

Prevention Act (Brady I), named after James Brady, the former White House Press Secretary shot during the 1981 attempted assassination of former President Reagan.<sup>115</sup>

### *E. Protecting the Use of Firearms*

Arguably the most controversial federal gun control legislation to date, the Public Safety and Recreational Firearms Use Protection Act of 1994<sup>116</sup> eliminates the right to “manufacture, transfer, or possess a semiautomatic assault weapon” unless such semiautomatic assault weapon was “otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.”<sup>117</sup> The Act banned semiautomatic assault weapons classified under any of three categories: weapons specifically identified within the statute; copies of the named weapons; and weapons capable of semiautomatic firing and possessing an additional two or more objective features detailed in a weapons characteristics checklist.<sup>118</sup> Large capacity ammunition magazines were also banned, subject to the same “grandfather” provision.<sup>119</sup> This legislation represented another reflexive congressional reaction to public outcry following a three-year period of

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114. 18 U.S.C. §§ 921(a), 922(q), 924(a) (1994). The Gun-Free School Zones Act was introduced to “ensure that our school grounds do not become battlegrounds . . . .” 136 CONG. REC. S17595-01 (1990). The Act was later declared unconstitutional. See *United States v. Lopez*, 115 S. Ct. 1624, 1629-34 (1995) (holding that the Gun-Free School Zone Act exceeds congressional authority granted under the Commerce Clause).

115. 18 U.S.C. § 922(s) (1994) (limiting handgun purchases by requiring a pre-purchase waiting period and a background check on prospective purchasers). The waiting period requirement called for the passage of five business days between the time an individual contracts to purchase a handgun and the date that possession transfers from the seller to the buyer. *Id.* § 922(s)(1). During those five days, local law enforcement officials were required to “make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law.” *Id.* § 922(s)(2). The Brady Handgun Violence Prevention Act’s background check requirement lacks a rational nexus to interstate commerce and interferes with the states’ right to control the activities of state law enforcement personnel. Accordingly, this statute’s constitutionality is doubtful. See *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994), *cert. granted*, 64 U.S.L.W. 3837 (U.S. June 17, 1996) (No. 95-1503) (holding that the Brady Handgun Violence Prevention Act’s requirement that local law enforcement personnel conduct a background check on prospective purchasers violates the Tenth Amendment); see also *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994), *cert. granted*, 64 U.S.L.W. 3837 (U.S. June 17, 1996) (No. 95-1478); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994). However, “even if a national 7-day waiting period had been in effect in 1981, it wouldn’t have prevented John Hinckley from buying the gun he used tragically to wound President Reagan, White House Press Secretary Jim Brady, a Secret Service agent and a local policeman.” 137 CONG. REC. H2831-02 (1991).

116. 18 U.S.C. §§ 921-22 (1994).

117. *Id.* § 922(v).

118. *Id.* § 921(a)(30).

119. *Id.* § 921(a)(31).

spectacular and escalating violence involving semiautomatic assault weapons and large capacity ammunition magazines.<sup>120</sup>

#### IV. SILENCE IN THE COURT

Unlike the Congress, the Supreme Court has taken a passive role on the subject of the right to bear arms. This judicial passivity has produced two distinct effects. First, the Court's silence is interpreted by anti-gun advocates as tacit approval of gun control legislation, while pro-gun forces, including gun collectors, decipher the Court's inaction as silent recognition of a constitutional or common law right to bear arms.<sup>121</sup> Second, in the few cases in which the Court has chosen to speak about the right to bear arms,<sup>122</sup> its pronouncements have been indeterminate. However, gun collectors should not take solace in the Court's complacency. The Court's inertia has allowed the political process to predominate constitutional law—with a resultant detrimental effect on the rights and privileges of all firearms owners.

##### A. *No Right at the State Level*

The Supreme Court did not address the Second Amendment until 1875, in *United States v. Cruikshank*.<sup>123</sup> Cruikshank had been convicted of violating the Enforcement Act of 1870 by "banding" and "conspiring" to prevent two African-Americans from exercising their constitutional rights.<sup>124</sup> Despite concluding that the pleadings were "so defective that no judgment of conviction should be pronounced upon them,"<sup>125</sup> the Court ignored the abstention principle—that federal courts should abstain from reaching a constitutional question when there is another ground on which the case can be decided<sup>126</sup>—and needlessly embarked upon a broad review of constitutional law.<sup>127</sup>

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120. See Michael G. Lenett, Note, *Violent Crime Control and Law Enforcement Act of 1994: Taking a Bite Out of Violent Crime*, 20 DAYTON L. REV. 573, 576-77 (1995) (noting statistics that indicate that assault weapons are 16 times more likely to be traced to crime than conventional weapons).

121. See discussion *infra* part IV.D. Pro-gun forces interpret the Court's silence as an affirmation of the Court's *Miller* opinion—"that *Miller* . . . guarantee[s] protection for any weapon with proven military utility." Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 AM. U.L. REV. 53, 100 (1992); see also discussion *infra* part IV.B. Anti-gun advocates emphasize that the Court's silence is indicative of the Court's "disinclination to disturb" lower court decisions favoring gun control statutes. Herz, *supra* note 55, at 77.

122. See discussion *infra* part IV.A-C.

123. 92 U.S. 542 (1875).

124. *Id.* at 548-49.

125. *Id.* at 559.

126. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.13(g) (5th ed. 1995).

127. See *Cruikshank*, 92 U.S. at 548-59.

Addressing the Second Amendment, the *Cruikshank* Court found that the Constitution does not grant the right to “bear[] arms for a lawful purpose.”<sup>128</sup> According to the Court:

The [S]econd [A]mendment 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, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 139, the “powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,” “not surrendered or restrained by the Constitution of the United States.”<sup>129</sup>

In *Cruikshank*, the Court failed to recognize that the Ninth Amendment—“[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”<sup>130</sup>—guarantee the continued enjoyment by American citizens of the common law rights inherited from their English forefathers.<sup>131</sup> These innate common law rights include the right to bear arms.<sup>132</sup> Furthermore, the Court failed to account for the Fourteenth Amendment’s restriction upon the states’ police power—“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>133</sup>

Ten years later, in *Presser v. Illinois*,<sup>134</sup> the Court again reviewed the Second Amendment. Herman Presser had been convicted of violating the Illinois Military Code for unlawfully belonging to, and parading and drilling with, “an unauthorized body of men with arms, who had associated themselves together as a military company and organization, without having a license from the governor, and not being a part of, or belonging to, ‘the regular organized volunteer militia’ of the state of Illinois, or the troops of the United States.”<sup>135</sup>

In affirming Presser’s conviction, the Court cited *Cruikshank* and *Miln*.<sup>136</sup> Like the *Cruikshank* Court, the *Presser* Court did not consider the

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128. *Id.* at 553.

129. *Id.* (citations omitted).

130. U.S. CONST. amend. IX.

131. See discussion *supra* part II.C; Johnson, *supra* note 67, at 3 (explaining that an individual right to arms may be derived from the Ninth Amendment).

132. Vandercoy, *supra* note 19, at 1017; *supra* notes 68-80 and accompanying text.

133. U.S. CONST. amend. XIV.

134. 116 U.S. 252 (1886).

135. *Id.* at 254 (quoting the indictment against Presser).

136. *Id.* at 265-68 (citing *City of New York v. Miln*, 11 Pet. 102, 139 (1837)). In *Miln*, the Court considered the extent of the state police power prior to the Fourteenth Amendment. *Miln*, 11 Pet. at 139. *Miln* explains that

Ninth Amendment in reaching a decision. Nonetheless, the *Presser* Court managed to draw an appropriate conclusion regarding the applicability of the Second Amendment:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, 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.<sup>137</sup>

The *Presser* Court proceeded to address the Fourteenth Amendment issue not previously raised in *Cruikshank*. The Court noted that the Fourteenth Amendment precluded state action to “abridge the privileges or immunities of citizens of the United States.”<sup>138</sup> The Court understood that among these privileges or immunities was a protection against state attempts to deny an individual right to arms or to preclude citizens from service as members of the militia.<sup>139</sup> Despite having recognized *Presser*’s right to serve in the militia, the Court was able to uphold the Supreme Court of Illinois by failing to enforce the Second Amendment at the state level<sup>140</sup> and by finding that the Constitution did not provide *Presser* with a right “to associate with others as a military company, and to drill and parade with arms.”<sup>141</sup>

In reaching this circuitous and contorted holding, the Court affirmed the *Miln* decision—that state police power may be wielded to secure the “general welfare by any and every act of legislation . . . not surrendered or restrained” by the Constitution.<sup>142</sup> The Court’s vague and limited con-

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[i]t is not only the right, but the bounded and solemn duty of a state, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise, are not surrendered or restrained by the constitution of the United States.

*Id.*

137. 116 U.S. at 265.

138. *Id.* at 266 (citing U.S. CONST. amend. XIV).

139. *Id.* at 265.

140. In effect, *Cruikshank* and *Presser* held that the Second Amendment applies solely against the federal government. See O’Hare & Pedreira, *supra* note 19, at 191-92. O’Hare and Pedreira note that the states’ rights argument

cannot withstand close scrutiny because it relies upon [*Cruikshank* and *Presser*, which] were decided before the concept of incorporation was adopted. Nonetheless, because of the Supreme Court’s rejection of “the proposition that the entire Bill of Rights applies to the states,” a number of federal and state courts refuse to incorporate the Second Amendment against state governments.

*Id.*

141. *Presser*, 116 U.S. at 266.

142. *Id.* at 268.

clusion left two key questions that have been the subjects of much debate.<sup>143</sup> To what extent is the right to bear arms linked with or limited by the duty of service in the militia, and to what extent may states regulate the right to bear arms by limiting militia activities or exercising police power?

### B. *Civilian Soldiers*

After a fifty-four-year hiatus from Second Amendment considerations, the Court addressed the National Firearms Act in *United States v. Miller*.<sup>144</sup> Miller had been indicted for the unlawful transport in interstate commerce of a double barrel twelve-gauge shotgun having a barrel less than eighteen inches in length.<sup>145</sup> The indictment had been quashed at the district court level for violation of the Second Amendment.<sup>146</sup> In a case where no appearance was made by the appellee,<sup>147</sup> where no record evidence was before the Court,<sup>148</sup> and where the Court erroneously refused to take judicial notice that the "sawed-off" shotgun was utilized in contemporaneous military service,<sup>149</sup> the Court concluded that the Second Amendment does not guarantee the right to bear a weapon that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia."<sup>150</sup>

The *Miller* Court engaged in a limited historical analysis of the Court's previous linkage of the right to bear arms with the duty of service in the militia, and it specifically found that "the [m]ilitia comprised all males physically capable of acting in concert for the common defense."<sup>151</sup> In so doing, the Court, though failing to address the Ninth Amendment expressly, noted the common law implied obligation of all adult males to possess arms and ammunition.<sup>152</sup>

Courts and pro-gun control commentators responded to the *Miller* opinion by attempting to limit the decision to its facts and describing the decision as adequate only to dispose of the case.<sup>153</sup> Despite this view, *Miller* remains an affirmation of the constitutional protection of the popular

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143. See generally Vandercoy, *supra* note 19; Levinson, *supra* note 43; Herz, *supra* note 55; Richard M. Aborn, *The Battle over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417 (1995).

144. 307 U.S. 174 (1939).

145. *Id.* at 175.

146. *Id.* at 177.

147. *Id.* at 175.

148. Herz, *supra* note 55, at 68.

149. *Id.*

150. 307 U.S. at 178.

151. *Id.* at 179.

152. *Id.* at 179-80.

153. See, e.g., *Cases v. United States*, 131 F.2d 916, 922-23 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943); Herz, *supra* note 55, at 69.

right to keep and bear military weapons.<sup>154</sup> Moreover, further consideration of three key factors—the *Miller* Court’s interpretation that the Second Amendment grants citizens the right to keep and bear military weapons, the fact that machine guns were used in military service on the date of the opinion, and the National Firearms Act’s ban on such weapons—inevitably leads to the conclusion that the *Miller* decision could not have been complete without a resounding judicial proclamation of the National Firearms Act’s unconstitutionality.

### C. *Armed Convicts*

Forty-one years elapsed before the Court again considered questions surrounding the right to bear arms. In *Lewis v. United States*,<sup>155</sup> the Court considered whether a convicted felon could be convicted of possessing a firearm shipped in interstate commerce in derogation of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>156</sup> The Court noted “that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm.”<sup>157</sup> For example, the Court previously upheld the legislative denial of a convicted felon’s right to vote.<sup>158</sup> Applying only rational basis scrutiny and availing itself of the strict construction and plain meaning jurisprudential principles, the *Lewis* Court found the defendant to be a convicted felon and affirmed his consequently illegal possession conviction.<sup>159</sup>

### D. *The Petition for Writ of Certiorari Is Denied*

Both sides of the gun debate have argued about the significance of the Court’s steady stream of certiorari denials. The *Miller* case, for example, concluded with the most radical and controversial judicial expression on the subject of gun rights. Yet, for fifty-seven years, the Court refused to address lower court cases that, for the most part, have run contrary to the *Miller* holding.<sup>160</sup> The Court’s track record of certiorari denials on these

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154. Levinson, *supra* note 43, at 654-55 (“Ironically, *Miller* can be read to support some of the most extreme anti-gun control arguments, e.g., that the individual citizen has a right to keep and bear bazookas, rocket launchers and other armaments that are clearly relevant to modern warfare, including, of course, assault weapons.”); see also Vandercoy, *supra* note 19, at 1009 (“[The Second Amendment] right envisioned was not only the right to be armed, but to be armed at a level equal to the government.”).

155. 445 U.S. 55 (1980).

156. *Id.* at 56.

157. *Id.* at 66.

158. See *id.* (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974)).

159. *Id.* at 60-68.

160. See, e.g., *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943); *United States v. Tomlin*, 454 F.2d 176 (9th Cir.), *cert. denied*, 406 U.S. 924 (1972); *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047

cases is particularly disturbing since a denial of certiorari must be interpreted as making no comment on the merits of the case.<sup>161</sup>

*Farmer v. Higgins*<sup>162</sup> illustrates this point. In *Farmer*, a conservative Court led by Chief Justice Rehnquist denied certiorari to a case in which the Eleventh Circuit held that, pursuant to the Firearms Owners' Protection Act of 1986, the making and manufacture of new machine guns for possession by private persons was illegal.<sup>163</sup> The Eleventh Circuit's ruling in *Farmer* was in direct conflict with *Miller's* implicit holding that citizens have a right to possess, and therefore presumably a right to manufacture, "ordinary military equipment. . . ."<sup>164</sup> Nevertheless, the Supreme Court exercised its constitutional prerogative not to take the case.

The plaintiff in *Quilici v. Village of Morton Grove*<sup>165</sup> was likewise denied an opportunity for debate before the Court. In *Quilici*, the Village of Morton Grove's board of trustees banned the possession, both in and out of the home, of numerous weapons including all handguns.<sup>166</sup> The village acted, pursuant to the police power, upon a finding that "handguns play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death."<sup>167</sup> *Quilici* and a host of other plaintiffs challenged the ordinance's constitutionality under the Second, Ninth, and Fourteenth Amendments but were denied relief in federal district court<sup>168</sup> and, subsequently, in the Seventh Circuit Court of Appeals.<sup>169</sup>

The Seventh Circuit's decision commenced on an ominous note, with the court acknowledging that it considered gun control (and not gun

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(1991); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993); *United States v. Kozerski*, 518 F. Supp. 1082 (D.N.H. 1981), *aff'd mem.*, 740 F.2d 952 (1st Cir.), *cert. denied*, 469 U.S. 842 (1984); *United States v. Sandidge*, 520 A.2d 1057 (D.D.C.), *cert. denied*, 484 U.S. 868 (1987).

161. See, e.g., *Carpenter v. Gomez*, 116 S. Ct. 488 (1995) (stating that "an order denying a petition for certiorari expresses no opinion on the merits of the case"); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2047 (1995) (quoting *United States v. Carver*, 260 U.S. 482 (1923)) (stating that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times"); *Barber v. Tennessee*, 115 S. Ct. 1177 (1995) (citing *Carver*, 260 U.S. at 490) (restating "the settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits"). Despite the Court's avowed position on the effect (or lack thereof) of certiorari denials, the Court's track record in gun control cases is described as "particularly disturbing" because certiorari denials allow lower court decisions to create or uphold laws in derogation of the right to arms. Herz, *supra* note 55, at 77 ("Although orthodox understanding views a denial of certiorari as making no comment on the merits, the Court's long-standing laissez-faire attitude indicates, at a minimum, a deep disinclination to disturb existing doctrine.").

162. 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991).

163. *Id.* at 1042.

164. *United States v. Miller*, 307 U.S. 174, 178 (1939).

165. 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

166. *Id.* at 264.

167. *Id.*

168. *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D.Ill. 1981).

169. *Quilici*, 695 F.2d at 261-64.

rights) “of vital importance to every citizen” and thus finding abstention to be no more important here than in cases involving fundamental rights.<sup>170</sup> From the outset,<sup>171</sup> the Seventh Circuit declined to grant the right to bear arms the status of a fundamental right.<sup>172</sup>

The court initially analyzed the Illinois Constitution and found that “the right to keep and bear arms . . . is so limited by the police power that a ban on handguns does not violate that right.”<sup>173</sup> The court concluded that because the ordinance did not prohibit all firearms, “Morton Grove [could] exercise its police power [under the Illinois Constitution] to prohibit handguns even though this prohibition interferes with an individual’s liberty or property.”<sup>174</sup>

The court noted that *Presser* did not apply the Second Amendment to the States.<sup>175</sup> The court explained that the Supreme Court never intended to incorporate the entire Bill of Rights and dismissed *Quilici*’s Second and Fourteenth Amendment argument.<sup>176</sup> The Seventh Circuit also summarily dismissed *Quilici*’s Ninth Amendment argument.<sup>177</sup> Despite an incontrovertible historical foundation for the common law right to bear arms and an equally undeniable record of the constitutional Framers’ intentions as to the Second and Ninth Amendments,<sup>178</sup> the court concluded: “Since appellants [could] not cite, and our research [did not reveal], any Supreme Court case holding that any specific right is protected by the Ninth Amendment, appellants’ argument has no legal significance.”<sup>179</sup>

## V. FUTURE SHOCK

Gun control activists are on a quest to disarm the American populace and take away the rights of gun collectors. The anti-gun activists’ regulatory ladder has four “rungs,” each incrementally more restrictive.<sup>180</sup>

170. *Id.* at 265.

171. *See, e.g.*, *Presser v. Illinois*, 116 U.S. 252, 265 (1885); *United States v. Miller*, 307 U.S. 174, 179-80 (1939).

172. *Quilici*, 695 F.2d at 271.

173. *Id.* at 267.

174. *Id.* at 268.

175. *Id.* at 269.

176. *Id.* at 270 (finding that “[t]he Supreme Court has specifically rejected the proposition that the entire Bill of Rights applies to the states through the [F]ourteenth [A]mendment”).

177. *Id.* at 271.

178. *See* discussion *supra* part II.

179. *Quilici*, 695 F.2d at 271. *Quilici* featured Judge Coffey’s well-considered dissenting opinion that may have been intended to whet the Supreme Court’s certiorian appetite. *Id.* at 271-80 (Coffey, J., dissenting). Judge Coffey highlighted the Village of Morton Grove’s violation of the Court’s oft-recognized and oft-defended fundamental right to privacy within the home. *Id.* at 279. The Court’s desire silently to support lower court rulings in contravention of the right to bear arms has been so strong that the Court, in denying certioria to *Quicili*, seemed willing to sacrifice the invocation and application of the Court’s cherished right to privacy.

180. *See, e.g.*, Lenett, *supra* note 120, at 614-15 (noting that there are four possible tiers of gun regulation).

Fourth-rung legislation—"a prospective freeze [only,] without licensing, registration, or any other means of controlling weapons currently in circulation"—is viewed by the anti-gun lobby as minimally intrusive on gun owners' rights and, therefore, worthy of rapid follow-up.<sup>181</sup> Third-rung legislation involves "a prospective [manufacturing] ban with a system of prospective licensing and registration of transfers of grandfathered weapons" and is the current goal of anti-gun forces.<sup>182</sup> "Second-rung" legislative efforts encompass a ban on the prospective manufacture and sale of all firearms together with a system for the licensing and registration of all firearms then in circulation.<sup>183</sup> First-rung legislation would represent the pinnacle of the anti-gun forces' scheme. This ultimate measure would foreclose the need for regulatory efforts by criminalizing the manufacture, sale, importation, receiving, and possession of any firearm.<sup>184</sup> Such legislation would necessarily embrace the confiscation of firearms, thereby triggering direct confrontation with the Fifth Amendment and direct infringement of the rights of gun collectors.<sup>185</sup>

Inspired by mounting successes on both the legislative<sup>186</sup> and judicial fronts, gun control advocates are expected to continue their quest to disarm the American populace after passage of the Public Safety and Recreational Firearms Use Protection Act.<sup>187</sup> In keeping with these expectations, the Gun Violence Prevention Bill, more commonly known as "Brady II," was introduced in the Senate and the House of Representatives in 1994.<sup>188</sup> This proposed legislation contained six principal directives: to license handgun purchasers prospectively; to require that all transfers of handguns be registered with local law enforcement agencies; to extend the waiting period prior to the transfer of a handgun from five days to seven days; to declare unlawful the leaving of a loaded firearm, or

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181. *Id.*

182. *Id.* at 614.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 611-12 (claiming that the successes registered by the anti-gun forces during the 103d Congress "broke forever the image of NRA invulnerability and gun control as a taboo subject of federal legislation").

187. 18 U.S.C. §§ 921-22 (1994); see also *supra* part III.E.

188. See H.R. 3932, 103d Cong., 2d Sess. (1993); S. 1882, 103d Cong., 2d Sess. (1993). The Gun Violence Prevention Bill was not enacted by the 103d Congress. Allen G. Breed, *Flea Market Handgun Sales Seen as Criminals' Loophole*, THE CHARLESTON GAZETTE, Jan. 16, 1995, at P1A. The bill has not been reintroduced in the Republican-controlled Congress although Handgun Control Inc. continues to lobby for the measure. *Id.* Handgun Control Inc. is a Washington, D.C.-based lobbying group that was instrumental in the passage of the Brady Handgun Violence Prevention Act (Brady I). *Id.*; 137 CONG. REC. H2840 (1991) (statement of Rep. Marlenee, Repub.) ("Of course, Handgun Control, Inc. wants the Brady bill passed. That is exactly why. Handgun control."). James Brady, former President Reagan's press secretary, is a member of Handgun Control, Inc.'s board of directors, and his wife, Sarah, is the organization's chair. *Larry King Live* (CNN television broadcast, Mar. 27, 1996) (The Bradys decried the Second Amendment as "a fraud on the American people.").

unloaded firearm with accessible ammunition, so situated that a person under the age of sixteen could gain control of the weapon; to require handgun manufacturers to provide a safety device that would preclude discharge of the weapon by a person under the age of seven; and, most significantly, to eliminate that category of handguns known as "Saturday Night Specials."<sup>189</sup>

Since the Public Safety and Recreational Firearms Use Protection Act<sup>190</sup> may be fairly classified as a fourth-rung legislative measure, *Brady II* was a follow-up endeavor to reach a higher regulatory plateau.<sup>191</sup> *Brady II* constituted the anti-gun lobby's legislative attempt to reach the third rung of its self-proclaimed regulatory ladder and, had it passed, would have represented a solid victory, given the strong Republican presence in both Houses of Congress and the National Rifle Association's view that licensing and registration of gun owners are anathema.<sup>192</sup> Because the measure failed, anti-gun forces will undoubtedly regroup for another attempt at passing similar legislation.<sup>193</sup>

Looking further ahead, the anti-gun lobby anticipates second- and first-rung legislation. For example, the Violence Policy Center, an anti-gun think tank located in Washington, D.C., has already prepared a legislative plan intended to be a halfway measure between the second and first rungs on the regulatory ladder. The Violence Policy Center's "baby step" ap-

189. H.R. 3932, 103d Cong., 2d Sess. (1993); S. 1882, 103d Cong., 2d Sess. (1993) (defining Saturday Night Specials as handguns whose barrels, slides, frames, or receivers are made of nonhomogeneous metals that melt or deform at temperatures less than 800 degrees; or pistols without safety mechanisms that meet specific criteria; or handguns that fail to meet minimum length and height requirements).

190. 18 U.S.C. §§ 921-22 (1994).

191. Lenett, *supra* note 120, at 614.

192. *Id.* The National Rifle Association was instrumental in assisting "the Republican Party [to] gain control of Congress in the 1994 elections with massive campaign contributions." James Rosen, *House Vote To Repeal Assault-Weapons Ban Won't Withstand Veto; Democratic Congressmen Accuse Speaker Newt Gingrich of Bowing to the National Rifle Association*, THE FRESNO BEE, Mar. 23, 1996, at A1. While conservative Republicans in the House of Representatives recently engineered the passage of a bill repealing the Public Safety and Recreational Firearms Use Protection Act, the majority was insufficient to override a promised veto by President Clinton. *Id.*; David Hess, *House Repeals Weapons Ban; Not Veto Proof: The Bill Isn't Likely To Get Out of the Senate and President Clinton Has Promised To Veto It*, THE POST & COURIER, Mar. 23, 1996, at A1. Although the Republican majority has proved insufficient to overturn existing gun control statutes, the Republican presence has temporarily derailed pro-gun control forces in their attempts to pursue more restrictive legislation. Naftali Bendavid, *Readying for a New Assault; After Hard-Won Gains, Gun Control Advocates Face the Prospect of Losing Ground in a Revamped Congress*, THE RECORDER, Nov. 22, 1994, at 1 (quoting Sarah Brady, Chair, Handgun Control Inc.) ("Obviously, with the Republican landslide, the hopes for a lot of positive action on our part are greatly diminished.").

193. See H.R. 3932, 103d Cong., 2d Sess. (1993); S. 1882, 103d Cong., 2d Sess. (1993). The Gun Violence Prevention Bill was not enacted by the 103d Congress. Allen G. Breed, *Flea Market Handgun Sales Seen As Criminals' Loophole*, THE CHARLESTON GAZETTE, Jan. 16, 1995, at P1A. The bill has not been reintroduced in the Republican-controlled Congress although Handgun Control Inc. continues to lobby for the measure. *Id.*

proach calls for a complete ban on handguns and on all other firearms capable of accepting detachable ammunition magazines.<sup>194</sup> Accordingly, Americans would be allowed to retain their current rights with respect to fixed capacity rifles and shotguns but all other arms would be subject to confiscation.<sup>195</sup> The Violence Policy Center's plan would also severely restrict ammunition transactions by establishing monthly limits on the number of rounds that individual customers could purchase and by precluding ammunition transactions from sources other than local law enforcement agencies or Bureau of Alcohol, Tobacco, and Firearms-operated ammunition sales centers.<sup>196</sup> The Violence Policy Center's plan thus raises Fifth Amendment questions not only on the issue of confiscation, but also on the issue of significant limitation of the gun owner's right to property enjoyment occasioned by severely restricted ammunition availability.

While gun collectors decried fourth-rung statutes as infringing upon hallowed constitutional rights, their lamentations were disingenuous. Gun collectors profited handsomely from fourth-rung gun control legislation.<sup>197</sup> Fourth-rung statutes served to limit the supply of weapons while fueling demand from a public concerned about future gun-restrictive legislation.<sup>198</sup> For example, demand surge following the passage of the Public Safety and Recreational Firearms Use Protection Act resulted in a trebling of prices, on average, for the impacted firearms and accessories.<sup>199</sup>

Third-rung legislation, while threatening to dampen the demand for firearms through licensing and registration requirements, would actually propel gun prices to extreme levels as supply responds to a manufacturing ban.<sup>200</sup> Accordingly, gun collectors will continue their half-hearted rights infringement protestations while privately making substantial profits.<sup>201</sup>

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194. Herz, *supra* note 55, at 151 n.424 (citing Josh Sugarman & Kirsten Rand, *Cease Fire: A Comprehensive Strategy To Reduce Firearms Violence 2* (1994) (discussing the Violence Policy Center's "comprehensive regulatory approach to firearms")).

195. *Id.*

196. *Id.*

197. Massad Ayoob, *In the Time of Brady, A Dealer's Responsibilities Continue To Grow; Brady Handgun Prevention Act*, 39 SHOOTING INDUSTRY 18, 18 (1994) ("The good news is that business is up, not just from old customers who see the grim legislative situation as the last chance to stock up on enough guns for themselves and their heirs, but from first-time gun purchasers."); Interview with Harry L. Coe, IV, *supra* note 6.

198. Herz, *supra* note 55, at 151 n.424.

199. *Id.* (citing the price of the 15-round capacity Glock magazine that moved from \$32 at the time of passage to \$100); see generally Joe Poyer, *Bonus Buyers' Guide*, GUNS & AMMO, June 1994, at 76, 78 (discussing gun pricing in general and citing the "Australian-made Lithgow L1A1s [whose] . . . price has more than tripled").

200. Interview with Harry L. Coe, IV, *supra* note 6; Telephone Interview with Wain Roberts, *supra* note 8. Mr. Roberts described the demand surge and price increases following the passage of the Public Safety and Recreational Firearms Use Protection Act. Telephone Interview with Wain Roberts, *supra* note 8. He concurred in the probable likelihood of a resurgence in demand and a resumption of dramatic price increases following the possible passage of third-rung legislation. *Id.* However, Mr. Roberts also described the present market as anemic, given the relative market security induced by the Republican Congress. *Id.* "It seems that if

Second-rung legislation, distinguished by the addition of a firearms sales ban to the manufacturing ban, would allow gun collectors to continue the quiet enjoyment of their hobby's aesthetic aspects but would eliminate all legal possibilities for the collector to enlarge his collection and would also eradicate the profit incentive in all but the black market. Additionally, the gun collector would realize an economic "total loss" from the extinguishment of his gun inventory's fair market value. Should second-rung legislation survive Second and Ninth Amendment challenge, the gun collector must argue that his lost economic value is compensable under the Fifth Amendment.<sup>202</sup>

At the first rung, again assuming that the legislation could survive Second and Ninth Amendment challenges, the gun collector would be left with nothing at all. His weapons would be confiscated—"taken" for public purposes—thereby implicating the Fifth Amendment.<sup>203</sup>

## VI. THE FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution proclaims that "private property [shall not] be taken for public use, without just compensation."<sup>204</sup> This legal maxim (hereinafter referred to as "takings" or "the takings clause") emanates from the natural law philosophy of eminent domain that bestows upon sovereigns the power to take privately owned property under a moral obligation justly to compensate the deprived property owner.<sup>205</sup> The federal government may exercise the power of eminent domain only in conjunction with an exercise of enumerated or implied powers.<sup>206</sup> Individual state governments may act under power of eminent domain for any purpose that is not violative of the Constitution.<sup>207</sup>

Under well-settled takings jurisprudence, when government takes title or actual possession of private property, the former owner must be compensated.<sup>208</sup> This process of taking property by virtue of eminent domain

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[the gun control lobby] wants to reduce the supply of firearms, they would be better served not to pursue gun control legislation and watch the dealers—large and small—go out of business from a lack of demand." *Id.*

201. Interview with Harry L. Coe, IV, *supra* note 6; Telephone Interview with Wain Roberts, *supra* note 8.

202. See *supra* note 183 and accompanying text.

203. See *supra* notes 184-85 and accompanying text.

204. U.S. CONST. amend. V.

205. See NOWAK & ROTUNDA, *supra* note 126, § 11.11 (noting that the Fifth Amendment "was not seen as creating a new legal restriction . . . but rather as recognizing the existence of a principle of natural justice").

206. See *id.*

207. See *id.*

208. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-26 (1982) (finding that a minor occupation is a taking requiring compensation).

is known as condemnation.<sup>209</sup> In an inverse condemnation case, the former private property owner may seek compensation by alleging that the government has taken the subject property without an action in condemnation.<sup>210</sup>

Unlike the federal government, which is limited by enumerated powers, a state government acts in accordance with an "immense mass of legislation," collectively referred to as the state's "police power."<sup>211</sup> The term "police power" refers generally to a government's inherent power to take action in promoting the public health, safety, welfare, or morals.<sup>212</sup> When used in the takings arena, police power generally refers to regulation, not physical possession, of land and property use for the public welfare without the payment of compensation.<sup>213</sup>

Under police power justification, state governments began to impose land and property use restrictions upon private property owners.<sup>214</sup> At times, such restrictions resulted in significant diminution of property values without compensation to property owners.<sup>215</sup> States exploited the police power to reserve property for public use without condemnation proceedings and, more importantly, without the need to assess taxes for compensation of dispossessed property owners.<sup>216</sup>

Responding to perceived property rights encroachment by state governments, property owners complained to the courts that such police power actions were de facto takings.<sup>217</sup> Court decisions attempted to balance the facts on a case-by-case basis seeking to achieve fairness.<sup>218</sup> Depending upon judicial proclivity and perspective of the facts, decisions

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209. BLACK'S LAW DICTIONARY 292 (6th ed. 1990); see also *Department of Transp. v. Lundberg*, 825 P.2d 641, 643 n.1 (Or. 1992).

210. See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (recognizing landowner's right to seek compensation by bringing an action in inverse condemnation of land).

211. See NOWAK & ROTUNDA, *supra* note 126, § 8.2 (noting that the police power is not mentioned in the Constitution but is cited often in constitutional law cases).

212. See *id.* § 11.10.

213. See *id.*

214. See *id.*

215. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (allowing the economic value of a brewery to be destroyed by state legislation prohibiting the production of alcoholic beverages and holding that a "prohibition simply upon the use of property for purposes that are declared . . . to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit").

216. See generally E.F. Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 293 (1986).

217. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (involving owners of subsurface mining rights who complained that a Pennsylvania statute severely restricted the mining of coal).

218. Nicholas V. Morosoff, Note, "'Take' My Beach, Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 837 (1989) (acknowledging that courts have had problems in determining when a regulation goes "'too far'").

were handed down in a patchwork fashion, alternately finding unreasonable confiscation in violation of the Fifth Amendment or justified regulation due to substantial relation to the public welfare.<sup>219</sup>

### A. *Invasion!*

In 1868, the Fourteenth Amendment to the Constitution made the takings clause of the Fifth Amendment applicable to the states.<sup>220</sup> *Pumpelly v. Green Bay Co.*,<sup>221</sup> was progressing through the federal courts at approximately that time. In *Pumpelly*, the plaintiff sought damages for the flooding of 640 acres of land pursuant to the statutorily authorized construction of a dam.<sup>222</sup> The defendant asserted that damages were not due because the land had not been physically “taken or appropriated.”<sup>223</sup> Although the Supreme Court heard this case under the Wisconsin takings clause, it noted that the state’s constitutional provision was “almost identical” to the federal provision and held that a taking could occur by means other than an “absolute conversion” of the property.<sup>224</sup>

### B. *Confronting the Police Power*

Sixteen years after *Pumpelly*, the Court addressed a takings claim brought by a brewery owner following Kansas’s prohibition of the manufacture or sale of alcoholic beverages. In *Mugler v. Kansas*,<sup>225</sup> the Court deliberated the issue of state police power at its zenith. Acting in furtherance of public health, safety, and morality, Kansas had outlawed the manufacture and sale of alcoholic beverages and declared Mugler’s brewery a common nuisance.<sup>226</sup> Kansas deemed Mugler’s economic loss unworthy of compensation, and the Court agreed.<sup>227</sup> The elder Justice Harlan delivered the opinion of the Court:

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his prop-

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219. See NOWAK & ROTUNDA, *supra* note 126, § 11.12(a) (stating that Supreme Court rulings follow no clear theoretical guidelines); see also *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987) (noting the absence of standards for defining “legitimate state interest” or “substantially advance”).

220. See, e.g., *Webb’s Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

221. 80 U.S. 166, 181 (1871) (finding a compensable taking of property where the “real estate is actually invaded by superinduced additions of water, earth, sand, or other material”).

222. *Id.* at 166.

223. *Id.* at 174.

224. *Id.* at 177.

225. 123 U.S. 623, 668-71 (1887) (holding that a statute preventing the injurious use of property does not effect a compensable taking).

226. *Id.* at 669.

227. *Id.*

erty without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.<sup>228</sup>

The Court was seemingly unimpressed by the apparent injustice and dramatic turn of events inflicted upon the business owner. Mugler's business, recently a model of American ingenuity and free enterprise, had been statutorily converted, virtually overnight, to a common nuisance. The Court refused to make any allowance for the fact that Mugler's significant investment had been made at a time when brewing alcoholic beverages was legal in Kansas or for the fact that Mugler's economic loss was being occasioned by a change in organized society's standards of morality. Following *Mugler*, state legislatures received the message that so long as legislative or regulatory actions could be veiled under cloak of concern over the health, morals, or safety of the public, states would not be burdened with the requirement of compensating the affected property owners for economic losses they might sustain.<sup>229</sup>

### C. Going How Far?

In *Pennsylvania Coal Co. v. Mahon*,<sup>230</sup> the Court encountered a Pennsylvania statute forbidding coal mining that could result in subsidence damage to surface improvements.<sup>231</sup> The statute was enacted pursuant to public concern that coal companies had sold lands subject to deed reservations allowing the coal companies to mine regardless of subsidence damage.<sup>232</sup> Justice Holmes observed that property purchasers had realized economic benefit from the reduced land prices that they negotiated with the coal companies in return for the mining rights reservations.<sup>233</sup> These same purchasers subsequently utilized the Pennsylvania statute to effect a

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228. *Id.*

229. See Allison B. Waters, *Takings—City Planners Must Bear the Burden of Rough Proportionality in Exactions and Land Use Regulation*, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), 37 S. TEX. L. REV. 267, 274-75 (1996) (citing *Mugler*, "[T]he Supreme Court carved out the police power exception to the Takings Clause: the government need not compensate landowners for governmental takings of private property which are necessary to protect public health, safety and welfare. The police power exception is still available to [state and local] government . . . ."); J. Kelly Strader, *Taking the Wind Out of the Government's Sails?: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449, 455 (1996) ("The *Mugler* decision and its progeny came to be known for the proposition that the government may regulate a 'harmful' or 'noxious' use of public property without paying just compensation.").

230. 260 U.S. 393 (1922).

231. *Id.* at 393 (noting that protection of private property in the Fifth Amendment presupposes that it is wanted for public use but provides that it shall not be taken for such use without compensation).

232. *Id.* at 395.

233. *Id.* at 415 (asserting that those "so short sighted as to acquire only surface rights without the right of support" should not be afforded judicial relief anymore than they should be allowed to take the right in the first place and refuse to pay for it).

denial of the coal companies' share of the bargain.<sup>234</sup> Noting that the statute had simply gone "too far" in contradiction of contract and property law, the Court refused to convey to the property purchasers "greater rights than they bought."<sup>235</sup>

In *Pennsylvania Coal*, the unsuccessful attempt to invalidate a mining company's property rights by statutory means was arguably motivated by the desire to protect the public health, safety, and welfare.<sup>236</sup> This tactic, which had been deployed successfully to deprive Mugler of the entire value of his business, should have prevailed in *Pennsylvania Coal*, given stare decisis and the *Mugler* decision.<sup>237</sup> However, Justice Holmes was not interested in the *Mugler* argument and did not address that case in *Pennsylvania Coal*. Justice Holmes found greater cause for alarm in the attempted unilateral contract invalidation and the magnitude of the loss in economic value that would have been imposed upon the mining company thereby.<sup>238</sup>

[S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude . . . there must be an exercise of eminent domain and compensation to sustain the act.<sup>239</sup>

Accordingly, *Pennsylvania Coal* stands for the principle that the greater the magnitude of property value diminution, the greater the probability that a taking has occurred.<sup>240</sup> The holding implies the existence of a continuum between the police power and eminent domain.<sup>241</sup> Once a statute or regulation has gone "too far" in depriving the property owner of economic value, the statutory or regulatory impact is deemed a taking.<sup>242</sup>

#### D. Timber!

In 1928, the Court, in *Miller v. Schoene*<sup>243</sup> considered a Virginia statute providing for the compulsory destruction of red cedar trees within two miles of an apple orchard when red cedar trees were found to be the

234. *Id.*

235. *Id.* at 416.

236. *Id.* at 397 (The "plaintiffs in error" claimed that the Kohler Act was enacted "to protect the lives and safety of the public.>").

237. See NOWAK & ROTUNDA, *supra* note 126, § 11.12(a) (noting that Justice Harlan's opinion in *Mugler* limited the recognition of a taking to cases of governmental property appropriation and thereby conflicted with Justice Holmes' concern with fairness and the degree of interference with property as expressed in *Pennsylvania Coal*).

238. 260 U.S. at 413 (questioning "whether the police power [could] be stretched so far").

239. *Id.*

240. *Id.*; see NOWAK & ROTUNDA, *supra* note 126, § 11.12(a).

241. See NOWAK & ROTUNDA, *supra* note 126, § 11.12(a).

242. See 260 U.S. at 415.

243. 276 U.S. 272 (1928).

source of the communicable plant disease called cedar rust.<sup>244</sup> Cedar rust was found to damage apple orchards severely, and destruction of the host cedars was viewed as the only practical means of saving the apple trees.<sup>245</sup> The owner was allowed to recover salvage value from the cut trees, but compensation was not allowed for the destruction-driven reduction in market value of the trees or the grove.<sup>246</sup> The Supreme Court, although finding that the economic value of cedars in Virginia was small compared with that of the apple orchards, found the statute constitutional.<sup>247</sup> The Court noted that “[w]hen forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.”<sup>248</sup>

### E. Mounting Confusion

From 1929 through 1987, the Court’s decisions in takings cases exhibited conflicts and inconsistencies resulting from the irreconcilability of the principles avowed in *Mugler* and *Pennsylvania Coal*.<sup>249</sup> The following cases are reflective of the mounting confusion in takings jurisprudence during the period.<sup>250</sup>

In 1978, the Court, in *Penn Central Transportation Co. v. New York City*,<sup>251</sup> refused to recognize a taking despite an historic landmark preservation law’s denial of millions of dollars’ worth of property improvement rights to Grand Central Station.<sup>252</sup> In 1982, the Court, in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>253</sup> found a taking involving a physical invasion of “one-eighth of a cubic foot of space” and worthy only of nominal damages.<sup>254</sup>

During this period, the Court, in *Andrus v. Allard*,<sup>255</sup> also ruled that owners could not sell Indian artifacts containing the feathers of protected

244. *Id.* at 277-78.

245. *Id.* at 278-79.

246. *Id.* at 277.

247. *Id.* at 279-80.

248. *Id.* at 279.

249. See NOWAK & ROTUNDA, *supra* note 126, § 11.12(a) (acknowledging that the “Court’s decisions in ‘takings’ issues may properly be viewed as a ‘crazy quilt pattern’ of rulings”) (citations omitted).

250. *Id.*

251. 438 U.S. 104 (1978).

252. *Id.* at 152 (Rehnquist, J., dissenting) (quoting *Pennsylvania Coal*, 260 U.S. at 416) (lamenting the majority’s failure to heed Justice Holmes’ warning in *Pennsylvania Coal* that the courts were “‘in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change’”).

253. 458 U.S. 419 (1982).

254. *Id.* at 438 n.16, 443 (Blackmun, J., dissenting) (noting that the property at issue was approximately “36 feet of cable one-half inch in diameter and two 4” x 4” x 4” metal boxes”).

255. 444 U.S. 51 (1979).

birds and that such a prohibition did not constitute a taking.<sup>256</sup> This decision is notable, not only for the rarity of being a Supreme Court Fifth Amendment case concerning personal property and for the unanimous ruling, but also for the radical holding favoring the state police power over property owners' rights.<sup>257</sup>

Speaking for the Court, Justice Brennan addressed the loss of economic value attending the statutory alienation of property owners' rights to dispose of collectible assets by sale:

Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase.

. . . .

The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking . . . .

. . . .

It is, to be sure, undeniable that the regulations here prevent the most profitable use of [the] property. Again, however, that is not dispositive . . . . [A] reduction in the value of property is not necessarily equated with a taking . . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.<sup>258</sup>

#### F. *At the Pinnacle*

Takings jurisprudence achieved the pinnacle of confusion in the Court's 1987 decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.<sup>259</sup> *Keystone* was the reincarnation of *Pennsylvania Coal*.<sup>260</sup> Sixty-five years after Justice Holmes's decision in *Pennsylvania Coal*, the Court was once again faced with a Pennsylvania statute prohibiting coal mining that could result in subsidence damage to surface improvements.<sup>261</sup> As before,

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256. *Id.* at 67-68 (holding that "the simple prohibition of the sale of lawfully acquired property . . . does not effect a taking in violation of the Fifth Amendment").

257. *See id.* at 65-66.

258. *Id.*

259. 480 U.S. 470, 504-05 (1987) (lambasting "petitioners' position that, because they contracted with some previous owners of property generations ago, they have a constitutionally protected legal right to conduct their mining operations in a way that would make a shambles of all those buildings and cemeteries") (citation omitted).

260. *See* NOWAK & ROTUNDA, *supra* note 126, § 11.12(b).

261. *Keystone*, 480 U.S. at 474.

mining companies had sold real property subject to express reservations of the rights to mine the coal providing support to the surface real estate.<sup>262</sup> Unlike the *Pennsylvania Coal* decision, however, the Court handed down a five-to-four decision that no taking had occurred.<sup>263</sup>

Writing for the majority, Justice Stevens declined to overrule *Pennsylvania Coal* and asserted that the facts of *Keystone* were distinguishable.<sup>264</sup> Citing *Mugler*, the very case that the Supreme Court declined to overturn in *Pennsylvania Coal*, Justice Stevens reaffirmed the supremacy of state police power over private property owners' rights.<sup>265</sup> After strong initial support for *Mugler*, Justice Stevens' opinion concluded with an apparent determination that the statute had not gone "too far" in diminishing the economic value of the mining companies' property.<sup>266</sup> In declining to overrule *Pennsylvania Coal* and in permitting the judgment in *Pennsylvania Coal* to resurface in the *Keystone* holding, the conflict between *Mugler* and *Pennsylvania Coal* was allowed to fester.<sup>267</sup>

Furthermore, in light of *Pennsylvania Coal*, the holding in *Keystone* was unjustifiable, irreconcilable, and simply erroneous. As stated by one scholar:

[A]lthough takings doctrine has no answer to the question of whether the [underground coal reserves] in *Pennsylvania Coal* or *Keystone* should be deemed an independent piece of property, usings doctrine strongly favors Justice Holmes's decision. Underground minerals do not have much use as a whole. And to the extent they do, Pennsylvania's anti-subsidence law in both cases effectively severed the support coal—with respect to its potential uses—from the rest of the owner's property. For these reasons, under a jurisprudence of usings, the Court in *Keystone* should have adhered to *Pennsylvania Coal*.<sup>268</sup>

### G. Public Purposes and Permit Requirements

In *Nollan v. California Coastal Commission*,<sup>269</sup> beachfront property owners were granted a rebuilding permit conditioned upon the owners'

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262. *Id.* at 478.

263. *Id.* at 506.

264. *Id.* at 481-89.

265. *Id.* at 488-93.

266. *Id.* at 495-96 (noting that "petitioners have not claimed . . . that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests in western Pennsylvania. Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit."). In this sentence, the author uses the phrase "too far" as a "term of art" and not as an attribution of that phrase to Justice Stevens' *Keystone* opinion.

267. *See generally id.* at 479-506.

268. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1162 (1993).

269. 483 U.S. 825, 841-42 (1987) (ruling that "California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public

granting an easement for lateral public access along the coastline. In yet another five-to-four decision, the Court found that such a permit condition, known as a development exaction, was a taking when the exaction was not reasonably necessary to effect a substantial government purpose or the exaction failed to advance substantially a legitimate state interest.<sup>270</sup>

#### H. Tricks with Mirrors

*Lucas v. South Carolina Coastal Council*<sup>271</sup> provided the Reagan/Bush-appointed Court members with an opportunity to enunciate a conservative standard in “takings” jurisprudence. This 1992 opinion considered the impact of South Carolina’s Beachfront Management Act, which prohibited the construction of permanent structures on two lots owned by Lucas.<sup>272</sup> Despite a finding that the statute deprived Lucas of all economic value in his property, the South Carolina Supreme Court held that the public welfare interest supporting the statute trumped Lucas’s property rights and the takings clause.<sup>273</sup>

In an opinion written by Justice Scalia, the United States Supreme Court disagreed.<sup>274</sup> Despite strong initial support for *Pennsylvania Coal*, Justice Scalia’s opinion concluded with a finding, deferential to *Mugler*, that the statute’s impact would not constitute a taking if the statute were consistent with the background principles of the law of nuisance inherent in Mr. Lucas’s title.<sup>275</sup> The Court expressed doubt that the statute would pass this test and remanded the case for a virtually certain lower court finding that a taking had occurred.<sup>276</sup> Nonetheless, for the second time in five years, a case that promised to settle the conflict created by the *Mugler* and *Pennsylvania Coal* cases failed to meet expectations.<sup>277</sup>

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purpose,’ . . . but if it wants an easement across the Nollans’ property, it must pay for it”) (citation omitted).

270. *Id.* at 834-67; see also Morosoff, *supra* note 218, at 823-24.

271. 112 S. Ct. 2886, 2901 (1992) (emphasizing “that to win its case South Carolina must do more than proffer the legislature’s declaration that the uses Lucas desires are inconsistent with the public interest”); see also Herman Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?*, 37 AM. U. L. REV. 9, 10 (1987) (anticipating the increasing influence of conservative economic and legal thought); Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L.J. 439, 442-47 (1993) (presenting views on Reagan agenda to thwart excessive property regulation at the federal and state levels).

272. 112 S. Ct. at 2889 (acknowledging that “[t]he Beachfront Management Act brought Lucas’s plans to an abrupt end”).

273. 404 S.E.2d 895 (S.C. 1991).

274. *Lucas*, 112 S.Ct. at 2889-902.

275. *Id.* at 2901 (stating that “it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit”).

276. *Id.* at 2901-02.

277. See Sugameli, *supra* note 271, at 441 (predicting that *Lucas* will have “very little practical effect on regulation of real property”).

The *Lucas* opinion is also troublesome because of Justice Scalia's statement, in dicta, regarding personal property. Justice Scalia warned personal property owners "of the possibility that new regulation might even render [personal] property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)."<sup>278</sup> The Court apparently distinguished personal property from real property in an attempt to remedy the conflict between *Lucas's* pro-property stance and the *Andrus* opinion.<sup>279</sup> As one commentator has criticized and certain courts have recognized, "This distinction is not only artificial, it is wrong. Either total destruction of private property is constitutionally permissible or it is not; the Constitution draws no distinction between the natures of the underlying property interests."<sup>280</sup>

## VII. APPLICATION

American gun collectors, represented by Messieurs Coe and Zomber, are justified in their concern for the future of their collections. Anti-gun activists have established a long-term agenda aimed at the elimination of firearms in America<sup>281</sup> and have succeeded, thus far, in the pursuit of their goals through legislative enactments and judicial acquiescence.<sup>282</sup> While gun collectors have been satisfied with the profits achieved under the status quo,<sup>283</sup> Messieurs Coe and Zomber might be dismayed to learn that further movement up the anti-gun forces' statutory ladder is legally viable.

Any second-rung legislative efforts, encompassing a ban on the prospective manufacture and sale of all firearms, would bear striking resemblance to the restrictions successfully imposed upon Indian artifact collec-

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278. 112 S. Ct. at 2899.

279. Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 129-30 (1995) ("Although the reduction in value in *Andrus* was substantial, the Court found that the appellees did retain some ability to derive an economic profit from the artifacts . . . . The [artifacts] were not confiscated by the government, nor were they subjected to restraint or physical invasion.").

280. *Id.*; see also *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1992) ("It is rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation.") (citing *United States v. Cors*, 337 U.S. 325 (1949); see, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984); *Fallini v. United States*, 56 F.3d 1378, 1383 (Fed. Cir. 1995) ("The fact that the water at issue in this case is personalty and the land at issue in the easement case was realty does not alter the nature of the analysis."); *Pittman v. Chicago Board of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (citing *Ruckelshaus*, 467 U.S. at 1003-04) (Property as used in the takings clause "encompasses real property and personal property . . . .").

281. See discussion *supra* part V.

282. See discussion *supra* parts III., IV. While anti-gun forces suffered a minor setback with the failure of *Brady II*, future attempts at passing similar legislation will undoubtedly be made. See *supra* notes 188, 193 and accompanying text.

283. See discussion *supra* part V.

tors by the Eagle Protection Act addressed in *Andrus*.<sup>284</sup> The congruence between any second-rung efforts to eliminate previously legal economic transactions and *Mugler's* conversion of a legal enterprise into a nuisance is unmistakable.<sup>285</sup> There would be a similarity between the second rung's motivation to reduce crime and protect lives and *Keystone's* affirmation of the supremacy of state police power over private property owners' rights.<sup>286</sup> *Nollan's* requirements—that regulations be reasonably necessary to effect a substantial government purpose or substantially advance a legitimate state interest—could easily be drafted into third-rung legislation.<sup>287</sup> Furthermore, third-rung legislation would find support in *Lucas's* personal property denigration.<sup>288</sup> Accordingly, legislative and judicial precedent exists for the noncompensable confiscation of all but the possessory value of American firearms collections.<sup>289</sup> First-rung legislation would embrace the outright confiscation of firearms.<sup>290</sup> While such legislation would confront the Fifth Amendment, gun collectors could not be assured of the recovery of their investments, since no Supreme Court decision addresses a similar issue.<sup>291</sup>

Anti-gun activists would undoubtedly argue that *Mugler*<sup>292</sup> and *Schoene*<sup>293</sup> support the proposition that the confiscation of an entire class of property recognized by the government as noxious to the public interest does not impose a duty to compensate.<sup>294</sup> However, such precedent does not indicate that the Court has gone, or is prepared to go, that far. *Mugler*, which addressed the loss of economic value resulting from a previously legitimate activity's being reclassified as a noxious use, is distinguishable from the first rung's confiscation of firearms.<sup>295</sup> *Mugler's* brewery was not physically taken.<sup>296</sup> Neither were the apple trees in *Schoene*.<sup>297</sup> While both *Mugler* and *Schoene* legitimize governmental conversion of historically significant business activities from legal to noxious, neither case resulted in the property's being physically taken from the owners.<sup>298</sup> On the other hand, *Pennsylvania Coal* stands for the proposi-

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284. See discussion *supra* part VI.E.

285. See discussion *supra* part VI.B.

286. See discussion *supra* part VI.F.

287. See discussion *supra* part VI.G.

288. See discussion *supra* part VI.H.

289. See discussion *supra* part VI.

290. See discussion *supra* part V.

291. See discussion *supra* part VI.

292. 123 U.S. 623 (1887).

293. 276 U.S. 272 (1928).

294. See O'Hare & Pedreira, *supra* note 19, at 200-01 (citing *Mugler* and *Schoene* to support the proposition that "a state has no duty to compensate a property owner if an entire class of property is destroyed for the public good rather than taken for public use").

295. See discussion *supra* part VI.

296. See discussion *supra* part VI.

297. See discussion *supra* part VI.D.

298. See discussion *supra* part VI.

tion that there are implied limitations of the police power.<sup>299</sup> Should first-rung legislation be enacted and survive Second and Ninth Amendment challenges, the Court could well find either a noncompensable noxious use or a police power application that has gone too far in favor of the public interest.<sup>300</sup> If the Court takes the latter position, then the “absolute conversion” principle exposed by the Court in *Pumpelly* would dictate compensation to the aggrieved gun collector.<sup>301</sup>

Should the Supreme Court hold that first-rung legislation requires compensation, gun collectors may be tempted to conclude that their hobbies would be preserved due to the massive economic ramifications attending such a holding. However, gun collectors must refrain from reaching this conclusion because the financial consequences of a legal confiscation would not be sufficiently severe. The Bureau of Alcohol, Tobacco, and Firearms estimates that there is a circulation of 222 million firearms within an American population of 260 million.<sup>302</sup> Conservatively appraised at an average of \$300 per firearm of net salvage value, the total fair market value attributable to the firearms in circulation is estimated to be \$66.6 billion.<sup>303</sup> However, when compared to current federal spending of \$1.5 trillion per annum,<sup>304</sup> the fair market value of American firearms represents less than five percent of the federal budget. Considering that this also represents between one-fifth and one-third of the projected savings and loan bailout cost,<sup>305</sup> Messieurs Coe and Zomber should be concerned about the future of their hobbies.

Equally troublesome to gun collectors is a type of anti-gun statute herein defined as a “practical confiscation.” Practical confiscation laws do not require a gun owner to surrender offending firearms to the government. Rather, surrender of the firearms is one of a limited number of statutory options available to enable compliance with gun-restrictive legis-

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299. See discussion *supra* part VI.C.; see also *supra* notes 239-42 and accompanying text.

300. See O'Hare & Pedreira, *supra* note 19, at 200-01 (arguing that the Court should find a noncompensable taking in the case of fourth-rung legislation). *But cf.* Mark Udulutch, Note, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19, 39-41 (1989) (concluding that a federal government-imposed firearms ban would require compensation).

301. See discussion *supra* part VI.A.

302. Robert Davis & Haya El Nasser, *New Ammo for Gun Debate*, USA TODAY, Dec. 28, 1994, at A1.

303. Telephone Interview with Wain Roberts, *supra* note 8 (stating that \$300 would be a reasonable valuation for the average American firearm in circulation). To place this figure in perspective, the fair market values of the two largest mergers in American history were \$25 billion for the RJR-Nabisco combination and \$19 billion for the Walt Disney-Capital Cities/ABC transaction. Paul Farhi, *Walt Disney Co. To Buy Capital Cities/ABC; \$19 Billion Merger Would Create a Giant in Movies, Television*, WASH. POST, Aug. 1, 1995, at A1.

304. 142 CONG. REC. S4161 (daily ed. Apr. 25, 1996) (statement of Sen. Moseley-Braun).

305. Amy Waldman, *Move Over, Charles Keating. Causes of the Savings and Loan Scandal*, 27 WASH. MONTHLY 26 (1995) (estimating the cost of the savings and loan bailout at a minimum of \$110 billion).

lation.<sup>306</sup> Other options typically allow owners voluntarily to sell their firearms or retain ownership in another jurisdiction.<sup>307</sup> For example, in *Fesjian v. Jefferson*,<sup>308</sup> the District of Columbia Court of Appeals denied a Fifth Amendment challenge to a practical confiscation statute that required the owner of a firearm not satisfying the statute's registration criteria to "(1) 'peaceably surrender' the firearm to the chief of police, (2) 'lawfully remove' the firearm from the District for as long as he retains an interest in the firearm, or (3) 'lawfully dispose' of his interest in the firearm."<sup>309</sup> Taking *Fesjian* to the logical extreme, Congress could enact practical confiscation legislation requiring Americans to surrender firearms without compensation so long as citizens are allowed to sell or physically transfer their firearms overseas. Denying personal satisfaction to those financially or otherwise unable to travel overseas, such options would effectively disarm the American gun collector.

#### VIII. STRICT CONSTRUCTION AND PLAIN MEANING

The Second Amendment has been the subject of much debate.<sup>310</sup> Legislatures, the judiciary, and academics have argued whether the right to bear arms is limited by a duty of service in the militia.<sup>311</sup> Anti-gun forces have been quick to apply a modern definition of the word "militia" to limit the right to bear arms to those persons in active military service.<sup>312</sup> While they have propounded the militia/right to arms nexus in both Congress and the courts,<sup>313</sup> their arguments are ignorant and defective given the historical perspective.<sup>314</sup>

306. See, e.g., D.C. CODE 1981, § 6-2320(c) (1995).

307. See, e.g., *id.*

308. 399 A.2d 861 (D.C. 1979).

309. *Id.* at 865 (citing D.C. CODE § 6-1820(c) (Supp. 1978)); see also *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1183-84 (N.D. Ill. 1981) (declining to find a taking when "gun owners who wish to may sell or otherwise dispose of their handguns outside" the town's lawful boundaries), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

310. See, e.g., *Vandercoy*, *supra* note 19; *Levinson*, *supra* note 43; *Herz*, *supra* note 55; *Aborn*, *supra* note 143.

311. Van Alstyne discounts the argument that the right to bear arms is limited by a duty of service in the militia:

In recent years it has been suggested that the Second Amendment protects the "collective" right of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.

William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1243 n.19 (1994) (quoting STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 83 (1984)); see also discussion *supra* part III.B.

312. See *Herz*, *supra* note 55, at 64.

313. See discussion *supra* parts III., IV.

314. See discussion *supra* part II.

Despite an explicit guarantee of rights retained by the American people, the Ninth Amendment has been ignored by Congress, the judiciary, and academics. John E. Nowak and Ronald D. Rotunda, in their comprehensive constitutional law “hornbook,” devoted only a footnote to the subject.<sup>315</sup> Despite the summary treatment they accord, the immense significance of the Ninth Amendment to the right to bear arms radiates from this literary atom.<sup>316</sup>

Although the Ninth Amendment has not been used as the basis for defining rights of individuals and invalidating either federal or state laws, it has been mentioned as a possible basis for justifying judicial protection of rights not explicitly listed in the Constitution or other Amendments. References to the Amendment in the Supreme Court appear to be only in dicta or in opinions of individual Justices.<sup>317</sup>

Takings jurisprudence is a massive body of conflicting law.<sup>318</sup> There is sufficient precedent to allow virtually any case to be decided as a taking or vice versa.<sup>319</sup>

As explained above, the American gun collector is precariously protected under the concepts and applications of modern constitutional law. The Second Amendment’s purpose is perverted by wordsmithing. The Fifth Amendment is convoluted by conflicting judicial rulings. The Ninth Amendment is ignored as inconsequential. When a statute generates conflicting court decisions due to ambiguity, change in circumstances, or misinterpretation, the responsible legislative body often reconvenes to clarify the intent and redraft the statute. However, given the protracted constitutional amendment process, a redrafting of the Second, Fifth, and Ninth Amendments is unlikely. Thankfully, constitutional redrafting is not only improbable but also unnecessary.

Strict construction of the Second, Fifth, and Ninth Amendments is a workable and practical alternative to constitutional redrafting. Moreover, strict construction of the Constitution is a stated requirement. According to Chief Justice John Marshall, “The words of the [C]onstitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction . . . .”<sup>320</sup>

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315. NOWAK & ROTUNDA, *supra* note 126, § 11.7, at n.10.

316. See Discussion *supra* part II.C.

317. NOWAK & ROTUNDA, *supra* note 126, § 11.7, at n.10 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 n.15 (1980) (plurality opinion by Burger, C.J.) (justifying a judicial role in defining “fundamental rights not expressly guaranteed” and stating: “Madison’s efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.”)).

318. See discussion *supra* parts VI., VII.

319. See discussion *supra* parts VI., VII.

320. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 198 (1819) (holding that the State of New York could not release a debtor from his contractual obligations).

The plain meaning of the Second Amendment, when taken in historical context, is undeniable. The term “militia” describes the American male populace.<sup>321</sup> In 1791, when the Bill of Rights was ratified, the availability of arms to the general able male population for service in the militia was viewed as necessary to preserve a free state.<sup>322</sup> Consequently, “the right of the people to keep and bear [a]rms[] shall not be infringed.”<sup>323</sup>

The Ninth Amendment declares that “[t]he enumeration in the Constitution, of certain rights,” may not serve to eliminate other rights enjoyed by the American populace.<sup>324</sup> Since American citizens clearly enjoyed the right to keep and bear arms in 1791, the right to bear arms, from an historical perspective, is not only fundamental but absolute.<sup>325</sup> Thus, regardless of the Second Amendment’s reference to the “militia,” the Constitution reflects American history and guarantees the right to arms through the Ninth Amendment.

Similarly, the Fifth Amendment’s requirement that “private property [not] be taken for public use, without just compensation” is readily apparent.<sup>326</sup> “[P]rivate property” refers to property that is owned by individuals and nongovernmental entities.<sup>327</sup> “[T]aken for public use” means the removal of any property right from the control of the private property owner for the benefit of the general public.<sup>328</sup> “[W]ithout just compensation” indicates that adequate value attributed to any rights lost by private property owners should be paid by the applicable government body representing the general public in the case at hand.<sup>329</sup>

What gun collectors require of the American legal system is sufficient judicial courage for the Court to found the law upon the simple definitions discussed above. Those who would prefer other alternatives would be wise to consider the following words of Justice Sutherland:

321. See *Presser v. Illinois*, 116 U.S. 252, 265 (1886); see also discussion *supra* part II.

322. U.S. CONST. amend. II; see also discussion *supra* part II.

323. U.S. CONST. amend. II.

324. U.S. CONST. amend. IX.

325. See *supra* note 41 and accompanying text.

326. U.S. CONST. amend. V.

327. BLACK’S, *supra* note 209, at 1195 (defining “[p]rivate as [a]ffecting or belonging to private individuals, as distinct from the public generally”); *id.* at 1217 (defining “[p]rivate property” thus: “[a]s protected from being taken for public uses, is such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition”); *cf. id.* (defining “[p]ublic property” as “those things . . . considered as being owned by ‘the public,’ the entire state or community, and not restricted to the dominion of a private person”); see generally Jeremy Paul, *Can Rights Move Left?*, 88 MICH. L. REV. 1622 (1990) (reviewing JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988)) (offering a discussion of the American private property system and private property rights).

328. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

329. BLACK’S, *supra* note 209, at 1195 (defining “[j]ust compensation” as “compensation which is fair to both the owner and the public”); see also *Kaiser Aetna*, 444 U.S. at 176 (requiring governmental payment for the taking of a “stick [] in the bundle of rights that are commonly characterized as property”).

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution. Judge Cooley, in the first volume of his *Constitutional Limitations* . . . very clearly pointed out that much of the benefit expected from written Constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. He pointed out that the common law, unlike a Constitution, was subject to modification by public sentiment and action which the courts might recognize; but that “a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail.”<sup>330</sup>

Perhaps Justice Frankfurter most succinctly summarized the subject of constitutional interpretation when he quoted Chief Justice John Marshall: “Precisely because ‘it is a constitution we are expounding,’ . . . we ought not to take liberties with it.”<sup>331</sup>

#### IX. CONCLUSION

Despite the hope that Congress would act to protect individual rights and liberties, the Framers of the Constitution intended Congress to function in a legislative capacity responsive to popular majority views in accordance with the concept of a democratic form of government.<sup>332</sup> The Framers realized that popular sentiment might operate to limit or eliminate individual freedoms to benefit the majority at the expense of the minority. Consequently, the Framers understood that American fundamental liberties embodied in the Bill of Rights had to be protected for the benefit of all Americans regardless of the majority view.<sup>333</sup> To this end, the

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330. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) (Sutherland, Van Devanter, McReynolds & Butler, JJ., dissenting).

331. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 647 (1949) (Frankfurter, J., dissenting and quoting Marshall, C.J.).

332. U.S. CONST. art. I.

333. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1210 (1987) (Interpretivism’s intellectual attractiveness derives from two closely related sources. The first is the assumption that the Constitution creates a predominantly democratic and majoritarian structure of government. With democracy representing the norm, interpretivists argue that society has consented to be bound by decisions of the Supreme Court, a nondemocratic institution, “only ‘within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.’”) (quoting Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971)).

Framers empowered the Supreme Court with the ability to adjudicate the constitutionality of legislative enactments.<sup>334</sup>

At present, the popular majority undoubtedly favors increased firearm restrictions.<sup>335</sup> Given our democratic form of government, Congress cannot be blamed for responding favorably to popular demands by enacting anti-gun legislation. Such congressional actions, while offensive to the Bill of Rights, are in keeping with Congress's constitutional role. On the other hand, the Framers relied upon the United States Supreme Court to resist political temptation and to look beyond the popular will to protect the Constitution.<sup>336</sup> To succeed in this historic role, the Court must defend the Bill of Rights in the face of popular sentiment. The Court must not falter lest the American populace be faced with the continued erosion of fundamental liberties and the conversion of "[g]overnment of the people, by the people, and for the people' into a government over the people."<sup>337</sup> "The [C]onstitution requires more than that."<sup>338</sup>

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334. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); NOWAK & ROTUNDA, *supra* note 126, § 1.3.

335. See Aborn, *supra* note 143, at 431 (citing a CNN/USA Today/Gallup poll of Dec. 17, 1993 and a LH Research, Inc. poll of Apr. 1, 1993); see also Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 AM. U.L. REV. 53, 54 (1992) ("Despite all the rhetoric from the gun lobby, the fact is that the vast majority of law enforcement officials and most of the American public supports [the Brady] bill.") (citation omitted).

336. THE FEDERALIST No. 78, at 465 (A. Hamilton) (Clinton Rossiter ed., 1961) (calling on the judiciary to defend the Constitution against the "encroachments and oppressions of the representative body").

337. *Konigsberg v. State Bar of California*, 366 U.S. 36, 68 (1961) (Black, J., dissenting).

338. *Dolan v. City of Tigard*, 854 P.2d 437, 447 (Or. 1993) (Peterson, J., dissenting), *rev'd*, 114 S. Ct. 2309 (1994).