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SO WHAT? THE INDIVIDUAL RIGHT TO THE OWNERSHIP OF FIREARMS UNDER THE NINTH AMENDMENT

ROBERT E. BODINE*

INTRODUCTION

For the centuries preceding the drafting of the United States Constitution, political philosophy began to endorse natural rights and forge a liberal tradition. Such philosophy resulted in political revolutions in the United States and France and influenced how new leaders of those countries shaped their political systems. One of the rights expressly protected by both federal and state constitutions and laws in the early United States was the right to keep and bear arms. That right was based on the “People’s” right to be free from tyranny, either foreign or domestic. Two schools of thought surfaced regarding the precise scope of that right. On the one hand, some believe that the means employed to provide for such freedom was the recognition of an individual right to keep and bear arms. On the other hand, some believe that the right, being collective in nature, was secured only through state regulation.

The Supreme Court of the United States has provided little direct guidance on this right, and what guidance the Court has provided is no less than sixty years old. However, even assuming that the right expressed in the Second Amendment of the United States Constitution is collective in nature, the issue of whether there exists an individual right to keep and bear arms still remains unsettled. Many rights guaranteed by the federal and state constitutions are not expressly listed within the documents but instead fall under what amount to “catch-all” provisions. For the U.S. Constitution, that provision is the Ninth Amendment, which provides that the express listing of certain rights in the constitution should not be used as a means to deny to the people other rights retained by them.

* J.D., Chicago-Kent College of Law, Illinois Institute of Technology, 2000; B.S., Physics, University of Maryland, 1992. The author would like to thank Elizabeth Falter for her inspiration and support. This Note is dedicated to the memory of Bruce Albert Bodine, 1938–1998.
Court has developed three methods for inference of an unenumerated right under the Constitution: by an appeal to autonomy and liberty, by an appeal to tradition, or by inference from other provisions of the Constitution. One may devise an individual right to possession of firearms under the Ninth Amendment using any one of those three methods.¹

Part I of this Note briefly discusses the views of (1) John Locke, the single greatest influence on the relevant views of the Founders, and (2) James Madison and Alexander Hamilton, the Federalists who drafted the United States Constitution, and (3) the Antifederalists, the group that opposed ratification of the Constitution. Part II provides a brief analysis of the relevant provisions of the Constitution. Part III examines the case law surrounding (1) the individual right firearms possession and (2) the inference of unenumerated rights from the Constitution. Part IV implements the techniques employed by the Supreme Court to deduce that there is indeed a fundamental right to individual ownership of firearms whether or not they have application to the security of freedom. Part V revisits the relevant Supreme Court precedent to demonstrate its consistency with the notion of a Ninth Amendment, individual right to keep and bear arms.

I. LEGAL THEORISTS AND THEIR VIEWS ON REVOLUTION/REBELLION

To understand the provisions of the Constitution, one must understand what its drafters sought to protect. This is accomplished by examining the source of the drafters' inspiration, the views of the drafters' themselves, the substance of the arguments of the drafters' opponents, and how precisely that inspiration and debate took form in the Constitution.

¹. The idea of an individual right to the possession of firearms under the Ninth Amendment is not unique. See, e.g., Nicholas J. Johnson, Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment, 24 RUTGERS L.J. 1 (1992); Roland Docal, The Second, Fifth, and Ninth Amendments—The Precarious Protectors of the American Gun Collector, 23 FLA. ST. U. L. REV. 1101 (1996). The approach of this Note differs from the prior work in that it does not address the author's opinion on how one should interpret the Ninth Amendment, but rather the United States Supreme Court's choice on how to do so. The author then shows that the Court's approach logically supports the adoption of a fundamental, individual right to keep and bear arms under the Ninth Amendment.
A. John Locke (1632–1704)

John Locke represented one of the strongest influences on the framers, who subscribed to the Lockean principle of property, which included not only one’s possessions but also one’s fundamental (natural) and political (positive) rights.2 “At least four times in his Second Treatise, Locke used the word property to mean all that belongs to a person, especially the rights he wished to preserve. Americans of the founding generation understood property in this general Lockean sense, which we have lost.”3

Locke shared the views of earlier philosophers in that a rebellion is never justified; however, he put an interesting spin on the issue. When a government acts tyrannically, it is not the citizenry that rebels, but rather the government itself. To understand this clearly, one must first understand Locke’s view on the legitimacy of government. A legitimate government satisfies two conditions. First, that those who hold office are appropriate by reference to the Constitution.4 Second, that the citizenry continues to place their trust in that constitutional form.5 Thus, if the citizenry no longer places trust in the Constitution, those previously in power are not authorized to remain in power.6 If they refuse to leave their positions, then their rule is absolute and arbitrary, which fails to respect God’s natural rights.7 In doing so, those individuals put themselves into a state of war with their people.8 Thus, as the Latin rebellare (to rebel) provides, the former leaders “bring back again the state of war.”9 “Moreover, we may do more than engage in civil disobedience; we have the right to ‘appeal to heaven’—that is, resort to arms—against such rulers.”10 Such a right is meaningless without some means of carrying out the logical consequences of that right.

Locke also discussed a more general right to self-preservation,

3. Id. at 252. Actually, we have not lost this concept entirely. In the often-used phrase “life, liberty, and property,” substantive rights are now seen as a part of liberty instead of property.
5. Id.
6. Id.
8. Id. (citing LOCKE, supra note 7, § 16, at 278-79).
9. Id. at 217.
10. Id. at 218.
referring to it as the most fundamental right. In his fifth essay on the law of nature, Locke noted that "if any law of nature would seem to be established among all as sacred in the highest degree, ... surely this is self-preservation, and therefore some lay this down as the chief and fundamental law of nature."\(^{11}\) Locke warns that such a right is not absolute, because the right could be used to harm others.\(^{12}\) However, protecting one's right to self-preservation is unjustified only where it is abused by infringing the self-preservation rights of others.\(^{13}\) It is on these moral and philosophical bases that James Madison, Alexander Hamilton, and the other founders based the United States Constitution.

B. The Federalists

"James Madison, ... if anyone, was the author of the Constitution,"\(^{14}\) and Madison and the Federalists in general were greatly influenced by the writings of John Locke.

Government was, for Madison, much like it was for Locke, a neutral arbiter over competing interests ... As it was for Locke, so, too, for Madison and the Federalists, justice effectively meant respecting private rights, especially property rights ... less a matter of civic virtue, of public participation in politics, ... than it was a reflection of the Lockean liberal world of personal rights ....\(^{15}\)

On the other hand, although some Antifederalists were communitarians, some in fact were true liberals who were greatly concerned with the enlarged federal government and enhanced executive power, and therefore responded with a call for the Bill of Rights to protect individual rights.\(^{16}\) It appears that the debate between the Federalists and Antifederalists was, not so much one of which is the more noble goal, but rather what means they would employ to achieve a common goal: the security of individual rights.

In Federalist No. 8, Alexander Hamilton wrote that the purpose of a large, standing federal army was to prevent conflicts between the states and to "suppress a small faction, or an occasional mob, or

12. Id.; see also JOHN LOCKE, Essays on the Law of Nature VI, in POLITICAL ESSAYS, supra note 11, at 116-17.
13. See THOMAS, supra note 4, at 18 (citing LOCKE, supra note 7).
15. Id. at 55.
16. See Editor's Introduction, supra note 14, at 60-61.
insurrection..." However, he also noted that such an army would "be unable to enforce encroachments against the united efforts of the great body of people." Thus, the people must collectively be able to defeat the federal army. In this light, even if the Second Amendment represented a state (as opposed to an individual) right, the current National Guard and state Reserves would not qualify as a state militia because they are subject to federal control. In the absence of a truly state-based militia, the people are all that qualify.

In *Federalist No. 26*, Hamilton again wrote in favor of a large standing army, arguing that so long as the power to call such a force into use remained in the hands of the legislature, as opposed to the chief executive, that power would not easily be abused. Later, in *Federalist No. 29*, Hamilton assured that where the standing army would be called into service for the Union, the states would still maintain power over the "appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Hamilton also observed that the standing army could never be expected to be used against the states because their total number would always be less than the "large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens."

Madison confirmed this line of reasoning in *Federalist No. 46*. He concluded that the federal army would not exceed 30,000 troops. "To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence." These passages suggest two things: that the ordinary citizen was expected to be well trained even though not necessarily serving in the armed forces, and that their purpose in doing so was to serve the necessary function of the defense of liberty.

These passages from *The Federalist* papers demonstrate the great concern that the founders had for tyranny at the hands of an individual.
unchecked government. Against the backdrop of this showing of concern, in *Federalist No. 28*, Hamilton characterized the underlying right at stake as that of “self-defense.” Echoing Locke’s view on the right to self-preservation, Hamilton characterized this as an “original right . . . paramount to all positive forms of government.” Hamilton then proceeded to distinguish between the threat of tyranny posed by the federal and state governments. The state militia could easily serve the purpose of repelling tyranny from the federal government, but where the state government was the source of tyranny, the task of self-defense would be extremely difficult, such that “there must be a peculiar coincidence of circumstances to insure success to the popular resistance.” The collective right protected by the Second Amendment, therefore, would not be sufficient to meet all the threats contemplated by Madison and Hamilton.

C. The Antifederalists

Despite this language, the Antifederalists were nevertheless concerned that the Constitution proposed by the Federalists did not adequately protect individual rights, and they called for a limiting Bill of Rights designed to do so. In fact, the Supreme Court has noted that without the promise of a limiting Bill of Rights, it is doubtful that the Constitution would have been ratified. There are countless examples of Antifederalist writings to this effect. For example, Agrippa wrote that:

[A] declaration of rights is of inestimable value. It contains those principles which the government never can invade without an open violation of the compact between them and the citizens. . . . Without such an express declaration the states are an annihilated in reality upon receiving this constitution [without a Bill of Rights]—the forms will be preserved only during the pleasure of Congress.

26. *Id.*
27. *Id.*
28. *Id.*
29. See *Editor's Introduction*, supra note 14, 60-61.
31. Apparently Agrippa was a pseudonym for James Winthrop, a Revolutionary War veteran from Massachusetts. See HERBERT J. STORING, THE ANTIFEDERALIST 227 (Univ. of Chicago Press 1985).
32. See *id.* at 239.
Brutus\textsuperscript{33} added that the provisions of the Bill of Rights "are as necessary under the [federal] government as under that of the individual states."\textsuperscript{34}

In response to the existence of a large standing army, the Antifederalists demanded that the people's right to keep and bear arms be protected expressly in the Bill of Rights.\textsuperscript{35} They appeared to show great concern for the unchecked power of the federal government while seeming content that state government was insufficiently distant from the will of the people to pose the same sort or threat. As Wilson Nichols noted, organized, professional armies were a necessary evil that could be kept in check by a militia composed of the common people.\textsuperscript{36} Moreover, Brutus warned that any government power, such as that of the right to keep a military presence, that tends towards abridging the rights of its citizens must, "if given at all . . . be so restricted as to prevent the ill effect of its operation."\textsuperscript{37} Recognizing that the nature of the federal government permits abuses more easily than a state government, Patrick Henry wrote that a standing army would likely develop and serve its own interests at the expense of individual interests.\textsuperscript{38} These expressions show that tyranny at the hands of government was clearly on the mind of the Antifederalists as well.

\textbf{D. Summary}

Recognizing an individual right to firearms would certainly go a long way toward protecting against the concerns that were clearly contemplated by the Federalists and Antifederalists, and would serve the bargain they struck in ratifying the Constitution. Although the scope of the Second Amendment may not cover such a right, the fact that it would greatly serve this serious concern, which relates to the most fundamental of rights, would suggest that it is a perfect candidate for an unenumerated right. In addition, one should consider other serious threats to self-preservation in inferring a Ninth

\textsuperscript{33} Identity unclear, but likely either Robert Yates or Thomas Treadwell. \textit{See id.} at 103.
\textsuperscript{34} \textit{Id.} at 120.
\textsuperscript{35} \textit{See} LEVY, \textit{supra} note 2, at 147 ("All adult males were required to own arms and serve in the militia, which, as Elbridge Gerry of Massachusetts stated, existed 'to prevent the establishment of a standing army, the bane of liberty.'").
\textsuperscript{37} \textit{See} STORING, \textit{supra} note 31, at 151.
\textsuperscript{38} \textit{Id.} at 303-04.
Amendment right to keep and bear arms. If taking a nonoriginalist approach to constitutional interpretation, purely modern concerns surface that also justify such an inference.

II. THE CONSTITUTION OF THE UNITED STATES

The founders' concern for self-preservation is apparent; however, the question still remains whether they protected such a right. The next step in answering that question is to look at the law itself.

A. The Bill of Rights

The Bill of Rights was drafted and adopted in response to the requests of the Antifederalists, who were concerned that the Constitution, having centralized many important powers in a strong federal government, did not adequately protect individual rights. Because there was no fear that the state governments would ever infringe these rights, the Bill of Rights did not restrict state power.

1. The Second Amendment

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.

Seems simple enough. Not really. The purpose of the Second Amendment is to protect us from tyranny. Thus, the Second Amendment does not protect us from crime, wildlife, or any other threat, however important protection from that threat may be. The United States Code defines the militia as

(a) [A]ll able-bodied males at least 17 years of age, and... under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens who are commissioned officers of the National Guard.

(b) The classes of the militia are—

39. See discussion supra Part II.D.
40. U.S. CONST. amend. II.
41. See United States v. Miller, 307 U.S. 174, 178 (1939) (refusing to protect a sawed-off shotgun on Second Amendment grounds because it was unclear that “its use could contribute to the common defense”); Presser v. Illinois, 116 U.S. 252, 265 (1886) (“[T]he states cannot... 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.”).
(1) the organized militia, which consist of the National Guard and the Naval Militia; and
(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.\textsuperscript{42}

The Oxford English Dictionary similarly defines the militia as a term "employed in [a] more restricted sense . . . to denote a 'citizen army' as distinguished from a body of mercenaries or professional soldiers."\textsuperscript{43} Additionally, Trenchard, a writer who influenced the founders, referred to the militia as a necessary civil power to check the military power.\textsuperscript{44} Thus, whether appealing to historical writings,\textsuperscript{45} the letter of the law,\textsuperscript{46} or plain English, the militia was not intended to consist (exclusively) of military personnel, but rather ordinary citizens as well.

If all [the Second Amendment] meant was the right to be a soldier or serve in the military, whether in the militia or the army, it would hardly be a cherished right and would never have reached constitutional status in the Bill of Rights. Pennsylvania, whose constitution of 1776 first used the phrase "the right to bear arms," did not even have a state militia.\textsuperscript{47}

Taking the view that "the Second Amendment guarantees a collective rather than an individual right,"\textsuperscript{48} the state retains a power to organize and regulate a civilian-based military force directly under its command. Regardless, however, of whom the militia consists, that right has a particular scope: possession and use of firearms in a military context. It logically follows that individual or collective access to firearms with no realistic military application is not protected under the Second Amendment; however, the fact that the

\textsuperscript{43} THE OXFORD ENGLISH DICTIONARY 768 (2d ed. 1989).
\textsuperscript{44} See BAILYN, supra note 36, at 62.
\textsuperscript{45} See Tom v. Sutton, 533 F.2d 1101, 1104 (9th Cir. 1976) ("In interpreting a constitutional provision, the fundamental principle of construction is to give the provision the effect intended by the framers and the people adopting it.") (citing Whitman v. Nat'l Bank of Oxford, 176 U.S. 559 (1900)).
\textsuperscript{46} In the Supreme Court's words:
It is appropriate to read the conviction expressed in a memorable address by Senator Albert J. Beveridge to the American Bar Association in 1920 . . . . His appeal was to the Constitution—to the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor. To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.
\textsuperscript{47} LEVY, supra note 2, at 135.
\textsuperscript{48} United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976).
militia is clearly a collection of civilians is of great consequence to any analysis of the right to keep and bear arms.

2. The Ninth Amendment

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.49

The Federalists opposed the Bill of Rights basically on two grounds: that it was unnecessary, and that it was in fact dangerous.50 The Bill of Rights was unnecessary because, as a limited government, the federal government did not have a power unless it was expressly granted.51 Thus, absent an express grant of a power to restrict freedom of speech, it lacked the power to do so; therefore, no protection from such abuse was needed. On the other hand, the Bill of Rights was dangerous because a specific listing of rights could imply that the federal government was not limited, but instead general.52 An incomplete listing of rights could result in an implication that other rights did not exist.53 For other Federalists, the issue seemed ridiculous. Noah Webster, for example, observed that the fear of a standing army was so strongly entwined in American society that there was no need to forbid it.1

Madison originally agreed with this position, but eventually changed his mind, in part out of concern for the minority, answering such concerns with what was to become the Ninth Amendment. He told Thomas Jefferson that “[w]herever the real power in a Government lies, there is a danger of oppression.... The majority, it seemed, were as capable of despotism as any [monarch].”55 This was wise in hindsight because

49. U.S. CONST. amend. IX.
50. See LEVY, supra note 2, at 244-46.
51. Id.
53. See id. (“Too precise an enumeration of the people’s rights was dangerous because it would be implying... that every right not included... might be impaired....”) (internal quotations omitted).
54. See BAILYN, supra note 36, at 354 (“Do the states outlaw standing armies? No (with a couple of exceptions). And is civilian government in the states threatened by military coup d’etats?”). The second question was rhetorical, suggesting that the states would never infringe basic human rights. That is, they were not the threat that they arguably are today, perhaps due to the immense growth in their populations. A necessary inference from this perspective is that little discussion ever occurred on the issue of protecting individual rights from state infringement because such infringement was highly improbable. The Ninth Amendment would seem to be even better applicable to such a change in circumstances as it would be to historical examples of unspecified infringements.
55. Id. at 410.
many cases have arisen under the Bill of Rights in which governments have exceeded their authority, and the judiciary has been instrumental in vindicating the rights of the people.

Madison wrote the Ninth Amendment, and submitted a total of twelve amendments (ten of which were ratified), yet he did not include protection of the freedom of speech. This freedom was as important to Madison as it is to present day Americans; therefore, it is clear that this is a right Madison originally sought to include in the Ninth Amendment. Madison discussed these concerns, noting that although the federal government is one of general powers, its discretionary powers—stemming in part from the "necessary and proper" clauses of the legislative powers—posed a threat to those unenumerated rights. Madison responded:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. I have addressed this concern, as gentlemen may see by turning to the last clause of the 4th resolution.

The clause to which this passage refers was the precursor of the Ninth Amendment. "For 175 years, from 1791 to 1965, the Ninth Amendment lay dormant...." From 1965 to 1980, however, "the Ninth Amendment was invoked in more than twelve hundred state and federal cases in the most astonishing variety of matters." How the Supreme Court has dealt with unenumerated rights will be discussed in Part IV.B.

56. See LEVY, supra note 2, at 249-50.
57. Id.
59. Id.
60. The text of the clause was as follows:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Id.
61. LEVY, supra note 2, at 241.
62. Id. at 242.
B. The Fourteenth Amendment

It was only through the adoption of the Fourteenth Amendment that the Bill of Rights was made enforceable against the states.\(^6\) Although this may lead to difficulties with interpretation of the Second Amendment,\(^6\) Supreme Court case law clearly supports application of the Fourteenth Amendment to prohibit state violation of Ninth Amendment rights. The Fourteenth Amendment makes any fundamental right, privilege, or immunity that belongs to a citizen of the United States independent of that person's state citizenship.\(^6\) However, not all of the provisions of the Bill of Rights have been enforced against the states through the Fourteenth Amendment. In *Palko v. Connecticut*, the Supreme Court introduced the doctrine of "selective incorporation."\(^6\) Under that doctrine, the Fourteenth Amendment incorporates only specific provisions of the Bill of Rights.\(^6\) The Court held that the double jeopardy prohibition of the Fifth Amendment did not satisfy that doctrine.\(^6\) In *Benton v. Maryland*, however, the Court overruled *Palko* on this point, holding that the double jeopardy provision is incorporated through the Fourteenth Amendment precisely because it is fundamental to the American scheme of justice.\(^6\) In doing so, the Court noted that "[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman

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64. There are two apparent problems with application of the Second Amendment through the Fourteenth Amendment. First, if the original purpose was to protect the states and the people from the tyranny of the federal government, can its purpose now be to protect us from the tyranny of state governments? Second, if the Second Amendment protects only a state right, does its application through the Fourteenth Amendment prohibit the state from infringing its own right? If so, the mechanism of the Fourteenth Amendment produces nonsense, and should not apply.

The answer to the first question is undoubtedly, "Yes." The framers did not protect the people from state violations of individual rights, and so the Fourteenth Amendment extends many protections not originally provided by the framers. The second question is a bit more difficult, but falls outside the scope of this Note. The reader should also note that this problem exists only if the Second Amendment does not protect an individual right (which is an assumption of the author), and perhaps only if one adopts an originalist approach to constitutional interpretation.


67. See id. at 324-25.

68. See id. at 328.

69. See *Benton*, 395 U.S. at 794.
times, and it became established in the common law of England long before this Nation's independence."70 Thus, the Court extends more, not less, protection of fundamental rights recognized by governments on which the American government was based. Moreover, in Paul v. Davis, the Court held that the determination of an alleged right's constitutional status is whether it had been "initially recognized and protected by state law."71 Finally, in San Antonio School District v. Rodriguez, the Supreme Court's dicta arguably stated that any right guaranteed in the Bill of Rights is a fundamental right.72 The Court may, therefore, be shifting to a "complete incorporation" approach.

On the other hand, the Supreme Court in Alexander v. Louisiana was faced with the argument that the Fifth Amendment guarantee of indictment by a grand jury before trial was applicable to the states through the Fourteenth Amendment.73 The Court noted that it had never held that the Fifth Amendment requirement of a grand jury was applicable to the States through the Fourteenth Amendment.74 Although it recognized that it had previously ruled such a right inapplicable to the states because it was not "fundamental to the American scheme of justice," it chose not to re-address the issue, following its "usual custom of avoiding decision of a constitutional issue[] unnecessary to the decision of the case before" them, which they overturned on other grounds.75 However, as we shall see, the Ninth Amendment has subsequently been interpreted to include within it rights that have nothing to do with the system of justice and procedure, yet have been held applicable to the states. Thus the argument that Alexander, speaking on the subject in dicta some twenty-eight years ago, stands in the way of recognition of a fundamental, individual right to keep and bear arms is of little weight. Moreover, under the traditional liberal doctrines of Locke and Madison, Hamilton, and the other founders, it seems that justice is

70. Id. at 795.
72. See 411 U.S. 1, 29 (1973) ("It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years.") (emphasis added). The Court's single sentence has been cited for the proposition that perhaps the Court seeks to expand the list of fundamental rights to include all rights secured under the Constitution. See, e.g., Stefan Tahmassebi, The Bill of Rights & the States, at <http://nraila.org/research19990728-BillofRightsCivilRights-001.html> (last visited Oct. 9, 1999). Although this is a far cry from overruling the doctrine of selective incorporation, it could be seen as a first and necessary step.
73. See 405 U.S. 625, 633 (1972)
74. See id.
75. Id. (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).
nonetheless secured—at least in some part—through private ownership of non-military firearms.

III. AMERICAN JURISPRUDENCE

A. The Supreme Court on the Possession and Use of Firearms

Before addressing Ninth Amendment rights to firearms, it is necessary to review the Supreme Court's previous treatment of gun rights. These cases all deal with issues brought under the auspices of the Second Amendment. Although they need not be consistent with the conclusions of this Note because a different law is addressed, to the extent that they are consistent, courts will have an easier time accepting private ownership of firearms under this alternate theory.

In *Presser v. Illinois*, the Court upheld a $10 fine for Herman Presser's participation in a parade where he and others "with arms, . . . 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." The Court held that the Second Amendment does protect the right to keep and bear arms from state government infringement, but in dicta recognized that "[i]t is undoubtedly true that all citizens capable of bearing arms constitute the reserve militia of the United States as well as of the states." Next, in *Miller v. Texas*, the Court again upheld a conviction based on a state statute prohibiting the carrying of a pistol in public. The Court echoed its sentiments in *Presser*, but added that "if the fourteenth amendment limited the power of the states as to such rights . . . we think it was fatal to this claim that it was not set up in the trial court." Therefore, at this point, the Court had not yet ruled on whether the Fourteenth Amendment extended the prohibitions of the Bill of Rights to state action.

The next and last case in which the Supreme Court directly addressed the Second Amendment was *United States v. Miller*. In that case, Jack Miller was charged with unlawfully transporting an unregistered, sawed-off shotgun (i.e., having a barrel less than 18

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76. 116 U.S. 252, 254 (1886) (internal quotations omitted).
77. *Id.* at 265 (emphasis added).
78. 153 U.S. 535 (1894).
79. *Id.* at 538.
inches in length) in interstate commerce. The Court upheld the conviction, and this case became the banner of the gun control movement. However, a closer inspection of the language of the Court reveals that this was not the victory that that movement claims it to have been. First, the language of the court clearly supports the definition of the militia set forth in the discussion of Part III.A.1 above. Second, the Court demands that application of the Second Amendment always consider the purpose of the Amendment, which was "to assure the continuation and render possible the effectiveness of [the militia]." Finally, the Court upheld the conviction on the grounds that the possession of a sawed-off shotgun did not relate to the security of a free state. Thus, the first conclusion of the Court in United States v. Miller was that personal ownership of military firearms would be protected under the Second Amendment as being necessary to the security of a free state. The second conclusion, however, is that personal ownership of non-military firearms would not be similarly protected under the Second Amendment.

The second conclusion is not one with which gun rights advocates agree, and perhaps the holding in United States v. Miller goes against everything for which the framers stood on this issue. Nevertheless, in the absence of any subsequent and contradictory interpretation of the Second Amendment by the Court, this stands as the law. This analysis now begs one question: does the Constitution nevertheless protect a right to personal ownership of non-military firearms? The answer is given in the sections that follow.

81. Id.
82. See id. at 179 ("The sentiment of the time strongly disfavored standing armies. . . . [T]he militia comprised all males physically capable of acting in concert for the common defense. . . . [T]hese men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.") (emphasis added).
83. Id. at 178.
84. Id. at 177.
85. But see Sandidge v. United States, 520 A.2d 1057, 1058 (D.C. Ct. App. 1987) (rejecting the claim that United States v. Miller "stands for the proposition that Congress may regulate only those classes of weapons which have no relationship to the militia"); Harris v. State, 432 P.2d 929, 930 (Nev. 1967) ("The right to bear arms does not apply to private citizens as an individual right.") (citing Miller II, 307 U.S. 174 (1938)).
86. By "non-military firearms," the author is including handguns, shotguns, and rifles that do not constitute semi-automatic or automatic weapons. Although these weapons arguably have a military use, yet another assumption of this paper is that they are not within the scope of Second Amendment protection. Such an assumption is consistent (at least in part) with the holding in United States v. Miller.
B. The Supreme Court on Unenumerated Rights

The starting points for interpreting the Ninth Amendment are the text itself and the rule of construction which holds that if a plain meaning exists, it should be followed. If a plain meaning does not exist, the language of the text must be construed so as not to contradict the document at any point, and meaning must be sought in its purposes or in the principles that it embodies as understood from its nature and object, its scope and design.\(^{87}\)

The Supreme Court has accepted only three unenumerated rights: association, travel, and privacy. The justifications through which the Court derives these rights are (1) an appeal to notions of autonomy and liberty, (2) inference through other provisions of the Constitution, and (3) recognition of a traditional basis for such a right. Although these methods share some overlap, the Court has at times treated each method separate from the others. The private right to non-military firearms may be derived using any of these methods.

1. An Appeal to Core Notions of Autonomy and Liberty: The Right to Travel

In *United States v. Guest*, the Supreme Court noted that "[t]he constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union."\(^{88}\) Three years later, the Court in *Shapiro v. Thompson* further held that "[o]ur constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."\(^{89}\) Thus, the Court’s long-standing case law refuses to attribute this right to any one provision of the Constitution, but instead relies upon a fundamental concept of liberty on which the Constitution was based.\(^{90}\)

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87. LEVY, supra note 2, at 244 (internal quotations omitted).
89. 394 U.S. 618, 629 (1969), overruled on other grounds, Edelman v. Jordan, 415 U.S. 651 (1974); see also Williams v. Fears, 179 U.S. 270, 274 (1900) (“Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution.”).
90. See *Shapiro*, 394 U.S. at 630 n.8. The cases cited had found the right to travel inherent in the Privileges and Immunities Clause of the Fifth Amendment, the Privileges and Immunities
fundamental right that is derived from our notions of autonomy and liberty. This represents the first method of inferring unenumerated rights: through an appeal to the notions of autonomy and liberty.

2. Deduction through Inference: The Freedom of Association

In *Griswold v. Connecticut*, Justice Douglas, writing for the Court, held that there was a right to association within the First Amendment, noting that association is a form of expression of opinion. The Court went on to hold that "while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful." The Court further held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." The Court then cited the First, Third, Fourth, Fifth, and Ninth Amendments, as well as relevant case law, to support that proposition.

One year later, in *DeGregory v. Attorney General of New Hampshire*, the Court threw out a contempt charge against a defendant who had been sent to prison because of his refusal to answer questions about his alleged association with the Communist Party. The Court reasoned that, absent any overriding and compelling state interest, there was nothing "that would warrant intrusion into the realm of political and associational privacy protected by the First Amendment." The freedom of association,
therefore, is a fundamental right that is necessarily derived from another constitutional provision in order to make that provision meaningful. This represents the second method of inferring unenumerated rights: through inference.

3. Protecting Traditionally Recognized Rights: The Right of Privacy

By far, privacy is the unenumerated right with the most support (and definition) in Supreme Court case law. In *Griswold v. Connecticut*, Justice Goldberg’s concurring opinion, joined by the Chief Justice and Justice Brennan, relied solely on the Ninth Amendment to hold unconstitutional the Connecticut statute at issue, which prohibited the use of contraceptives. Justice Goldberg, therefore, also employed the method of inference to derive the general right to privacy. However, Justice Goldberg also relied upon a deeply rooted tradition of marital privacy:

To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

In determining which rights are fundamental, judges... must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there]... as to be ranked as fundamental.”

The concurrences of Justices Harlan and White relied upon the notion of liberty as that term is defined in the Fourteenth Amendment’s Due Process Clause.

*Roe v. Wade*, the landmark abortion rights case, is probably the most influential precedent for privacy rights. In *Roe*, a woman seeking an abortion brought an action for declaratory and injunctive relief, arguing that a Texas statute—making it a crime to procure an organization’s illegal purposes and with the specific intention to further those purposes.

*Id.* at 932 (citations omitted); *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) (“The First Amendment... imposes limitations upon governmental abridgement of ‘freedom to associate and privacy in one’s associations.’”) (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)).

97. See 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring).

98. See *id.* at 484-85.

99. *Id.* at 491.

100. *Id.* at 493 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

101. See *id.* at 500.

102. See *id.* at 502.

The Court found that "the right to privacy . . . founded in the Fourteenth Amendment's concept of liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."105 However, the Court noted that like all fundamental rights, this one was not absolute. "Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."

This is one of many times that the Court has set the standard against which a statute infringing a fundamental right must be measured. In Roe itself, a compelling state interest was found to exist after the third trimester of pregnancy.107 Specifically, the Court took notice of the state's interests in protecting the health of the mother and the potential life of the unborn.108 As for the interest in protecting the health of the mother, the point at which the state's interest becomes compelling is the end of the first trimester.109 Regulations that would narrowly serve that interest would include licensing and standardizing of both those practicing abortions and the facilities at which they are performed.110 As for the interest in protecting the potential life of the unborn, that point occurs at the end of the second trimester.111 "If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."112

In United States v. Orito, the Supreme Court refused to extend the fundamental right to privacy in viewing obscene material to include a correlative right to receive it, transport it, or distribute it.113 The Court noted that "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child

104. See id at 117-18.
105. Id. at 153.
106. Id. at 155.
107. See id. at 156.
108. See id.
109. See id. at 163.
110. See id.
111. See id.
112. Id. at 164-63; see also Erznoznik v. Jacksonville, 422 U.S. 205, 216 (1975) (holding that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts and its deterrent effect is both real and substantial).
113. See 413 U.S. 139, 141 (1973).
rearing, and education." Justice Burger, writing for the majority, took care to note, however, "(a) that obscene material is not protected under the First Amendment, (b) that the Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce, and (c) that no constitutionally protected privacy is involved." The Court also had the Roe v. Wade decision behind it, and so this holding should be considered in light of that precedent. That is, the right to an abortion clearly carried with the mother beyond the home and even into interstate travel.

In Katz v. United States, the defendant's conviction was overturned after law enforcement officials obtained evidence through the installation of an electronic listening device, or bug, in a public phone booth. The Supreme Court held that a defendant's right to privacy—i.e., his right to be left alone—may be inferred from other provisions of the Constitution. This right is as sacrosanct as the rights to life and property, and was violated when the government intruded under circumstances where the defendant reasonably expected privacy even though he was in a public place. On the other hand, the Court also recognized that as sacred as this right was, like life and property, protection of privacy is "left largely to the law of the individual States."

4. Summary of the Deduction of Unenumerated Rights

Summarizing the case law appearing in this Part, the express guarantee of a fundamental constitutional right necessarily implies unenumerated rights where such implied rights are necessary to make the express rights meaningful. Moreover, those implied rights are themselves fundamental. Fundamental rights are also necessarily inferred where they are demanded by our basic notions of autonomy.

114. Id. at 142 (emphasis added); see also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (holding that the "privacy right encompasses and protects the personal intimacies of the home") (emphasis added).
115. Id. at 143 (citations omitted).
116. See id. at 162 (holding that the state's compelling interest applied to abortions performed both on citizens and non-citizens of the state who sought medical treatment in the state, thus recognizing that abortion would have an impact on interstate travel).
118. See id. at 510. The Court cited the First, Third, Fourth, and Fifth Amendments.
119. See id. at 350-51.
120. See id. at 352.
121. Id. at 350-51.
and liberty. Additionally, deeply rooted traditions, especially those traditionally recognized by state law, are deemed fundamental. Finally, even activity not protected in and of itself may nonetheless be protected within the confines of a person's home.

IV. THE UNENUMERATED INDIVIDUAL RIGHT TO FIREARMS

Using any of the three methods of deriving an unenumerated, fundamental right, an individual right to firearms arises. Part III.B showed the three ways through which the U.S. Supreme Court has inferred unenumerated rights. This Note will now show that, using any of these three methods in the manner traditionally employed by the Court, an individual fundamental right to keep and bear arms arises. In fact, failure to recognize such a right would be inconsistent with all of those cases cited above that have dealt with unenumerated rights.

A. Acceptance Based on Notions of Autonomy and Liberty

In a democracy, the true sovereign is the people. Although many Americans have their own opinions as to what liberty is and what it requires, most agree that liberty includes a general right to self-defense and, more generally, self-preservation. Certainly the private ownership of firearms that are easy to obtain, operate, and maintain serve these interests. This conclusion is consistent with the views of those who wrote the Constitution, and those who influenced its authors. Furthermore, the Supreme Court has derived at least one test for determining what rights are fundamental to liberty; to wit, whether the right was traditionally recognized by state law, and state law has always protected the right to keep and bear arms. In fact, forty-four states have within their constitutions a provision protecting the right to keep and bear arms, some of which expressly protect the right as individual.

122. See discussion supra Part II.
123. See discussion supra Parts III.B., IV.B.3.
124. See Tahmassebi, supra note 72. Some examples from states representing the first few and last few states to have been admitted to the Union:

A person has the right to keep and bear arms for the defense of self, family, home and state, and for hunting and recreational use. DEL. CONST. art. I, § 20 (as amended Apr. 16, 1987).

The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne. GA. CONST. art. I, § VIII.

All persons have the right to keep and bear arms in defense of themselves, their
B. Acceptance by Inference

No constitutional guarantee enjoys preference over another; all provisions have equal weight. Therefore, it is no less reasonable to infer fundamental rights from the Second Amendment and the Constitution than from the First, Third, Fourth, and Fifth Amendments. The Second Amendment places with the states the power to repel an attack against its very nature as a sovereign. That is, it protects a state's right to self-preservation. Similarly, an individual right to firearms grants the individual that same power: the right to self-preservation through self-defense and acquisition of subsistence through hunting. Moreover, the individual right to firearms is necessary to make the Second Amendment meaningful. Because the militia consists in part of non-military personnel, and because that segment of the militia does not receive military training, their availability for immediate call into service would depend upon training received outside of military service. Absent an individual right to firearms, this is impossible to expect. Furthermore, under the logic of Orito, even if ownership of firearms itself is not a fundamental right per se, the interest of privacy certainly justifies ownership of a firearm in one's home.

C. Acceptance Based on Tradition

The Supreme Court's test for determining what rights are fundamental to liberty blends the question of liberty with the question of whether a right was traditionally recognized. The fact that so many of the states, including the original thirteen, included the protection of an individual right to keep and bear arms demonstrates
that such a right is well grounded in tradition. "For example, several towns and a few colonies required subjects to go about armed, even on the way to church. Internal dangers and the possibility of insurrection, as well as foreign and Indian dangers, explain such legislation." 126

In addition, two influential treatises both recognized the right to keep and bear arms. 127 Blackstone's *Commentaries* grounded this right on the natural rights of resistance and self-preservation. 128 Its American counterpart, *Blackstone's Commentaries, with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia*, the 1790 treatise of St. George Tucker, also recognized the right. Tucker, however, insisted that the English version of this right as specified by Blackstone did not adequately protect the individual right. 129 Both of these treatises have been cited often by American courts and continue to be cited today. 130

V. REVISITING THE CASE LAW

Would recognition of a Ninth Amendment right to keep and bear arms be inconsistent with Supreme Court precedent on the Second Amendment? Absolutely not. First, the Supreme Court has not even addressed the issue of incorporation of the Second Amendment protections through the Fourteenth Amendment. The issue remains open as to whether such a right is fundamental to the American scheme of justice. Second, the Court has never heard a case bringing a Ninth Amendment argument for gun rights. *United States v. Miller* addressed the question of the possession of shotguns

126. *Levy*, *supra* note 2, at 140. These laws themselves would be unconstitutional under the Ninth (or Second) Amendment because the right to keep and bear arms, like many constitutional rights, should include the corresponding negative right to neither keep nor bear arms. The legislation is informative, however, in establishing that the right is deeply rooted in American culture.


128. See *id*.

129. See *id*.

130. See, e.g., Alden v. Maine, 527 U.S. 706, 715 (1999) (citing *Commentaries* for the recognition of sovereign immunity in English Law); Lilly v. Virginia, 527 U.S. 116, 141 (1999) (Breyer, J., concurring) (citing *Commentaries* for the recognition of the admissibility of hearsay statements that were against the interest of the declarant); City of Chicago v. Morales, 527 U.S. 41, 54 (1999) (citing *Commentaries* on the fundamental right of travel); Neder v. United States, 527 U.S. 1, 30 (1999) (citing *Commentaries* on the right of trial by jury in criminal cases); New York Times v. Sullivan, 376 U.S. 254, 296 n.2 (1964) (citing *Commentaries* to demonstrate the traditional grounding of the First Amendment).
under the Second Amendment, which under the assumptions of this Note would appropriately fall outside the Second Amendment. Thus, there is no precedential barrier to recognizing a Ninth Amendment right to keep and bear arms.

CONCLUSION

Our Constitution was based upon a liberal tradition formed over and upheld throughout several centuries. Although the Supreme Court has not visited the issue of gun control in several decades, the mounting attacks against that right—peculiarly, coming primarily from those Americans that refer to themselves as *liberals*—should motivate the Court to reaffirm the reasoning of its prior case law. At the core of American liberal tradition is the fundamental right to self-preservation, and that right itself represents the core of liberal theory in general. To be truly faithful to such a tradition requires the recognition of the right to self-preservation, which has many enemies—from crime to tyranny. However, by employing any of its methods for inferring an unenumerated right, the Court can protect our individual right to keep and bear arms, a right that was supported by those that drafted the Constitution. Once this right is formally recognized by the Court, that decision will force other courts to employ the proper level of scrutiny in addressing legislation abridging that right.