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**Glenn Harlan Reynolds**

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## FOREWORD: THE SECOND AMENDMENT AS ORDINARY CONSTITUTIONAL LAW

GLENN HARLAN REYNOLDS\*

Just about twenty years ago, the *Tennessee Law Review* put together a symposium issue on the Second Amendment. For its time, that was a bold step: Second Amendment scholarship had been almost entirely nonexistent for decades, and what little there was (mostly written by lobbyists for gun-control groups) treated the matter as open-and-shut. The Second Amendment, we were told, protected only the right of state militias (or as former Chief Justice Warren Burger characterized them, “state armies”)<sup>1</sup> to possess guns. Lower court opinions were largely in agreement,<sup>2</sup> and the political discussion, such as it was, generally held that anyone who believed that the Second Amendment might embody a judicially enforceable right for ordinary citizens to possess guns was a shill—probably paid—for the NRA.<sup>3</sup>

Once published, that symposium issue achieved great currency—it is surely one of the few, if not the only, law review symposia to be reviewed in the *New York Review of Books*—and, over time, things have changed. Since the Supreme Court’s decisions in *District of Columbia v. Heller*<sup>4</sup> and *McDonald v. Chicago*,<sup>5</sup> the Second Amendment has gone from something outside the mainstream of constitutional discussion—in Sandy Levinson’s characterization, the “embarrassing” Second Amendment<sup>6</sup>—to something very different. Now that the Supreme Court has nailed down the old question of whether the Second Amendment protected any sort of right at all, the questions that arise seem a lot like those addressed by courts in other constitutional contexts.

In this Foreword, I will briefly survey the history of the Second Amendment debate, culminating in the Supreme Court’s decisions in

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1. See *infra* note 16.

2. See *infra* pp. 5-6.

3. Indeed, when interviewed by a reporter for the *Chronicle of Higher Education* on the new Second Amendment scholarship after the *Tennessee Law Review* symposium was published, I was given the third degree about whether I had received money from the NRA or other, presumably nefarious, gun-rights organizations. Alas, no.

4. 554 U.S. 570 (2008).

5. 130 S. Ct. 3020 (2010).

6. See *infra* pp. 6-7.

*Heller* and *McDonald*. I will then discuss a few subjects likely to be of future importance. I will then conclude with a few thoughts on how this issue relates to other constitutional debates.

#### A BRIEF HISTORY OF THE SECOND AMENDMENT

Until well into the 20th Century, the Second Amendment received little attention. Gun control at the federal level was almost nonexistent prior to the National Firearms Act's passage in 1934, and with the doctrine of incorporation not developed until mid-century, the Second Amendment did not come into play with regard to what state gun-control laws—mostly aimed at disarming freed blacks, immigrants, and other classes held in low regard<sup>7</sup>—existed prior to that. This began to change as the federal government began to limit civilian gun ownership and as the Supreme Court began to apply federal constitutional protections as a limit on action by states.

The Supreme Court's only significant opinion of the 20th Century, *United States v. Miller*,<sup>8</sup> shed little light on this issue. In *Miller*, the government had appealed the dismissal of an indictment against two men charged with possessing a sawed-off shotgun in violation of the National Firearms Act of 1934.<sup>9</sup> The United States District Court for the Western District of Arkansas had quashed the indictment, finding that the Act was invalid because it violated the Second Amendment to the Constitution.<sup>10</sup> The indictment quashed, Miller and his co-defendant went their own ways, but the government appealed directly to the United States Supreme Court.

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7. As Dave Kopel notes, gun-control efforts were based on fear of African-Americans in the South and of Bolsheviks in the North. See David B. Kopel, *The Great Gun Control War Of The Twentieth Century—And Its Lessons for Gun Laws Today*, 39 *FORDHAM URB. L.J.* 1529-30 (2012); see also Robert J. Cottrol & Raymond T. Diamond, "Never Intended to be Applied to the White Population": *Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 *CHI.-KENT L. REV.* 1307-35 (1995) (exploring the connections between racial conflict in American history and the evolution of the notion of the right to bear arms in American constitutionalism); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 *KAN. J.L. & PUB. POL'Y* 17-25 (1994-1995) (providing compelling evidence that racism underlined gun control laws throughout America's history).

8. 307 U.S. 174 (1939). Much of this discussion is drawn from Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply To David Yassky*, 65 *LAW & CONTEMP. PROBS.* 113 (2002).

9. *Miller*, 307 U.S. at 175, 177 (citing I.R.C. § 1132d (1934)).

10. *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939), *rev'd*, 307 U.S. 174 (1939).

The government was the only party to file a brief and was the sole party at oral argument.

The Supreme Court reversed the District Court's decision,<sup>11</sup> but without making any sweeping statements regarding the reach of the Second Amendment. After some general discussion regarding the historical character of the militia and the right to bear arms that were part of "the ordinary military equipment," the Court simply held that:

In the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>12</sup>

Presumably, had Miller been present to make such an argument, the Court might have found otherwise. The Court rejected a "collective rights" argument made by the United States Government in its brief, to the effect that only an organized militia could assert a right to arms under the Second Amendment.<sup>13</sup>

Nonetheless, while the Supreme Court heard no more cases on the Second Amendment, the lower courts engaged in what amounted to a game of judicial "telephone," responding to Second Amendment claims (admittedly, often by felons and other unsavory types) with opinions that increasingly adopted the very "collective right" position that the Supreme Court had rejected in *Miller*.<sup>14</sup> By the latter part of the twentieth century, the consensus in the journalistic and legal communities was that the Second Amendment, if it did anything at all, protected only a right of states to have militias—generally characterized as the modern-day National Guard. As former Chief Justice Warren Burger opined, it was all about "state armies":

[O]ne of the frauds—and I use that term advisedly—on the American people, has been the campaign to mislead the public about the Second Amendment. The Second Amendment doesn't guarantee the right to have firearms at

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11. *Miller*, 307 U.S. at 183.

12. *Id.* at 178 (citation omitted).

13. Brief for the United States at 4-5, *Miller*, 307 U.S. 174 (No. 696).

14. For a detailed discussion of this process, see Brannon P. Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of United States v. Miller And The Second Amendment*, 26 CUMB. L. REV. 961 (1996).

all. . . [The Framers] wanted the Bill of Rights to make sure that there was no standing army in this country, but that there would be state armies.<sup>15</sup>

Burger offered no evidence for this proposition, which might have been more troublesome than imagined if actually put into practice,<sup>16</sup> but gun-control supporters did produce some law review articles making a similar argument.<sup>17</sup> But scholarship regarding the Second Amendment began to heat up after Sanford Levinson published a piece in the *Yale Law Journal* entitled *The Embarrassing Second Amendment*.<sup>18</sup> Levinson noted the shortage of Second Amendment scholarship and observed:

I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even “winning,” interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.<sup>19</sup>

The publication of Levinson’s essay, both because of its eminent source and because of its prominent placement, led to a significant increase in scholarship on the Second Amendment, a sort of scholarly “land rush” in which a previously off-limits tract of the Bill of Rights was suddenly open to development.<sup>20</sup>

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15. *Press Conference Concerning the Introduction of the Public Health and Safety Act of 1992*, June 26, 1992, available in LexisNexis Library, ARCNWS file.

16. *See generally* Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States’ Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995) (exploring implications of the “state armies” approach).

17. *See, e.g.*, Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 39-40 (1989).

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

19. *Id.* at 642 (footnote omitted).

20. *See, e.g.*, William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992)

By the mid-1990s, it was possible to speak of a “standard model” of Second Amendment interpretation: a rather sizable body of scholarship that agreed, in a broad sense, on what questions were important and on the general nature of their answers. This scholarship recognized the Second Amendment as protecting an individual right to arms, not just “state armies”—a right that was, in fact, not at all dependent on the individual’s membership in any organized body or militia.<sup>21</sup>

But although this scholarship continued to grow and broaden, responding to criticism and fleshing out doctrine, it was some time later—all the way to the twenty-first century, in fact—before the Supreme Court revisited the Second Amendment. When it did, however, it once again rejected the “collective rights”-“state armies” interpretation, despite its currency among the commentariat, and instead found an individual right to arms under the Second Amendment.<sup>22</sup>

The Supreme Court’s ruling in *District of Columbia v. Heller*<sup>23</sup> moved the Second Amendment from the domain of scholarly discussion to that of judicial determination. The most interesting thing about *Heller* is that not a single Justice endorsed the militia-centric, “collective rights” theory that had been so dominant in popular discussion (or, at least, *bien-pensant* discussion) for several decades. Rather, all Justices agreed that the Second Amendment embodies an individual right, though the majority and the dissent differed significantly on the nature and scope of that right.<sup>24</sup>

The guarantee of “the individual right to possess and carry weapons in case of confrontation” was at the center of the majority’s reading.<sup>25</sup> The Second Amendment, in this reading, is primarily about self-defense.<sup>26</sup> However, *Heller* left many details unanswered,

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21. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464-488 (1995) (describing “standard model” interpretation).

22. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008).

23. *Id.* at 635.

24. For a discussion of this interesting result, see Brannon P. Denning & Glenn H. Reynolds, *Five Takes On District of Columbia v. Heller*, 69 OHIO ST. L.J. 671, 673-74 (2008).

25. *Heller*, 554 U.S. at 592.

26. To this extent, the majority in *Heller* departed somewhat from Framing-era thought regarding the primacy of resisting tyranny; though as Don Kates has noted, that distinction seems much sharper to moderns than it did to the Framing generation, which treated tyrants and robbers as equally outside the law. See Kates, *The Second Amendment and the Ideology of Self-Protection*, *supra* note 20 (recognizing that the Framers saw resisting tyranny and resisting crime as similar exercises in responding to lawlessness).

and the right to “carry weapons in case of confrontation” was somewhat undercut by a safe harbor provision allowing many traditional regulations of gun-ownership and gun-carrying to remain.<sup>27</sup> In regard to this, the Court stated:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>28</sup>

This sentence alone guaranteed much work for lower courts in hashing out the boundaries of this new right. The other big unanswered question from *Heller* was, of course, incorporation against the states. Arising in the District of Columbia, the *Heller* case implicated the Second Amendment directly. That meant that the question of incorporation against the states remained to be addressed.

The incorporation question was addressed more swiftly than many might have expected in *McDonald v. Chicago*.<sup>29</sup> *McDonald* involved a challenge to Chicago’s draconian gun control law—one almost as strict as the District of Columbia’s. The case was argued largely on privileges or immunities grounds, in an effort (backed by many generally liberal legal scholars who were not particularly interested in the gun issue itself) to revisit the *Slaughter-house Cases* and revive that clause of the Fourteenth Amendment.<sup>30</sup> Though only Justice Thomas endorsed that effort,<sup>31</sup> it may nonetheless have been smart lawyering, as it made incorporation of the Second Amendment against the states via the traditional substantive due process route look modest by comparison. Thomas’s concurrence was also notable, however, for its extensive look at the racial roots of gun control and at the Fourteenth Amendment’s role in protecting arms possession:

The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence. As Eli Cooper, one target of such violence, is said to have

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27. *Heller*, 554 U.S. at 592.

28. *Id.* at 626-27.

29. 130 S. Ct. 3020 (2010).

30. See Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 288-94 (2011) (describing this effort and its reception by the Court).

31. *McDonald*, 130 S. Ct. at 3059 (Thomas, J., concurring).



explained, [t]he Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob. . . . One man recalled the night during his childhood when his father stood armed at a jail until morning to ward off lynchers. The experience left him with a sense, not of powerlessness, but of the possibilities of salvation that came from standing up to intimidation.<sup>32</sup>

As noted earlier, scholars such as Robert Cottrol and Ray Diamond had been addressing this phenomenon for years, noting the value of firearms in resisting lynchings and in protecting civil rights workers during the 1950s and 1960s—as well as the extensive history of gun-control laws being aimed at African Americans and other minorities. Their work is erudite, extensively documented, and hardly disputed by other scholars, but it has received comparatively little attention. Post-*McDonald*, however, this history has achieved greater attention and may receive more in the future. As courts evaluate various cities' gun-control laws, the racial history of gun control may become more salient. We are often told that gun control is more appropriate for “urban” areas than for rural ones, but one key difference between rural and urban areas is that the latter are more heavily populated by African Americans and other minorities. If—as is often the case in today's discourse—“urban” is a synonym for “black,”<sup>33</sup> then what does it mean to say that gun control is more appropriate in urban settings?

At any rate, *McDonald's* incorporation of the Second Amendment against the states, albeit by traditional methods, guaranteed that more cases would be brought and that more cases would be heard by lower courts. And although there was reason to wonder if lower courts would be particularly enthusiastic about enforcing the Second Amendment, in fact—as Brannon Denning's contribution to this Symposium notes—they have done a lot of work.

#### ORDINARY CONSTITUTIONAL LAW

The result is that the Second Amendment is now ordinary constitutional law. It is no longer *sui generis*, tied to the nearly-defunct institution of the militia, or somehow not enforceable in court. It is, like other parts of the Bill of Rights, a source of established protections for the benefit of individuals, and it is

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32. *Id.* at 3088 (citations omitted) (internal quotation marks omitted).

33. “The term is exploited by corporations such as MTV to refer to black music/culture, without mentioning race.” *Urban*, URBAN DICTIONARY (June 9, 2005), <http://www.urbandictionary.com/define.php?term=urban>.

enforceable in court by those individuals against both the states and the federal government.

By “ordinary constitutional law,” I do not mean that everything is settled or that the courts have gotten, or will get, everything right. In fact, a survey of cases involving other Bill of Rights provisions will make abundantly clear that such a situation would be anything *but* ordinary. However, the days of the Second Amendment being effectively read out of the Constitution by strained readings that robbed it of all effect are now over.

One possible consequence of this normalization is that a wide variety of statutes and regulations—complex and draconian rules intended to de-normalize gun ownership and to subject gun owners to *in terrorem* effects that would discourage having or keeping firearms—must now come under Second Amendment scrutiny as well. If the right to own a gun is protected by the Constitution, then efforts to treat it as, in effect, a deviant act must be disfavored, and those *in terrorem* aspects now look more like efforts to chill the exercise of a protected right.<sup>34</sup>

Finally, I wonder if the primacy of individual self-defense under *Heller* and *McDonald* might not have implications for other areas of the law. At the core of *Heller* and *McDonald* is a constitutionalization of the right of self-defense. The right of individuals to protect themselves against violence is so important that it is, in many ways, beyond the power of the state to regulate. Though the state might prefer to sacrifice citizens’ lives and safety in order to limit gun ownership, such a sacrifice is not permitted. This indicates that individual citizens’ lives and autonomy are themselves, in some important aspects, beyond the power of the state to sacrifice. Does that have implications for other, unenumerated rights? It just might.<sup>35</sup>

The normalization of the Second Amendment is one of the great constitutional revolutions of the twenty-first century, taking a part of the Bill of Rights that had previously lain fallow and converting it into working constitutional law. The process of marking the metes and bounds and cultivating what lies within will take many more years and decisions. But in time, things are likely to approach a fairly steady state, as they have in most other areas of constitutional law.

Beyond these specifics, another consequence—happily for those of us in the business of writing for law reviews, at least—is that

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34. See generally Glenn Harlan Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CAL. L. REV. 247 (2012) (discussing some penumbral aspects of the Second Amendment as it may be applied in the future).

35. See *id.* at 255-59.

there will be more cases to discuss,<sup>36</sup> as the courts go about the business of settling and developing the new constitutional real estate opened up by the normalization of the Second Amendment. As this Symposium indicates, that process is well underway.

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36. One interesting area, so far not significantly addressed by the courts, has to do with non-firearm aspects of the Second Amendment. The right to bear arms, after all, is not limited to firearms. *See, e.g.*, David B. Kopel, Clayton E. Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167, 168 (2013); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Right To Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 202 (2009).