Private Enforcement of the Social Contract: *DeShaney* and the Second Amendment Right to Own Firearms

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A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.¹

The United States Supreme Court has been derelict in its duty to interpret the right to keep and bear arms.² It has not decided a Second Amendment case since 1939,³ and has refused on numerous occasions to grant certiorari to gun control cases.⁴ The Court must

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1. U.S. CONST. amend. II.

2. Chief Justice Marshall wrote, "It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule . . . This is of the very essence of judicial duty." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).


cease its two-hundred year neglect of the right to keep and bear arms and delineate the implications of the Second Amendment.\textsuperscript{5}

The Court's unwillingness to interpret the Second Amendment has resulted in a ridiculous national debate over the right to keep and bear arms. Second Amendment interpretations generally do not differ over details, such as "where the line is drawn," as one might expect with a question about free speech or the right to an attorney. Few academics address the Second Amendment; most seem to ignore it when discussing fundamental rights Americans possess under the Constitution.\textsuperscript{6} Some scholars, in discussing the right to bear arms, dismiss the Amendment as a relic harking back to an era when states needed militias to guard against federal government encroachment. Others, often coming from the opposite side of the political spectrum, ignore the Amendment's language about the necessity of a militia and base their arguments on the words "the right of the people." Regardless of viewpoint, the legal issues in the debate require clarification before any meaningful dialogue is possible.

By considering the origins of the Second Amendment, its relation to the guarantees of other fundamental rights, and the Supreme Court's interpretation of it, this article will answer the question: Does the Second Amendment recognize a right to armed self-defense? The answer is an unequivocal "yes." The Second

\textsuperscript{5} This underdeveloped Second Amendment case law is analogous to the Court's interpretation of the First Amendment before the early Twentieth Century. Prior to that time, "there was still to issue from the Supreme Court a single decision establishing the First Amendment as an amendment of any genuine importance at all." William Van Alstyne, \textit{The Second Amendment and the Personal Right to Arms}, 43 DUKE U.J. 1236, 1239 (1994).

\textsuperscript{6} Sanford Levinson has stated, "I think it is accurate to say that no one recognized by the legal community as a major writer on Constitutional Law has deigned to turn his or her talents to a full consideration of the Amendment." Sanford Levinson, \textit{The Embarrassing Second Amendment}, 99 YALE L.J. 637 (1989). Levinson also quotes Professor L. H. LaRue as stating "The Second Amendment is not taken seriously by most scholars." \textit{Id.} at 640 (citing L.H. LaRue, \textit{Constitutional Law and Constitutional History}, 36 BUFF. L. REV. 373, 375 (1978)).

Levinson noted that the "leading" casebooks and treatises barely, if at all, analyze the Second Amendment. Levinson, \textit{supra}, at 639, n.14, 642 (citing Laurence Tribe, \textit{American Constitutional Law} (2d ed. 1988); J. Nowak, Et Al., \textit{Constitutional Law} (3d ed. 1986)).
Amendment provides a guarantee that citizens may keep arms for their self-defense against violence that our government is unable, or unwilling, to prevent.

More importantly, this article introduces a novel interpretation of the Second Amendment. Instead of merely reciting the Court’s holdings regarding an individual right to self-defense, this article will analyze that right from the basis of the government’s duty to protect citizens from harm, as delineated in *DeShaney v. Winnebago County.* The implications of *DeShaney* virtually mandate an individual rights interpretation of the Second Amendment. Even if the dissent’s position in *DeShaney* were adopted, the result would still be an individual right to own arms. Ironically, *DeShaney* has the potential to be the most important Second Amendment case yet decided but never mentions the Second Amendment.

Part I of this article analyzes whether the Second Amendment is a “collective” right, applying only to the states, or an “individual” right, possessed by all citizens. Part II examines the scant Supreme Court case law interpreting the right to keep and bear arms. This section also examines whether the Second Amendment prohibits state and local bans on firearms. Part III argues that a strong individual rights interpretation of the Second Amendment is mandated in light of *DeShaney* that limits the government’s obligation to protect the citizenry.

**I. DOES THE SECOND AMENDMENT PROTECT AN INDIVIDUAL RIGHT TO BEAR ARMS?**

**A. Introduction**

The perplexing language of the Second Amendment confuses the issue of what rights a citizen has to bear arms. Does the Second Amendment protect an individual right to bear arms, or merely guarantee that states will be free to maintain a militia? To one unfamiliar with the origins of the Second Amendment, terms such as “militia” and “right of the people” seem to be mutually exclusive. This is not so; rather, the two phrases are complementary. The Amendment was intended to protect both an individual right and a group right — a right belonging to the “body of the people.”

Because this article focuses on the individual right recognized by the Second Amendment, it will not analyze the “well-regulated
militia" aspect of the Amendment.\(^8\) Perhaps the Founders intended the militia to describe the body of arms-bearing citizens, or a loosely-organized group that could be called by Congress in time of emergency. The militia envisioned by the Founders might be relevant today, or it could be completely unimportant. Regardless of what the Founders intended concerning the militia, they also wished to recognize an individual right to bear arms, a right that predated the Constitution.\(^9\)

**B. Collective Rights**

"Collective rights" proponents view the Second Amendment as a guarantee to states that they could maintain armies as a check on federal tyranny. Relying on the phrase "[a] well-regulated militia, being necessary to the security of a free state," this school contends that the only right the Second Amendment confers is for states to maintain a militia, which they define as organized, government-sponsored military units such as the National Guard.\(^10\) In addition, this school sees the Second Amendment tied to Article I, section 8, clauses 15 and 16 of the Constitution, which authorizes Congress to call out the militia and to organize, arm, and discipline it.\(^11\)

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8. Nor will this article consider what weapons the Second Amendment protects, or when the government can legitimately curb the possession of arms. The purpose of this article is to establish the fundamental rights recognized by the Second Amendment, not its outer limits.


11. The Constitution provides:

\[15\] To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel invasions;

\[16\] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the states respectively, the Appointment of the Officers, and the Authority of
Because the Civil War decided the course of federalism our country would take, there is no longer any need to maintain a state-sponsored militia as a protection against a large standing army. The Second Amendment is obsolete, on par with the Third Amendment’s prohibition against the quartering of troops in peacetime.\(^1\)

**C. Individual Rights**

The individual rights position relies primarily on the “right of the people” language in the Second Amendment to assert that individuals, not states, have the protected interest. The Amendment also recognizes certain militia rights. While the relevance of these rights should not be ignored, it is not determinative of the individual right the Founders acknowledged with the Second Amendment.

An examination of English history clarifies what the framers envisioned when drafting the Second Amendment. A general requirement to possess arms and serve in the military in England is traceable to at least 690 A.D.\(^13\) The tradition continued for centuries, requiring noblemen, and later commoners, to keep arms and comprise the militia.\(^14\) This obligation to keep arms was not solely for military service to the King; English subjects were also required to provide police services. Citizens were obligated to pursue criminals and guard their village to prevent crime.\(^15\)

By the 1660’s, however, the individual right to arms was jeopardized. Charles II, and later James II, began to disarm many Protestant subjects.\(^16\) Because of the deep resentment James’ policies caused among both political and religious communities, he fled England in what became known as the “Glorious Revolution.”\(^17\)

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\(^1\) Kates, supra note 10, at 212. “No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST., amend. III.

\(^12\) Hardy, supra note 9, at 562 (citing 1 J. BAGLEY & P. ROWLY, A DOCUMENTARY HISTORY OF ENGLAND (1066-1540) 152 (1965)).

\(^13\) Id. at 563-65.


\(^15\) Hardy, supra note 9, at 574-79.

\(^16\) Id. at 579. Obviously a full explanation of the religious and political quarrels that befell England in the Seventeenth Century is beyond the scope of this article, but they are important in tracing both the common law right to bear arms and the consequences of the government’s interference with that right. For a thorough explanation of this time in
As a result of this revolution, the English Bill of Rights was passed in 1689, and the individual right to bear arms was codified. The Bill provided that all Protestants “may have Arms for their Defence suitable to their condition and as allowed by law.”\textsuperscript{18} The right to bear arms for self-defense and the right to petition the King were the only individual rights the English Bill of Rights acknowledged; all other parts of the Bill consisted of enumerated powers of government.\textsuperscript{19}

This right to bear arms was adopted by the American colonies.\textsuperscript{20} Complementing it was the requirement that all men between the ages of sixteen and sixty be subject to military service.\textsuperscript{21} Many colonial laws adopted the English tradition of not merely allowing, but requiring, citizens to own guns. For example, a 1631 Virginia law provided that “all men that are fittinge to beare armes, shall bring their pieces to church . . .” for drill and target practice.\textsuperscript{22} By 1658, the law required every man to keep a functioning weapon in the home.\textsuperscript{23} These laws served the two-fold purpose of allowing individual self-defense and giving Britain a reserve force to be called in case of war.

English actions after the French and Indian War — increasing taxes, discouraging expansion into the American interior, and stationing a large army in the colonies — led to growing resentment toward the mother country. Editorials appeared in leading colonial newspapers, asserting that the colonists had a right to arm themselves to fend off English injustice.\textsuperscript{24}

After the “Boston Tea Party,” English soldiers attempted to...
disarm the colonists. The English banned all exports of muskets and ammunition to the colonies and began seizing the colonists' weapons and ammunition.\textsuperscript{25} This repression resulted in the widespread formation of militia organizations, manned by colonists wielding their own firearms.\textsuperscript{26} In February 1775, colonial militia prevented the English from seizing firearms at an armory in Salem, Massachusetts; two months later, the English were repulsed at Concord.\textsuperscript{27} Distinguished leaders such as George Washington and Samuel Adams were instrumental in organizing and mobilizing the local militias.\textsuperscript{28}

The right to bear arms, long a tradition in England and the colonies, was important in resisting the English army and establishing our nation's independence. The war was fought mainly by commoners who supplied the arms necessary to defeat the British.\textsuperscript{29} It was not merely the benefit of arms that made an impression on the Founders; the resentment evoked by the British in their attempt to disarm the colonists had a lasting impact.\textsuperscript{30} The Revolutionary experience paralleled the abuses and disarmament policies of the English monarchs from a century earlier. Like the English in 1689, the Founders codified the individual right to arms in order to prevent government tyranny.

\textit{D. Early State Constitutions}

The early state constitutions are important to a thoughtful understanding of the Second Amendment because they provide the basis from which the Founders drafted the Constitution and Bill of Rights.\textsuperscript{31} The centuries-old right to possess arms and the bitterness evoked by England's violation of that right before the Revolution were apparent when the newly-formed states drafted constitutions. Many state constitutions contain provisions regarding arms, militias, and standing armies. For example, Pennsylvania's Bill of Rights contained the protection that "People have a right to bear arms for the defense of themselves, and the state."\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{25} "Id. at 589-90."
\item \textsuperscript{26} HALBROOK, \textit{supra} note 19, at 60.
\item \textsuperscript{27} Hardy, \textit{supra} note 9, at 591.
\item \textsuperscript{28} HALBROOK, \textit{supra} note 19, at 60.
\item \textsuperscript{29} "Id. at 63."
\item \textsuperscript{30} \textit{Stephen Halbrook, A Right to Bear Arms} 17 (1989).
\item \textsuperscript{31} "Id. at vii."
\item \textsuperscript{32} \textit{Pa. Dec. of Rights}, art. XIII (1776). Three other states explicitly recognized the right to bear arms — North Carolina, Vermont, and Massachusetts. HALBROOK, \textit{supra} note 30, at ix.
\end{itemize}
Other constitutions were not explicit about an individual right to possess firearms. For example, while the Massachusetts Constitution of 1780 mentioned that the right to keep and bear arms was for the common defense, it also granted people the right to defend life and liberty. These latter rights would be meaningless if people were not allowed to keep and bear arms.

Among the states that did not mention a right to bear arms, two phenomena stand out. First, because of the colonists' mistrust of standing armies, every state created a general militia, composed of nearly all adult men, as opposed to a select militia, which was much closer to a standing army. A general militia, unlike a government-sponsored militia, required citizens to provide their own arms. To have a general militia and anything less than universal arms ownership would be logistically impossible.

Second, even if an individual right to arms is not explicit, it is assumed. The states that did not mention a right to possess arms often mentioned the rights of life, liberty, and property, as well as the peoples' right to defend life and property.

Six states did not have a bill of rights at all, and said nothing about a right to bear arms. From such an omission it cannot be deduced that these states failed to recognize the right to bear arms; such an inference would then force one to conclude that citizens had no right to life, liberty, and property, which were also omitted. Perhaps state leaders believed that their natural rights were sufficiently protected, thereby eliminating the necessity of listing them in a bill of rights. More likely was a fear that listing such rights would give the government more control over individuals; it might encourage the erroneous assumption that natural rights had to be listed in order to receive protection.

33. MASS. CONST. of 1780, art. 1, art. 17.
34. HALBROOK, supra note 30, at 42.
35. Id. at 51. The states that recognized a militia, but not an explicit individual right to arms, included Virginia, Maryland, Delaware, and New Hampshire.
36. Id. at 52.
37. MALCOLM, supra note 18, at 148-49.
38. HALBROOK, supra note 19 at ix. New York, New Jersey, South Carolina, and Georgia adopted constitutions but no bill of rights. Id. at 79. Connecticut and Rhode Island adopted neither a constitution nor a bill of rights, but instead relied on their royal charters. Id. at 97.
39. MALCOLM, supra note 18, at 148.
40. Id. at 149-50. New Jersey explicitly adopted the Common Law of England, a tactic its leaders believed would sufficiently protect the colonists' natural rights. Id.
E. The Constitution and the Bill of Rights

The Founding Fathers' belief in an individual right to possess arms is further supported by the debates surrounding the ratification of both the Constitution and the Bill of Rights. While information about the proceedings is imperfect, the evidence is overwhelming that the Founders supported an individual right to possess firearms.

The Federalist Papers reveal that two of the most important Founders, Alexander Hamilton and James Madison, supported an individual right to bear arms. Hamilton's The Federalist No. 28 argued that should government become tyrannical, "the citizens must rush tumultuously to arms, without system, without recourse, except in their courage and despair."41 In The Federalist No. 29, Hamilton noted that a standing army might be needed in the future, but it would never be able to abuse the people "while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens."42

Madison, too, acknowledged the right to keep and bear arms. In The Federalist No. 46, he explained that a federal army would never be able to impose its will on the people if it had to oppose "a militia amounting to near a half a million of citizens with arms in their hands . . . fighting for their common liberties."43

Other prominent Founders, such as Noah Webster, echoed Madison's view: "Before a standing army can rule the people, the people must be disarmed; as they are in almost every kingdom of Europe. The Supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people is armed, and constitutes a force superior to any bands of regular troops that can be, on any pretense, raised in the United States."44

This desire to guarantee that individuals maintain the right to bear arms was developed further in the Bill of Rights. Madison drafted the Bill of Rights based on a pamphlet that compiled proposed amendments from state ratifying conventions.45 No right

45. Robert A. Rutland, Framing and Ratifying the First Ten Amendments, in The
was more requested than the right to bear arms; it was requested seven times, while freedom of speech appeared only three times.\textsuperscript{46}

When Madison introduced his proposed rights to the House of Representatives, he interspersed them throughout the Constitution, rather than adopt an appendix that listed the amendments separately (like our present system). Madison placed the right to bear arms, along with speech, religion, and free press, with the other individual rights provisions contained in the Constitution, such as those relating to a bill of attainder and ex-post facto laws. The right was not placed with the militia clause of the Constitution.\textsuperscript{47}

Of course, Madison's organizational plan was not implemented, and the House passed a version of the Second Amendment similar to its ratified form. There was no dissent expressed to this measure, indicating that it was unthinkable that the right to bear arms would be infringed.\textsuperscript{48} The Senate did not leave official records of its debates. However, the writings of John Randolph explain that the Senate rejected a proposal that would limit the right to keep and bear arms only for "the common defense," thereby indicating a desire that the right not be confined merely to military activities.\textsuperscript{49}

That the Founders intended the Second Amendment to recognize an individual right is likewise supported by its placement. As mentioned above, Madison's original plan to group the individual rights amendments together in the Constitution was not adopted. However, these individual rights were clustered together in the Bill of Rights. Adopting the collective rights school's explanation of the Second Amendment requires reading the First Amendment as an individual right, the Second Amendment as a state right, and the remaining amendments as individual rights. Such a reading is inconsistent with the Amendment's placement in the Bill of Rights.

The collective rights school also must explain why the Founders used the term "people" to refer to individual rights in the First and Fourth Amendments, while in the Second they meant to protect only a state right. Such a reading is implausible and the Supreme Court has held that "the people" refers to individuals in all of the
amendments.  

F. The Militia

As mentioned above, an exhaustive analysis of the meaning of "militia" is beyond the scope of this article. Such analysis is unnecessary to the individual rights school; whatever is meant by "militia" does not negate the peoples' right to keep and bear arms. At the risk of some repetition, this section will demonstrate that nothing about the militia interferes with the individual right to bear arms.

The militia system and the individual right to bear arms were closely linked for hundreds of years before the Constitution. The tradition was adopted from England, where citizens were required to keep weapons and were subject to militia service for both military and law-enforcement purposes. Both the arms and militia aspect of this tradition were adopted in the American colonies.

The militia of the late 1700's bore no resemblance to the organized, government-sponsored National Guard of today. National Guard-like units were usually referred to as the "select militia." Contrarily, references to the militia were almost always synonymous with the "body of the people," indicating an armed populace. The state constitutions, drafted during and after the Revolutionary War, used this body of the people wording to describe militias.

This terminology was also used by the Founders. For example, George Mason asked "who are the militia, if they be not the people of this country?" Tench Coxe, arguing that the nation need not fear a large standing army, mentioned "[t]he militia, who are in fact the effective part of the people at large. . . ." Alexander Hanson, a member of the Maryland ratification committee, opined that if the army grew too large, "could we not . . . depend on the militia, 

50. See United States v. Verdugo-Urquidez, 494 U.S. 258 (1990) (holding that the phrase "the people," as used in the First, Second, and Fourth Amendments, applies to individuals.) See also infra note 110, and accompanying text.


52. Hardy, supra note 9, at 623-24.

53. Id.


which is ourselves.\textsuperscript{56} The same Congress that ratified the Bill of Rights also enacted the Militia Act of 1792, which defined the militia to include all able-bodied males, aged 18-45, and required each man to own a weapon.\textsuperscript{57}

Common sense suggests that the Founders would not, in drafting the Second Amendment, recognize a state military force yet fail to protect an individual right to keep arms. In addition to the long tradition of armed citizens comprising the militia, the Founders had just fought the Revolutionary War. The nature of the conflict involved armed colonists, organized in small units, fighting a legal government. That the Founders then intended to drop the individual right to arms, so long an integral part of the Anglo-American tradition and the most requested right by state conventions, in order to legitimize a state-imposed army violates every tenet of common sense and rationality.

G. Conclusion

Evidence that the Founders desired an individual right to bear arms is overwhelming. This individual right began with the Founders' ancestors in England, who brought it to the new world. England codified the individual right to bear arms after the monarchy began to disarm the citizenry. Armed colonists proved crucial to the early stages of the Revolutionary War, and the English attempts to disarm the rebellious colonists provided a lasting and bitter memory. Most states adopted an individual right to bear arms in both their constitutions and bills of rights and later adopted proposals calling for the Constitution to guarantee such rights. The writings of Madison, Hamilton, and other Founders premised the efficacy of the Constitution on an armed populace, and evidence indicates that the Senate rejected a proposed amendment that would have limited the right to bear arms. Finally, the term "militia" does not preclude an individual right to arms.

II. THE SUPREME COURT AND THE RIGHT TO KEEP AND BEAR ARMS

A. Introduction

The Second Amendment, which is no model of clarity, shines as fine-tuned prose in comparison to the Supreme Court's

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\textsuperscript{57} First Militia Act, 1 Stat. 271 (1792).
\end{quote}
interpretation of it. To date, the Court has provided almost no help to those interested in understanding the Second Amendment. Most of its decisions are tangential to the right to bear arms — for example, whether the Second Amendment protects private militias\footnote{Presser v. Illinois, 116 U.S. 252 (1886).} or a citizen from being disarmed by another citizen.\footnote{United States v. Cruikshank, 92 U.S. 542 (1876).} Not until 1939, and not since then, did the Court attempt to define the Second Amendment's guarantees.\footnote{United States v. Miller, 307 U.S. 174 (1939).} This dearth of cases can be partially explained by the Court's deference to state laws before the era of incorporation\footnote{United States v. Cruikshank, 92 U.S. 542 (1876).} as well as the lack of federal laws regulating firearms. However, the Court's neglect of the Second Amendment in the post-World War II era is inexcusable and leaves the nation with no significant body of case law on the right to bear arms.

B. Reconstruction and Post-Reconstruction Cases

The first major case to explore the Second Amendment was \textit{United States v. Cruikshank},\footnote{United States v. Cruikshank, 92 U.S. 542 (1876).} which concerned members of a mob indicted for invading a freedmen's meeting, at which they confiscated the attendees' weapons and prevented them from voting in a state election.\footnote{United States v. Miller, 307 U.S. 174 (1939).} The Supreme Court held that while the Fourteenth Amendment prevents state infringement of some rights, it does not protect citizens from infringements by other citizens. Because the actions of the mob were purely private in nature, the national government had no authority to intervene.\footnote{United States v. Cruikshank, 92 U.S. 542 (1876).}

While the case was dismissed for want of federal jurisdiction, \textit{Cruikshank} nonetheless raises several important points regarding the post-Civil War Court's analysis of the Second and Fourteenth Amendments. The Court, in explaining its version of federalism, relied on the Privileges and Immunities clause\footnote{See infra note 93, and accompanying text for explanation of this doctrine.} of the Constitution, \\

\begin{itemize}
\item \textit{Dred Scott v. Sanford}, 60 U.S. 393 (1857). In \textit{Dred Scott}, Chief Justice Taney warned that if free blacks became United States citizens, they could "keep and carry arms wherever they went." \textit{Id.} at 47. Note that Chief Justice Taney implicitly acknowledged the individual rights nature of the Second Amendment.
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\end{itemize}
holding that the Fourteenth Amendment extended the protections of the Bill of Rights against state action only to the extent that those rights related to the national government.\textsuperscript{66} For example, peaceably assembling to petition Congress for a redress of grievances is protected by the Fourteenth Amendment from state interference; other parts of the First Amendment are not, because they do not relate to the national government and thus were left free to state regulation.\textsuperscript{67}

Holding that the Second Amendment was not incorporated against state action, the Court added:

The right . . . of bearing arms for a lawful purpose . . . is not a right granted by the Constitution; neither is it any manner dependent upon that instrument for its existence. The Second Amendment declares that [the right to bear arms] shall not be infringed, but this means no more than that it shall not be infringed by Congress.\textsuperscript{68}

The justices concluded that citizens should look to local law or police to protect against violations.\textsuperscript{69}

The holding in \textit{Cruikshank} is irrelevant for modern times, useful only as an example of archaic constitutional reasoning.\textsuperscript{70} However, the Court recognized the individual nature of the Second Amendment and, despite its use of the Privileges and Immunities Clause, explicitly stated that it was a right that could not be infringed. Finally, it held that the right to bear arms existed independent of, and antecedent to, the Constitution, a document that merely recognized the pre-existing natural right to bear arms.

The Court's next Second Amendment case was \textit{Presser v. Illinois}.\textsuperscript{71} Presser had organized an armed "workers' militia" in response to abuses and intimidation from the Illinois National Guard.\textsuperscript{72} Illinois indicted Presser for violating a statute that

\textsuperscript{66} 92 U.S. at 546.
\textsuperscript{67} \textit{Cruikshank}, 92 U.S. at 546
\textsuperscript{68} Id. at 553.
\textsuperscript{69} Id.
\textsuperscript{70} Despite the death of the Privileges and Immunities Clause, some writers still use \textit{Cruikshank} to buttress their anti-gun position. \textsc{Cramer}, supra note 48, at 125-26 (citing Michael K. Beard & Samuel L. Fields, \textit{National Coalition to Ban Handguns Statement on the Second Amendment}). One wonders if the group would also use \textit{Cruikshank} to argue against the rights of free speech and free press.
\textsuperscript{71} \textit{Presser v. Illinois}, 116 U.S. 252 (1886).
\textsuperscript{72} Id. at 254.
prohibited men not under state or federal authority from acting as a private militia (which included bearing arms) without a license. Presser sought legal relief, claiming that the Illinois statute violated his Second Amendment rights.73

The Court sided with Illinois, and in dicta stated that the Second Amendment inapplicable to the case. Citing Cruikshank, the Court defined the Amendment as a limit only on the “power of Congress and the national government, not upon the states.”74 The Court, however, acknowledged a limitation on state power by noting:

[A]ll citizens capable of bearing arms constitute the reserved military force or the reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.75

Whether the Court viewed the Second Amendment as conferring rights on individuals, states, or both is uncertain; it never had cause to explore the nature of the Amendment. Yet, the Court noted that a state could not interfere with the individual right to keep and bear arms when such regulation interfered with the “public security” of the United States.

The value of Cruikshank and Presser in determining the scope of the right to keep and bear arms is limited. While both cases acknowledge an individual right to arms, they also hold the Second Amendment inapplicable to states. The discussions of the Second Amendment in each case were dicta, and the analysis of the right to bear arms was decided well before the Bill of Rights was incorporated to apply to states, a fact that presumably nullifies any grant of state power to infringe the right to bear arms. Cruikshank and Presser are nearly useless in clarifying what rights an individual possesses under the Second Amendment today.

73. Id.
74. Id. at 265.
75. Id.
C. Other Supreme Court Cases, 1894-1914

The Supreme Court again considered whether the Second Amendment limits state action in *Miller v. Texas*. Defendant, Miller, was convicted of murder, and on appeal to the Supreme Court contended that a Texas law allowing the warrantless arrest of anyone carrying a weapon violated the Second and Fourth Amendments. The Court assumed that the Second Amendment “only operates on the federal power,” but added that the Fourteenth Amendment might apply these restrictions to the states. Because the defendant had failed to raise the Fourteenth Amendment issue at trial, however, the Court refused to consider it, and the Second Amendment was assumed not to apply to the states. *Miller* is essentially trivia as a Second Amendment case, with its logic about limits only on the federal power long since discredited.

The Court considered two other cases with Second Amendment implications in this era. *Robertson v. Baldwin* concerned a group of seamen who argued that the Bill of Rights prohibited their forcible return to ship without due process. The Court held that the Bill of Rights did not create new rights, but merely embodied certain guarantees that derived from English common law. These English common law rights had, “from time immemorial,” been subject to certain exceptions when necessity dictated. Among these rights, and exceptions, was the individual right to arms: “the right of the people to keep and bear arms (Article 2) is not infringed by laws prohibiting the carrying of concealed weapons.” The justices listed other rights that fell into this category, such as the rights to free speech and press and a prohibition against double jeopardy.

The Court in *Robertson* categorized the Second Amendment as individual in nature; not only is it listed with individual rights, but a law against concealed weapons would not make sense if applied to a militia. Also significant is the fact that the Court again recognized

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77. *Id.* at 536.
78. *Id.*
79. *Id.* at 538.
81. *Id.* at 281.
82. *Id.* at 282.
83. *Id.* at 281-82.
this right as predating the Constitution – a common law right that the Founders had not created but rather acknowledged and clearly stated was not to be infringed.

Guns, but not the Second Amendment, were the issue in *Patsone v. Pennsylvania*. Patsone concerned a Pennsylvania statute that made it illegal for any unnaturalized foreign-born resident to "kill any wild bird or animal except in defense of person or property" and thus prohibited such a person from owning a rifle or shotgun. The Court upheld the statute, and with Justice Holmes writing for the majority, held "the prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense." Holmes seemed to indicate that because pistols are necessary to protect an individual, they are not subject to legislative restrictions. However, he could have meant that a law which prohibited hunting could not, absent specific language, be used to ban pistols, weapons rarely for that purpose.

The cases from this era are minor, and do little to clarify the meaning of the Second Amendment. *Miller* was decided before the Bill of Rights was incorporated into the Fourteenth Amendment to apply to states. *Patsone* is ambiguous and its language about weapons is only tangential to the decision. *Robertson* is of some value, for it implicitly recognizes the individual right to bear arms as well as the right as predating the Constitution. However, Robertson's discussion of the right is dicta and hardly provides a convincing precedent from which to derive an individual rights interpretation of the Second Amendment.

**D. United States v. Miller**

After *Patsone*, the Court was silent on the Second Amendment for twenty-five years until *United States v. Miller*. Miller was a challenge to the National Firearms Act of 1934, under which the defendants were accused of transporting unregistered sawed-off shotguns across state lines. The district court sided with the defendants, taking judicial notice of the fact that a sawed-off shotgun was a militia weapon, and federal prohibition of such a

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85. *Id.* at 143.
86. *Id.* at 144.
weapon would violate the Second Amendment.\textsuperscript{88}

The government appealed the case to the Supreme Court, but dropped all charges against the defendants. As a result, no brief was filed in opposition to the government's appeal.\textsuperscript{89} The Supreme Court reversed the district court, holding that Miller must produce evidence showing that a sawed-off shotgun had some "reasonable relationship to the preservation or efficiency of a well-regulated militia." In the absence of such evidence, the Court could not take judicial notice that the weapon was ordinary military equipment.\textsuperscript{90}

The Court also stated that the "obvious purpose" of the Second Amendment was to provide for the militia; but what was the militia?\textsuperscript{91} The constitutional debates "show plainly enough that the militia comprised all males capable of acting in concert for the common defense . . . [a]nd further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."\textsuperscript{92}

While the Miller Court focussed on the "militia" aspect of the Amendment, it did not deny an individual right to bear arms. Rather, the Court's definition of militia is actually helpful to an individual rights position. By defining the militia to include "all males physically capable of acting in concert for the common defense," the Court endorsed a broad view of who could possess arms. While Miller held that the Second Amendment relates to the militia, the practical effect is to create a well-armed populace — a scenario endorsed by the individual rights view. In addition, the Court never mentioned the national guard; common sense dictates that had the Court meant an organized, disciplined group such as the Guard, it would have specifically referred to such a group and not used the above "body of the people" definition.

Miller, then, could both help and harm the competing views of the Second Amendment. The individual rights school must accept that in the Court's only major Second Amendment case, it did not explicitly recognize an individual right to arms. However, the collective rights view may have won a Pyrrhic victory. By defining "militia" to include the body of the people, the Court seemed to endorse widespread ownership of guns — much as the Founders had intended.

\textsuperscript{88} Id.
\textsuperscript{89} CRAMER, supra note 48, at 188.
\textsuperscript{90} 307 U.S. at 178.
\textsuperscript{91} Miller, 307 U.S. at 178.
\textsuperscript{92} Id. at 179.
The practical significance of *Miller* is limited, because the decision provides no insight in clarifying the relationship among the individual, government, and firearms. Unfortunately, *Miller* is the Court’s latest word on the Second Amendment. By stopping its interpretations of the Second Amendment with *Miller* in 1939, the Court has effectively washed its hands of one of the most important issues of the post-World War II era.

**E. Is the Second Amendment Incorporated by the Fourteenth Amendment?**

Many of the cases mentioned above, *e.g.*, *Miller v. Texas*, *Cruikshank*, and *Presser*, interpreted the Second Amendment as a restraint only on federal — not state, local, or private — interference with the right to bear arms. These cases were decided over one hundred years ago, before the Supreme Court began to rule that the Bill of Rights is incorporated into the Fourteenth Amendment and therefore applicable to states. By refusing to take a Second Amendment case, the Court has not only confused the right to bear arms, but also failed to decide whether the Amendment applies to states. While nearly all provisions of the Bill of Rights have been explicitly incorporated, the Second Amendment has not. Many federal courts have ruled that the Second Amendment is not incorporated. However, the arguments favoring incorporation are so strong that to hold otherwise is inconsistent and intellectually dishonest.

An example of the misinterpretation of the incorporation doctrine is found in *Quilci v. Morton Grove*, the most famous gun-control case of the post-war era. In 1981, Morton Grove, Illinois, banned the private ownership of handguns and was sued by local gun owners who sought to stop enforcement of the law. The federal district court granted Morton Grove summary judgment, and Quilci appealed to the Seventh Circuit Court of Appeals.

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93. The Court has never accepted a “total incorporation” theory. Instead, it has employed a “selective incorporation” test, incorporating rights on a piecemeal basis. Tribe, supra note 6, at 721. The only amendments that have not explicitly been incorporated are the Second and Third Amendments, the Fifth Amendment’s grand jury requirement, and the Seventh Amendment. *Id.*


95. 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

96. *Id.* at 262-63.
Quilci contended that: 1) the Supreme Court in *Presser* had recognized that a state could not prohibit people from bearing arms; and 2) *Presser*'s holding that the Second Amendment does not apply to states had been overruled, because the Second Amendment — implicitly, the whole Bill of Rights — had been incorporated by the Fourteenth Amendment and several cases.\(^\text{97}\) The Court of Appeals rejected both arguments.\(^\text{98}\)

*Quilci* provided an excellent opportunity for the Court to clarify the right to keep and bear arms. Unfortunately, its failure to grant certiorari not only resulted in an extension of the gun control debate, but also a continuation of the incorporation question, a matter that could have, and should have, been decided years ago. To cite *Presser* for the proposition that the Second Amendment is not incorporated requires relying on a method of constitutional reasoning that the Court has rejected for decades. *Presser* is inconsistent with today's incorporation doctrine, which applies the Bill of Rights to state and local governments.\(^\text{99}\)

The Supreme Court has unfairly burdened the individual rights school by utilizing its "selective incorporation" approach to the Bill of Rights. Because the Court refuses to hear right to bear arms cases, it cannot incorporate the Second Amendment. This places the individual rights school in a bind. Although the school has a plausible argument for why the Amendment should be considered incorporated, it must acknowledge that the Court has never done so. However, when the Court takes a Second Amendment case in the future, there is ample reason to believe that it will incorporate right.

In deciding whether a provision of the Bill of Rights is incorporated, the Supreme Court has traditionally asked: (1) How deeply is the right rooted in our Anglo-American heritage?\(^\text{100}\) and (2) How greatly did the Founders value the right?\(^\text{101}\) Regarding the individual right to bear arms, the response to both questions is overwhelmingly positive.\(^\text{102}\) The records of the Founding Fathers show that they valued the right to bear arms highly. In addition, the

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\(^{97}\) *Id.* at 270.

\(^{98}\) *Id.*


\(^{101}\) *Id.* at 254 n.214 (discussing *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Klopfer v. North Carolina*, 386 U.S. 213 (1967)).

\(^{102}\) *See supra* notes 31-50, and accompanying text.
right had been part of the English tradition for centuries and passed to the colonies in the Seventeenth Century.\textsuperscript{103} Only an \textit{au contrario} argument against incorporation is consistent — the Second Amendment grants states the right to have a militia, and holding that a state militia is not subject to state regulations would be contradictory. However, as explained above, the Founders’ main intent in drafting the Second Amendment was not to grant states the right to create their own militias, but instead to recognize an individual right to bear arms.

Opponents of the right to bear arms often claim that the Second Amendment is not incorporated. While they are correct that the Court has never explicitly incorporated the Second Amendment, they also must acknowledge that the Court has not heard a right to bear arms case in several decades. According to the Court’s own incorporation test, as well as the demise of the Privileges and Immunities clause, the Second Amendment is immune from state and local infringement. The foolish debate over incorporation is yet another consequence of the Court’s unwillingness to hear a Second Amendment case.

\section*{F. Post-Miller Developments}

The Court’s inexplicable failure to decide a Second Amendment case since \textit{Miller} is irresponsible, given society’s tumultuous debate about guns and the abundance of lower court cases from which to choose. In a recent decision, however, it provided support for interpreting the Second Amendment as applying to individuals and also offered a glimpse of how it might decide a right to bear arms case in the future.

\textit{United States v. Verdugo-Urquidez}\textsuperscript{104} held that the Fourth Amendment does not apply to the search and seizure of property located in a foreign country and owned by nonresident aliens.\textsuperscript{105} In exploring the phrase “the right of the people” in the Fourth Amendment, the Court noted that “the people” was a “term of art” employed in select parts of the Constitution, including the Preamble and the First, Second, Fourth, Ninth and Tenth

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\item\textsuperscript{103} There is also evidence that the framers of the Fourteenth Amendment intended that the Second Amendment apply to states. Kates, \textit{supra} note 10, at 256. One reason the Fourteenth Amendment was passed was in response to the “black codes” states used to deprive blacks of their right to bear arms. \textit{Id.}
\item\textsuperscript{104} \textit{United States v. Verdugo-Urquidez}, 494 U.S. 258 (1990).
\item\textsuperscript{105} \textit{Id.} at 259.
\end{itemize}
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Amendments. This textual analysis suggests that the term refers to "a class of persons who are part of a national community." The case vindicates an individual rights view of the Second Amendment. The Court did not mention any limitations on this "right of the people" imposed by a militia; instead, it is classified with other "obvious" individual rights, which use the same terminology as the Second Amendment.

Verdugo-Urquidez does not strike a decisive blow for the individualist school, but does provide evidence that the Court might interpret the Second Amendment in the way the Founders intended. That the Court implicitly views the Second Amendment in the same manner as the First and Fourth Amendments is long in coming. It is implausible that the Founders would have accorded "the people" more than one meaning, and the Court's decision validates the idea that language should be read consistently throughout the Constitution.

G. Conclusion

The Supreme Court has done the country a great disservice by not accepting a Second Amendment case in the last several decades. To make an argument that relies heavily on any previous Supreme Court decision risks exposing such a position to plausible counter-argument, for the opinions are illogical, contradictory, ambiguous and, in some cases, based upon discarded judicial doctrines. While Verdugo-Urquidez indicates how the Court might rule in a future Second Amendment case, it must first accept such a case. At present, the body of Second Amendment case law is virtually nothing. That is why necessity dictates a new approach be

106. Id.
107. Id. at 259-60.
108. The Court's holding that the phrase "the people" applies to individuals "who are part of the national community" does not mean that the other amendments do not provide an individual right. The Court specifically mentioned the Fifth and Sixth Amendments as individual rights that are fundamental to any individual and do not attach only to United States citizens. Id. at 261.

109. Justice Thomas, in his concurring opinion in Printz v. United States, seemed eager for the Court to accept such a Second Amendment case. He noted that if the Second Amendment protects an individual right, the federal government would be prohibited from regulating the intrastate aspects of the sale and possession of firearms. Prinz v. United States, 117 S. Ct. 2365, 2386 (1977) (Thomas, J., concurring). Justice Thomas added, "Perhaps, at some future date this court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered as the palladium of the liberties of a republic.'" Id. (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 708 (1833) (reprinted 1987)).
utilized in interpreting the individual right to arms.

III. TOWARD A NEW READING OF THE SECOND AMENDMENT: DeSHANEY v. WINNEBAGO COUNTY DEP'T OF SOCIAL SERVS.

A. Introduction

Section I explained the Founders' intention that individuals have the right to keep and bear arms. The arguments advanced concerned both political and self-protective motives. The Founders themselves did not distinguish between "personal safety" and "political safety" reasons for the individual right to keep and bear arms.\textsuperscript{110} One justification is that America had no organized police force at the time of its founding. Like their English counterparts, American citizens had to serve in both "militia" and "police" roles when the situation required.\textsuperscript{111} Of course, America was primarily a rural culture at that time, so a spirit of self-reliance was inherent among many people on the frontier.

Conditions have changed considerably since the 1790's. Although there is still ample reason to distrust the government, the more immediate threat of physical harm comes from individuals. Because the Court has steadfastly refused to hear Second Amendment cases, Americans are uncertain what rights, if any, they possess to respond to this growing threat.

The Court, however, has laid the foundation for a decisive victory for the individual rights view. While this article strongly encourages the Court to take Second Amendment cases, its failure to do so will not foreclose a winning argument in favor of the individual right to arms. Surprisingly, the parties engaged in the gun debate have failed to grasp the significance of a Supreme Court case that has effectively defined the individual right to bear arms question, yet at no time mentions the Second Amendment.\textsuperscript{112} DeShaney v. Winnebago County Dep't of Social Servs.\textsuperscript{113} concerned a young boy, Joshua DeShaney, left severely retarded

\textsuperscript{110} Lund, supra note 9, at 117.

\textsuperscript{111} Id. at 118.


\textsuperscript{113} 489 U.S. 187 (1989).
after a severe beating from his father. Members of the defendant Department of Social Services ("DSS") were aware of the prolonged abuse and took some minimal steps to protect Joshua, but failed to remove him permanently from his father's custody.\textsuperscript{114} Despite ample evidence — including hospital reports — that Joshua was being abused, the case worker handling the matter did nothing more than to "dutifully record" the incidents and her own suspicions about the abuse.\textsuperscript{115} Several months later, the father beat him so severely that he lapsed into a coma and suffered permanent brain damage.\textsuperscript{116} After the injury, Joshua's mother sued the DSS, a subdivision of the state, under 42 U.S.C. § 1983.\textsuperscript{117} Specifically, plaintiff alleged that the D.S.S. had deprived Joshua of his liberty interest in his bodily integrity in violation of the Fourteenth Amendment by failing to protect him from abuse that they knew, or should have known, was occurring.\textsuperscript{118}

\textbf{B. The Majority Opinion}

In an opinion written by Chief Justice Rehnquist, the Court held that the state's failure to protect an individual from private violence generally is not a violation of the Due Process Clause,\textsuperscript{119} which acts as a limitation on the state's power to act, not a guarantee of

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\item \textsuperscript{114} \textit{DeShaney}, 489 U.S. at 191-92. Joshua had been placed in temporary custody at a Wisconsin hospital. A DSS "child protection team" then enrolled the child in a pre-school program, provided his father with counseling services, and encouraged the father's girlfriend to leave the home. Joshua's father promised that he would cooperate with the DSS in accomplishing these goals, but he failed to do so. \textit{Id.}
\item \textsuperscript{115} \textit{Id.} at 192-93.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.} Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the persons injured in an action of law, suit in equity, or other proper proceedings for redress." 42 U.S.C. § 1983 (1988).
\item Note that Section 1983, as a purely remedial statute, does not itself provide a cause of action. A party must prove a violation of a federally secured right — such as a liberty interest provided by the Fourteenth Amendment — in order to prevail in a § 1983 suit.
\item \textsuperscript{118} \textit{DeShaney}, 489 U.S. at 193.
\item \textsuperscript{119} \textit{Id.} at 195. There are exceptions to this. The Court acknowledged that a state could not deny protective services to certain disfavored minorities without violating the Equal Protection Clause. \textit{Id.} at 197 n.3 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)). A government service might also become an "entitlement" which could not be deprived without due process of law. Such a guaranteed right would have to be created by statute. 489 U.S. at 196 n.2 (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)). In addition, for an explanation of the "special relationship" theory, see \textit{infra} note 122, and accompanying text.
\end{itemize}
certain minimal levels of safety. While the state may not deprive individuals of life, liberty, and property without due process of law, it is not obligated to ensure that those interests are not harmed through other means.\textsuperscript{120} "Its purpose [is] to protect the people from the State, not to ensure that the State [protect] them from each other. The framers were content to leave the extent of governmental obligation in the latter area to the democratic political process."\textsuperscript{121}

Furthermore, the Court also declined to hold that the state's knowledge of Joshua's danger and its express willingness to help him constituted any type of "special relationship" leading to an affirmative constitutional duty to protect him. The plaintiff argued that a "special relationship" existed because the DSS was aware of Joshua's dangerous situation and "specifically proclaimed" its intention to protect him against the danger.\textsuperscript{122} By attempting to shield Joshua from abuse, the state acquired a duty to protect him. The state's failure to discharge this duty, according to plaintiff, constituted a substantive due process violation.\textsuperscript{123}

The Court disagreed, stating that "[t]he affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help, but from the limitation that it has imposed on his freedom to act on his own behalf."\textsuperscript{124} The majority defined such a limitation narrowly, finding it applicable only to situations where the state takes an individual into custody thereby preventing him from taking care of himself.\textsuperscript{125} Such was not the case in \textit{DeShaney}. The Court stated that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to make him more vulnerable to them."\textsuperscript{126}

The reasoning in \textit{DeShaney} represents an excellent opportunity for the individual rights position. \textit{DeShaney} sets the parameters of the gun debate by defining the government's obligations, rather

\begin{footnotesize}
\textsuperscript{120} \textit{DeShaney}, 489 U.S. at 195.
\textsuperscript{121} \textit{Id.} at 196.
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 200.
\textsuperscript{125} \textit{DeShaney}, 489 U.S. at 200. \textit{See} Youngberg v. Romero, 457 U.S. 307, 314-25 (1982) (holding that involuntarily committed mental patients have a Fourteenth Amendment due process right to have the state provide "reasonable safety" for themselves and others); Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (holding that the Due Process Clause requires states to provide adequate medical care to prisoners).
\textsuperscript{126} \textit{DeShaney}, 489 U.S. at 201.
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than a citizen's rights. From this, one would turn traditional Second Amendment analysis on its head. Rather than supporting an individual right to arms by citing virtually nonexistent Second Amendment case law, \textit{DeShaney} opens the door for much more dynamic arguments and potentially shifts the burden of persuasion in right to arms cases.

\textit{DeShaney} holds that government has no obligation to protect individuals from the violence of others. A realistic assessment of that holding is that, as a general rule, the government has no obligation to prevent murders, rapes, and armed robberies. Assuming that, as humans, we have a right to life and liberty,\footnote{A "right" is defined in the abstract as "justice, ethical correctness, or consonance with the rules of law or morals." \textit{Black's Law Dictionary} 1486 (6th ed. 1990). In the concrete sense, it is "a power, privilege, faculty, or demand inherent in one person and incident upon another . . . [they exist antecedent] to their recognition by positive law." \textit{Id}.}

the Court has left the protection of these rights solely to the individual. By declining to guarantee protection to citizens, the government forces individuals to protect themselves. The role of the Second Amendment becomes apparent — individual protection is not possible without the right to own firearms. An individual has no chance to prevent, or even deter, an armed murderer from acting if he is not also armed.

The above analysis suggests that \textit{DeShaney}, unwittingly, is the most important Second Amendment case ever decided by the Supreme Court. By clarifying the government's obligation (or lack of) to protect citizens, the Court has virtually mandated that the Second Amendment be read as an individual right. Any other interpretation of the Amendment would mean that the rights of life and liberty are not rights at all, but mere empty promises to be provided at the government's whim.\footnote{This is hardly radical. It is exactly what the Founders intended when they ratified the Second Amendment over two-hundred years ago. Although the Second Amendment has been subject to numerous interpretations, \textit{DeShaney} necessitates that it be read as an individual right — a}
right that allows one to defend oneself against the violence of others.\textsuperscript{129}

Members of the collective rights view might still argue against allowing citizens the right to defend themselves with firearms. However, because \textit{DeShaney} obliges the government to do nothing to protect its citizens, this view cannot withstand close scrutiny. If the government generally has no obligation to protect a citizen, how can a just society prevent an individual from arming to protect himself? Under a ban on individual possession of firearms, the government would have a monopoly on all forms of protection, and an individual would be at the government's mercy for the protection he receives. An individual would be caught in a quandary: if he obeys the law, he risks being wounded or slain. All hope for survival rests solely with the government. Yet should the police fail to protect him, even if they are aware of dangers he faces, the government is absolved of all responsibility and is immune from liability. The government therefore has no incentive to protect the lives of its citizens, and a citizen who protects his life becomes a criminal.

The forced surrendering of the right to defend oneself is incompatible with social contract theory, upon which much of modern political theory, and to a great extent, the United States Government, is based.\textsuperscript{130} Social contract theory contemplates that we exist independent of, and in competition with, one another in a state of nature, with no law to govern us. By forming the social contract, we enter into a societal agreement that requires that we surrender some of our freedoms enjoyed in the state of nature. In return, we receive political rights and government services that

\textsuperscript{129} Nicholas J. Johnson argues that even if the Second Amendment protects only a collective right (which he does not concede), an individual right to arms might still be found in the Ninth Amendment. Nicholas J. Johnson, \textit{Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment}, 24 Rutgers L.J. 1 (1992).

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. Johnson contends that the Ninth Amendment protects those unenumerated rights deemed fundamental to the Founders. \textit{Id.} at 27. Given the vast evidence proving that the Founders considered such a right fundamental, it might be "substantially easier" to derive the individual right to arms through the Ninth Amendment. \textit{Id.} at 36.

\textsuperscript{130} Thomas Jefferson claimed that the Declaration of Independence and Bill of Rights had their origins in "the elementary book of public right, as Aristotle, Cicero, Locke, Sidney, etc." Thomas Jefferson, \textit{Living Thoughts} (Dewey ed., 1940). See also Carl Becker, \textit{The Declaration of Independence} (1922). For an overview of the role of philosophy as it relates the right to bear arms, see Stephen Halbrook, \textit{The Second Amendment as a Phenomenon of Classical Political Philosophy}, in \textit{Firearms and Violence} (Donald Kates ed., 1984).
supposedly make us safer and better able to function interdependently.\textsuperscript{131}

Yet not even the most authoritarian of the social contract theorists would ever allow an individual to surrender the right to defend his life. For example, Hobbes considered it a sacred right that "[b]y all means we can, to defend ourselves."\textsuperscript{132} In fact, he considered the right so fundamental that it could not be waived by the social contract with the sovereign: "a covenant not to defend myself from force, by force, is always voyd."\textsuperscript{133} Man is guided by the passions, and the greatest of these passions is fear of violent death at the hands of another; this is the fundamental right from which all natural law originates, and no government-made law may supersede it.\textsuperscript{134}

Perhaps the most influential of liberal thinkers,\textsuperscript{135} John Locke, also recognized that individuals have a fundamental right to protect their lives, a right with which the government cannot interfere: "[I]t being reasonable and just, I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible when all cannot be preserved the safety of the innocent is to be preferred . . . ."\textsuperscript{136}

What is Locke's reason for this? "[B]ecause such men are not under the ties of the common law of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey . . . ."\textsuperscript{137}

Locke, like Hobbes, recognized that no agreement with the sovereign could waive this right of self-defense: "This freedom from absolute arbitrary power is so necessary to, and closely tied with, a man's preservation, that he cannot part with it but by what he forfeits its preservation and life together. For a man not having the power of his own life cannot be compact, for his own consent enslaves himself to anyone, nor put himself under the absolute arbitrary power of another to take away his life when he

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\item[131.] THOMAS HOBBES, LEVIATHAN (1651) (reprinted Cambridge ed. 1991); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (1690) (reprinted Hackett ed. 1980); LEO STRAUSS, THE POLITICAL PHILOSOPHY OF HOBBES (1953); LEO STRAUSS, NATURAL RIGHT AND HISTORY (1960).
\item[132.] HOBBS, supra note 131, at 109.
\item[133.] Id.
\item[134.] Id. at 112.
\item[136.] LOCKE, supra note 131, at 14.
\item[137.] Id. at 16.
\end{enumerate}
It is not merely the liberal political philosophers who have viewed self-protection as a fundamental right. This was also the conclusion of William Blackstone, who contended that preventing a citizen from defending himself is incompatible with liberty. Blackstone divided individual rights into two categories: "primary" and "auxiliary." The former consisted of those inherent rights that a person enjoys, such as security, property, and liberty, while the latter consists of rights used to protect primary rights, including courts of law, the right to petition, and "the right of having and using arms for self-preservation and defense." Blackstone also stated, "[If a person is attacked] . . . it is lawful for him to repel the attack by force . . . [The law] considers that the future process of law is by no means an adequate remedy for injuries accompanied by force . . . Self-defense, therefore, as it is justly called by the primary laws of nature . . . [cannot] be taken away by the law of society."

American history provides examples of government failure to protect individuals or groups, forcing them to defend themselves. Robert Cottrol and Raymond Diamond document the value of firearms in curbing violence committed by racist whites in the South, violence that the government did little to prevent. This threat was real. Between 1882 and 1968, approximately 75% of the 4,743 persons lynched were black. The authors also explain that the goal of the "black codes" was the disarmament of blacks, thereby preventing them from asserting their rights. By using weapons to defend their lives and property, blacks were often successfully able to decrease violent attacks against them.

138. Id. at 23.
139. 1 WILLIAM BLACKSTONE COMMENTARIES 129, 141 (1766).
140. Id. at 44.
141. 3 WILLIAM BLACKSTONE COMMENTARIES 4 (1766).
142. Robert Cottrol & Raymond Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 GEO. L.J. 309 (1991). The authors also note that the Supreme Court sanctioned this violence. Id. at 318 (citing United States v. Harris, 106 U.S. 629 (1882) (holding that a federal criminal statute designed to protect equal privileges and immunities for blacks from invasion by private parties was unconstitutional); United States v. Cruikshank, 92 U.S. 542 (1876).
144. Id. at 344.
145. Id. at 353-54. Granted, this strategy worked when blacks fought as a group against white mob violence. They were less successful when one armed black man was attacked by a mob. Id. This fact makes the right no less valuable, and, as with all firearms data, the deterrent effect cannot be measured.
The value of a firearm in the face of obvious violence that the government is unable, and not obligated, to prevent is clear in other contexts. For example, what of the abortionist targeted for execution by a pro-life extremist? Or the abused wife hiding from a husband who has threatened to kill her? What if she has already called the police several times, and they are unwilling, or unable, to respond immediately? While these scenarios are more the exception than the norm, they are examples of how total reliance on the police can result in death, and why gun control cannot be reconciled with the law as interpreted in DeShaney.

DeShaney thus not only requires a strong individual rights view of the Second Amendment, it also severely damages the collective rights view by exposing the glaring weaknesses of its argument. It forces that latter position to concede that life and liberty are not rights that the Constitution allows to be enforced by either private or public means. The Constitution does not, and should not, guarantee that a person's rights to life and liberty will be free from private interference. But under the collective rights view, a person would be prevented from defending his rights to life and liberty. This position thus relegates life and liberty to mere "goals" or "good intentions"—certainly not rights, which require some type of enforcement. Such a position is incompatible with liberal theory, ignores the foundations of modern jurisprudence, and rejects the evidence of history.

C. The Dissenting Opinion

The collective rights view, in order to avoid the dangerous implications of its position as explained above, might argue that DeShaney was incorrectly decided and that the dissent was correct: government inaction can become action, thereby creating a duty to protect citizens. This view, no matter how persuasive, does not change the law of the land, which requires individuals to protect themselves from the violence of others. However, even if Justice Brennan's dissent became law, the ultimate result would still be an individual right to arms.

In his dissent, Brennan took issue with the majority's suggestion that only physical control was "the affirmative act of restraining the individual's freedom to act on his own behalf." He argued that the decisions upon which the Court relied essentially held that "if a

146. DeShaney, 489 U.S. at 205 (Brennan, J., dissenting).
state cuts off private sources of aid and then refuses to aid itself, it cannot wash its hands of the harm that results from its inaction."\textsuperscript{147} Other cases, too, "have acknowledged that a state's actions — such as the monopolization of a particular path of relief — may impose upon the state certain positive duties."\textsuperscript{148} The Court has also found that the state can contribute to an injury, even if it did not cause the harm itself.\textsuperscript{149}

Brennan added that a state's prior actions may decide the constitutional significance of its inactions.\textsuperscript{150} In \textit{DeShaney}, Wisconsin law directed citizens to depend on the DSS, and the decision about whether or not to remove the child rested solely with the government agency, the DSS. He further noted: "Through its child welfare program . . . Wisconsin has relieved ordinary citizens and governmental bodies other than [DSS] of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap."\textsuperscript{151}

The result, Brennan acknowledged, was that the DSS had effectively condemned Joshua to a life of abuse until it decided to intervene. He added, "[c]onceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs."\textsuperscript{152} This could be tantamount to state action, and Brennan argued that the plaintiffs should be able "to show that the [DSS's] failure to help [Joshua] arose, not at the sound exercise of professional judgement . . . but from the kind of arbitrariness we have in the past condemned."\textsuperscript{153}

Brennan's description of the DSS is analogous to the police and their obligation to citizens in situations where guns have been banned. With gun control, the government has "cut off private sources of aid," monopolized a particular path of relief, directed citizens to rely solely on it, and retains ultimate power in deciding

\begin{itemize}
\item \textsuperscript{147} \textit{Id.} at 207 (Brennan, J., dissenting).
\item \textsuperscript{149} \textit{DeShaney}, 489 U.S. at 207 (Brennan, J., dissenting); \textit{Shelley v. Kraemer}, 334 U.S. 1 (1968); \textit{Burton v. Wilmington Parking Auth.}, 365 U.S. 715 (1961).
\item \textsuperscript{151} \textit{DeShaney}, 489 U.S. at 211 (Brennan, J., dissenting).
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.}
\end{itemize}
whether to intervene. True, police protection is not a fundamental right. However, if the government forces people to rely solely on the police, and precludes people from defending themselves, the Brennan theory would recognize state action. By his own words, Brennan has constructed a model of government duty and control that could be tantamount to state action, thereby creating liability for damages under section 1983.

Brennan's model of government obligation was implemented in a Ninth Circuit Court of Appeals case decided soon after DeShaney. The case provides an example of what might be expected if the dissenting position in DeShaney is followed. In Wood v. Ostrander, Wood was a passenger in a car that the police stopped for a minor infraction. The police arrested the driver for drunk driving and then impounded the car. Wood claimed that the officer left her at the site of the arrest, a notorious high-crime area, and refused to help her get home. She was raped later that evening after accepting a ride with a stranger.

The United States Court of Appeals for the Ninth Circuit held that Wood had raised triable issues of fact regarding whether the police conduct had affirmatively placed her in a position of danger. The court noted that this was a situation that was distinct from DeShaney, a case where the state had "played no part in creating the danger." Because the policeman "had arrested [the driver], impounded his car, and stranded Wood in a high crime area at 2:30 [a.m.] distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety."

The court also noted that Wood had raised a triable issue regarding the defendant's knowledge of the danger. Because the defendant had been a police officer for several years, he might be chargeable with knowledge of the high crime rate in the area. Brennan added: "Moreover, the inherent danger facing a woman left alone at night in an unsafe area is a matter of common sense."

Wood shows that the activity of police can be construed as "creating the danger" an individual faces, even if that danger comes from a third party. Note that the policeman did nothing illegal — because of a probable crime, he removed an adult passenger from

155. Wood, 879 F.2d at 586.
156. Id. at 590.
157. Id.
158. Id.
a car and left her in the neighborhood into which she had traveled. Because of this action, Ostrander was potentially liable for damages on the issue of whether he, as a state actor, created the danger faced by the plaintiff.

*Wood* shows the practical effect of the dissent's position in *DeShaney*. While the two cases are factually distinct, both positions stand for government inaction being construed as action, thus violating the Fourteenth Amendment. In neither case did the government actually commit the offense. In both cases, however, the government: failed to rescue an individual from a dangerous situation; had knowledge, or should have had knowledge, of that situation; monopolized the path of relief for the individual; had ultimate power in deciding to intervene; and made the individual worse off because of its inaction. These factors, according to the Brennan-Wood model, raise triable issues of fact as to whether state inaction becomes state action.

As explained above, the Brennan-Wood model is also analogous to the government's failure to prevent crime in an area with strict gun control. The result of such a liability system would be unsustainable for any length of time. True, Justice Brennan promised that courts would defer to the decision-maker's professional judgement. *Wood* showed how willing the Court of Appeals for the Ninth Circuit was to defer to a state actor's professional judgement.

If only a fraction of violent crimes led to civil suits against the government, most jurisdictions would be unable to pay the resulting large damage awards. More likely, cities would not risk going to trial, thereby resulting in out-of-court settlements. This liability would eventually force most governments to forgo the "monopolization of relief" system designed by banning guns and forcing reliance on the police — in essence, partially privatizing the role the police play in protecting our lives.\(^{159}\)

**D. Conclusion**

Regardless of the side one chooses as just in *DeShaney*, the result is the same — an individual right to bear arms. This result is reached on justice grounds if one sides with the majority. By

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\(^{159}\). This does not mean that the police would no longer have a role in protecting individuals. Instead, the police could no longer be held liable pursuant to section 1983 for failing to prevent serious harm which otherwise might not have occurred if a person were able to defend himself.
exempting government from the responsibility of upholding our rights from violations by third parties, the Court has effectively placed the responsibility of self-defense on the individual. Rights are meaningless if unenforceable. Hence, an individual rights view of the Second Amendment is required. This scenario is hardly radical; but rather it is the view of society that the Founders had two-hundred years ago.

The collective rights view might ignore the individual rights view of the Second Amendment mandated by DeShaney. A gun ban coupled with the DeShaney holding, however, would result in the government's monopolization of the ability to protect life, with no legally enforceable method to guarantee that protection, or recover damages when the protection fails. Not only does this force the collective rights view to take a virtually indefensible position; it also flagrantly violates the foundations of modern government and ignores history.

Even if one agrees with the dissent in DeShaney, the same result is reached, but through economic impact. If the state assumes the duty to protect an individual and forecloses any private form of protection, its inaction can become state action — leaving it liable for damages. These damages could not be sustained over time and would result in the partial privatization of the government's role in our lives.

IV. CONCLUSION

This article argues that the Second Amendment provides an individual right to bear arms. The evidence that the Founders intended an individual right is overwhelming, and the location within the Bill of Rights as well as the terminology of the Second Amendment indicates that it was meant as an individual right. The Court has been derelict in its duty to interpret the Second Amendment. Nearly every decision it has rendered contains language that can help and harm both sides of the gun debate. It has also left unclear whether the Second Amendment applies to the states. This confusion may cease, for a recent decision lists the Second Amendment as an individual right. Yet because the Court refuses to take Second Amendment cases, a new approach is necessary. The implications of DeShaney point to an individual right to keep and bear arms, and limited government responsibility, exactly as the Founders envisioned. This result is achieved, regardless of whether the holding of the majority or the dissent
became the rule of law.