

THE SECOND AMENDMENT IN THE TENTH CIRCUIT: THREE DECADES OF (MOSTLY) HARMLESS ERROR

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Since 1977, the Tenth Circuit Court of Appeals has decided many cases involving the Second Amendment. In light of the U.S. Supreme Court's decision in *District of Columbia v. Heller*,¹ it appears that the Tenth Circuit was wrong in most of those cases. That is, the Circuit's theory of the Second Amendment was that it only applies to a person who is keeping or bearing arms while serving in a well-regulated militia. *Heller* affirmed the Standard Model of the Second Amendment:² that the Second Amendment is functionally similar to the First Amendment, and to most of the rest of the Bill of Rights; and the right protects all law-abiding citizens, not just a small number of people in government ser-

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1. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

2.

Perhaps surprisingly, what distinguishes the Second Amendment scholarship from that relating to other constitutional rights, such as privacy or free speech, is that there appears to be far more agreement on the general outlines of Second Amendment theory than exists in those other areas. Indeed, there is sufficient consensus on many issues that one can properly speak of a "Standard Model" in Second Amendment theory, much as physicists and cosmologists speak of a Standard Model" in terms of the creation and evolution of the Universe. The picture that emerges from this scholarship is a coherent one, consistent with both the text of the Constitution and what we know about the Framers' understanding. The purpose of the right to bear arms is twofold: to allow individuals to protect themselves and their families, and to ensure a body of armed citizenry from which a militia could be drawn, whether that militia's role was to protect the nation, or to protect the people from a tyrannical government.

Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463, 475 (1995) (footnote omitted). In the late 1990s and early twenty-first century, there were some scholars who disputed the Standard Model. The most famous of these was Michael Bellesiles, whose 2000 book *Arming America, The Origins of a National Gun Culture*, was withdrawn by its publisher after it was demonstrated to be a fraud. See CLAYTON E. CRAMER, *ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* (2006); James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777 (2002); James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002). There were non-fraudulent dissents from the Standard Model, although they had great difficulty in explaining a coherent theory of what the Second Amendment *does* mean. See, e.g., H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002); DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2003); Nelson Lund, *Putting the Second Amendment to Sleep*, 8 GREEN BAG 2D 101 (2004) (critical review of the Uviller & Merkel and Williams books).

vice.³ And the right is not limited to a single purpose (militia service), but encompasses a wide variety of lawful purposes, particularly self-defense.⁴ What effect does *Heller* have on three decades of Tenth Circuit jurisprudence that was premised on an incorrect theory of the Second Amendment?

In regards to Second Amendment jurisprudence, the Tenth Circuit will have to start all over again. It is difficult to argue for the continuing validity of cases which are founded on the incorrect premise that the Second Amendment protects only a tiny slice of the American people.

This Article surveys the Tenth Circuit's jurisprudence on the Second Amendment chronologically. Although most of the pre-*Heller* Tenth Circuit decisions are no longer valid, many of the new cases will come to the same ultimate result as did the Tenth Circuit's previous cases. For every federal gun control law which was addressed by the Tenth Circuit pre-*Heller*, this Article explains how a post-*Heller* analysis might proceed.

In particular, the Tenth Circuit can follow *Heller*'s dicta and decide that convicted felons are not protected by the Second Amendment, and neither are machine guns. Some other issues, including gun bans for certain misdemeanants, were not addressed in *Heller*, and so the Tenth Circuit will have to decide those issues anew. It might be hoped that the Tenth Circuit will undertake a more serious treatment of these unresolved issues than have some of the post-*Heller* district courts, whose analyses have often been glib and shallow.

Glib and shallow is also a fair description of many of the Tenth Circuit's pre-*Heller* cases on the Second Amendment. Some of those cases amounted to barely more than a judicial ipse dixit, and those cases certainly did not inspire confidence that the Circuit had treated the constitutional issues with appropriate seriousness and diligence. Pre-*Heller*, the Tenth Circuit's rule for the Second Amendment was "the government always wins."⁵

Perhaps one reason is that almost all the persons raising Second Amendment claims were highly unsympathetic. This was to be expected: once the Tenth Circuit nullified the Second Amendment in 1977, just about the only people who would dare to raise a Second Amendment claim were lawyers offering desperate arguments for criminal defendants, or *pro se* citizens raising hopeless, poorly-prepared claims.

3. *Heller*, 128 S. Ct. at 2799.

4. *Id.* at 2801.

5. *Cf.* *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (observing that the Warren Court's only consistent rule in merger cases was that "the government always wins.").

After a quarter-century of poor jurisprudence, the Tenth Circuit did improve significantly following the 2004 publication of a concurring opinion by Judge Kelly in the *Parker* case. Once Judge Kelly had pointed out many of the flaws in the Tenth Circuit's previous cases involving the Second Amendment, most of the Tenth Circuit panels followed Judge Kelly's admonition to decide cases narrowly, and to eschew grand pronouncements asserting that ordinary people have no Second Amendment rights.

I. MIGHTY OAKES FROM TINY THINKING GREW

The root of the Tenth Circuit's Second Amendment failure was the 1977 decision in *United States v. Oakes*.⁶ The case grew out of a prosecution by the Bureau of Alcohol, Tobacco and Firearms (BATF).⁷ An undercover BATF agent met with Ted Oakes over a period of months. The agent bought from him a non-functioning firearm which, with some repair work by a gunsmith, could have been restored to function as a machine gun. Arguably, the non-functioning gun was therefore a "machine gun" under federal law.⁸ Since the National Firearms Act of 1934, federal law has required that machine gun owners register their guns and pay a federal tax.⁹ Oakes had not done so, and after he was convicted at trial in Kansas, he appealed his conviction to the Tenth Circuit.

The panel, consisting of Chief Judge Lewis, along with Judges Breitenstein and Doyle, rejected Oakes' arguments about Fourth Amendment violations and entrapment. As for Oakes' Second Amendment claim:

The second constitutional argument that appellant advances is that the prosecution here violated his right to bear arms guaranteed by the second amendment. Defendant presents a long historical analysis of the amendment's background and purpose from which he concludes that every citizen has the absolute right to keep arms. This broad conclusion has long been rejected. *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206.¹⁰

So instead of addressing Oakes' "long historical analysis of the amendment's background," the panel simply cited the Supreme Court's *Miller* case. It is true that *Miller* unquestionably stands for the proposition that the right to arms is not "absolute." The case reversed and remanded a district court decision dismissing charges against a career

6. See *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978).

7. In 2003, the Bureau was renamed the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE). Homeland Security Act of 2002 § 1111, 6 U.S.C.A. § 531 (2009).

8. 26 U.S.C.A. § 5845(b) (West 2009) ("The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.")

9. 26 U.S.C.A. § 5861(d) (West 2009).

10. *Oakes*, 564 F.2d at 387 (footnote omitted).

criminal who possessed an unregistered sawed-off shotgun, in violation of the National Firearms Act of 1934.¹¹ Presumably, if the right to arms were “absolute,” the Court would have followed the district court, and held the National Firearms Act’s registration requirement facially unconstitutional.¹²

Of course most other constitutional rights are not “absolute” either. If a party submitted a long historical brief which asserted that the right of freedom of speech is absolute, a Circuit Court of Appeals could not dispose of the First Amendment issue simply by citing a Supreme Court precedent showing that the right of free speech is not absolute. The Circuit Court should take the further step of examining whether the litigant has rights which are protected by the non-absolute First Amendment.

Before *Heller*, there were three different readings of *Miller* in the Circuit Courts.

- That *Miller* stands for the proposition that the Second Amendment is a “collective right.” In effect, this made the right to arms like “collective property” in a Communist country: nominally the right belongs to all the people but in a non-individual way. In practice, the right belongs only to the government. All nine Justices in *Heller* rejected the “collective right.”¹³
- The right belongs to all American citizens (with a few exceptions, such as convicted felons), and the right may be exercised by individuals for legitimate purposes, including self-defense. This was the view of the *Heller* majority opinion written by Justice Scalia.¹⁴
- The right belongs only to individuals who are serving in a state militia. This was the view of the *Heller* dissent written by Justice Stevens.¹⁵

The majority and dissenting opinions in *Heller* both argued at length that their interpretation was supported by the *Miller* precedent. I do not wish, in this Article, to argue for or against the conflicting inter-

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

12. *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).

13. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790 (2008). *See also id.* at 2822 (Stevens, J., dissenting) (“The question presented by this case is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.”).

14. *Id.* at 2797 (“Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.”).

15. *Id.* at 2823 (Stevens, J., dissenting) (arguing that the Second Amendment “protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons”).

pretations of *Miller*. I do not criticize the Tenth Circuit for adopting an interpretation which, ultimately, had enough plausibility to earn the support of four Supreme Court Justices. However, as the back and forth argument in *Heller* demonstrated, *Miller* is an ambiguous case, from which different readers may in good faith draw different conclusions. What is not legitimate was for the Tenth Circuit to blandly cite *Miller*—with no discussion—as if *Miller* obviously had only one possible reading.

The Tenth Circuit was not the only Circuit Court in the last quarter of the twentieth century to pretend that *Miller* was much clearer than it really is. In *Can the Simple Cite be Trusted?*, Brannon Denning details how several Circuits used a simple cite to mask a much more complicated precedent.¹⁶ Not until twenty-three years after *Oakes*, in *United States v. Baer*, did the Tenth Circuit even attempt a serious analysis of what the *Miller* precedent really meant.

Beyond the bare citation of *Miller*, *Oakes* provided a two-sentence summary of the case:

The purpose of the second amendment as stated by the Supreme Court in *United States v. Miller*, supra at 178, 59 S.Ct. 816, was to preserve the effectiveness and assure the continuation of the state militia. The Court stated that the amendment must be interpreted and applied with that purpose in view. *Id*

The above language is a fair paraphrase of part of the *Miller* opinion—although that part of the opinion does not necessarily lead to the conclusion that only militiamen have Second Amendment rights. Justices Scalia and Stevens argued extensively about whether *Miller*'s statement about the state militia purpose necessarily implies a right only for militiamen.

Even if one assumes, from *Miller*, that the militia purpose of the Second Amendment is the only purpose for which the right to arms exists, the assumption does not negate an individual right for all Americans. The *Heller* decision quoted the leading American constitutional law scholar of the latter nineteenth century, Michigan Supreme Court Judge Thomas Cooley, to explain the point:

“It might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law

16. 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).

may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.”¹⁷

Of course *Oakes* did precisely what Cooley had explained was wrong, adopting an interpretation that made the Second Amendment a practical nullity. Justice Scalia would later observe that lower court judges who wrote opinions similar to *Oakes* had “overread *Miller*.”¹⁸ He also observed that “it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right.”¹⁹ As we shall see, this is true for almost all of the Tenth Circuit’s Second Amendment cases.

With a militia-only reading of *Miller*, the Tenth Circuit created another problem for itself: *Oakes* actually was a militiaman:

He contends that, even if the second amendment is construed to guarantee the right to bear arms only to an organized militia, he comes within the scope of the amendment. He points out that under Kans. Const. art. VIII, § 1, the state militia includes all “able-bodied male citizens between the ages of twenty-one and forty-five years” He further points out that he is a member of “Posse Comitatus, a militia-type organization registered with the state of Kansas.”²⁰

The Tenth Circuit responded:

To apply the amendment so as to guarantee appellant’s right to keep an unregistered firearm which has not been shown to have any con-

17. *Heller*, 128 S. Ct. at 2811-12 (quoting THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 271 (1880)). As the *Heller* Court noted, the heading for the above-quoted section of the Cooley treatise was “The Right is General.” *Id.* at 2811.

18. *Id.* at 2815 n.24.

19. *Id.*

20. *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977). “Posse comitatus” is a legal term referring to the authority of a sheriff to call forth the able-bodied men of his county in order to assist him in the performance of his duties. For example, in 1977 the Pitkin County, Colorado, sheriff used his posse comitatus power to summon armed citizens to assist in the manhunt for serial killer Ted Bundy. *Oakes* apparently belonged to an organization of which named itself after a government power which it admired—as if a coin-collecting club named itself, “The Power to coin Money and regulate the Value thereof.”

nection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy.²¹

Here, the court might have been expected to supply some logical analysis and policy arguments. But the court did not. It is not very persuasive for a court to announce a result based on “logic” and “policy”—and then fail to offer any logic or policy.

Similarly, as to Oakes’ membership in the non-government organization, the court simply declared—with not a shred of reasoning—that the “lack of justification” for invoking the Second Amendment was “apparent.”²² Yet whatever was so “apparent” to the panel was something which the panel was unable or unwilling to articulate.

I am not claiming that it would have been impossible for the Tenth Circuit to offer plausible logical or policy arguments, or to provide at least a scintilla of support for the legal conclusion which was supposedly so “apparent.”²³ Or the panel could have said whatever else it was that made the legal conclusion so “apparent” to the panel. However, Chief Judge Lewis and the other judges did not deign to use any words to explain why they felt the way they did.

Judicial legitimacy depends on courts providing legal *reasoning* for their decisions. A Circuit Court of Appeals decision—especially on an issue of constitutional law—which does not even attempt to justify its result is not really an application of the law, but is rather a form of judicial lawlessness.

Parties making legal claims to the Tenth Circuit are expected to provide arguments and citations in support of their claims.²⁴ The Tenth

21. *Id.*

22. *Id.* (“This lack of justification is even more apparent when applied to appellant’s membership in ‘Posse Comitatus,’ an apparently nongovernmental organization. We conclude, therefore, that this prosecution did not violate the second amendment.”).

23. It appears that the group to which Oakes belonged was a highly disreputable organization, if it was an affiliate of the “posse comitatus” groups which were active in several states during the 1970s. These groups were not organized around the principle of helping the local sheriff (which is what a real posse comitatus does); rather, the groups were based on white racism. See ELAINE LANDAU, *THE WHITE POWER MOVEMENT: AMERICA’S RACIST HATE GROUPS* 62 (1993). This is perhaps why Oakes was targeted for a BATF undercover sting. A well-reasoned opinion from the Tenth Circuit (or from the district court, after further fact-finding on remand) might have discussed the so-called “posse comitatus” group, and explained that it is not a constitutional militia, in that it is not organized for the purpose of aiding state or local law enforcement. The opinion might have pointed out the absence of any evidence that the group had made itself available to come to the aid of the local sheriff—such as by telling the sheriff of its existence, and providing contact information in case the sheriff needed help.

24. See *Brownlee v. Lear Siegler Mgmt. Servs. Corp.*, 15 F.3d 976, 977 (10th Cir. 1994) (An “unsupported, conclusory assertion . . . is not adequate appellate argument.”); *Primas v. City of Okla. City*, 958 F.2d 1506, 1511 (10th Cir. 1992) (“[A party] has a duty to provide authority for any argument that he raises.”); *Am. Airlines v. Christensen*, 967 F.2d 410, 415 n.8 (10th Cir. 1992) (“It is insufficient merely to state in one’s brief that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for the appeal.”).

Circuit should have held itself to the same standard in the announcement of its assertions of law. Instead, the reader is left with the strong suspicion that the panel just did not like the idea that people might have a right to own guns, and that the panel was unable to think of a legal reason why, under a militia-only reading of *Miller*, a man who has been statutorily declared by the Kansas state legislature to be a member of the Kansas state militia has no Second Amendment right. Unable to provide a legal argument, the panel resorted to bluster and ipse dixit.

Oakes had also argued that the Ninth Amendment protected his ownership of firearms. This argument was not addressed on appeal, since Oakes had not raised it below.²⁵ The Ninth Amendment argument for a right to own firearms has some heft: Nicholas Johnson has written a Ninth Amendment argument for handguns (not for machine guns) which provides extensive evidence that handgun ownership for self-defense easily passes the various Supreme Court tests for unenumerated rights.²⁶ However, the Tenth Circuit acted reasonably in not considering the issue, since it was raised for the first time on appeal. In light of how irresponsibly and lawlessly the *Oakes* panel treated the Second Amendment, it was just as well that they never addressed the Ninth Amendment.

Following *Heller*, it would be easy for the Tenth Circuit to uphold the National Firearms Act's registration requirement for machine guns. The *Heller* majority wrote:

Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns

. . .

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U. S., at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." [citations omitted].

25. *Oakes*, 564 F.2d at 387.

26. Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

...

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.²⁷

One can argue with the *Heller* language. As the opinion itself admits, all the precedents it cites merely involve restrictions on the “carrying” of weapons, not their possession. But the opinion is what it is, and if the opinion does not explicitly say that machine guns are not Second Amendment arms, the opinion comes close enough so that lower federal courts have readily cited it for the proposition that the Second Amendment does not protect machine gun ownership.²⁸

II. ROSE: SHORT RIFLES

The Tenth Circuit’s next case on the Second Amendment, *United States v. Rose*,²⁹ will also require a new analysis under *Heller*’s “dangerous and unusual” rule, once the issue returns to the Tenth Circuit.

27. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815-17 (2008).

28. *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (“Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.”); *United States v. Gilbert*, 286 F. App’x 383 (9th Cir. 2008) (upholding a jury instruction that there is no Second Amendment right to machine guns); *Hamblen v. United States*, No. 3:08-1034, slip op., 2008 WL 5136586, at *4 (M.D. Tenn. Dec. 5, 2008) (“The Petitioner argues that the limitations placed on the Second Amendment right to bear arms by the majority opinion in *Heller* can not square with the Court’s earlier decision in *Miller*. Whatever merit there is to that argument, however, this Court is bound by the *Heller* opinion as written.”); *Mullenix v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 5:07-CV-154-D, slip op., 2008 WL 2620175, at *1 (E.D.N.C. July 2, 2008) (“Plaintiff is a federally-licensed firearms dealer, and alleges that the ATF arbitrarily denied him permission to import a reproduction of a World War II-era German machinegun.” The district court quoted the *Heller* language to conclude that the Second Amendment does not apply to machine guns.).

29. 695 F.2d 1356 (1982). The panel consisted of Judges Holloway, Barrett, and Logan, with the opinion written by Logan.

At this point, it would be helpful to provide a brief explanation of federal gun control law. The main federal gun control law is the much-amended Gun Control Act of 1968.³⁰ It covers the sale and possession of ordinary rifles, shotguns, and handguns. We will examine it in more detail *infra*, as it appears in Tenth Circuit cases.

A much older federal gun law is the National Firearms Act of 1934. It requires registration and the payment of a tax for the possession (as well as sale or manufacture) of a relatively small group of firearms: machine guns, short shotguns (barrels under eighteen inches), and short rifles (barrels under sixteen inches).³¹ These guns were controlled with registration and taxing, rather than prohibition, because, as President Franklin Roosevelt's Attorney General Homer Cummings explained to the U.S. House Ways & Means Committee, the administration believed that the Second Amendment forbade an outright federal ban of machine guns.³² (The NFA was expanded in 1968 to include some other weapons, which will be discussed *infra*.)

It might be tempting for courts to assume that any firearm covered by the National Firearms Act is a "dangerous and unusual" gun which, pursuant to *Heller*, is not protected by the Second Amendment. But this would obviously be going too far. *Heller* holds that handguns certainly *are* protected by the Second Amendment;³³ as introduced in Congress, the draft NFA included handguns.³⁴ The removal of handguns from the NFA was the compromise which ended the National Rifle Association's opposition to the NFA, so that the bill could pass.³⁵ Had the NFA passed in its original form, its inclusion of handguns obviously could not (post-*Heller*) be used to assert that handguns are not covered by the Second Amendment.

30. 18 U.S.C.A. §§ 921–931 (West 2009).

31. 26 U.S.C.A. § 5801 (West 2009).

32. When a Representative asked the Attorney General how the proposed NFA "escaped" the "provision in our Constitution denying the privilege to the legislature to take away the right to carry arms," Cummings answered:

Oh, we do not attempt to escape it. We are dealing with another power, namely the power of taxation and of regulation under the interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say "We will tax the machine gun" and when you say that "the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated" you are easily within the law.

The Representative then stated, "In other words, it does not amount to prohibition but allows of regulation," to which Attorney General Cummings responded, "That is the idea. We have studied that very carefully." *The National Firearms Act of 1934: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73rd Cong. 6, 13, 19 (1934).

33. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817-18 (2008).

34. *The National Firearms Act of 1934*, *supra* note 32, at 1.

35. *To Regulate Commerce in Firearms: Hearings Before the Subcomm. of the Comm. on Commerce*, 73rd Cong., 2d Sess. 58 (1934).

Moreover, Attorney General Cummings' own testimony indicates that the administration believed that NFA firearms *were* covered by the Second Amendment.³⁶ His brief answer did not, however, specifically indicate whether he thought *all* the NFA firearms were protected by the Second Amendment, or whether only machine guns were.

As of 1934, machine guns, particularly the Thompson submachine gun,³⁷ were notorious as gangster weapons. Sawed-off shotguns were (and still are) used by criminals with devastating effect. With a shortened barrel (say, eleven inches) they are as concealable as a very large handgun, but are vastly more lethal at short range.

Short-barreled rifles, though, are another story. They are not and never have been a particular criminal problem, and they were not in the NFA as it was introduced in Congress. They were simply added into NFA in order to clarify that longer rifles were not covered by some generic language in the draft NFA.³⁸ Pre-NFA, short rifles, typically with a barrel length of fourteen or fifteen inches, were commonly used by hunters, trappers, ranchers, and horseback riders. Their shorter length meant lesser weight, so they were particularly suitable for introducing young people to firearms safety.³⁹

So whether short rifles are within the scope of the Second Amendment remains an open question, and the fact that they are covered by the NFA does not, in itself, provide a negative answer. If short rifles are within the Second Amendment, are the stringent NFA controls (which

36. *The National Firearms Act of 1934*, *supra* note 32, at 19.

37. A submachine gun is a smaller, more portable type of machine gun.

38. As introduced, the NFA bill provided that "the term 'firearm' means a pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefor, or a machine gun." *The National Firearms Act of 1934*, *supra* note 32, at 1. Attorney General Cummings suggested changing the shotgun barrel length to eighteen or twenty inches. *Id.* at 6. Because the draft NFA applied to "any other firearm capable of being concealed on the person," there was concern that rifles might be inadvertently covered. After all, a tall person with a full-length coat can carry a large rifle concealed. So a specific definition for short-barreled rifles was added to the NFA to prevent longer-barreled rifles from being considered as a firearm capable of being concealed on the person. The following discussion took place between Rep. Harold Knutson (a Republican from St. Cloud, Minnesota, who served fifteen terms in the House) and Attorney General Cummings:

Mr. Knutson. General would there be any objection, on page 1, line 4, after the word "shotgun" to add the words "or rifle" having a barrel less than 18 inches? The reason I ask is I happen to come from a section of the State where deer hunting is a very popular pastime in the fall of the year and, of course, I would not like to pass any legislation to forbid or make it impossible for our people to keep arms that would permit them to hunt deer.

Attorney General Cummings. Well, as long as it is not mentioned at all, it would not interfere at all.

Mr. Knutson. It seems to me that an 18-inch barrel would make this provision stronger than 16 inches, knowing what I do about firearms.

Attorney General Cummings. Well, there is no objection as far as we are concerned to including rifles after the word "shotguns" if you desire.

Id. at 13. As enacted, the NFA covered rifles under eighteen inches. The length was changed to sixteen inches in 1960.

39. *E.g.*, JAMES J. GRANT, *BOYS' SINGLE SHOT RIFLES*, at vii, ix (1967).

are much more restrictive than the controls for ordinary guns) a violation of the Second Amendment? Mr. Heller's brief asserted that the NFA would be unconstitutional for ordinary firearms such as handguns, but did not address the question of short rifles.⁴⁰

Rose involved a challenge to the conviction of a man who had shortened the barrels on two rifles, without first obtaining the requisite permission via the registration and tax scheme.⁴¹

Rose raised a variety of technical objections, which the court rejected, and which did not directly implicate the Second Amendment.⁴²

Rose's Second Amendment claim was dismissed with a simple citation to *Oakes*, with no discussion.⁴³

Post-*Heller*, this part of the *Rose* opinion is obviously not good law. So far, the only post-*Heller* case involving short rifles is an unpublished

40. Brief of Respondent at 53, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), available at 2008 WL 336304.

41. *United States v. Rose*, 695 F.2d 1356, 1357 (1982).

42. *Id.* For example, the guns had a folding, collapsible stock. This means that they could be fired from the shoulder (with the stock extended), like a rifle. Or with the stock collapsed, the guns could be fired one-handed, like a handgun. Rose argued that the guns were therefore not "rifles" within the meaning of the National Firearms Act, 26 U.S.C. § 5845(c) (2008). Notwithstanding the rule of lenity, the court ruled that the guns were NFA rifles, especially since, as part of the process authorizing their importation into the United States, they had been legally classified as "carbines." *Rose*, 695 F.2d at 1357. (A carbine is type of lightweight rifle, with a barrel which is shorter [but not necessarily shorter than sixteen inches] than the barrels of heavier rifles.). Rose also claimed that he did not know it was illegal to shorten the barrels without going through the NFA tax and registration process. As the court pointed out, "[t]he carton, the instructions, and the firearm itself contained warnings that modification of the firearm was unlawful." *Id.* at 1358.

The National Firearms Registration and Transfer Record office is where records of NFA registrations are kept. The office is operated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE). The records are incomplete and frequently inaccurate, and an internal BATFE training admitted, in essence, that BATFE agents routinely perjure themselves by testifying that the records are one hundred percent complete and accurate. See 142 CONG. REC. E1461-01 (1996) (statement of Rep. Funderburk) ("Our first and main responsibility is to make accurate entries and to maintain accuracy of the NFRTR [W]hen we testify in court, we testify that the data base is 100 percent accurate. That's what we testify to, and we will always testify to that. As you probably well know, that may not be 100 percent true So the information on the 728,000 weapons that are in the data base has to be 100 percent accurate. Like I told you before, we testify in court and, of course, our certifications testify to that, too, when we're not physically there to testify, that we are 100 percent accurate When I first came in a year ago, our error rate was between 49 and 50 percent") (quoting Thomas A. Busey, then Chief of the National Firearms Act Branch of the BATF, in the October 18, 1995 training video). The trial court had denied Rose's motion to inspect the records room. The Tenth Circuit found the denial proper: "Rose did not allege that he had in fact registered the weapons, even after his counsel was specifically questioned on this point by the trial judge at the hearing on the motion. He did not allege that the system had malfunctioned as to him. There may be circumstances in which one who wishes to impeach the quality of a recordkeeping system must be allowed to examine the system's operation." *Rose*, 695 F.2d at 1358. As the *Rose* court recognized, inspection of records room might well be appropriate in a future case. For a defendant who credibly claims that he *did* register a NFA firearm, it is questionable whether, as a matter of law, the absence of registration records in the BATFE records room would be sufficient to support a conviction beyond a reasonable doubt—especially given BATFE's own admission that the records are incomplete and given that BATFE agents routinely commit perjury about the records.

43. *Id.* at 1359.

Ninth Circuit decision which assumes, with no reasoning, that *Heller*'s language about machine guns also applies to short rifles.⁴⁴

III. *SLESARIK*: THE NEW MEXICO CONSTITUTION

Slesarik's friend was arrested for carrying a revolver in a New Mexico restaurant, in violation of a city ordinance which forbade all gun carrying.⁴⁵ Slesarik, who was present in the restaurant (according to the trial court's finding of disputed facts), was later arrested as an accessory. In a *pro se* case under 42 U.S.C. sections 1983 and 1985, Slesarik sued the arresting officer, the police chief, two judges, and the City of Deming for violating his rights under the Second Amendment and under the New Mexico Constitution. At trial, some of the counts were dismissed on grounds of immunity: the jury ruled for Slesarik on some other counts, but awarded him no money damages.⁴⁶ The Tenth Circuit affirmed all aspects of the result below.⁴⁷

Slesarik had allegedly carried his own gun to the police station where his friend was being booked. Although he was not prosecuted for the carrying at the police station, *Heller* would allow a prosecution in such a situation. *Heller* preemptively affirms the constitutionality of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"⁴⁸

44. *United States v. Gilbert*, 286 F. App'x 383, 386 (9th Cir. 2008) ("Under *Heller*, individuals still do not have the right to possess machineguns or short-barreled rifles").

45. *Slesarik v. Luna County*, No. 93-2161, 1993 WL 513843, at *1 (10th Cir. Dec. 10, 1993) (per curiam) (Seymour, Anderson, and Ebel, JJ.) (referring to ordinance 6-4-6 of the City of Deming). The trial court ruled the ordinance unconstitutional under the New Mexico Constitution's right to arms. *Id.* at *2 (citing Mem. Opinion & Order at 9, *Slesarik v. Luna County*, R. Vol. 3, Tab 66 (quoting *City of Las Vegas v. Mosberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971))). The New Mexico constitutional right explicitly excludes concealed weapons. N.M. CONST. art. II, § 6 ("No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons."). The arresting officer claimed that Slesarik's friend's handgun was "partially concealed." *Slesarik*, 1993 WL 513843, at *1. There is a large body of state law, much of it contradictory, about whether partially-concealed handguns are considered "concealed" or not. *See, e.g.*, MISS. CODE ANN. § 97-37-1(1) (2008) (banning the carrying of a firearm, except with a license, which is "concealed in whole or in part"); *State v. Fluker*, 311 So. 2d 863, 866 (La. 1975) (holding that a weapon which is sufficiently exposed so as to reveal its identity is not concealed, even if it is not in full open view); *Reid v. Commonwealth*, 184 S.W.2d 101, 102 (Ky. 1944) (finding that a pistol stuck in a belt was not concealed); *Winston v. Commonwealth*, 497 S.E.2d 141, 146 (Va. Ct. App. 1998) ("We have previously stated that a weapon is hidden from common view under [Virginia] Code § 18.2-308(A) when it is 'hidden from all except those with an unusual or exceptional opportunity to view it.'"); *State v. Ogletree*, 244 So. 2d 288, 291 (La. Ct. App. 1971) (determining that a partially visible gun in waistband is not "concealed"); W. M. Moldoff, Annotation, *Offense of Carrying Concealed Weapon as Affected by Manner of Carrying or Place of Concealment*, 43 A.L.R.2d 492, § 5 (1955). The trial court ruled that the issue of whether the friend's handgun was "concealed" was a jury question. *Slesarik*, 1993 WL 513843, at *2. Many other courts have adopted a similar approach.

46. *Slesarik*, 1993 WL 513843, at *2.

47. *Id.* at *4.

48. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008). Post-*Heller*, the "sensitive places" rule has been used to uphold bans on carrying a concealed handgun on an airplane (an easy case) as well as possessing a gun in a parked car in a Post Office parking lot (a harder case). *See*

IV. BRUMFIELD: UNREGISTERED EXPLOSIVE DEVICES FOR USE IN CRIME

In 1968, the National Firearms Act was amended so that it also covered certain explosive devices.⁴⁹ Brumfield was convicted of possession of nine unregistered explosive devices.⁵⁰ He had become the subject of an undercover BATF investigation after Roosevelt City, Utah, police told BATF that Brumfield had made comments about killing people with explosives, about blowing up the statue of the Angel Moroni (which adorns the Latter Day Saint temple in Salt Lake City), and had boasted about his expertise with explosives.⁵¹

BATF deployed an undercover informant, who (the trial court found) got Brumfield to supply him with car bombs, which Brumfield was told were being re-sold to California gangs.⁵² “The undercover agents then asked Mr. Brumfield to make silencers for Uzi submachine guns in an attempt to divert Mr. Brumfield’s activities toward less dangerous activities.”⁵³

At trial, Brumfield claimed that he was entrapped, and the trial judge allowed the jury to consider the issue. The jury found that he was not entrapped.⁵⁴

On appeal, the Tenth Circuit rejected Brumfield’s entrapment argument.⁵⁵ Brumfield also raised the Second Amendment, which the Circuit brusquely dismissed with a citation to *Oakes* and *Rose* (which the opinion misspelled as “Ross”). Notably, the decision simply said that Brumfield’s Second Amendment claims were “without merit.” The pan-

United States v. Davis, No. 05-50726, 2008 U.S. App. LEXIS 26934, at *1-2 (9th Cir. Sept. 10, 2008) (unpublished and unsigned decision) (finding 49 U.S.C. § 46505, which bans concealed weapons on airplanes, constitutional); United States v. Dorosan, No. 08-042, slip op., 2008 WL 2622996, at *6 (E.D. La. June 30, 2008) (upholding the ban on postal parking lots as narrowly tailored to effect public and workplace safety solely on postal property, so 39 C.F.R. § 232.1(a) is not unconstitutional as applied). The *Dorosan* opinion assumes, without evidence, that the parking lot ban does in fact advance public safety. The court’s observation that the ban at issue does not affect the right of all individuals to bear arms at home or traveling in a vehicle to and from work through high crime areas, is presumably based on the fact that Dorosan could have parked his private car on a public street or a private lot near the post office; if no such parking were available, then Dorosan would have been deprived of his right to protect himself while traveling to and from work, and the parking lot ban might have been unconstitutional “as applied.” *Id.*

49. See 26 U.S.C.A. §§ 5845(f), 5861(d), 5871 (West 2009). “[D]estructive device” means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device” 26 U.S.C. § 5845(f). So the NFA does not regulate an “explosive” *per se*, but rather regulates devices (bombs, grenades, etc.) which use explosives. Explosives qua explosives are regulated by a separate law. 18 U.S.C.A. § 847 (West 2009).

50. United States v. Brumfield, No. 93-4033, 1994 WL 475030, at *1 (10th Cir. Sept. 1, 1994) (unpublished disposition) (*per curiam*).

51. *Id.*

52. *Id.* at *2.

53. *Id.*

54. *Id.* at *1.

55. *Id.* at *2.

el did not opine that the reason Brumfield's claims were meritless was that he was not in a state militia.⁵⁶

Because Brumfield's involvement with weapons was for the purpose of what he believed to be serving as an accessory to criminal homicides, *he* clearly did not have a meritorious Second Amendment claim. Just as the First Amendment protects speech in general, but does not protect speech that is part of a violent crime (e.g., two criminals making plans for a homicide), the Second Amendment does not protect the supplying of firearms (or explosive devices) for use in violent crimes.

In practice, the BATFE (formerly the BATF)⁵⁷ administers the National Firearms Act so that a person can lawfully possess machine guns, but the BATFE is much more restrictive about allowing registration for explosive devices. It is doubtful that BATFE would accept a registration for a person to manufacture car bombs, even if the person could prove beyond any doubt that his purposes were innocent. (E.g., he wanted to blow up some old cars on his farm.)

Heller never addressed the issue of explosive devices, but, given the sensibility of the Court's language on machine guns, it seems very doubtful that most explosive devices would be considered to have Second Amendment protection. (Gunpowder, which is an "explosive" but not an "explosive device," would obviously be included in the Second Amendment.)

Even without *Heller*, it might be argued that explosive devices are not Second Amendment "arms," since Second Amendment arms are those that can be aimed at a particular target, whereas explosive devices kill everyone in the area.

A closer question is raised by sound reducers, which are sometimes inaccurately called "silencers." These too are covered by the NFA, with possession allowed if there is registration and the tax is paid.⁵⁸ Brumfield was not convicted of making unregistered silencers, although the BATFE's confidential informant had tried to convince him to do so.⁵⁹

What about a situation where a silencer was not manufactured for use in a violent crime? Sound reducers have many legitimate purposes. Except in the movies, sound reducers do not really make a gun silent (so

56. *Id.* at *4.

57. See Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2274 (2002) (codified as amended at 6 U.S.C.A. § 531 (West 2009)).

58. 26 U.S.C.A. §§ 5801-5802, 5841 (West 2009) (procedure for lawful registration and payment of tax); see 18 U.S.C.A. § 921(a)(24) (West 2009) (defining "silencers"); 26 U.S.C.A. § 5845(a)(7) (West 2009).

59. *Brumfield*, 1994 WL 475030, at *2.

that an assassin may carry out his crime undetected).⁶⁰ Rather, sound reducers simply reduce a gun's noise by a several decibels. Because a gunshot is very loud, the reduced sound is still quite loud.

The most obvious legitimate use of a sound reducer is reducing noise so that it does not bother neighbors. For example, person with an acre or more of property might have a shooting range, and might use sound reducers to reduce the noise that his neighbors hear.

Sound reducers are also a very useful tool in firearms training. The noise from a gun may produce an involuntary flinch in some novice shooters. If the novice trains with a gun that has a sound reducer, the tendency to acquire the bad habit of flinching will be reduced, and the novice will learn to shoot more accurately and more safely. In addition, the noise reduction makes it easier for students to hear instructions from the safety instructor.

For all of the above reasons, most European countries regulate sound reducers much less stringently than does the U.S. federal government. Although European gun controls are generally more restrictive than American ones, European countries do not put sound reducers in a specially restrictive category reserved for very powerful weapons like machine guns and explosive devices.

In practice, the BATFE *does* allow the registration of silencers under the NFA. However, the \$200 tax and the burden of the months-long registration process makes the use and possession of sound reducers in the United States much rarer than it would otherwise be.

Heller allows bans on "dangerous and unusual" weapons. But a sound reducer is not even a weapon, and it is "dangerous" only in the eyes of ignorant people whose knowledge of firearms is based mainly on *James Bond* and similar movies.

The NFA may be constitutional as applied to machine guns, but it is debatable whether extremely stringent NFA rules are really constitutional for benign accessories such as sound reducers. Arguably, a sound reducer might constitutionally be regulated the same as an ordinary firearm under the Gun Control Act of 1968 (requiring a background check before purchase, and simple on-the-spot registration, but not a high tax).

V. *GUEST*: EXTRA PUNISHMENT FOR EXERCISING CONSTITUTIONAL RIGHTS

Another unpublished case was *United States v. Guest*.⁶¹ Under the federal sentencing guidelines, the district court had used its discretion to

60. 1 ALAN C. PAULSON, *SILENCER: HISTORY AND PERFORMANCE; SPORTING AND TACTICAL SILENCERS X* (1996); 2 ALAN C. PAULSON, N.R. PARKER & PETER G. KOKALIS, *SILENCER: HISTORY AND PERFORMANCE; CQB, ASSAULT RIFLE, AND SNIPER TECHNOLOGY X* (2002).

enhance Guest's sentence because firearms were found at his residence, even though the firearms had nothing to do with the crime which he committed. He did not preserve the issue for appeal, and the Tenth Circuit decided that his raising of a Second Amendment argument on appeal did not meet the standards for a post-conviction collateral attack under 28 U.S.C. § 2255.⁶²

The grounds for a 2255 motion include "that the sentence was imposed in violation of the Constitution or laws of the United States." Although the *Guest* court provided no citation, presumably the court was relying on *Oakes* for the theory that since Guest was not in the National Guard, he had no Second Amendment rights.

But now, a post-conviction 2255 claim about the Second Amendment from an ordinary citizen would raise a real constitutional issue. And a claim that the defendant was punished for possessing firearms, even though the firearms had no relation to the underlying offense, would be meritorious.

To see why, let us examine a First Amendment analogy. The U.S. Constitution protects only two specifically-identified technologies: "arms" and "the press," and the Founders plainly described the two as technologies of supreme importance in the preservation of a free state.⁶³

61. U.S. v. Guest, No. 94-6091, 1994 WL 602693 (10th Cir. Nov. 4, 1994) (per curiam).

62. *Id.* at *2. Guest was running a large marijuana growing and distribution operation out of his home. It is possible that the guns were in fact used to support the crime, in that the guns might have been kept to protect the operation. However, the Tenth Circuit opinion does not indicate that there was any such factual finding by the lower court.

63. See Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, WM. & MARY BILL RTS. J. (forthcoming May 2009), available at <http://ssrn.com/abstract=1156526>.

The principal (initial) drafter of both clauses, James Madison, often spoke of arms and the press in the same breath. For example, in his notes for his floor speech on June 8, 1789 in favor of the Bill of Rights, Madison grouped together as features or flaws of the English Declaration of Rights of 1688: "no freedom of press" as well as "arms to Protestts" only And writing years later, Madison spoke of both rights as vital to the Republic: "a government resting on a minority is an aristocracy, not a Republic, and could not be safe with a numerical and physical force against it, without a standing army, and enslaved press, and a disarmed populace."

Madison was not alone in drawing a connection between arms and press in the Framing generation. As Randy Barnett and Don Kates have recounted, "James Madison, James Monroe, Fisher Ames, Albert Gallatin, and others mentioned the right to arms in the same breath with the freedom of religion and press, and described them all interchangeably as 'human rights,' 'private rights,' 'essential and sacred rights' which 'each individual reserves to himself.'"

To the modern sensibilities, the historical connection between arms and the press may seem odd. But, to the Framing generation, the connection would have been commonsensical. The right to bear arms and the freedom of the press presented the exact same type of question for the Framers: can there ever be a *natural right* to a man-made device? In the case of arms and presses, the Framers believed so.

Id. at *10-11.

It is also significant that five of the eight states that proposed amendments during the ratification of the Constitution offered proposals for protecting the freedom of the press . . .

Just as someone can be punished for using arms in a crime, he can be punished for using a press in a crime.

Imagine someone who owns an at-home printing press. He creates a fake charity, designed to swindle Roman Catholics. Then, using his at-home press, he prints counterfeit copies of the *Denver Catholic Register*, the newspaper which is mailed to Catholic families through the Archdiocese of Denver. The counterfeit copy is identical in every respect to the real current issue of the *Denver Catholic Register*—except that Archbishop Chaput’s real column is replaced by a fake column in which the Archbishop purportedly implores all Catholics to donate generously to the fake charity.

Having previously stolen the Archdiocese’s mailing list, the criminal sneaks into a post office, and substitutes the counterfeit issues of the *Denver Catholic Register* for the real one. The U.S. Postal Service delivers the fake issues to Denver-area Catholics.

Later, the criminal is caught and convicted of mail fraud. Can his possession of the printing press be used to enhance his sentence under the Sentencing Guidelines? Certainly yes. The printing press is evidence of the criminal’s use of a special skill, and therefore can justify extra points under the Sentencing Guidelines.⁶⁴

Now imagine another criminal, who also uses an at-home printing press. He prints flyers which he hands out on the Pearl Street Mall in Boulder, urging people to recycle. In the very same room in his house where the printing press is kept, he also cultivates psychedelic mushrooms, and sells them. He is eventually caught and convicted.

Can his sentence be enhanced because he possessed the printing press? Of course not. The possession of the press is constitutionally protected, and the man’s possession of the press had nothing to do with his crime.

Similar reasoning would apply to the possession of arms. If the arms are actually used in the crime (e.g., an armed robbery, the guarding of a crack house), then an enhanced sentence is constitutional. If the arms have no relation to the crime, then there should not, constitutionally, be any extra punishment for possessing them.

[and] the right to bear arms And of these states, Pennsylvania, Virginia, and North Carolina . . . placed the proposals for the freedom of the press and the right to bear arms consecutively or back-to-back—which is how eventually they came to be ordered in the Bill of Rights in what became of the First and Second Amendments. In their state constitutions and declarations of rights, Massachusetts (1780), Pennsylvania (1776), and Vermont (1777) also listed the protections for the freedom of the press and the right to bear arms consecutively.

Id. at *13.

64. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2005) (“[D]efendant . . . used a special skill, in a manner that significantly facilitated the commission . . . of the offense.”).

VI. *MARCHANT*: PRIVACY OF REGISTRATION FORMS

The first Tenth Circuit Second Amendment case involving the Gun Control Act (ordinary guns) rather than the National Firearms Act (machine guns, etc.) came in 1995.⁶⁵

Because of extensive documented abuses by the Bureau of Alcohol, Tobacco & Firearms (BATF),⁶⁶ Congress in 1986 enacted the Firearms

65. *United States v. Marchant*, 55 F.3d 509 (10th Cir. 1995) (per curiam).

66. SUBCOMM. ON THE CONSTITUTION, COMM. ON THE JUDICIARY, 97TH CONG., *THE RIGHT TO KEEP AND BEAR ARMS* 20-23 (2d. Sess. 1982), available at <http://www.guncite.com/journals/senrpt/senrpt.html>:

Based upon these hearings, it is apparent that enforcement tactics made possible by current federal firearms laws are constitutionally, legally, and practically reprehensible. Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement [S]ubsequent to these hearings, BATF stated that 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and a third involve citizens with no prior police contact at all.

The Subcommittee received evidence that BATF has primarily devoted its firearms enforcement efforts to the apprehension, upon technical *malum prohibitum* charges, of individuals who lack all criminal intent and knowledge Even in cases where the collectors secured acquittal, or grand juries failed to indict, or prosecutors refused to file criminal charges, agents of the Bureau have generally confiscated the entire collection of the potential defendant upon the ground that he intended to use it in that violation of the law. In several cases, the agents have refused to return the collection even after acquittal by jury.

. . . .

. . . In several cases, the Bureau has sought conviction for supposed technical violations based upon policies and interpretations of law which the Bureau had not published in the Federal Register, as required by 5 U.S.C. § 552

The Constitution Subcommittee also received evidence that the Bureau has formulated a requirement, of which dealers were not informed that requires a dealer to keep official records of sales even from his private collection. BATF has gone farther than merely failing to publish this requirement. At one point, even as it was prosecuting a dealer on the charge (admitting that he had no criminal intent), the Director of the Bureau wrote Senator S. I. Hayakawa to indicate that there was no such legal requirement and it was completely lawful for a dealer to sell from his collection without recording it In these and similar areas, the Bureau has violated not only the dictates of common sense, but of 5 U.S.C. § 552, which was intended to prevent “secret lawmaking” by administrative bodies.

. . . .

These practices, amply documented in hearings before this Subcommittee, leave little doubt that the Bureau has disregarded rights guaranteed by the constitution and laws of the United States.

It has trampled upon the second amendment by chilling exercise of the right to keep and bear arms by law-abiding citizens.

It has offended the fourth amendment by unreasonably searching and seizing private property.

It has ignored the Fifth Amendment by taking private property without just compensation and by entrapping honest citizens without regard for their right to due process of law.

. . . [E]xpert evidence was submitted establishing that approximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations. . . .

Owners' Protection Act (FOPA).⁶⁷ That Act strengthened federal laws regarding use of guns in violent crimes and drug crimes, and also imposed various restrictions on BATF searches and seizures, forfeitures, and prosecutions for technical paperwork violations.

Marchant pawned a rifle in New Mexico. To redeem a gun from a pawnshop, the owner must go through the same process as if he were buying a gun.⁶⁸ Accordingly, when Marchant redeemed his gun, he filled out Federal Form 4473. That form must be completed by all gun buyers; on it, the buyer provides identifying information (such as name, address, and date of birth), and checks boxes to indicate his eligibility to buy a gun (that he is not a convicted felon, not under indictment, was never dishonorably discharged from the military, etc.). The firearms dealer fills in information about the make, model, and serial number of the gun.⁶⁹

After the sale is completed, the dealer must retain the 4473 form for the next twenty years.⁷⁰ In effect, the gun is registered, with the registration record held by the dealer. The system is part of the compromise that allowed the passage of the Gun Control Act of 1968. Many gun control advocates had demanded a federally-centralized gun registration system.⁷¹ Congress rejected the idea, and instead enacted the de-centralized, dealer-based system. The de-centralized system had the advantage of creating records of gun sales, without the dangers (according to Second Amendment advocates) of a centralized registry, which could be used for gun confiscation. The Second World War was still fresh in the minds of many congresspeople, and they were aware that the Nazis had used gun registries created by the Weimar Republic and by other democratic nations which were later conquered by the Nazis in order to carry out gun confiscation.⁷²

The day after Marchant redeemed his rifle from the pawn shop in Albuquerque, two New Mexico Probation-Parole Officers visited the pawn shop, because they had heard that someone on probation (not Marchant) had bought a gun there. With the consent of the pawnshop owner, they examined the store's 4473 forms. In the course of doing so, they

67. Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1(a)-(b), 100 Stat. 449 (1986) (codified as amended at 18 U.S.C.A. §§ 921-929 (West 2009)).

68. The requirement was imposed administratively by the BATF. 27 C.F.R. § 178.124(a) (2002); see also *Huddleston v. United States*, 415 U.S. 814, 828-29 (1974) (upholding regulation).

69. 27 C.F.R. § 178.124 (2002).

70. 27 C.F.R. § 178.129(b) (2002).

71. See ROBERT SHERRILL, *THE SATURDAY NIGHT SPECIAL* 85-86 (1975).

72. See, e.g., Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMP. L. 483, 485 (2000). Concern about Nazi firearms practices had led Congress during World War II to specifically exempt firearms from the Property Requisition Act. See 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, 599 (1995).

saw that Marchant had just redeemed his gun, and they knew that Marchant had been convicted of a felony.

Marchant was then prosecuted and convicted for making a false statement in acquiring a firearm, and of being a felon in possession of a firearm.⁷³ The appeal turned on the Fourth Amendment, and Marchant's argument that his 4473 form should have been suppressed as the fruit of an illegal search.

The 1968 GCA had allowed BATF limitless inspection of the 4473 forms retained by licensed firearms dealers.⁷⁴ FOIPA changed the law so that once a year, BATF can conduct a compliance inspection to see if the records are being properly maintained. The one-per-year-limit does not apply if BATF has reason to believe that the particular dealer is not maintaining records appropriately, or may be violating some other part of federal gun law.⁷⁵ In addition, BATF can inspect dealer records as often as it wants to when it is tracing a gun. And BATF can conduct limitless inspections in the course of bona fide criminal investigations.⁷⁶ In conjunction with a firearms trace or a criminal investigation, BATF can share information from the 4473 forms with federal, state, or local law enforcement.⁷⁷

Thus, Congress crafted a system to protect firearms dealers from administrative harassment, to protect the privacy of firearms purchasers, and to allow legitimate records inspections for law enforcement purposes.

Accordingly, the state law enforcement officers' warrantless examination of the pawnshop records appears dubious. If the officers had a legitimate law enforcement investigation (as they apparently did), they should have asked BATF to take the lead in inspecting the records, and to share the information with them. Because part of the purpose of the GCA/FOIPA records system is to protect the privacy of firearms purchasers, it is not clear that the pawnshop owner had the authority to allow the records examination, and he violated the privacy of his customers.

However, the Tenth Circuit evaded the Fourth Amendment issue by holding that Marchant had no standing to raise privacy claims under GCA/FOIPA. Because Marchant was a convicted felon, *he* had no

73. See 8 U.S.C.A. § 922(a)(6), (g)(1) (West 2009).

74. See Pub. L. No. 90-618, § 923(g), 82 Stat. 1213, 1223 (1968) (requiring that licensed dealer must "make such records available for inspection at all reasonable times").

75. Pub. L. No. 99-308, § 103(g)(1)(A), 100 Stat. 449, 454 (1986) (codified at 18 U.S.C.A. § 923(g)(1)(A) (West 2009)); Pub. L. No. 99-308, § 103(g)(1)(B), 100 Stat. 449, 454 (1986) (codified at 18 U.S.C.A. § 923(g)(1)(B) (West 2009)).

76. Pub. L. No. 99-308, § 103(g)(1)(B), 100 Stat. 449, 454 (1986) (codified at 18 U.S.C.A. § 923(g)(1)(B) (West 2009)).

77. Pub. L. No. 99-308, § 103(g)(1)(D), 100 Stat. 449, 455 (1986) (codified at 18 U.S.C.A. § 923(g)(1)(D) (West 2009)).

GCA/FOPA privacy rights.⁷⁸ As the court detailed, the language of GCA and FOPA and their legislative history was replete with statements of Congress's objective of keeping guns away from criminals, including convicted felons; Congress apparently cared about the privacy rights of law-abiding citizens, but not of criminals.⁷⁹

The Tenth Circuit's conclusion about standing, as applied to *Marchant*, was not unreasonable. On the other hand, the privacy rights of the rest of the pawnshop's customers were violated, and they *were* the law-abiding gun owners whose privacy rights Congress had intended to protect. As a practical matter, they had no remedy for the violation of their privacy, and under the Tenth Circuit's rule, there is no deterrent to violations of the privacy rights of the law-abiding gun owners whose 4473 forms are in the custody of licensed firearms dealers throughout the Circuit.

In *Marchant*, as in many other cases, the continuing erosion of the exclusionary rule leads to an attractive result (the conviction of an actual criminal) in the case at bar, but greatly harms the privacy rights of people whom the court will never see.

Marchant had argued in that "Congress manifested an intent to create a reasonable expectation of privacy in firearms records in the possession of federally licensed firearms dealers in order to protect Second Amendment freedoms."⁸⁰ Happily, the panel did not retort that only militiamen could have Second Amendment freedoms; rather the court did not address the Second Amendment issue, since the admissibility of the evidence was resolved by analysis of the standing issue.

As for the ban on the possession of firearms by convicted felons, *Heller* explicitly affirmed the constitutionality of the ban (at least for felons in general, without discussion of whether the ban might be unconstitutional as applied in particular cases).⁸¹ Lower federal courts have readily upheld post-*Heller* challenges to the felon-in-possession law.⁸²

78. *United States v. Marchant*, 55 F.3d 509, 514-16 (10th Cir. 1995).

79. *Id.*

80. *Id.* at 515.

81. "[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" *District of Columbia v. Heller*, 128 S.Ct. 2783, 2816-17 (2008).

82. *United States v. Brunson*, No. 07-4962, 2008 WL 4180057 (4th Cir. Sept. 11, 2008) (unpublished); *United States v. Irish*, No. 06-4082, 2008 WL 2917818 (8th Cir. July 31, 2008) (unpublished); *United States v. Gilbert*, No. 07-30153, 2008 WL 2740453 (9th Cir. July 15, 2008) (unpublished); *United States v. Harden*, No. 06-79-KI, 2007 WL 3312342 (D. Or. Nov. 6, 2007) (unpublished); *United States v. Robinson*, No. 07-CR-202, 2008 WL 2937742 (E.D. Wis. July 23, 2008) (unpublished); *Johnson v. United States*, No. 4:06-CV-1363, 2008 WL 2397378 (E.D. Mo. June 9, 2008); *Industrious v. Cauley*, No. 08-CV-109-HRW, 2008 WL 4525451, at *4 (E.D. Ky. Oct. 1, 2008) (unpublished) (mistakenly treating the dissenting opinion in *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller*, 128 S.Ct. 645 (2008), as if it had been the majority opinion.); *United States v. Kilgore*, No. 08-cr-66-bbc, 2008 WL 4058020 (W.D. Wis. Aug. 26, 2008) (unpublished).

VII. WILKS: THE FEDERAL MACHINE GUN BAN

The passage of FOPA through Congress in 1985-86 had an odd twist. The bill passed the Senate overwhelmingly. When the bill was before the House, Speaker Tip O'Neil made Rep. Mario Biaggi the presiding officer. Biaggi was a staunch gun control advocate, and would later leave the House after being convicted of felonies.

A proposed amendment to the bill, by Rep. Bill Hughes of New Jersey, banned the sale of machine guns manufactured after the date that FOPA would become law. There was no debate, and Biaggi called for a voice vote. Ignoring (in violation of House rules) members' demands for a roll call, Biaggi declared that the amendment was adopted. So now, 18 U.S.C. 922(o) is part of the Gun Control Act, and bans citizens who are not government employees from possessing machine guns manufactured after May 19, 1986.⁸³ For machine guns manufactured before that date, of which there are about 120,000, possession is still lawful, as long as the tax and registration requirements of the National Firearms Act are met.

FOPA did not change the law regarding sound reducers (a/k/a "silencers"), and they may still be possessed in compliance with the NFA.

Larry Francis Wilks owned a gun store in Tulsa. He sold three post-1986 machine guns to undercover BATFE agents, as well as two sound reducers for which he did not comply with the NFA transfer requirements.⁸⁴

On appeal, Wilks did not raise the Second Amendment. But the court noted that "this orphan of the Bill of Rights may be something of a brooding omnipresence here."⁸⁵ Wilks argued that the machine gun ban was unconstitutional, because it was not a proper exercise of Congressional power to regulate interstate commerce. A few months before the Tenth Circuit heard *Wilks*, the Supreme Court had ruled in *United States v. Lopez* that the federal "Gun Free School Zones Act" was not a lawful exercise of Congress's power to regulate interstate commerce.⁸⁶

83. 18 U.S.C.A. § 922(o) states:

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to-

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

18 U.S.C.A. § 922(o) (West 2009).

84. *United States v. Wilks*, 58 F.3d 1518, 1519 (10th Cir. 1995).

85. *Id.* at 1519 n.2 (quoting *United States v. Lopez*, 2 F.3d 1342, 1364 n.46 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995)).

86. *Lopez*, 514 U.S. at 551.

As the Tenth Circuit noted, there was no legislative history indicating that Congress was thinking about interstate commerce when the machine gun ban was passed. Or, indeed, that Congress was thinking about anything at all:

The legislative history surrounding § 922(o) is virtually nonexistent. The provision was a last minute floor amendment, no hearings were conducted, and no committee report refers to it. See David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 *Cumb.L.Rev.* 585, 670-71 (1987). The scant legislative history merely contains a discussion of an earlier bill proposed in the House of Representatives which "prohibited the transfer and possession of machine guns, used by racketeers and drug traffickers for intimidation, murder and protection of drugs and the proceeds of crime." H.R.Rep. No. 495, 99th Cong., 2d Sess. 4 (1986), reprinted in 1986 U.S.C.C.A.N. 1327, 1330. "The only apparent explanation for it is the statement of its sponsor, Representative Hughes, that 'I do not know why anyone would object to the banning of machine guns.'" . . . (quoting 132 Cong.Rec. H1750 (1986)) (statement of Rep. Hughes).⁸⁷

The Tenth Circuit applied the three-part test which the Supreme Court had articulated in *Lopez*. Under the interstate commerce clause, according to *Lopez*, Congress can regulate:

- (1) the channels of interstate commerce;
- (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and
- (3) activities which have "a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce."⁸⁸

The *Wilks* court decided that the machine gun ban was a proper example of Congress's power to regulate "things in interstate commerce." First, when enacting the Gun Control Act of 1968, which Congress amended in 1986 with FOPA, Congress had made findings about the need to regulate interstate firearms transfers.⁸⁹ Supposedly, these 1968 findings could inure to the benefit of the 1986 machine gun ban—even though Congress was not regulating machine gun transactions, but was instead simply banning possession.

The Supreme Court had not allowed such relation back in *Lopez*, but the Tenth Circuit distinguished the ban on possessing or carrying

87. *Wilks*, 58 F.3d at 1519.

88. *Id.* at 1520 (summarizing and quoting *Lopez*, 514 U.S. at 558-59).

89. *Id.* at 1521-22.

handguns within a thousand feet of a school. That activity was not a commercial activity, either alone or even in the aggregate of all such carrying. In contrast, machine guns “by their nature are ‘a commodity . . . transferred across state lines for profit by business entities.’”⁹⁰

This argument makes no sense. Handguns also, “by their nature are a commodity . . . transferred across state lines for profit by business entities.” Yet Congress could not ban the mere carrying of handguns in certain places. The machine gun law went even further, by banning possession entirely. A machine gun is no more and no less a commodity than is a handgun. Yet according to the Tenth Circuit, a machine gun, just by being a machine gun, has “interstate attributes”:

Section 922(o) regulates “this extensive, intricate, and definitively national market for machineguns” by prohibiting the transfer and possession of machineguns manufactured after May 19, 1986. As such, § 922(o) represents Congressional regulation of an item bound up with interstate attributes and thus differs in substantial respect from legislation concerning possession of a firearm within a purely local school zone.⁹¹

As if a thing can have interstateness in its very nature, based on how it functions. A rocket capable of firing hundreds of miles might be considered “bound up with interstate attributes.” The maximum range of a machine gun (depending on whether it is a rifle or a handgun), is no more than a few hundred yards. The capacity to shoot a projectile several hundred yards would only be “bound up with interstate attributes” if the average size of a state were about a square mile or less.

Second, the ban on local possession was supposedly necessary, in the congressional mind, to “regulate” (that is, prohibit) interstate sales.

Thus, although not explicitly stated in the language of the statute itself, it is evident that Congress prohibited the transfer and possession of most post-1986 machineguns not merely to ban these firearms, but

90. *Id.* at 1521 (quoting *United States v. Hunter*, 843 F. Supp. 235, 249 (E.D. Mich. 1994)). In a footnote, the *Wilks* court wrote:

We are mindful that in *Lopez* the Supreme Court refused to examine previous Congressional findings surrounding prior federal firearms legislation in determining whether § 922(q) violated the Commerce Clause because § 922(q) “represent[ed] a sharp break with the long-standing pattern of federal firearms legislation.” *Lopez*, 514 U.S. at ___, 115 S.Ct. at 1632. In contrast to § 922(q), we do not view § 922(o) as constituting a “sharp break” with previous firearms legislation which regulated the interstate flow of firearms. Rather, § 922(o) is consistent with this earlier federal legislation because it merely regulates the movement of a particular firearm in interstate commerce. We therefore believe it is entirely appropriate to examine prior enactments and legislation in determining the constitutionality of § 922(o).

Id. at 1521 n.4. Yet quite obviously, § 922(o) is not a law that “merely regulates the movement of a particular firearm in interstate commerce.” *Id.* A ban on interstate machine gun sales would be such a law. A ban on simple intrastate possession is not the same as a ban on interstate sales.

91. *Id.* at 1521 (quoting *Hunter*, 843 F. Supp. at 249) (citations omitted).

rather, to control their interstate movement by proscribing transfer or possession.⁹²

The “evidence” of this supposed Congressional intent was the Congressional statements involving the enactment of the 1968 GCA, plus generic statements (having nothing to do with machine guns) that FOPA was intended to strengthen the GCA as a tool for fighting violent crime and drug trafficking.⁹³

But the machine gun ban had nothing to do with fighting violent crime or drug trafficking. As BATF itself had testified to Congress, during hearings on a previous attempt to ban machine guns, the NFA was working perfectly well. Machine guns which were properly registered under the NFA were virtually never used in crime.⁹⁴

Nevertheless, heroic efforts to stretch the interstate commerce power were validated later in *Gonzales v. Raich*, where the Court’s majority ruled that a federal ban on the legal (under state law) cultivation of medical marijuana exclusively for personal use was a legitimate incident to Congress’s efforts to prohibit an interstate market in marijuana.⁹⁵ Apparently the personal cultivation of legal medical marijuana would reduce the demand for interstate illegal marijuana, thereby reducing the market price for the illegal marijuana. And the effect on price, in turn, meant that Congress could control personal medical cultivation under its power to regulate interstate commerce.⁹⁶

Wilks also argued, creatively, that the National Firearms Act definitions are unconstitutionally vague.⁹⁷ At the least, they certainly are odd. The NFA applies itself to “firearms.” But a “firearm” for NFA purposes is not a “firearm” in normal English usage. The NFA applies to only a small fraction of actual firearms—namely machine guns, short shotguns, short rifles, and a few other types. And a NFA “firearm” includes many things which are obviously not firearms: namely certain explosive devices, such as rockets and grenades, and, of course, “silencers.” The NFA’s definitions section is clear enough; a “silencer” is explicitly defined as a NFA “firearm.”⁹⁸ So the law is similar to a “National Cow Act” which

92. *Id.* at 1522 (quoting *Hunter*, 843 F. Supp. at 248-49).

93. *Id.*

94. *Armor Piercing Ammunition and the Criminal Misuse and Availability of Machineguns and Silencers: Hearing on H.R. 641 and Related Bills Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 98th Cong. 117 (1984)* (statement of Stephen Higgins, Dir. Bureau of Alcohol, Tobacco, and Firearms) (“[I]t is highly unusual—and in fact, it is very, very rare” for registered machineguns to be used in crime.).

95. *Gonzales v. Raich*, 545 U.S. 1, 32-33 (2005).

96. *Id.*

97. *Wilks*, 58 F.3d at 1522.

98. 26 U.S.C.A. § 5845(a) (West 2009) (“The term ‘firearm’ means . . . (7) any silencer (as defined in section 921 of title 18, United States Code)”; 18 U.S.C.A. § 921(a)(24) (West 2009) (“The terms ‘firearm silencer’ and ‘firearm muffler’ mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or rede-

defines a “cow” to include only Holstein cows, but also states that chickens and pianos are a type of “cow.”

It is an interesting question whether a legal definition which is 1) clear, but 2) patently false and nonsensical, could be considered void for vagueness. But Wilks had not preserved the issue for appeal, and the Tenth Circuit did not have to decide the issue.

VIII. BAER: MORE (BUT NOT MUCH MORE) ANALYSIS OF THE SECOND AMENDMENT

Regarding *pro se* lawyering, there is a saying that a man who represents himself has a fool for a client.⁹⁹ The observation may not be true in all cases, but it was in *United States v. Baer*.¹⁰⁰

The Tenth Circuit’s 1977 decision in *Oakes* had announced a Second Amendment result based on “logic” and “policy” and what was “apparent,” but had not made any logical or policy arguments, and had not pointed out any “apparent” facts.¹⁰¹ For twenty-three years, the Tenth Circuit had offered not one more word of Second Amendment analysis. In *Baer*, the Circuit went further, adding an entire paragraph to its thin corpus of Second Amendment analysis.

Baer was convicted of being a convicted felon in possession of a firearm,¹⁰² and of possessing firearms with obliterated serial numbers.¹⁰³ He argued that the felon-in-possession ban exceeded Congressional power post-*Lopez*, a claim which the Tenth Circuit rejected, citing its own precedent that the ban was constitutional, because the ban only applied to firearms which had at some point been transferred in interstate commerce.¹⁰⁴

He also raised a Ninth Amendment claim, which was speedily dismissed with a citation to other Circuit Courts which rejected the notion of a Ninth Amendment right to arms.¹⁰⁵ The dissent did not address any

signed, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.”).

99. The quote is often attributed, incorrectly, to Abraham Lincoln. RALPH KEYES, THE QUOTE VERIFIER 128 (2006).

100. 235 F.3d 561 (10th Cir. 2000).

101. *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977).

102. 18 U.S.C.A. § 922(g)(1) (West 2009).

103. 18 U.S.C.A. § 922(k) (West 2009).

104. *Baer*, 235 F.3d at 563 (citing *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995)). The machine gun ban, discussed *supra*, is not limited to machine guns that have been transferred in interstate commerce.

105. *Id.* at 564 (citing *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996); *United States v. Wright*, 117 F.3d 1265, 1275 (11th Cir.1997), *vacated in part on other grounds*, 133 F.3d 1412 (11th Cir. 1998); *United States v. Broussard*, 80 F.3d 1025, 1041 (5th Cir. 1996)).

of the arguments in Nicholas Johnson's 1992 *Rutgers Law Journal* article on the Ninth Amendment and the right to arms.¹⁰⁶

Presumably, Baer, as a *pro se* litigant, had not done an excellent job in presenting the Ninth Amendment argument. But the Tenth Circuit went too far with its breezy rejection pronouncement against any Ninth Amendment right to arms. If the panel did not want to write a serious analysis of the Ninth Amendment issue, the panel simply could have pointed out that there is *no* authority for the proposition that convicted felons have a Ninth Amendment right to own guns, or that there is a Ninth Amendment right to firearms which have obliterated serial numbers.

In future years, it would be best to understand *Baer*, in regards to the Ninth Amendment, as standing for nothing more than the above two propositions. The panel never even attempted to engage the merits of a Ninth Amendment analysis as applied to law-abiding citizens, and *Baer* should not be treated as if the panel had engaged the issue.

Baer had also raised the Second Amendment. The panel responded with a scornful footnote:

Mr. Baer also makes the time-worn argument that his conviction violates the Second Amendment. The Supreme Court has long held that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Lewis v. United States*, 445 U.S. 55, 65 n. 8, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980) (quoting *United States v. Miller*, 307 U.S. 174, 178, 59 S.Ct. 816, 83 L.Ed. 1206 (1939)). The Court in *Lewis* concluded that federal legislation regulating the receipt and possession of firearms by felons "do[es] not trench upon any constitutionally protected liberties," including those guaranteed by the Second Amendment. *Id.* In light of this authority, the circuits have consistently upheld the constitutionality of federal weapons regulations like section 922(g) absent evidence that they in any way affect the maintenance of a well regulated militia. See, e.g., *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir.1995); see also *Wright*, 117 F.3d at 1271-74 (upholding 18 U.S.C. § 922(o), which bars possession of machine gun, against Second Amendment challenge); *United States v. Hale*, 978 F.2d 1016, 1018-1020 (same); *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir.1988) (upholding Switchblade Knife Act, 15 U.S.C. § 1242, against Second Amendment challenge); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir.1977) (upholding 26 U.S.C. § 5861(d), which bars possession of unregistered machine gun, against

106. See generally Johnson, *supra* note 26.

Second Amendment challenge). Mr. Baer's prosecution did not violate the Second Amendment.¹⁰⁷

Lewis was a 1980 Supreme Court case involving a Sixth Amendment challenge to the felon in possession ban. The Second Amendment had not been raised or briefed by any party.¹⁰⁸ Still, the Court did include the footnote with the above-quoted language.¹⁰⁹ Although it is possible to argue about what *Lewis* means, the Tenth Circuit's quotation of *Lewis* was at least a plausible interpretation of *Lewis* as rejecting the notion of a constitutionally protected right to arms. (The narrower reading of *Lewis* is simply that it affirms that convicted felons have no right to arms.)

It was reasonable for the Tenth Circuit, in 2000, to update its 1977 Second Amendment analysis by citing dicta from a footnote in a 1980 U.S. Supreme Court case. Unfortunately, the Tenth Circuit, in its 2000 update, paid no attention at all to what the Supreme Court had written about the Second Amendment in the text of a 1990 opinion, *United States v. Verdugo-Urquidez*. There, the Court had explained that "the people" was a constitutional "term of art" which had the same meaning in the First, Second, Fourth, and Ninth Amendments.¹¹⁰

It is difficult to square the Tenth Circuit's insistence that "the right of the people to keep and bear arms" applies only to members of state militias with the Supreme Court's rule that "the people" in the Second Amendment are just the same as "the people" who are protected by the First, Fourth, and Ninth Amendments.

It is true that ingenious arguments can be made to get around what seems to be *Verdugo*'s plain language.¹¹¹ But the Tenth Circuit did not offer any such arguments about *Verdugo*. Rather, the Circuit acted as if *Verdugo* did not exist. This was the style of the Tenth Circuit's treatment of the Second Amendment in the late twentieth century: not to refute the strongest authorities and arguments in favor of an ordinary individual right in the Second Amendment, but simply to refuse to address them at all.

107. *Baer*, 235 F.3d at 564.

108. *See infra* note 193.

109. *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

110. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

111. *See* Brief for Brady Center as Amicus Curiae Supporting Petitioner at 26-28, *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (No. 07-290), *available* at <http://www.gurapossessky.com/news/parker/documents/07-290tsacBradyCenter.pdf>.

IX. *HANEY*: THE MACHINE GUN BAN, THE INTERSTATE COMMERCE POWER, AND THE FOUR-PART TEST

John Lee Haney is one of the many litigants who have made terrible Second Amendment law by bringing poorly prepared cases.¹¹²

John Lee Haney walked into a police station, engaged an officer in conversation, and told him that he owned semiautomatic and fully automatic guns. He stated that they were not licensed and that the federal government lacks authority to require him to get a license. Through a combination of Haney's consent and a warrant, the authorities found two fully automatic guns in Haney's car and house. Haney also had literature on how to convert a semiautomatic gun to a fully automatic gun. Haney had converted one of the guns himself and had constructed the other out of parts. He admitted possessing them.¹¹³

The case was preposterous. Had Haney consulted a competent attorney, he would have found that:

- The Tenth Circuit had already rejected the idea of Second Amendment rights for anyone outside the National Guard in *Oakes*, in 1977.¹¹⁴
- The Tenth Circuit has already rejected the idea that, even post-*Lopez*, Congress cannot use the interstate commerce power to ban machine gun possession.¹¹⁵
- Haney's semi-automatic arms were entirely legal, and thus could not be used to set up any kind of test case.

Addressing the Second Amendment, Judge Ebel briefly quoted from *Miller* and *Lewis*, with no greater length nor depth of analysis than had been used in *Oakes* or *Baer*. (Judge Ebel was on the panel in *Baer*.) The opinion also quoted from *Oakes* itself.

There was one slightly novel (from a Tenth Circuit standpoint) iota of analysis. Namely the assertion:

Consistent with these cases, we hold that a federal criminal gun-control law does not violate the Second Amendment unless it

112. See *United States v. Haney*, 264 F.3d 1161 (10th Cir. 2001).

113. *Id.* at 1163.

114. Perhaps Haney had drawn hope from the circuit's hint about the "brooding omnipresence" in *Wilks* in 1995. *United States v. Wilks*, 58 F.3d 1518, 1519 n.2 (1995). But in 2000—after Haney had gotten himself arrested, but before the Tenth Circuit heard his appeal—another panel, in *Baer*, had slammed the door on revising the circuit's approach to the Second Amendment. See *United States v. Baer*, 235 F.3d 561 (10th Cir. 2000).

115. *Wilks*, 58 F.3d at 1519.

impairs the state's ability to maintain a well-regulated militia. This is simply a straightforward reading of the text of the Second Amendment.¹¹⁶

To say the least, Judge Ebel's interpretation is hardly a "straightforward reading of the text." The text protects "right of the people." It takes a rather circuitous reading to transpose "the militia" (whose importance is extolled in the first part of the Amendment) from the opening clause of the Amendment into the main clause of the Amendment, so that the Amendment is somehow read "the right of state militiamen to keep and bear arms shall not be infringed."

The *Heller* opinion itself—with a 5-4 split in which each side argued vehemently about the text of the Second Amendment—demonstrates the incorrectness of Judge Ebel's claim that his militia-only reading of the Second Amendment was "simply a straightforward reading of the text." The Ebel reading was the one which four Supreme Court Justices adopted, so it might be characterized as an intellectually plausible reading. But it was hardly an obvious, "straightforward" reading—as shown by the fact that five Supreme Court Justices had a different reading.

Moreover, at the time that *Haney* was decided, there were many Supreme Court opinions which had treated the Second Amendment as a normal (not a militia-only) individual right, usually to make a point about something else (e.g., Fourteenth Amendment incorporation of another right).¹¹⁷ Judge Ebel adroitly avoided mention of any of these cases (including the 1990 *Verdugo-Urquidez* decision) by writing, "There are two twentieth-century Supreme Court cases discussing the Second Amendment in what appear to be holdings."¹¹⁸ Describing the Second Amendment footnote in *Lewis*, a case involving the Sixth Amendment, as a "holding" was something of a stretch. But more importantly, Judge Ebel's careful phrasing—which limited his written opinion to consideration of a mere two of the thirty-six Supreme Court cases which mentioned the Second Amendment—indicated that he was aware of at least some of those thirty-four other cases. The vast majority of those cases were not only inconsistent with *Haney*; they also showed the patent absurdity of Judge Ebel's claim that the militia-only view was the "straightforward reading" of the Second Amendment, for from the Early

116. *Haney*, 264 F.3d at 1164.

117. See David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999). This article is critiqued in David Yassky, *The Sound Of Silence: The Supreme Court And the Second Amendment—A Response to Professor Kopel*, 18 ST. LOUIS U. PUB. L. REV. 189 (1999). My reply is *The Sounds of the Supremes: A Reply to Professor Yassky*, 18 ST. LOUIS U. PUB. L. REV. 203 (1999). For another critique, see Robert Hardaway, Elizabeth Gormley & Bryan Taylor, *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMM. 99 (2002).

118. *Haney*, 264 F.3d at 1164.

Republic to the present, opinion after opinion from the United States Supreme Court had read the Second Amendment differently from what Judge Ebel declared was the “straightforward reading.”

Judge Ebel then proffered a string cite to five cases from other Circuits.¹¹⁹ The *Haney* opinion does not seem to notice that two of these opinions actually had an entirely different theory of the Second Amendment than did the Tenth Circuit. According to the Tenth Circuit, the Second Amendment was an individual right which could only be exercised by persons in state militias. According to two of the five cited cases, the Second Amendment was not an individual right at all, but was a “collective right” which belonged only to the government.¹²⁰

But all five cases did stand for the Tenth Circuit’s operative rule in challenges to federal gun laws: “The government always wins.”¹²¹

In *Oakes*, the panel had been unable to offer any reason for its pronouncement that a person who was statutorily defined as a militiaman by state law, and who belonged to a private organization which he claimed was a militia, did not have Second Amendment rights.¹²² The *Haney* opinion did at least offer some argument for its claim that Haney was not part of “the militia” protected by the Second Amendment. Oklahoma law (like federal law)¹²³ classifies “the militia” into two groups: the “organized militia” is the National Guard and the State Guard.¹²⁴ In Oklahoma, the “unorganized militia” is all other able-bodied adult males aged 17 to 70.¹²⁵ Judge Ebel argued that Haney had not shown that his participation in the unorganized militia was “well-regulated by the State of Oklahoma” or “that machineguns of the sort he possessed are used by the militia, or that his possession was connected to any sort of militia service.”¹²⁶

One might disagree with *Haney*’s reasoning, but at least there was some reasoning, making the decision much better than *Oakes*.

The *Haney* case announced a four-part test, which made it clear that, even for persons in state militias, it would be essentially impossible even to raise a Second Amendment claim:

As a threshold matter, he must show that (1) he is part of a state militia; (2) the militia, and his participation therein, is “well regulated”

119. *Haney*, 264 F.3d at 1165.

120. *United States v. Napier*, 233 F.3d 394 (6th Cir. 2000); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000).

121. *Haney*, 264 F.3d at 1165.

122. See *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), cert. denied, 435 U.S. 926 (1978).

123. 10 U.S.C. § 311 (West 2009).

124. OKLA. STAT. ANN. TIT. 44, § 41 (West 2009).

125. *Id.* For the federal militia, the age range is 17 to 45. 10 U.S.C. § 311(a) (West 2009).

126. *Haney*, 264 F.3d at 1165.

by the state; (3) machineguns are used by that militia; and (4) his possession of the machinegun was reasonably connected to his militia service.¹²⁷

Regarding the issue of post-*Lopez* congressional power to ban machine gun possession, the *Haney* court restated the *Wilks* analysis at length. *Haney* also string-cited the other federal circuit decisions upholding 18 U.S.C. 922(o).¹²⁸ But *Haney* did not mention the Fifth Circuit's en banc case on the issue, *United States v. Kirk*, in which the ban survived only by an 8-8 vote.¹²⁹ The Third Circuit's decision in *Rybar* was cited, but there was no discussion of the arguments raised by Judge Alito's dissenting opinion in that case.¹³⁰ As was the standard practice in the Tenth Circuit on firearms issues, the panel simply refused to acknowledge that there was anyone (other than the criminal defendants at bar) who thought that there might be the slightest constitutional impediment to gun prohibition.

Wilks had upheld the machine gun ban because machine guns are (supposedly) like railroads and Internet backbones: "instrumentalities of interstate commerce." They allegedly become such instrumentalities because by their very nature they are bought and sold across state lines.¹³¹

But *Haney* had not bought or sold any machine guns, not even within his own county. He had converted his own semi-automatic guns to automatic. (If not for 922(o), he could have done so lawfully under the National Firearms Act by paying a tax and registering them.) *Haney* asserted, with no supporting argument, that the federal ban on post-1986 machine gun possession is also legitimate under the third *Lopez* prong: "regulating activities that substantially affect interstate commerce."¹³² It is very difficult to see how the home conversion of a semi-automatic gun to an automatic gun has *more* of an effect on interstate commerce than does the carrying of guns in school zones. It borders on the absurd to say that the non-commercial production of machine guns for personal use has (in the aggregate) *more* of an effect on interstate commerce than does violence against women. And the Supreme Court, in *Morrison*, had just

127. *Haney*, 264 F.3d at 1165.

128. *Haney*, 264 F.3d at 1166-71 (citing *United States v. Franklyn*, 157 F.3d 90 (2d Cir. 1998), *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997), amended on other grounds, 133 F.3d 1412 (11th Cir. 1998), *United States v. Knutson*, 113 F.3d 27 (5th Cir. 1997) (per curiam), *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996), *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996), *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996), *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995), and *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992)).

129. *United States v. Kirk*, 105 F.3d 997 (5th Cir. 1997). *Kirk* was cited elsewhere (without mention that it was a case about machine guns, and had drawn eight dissenters on the very issue at bar in *Haney*) for a point about the standard of review. *Haney*, 264 F.3d at 1167.

130. *Rybar*, 103 F.3d at 286-94 (Alito, J., dissenting).

131. *Wilks*, 58 F.3d at 1521.

132. *Haney*, 264 F.3d at 1170-71.

applied *Lopez* to find part of the federal Violence Against Women Act unconstitutional.¹³³

Haney distinguished *Morrison* by claiming that *Morrison* ruled against VAWA because violence against women is not an economic activity.¹³⁴ But if beating up a woman during the course of a robbery is not an economic activity, then neither is changing the functioning of a gun you already own.

Glenn Reynolds and Brannon Denning have observed that lower federal courts have, in essence, nullified *Lopez*, refusing to extend it beyond its facts, and upholding laws by using reasoning which *Lopez* explicitly rejects.¹³⁵ *Haney* and *Wilks* fit with the Reynolds-Denning paradigm, insofar as they claim that machine guns are naturally interstate, or that the aggregate effect of home conversion of one's own gun from semi-automatic to automatic has a "substantial" effect on interstate commerce.

Haney, however, builds extensively on the idea which had been sketchily developed in *Wilks*: that the ban on personal possession (and even personal manufacture) was necessary for Congress to regulate the interstate market in machine guns.¹³⁶ This type of analysis was later validated by the Supreme Court in *Raich*.¹³⁷ Even if one disagrees with the *Haney-Raich* reasoning, at least it was extensive reasoning. This one sub-section of the *Haney* opinion was more thorough than all of the Tenth Circuit's analysis (including the analysis in *Haney* itself) of the Second Amendment, combined, thus far.

X. GRAHAM: LICENSES FOR EXPLOSIVES DEALERS, THE STANDARD OF REVIEW

Graham was convicted of selling explosives without a license.¹³⁸ On appeal, one of his claims was that requiring a federal license for explosives dealers¹³⁹ violated the Second Amendment.

He argued that explosives "have a common use in military training exercises," that there is an "individual right to participate in militia training exercises and to keep and bear arms needed by a militiaman," and that "[t]hese rights would mean little if he could not purchase or sell these arms."

133. United States v. Morrison, 529 U.S. 598 (2000).

134. *Haney*, 264 F.3d at 1168.

135. Glenn H. Reynolds & Brannon P. Denning, *Lower Court Interpretations of Lopez, Or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 (2000).

136. *Haney*, 264 F.3d at 1168-70.

137. *Gonzales v. Raich*, 545 U.S. 1 (2005).

138. *United States v. Graham*, 305 F.3d 1094 (10th Cir. 2002).

139. 18 U.S.C.A. § 842(a)(1) (West 2009).

Graham quickly reprised *Haney*, and observed that Graham was not part of the state militia. He was part of a group called “Organization,” which acted as an independent militia. But since Organization was not recognized by the state, it was not a part of the “well-regulated militia,” which was the only type of group whose members had Second Amendment rights. Indeed, even if Organization were recognized by the state, and were highly organized, the fact that Organization was not part of the state’s National Guard meant that Organization was not part of the “organized” militia, and therefore was not “a well-regulated militia.”¹⁴⁰

The *Graham* opinion added that even if the defendant had Second Amendment rights, those rights were subject to “reasonable regulation,” and that requiring a license for explosive dealers was a reasonable regulation.

Heller did not formally articulate a Second Amendment standard of review, but Justice Breyer’s dissent argued for a reasonableness standard, and the *Heller* majority opinion explicitly rejected that approach.¹⁴¹

Thus, *Graham* cannot be considered good law any more, on any part of its Second Amendment analysis. However, as detailed *supra*, it may be that explosives (other than gunpowder) are not Second Amendment arms, if they are not considered to be the type of arms commonly used by law-abiding citizens for legitimate purposes.¹⁴²

If explosives are Second Amendment arms, dealer licensing is probably constitutional, given *Heller*’s explicit affirmation of laws regulating the commercial sale of arms.¹⁴³

Graham does contain one step towards an appropriate standard of review. Besides finding that licensing law was “reasonable,” the court also stated that it was “sufficiently tailored.”¹⁴⁴ This is not quite the “narrow tailoring” that the First Amendment requires for time, place, and manner regulation, but it is a sort of back-handed acknowledgement of that standard. First Amendment time/place/manner analysis is very useful and appropriate (one might say “well-tailored”) for analysis of many gun controls under the Second Amendment.¹⁴⁵

140. *Graham*, 305 F.3d at 1106.

141. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2821 (2008) (Scalia, J.). *Id.* at 2847 (Breyer, J., dissenting) (“[T]he majority’s view cannot be correct unless it can show that the District’s regulation is unreasonable or inappropriate in Second Amendment terms.”).

142. *United States v. Graham*, 305 F.3d 1094 (10th Cir. 2002).

143. *Heller*, 128 S.Ct. at 2817 (“laws imposing conditions and qualifications on the commercial sale of arms” are not *per se* violations of the Second Amendment).

144. *Graham*, 305 F.3d at 1106.

145. See, e.g., Gary E. Barnett, Note, *Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J. L. & PUB. POL’Y 607, 608 (2008).

XI. LUCERO

Richard Joseph Lucero converted two semi-automatic rifles into machine guns, and sold them to an undercover agent.¹⁴⁶ He was convicted of violating the 1986 ban on machine guns.

He argued that he was a member of the unorganized militia, and at trial, presented expert testimony “that machineguns have reasonable military uses and are in fact used by the military.”¹⁴⁷ But his argument was hopeless in light of the recently-decided *Haney*, because Lucero was not a member of the organized component of a state militia.¹⁴⁸

The most interesting part of the unpublished opinion was the concurrence by Judge Carlos Lucero. He had run for the Democratic nomination for United States Senate in 1990. His opponent was gun control advocate Josie Heath, and Lucero contrasted his position with hers: “I believe the Second Amendment means what it says.”¹⁴⁹

The U.S. Department of Justice agreed. By the time that the *Lucero* case reached the Tenth Circuit, the Attorney General had adopted the position (held by many previous Attorneys General, but not by Janet Reno),¹⁵⁰ that the Second Amendment guarantees an ordinary individual right.¹⁵¹ The change from the Reno to the Ashcroft position had come after the government’s brief in *Lucero* had been filed. Accordingly, the U.S. Attorney’s office moved to modify its answer, and, as a matter of courtesy, to allow the defendant to rebrief the Second Amendment.¹⁵²

The two-judge majority of Tacha and Hartz refused to allow the additional briefing. Judge Lucero’s concurrence said that he would have allowed the rebriefing on the Second Amendment. He also wrote:

I concur in the result reached by the majority opinion, and would affirm. Even were we to accept the proposition that the defendant has an individual right under the Second Amendment “to keep and bear Arms” in order to serve in “[a] well regulated Militia” subject to call

146. *United States v. Lucero*, 43 Fed. Appx. 299, 2002 WL 1750878 (10th Cir. 2002).

147. *Id.* at 301.

148. *Id.*

149. COLO. STATESMAN, Aug. 1990. Thus, to Lucero, unlike to the *Baer* panel, the “straightforward” reading of “the right of the people to keep and bear arms” was that people have a right to own and carry guns.

150. Brief for Amici Curiae Former Senior Officials of the Department of Justice in Support of Respondent at 2, *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (No. 07-290), available at <http://tinyurl.com/cngu6j>.

151. Memorandum to All United States’ Attorneys from the Attorney General, Re: *United States v. Emerson* (Nov. 9, 2001), available at <http://www.usdoj.gov/ag/readingroom/emerson.htm>.

152. The U.S. Attorney’s motion to amend its brief was filed on June 24, 2002. The original brief had been filed in April 2002 (and was termed “deficient” by the Tenth Circuit, because it had the wrong color cover, and was a day late). Appellee’s Motion to Modify Argument in Its Answer Brief, *United States v. Lucero*, 43 F. App’x 299, 2002 WL 1750878 (10th Cir. June 24, 2002). Since the Ashcroft memorandum had been distributed in November 2001, the New Mexico U.S. Attorney’s office did not appear to have a good excuse for having filed, half a year later, a brief that violated Department of Justice policy.

by a “free State,” I am not persuaded that the semi-automatic and fully automatic “machineguns” which defendant sold to federal agents, and which have been outlawed by federal legislation, are the type of arms subject to Second Amendment protection. For that reason I would affirm the judgment of the district court.¹⁵³

The above paragraph is, of course, not a detailed analysis of the issues, but detailed analysis is generally not expected from concurrences in unpublished opinions.

Judge Lucero’s conclusion that machine guns are not part of the Second Amendment right appears to have been vindicated by *Heller*.¹⁵⁴ As to the semi-automatics that were involved in the particular case, Judge Lucero was not “persuaded” that they were protected by the Second Amendment. Presumably, in a post-*Heller* case, he would have an open mind to a full exposition on the merits of whether such guns are the type “typically possessed by law-abiding citizens for lawful purposes.”¹⁵⁵

XII. *BAYLES*: GUN POSSESSION BY PERSONS SUBJECT TO A PROTECTIVE ORDER

In 1994, Congress amended the Gun Control Act to prohibit gun possession by persons subject to domestic violence protective orders.¹⁵⁶

In 1999, a Utah trial court issued a protective order against Bayles, ordering him to stay away from his ex-wife and her new husband.¹⁵⁷ The order was a standard boilerplate form. The Utah judge did *not* check the box on the form which would have prohibited Bayles from owning guns.¹⁵⁸

153. *Lucero*, 43 F. App’x at 301-02 (Lucero, J., concurring).

154. *See* District of Columbia v. *Heller*, 128 S. Ct. 2783, 2799 (2008).

155. *Id.* at 2815.

156. 18 U.S.C.A. § 922(g)(8) (West 2009):

It shall be unlawful for any person . . .

who is subject to a court order that—(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .

157. *United States v. Bayles*, 310 F.3d 1302, 1304 (10th Cir. 2002).

158. *Id.* at 1304-05.

Bayles was a gun collector. Federal agents launched an undercover investigation, which led to his conviction for violation of the federal law.¹⁵⁹

The Tenth Circuit speedily disposed of his Second Amendment challenge, citing *Haney* and *Baer*, and pointing out that Bayles was not a member of the militia, and had not satisfied any of the four parts of the *Haney* test.¹⁶⁰ The *Bayles* court acknowledged that a federal district court in Texas had recently found that the federal ban on subjects of a restraining order violated the Second Amendment, as applied to a particular defendant. But, as the *Bayles* court noted, the Fifth Circuit's disposition of the appeal had been to affirm the validity of the federal ban.¹⁶¹ (The Tenth Circuit delicately avoided mentioning that the Fifth Circuit had held that the Second Amendment is an ordinary individual right, not a militia-only right.)¹⁶²

Unlike the gun zone statute in *Lopez*, or the machine gun ban in 18 U.S.C. 922(o), the protective order ban had an explicit jurisdictional component: the gun must have been moved in interstate commerce. (Presumably, then, the ban would not apply to the possession of a gun that never left the state of its manufacture.) The Tenth Circuit, like other Circuits,¹⁶³ ruled that this was a sufficient basis for use of the interstate commerce power.¹⁶⁴

So if a gun were manufactured in Massachusetts in 1922, and sold in Utah in 1923, and never left Utah thereafter, its possession within Utah in 1999 could still be prohibited under the congressional power to regulate interstate commerce. This might be considered the Herpes Theory of Interstate Commerce; one act of interstate commerce will attach to an object for the rest of the object's life, no matter how long.

The Tenth Circuit also reversed the district court's downward departure from the Sentencing Guidelines, based on the fact (which was

159. *Id.* at 1305-06.

160. *Id.* at 1307; *see also* *United States v. Napier*, 233 F.3d 394, 403-04 (6th Cir. 2000).

161. *Bayles*, 310 F.3d at 1307 (discussing *United States v. Emerson*, 46 F. Supp. 2d 598, 610 (N.D.Tex.1999)); *see also* *United States v. Emerson*, 270 F.3d 203, 210, 265 (5th Cir. 2001).

162. *Bayles*, 310 F.3d at 1307.

163. *Id.* at 1308 (citing *United States v. Bostic*, 168 F.3d 718, 723 (4th Cir. 1999) ("Unlike the statute at issue in *Lopez*, Section 922(g) expressly requires the government to prove that the firearm was ship[ped] or transport[ed] in interstate or foreign commerce; was possess[ed] in or affect[ed] interstate commerce; or is received after having been shipped or transported in interstate or foreign commerce."); *Napier*, 233 F.3d at 402 (6th Cir. 2000) ("Section 922(g)(8) . . . does contain a jurisdictional element that establishes that it was enacted in pursuance of Congress' power to regulate interstate commerce in firearms and ammunition."); *United States v. Jones*, 231 F.3d 508, 514-15 (9th Cir. 2000) ("[E]very Court of Appeals that has considered this question has concluded that § 922(g)(8) is a valid exercise of Congress' power under the Commerce Clause."); *United States v. Wilson*, 159 F.3d 280, 286 (7th Cir. 1998) (stating that 922(g)(8) "contains a jurisdictional element that brings it within Congress' power under the Commerce Clause").

164. *Bayles*, 310 F.3d at 1308. The Tenth Circuit had used the same approach for the federal ban on gun possession by convicted felons. *See* *United States v. Dorris*, 236 F.3d 582, 586 (10th Cir. 2000).

disputed, but which the district court had found in Bayles' favor) that he did not know he was prohibited under federal law. As the district court had noted, one very important fact was that the state restraining order which Bayles received had a box to prohibit firearms possession, and that box was not checked.¹⁶⁵

The Tenth Circuit cited cases from sister circuits holding that ignorance of the law was not a defense to conviction for the crime itself. As the Tenth Circuit admitted, none of these cases addressed whether ignorance could be a justification for a downward departure in sentencing. But these cases were enough for the Tenth Circuit to find the downward departure invalid as a matter of law. Appropriately, one of the cited cases was *United States v. Kafka*.¹⁶⁶ The very fact that there were so many cases involving the restraining order statute in which the defendant had no idea that he was banned from owning guns, the Tenth Circuit argued, proved that the case of the ignorant Bayles was not outside the "heartland" of cases involving the statute; hence, he did not qualify for a downward departure.¹⁶⁷ Post-*Heller*, mistake may be a viable defense in some cases, as a district court in Pennsylvania held, in a case involving man who had very good reason to believe that he was not a convicted felon.¹⁶⁸

165. *Bayles*, 310 F.3d at 1304-06, 1309-13.

166. *Id.* at 1311 (citing *United States v. Kafka*, 222 F.3d 1129, 1131-33 (9th Cir. 2000)).

167. *Bayles*, 310 F.3d at 1304-06, 1309-13. The opinion acknowledged that a downward departure might be legitimate if a defendant had been actually misled by a federal district judge or by his lawyer about what the law required. But Bayles' lawyer had told him, in effect, that he was in a gray zone, and it would be prudent to get rid of his guns, and Bayles had in fact gotten rid of most of his guns.

168. See *United States v. Kitsch*, No. 03-594-01, slip op., 2008 WL 2971548, at *1, *3 to *7 (E.D. Pa. Aug. 1, 2008). In *Kitsch*, the defendant was working as an informant for law enforcement officials in New Jersey.

As a means of helping the narcotics officer with whom he was working. . . . Kitsch set a small, smoky fire on the windowsill of the barn and then promptly called the fire department As a result of the fire, Kitsch was charged with third-degree arson, a felony under both New Jersey and federal law. He pled guilty to the state offense after meeting with law enforcement officials who told him they would set aside the conviction and Kitsch could live as though the event had never happened. Although he served a thirty-day custodial sentence on Sundays, Kitsch avers that he truly and reasonably believed that his conviction had either been set aside or expunged.

Thus, "in order to convict Kitsch, the Government must prove beyond a reasonable doubt that he knew or was willfully blind to the fact that he had a prior felony conviction that had not been set aside or expunged." Among the rationales for the district court's conclusion was the Second Amendment:

A statute that imposes criminal penalties for the exercise of an enumerated constitutional right despite defendant's reasonable belief in good faith that he has complied with the law must, at the very least, raise constitutional doubts. Post-*Heller*, the Government's desired construction of Section 922(g)(1) imposes just such a burden on defendants who, for whatever reason, reasonably believe that they are not felons within the statutory definition. Faced with a statute that raises this sort of doubt, it is "incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress."

As for the constitutionality of the gun ban for targets of a protective order, it has been upheld in one post-*Heller* case. That court did suggest the ban would be unconstitutional if applied (as the federal statute allows) in a situation where the protective order was issued *without* a finding that the defendant had used, attempted, or threatened to use violence.¹⁶⁹ Lower courts have also upheld the federal ban on gun possession by persons convicted of domestic violence misdemeanors.¹⁷⁰

XIII. WYNNE: ANOTHER RESTRAINING ORDER

Having thoroughly discussed the restraining order issue in *Bayles*, the Tenth Circuit did not publish its opinion in *United States v. Wynne*, another case involving the same subsection of the Gun Control Act.¹⁷¹

Wynne's Second Amendment argument was quickly rejected with citations to *Bayles* and *Baer* (misspelled as "Baur"), pointing out that Wynne had not satisfied the four-part test in *Haney*.¹⁷²

A protective order against Wynne was issued in 1994. In 1997, the order was revised to reflect the new address of the protected person, Lisa Foreman.¹⁷³

The federal law applies only to restraining orders issued after the subject had notice and an opportunity to appear.¹⁷⁴ Wynne had notice and opportunity for the 1994 order but not for the 1997 order. His argument to the Tenth Circuit was that the 1997 order replaced the 1994 order, and therefore there was no longer any valid (for purposes of the Gun

See also State v. Williams, 148 P.3d 993, 995-96 (Wash. 2006) (writing that strict liability readings of gun control statutes are strongly disfavored under the Second Amendment and the Washington state constitutional right to arms).

169. *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1020-26 (E.D. Wis. 2008) (indicating that *Heller* stated that bans on felons and the mentally ill are constitutional; the *Heller* language should be understood as providing examples (not an exclusive list) of the *type* of people who can be prohibited: namely, people who have been proven to be dangerous; persons subject to a domestic violence order based on particularized finding of violence can be prohibited).

170. *United States v. Booker*, 570 F. Supp. 2d 161, 163-65 (D. Me. 2008) (suggesting that the federal statute on domestic violence, prohibiting gun possession by a person who has been convicted of "the use or attempted use of physical force" in domestic violence, is actually a closer fit for identifying dangerously violent persons who might misuse guns than is the federal ban on gun possession by convicted felons, since many felons are non-violent); *see also* *United States v. White*, No. 07-00361-WS, slip op., 2008 WL 3211298, at *1 (S.D. Ala. Aug. 6, 2008).

171. *United States v. Wynne*, No. 01-6386, slip op., 2003 WL 42508, at *1 (10th Cir. 2003) (not selected for publication).

172. *Id.* at *2.

173. *Id.* at *1, 4-6.

174. 18 U.S.C.A. § 922(g)(8) (West 2009):

(A) [the order] was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) [the order] restrains the person from harassing, stalking, or threatening an intimate partner . . . ; and (C) [the order] by its terms explicitly prohibits the use, attempted use, or threatened use of physical force . . .

Control Act) restraining order which would prohibit him from having guns.¹⁷⁵

The Tenth Circuit agreed with the district court that the 1994 order was still in effect, and that whatever had happened in 1997 was just an attempted technical change of the 1994 order, and not a new order.¹⁷⁶

XIV. *RHODES*

Jimmy Eugene Rhodes ran a methamphetamine lab, and was caught in possession of stolen firearms.¹⁷⁷ His Second Amendment challenge to the federal ban on gun possession by convicted felons was rejected with a short citation of *Baer*, and the observation that three-judge panels cannot overrule previous panels. Notably, the *Rhodes* opinion simply cited *Baer* for the constitutionality of the felon-in-possession statute, and did not discuss Rhodes' non-membership in the militia.¹⁷⁸

XV. *PARKER*

Ever since the early 1980s, that "brooding omnipresence"¹⁷⁹ of the Second Amendment had become more and more powerful. In 1982, the U.S. Senate Subcommittee on the Constitution investigated the Second Amendment, and issued a lengthy report in which all the Democrats and Republicans on the Subcommittee agreed that the Second Amendment is a normal individual right.¹⁸⁰ In 1986, Congress passed the Firearms Owners' Protection Act (FOPA) by huge bipartisan majorities in both houses,¹⁸¹ and FOPA declared the Second Amendment to be an individual right of all Americans.¹⁸²

175. *Wynne*, 2003 WL 42508, at *4-5.

176. *Id.* at *5-6.

177. *United States v. Rhodes*, No. 02-6280, 62 F. App'x. 869, 870-72, 2003 WL 1565166, at *1-2 (10th Cir. March 27, 2003) (unpublished).

178. *Id.* at 875-76.

179. *United States v. Wilks*, 58 F.3d 1518, 1519 (10th Cir. 1995).

180. SUBCOMM. ON THE CONSTITUTION, COMM. ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG., 2D SESSION, THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982), available at <http://www.guncite.com/journals/senrpt/senrpt.html>.

181. FOPA passed the Senate 79-15, with thirty Democrats in favor and thirteen opposed. Among the Democratic senators voting in favor were Joe Biden and Al Gore. FOPA passed the House 292-130, with Democrats voting 131 in favor and 115 opposed. The lead House sponsor, Harold Volkmer, was a Democrat. 131 CONG. REC. D00000-02 (1985), 1985 WL 714108.

182.

CONGRESSIONAL FINDINGS--The Congress finds that--

(1) the rights of citizens--

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and

A 1983 article by Don Kates in the *Michigan Law Review*¹⁸³ began what eventually became a flood of law review articles on the Second Amendment. The most eminent Professors of Constitutional Law—including Sanford Levinson,¹⁸⁴ Akhil Amar,¹⁸⁵ William Van Alstyne,¹⁸⁶ and even Larry Tribe¹⁸⁷—wrote articles and treatises affirming the Standard Model.

The American public demonstrated its belief in the continuing importance of the right to keep and bear arms. In recent decades, twenty states added or strengthened right to arms provisions in the state constitutions, always doing so by enormous majorities—even in liberal states such as Wisconsin.¹⁸⁸

And if, as Mr. Dooley said, the courts follow the election returns, the Democrats lost the House of Representatives in 1994,¹⁸⁹ and Al Gore lost the Presidency in 2000 because of public backlash at gun control—at least according to President Clinton’s analysis of those elections.¹⁹⁰

Even if the judges on the Circuit were not paying attention to state constitutional law developments all over the nation, or to the newspapers, or the law reviews, or to the Senate subcommittee on the Constitution, the judges were surely reading the briefs filed in the Tenth Circuit by the U.S. Department of Justice. And since 2001 those briefs were politely but relentlessly telling the Tenth Circuit that the Circuit was wrong, and the Second Amendment was a meaningful right. (Of course those briefs

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that “it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.”

Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 1(b) (100 Stat. 449) (1986).

183. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

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

185. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); see also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

186. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

187. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000).

188. Since 1963, the people of Alaska, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Louisiana, Maine, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Utah, Virginia, West Virginia, and Wisconsin chose, either through their legislature or through a direct vote, to add a right to arms to their state constitution, to re-adopt the right to arms, or to strengthen an existing right. In every state where the people had the opportunity to vote directly, they voted for the right to arms by overwhelming margins. For example, in 1998 Wisconsin adopted a guarantee by a vote of 1,205,873 to 425,052; in 1986, West Virginia adopted its guarantee by a vote of 342,963 to 67,168.

189. See Alex Machaskee et al, Editorial, *A Conversation with President Clinton*, THE PLAIN DEALER (Cleveland), Jan. 14, 1995, at 11B (“The NRA is the reason the Republicans control the House.”).

190. BILL CLINTON, *MY LIFE* 629-30 (2004).

also argued that the various federal laws about prohibited persons who should not have guns were still valid.)

But if all you knew about the Second Amendment was what you had read in published Tenth Circuit opinions since *Oakes* was decided in 1977, you would think that nothing had changed since then. Indeed, you would think that nothing of importance had ever been said or written about the Second Amendment, other than the Supreme Court's 1939 *Miller* decision.

The one, and only one, post-1977 development you would know about would be that in a 1980 case involving the Sixth Amendment, Justice Blackmun had written a two-sentence footnote which seemed compatible with the militiamen-only reading of *Miller*.¹⁹¹ You would have seen Tenth Circuit citations to this favorite footnote¹⁹²—coming from a case in which neither party had mentioned the Second Amendment.¹⁹³

If all you knew were what the Tenth Circuit told you, you would not know about the 1990 U.S. Supreme Court case of *Verdugo-Urquidez* in which the briefing—and the Ninth Circuit opinion which was being reviewed—*did* include the Second Amendment. In that case, the Court explained that “the people” was a “term of art” which had the same meaning in the First, Second, Fourth, and Ninth Amendments.¹⁹⁴

Nor would you know about Justice Thomas's concurring opinion in *Printz*, in which he argued that *Miller* did not stand for a militia-only right to arms, and neither did anything else in the Court's prior decisions stand for the principle that the right is militia-only.¹⁹⁵ The concurrence also made it rather clear that Justice Thomas agreed with Justice Story that the right to keep and bear arms is “the palladium of the liberties of a republic.”¹⁹⁶

But back in the hermetically sealed world of the Tenth Circuit, the only news about the Second Amendment was that the cites to anti-Standard Model decisions from sister circuits got updated every so often. You would know that the Fifth Circuit had decided a gun control case

191. *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

192. *United States v. Baer*, 235 F.3d 561, 563 (10th Cir. 2000); *see also* *United States v. Haney*, 264 F.3d 1161, 1164 (10th Cir. 2001).

193. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 n.25 (2008) (stating that the *Lewis* court suggested that “[n]o Second Amendment claim was raised or briefed by any party. In the course of rejecting the asserted challenge, the Court commented gratuitously, in a footnote It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued.”).

194. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

195. *Printz v. United States*, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring).

196. *Id.* at 939.

called *United States v. Emerson* in 2001,¹⁹⁷ but you would not know that the Fifth Circuit had adopted the Standard Model.

Indeed, in the quarter-century of published opinions after *Oakes*, there was little to suggest that *anyone* other than felons thought that the Second Amendment protects Americans who are not in the National Guard.¹⁹⁸

In short, the Tenth Circuit's quarter-century record on the Second Amendment was one of arrogance and timidity: arrogance in the tone and scope of its pronouncements on the Second Amendment, and timidity about addressing any of the growing body of law and scholarship which made it more and more clear that the Tenth Circuit's Potemkin Village version of the militia-only Second Amendment was a sham.

Finally, in *United States v. Parker*, some *glasnost* began in the Tenth Circuit.¹⁹⁹ The two judge majority opinion actually acknowledged an authority which did not support the Tenth Circuit's militia-only view.²⁰⁰

More importantly, Judge Kelly penned a concurring opinion which described the last quarter-century for what it had been: judicial overreaching to trash an important constitutional right, in case after case which easily could, and should, have been decided on much narrower grounds.²⁰¹

Dale Parker was a civilian employee at the U.S. Army's Dugway Proving Ground, in Utah.²⁰² Like every other state in the Tenth Circuit, Utah has a "shall issue" system for licensing the carrying of concealed handguns. A law-abiding adult can obtain a permit to carry a concealed handgun for lawful protection, if the adult passes a background check and a safety class.²⁰³ Utah is the only state in the Tenth Circuit which

197. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

198. Judges Anderson and Baldock (joined by a district judge sitting by designation), in *Wilks*, had referred to the Second Amendment as "a brooding omnipresence" and "an orphan of the Bill of Rights." *United States v. Wilks*, 58 F.3d 1518, 1519 n.2 (10th Cir. 1995). In the unpublished *Lucero* case, Judge Lucero had acknowledged the possibility that the Second Amendment could be interpreted as an individual right. *United States v. Lucero*, 43 F. App'x. 299, 301-02, 2002 WL 1750878, at *2 (10th Cir. July 26, 2002) (Lucero, J., concurring) (unpublished). The 2003 unpublished opinion in *Rhodes* had said that a three-judge panel could not overrule *Oakes/Baer/Haney* on the Second Amendment; the statement contained the implicit recognition that a different result on the Second Amendment was at least theoretically possible. *United States v. Rhodes*, 62 F. App'x. 869, 875-76, 2003 WL 1565166, at *6 (10th Cir. March 27, 2003) (unpublished). The Tenth Circuit had also noted that Slesarik, a *pro se* civil plaintiff in New Mexico, had raised a Second Amendment claim as part of his Section 1983 suit, although the case was decided only with reference to the New Mexico Constitution right to arms. *Slesarik v. Luna County*, 13 F.3d 406 (Table), 1993 WL 513843, at *1-2 (10th Cir. Dec. 10, 1993) (unpublished).

199. 362 F.3d 1279 (10th Cir. 2004).

200. *Id.* at 1283.

201. *Id.* at 1285-88 (Kelly, J., concurring).

202. *Id.* at 1280.

203. UTAH CODE ANN. §§ 53-5-704 to -706 (LexisNexis 2009).

requires such a permit for someone who wants to carry a protective gun in his car.²⁰⁴

Inside the Dugway Proving Ground, a random search found a revolver in Parker's pick-up truck. He said that he had forgotten that it was in the truck. He did not have a Utah carry permit, and was prosecuted under the Assimilative Crimes Act (ACA).²⁰⁵ The ACA authorizes federal prosecutions for state law crimes that take place on federal property within a state.²⁰⁶ On appeal, Parker raised the Second and Tenth Amendments.

The majority opinion written by Judge Briscoe and joined by Judge McWilliams reprised the Circuit's familiar summaries of *Miller* and *Lewis*. No new analysis of *Miller* was added, although the description of the case added some detail; the description of *Lewis* added an additional sentence of analysis (that the Supreme Court had used rational basis to review a ban on firearms possession by a convicted felon.)²⁰⁷

Then, *glasnost*: a tacit, indirect admission that *Miller* itself might be ambiguous:

Miller has been interpreted [!] by this court and other courts to hold that the Second Amendment does not guarantee an individual the right to keep and transport a firearm where there is no evidence that possession of that firearm was related to the preservation or efficiency of a well-regulated militia.²⁰⁸

Then came cites to *Lewis*, to the Tenth Circuit's *Oakes*, and to three sister circuit cases.²⁰⁹ Each of the sister circuit cites included a parenthetical which acknowledged that the anti-individual interpretation of *Miller* was actually an interpretation, not a straightforward application.²¹⁰

204. UTAH CODE ANN. § 76-10-505(1) (LexisNexis 2009) ("Unless otherwise authorized by law, a person may not carry a loaded firearm: (a) in or on a vehicle; (b) on any public street; or (c) in a posted prohibited area.").

205. *Parker*, 362 F.3d at 1280-81.

206. 18 U.S.C.A. § 13 (West 2009).

207. *Parker*, 362 F.3d at 1282.

208. *Id.* (exclamation point added).

209. *Id.* at 1282-83.

210. *Id.* at 1282:

[S]ee also *Silveira v. Lockyer*, 312 F.3d 1052, 1061 (9th Cir. 2003) (referring to *Miller*'s implicit rejection of traditional individual rights position); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995) ("Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right."); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (interpreting *Miller* to stand for rule that, absent reasonable relationship to preservation of well-regulated militia, there is no fundamental right to possess firearm); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (analyzing *Miller* and concluding that "[t]o apply the amendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy")

Then—then it came. The citation signal that must not be used. The citation signal that never had been used in a quarter century of Second Amendment cases: *but see*.

Apparently there was somebody who disagreed with the Tenth Circuit's interpretation of the Second Amendment and *Miller*. And that someone was not a convicted felon who thought that the Second Amendment guaranteed his absolute right to manufacture unregistered explosives for gangs and not pay taxes on the machine guns he kept at his meth lab so they would be handy when he went to stalk his ex-wife in violation of a protective order.

but see United States v. Emerson, 270 F.3d 203, 226 (5th Cir.2001) (reading *Miller* as indecisive and, at best, supporting an individual's right to bear arms).²¹¹

At that point, the *glasnost* had gone far enough. The opinion returned to familiar ground, the four part militia test from *Haney*. Parker never claimed to be in the Utah militia, or that his revolver was connected to militia service, so he had no Second Amendment rights.²¹²

As for Parker's argument that the Tenth Circuit should follow *Emerson*, the panel explained that it could not deviate from Tenth Circuit precedent. And besides, most of the other Circuits still adhered to the anti-individual version of the Second Amendment.²¹³

Moreover, even if *Emerson's* interpretation of *Miller* were correct (that the case turned on whether a short shotgun was a weapon suitable for the militia, and not on whether Miller was a member of the militia), Parker would still lose, since his gun was not a military type gun. "To the contrary, at trial, Officer Michael Palhegyi, who was part of the military police unit that took Parker into custody, testified that Parker's firearm was 'not considered a military grade weapon' and, instead, more commonly was used for personal defense or target practice."²¹⁴

Heller, of course, viewed *Miller* differently, as standing only for the permissibility of bans on the types of weapons not typically possessed for legitimate purposes by law-abiding citizens.²¹⁵ The specific gun

211. *Id.* at 1283.

212. *Id.*

213. *Id.* at 1284. The listing of cases from the other Circuits separated the militia-only cases (including those of the Tenth Circuit) from the collective right cases. This was the first recognition that militia-only and collective right were two entirely different theories. Some previous Tenth Circuit opinions had failed to recognize that the two theories are incompatible. See *supra* text accompanying notes 119-20. What they have in common is that they both negate the Second Amendment as a right for all (collective right) or for more than ninety-nine percent (militia-only) of the American population.

214. *Parker*, 362 F.3d at 1284.

215. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2815-16 (2008) ("We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.").

which Mr. Heller wanted to register in D.C. was a revolver, and the *Heller* Court found his gun to be protected by the Second Amendment. Even under the military-arms reading of *Miller*, a revolver might well be protected; although it is not currently used by the U.S. military, it has been in the past. The *Miller* language, about the type of gun, did not ask whether the gun was current equipment for the U.S. standing army; the question was whether the gun could be of use to the *militia* using “arms supplied by themselves and of the kind in common use at the time.”²¹⁶ (A revolver has been “in common use” in the United States ever since its invention in the 1830s.²¹⁷)

Judge Kelly joined in the *Parker* opinion, except for the part involving the Second Amendment. He explained that the case could be decided on much simpler grounds: “I would affirm the conviction by simply noting that the obvious purpose of this prosecution—restricting concealed weapons on a military base to identified military personnel—is a reasonable restriction and thus does not contravene the Second Amendment.”²¹⁸

Judge Kelly then surveyed the record of Tenth Circuit panels which had made sweeping pronouncements against Second Amendment rights, “[a]lthough not required by the cases before them” and in violation of “the universal admonition to decide constitutional issues narrowly.” First came *Oakes*. Then in *Baer*, a case involving a convicted felon with machine guns, the panel claimed that only militia members had Second Amendment rights. The opinion ignored a much easier rationale for the desired result of upholding Baer’s conviction: “Regardless of the fact that a machine gun might be useful in a well regulated militia, it is apparent that a felon would not be.” *Haney*, another machine gun case, had introduced the four-part test, which Judge Kelly characterized as “clearly dicta.” “The court (without any record support) speculated that a ‘well-regulated’ militia is one actively maintained and trained by the state. *Haney*, 264 F.3d at 1165-66.”²¹⁹

Judge Kelly observed that “Our subsequent cases have applied this test, *though not needed in the context of restricted persons or devices*, to conclude that no Second Amendment violation occurred.” (emphasis added).

As for *Graham*, “if one had a wild imagination,” Judge Kelly observed, the licensing requirement for explosive dealers “could be viewed as involving a restriction on a weapon The court correctly noted that even assuming a defense was stated, Second Amendment rights are subject to reasonable governmental restrictions.” Unfortunately, the *Graham* court had used, as an alternative basis for the decision, the *Ha-*

216. United States v. Miller, 307 U.S. 174, 179 (1939).

217. See CLAYTON E. CRAMER, ARMED AMERICA 203, 242 (2006).

218. *Parker*, 362 F.3d at 1285 (Kelly, J., concurring).

219. *Id.* at 1286-87.

ney test, which was “totally unnecessary to the holding.” In *Bayles* (prohibiting gun possession following a protective order), the panel’s application of the *Haney* test (that *Bayles* was not in a militia, etc.) were presented “gratuitously.” “[T]he bottom line was that the statute was a reasonable restriction that did not infringe Second Amendment rights. Regardless of the *Haney* test, defendant was a restricted person and could not possess a weapon.”²²⁰

In short,

All of these cases involved uniform, federal restrictions on various types of firearms or uniform, federal restrictions on the persons possessing such firearms. Whether the Second Amendment right is an individual right or a collective right has not been decided by the Supreme Court—*Miller* did not define this aspect of the Second Amendment right, and we need not reach the issue here.²²¹

Like this court, the Fifth Circuit recognized reasonable restrictions on the Second Amendment right are constitutional. This case also can be decided on that narrow basis—there is no need to dilute prematurely what many consider to be one of the most important amendments to the United States Constitution.²²²

Judge Kelly’s concurring opinion was vindicated in *Heller*: bans on particularly dangerous arms and particularly dangerous people are consistent with the Second Amendment. The previous Tenth Circuit panels had asserted that only militiamen have Second Amendment rights; even those militiamen’s rights were so narrowly circumscribed (according to the previous panels) that it was hard to imagine why the Founders would have bothered to waste a whole Amendment on such a miniscule “right.”

Judge Kelly’s opinion apparently was persuasive to several of his colleagues. Previously, Judges Anderson, Briscoe, Murphy, Lucero, and Murphy had written on or joined in opinions which “gratuitously” declared the Second Amendment to be inapplicable to almost the entire American public. Post-*Parker*, each of these judges wrote or joined opinions which rejected Second Amendment claims being raised by particular litigants, but did so on narrow grounds, without denigrating the Second Amendment rights of law-abiding citizens.

220. *Id.* at 1287.

221. *Id.* at 1288. Judge Kelly also discussed of Justice Thomas’s concurrence in *Printz*, and the split of *Emerson* (5th Circuit, Standard Model) vs. *Silveira* (9th Circuit, “collective right”). *Id.* (citing *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002); *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003)). *Emerson* and *Silveira* are virtually alone as pre-*Heller* Circuit Court of Appeal decisions involving in-depth analysis of the original meaning of the Second Amendment and of Supreme Court precedent.

222. *Id.*

XVI. *EASTERLING*: AFFIRMING THE FELON BAN WHILE RESPECTING THE SECOND AMENDMENT

Easterling was convicted of possessing a firearm after having been previously convicted of a felony; he was sentenced to 235 months in prison.²²³ He argued that the federal felon in possession statute is unconstitutional because it amends the Second Amendment but did not go through the ratification process for an amendment. The Tenth Circuit disagreed, with a cite to *Baer*.

Notably, Judge Briscoe's opinion, joined by Judges Lucero and Murphy, simply cited the *holding* in *Baer* (that the felon in possession ban is constitutional), without repeating or adverting to *Baer*'s verbiage about only the militia having Second Amendment rights.²²⁴ This was the type of approach that Judge Kelly had urged in his *Parker* concurrence.²²⁵

XVII. *CARPENTER*: A RETURN TO GRATUITOUS DENIGRATION

Carpenter was convicted of possessing a firearm in Wyoming in furtherance of his distribution of methamphetamine.²²⁶ His Second Amendment claim was rejected since he had not preserved it for appeal.²²⁷

The case could have ended there, but *Carpenter* was written by Judge Ebel, the Tenth Circuit's staunchest foe of Second Amendment rights, and the author of the four-part *Haney* test. So in a footnote, Judge Ebel, joined by Judges McKay and Henry, wrote that "we repeatedly have held that to prevail on a Second Amendment challenge, a party must show that possession of a firearm is in connection with participation in a 'well-regulated' 'state' 'militia.'"²²⁸ But "Mr. Carpenter claims only that the firearm was for 'protection of my family, home and property'; thus, he could not prevail on a Second Amendment claim even if not waived."²²⁹

Heller, of course, decided just the opposite. Protection of family, home, and property is the core of the Second Amendment.²³⁰

223. *United States v. Easterling*, No. 04-6341, 137 F. App'x. 143, 144, 2005 WL 1499755, at *1 (10th Cir. June 24, 2005) (unpublished).

224. *Id.* at 147.

225. *Parker*, 362 F.3d at 1287 (Kelly, J., concurring).

226. *United States v. Carpenter*, No. 05-8010, 163 F. App'x. 707, 708-09, 2006 WL 122476 (10th Cir. Jan. 18, 2006) (unpublished).

227. *Id.* at 711.

228. *Id.* at 711 n.1 (quoting *Parker*, 362 F.3d at 1283).

229. *Id.*

230. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2818 (explaining that citizens can constitutionally own firearms for "the core lawful purpose of self-defense").

XVIII. *BASTIBLE*: TREATING THE RIGHT TO ARMS AS A NORMAL RIGHT

Bastible v. Weyerhaeuser Co. was a factually complex tort case brought by employees of a contractor at a Weyerhaeuser paper mill in Valiant, Oklahoma.²³¹ The suit involved the right to arms under the Oklahoma Constitution, not under the Second Amendment. It is worth some attention, however, as an illustration of how the Tenth Circuit was able to address a right to arms case in a manner which treated the right to arms as a normal right.

In October 2002, the mill's security staff obtained the assistance of the local sheriff to use trained detection dogs for mass, warrantless searches of employee cars in the company parking lot which was open to the public, and which was used by customers of a nearby Wal-Mart and golf course. Although the sheriff had been told that the searches would be only for drugs, Weyerhaeuser used the dogs to also search for guns. A dozen employees had guns in their cars, and there was no dispute that the guns were owned for lawful purposes, such as for going hunting after work, or for protection while traveling to and from work. (One employee had driven his father's car to work that day, and did not know it contained a gun.) All the employees were fired for violating company policy, and they then sued.²³²

The case involved a variety of tort and employment law issues, plus state action issues related to the sheriff.

At the time, an Oklahoma statute gave employers unlimited power to ban guns on company property.²³³ But the public reaction to Weyerhaeuser's actions was near-universal outrage. The automobile searches had been conducted at the beginning of hunting season.²³⁴ If the automobile searches were not an attempt to find a pretext to fire as many employees as possible, the company did a good job of conveying a contrary impression. The Oklahoma legislature promptly passed—by a vote of 92-4 in the House in the Senate—a statute prohibiting employer bans of guns in employee cars in company parking lots.²³⁵

231. 437 F.3d 999 (10th Cir. 2006).

232. *Id.* at 1001-03.

233. OKLA. STAT. tit. 21, § 1290.22 (2001), amended by OKLA. STAT. tit. 21, § 1290.22(B) (2004).

234. Amy Haimerl & Malika Zouhali-Worrall, *The right to bear guns at work*, CNNMONEY.COM, June 27, 2008, http://money.cnn.com/2008/06/05/smallbusiness/guns_at_work.fsb/.

235. 2004 Okla. Sess. Law Serv. Ch. 39 (H.B. 2122 West). OKLA. STAT. ANN. tit. 21, § 1290.22(B) (West 2009) ("No person, property owner, tenant, employer, or business entity shall be permitted to establish any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle."). The voting record is available via Oklahoma Legislative Service Bureau Bill Tracking Reports Website, <http://webserver1.lsb.state.ok.us/WebBillStatus/main.html> (click on "Basic Search Form" on the left side of the screen; on the "Basic Search Form" enter "HB 2122" in the "Measure Number(s)" box and under the "Session" box scroll down to "2004 Regular Session" and

Oklahoma—even in comparison to its neighbors of Kansas, Arkansas, Texas, Colorado, and New Mexico—has a very strong culture of gun rights and hunting. Oklahoma also has a very strong tradition of suspicion of corporations, as exemplified by a state constitution which contains more restrictions on corporate power than any other American state constitution.²³⁶ Could anything provoke a greater backlash by the people of Oklahoma than a big business firing employees under a pretext because the employees were going hunting after work? Perhaps the only way that Weyerhaeuser, which ended up with only four defenders in the state legislature, could have made itself even more unpopular would have been if the corporation had defiled the grave of Will Rogers.

But for the Tenth Circuit, the issue was whether Weyerhaeuser had acted legally, under the law as it existed before the changes made by the Oklahoma legislature. That law had provided:

“Nothing contained in any provision of the Oklahoma Self-Defense Act . . . shall be construed to limit, restrict or prohibit in any manner the existing rights of any person, property owner, tenant, employer, or business entity to control the possession of weapons on any property owned or controlled by the person or business entity.”²³⁷

Weyerhaeuser’s use of the statute to fire employees for hunting guns locked in cars in an employee parking lot was (obviously) a gross violation of the social consensus about how a corporation should behave, but the parking lot ban was within the literal ambit of the statute.

The Plaintiffs argued that the pre-amendment law “provides no support for Weyco’s firearms policy because the statute, by its terms, only protects the ‘existing rights . . . to control the possession of weapons’ on its property, and Weyco had no ‘existing right’ to do something which interferes with the fundamental and preeminent right to bear arms.”²³⁸

The *Bastible* court disagreed. First of all, the Oklahoma state constitution explicitly authorized limits on the carrying of arms.²³⁹ Second, the Oklahoma Supreme Court had ruled that some regulation of the right to arms was permissible.²⁴⁰ Thus, the statute allowing businesses to ban

click “Retrieve”). In 2009, the Tenth Circuit rejected a lawsuit challenging the validity of the parking lot reforms. See *infra* text at notes _ .

236. Article 9 of the Oklahoma Constitution contains forty-eight sections (a few of which have been repealed) imposing limits on corporate power, and providing for strong government regulation of corporate activity. OKLA. CONST. art. 9 §§ 1-48.

237. OKLA. STAT. ANN. tit. 21, § 1290.22 (West 2009).

238. *Bastible v. Weyerhaeuser Co.*, 437 F.3d 999, 1006 (10th Cir. 2006).

239. *Id.* (quoting OKLA. CONST. art. 2, § 26 (stating that “nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.”)).

240. *Id.* (quoting State ex rel. Okla. State Bureau of Investigation v. Warren, 975 P.2d 900, 902 (Okla.1998)).

guns on business property was, in the Tenth Circuit's view, a "reasonable regulation."²⁴¹

Under Oklahoma law, an at-will employee may prevail in a wrongful discharge suit if he was fired for "performing an act consistent with a clear and compelling public policy."²⁴² As the Tenth Circuit noted, "The Oklahoma Supreme Court has, however, cautioned that this 'unique tort' applies 'to only a narrow class of cases and must be tightly circumscribed.'"²⁴³

The plaintiffs argued that the firing violated the clear and compelling public policy of "the right to keep arms espoused by the Oklahoma Constitution."²⁴⁴ The Tenth Circuit, admitting that there was no direct Oklahoma precedent, decided

we are confident that those courts would not embrace that view. As indicated, both the Oklahoma Constitution and the Oklahoma courts recognize that the right to bear arms is not unlimited, and, indeed, may be regulated. We agree with the district court that "[g]iven the finding by [the Oklahoma Supreme] Court that the right to keep arms is not unfettered, establishing a wrongful discharge tort for exercising a statutorily sanctioned restriction on the right would be counterintuitive."²⁴⁵

XIX. HUGGINS: REJECTING AN ABSURD SECOND AMENDMENT CLAIM WITHOUT REJECTING THE SECOND AMENDMENT

Paul Huggins was an obvious nut who brought *pro se* suits against a church, two pastors, and Safeway.²⁴⁶ His complaints raised, inter alia, Second Amendment claims, although they were no more coherent than the rest of his pleadings. For example:

Mr. Huggins's complaint alleges that, while he was paying for gas at a Safeway store, a Safeway employee allowed other customers to have access to personal information on his credit card. According to Mr. Huggins, the employee "stated directly to me that I, am Penetration against you and I, am Penetration against all Black People" and told him that he was not allowed to come back into the store. Rec. doc. 3, at 2. Mr. Huggins asserts that this conduct violated his First and Second Amendment rights and his right to equal protection.²⁴⁷

241. *Id.*

242. *Burk v. K-Mart Corp.*, 770 P.2d 24, 29 (Okla. 1989).

243. *Bastible*, 437 F.3d at 1007 (quoting *Clinton v. State ex rel. Logan County Election Bd.*, 29 P.3d 543, 545 (Okla. 2001)).

244. *Id.*

245. *Id.* at 1008.

246. *Huggins v. Safeway*, No. 06-1423, 210 F. App'x. 819, 2007 WL 4214 (10th Cir. Jan. 2, 2007) (unpublished); *Huggins v. Hilton*, No. 05-1466, 180 F. App'x. 814, 2006 WL 1389086 (10th Cir. May 18, 2006) (per curiam).

247. *Huggins v. Safeway*, 210 F. App'x. at 820.

In two separate cases, the Tenth Circuit affirmed the district court dismissals for failure to state a claim upon which relief can be granted. In contrast to how the Tenth Circuit had treated some extremely weak Second Amendment claims in the past, the panels did not use the *Huggins* cases as an opportunity to announce a broad declaration against Second Amendment rights.

XX. ARLEDGE: CONTINUING TO FOLLOW JUDGE KELLY'S NEW APPROACH

Arledge was convicted of possessing a gun and ammunition while he was subject to a protective order.²⁴⁸ He appealed *pro se*, after his appointed appellate counsel filed an *Anders* brief²⁴⁹ stating that there were no arguable issues for appeal.

In a decision written by Judge O'Brien, and joined by Judges Kelly and Tymkovich, the Tenth Circuit rejected Arledge's Second Amendment claim. The panel cited Tenth Circuit precedent in a manner consistent with Judge Kelly's approach in *Parker*: as affirming the particular gun control, and without gratuitous attacks on the Second Amendment rights of the law-abiding:

Arledge argues his conviction under § 922(g)(8) violates the Second Amendment. As both Arledge's counsel and the government correctly note, § 922(g)(8) does not violate the Second Amendment. *United States v. Bayles*, 310 F.3d 1302, 1306-07 (10th Cir. 2002); *see also United States v. Baer*, 235 F.3d 561, 564 (10th Cir. 2000) (concluding defendant's § 922(g)(1) conviction (felon-in-possession of a firearm) did not violate the Second Amendment).²⁵⁰

After *Parker*, the Tenth Circuit had handed down five decisions in cases involving the right to arms. (Four under the Second Amendment, and one under the Oklahoma Constitution.) In four of the five cases, the Circuit panel had followed the approach urged by Judge Kelly in the *Parker* case: the panels had decided whether the right to arms had been violated in the particular case. The panels did not propound broad decisions asserting that the right to arms was a nullity. Only one decision, written by Judge Ebel, had reverted to the pre-*glasnost* style, and had used a criminal's obviously frivolous Second Amendment claim as an excuse to declare that there were, in effect, no Second Amendment rights for anyone.

248. *United States v. Arledge*, No. 04-5161, 220 F. App'x. 864, 865-66, 2007 WL 987398 (10th Cir. Apr. 4, 2007) (unpublished).

249. *Anders v. California*, 386 U.S. 738, 744 (1967) (holding that appointed criminal defense counsel may withdraw after trial if the counsel files a brief showing that there is nothing in the record which might support a non-frivolous appeal).

250. *Arledge*, 220 F. App'x. at 869.

Perhaps if the Supreme Court had not granted certiorari in *Heller*, the Tenth Circuit might eventually have taken a Second Amendment case en banc; confined *Oakes*, *Haney*, and similar cases to their facts; and followed the Fifth Circuit and the D.C. Circuit in acknowledging that ordinary law-abiding Americans do have Second Amendment rights.

XXI. COLORADO CHRISTIAN UNIVERSITY: USING THE SECOND AMENDMENT TO PROTECT THE FREE EXERCISE OF RELIGION

The first post-*Heller* case in the Tenth Circuit to involve the Second Amendment was *Colorado Christian University v. Weaver*, a First Amendment challenge to a state law which gave Colorado residents scholarships to in-state private universities, but which excluded “pervasively sectarian” universities.²⁵¹

The State argued that its funding decisions, even those that discriminate on the basis of religion, are subject only to rational basis review. The Court rejected this argument, and cited, inter alia, the *Heller* decision:

That First Amendment challenges to selective funding would be subject only to rational basis scrutiny seems especially unlikely after *Dist. of Columbia v. Heller*, [] (2008). There the court noted that rational basis scrutiny had been applied only to “constitutional commands that are themselves prohibitions on irrational laws.” In contrast, the Court said that “[o]bviously the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.” *Id.* (internal citation omitted). The same goes, we assume, for the Free Exercise and Establishment Clauses.²⁵²

The Second Amendment was, finally, no longer the “orphan of the Bill of Rights.”²⁵³ Now, it is a real member of the constitutional family—indeed, such a strong member that teachings about the Second Amendment could be used to defeat efforts to prevent careful judicial scrutiny of alleged infringements of First Amendment rights.

251. 534 F.3d 1245 (10th Cir. 2008).

252. *Id.* at 1255, n.2.

253. *United States v. Wilks*, 58 F.3d 1518, 1519, n.2 (10th Cir. 1995) (citing *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993)).

XXII. RAMSEY WINCH V. HENRY: THE SECOND AMENDMENT IS LIKE THE RIGHT TO PETITION

The *Bastible v. Weyerhaeuser Co.* case, discussed *supra*, observed that the Oklahoma legislature had (subsequent to the events involved in the case) enacted reforms to forbid employers from firing employees for storing lawfully-owned guns in the employees' locked cars in a company parking lot. Several corporations filed a suit in federal district court in Oklahoma against the new law—although several of the plaintiffs dropped out after the National Rifle Association announced a boycott of Conoco, which was one of the plaintiffs.

The heart of the lawsuit was the claim that the Oklahoma law was preempted by the federal Occupational Health and Safety Act (OSHA), which has a general requirement that employers maintain a safe workplace. Plaintiffs also raised various constitutional claims. They won on the OSHA in district court, but the Tenth Circuit unanimously reversed.²⁵⁴

The OSHA claim failed because the Occupational Health and Safety Administration had never promulgated any regulation against guns in the workplace (let alone in parking lots).²⁵⁵ Indeed, OHS Administration itself had written to the Tenth Circuit to affirm that the OSHA statute and regulations did nothing to preempt the Oklahoma law.²⁵⁶

The Tenth Circuit rejected the claim that the parking lot law was a “taking” of the corporations’ property. Rather, corporations were simply required not to interfere with citizens’ exercise of their own rights. The case was similar to *PruneYard Shopping Center v. Robins*.²⁵⁷ There, the U.S. Supreme Court had upheld a California statute which prevented shopping center owners from prohibiting the circulation of petitions in the shopping center. “As in *PruneYard*, Plaintiffs have not suffered an unconstitutional infringement of their property rights, but rather are required by the Amendments to recognize a state-protected right of their employees.(noting that the state may exercise its police power to adopt individual liberties more expansive than those conferred by the Federal Constitution). As such, we conclude that Plaintiffs have not suffered a per se taking.”²⁵⁸

Nor was there are regulatory taking, because the corporations suffered no economic loss, and no diminution of their investment-based expectations. Besides, even if there had been some economic effect, regulations generally do not constitute takings when the regulations are “laws meant

254 Ramsey Winch v. Henry, 555 F.3d 1199 (10th Cir. 2009). The opinion was written by Judge Baldock, and joined by Judges Henry and McConnell.

255 *Id.* at 1204-08.

256 *Id.* at 1207 n. 9.

257 447 U.S. 74 (1980).

258 Ramsey Winch, *supra* note 254, at 1209.

to support the health, safety, morals, and general welfare of the entire community.²⁵⁹

Finally, there was the claim that the parking lot law was a due process violation because it was irrational. The Tenth Circuit disagreed:

One professed purpose of the Amendments is the protection of the broader Oklahoma community. We need not decide the long-running debate as to whether allowing individuals to carry firearms enhances or diminishes the overall safety of the community. The very fact that this question is so hotly debated, however, is evidence enough that a rational basis exists for the Amendments.²⁶⁰

In addition, the parking lot law was rational because it was an effort to expand the protection of Second Amendment rights. One could argue that parking lot reforms “are simply meant to expand (or secure) the Second Amendment right to bear arms. See *PruneYard*, 447 U.S. at 81, 100 S.Ct. 2035 (noting that the state may exercise its police power to adopt individual liberties more expansive than those conferred by the Federal Constitution). Because we cannot say the Amendments have no reasonably conceivable rational basis, Plaintiffs’ due process claim must fail.”²⁶¹

As in *Colorado Christian University*, the Second Amendment’s appearance in *Ramsey Winch* was brief, but it did show that the Second Amendment is now a normal part of constitutional law, and that cases involving other rights, such as the right to petition, may be useful in Second Amendment analysis.

CONCLUSION

From 1977 until 2004, the Tenth Circuit’s record of Second Amendment cases was a disgrace to the rule of law.

It was not a disgrace for wrong results. Almost all the decisions involved restrictions on narrow classes of especially dangerous weapons, or the prohibition of gun ownership for people who had proven themselves to be dangerous. Most of these results are presumptively valid under *Heller*, and most of the rest are in no worse than a gray zone of validity. Even pre-*Heller*, almost all the decisions could, as Judge Kelly observed in *Parker*, have been written on the narrow grounds of upholding legitimate, narrowly tailored restrictions on the Second Amendment.

The Tenth Circuit’s jurisprudence was not a disgrace because it adopted a militia-only theory of the Second Amendment. Personally, I

259 *Id.* at 1210.

260 *Id.* at 1211.

261 *Id.*

think that militia-only theory is much weaker than the Standard Model of the Second Amendment. But as Justice Stevens's dissent in *Heller* demonstrated, there was surely *some* authority which could be read as supporting the militia-only interpretation. The militia-only interpretation was, whatever its flaws, at least intellectually coherent at a surface level, and was thus far superior to the oxymoronic "collective right" embraced by some other circuits.

Moreover, the Tenth Circuit's militia-only version of the Second Amendment was based almost entirely on the major Supreme Court precedent, *United States v. Miller*. Today, we know that *Miller* was the product of a collusive, dishonest conspiracy organized by a U.S. Attorney, and that the federal district judge and the defense counsel were willing participants in his unethical scheme.²⁶² But the Tenth Circuit did not know that. The *Miller* opinion is (perhaps deliberately) oblique and vague. When the decision is analyzed in careful detail, there are portions which support the interpretation of Justice Scalia and the Standard Model, and there are portions which can support the interpretation of Justice Stevens and the *Oakes* line of cases. The Tenth Circuit's jurisprudence cannot be called a disgrace because it ultimately ended up on the "4" side of a 5-4 Supreme Court decision.²⁶³ Although militia-only was a weaker theory, it was not a preposterous theory, or a theory bereft of any intellectual support.

The reason that the Tenth Circuit's Second Amendment cases were a disgrace is that they barely had any reasoning. If you take everything that the Tenth Circuit wrote about the Second Amendment in *Oakes* (1977) and the twenty-five years of cases thereafter, the whole thing combined would not add up to a mediocre student Note in a secondary journal at an unaccredited law school.

Even the lowliest of student Notes must at least attempt to address the most important arguments on the other side. Especially when those contrary arguments come from the U.S. Supreme Court's explication of the very text that is at issue. Or from enactments of the Congress of the United States. Or from the *Yale Law Journal*, the *Michigan Law Review*, or Larry Tribe, Akhil Amar, or Sanford Levinson. A mediocre student Note would not address all these sources, but it would address at least a couple. The Tenth Circuit spent a quarter century pretending there were no serious contrary authorities.

Nobody forced the Tenth Circuit to propound a grand theory of the Second Amendment without being able to make a serious intellectual defense of the theory. As Judge Kelly pointed out, almost all the Second

262. See Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 56 (2008) (cited in *Heller*, 128 S.Ct. at 2814 (2008)).

263. The collective right, on the other hand, got zero votes from nine Justices. See *supra* text accompanying note 13.

Amendment cases that came to the Tenth Circuit could have been handled simply by addressing whether they involved legitimate restrictions on the right. It was a deliberate choice of the Tenth Circuit to reach out in *Oakes*, and to, in effect, declare that an entire Amendment to the Bill of Rights was a nullity, insofar as its protection of 99.9% of the American people.

It was the choice of the Tenth Circuit to continue to declare its Second Amendment decisions in the sweeping, nullificationist terms of *Oakes*. If the Circuit were determined to proceed on such a broad front, then the Circuit owed the American people a real justification of its actions. Not the pompous ipse dixit of *Haney*, *Oakes*, and the other cases, but a serious explanation. An explanation which addressed the best arguments on the other side.

That the Tenth Circuit never did so perhaps reflected a lack of intellectual self-confidence. The Tenth Circuit is a good example of Sanford Levinson's observation that some elements of the legal elite refused to intellectually engage with the Second Amendment because of "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."²⁶⁴

In contrast, the Tenth Circuit took the post-*Lopez* challenges on interstate commerce grounds seriously. A reader may agree or disagree with those decisions (and I tend to disagree) but those decisions are detailed, and replete with lengthy, intricate arguments, and sophisticated doctrinal analysis. They read like legitimate appellate opinions. They read like legal opinions. "Because I said so" is not a legitimate jurisprudential tool. Legal reasoning is supposed to include reasoning.

Why was the Tenth Circuit's approach to the Second Amendment so lawless?

One might speculate that none of the Second Amendment litigants were very attractive. The best of the bunch was Parker, who was a law-abiding, decent man who just forgot to take a handgun out of his truck one day. As for the rest, the cream of the crop was Haney, an otherwise law-abiding man whose version of the Second Amendment was closer to what might be found in a Robert Heinlein science fiction novel than in American legal practice. After Haney, we descend into a group of meth dealers, stalkers, convicted felons, explosives dealers for gangsters, and other miscreants. Not a very attractive bunch.

But courts, including the Tenth Circuit, routinely understand that the courts must deal with the scurrilous characters in a way that protects

264. Levinson, *supra* note 183, at 642.

the rights of the good people. When the courts protect the speech rights of Nazis, the free speech of thoughtful but unpopular minorities is protected. When courts require a retrial of a patently guilty criminal because the jury instructions were defective, the right of the mistakenly-accused to accurate jury instructions is protected. And so on.

Thus, the unattractive nature of the Second Amendment claimants in the Tenth Circuit cannot be the full explanation of why the Circuit's treatment of the Second Amendment was so atrocious. It is hard to escape the inference that many judges on the Circuit were viscerally hostile to gun ownership. The Tenth Circuit's first case on the Second Amendment, *Oakes*, involved a member of a racist, anti-Jewish organization; another case involved an anti-Mormon bigot. Sadly, the three decades of Tenth Circuit cases involving the Second Amendment appear to have involved not only some bigoted defendants, but an unfortunate number of bigoted judges.²⁶⁵

265. Cf. Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONST. COMM. 395, 399-400 (1991) (observing that in the world of the legal elite, expressions of bigotry against gun owners are treated as conventional wisdom, whereas similar bigotry expressed against a racial group would be considered highly offensive); Michael Lerner, *Respectable Bigotry*, 38 AM. SCHOLAR 606 (1969).