

THE PECULIAR STORY OF *UNITED STATES V. MILLER*

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This article provides a comprehensive history and interpretation of *United States v. Miller*, the only Supreme Court case construing the Second Amendment. It presents evidence *Miller* was a test case designed by the government to test the constitutionality of federal gun control. It shows the holding in *Miller* is narrower than generally assumed. It argues *Miller* adopts neither the individual nor the collective right theory of the Second Amendment. It suggests the Supreme Court's pragmatic, deferential approach in *Miller* remains appropriate.

INTRODUCTION

On April 18, 1938, the Siloam Springs police stopped Jack Miller and Frank Layton, two washed-up Oklahoma bank robbers. Miller and Layton had an unregistered sawed-off shotgun, so the police arrested them for violating the National Firearms Act ("NFA"). Surprisingly, the district court dismissed the charges, holding the NFA violates the Second Amendment. The Supreme Court reversed in *United States v. Miller*, holding the Second Amendment doesn't guarantee the right to keep and bear a sawed-off shotgun.¹

Sixty years later, *Miller* remains the only Supreme Court opinion construing the Second Amendment.² But courts struggle to decipher its holding. Some find *Miller* adopted an individual right theory of the Second Amendment, some find it adopted a collective right theory, and some find it adopted a hybrid theory, protecting the right to possess a firearm in connection with

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¹ 307 U.S. 174 (1939).

² Of course, other cases mention or allude to the Second Amendment. See David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 St. Louis U. Pub. L. Rev. 99 (1999).

militia service.³ Most recently, in *Parker v. District of Columbia*, the D.C. Circuit found *Miller* held the Second Amendment protects an individual right to possess and use handguns in common use.⁴

Oddly, Second Amendment scholars have largely ignored *Miller*. While individual and collective right theorists alike claim *Miller* supports their position, most provide only a perfunctory account of the case and its holding. The few exceptions focus on the text of the opinion, rather than the history of the case and the context in which it was decided.⁵ And all conclude *Miller* is an impenetrable mess.

This essay suggests the conventional wisdom is only half-right, because *Miller* did less than generally supposed. Part I presents a brief historiography of *Miller*. Part II recounts the history of the case. And Part III analyses *Miller* in light of its history. This essay concludes *Miller* is coherent, but largely irrelevant to the contemporary debate over the meaning of the Second Amendment. *Miller* was a Second Amendment test case, teed up with a nominal defendant by a district judge sympathetic to New Deal gun control measures. But the Supreme Court issued a surprisingly narrow decision. Essentially, it held the Second Amendment permits Congress to tax firearms used by criminals. While dicta suggests the Second Amendment

3 See *United States v. Parker*, ___ F.3d ___ (2007), *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (individual right theory); *Silveira v. Lockyer*, 312 F.3d 1052, 1086-87 (9th Cir. 2003); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (collective right theory); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1274 & n.18 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (hybrid theory protecting right to own firearm in connection with militia membership).

4 *Parker v. District of Columbia*, ___ F.3d ___ (2007).

5 See, e.g., Brandon P. Denning & Glenn H. Reynolds, *Enduring and Empowering: The Bill of Rights in the Third Millennium: Telling Miller's Tale: A Reply to David Yassky*, 65 *Law & Contemp. Prob.* 113 (2002).

guarantees an individual right to possess and use a weapon suitable for militia service, dicta isn't precedent.⁶ In other words, *Miller* didn't adopt a theory of the Second Amendment guarantee, because it didn't need one.

I. THE HISTORIOGRAPHY OF *UNITED STATES V. MILLER*

Originally, courts and commentators alike found *Miller* inscrutable.⁷ Or maybe just unremarkable. Anyway, they basically ignored it. In 1939, legal scholars weren't much interested in anachronisms like the right to keep and bear arms. But as gun control became increasingly controversial, scholars began to debate the meaning of the Second Amendment and the nature of the right to keep and bear arms. Eventually, they produced remarkably sophisticated and comprehensive competing accounts of its origins and ratification.

Second Amendment scholarship reflects the bitterly partisan politics of gun control. Opponents of gun control generally endorse an individual right theory, claiming the Second Amendment protects an individual right to possess and use firearms. Advocates generally endorse a collective right theory, claiming it protects a collective right to form a militia. Both theories find substantial support in the text and history of the Second Amendment.

Unusually, for Second Amendment scholars, text and history are everything. Individual and collective right theorists alike focus on the original meaning of the Second Amendment, carefully parsing its origins, drafting, ratification, and

⁶ See, e.g., *Carey v. Musladin*, 549 U.S. ____ (2006).

⁷ See, e.g., *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942) ("However, we do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go.").

implementation in the early republic. Indeed, originalism uniquely dominates Second Amendment scholarship.⁸

Why? Maybe it's tactical. Nothing beats a killer argument. Maybe it's strategic. Collective right theorists, in particular, may find originalist arguments less "embarrassing" than the alternatives.⁹ Second Amendment scholarship does highlight the Talmudic niceties of constitutional law: Why is this right different from every other right? And maybe it's just circumstantial. After all, without clear precedents, what's left but original meaning? Regardless, courts are obliged to follow *Miller*, as far as it goes, whatever the Second Amendment originally meant.

Of course, both individual and collective right theorists still claim *Miller* supports their position. Individual right theorists generally emphasize that the Court addressed the merits of Miller's Second Amendment claim, rather than dismissing it for lack of standing.¹⁰ Some go further, and argue Miller simply failed to show short-barreled shotguns have military uses.¹¹ Collective right theorists highlight the Court's conclusion the Second Amendment "must be interpreted and applied" with the end of preserving the militia in view and argue the Second

8 "For some reason, virtually everyone on both sides of the pro- and anti-gun Second Amendment debate tends to focus on text and history." Glenn Harlan Reynolds, *The Second Amendment as a Window on the Framers' Worldview*, 48 J. Legal Ed. 597, 599 (1998).

9 See Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989) (noting Hobson's choice faced by gun control supporters zealously committed to the Bill of Rights).

10 See, e.g., Brandon P. Denning & Glenn H. Reynolds, *Enduring and Empowering: The Bill of Rights in the Third Millennium: Telling Miller's Tale: A Reply to David Yassky*, 65 Law & Contemp. Prob. 113 (2002).

11 See, e.g., Stephen P. Halbrook, *Introduction: The Second Amendment in the Supreme Court: Where It's Been And Where It's Going*, 29 Hamline L. Rev. 449, 453-54 (2006).

Amendment simply protects the right to serve in the militia.¹² Many note the absurd consequences of holding the Second Amendment protects only military firearms, rather than those actually used by civilians.¹³ In the end, it's a stalemate.

II. THE HISTORY OF *UNITED STATES V. MILLER*

A. *Jackson Miller and the O'Malley Gang*

Jackson "Jack" Miller¹⁴ was a gambler, roadhouse owner, and small-time hood from Claremore, Oklahoma.¹⁵ Born in about 1900, he was a hulking, 250-pound thug with a touch of Cherokee blood.¹⁶ By 1921, he was in trouble with the law.¹⁷ His troubles worsened on August 14, 1924, when he accidentally killed H.A. Secrest, a young court reporter from Tulsa, while working as a bouncer at the Oak Cliff Resort near Claremore.¹⁸ Secrest was plastered and roughing up his date, so Miller decked

¹² See, e.g. H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 420 (2000) and David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588 (2000).

¹³ See, e.g., Michael C. Dorf, *What Does the Second Amendment Mean Today?* in *The Second Amendment in Law and History* (Carl T. Bogus ed. 2000) 247, 250.

¹⁴ Also known as "J. J. Miller." *Gilmore v. United States*, 124 F.2d 537 (10th 1942).

¹⁵ O'Malley Gang Trial Witness Slain, *Muskogee Daily Phoenix*, April 6, 1939 at 1.

¹⁶ Miller was one-eighth Cherokee. See *Claremore Man is Found Slain in Gang Killing*, *Tulsa Daily World*, April 6, 1939, at 1 and *Robber Suspect to Get Immunity*, *Tulsa Daily World*, Nov. 26, 1935, at 20. Oklahoma police called him a "big, yellow punk." *Officers Continue Without Clues In O'Malley Gang Witness Slaying*, *The Muskogee Daily Phoenix*, April 7, 1939 at 1.

¹⁷ See *State v. Miller*, CR-21-03077B (Oklahoma District Court, Kay County Nov. 23, 1921).

¹⁸ *Claremore Man is Found Slain in Gang Killing*, *Tulsa Daily World*, April 6, 1939, at 1, *Gangland Death Mystery Deepens*, *Tulsa Daily World*, April 7, 1939 at 1-2, and *Robber Suspect to Get Immunity*, *Tulsa Daily World*, Nov. 26, 1935, at 20.

him, breaking his jaw.¹⁹ Unfortunately, Secret died of septicemia a couple of weeks later.²⁰ Miller turned himself in on September 11, 1924, and immediately posted \$5,000 bail.²¹

But Miller didn't hit the major leagues until he joined the O'Malley Gang in 1934. The Depression was the golden age of Midwestern bank robbery, and the O'Malleys executed some of the era's most daring and successful heists. From 1932 to 1935 they claimed "most of the major bank robberies in the Southwest," hitting banks in Missouri, Arkansas, Kansas, and Illinois.²² Originally known as the Ozark Mountain Boys, the gang consisted of a score of hoods, most of whom met in the Missouri State Penitentiary. A reporter christened them the O'Malley Gang after the dashing Leo "Irish" O'Malley, notorious for his sensational but remarkably inept kidnapping of August Luer. In fact, O'Malley was only a bit player.²³ The gang's real leaders were Dewey Gilmore, Daniel "Dapper Dan" Heady, and George Leonard "Shock" Short.²⁴

In the summer of 1934, Short moved to a rented farmhouse outside of Claremore.²⁵ The rest of the gang soon followed. Heady recruited Miller as a "follow-up man" or

19 Blow on Jaw Caused Death of Tulsa Man, *The Oklahoman*, August 29, 1924, at 18.

20 Blow on Jaw Caused Death of Tulsa Man, *The Oklahoman*, August 29, 1924, at 18.

21 Alleged Oak Cliff Guard Surrenders, *The Oklahoman*, September 12, 1924, at 1.

22 Robert E. Bates, *Irish O'Malley and the Okemah Caper*, *Oklahombres*, Summer 2001, at 1.

23 What's more, "Leo O'Malley" was the alias of Walter Holland, who was born Walter Riley and adopted his foster parents' surname. See R.D. Morgan, *Irish O'Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author).

24 Short was the wayward son of a prominent Galena, Missouri family and the brother of Missouri Congressman Dewey Short.

25 See R.D. Morgan, *Irish O'Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author).

lookout and “wheelman” or getaway driver.²⁶ And the O’Malleys got to work. On September 14, 1934, they hit the McElroy Bank and Trust in downtown Fayetteville, the oldest bank in Arkansas. While Miller and Art Austin circled the block, Gilmore, Heady, Virgil “Red” Melton, and Fred Reese broke into the bank before it opened, shanghaied the employees as they arrived, and made off with about \$5,700.²⁷

Then, on December 22, 1934, the O’Malleys robbed two Okemah, Oklahoma banks at the same time, one of the few successful double heists in American history.²⁸ They drove a Plymouth and a Ford into Okemah at dawn, bandages concealing their faces, and struck shortly before the banks opened.²⁹ Gilmore, O’Malley, Short, and Russell Land Cooper hit the Okemah National Bank, while Heady, Melton, and Reese hit the First National Bank of Okemah.³⁰ Miller “was stationed at the Okemah city limits to guard against possible breakdowns and to pick up members of the gang if their autos failed.”³¹ Armed with pistols and machineguns, the O’Malleys bound and gagged the unsuspecting bank employees as they arrived, then forced a bank officer to open the safe. The Okemah National Bank yielded \$5,491.25 and the First National Bank of Okemah yielded \$13,186.³² The police pursued, to no avail.

26 Robber Suspect to Get Immunity, *Tulsa Daily World*, Nov. 26, 1935, at 20.

27 See R.D. Morgan, *Irish O’Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author).

28 Five Bank Bandits to Trial Monday, *Tulsa Daily World*, November 24, 1935, at 6. Five to Face Trial in Raid, *The Oklahoman*, Nov. 24, 1935, at 22. Today, Okemah is best known as Woody Guthrie’s hometown.

29 See R.D. Morgan, *Irish O’Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author).

30 *Gilmore v. United States*, 124 F.2d 537 (10th 1942).

31 O’Malley Gang Trial Witness Slain, *Muskogee Daily Phoenix*, April 6, 1939 at 1.

32 *Gilmore v. United States*, 124 F.2d 537 (10th 1942).

Miller returned to Claremore with his \$2,100 share of the Okemah job, half of which he kicked back to Gilmore on the sly.³³ But he soon grew restless. On the night of January 11, 1935, he and some friends decided to rob Joe Lewis's gas station and café in Salina, Oklahoma. Nineteen-year-old Percy Bolinger was alone behind the counter when Miller, Earnest Tennyson, Ray Anderson, Norman Hoch, Howard Bridwell, Cap Ellis, Bill Meyers, and Blue Culver sauntered in at about 2 a.m. They ordered coffee and started playing the slot machines. But when they got unruly and started tilting the machines, Bolinger asked them to leave. The hoods returned a few hours later, accompanied by Jeff Armstrong, who promptly pistol-whipped Bolinger. They stole \$23.71 from the till and \$200 from four slot machines, which they dumped in Lake Cherokee.³⁴ A week later, the police arrested the whole crew in Claremore.³⁵ It was the beginning of the end for the O'Malleys.

On May 3, 1935, the O'Malleys hit the City National Bank of Fort Smith, Arkansas, stealing about \$22,000. It was their last big job. The police arrested Cooper as a likely suspect and struck gold. Cooper ratted out Gilmore, who was already on the lam. The police caught up with him on May 21, outside of Dallas, Texas.³⁶ Gilmore sang, too, fingering the rest of the gang. The police pinched O'Malley and Heady in Kansas City, where they'd rented a swanky pad from James Maroon.³⁷ O'Malley immediately confessed to the Luer kidnapping and was

33 Robber Suspect to Get Immunity, *Tulsa Daily World*, Nov. 26, 1935, at 20. O'Malley Gang Trial Witness Slain, *Muskogee Daily Phoenix*, April 6, 1939 at 1.

34 *Armstrong v. State*, 68 P.2d 114-17 (Okla. Crim. App. 1937).

35 *Armstrong v. State*, 68 P.2d 114-17 (Okla. Crim. App. 1937).

36 Five Bank Bandits to Trial Monday, *Tulsa Daily World*, November 24, 1935, at 6.

37 Luer Kidnapping Leader is Seized in Kansas City, *Chicago Daily Tribune*, June 1, 1935, at 3. And see R.D. Morgan, *Irish O'Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author).

extradited to Illinois.³⁸ But the FBI took Heady to Muskogee, Oklahoma, to face federal charges on the Okemah job.³⁹ A couple weeks later, the police nabbed Short in Galena, Missouri. And on August 8, they caught up with Melton and Reese at a fishing camp in Taney County, Missouri. The FBI took all three to Muskogee for trial.⁴⁰

In the meantime, federal prosecutors indicted the O'Malleys in both the Eastern District of Oklahoma and the Western District of Arkansas. The Oklahoma trial came first. Federal prosecutors charged Gilmore, Cooper, O'Malley, and Short with robbing the Okemah National Bank and Heady, Melton, and Reese with robbing the National Bank of Okemah.⁴¹ All seven pleaded not guilty and trial was set for October 16. But on October 2, the United States re-indicted the lot of them, added Jack Miller to both counts, and postponed the trial to November 25.⁴² Miller soon flipped, confessing to his role in the Okemah job and turning state's evidence.

Miller was the government's ace in the hole. To preserve the surprise, federal prosecutors sequestered him in the county jail until trial.⁴³ As soon as the trial began, Miller's lawyer H. Tom Kight announced, "Jack Miller, my client, will testify only

38 R.D. Morgan, *Irish O'Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author)..

39 R.D. Morgan, *Irish O'Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author).

40 *Five Bank Bandits to Trial Monday*, *Tulsa Daily World*, November 24, 1935, at 6.

41 *Gilmore v. United States*, 124 F.2d 537, 538 (10th Cir. 1942) and *Gilmore v. United States*, 129 F.2d 199, 201 (10th Cir. 1942)

42 *Gilmore v. United States*, 129 F.2d 199 (10th Cir. 1942). *Okemah Bank Holdup Trial Begins Today*, *The Oklahoman*, Nov. 25, 1935, at 9.

43 *Five Bank Bandits to Trial Monday*, *Tulsa Daily World*, November 24, 1935, at 6. *O'Malley Gang Trial Witness Slain*, *Muskogee Daily Phoenix*, April 6, 1939 at 1.

on condition that he be granted complete immunity.”⁴⁴ Judge Robert L. Williams agreed, on the condition Miller “gives a complete and truthful account of the crime.”⁴⁵

He did, and then some. “Miller, placed on the witness stand, identified the defendants as coconspirators and testified Dan Heady, charged with participation in the robbery of the First National bank approached him ‘regarding robbery of some banks.’ He testified the plan of robbing the Okemah banks was agreed upon and he was employed as a ‘follow-up man.’ He said he received \$2,100 as his share of the loot taken from the banks.”⁴⁶ Miller’s erstwhile companions branded him a “squealer,” Cooper even requesting to leave the courtroom while Miller testified.⁴⁷

The trial was over almost as soon as it started. On November 27, the jury convicted on all counts.⁴⁸ Williams acquitted Miller as promised, but added an admonishment. “You had a narrow escape this time and you won’t be so lucky again. Get into something honest and quit this gambling business.”⁴⁹ Miller immediately returned to Claremore.⁵⁰

44 Robber Suspect to Get Immunity, *Tulsa Daily World*, Nov. 26, 1935, at 20. Kight was a sometime state legislator from Claremore, elected as a Democrat to represent Rogers County in 1919, 1927, 1929, 1931, 1933, 1937, 1939, 1943 (128 ok 269).

45 Robber Suspect to Get Immunity, *Tulsa Daily World*, Nov. 26, 1935, at 20; Okemah Band Hearing Ends, *The Oklahoman*, Nov. 27, 1935, at 2.

46 Robber Suspect to Get Immunity, *Tulsa Daily World*, Nov. 26, 1935, at 20.

47 O’Malley Gang Trial Witness Slain, *Muskogee Daily Phoenix*, April 6, 1939 at 1.

48 *Gilmore v. United States*, 124 F.2d 537 (10th 1942).

49 Okemah Bank Convictions Heard, *The Oklahoman*, Nov. 28, 1935, at 23. O’Malley Gang Trial Witness Slain, *Muskogee Daily Phoenix*, April 6, 1939 at 1.

50 Three Convicted of Bank Robbery, *Tulsa Daily World*, Nov. 28, 1935, at 8. O’Malley Gang Trial Witness Slain, *Muskogee Daily Phoenix*, April 6, 1939 at 1.

Williams set sentencing for December 9, 1935. But on December 3, Heady's wife "Pretty Betty" slipped him a pistol during a visit. Heady used the pistol to break out, escaping with Gilmore, Short, and Cooper, among others. During the jailbreak, Heady shot Muskogee Chief of Detectives Ben Bolton, who died a couple days later.⁵¹ A huge posse of Oklahoma police and federal agents, aided by bloodhounds and airplane observers, tracked the fugitives to Pushmataha County into the Kiamachi mountains near Clayton, Oklahoma. On December 5, they caught Cooper walking down a country road twelve miles north of Clayton.⁵² And the next day, they found Heady and Gilmore in a farmhouse near Weathers, Oklahoma. When Heady and Gilmore refused to surrender, the police opened fire, killing Heady. Gilmore quickly gave up and led the police to Short, about a mile and a half away. Short was already dying, critically burned in an accidental fire the night before, and he drowned when a boat used to evacuate him accidentally capsized.⁵³ And on December 9, Williams sentenced Gilmore, Cooper, O'Malley, Melton, and Reese to 25 years.

Miller was terrified of the fugitive O'Malleys, so the FBI held him in a county jail during the manhunt.⁵⁴ They needed their snitch alive for the Arkansas trial. On January 10, 1936, federal prosecutors charged Dewey Gilmore, Russell Cooper, Otto Jackson, and Floyd Y. Henderson with robbing the McElroy Bank and Trust Company of Fayetteville and the City National

51 Four Are Slain in Day's Toll of Prison Escapes, *Chicago Daily Tribune*, Dec. 4, 1935, at 1. Oklahoma Fugitive Captured, *Chicago Daily Tribune*, Dec. 5, 1935, at 11.

52 Oklahoma Fugitive Captured, *Chicago Daily Tribune*, Dec. 5, 1935, at 11.

53 Oklahoma Fugitive Captured, *Chicago Daily Tribune*, Dec. 5, 1935, at 11. Short was very popular in Galena - over 1,000 people attended his funeral - and his death was controversial. The police denied shooting him, but a Galena undertaker insisted he found several buckshot wounds in the corpse. See R.D. Morgan, *Irish O'Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author).

54 Claremore Man is Found Slain in Gang Killing, *Tulsa Daily World*, April 6, 1939, at 1.

Bank of Fort Smith, Arkansas.⁵⁵ At first, all four pleaded not guilty, but Gilmore flipped when Miller implicated him in the Fayetteville job, and the others quickly folded.⁵⁶ On January 14, Judge Hiram Heartsill Ragon sentenced Gilmore, Cooper, and Jackson to 25 years, and Smith to twelve.⁵⁷ And on February 14, Gilmore and Cooper got another 99 years for murdering Bolton.⁵⁸

That was the end of the O'Malleys. Melton, Cooper, Gilmore, and Reese started in Leavenworth and ended up in Alcatraz.⁵⁹ O'Malley did his time in Illinois, but soon went mad and died in 1944. And Miller returned to his penny-ante ways. In 1937, the United States Fidelity and Guarantee Company sued him for the proceeds of the Okemah job, to little effect.⁶⁰ Eventually, he fell in with Frank Layton, another small-time Claremore hood.⁶¹

On April 18, 1938, local police stopped Miller and Layton outside of Siloam Springs, Arkansas, en route from Claremore.⁶²

55 *Gilmore v. United States*, 131 F.2d 873, 873-74 (8th Cir. 1942).

56 Officers Continue Without Clues In O'Malley Gang Witness Slaying, *The Muskogee Daily Phoenix*, April 7, 1939 at 1.

57 Crime, *Chicago Daily Tribune*, Jan. 19, 1936, at A8. O'Malley Gang is Sentenced, *The Oklahoman*, Jan. 15, 1936, at 16

58 Two of O'Malley Gang Get 99 Year Sentences, *Chicago Daily Tribune*, December 16, 1936, at 18.

59 Several members of the O'Malley Gang ultimately served time in Alcatraz: Dewey E. Gilmore # 301, Russell Land Cooper # 304, Donnie Garrett # 314, Fred Reese # 321, Virgil Melton # 381. Letter from R.D. Morgan to author (DATE) (on file with author).

60 Return of \$11,647 In Loot is Sought, *The Oklahoman*, Feb 12, 1937, at 21.

61 Layton was affiliated with Robert Trollinger of the Cookson Hills Gang and did time in the 1920s for helping the Henry Starr Gang rob a bank in Maize, Oklahoma. See R.D. Morgan, *Irish O'Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author).

62 Firearms Test Case Probable at Ft. Smith, *Arkansas Democrat*, January 4, 1939 at 2.

It's unclear where they were going and why. But they had an unregistered, short-barreled shotgun in the car. So the police arrested them.⁶³

A. Miller in the District Court

Miller and Layton ended up in Fort Smith, Arkansas, where United States Attorney for the Western District of Arkansas Clinton R. Barry charged them with violating the National Firearms Act. Barry knew all about Miller, as he attended the O'Malley trials and saw Miller testify.⁶⁴ Miller was scheduled to appear before the district court in Fort Smith during its next term, which began June 6, 1938.⁶⁵ While in prison, Miller returned to form, ratting out Joel Carson for murdering a hospital security guard in Little Rock, Arkansas.⁶⁶ On May 3, 1938, District Judge for the Western District of Arkansas Hiram Heartsill Ragon set Miller's bail at \$2,000,⁶⁷ which D.A. Blackburn of Clarksville, Arkansas posted on May 16, 1938.⁶⁸

On June 2, 1938, Miller and Layton were both indicted on one count of violating 26 U.S.C. § 1132(c) by transporting an untaxed short-barreled shotgun in interstate commerce.⁶⁹ Miller and Layton both pleaded guilty, but Ragon refused to accept their

63 Indictment, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. June 2, 1938) and Indictment, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. Sept. 21, 1938).

64 Robber Suspect to Get Immunity, *Tulsa Daily World*, Nov. 26, 1935, at 20.

65 Recognizance, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. May 19, 1938).

66 Officers Continue Without Clues In O'Malley Gang Witness Slaying, *The Muskogee Daily Phoenix*, April 7, 1939 at 1. Gangland Death Mystery Deepens, *Tulsa Daily World*, April 7, 1939 at 1-2

67 Minutes *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. May 3, 1938).

68 Recognizance, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. May 19, 1938).

69 Indictment, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. June 2, 1938).

plea and appointed Paul E. Gutensohn as counsel.⁷⁰ On June 11, 1938, Miller and Layton demurred to the indictment, claiming it presented insufficient evidence of a transfer requiring payment of a tax and challenging the constitutionality of the NFA under the Second and Tenth Amendments.⁷¹ Surprisingly, Ragon immediately issued a memorandum opinion sustaining the demurrer and quashing the indictment. He held the NFA violates the Second Amendment by prohibiting the transportation of unregistered covered firearms in interstate commerce.⁷²

United States v. Miller immediately became the first Second Amendment test case.⁷³ On September 21, 1938, Miller and Layton were both re-indicted on one count of violating 26 U.S.C. § 1132(j) by transporting an unregistered short-barreled shotgun in interstate commerce.⁷⁴ The Attorney General expected to appeal to the Supreme Court.⁷⁵ On January 3, 1939, Miller and Layton demurred again, claiming the NFA registration

⁷⁰ See Firearms Test Case Probable at Ft. Smith, Arkansas Democrat, January 4, 1939 at 2. See also Southwest American [Fort Smith, AR], September 22, 1938). Murrey v. United States, 138 F.2d 94, 99 (8th Cir. 1943) (noting “it was the practice of Judge Ragon to decline to accept a plea on a felony charge from a defendant until the Judge had ascertained whether or not the defendant desired counsel, and . . . it was the Judge’s custom to appoint counsel for defendants in criminal cases who were not represented by counsel and who desired counsel”). A member of the Fort Smith firm of Warner & Warner, Gutensohn graduated from the University of Oklahoma Law School in 1929 and joined the Arkansas Bar in February 1934. See Law Class of ’29 Plans Reunion, The Oklahoman, Sept. 17, 1939, at 25 and Richard W. Stevens & Aaron Zelman, The U.S. v. Miller Revisited, Firearms Sentinel (Fall / Winter 1995).

⁷¹ Demurrer to Indictment, United States v. Miller, 26 F. Supp. 1002, No. 3926 (W.D. Ark. June 11, 1938).

⁷² Memorandum Opinion, States v. Miller, 26 F. Supp. 1002, No. 3926 (W.D. Ark. June 11, 1938).

⁷³ Firearms Test Case Probable at Ft. Smith, Arkansas Democrat, January 4, 1939 at 2. National Firearms Act May Be Attacked as Invalid, The Arkansas Gazette, January 5, 1939 at 2.

⁷⁴ Indictment, United States v. Miller, 26 F. Supp. 1002, No. 3926 (W.D. Ark. Sept. 21, 1938).

⁷⁵ Southwest American [Fort Smith, Arkansas], September 22, 1938.

and taxation provisions violate the Second Amendment.⁷⁶ Ragon immediately re-issued the same memorandum opinion.⁷⁷ Miller and Layton were free men, and promptly disappeared. The next day, Governor Bailey appointed Gutensohn to finish the term of State Senator Fred Armstrong, who had died on December 10, 1938.⁷⁸ The appointment sparked a political firestorm.⁷⁹

B. National Firearms Act

Enacted in 1934, the National Firearms Act taxed the manufacture, sale, and transfer of short-barreled rifles and shotguns, machine guns, and silencers; required registration of covered firearms; and prohibited interstate transportation of unregistered covered firearms.⁸⁰ Nominally, it was a revenue act, levying a \$200 transfer tax on all covered firearms, as well as an annual license tax of \$200 on dealers, \$300 on pawnbrokers, and \$500 on manufacturers. In practice, it produced little revenue because it imposed prohibitive rates, often many times the value of the covered firearms.⁸¹

Of course, the NFA was really a ban disguised as a tax, intended to discourage the possession and use of covered

⁷⁶ Demurrer to Indictment, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. Jan. 3, 1939).

⁷⁷ *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1939).

⁷⁸ *Matthews v. Bailey*, 131 S.W.2d 425, 430 (Ark. 1939). See also, Charles Aikin, *State Constitutional Law in 1939-1940*, 34 *Am. Pol. Sci. Rev.* 700, 701-02 (1940).

⁷⁹ No Governor Should Name a Legislator, *The Arkansas Gazette*, January 6, 1939 at 4 (arguing Arkansas Constitution prohibits appointment of legislators, requiring special elections instead).

⁸⁰ 26 U.S.C. § 1132. The House Ways and Means Committee held hearings on the NFA in the spring of 1934. See *Hearings on H.R. 9066 Before the House Comm. on Ways and Means, 73rd Cong.* (1934).

⁸¹ Apparently, the \$200 transfer tax was based on the average price of a machine gun. *Firearms: Hearing on H.R. 2569, H.R. 6606, H.R. 6607, and H.R. 11325, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 12* (1930). A typical shotgun cost about \$30 new or \$10 used. Adjusted for inflation, the \$200 transfer tax would amount to roughly \$3000 today. See *The Inflation Calculator*, at <http://www.westegg.com/inflation/>.

firearms. “The gangster as a law violator must be deprived of his most dangerous weapon, the machine gun.”⁸² Modeled on the Harrison Narcotics Act, the NFA made covered firearms risky and expensive.⁸³ “We certainly don’t expect gangsters to come forward to register their weapons and be fingerprinted, and a \$200 tax is frankly prohibitive to private citizens.”⁸⁴ And it was quite successful. While many people registered NFA firearms,⁸⁵ few legitimate dealers could afford to pay the license tax and even fewer legitimate buyers were willing to pay the transfer tax.⁸⁶ For example, Oklahoma police saw dealers get rid of NFA firearms and criminals give up on them.⁸⁷ The Tommy Gun era was soon over.⁸⁸

The NFA was a product of a long-standing push toward federal regulation of firearms. In 1927, Congress prohibited mailing most handguns, with limited success.⁸⁹ Several bills introduced in 1930 would have prohibited the transportation of

82 H.R. Rep. 1780, May 28, 1934.

83 John Brabner-Smith, *Firearms Regulation*, 1 *L. & Contemp. Probs.* 400, 406-07 (1934). FJK, *Federal Legislation: National Firearms Act*, 98 *U. Pa. L. Rev.* 917, 918 (1950).

84 *Registry of One Weapon Purchase in Year Shows Gangsters Flouting Firearms Tax*, *New York Times*, Nov. 6, 1936, at 52.

85 By 1937, about 16,000 short-barreled rifles and shotguns, 18,000 machine guns, and 700 silencers were registered under the NFA. *Urges Firearms Act to Include All Kinds*, *New York Times*, May 5, 1937, at 13.

86 In 1935, 25 manufacturers and dealers paid the license tax, but only one person paid the transfer tax. *Registry of One Weapon Purchase in Year Shows Gangsters Flouting Firearms Tax*, *New York Times*, Nov. 6, 1936, at 52.

87 *Rigid Act on Firearms Put in Force Here*, *The Oklahoman*, Sept. 7, 1934, at 5. *New Federal Act Discloses Arms Bristle in State*, *The Oklahoman*, Sept. 17, 1934, at 9.

88 *Federal Legislation: National Firearms Act*, 98 *U. Pa. L. Rev.* 917, 918 (1950).

89 86 U.S.C. § 1715.

certain firearms in interstate commerce.⁹⁰ But Attorney General Homer Cummings supported the NFA because it relied primarily on the tax power, ensuring constitutionality.⁹¹

As originally proposed, the NFA also applied to pistols and levied a \$1000 tax on manufacturers and importers. However, after the NRA and other firearms associations opposed the inclusion of pistols at the public hearings, the restrictions on pistols were eliminated.⁹² The Ways and Means committee approved the bill without reservation, and the Finance committee recommended amending the tax on manufacturers and importers to \$500, which the House accepted.⁹³ Congress explicitly disclaimed any intention to include “pistols and revolvers and sporting arms” because “there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction.”⁹⁴

Some gun control opponents of suggested the NFA was “sponsored by people who wish to compel all sportsmen to register their firearms and store them in armories when they are not being used for hunting or target purposes.”⁹⁵ But even they generally conceded the Second Amendment doesn’t protect

90 See Stephen P. Halbrook, *Congress Interprets Second Amendment*, 62 *Tenn. L. Rev.* 597, 605. See also *Firearms: Hearing on H.R. 2569, H.R. 6606, H.R. 6607, and H.R. 11325, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 1-3, 7 (1930)*.

91 *Firearms: Hearing on H.R. 2569, H.R. 6606, H.R. 6607, and H.R. 11325, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 6-8 (1930)*.

92 John Brabner-Smith, *Firearms Regulation*, 1 *L. & Contemp. Probs.* 400, 406 (1934). Note, *Federal Legislation: National Firearms Act*, 98 *U. Pa. L. Rev.* 917, 917 (1950).

93 Senate Report No. 1444, Calendar no. 1542, June 6, 1934.

94 H.R. Rep. 1780, May 28, 1934.

95 G.A. Nelson, *Objections Made to Firearms Act*, *New York Times*, Jun. 3, 1934, at E5 (letter to editor).

machineguns and other gangster weapons.⁹⁶ As General M. A. Reckford, the executive vice-president of the National Rifle Association told Congress, “You can be just as severe with machine guns and sawed-off shotguns as your desire, and we will go along with you.”⁹⁷

But Cummings wasn’t content with the NFA. He considered federal regulation of pistols, “the national government’s next step in the war against crime.” So he circulated a proposed bill imposing a \$1 transfer tax on pistols and requiring registration in 1936.⁹⁸ The gradual expansion of federal gun control met with growing opposition. Thousands of gun owners wrote to the Ways and Means Committee objecting to the Federal Firearms Act, some invoking the Second Amendment.⁹⁹ Nevertheless, on June 30, 1938, Congress passed the Federal Firearms Act, regulating interstate commerce in firearms.¹⁰⁰

C. Judge Ragon

The papers assumed *Miller* was a “test case of the national firearms act.”¹⁰¹ They were probably right. The government needed Supreme Court precedent holding federal gun control

96 See Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 *Crime & Just.* 137, 169-70 (2001).
G.A. Nelson, *Objections Made to Firearms Act*, *New York Times*, Jun. 3, 1934, at E5 (letter to editor).

97 *Congressional Record* at 30, 1934.

98 *Pistol Control Sought*, *New York Times*, Jan 12, 1936, at E11. *Urges Firearms Act to Include All Kinds*, *New York Times*, May 5, 1937, at 13.

99 Raymond R. Camp, *Wood, Field and Stream*, *New York Times*, March 17, 1938, at 27; Raymond R. Camp, *Wood, Field and Stream*, *New York Times*, March 10, 1938, at 25. John W. Rankin, *Letter to the Editor*, *Washington Post*, April 9, 1938, at X6 (suggesting more than 20,000 people wrote the Ways & Means Committee in opposition).

100 *Federal Firearms Act*, ch. 850, 52 Stat. 1250 (1938). 15 U.S.C. §§ 901-909. Alfred M. Ascione, *Federal Firearms Act*, 13 *St. John’s L. Rev.* 437 (1939).

101 *State Men Force Test of Arms Law*, *The Oklahoman*, Jan. 5, 1939, at 4.

doesn't violate the Second Amendment. Ragon teed up the case. He didn't really think the NFA violates the Second Amendment, and probably colluded with the government. His opinion is peculiar on its face, begging for an appeal. A memorandum disposition is appropriate when deciding a routine case, but not when holding a law facially unconstitutional. And Ragon was the first judge ever to hold a federal law violated the Second Amendment, even disagreeing with another district court which dismissed a Second Amendment challenge to the NFA.¹⁰²

Before he became a judge, Ragon represented the Fifth District of Arkansas in Congress from 1923 to 1933.¹⁰³ As a congressman, he was a vocal advocate of federal gun control.¹⁰⁴ In 1924, he introduced a unsuccessful bill prohibiting the importation of guns in violation of state law,¹⁰⁵ and vigorously supported another bill prohibiting the mailing of most pistols, which eventually passed in 1927.¹⁰⁶ Basically, Ragon wanted to prohibit firearms used by criminals.¹⁰⁷ "I want to say that I am unequivocally opposed to pistols in any connection whatever. If you want something in the home for defense, there is the shotgun

102 "The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights." *United States v. Adams*, 11 F. Supp. 216, 218-19 (D.C. Fla. 1935) (holding Second Amendment "has no application" to NFA).

103 Endorsed by the Ku Klux Klan, Ragon succeeded H.M. Jacoway. *Shadow of Ku Klux Klan Grows Larger in Congress and Nation*, *New York Times*, December 10, 1922, at 116. Apparently, he was a bit hotheaded, starting a fistfight with a man who called him a liar. *Telegraphic Dispatches*, *Washington Post*, July 16, 1932, at 3.

104 Incidentally, in 1931, Ragon's son, thirteen-year-old Heartsill Ragon, Jr., accidentally shot and wounded his seventeen-year-old friend John Basham while hunting. See *The Herald Democrat* [Arkansas], Apr. 2, 1931.

105 H.R. 6868, *Congressional Record* at 2282, February 11, 1924 ("A bill for the prevention of the shipment and transportation of certain firearms into a State, Territory, or District of the United States in violation of any law thereof.").

106 86 U.S.C. §1715.

107 *Congressional Record* at 734, December 17, 1924.

and the rifle, but a pistol is primarily for the purpose of killing somebody.”¹⁰⁸ And he specifically dismissed Second Amendment objections to federal gun control. “I cannot see that violence to the Constitution which my friend from Texas sees in this bill.”¹⁰⁹ If Arkansas could prohibit pistols, so could the United States.¹¹⁰

A prominent Democrat, Ragon endorsed Roosevelt in 1932 and helped push the New Deal through the Ways and Means Committee.¹¹¹ In return, Roosevelt made him a district judge.¹¹² The NFA was part of Roosevelt’s New Deal program, enacted with broad support shortly after Ragon took the bench.¹¹³ But the Federal Firearms Act of 1938 was stirring up popular opposition, based on the Second Amendment.¹¹⁴ The government needed to shut it down, and *Miller* was the perfect vehicle. Ragon presided in an O’Malley prosecution, so he knew Miller was a crooked, pliable snitch, who wouldn’t cause any trouble. And Gutensohn was a comer who knew the game and

¹⁰⁸ Congressional Record at 729, December 17, 1924.

¹⁰⁹ Congressional Record at 734, December 17, 1924.

¹¹⁰ “In the State of Arkansas, it is a violation of the law for a man to sell a pistol within that State. . . . This law has been, by the Supreme Court of the State of Arkansas, held constitutional, and you can not lawfully sell a pistol in the State of Arkansas.” Congressional Record at 728-29, December 17, 1924.

¹¹¹ Ragon is Appointed to District Bench, *New York Times*, May 13, 1933, at 5. Heartsill Ragon, Judge, Dies at 55, *NY Times*, Sept. 16, 1940, at 24.

¹¹² See John Kyle Day, *Bargain and Corruption, Arkansas Style: The Theft of the 1933 Special Congressional Election*, 2 *Central Arkansas Historical Review* 1 (1999).

¹¹³ See, e.g., *New York Times*, March 21, 1932, at 4. *New Deal Victor in Court Tests*, *New York Times*, May 30, 1937, at 39 (including Sonzinsky in list of victories).

¹¹⁴ Raymond R. Camp, *Wood, Field and Stream*, *New York Times*, March 20, 1938, at 74. Raymond R. Camp, *Wood, Field and Stream*, *New York Times*, March 17, 1938, at 27; Raymond R. Camp, *Wood, Field and Stream*, *New York Times*, March 10, 1938, at 25. John W. Rankin, *Letter to the Editor*, *Washington Post*, April 9, 1938, at X6 (suggesting more than 20,000 people wrote the Ways & Means Committee in opposition).

got his due. Ragon's memorandum opinion presented no facts and no argument. With no defense muddying the waters, it was the government's ideal test case.

D. Miller in the Supreme Court

The test came quickly. On January 30, 1939, Barry appealed *Miller* directly to the Supreme Court.¹¹⁵ Embroiled in the controversy concerning his contested appointment to the Arkansas State Senate,¹¹⁶ Gutensohn didn't object.¹¹⁷ The Supreme Court accepted the government's appeal on March 13, 1939.¹¹⁸

As usual, the Solicitor General's office drafted the government's brief, which argued the kitchen sink.¹¹⁹ The government began by claiming the Second Amendment doesn't grant a new right, but prohibits Congress from infringing a common law right.¹²⁰ So what common law right does the Second Amendment protect? The government argued the Second Amendment "refers to the militia, a protective force of

115 Assignments of Error & Petition for Appeal, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. January 30, 1939). At that time, the United States could appeal criminal cases implicating a constitutional question directly to the Supreme Court under the Criminal Appeals Act, 18 U.S.C. § 682 and 28 U.S.C. § 345

116 *Matthews v. Bailey*, 131 S.W.2d 425, 430 (Ark. 1939). See also, Charles Aikin, *State Constitutional Law in 1939-1940*, 34 Am. Pol. Sci. Rev. 700, 701-02 (1940).

117 Notice of Service, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. January 30, 1939).

118 *United States v. Miller*, 59 S.Ct. 594 (1939). Letter from Charles Elmore Croyley to Paul E. Gutensohn, March 13, 1939, National Archives, Supreme Court Case Records, *United States v. Miller*, October Term 1938, No. 696

119 See Warner W. Gardner, *Pebbles From The Path Behind*, reprinted in 9 *Green Bag 2d* 271, 273 (2006) (noting the Solicitor General's office generally had to draft briefs from scratch in appeals from the criminal division).

120 "The Second Amendment does not confer upon the people the right to keep and bear arms; it is one of the provisions of the Constitution which, recognizing the prior existence of a certain right, declares that it shall not be infringed by Congress. Thus the right to keep and bear arms is not a right granted by the Constitution and therefore is not dependant [sic] upon that instrument for its source." Appellant's Brief, *US v. Miller*, March 1939.

government; to the collective body and not individual rights.”¹²¹ In any case, it only guarantees the right to keep and bear arms “for lawful purposes,” and certainly doesn’t protect weapons used by criminals.¹²² The NFA affects “weapons which form the arsenal of the gangster and desperado,” and the Second Amendment “does not, we submit, guarantee to the criminal the right to maintain and utilize arms which are particularly adaptable to his purposes.”¹²³

Supreme Court Clerk Charles Cropley wrote to Gutensohn on March 15, informing him the Supreme Court had accepted the appeal and expected to hear oral argument on March 31.¹²⁴ Gutensohn replied on March 22, asking why he hadn’t received the record or the government’s brief and emphasizing he represented Miller and Layton *pro bono*.¹²⁵ Cropley replied on March 25, informing Gutensohn the government had submitted a typewritten brief and he could do the same. In the alternative, Cropley suggested the court could postpone oral argument until April 17. But on March 28, Gutensohn replied by telegram: “Suggest case be submitted on Appellants brief. Unable to obtain any money from clients to be present and argue case = Paul E Gutensohn.”¹²⁶ Embroiled in the controversy concerning his contested appointment to the Arkansas State Senate,

¹²¹ Appellant’s Brief, *US v. Miller*, March 1939.

¹²² Appellant’s Brief, *US v. Miller*, March 1939.

¹²³ Appellant’s Brief, *US v. Miller*, March 1939.

¹²⁴ Letter from Charles Elmore Cropley to Paul E. Gutensohn, *United States v. Miller*, 307 U.S. 174, No. 696 (March 15, 1939).

¹²⁵ Letter, Paul E. Gutensohn to Charles Elmore Cropley, *United States v. Miller*, 307 U.S. 174, No. 696 (March 22, 1939).

¹²⁶ Telegram, Paul E. Gutensohn to Charles Elmore Cropley, , *United States v. Miller*, 307 U.S. 174, No. 696 (March 28, 1939).

Gutensohn was probably relieved to be shut of Miller and Layton.¹²⁷

On March 30, 1939, seven justices of the Supreme Court heard oral argument in *United States v. Miller*. Chief Justice Hughes was ill and the newly appointed Justice Douglas wasn't confirmed until April 4. Gordon Dean represented the United States and no one represented Miller or Layton.¹²⁸ Two days later, Gutensohn finally received four copies of the government's brief.¹²⁹

The decision came quickly. On May 15, 1939, Justice James Clark McReynolds "drawled from the bench: 'We construe the amendment as having relation to military service and we are unable to say that a sawed-off shotgun has any relation to the militia.'"¹³⁰ The unanimous vote was 8-0, as Justice Douglas was recused.

The papers were bemusedly pleased. "The record in the case of Miller and Layton does not show for what purpose they were taking the sawed-off shotgun across State lines. Government officials felt, today, however, that the McReynolds decision had given them a new instrument with which to fight bank robbers, gangsters and other criminals, whose favorite arm is the sawed-off shotgun."¹³¹ And Jackson soon proposed legislation requiring the registration of all firearms, in order to foil subversives.¹³² "It is to be particularly noted that the

127 *Matthews v. Bailey*, 131 S.W.2d 425, 430 (Ark. 1939). See also, Charles Aikin, *State Constitutional Law in 1939-1940*, 34 *Am. Pol. Sci. Rev.* 700, 701-02 (1940).

128 *United States Supreme Court*, *New York Times*, March 31, 1939, at 42.

129 Notice of Service, *United States v. Miller*, 307 U.S. 174, No. 696 (April 3, 1939).

130 *Supreme Court Bars Sawed-Off Shotgun*, *New York Times*, May 16, 1939, at 15.

131 *Supreme Court Bars Sawed-Off Shotgun*, *New York Times*, May 16, 1939, at 15.

132 *Proposes a Law to Register All Firearms in U.S.*, *Chicago Daily Tribune*, May 30, 1940, at 5.

legislation, the enactment of which I recommend, would in nowise improperly limit the freedom of action of peaceful, law abiding persons. The contemplated legislation would not hamper or hinder any person from purchasing or possessing a firearm. It would merely require him to register the firearm and to record any transfer of the weapon.”¹³³

E. Postscript

In the meantime, Miller resurfaced. On April 2, 1939, Miller, Robert Drake “Major” Taylor, and an unidentified accomplice robbed the Route 66 Club, a Miami, Oklahoma dive.¹³⁴ Armed with shotguns, they got about \$80, superficially wounding two bystanders in the process.¹³⁵ Apparently, it was an inside job. Earl “Woodenfoot” Clanton, the uncle of notorious bank robbers Herman and Ed “Newt” Clanton, owned the bar.¹³⁶ Taylor was a former associate of Newt’s.¹³⁷ And he was also a peripheral member of the O’Malleys.¹³⁸

At about 9 a.m. on April 4, two or three men in a car picked up Miller at his home in Ketchum, Oklahoma.¹³⁹ The

133 Proposes a Law to Register All Firearms in U.S., *Chicago Daily Tribune*, May 30, 1940, at 5.

134 Claremore Slayer Suspect Captured, *The Oklahoman*, Oct. 9, 1939, at 13. See also, Prisoner is Halted in Flight Attempt, *The Oklahoman*, Sept. 20, 1932, at 9 (recounting Taylor’s unsuccessful attempt to escape from custody in Mo.). And see Morgan.

135 Former O’Malley Gangster to Start 10-Year Sentence, *The Oklahoman*, Oct. 20, 1939, at 26.

136 See R.D. Morgan, *Irish O’Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with author).

137 In 1927, Taylor and Newt Clayton were convicted of robbing a bank in Bluejacket, Oklahoma. They were sentenced to 75-year terms in McAlester Prison. Taylor escaped on November 26, 1938. Aide of O’Malleys Arrested in Texas, *Muskogee Daily Phoenix*, October 9, 1939 at 1.

138 Aide of O’Malleys Arrested in Texas, *Muskogee Daily Phoenix*, October 9, 1939 at 1.

139 Auto of Slain Gang Member Found Burned, *The Oklahoman*, April 7, 1939, at 4. Officers Continue Without Clues In O’Malley Gang Witness Slaying, *The Muskogee Daily Phoenix*, April 7, 1939 at 1.

next day, around noon, a farmhand named Fisher discovered Miller's bullet-ridden corpse on the bank of the "nearly dry" Little Spencer Creek, nine miles southwest of Chelsea, Oklahoma.¹⁴⁰ Miller was shot four times with a .38, twice in the chest, once under the left arm, and once through the left arm. The .45 automatic next to him had been shot three times.¹⁴¹ On April 6, someone found Miller's torched 1934 sedan off a dirt road in the Verdigris River bottoms, about four miles southeast of Nowata.¹⁴² It was stripped and still smoldering. A farmer said he saw it burning shortly before noon on April 3.¹⁴³

Taylor was the prime suspect.¹⁴⁴ And on October 8, 1939, Sheriff Ellis Summers arrested him in Kermit, Texas, after he got in a fight with a oil field worker over a dice game.¹⁴⁵ Ultimately, what happened on April 4 is unclear. The Texas police thought Miller and Taylor disputed the split on April 3 and Taylor shot Miller the next day.¹⁴⁶ But the Oklahoma police thought Taylor shot Miller for snitching on the O'Malleys.¹⁴⁷ In any case, Oklahoma charged Taylor with murder, but eventually dropped

140 Claremore Man is Found Slain in Gang Killing, *Tulsa Daily World* [Oklahoma], April 6, 1939, at 1.

O'Malley Gang Trial Witness Slain, *Muskogee Daily Phoenix*, April 6, 1939 at 1. See also *Southwest American* [Oklahoma], April 6, 1939.

141 Auto of Slain Gang Member Found Burned, *The Oklahoman*, April 7, 1939, at 4.

142 Officers Continue Without Clues In O'Malley Gang Witness Slaying, *The Muskogee Daily Phoenix*, April 7, 1939 at 1.

143 Auto of Slain Gang Member Found Burned, *The Oklahoman*, April 7, 1939, at 4.

144 Missouri Convict Sought in Slaying, *The Oklahoman*, April 20, 1939, at 15.

145 Claremore Slayer Suspect Captured, *The Oklahoman*, Oct. 9, 1939, at 13. Aide of O'Malleys Arrested in Texas, *Muskogee Daily Phoenix*, October 9, 1939 at 1.

146 Missouri Convict Sought in Slaying, *The Oklahoman*, April 20, 1939, at 15. Claremore Slayer Suspect Captured, *The Oklahoman*, Oct. 9, 1939, at 13.

147 Aide of O'Malleys Arrested in Texas, *Muskogee Daily Phoenix*, October 9, 1939 at 1.

the charges for lack of evidence. Still, he pleaded guilty to armed robbery and got ten years in McAlester.¹⁴⁸

On January 8, 1940, Layton pleaded guilty to the reinstated NFA charge and Ragon sentenced him to five years probation.¹⁴⁹ Ragon expected an appointment to the Eighth Circuit, but died suddenly of a heart attack on September 15, 1940.¹⁵⁰ Layton's probation ended on January 29, 1944.¹⁵¹ He died in 1967. Both Miller and Layton were buried at Woodlawn Cemetery in Claremore, Oklahoma.

148 Former O'Malley Gangster to Start 10-Year Sentence, *The Oklahoman*, Oct. 20, 1939, at 26. See R.D. Morgan, *Irish O'Malley and the Ozark Mountain Boys*, at <http://www.geocities.com/ezlane2002/Omalleypart1.htm>. Taylor later won a wild-cow milking award in the McAlester rodeo. See *Crowd of 24,000 Sees Rodeo in McAlester Prison*, *The Oklahoman*, Oct. 14, 1940, at 4.

149 Probation Document, *United States v. Layton*, C-3917 (W.D. Ark. Jan 29, 1944).

150 Heartsill Ragon, Federal Judge in Arkansas, Dies, *The Oklahoman*, Sept. 16, 1940, at 1. Judge Heartsill Ragon, *Arkansas Democrat*, September 17, 1940, at 8. Ragon Rites Wednesday at Fort Smith, *Arkansas Democrat*, September 16, 1940 at 1.

151 Probation Document, *United States v. Layton*, C-3917 (W.D. Ark. Jan 29, 1944).

III. INTERPRETING UNITED STATES V. MILLER

Both individual and collective right theorists claim *Miller* adopted their position. But few Second Amendment scholars spend much time analyzing *Miller*, because few take it seriously. Most assume Justice McReynolds was either uninterested in or incapable of drafting a competent opinion, and dismiss *Miller* as hopelessly opaque.¹⁵² However, this consensus reflects the identity of the author as much as his opinion. Many justices were poor draftsmen. But none are as universally despised as McReynolds.¹⁵³ The last of the “Four Horsemen,” he’s remembered only as a cranky bigot, notorious for shunning Justice Brandeis¹⁵⁴ and referring to blacks as “darkies.”¹⁵⁵ Even his own, lone biographer dismissed him as “the greatest judicial failure” ever to serve on the court.¹⁵⁶

And yet, McReynolds’s peers were far more charitable.¹⁵⁷ Holmes considered him “acute.”¹⁵⁸ Taft described him as “a man of real ability, and great sharpness of intellect.”¹⁵⁹ Frankfurter

152 David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 665 (2000) (claiming “the opinion itself says very little”).

153 See Timothy S. Huebner, *Book Review*, 45 Am. J. L. Hist. 346 (2001) (reviewing *The Forgotten Memoir of John Knox 51* (Hutchinson & Garrow eds. 2002)) (noting McReynolds “routinely ranks among the least effective or ‘worst’ justices in the Court’s history”).

154 Alexander M. Bickel, 9 *Holmes Devise* 354.

155 See *The Forgotten Memoir of John Knox 51* (Univ. of Chicago: Hutchinson & Garrow eds. 2002).

156 James E. Bond, *I Dissent: The Legacy of Justice James Clark McReynolds* (1992).

157 R.V. Fletcher, *Mr. Justice McReynolds – An Appreciation*, 2 Vand. L. Rev. 35, 45 (1948).

158 Alexander M. Bickel, 9 *Holmes Devise* 355 (quoting Holmes-Laski Letters, I, 413)

159 Alexander M. Bickel, 9 *Holmes Devise* 355 (quoting letter from W.H. Taft to R.A. Taft, Feb 1, 1925, Taft Papers).

despised him, but respected his abilities.¹⁶⁰ Even Brandeis conceded McReynolds “is capable of effective writing.”¹⁶¹ The problem was “his studied avoidance of *obiter*, even when there may have been an alluring temptation to catch the public eye by some spectacular utterance.”¹⁶² Or rather, his “curious notion that opinions were essentially superfluties anyway, and that the less said, the better.”¹⁶³

True to form, *Miller* is quite terse. The nine page opinion consists primarily of lengthy quotations and string cites, anchored by a few paragraphs of crabbed analysis. Still, it wasn’t an afterthought. Chief Justice Hughes usually assigned opinions at the Saturday conference after argument.¹⁶⁴ But Hughes fell ill in mid-March 1939, and didn’t return to the bench until after *Miller* was argued and assigned.¹⁶⁵ As the most senior associate, McReynolds assigned cases in Hughes’s absence. Apparently, he assigned *Miller* to himself, presumably because he considered it important.

The NFA found an unlikely champion in McReynolds, erstwhile foe of federal regulation. McReynolds was a Democrat, but he wasn’t any New Dealer. On the contrary, he was a Gold Democrat¹⁶⁶ who detested Roosevelt and the New

160 Alexander M. Bickel, 9 Holmes Devise 356 (quoting Phillips ed, Felix Frankfurter Reminisces 101).

161 Melvin I. Urofsky, The Brandeis-Frankfurter Conversations, 1985 Sup. Ct. Rev. 299, 309

162 R.V. Fletcher, Mr. Justice McReynolds – An Appreciation, 2 Vand. L. Rev. 35, 45 (1948)

163 Alexander M. Bickel, 9 Holmes Devise 355.

164 Edwin McElwain, The Business of the Supreme Court as Conducted by Chief Justice Hughes, 63 Harv. L. Rev 5, 17 (1949).

165 Paul A. Freund, Charles Evan Hughes as Chief Justice, 81 Harv. L. Rev. 4, 39 (1967).

166 Oxford Companion to the Supreme Court of the United States 542 (Kermit Hall, ed. 1992). Gold Democrats supported the gold standard in opposition to William Jennings Bryan’s Free Silver movement.

Deal alike.¹⁶⁷ And he hated Attorney General Cummings, too. As the architect of Roosevelt's court-packing plan, Cummings added insult to injury by citing a superficially similar proposal McReynolds himself advanced in 1913.¹⁶⁸

McReynolds knew gun control was part of the New Deal program. He knew Miller and Layton were gangsters. And he knew *Miller* was a Second Amendment test case. But he barely addressed the Second Amendment. Instead, he discussed the nature of the militia and the history of its governance. And he concluded the Second Amendment doesn't protect short-barreled shotguns because they aren't related to the militia.

Oddly, McReynolds began by holding the NFA doesn't violate the Tenth Amendment by infringing state police power. "Considering *Sonzinsky v. United States*, and what was ruled in sundry causes arising under the Harrison Narcotic Act . . . the objection that the Act usurps police power reserved to the States is plainly untenable."¹⁶⁹ But Ragon didn't reach Miller's Tenth Amendment claim and the government didn't brief it, so it wasn't properly before the court. Of course, *Sonzinsky* did indeed foreclose most Tenth Amendment objections to the

167 McReynolds considered Roosevelt "utterly incompetent," pointed to farm relief as "evidence of his mental infirmity and lack of stability," and attributed the New Deal to "the forces which control" Roosevelt, who "probably lacks brains to understand what he is doing." Paul A. Freund, Charles Evan Hughes as Chief Justice, 81 Harv. L. Rev. 4, 12 (1967) (quoting letters from McReynolds to Robert P. McReynolds, Mar. 20, 1933 and Jan. 10, 1936, McReynolds Papers, University of Virginia Library). Roosevelt reciprocated by snubbing McReynolds when he retired. R.V. Fletcher, Mr. Justice McReynolds – An Appreciation, 2 Vand. L. Rev. 35, 45-46 (1948) (citing James Farley, Jim Farley's Story: The Roosevelt Years 83 (1948)).

168 John Knox, The Forgotten Memoir of John Knox 108 n.8 (2002).

169 *United States v. Miller*, 307 U.S. 174, 177-78 (1939).

NFA.¹⁷⁰ But McReynolds was notoriously punctilious about jurisdiction.¹⁷¹ It's surprising he addressed the issue at all.

In fact, McReynolds alone thought the NFA does violate the Tenth Amendment. Today, Congress can regulate virtually anything under the Commerce Clause. But when Congress drafted the NFA in 1934, the Court prohibited federal regulation of intrastate commerce under the Commerce Clause.¹⁷² Because Congress couldn't regulate directly under the Commerce Clause, it regulated indirectly under the Tax Clause. For example, the Harrison Narcotics Act effectively regulated narcotics by taxing them and enforcing the tax. The Supreme Court held such regulatory taxation did not infringe state police power, so long as it produced some revenue.¹⁷³

The Four Horsemen and their predecessors disagreed.¹⁷⁴ They conceded Congress can both tax narcotics and punish tax evasion, but argued the Harrison Act is "beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States."¹⁷⁵ In other words, they thought regulatory taxes violate the Tenth Amendment.

For years, McReynolds continued to object to regulatory taxes on Tenth Amendment and due process grounds, gradually

170 Some contemporary commentators noted the NFA transfer tax and registration requirements were arguably more regulatory than the sales tax at issue in *Sonzinsky*. See *Recent Decisions*, 38 Mich. L. Rev. 391, 404 (1939).

171 According to Brandeis, "McR cares more about jurisdictional restraints than any of them." Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 Sup. Ct. Rev. 299, 317.

172 See *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

173 *United States v. Doremus*, 249 U.S. 86 (1919).

174 Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 Va. L. Rev. 559.

175 *United States v. Doremus*, 249 U.S. 86, 95 (1919) (White, C.J., dissenting).

getting lonelier and lonelier.¹⁷⁶ Eventually, even he threw in the towel. In 1937, Max Sonzinsky, “a notorious East St. Louis fence,” challenged the NFA under the Tenth Amendment.¹⁷⁷ McReynolds joined the unanimous opinion upholding the law.¹⁷⁸ And in *Miller*, he relied on *United States v. Jin Fuey Moy*,¹⁷⁹ *United States v. Doremus*,¹⁸⁰ *Linder v. United States*,¹⁸¹ *Alston v. United States*,¹⁸² and *Nigro v. United States*,¹⁸³ the very cases in which he resisted the Harrison Act.

In any case, McReynolds began *Miller* by emphasizing the NFA satisfies the Tenth Amendment only because it is at least nominally a tax, rather than a regulation.¹⁸⁴ As the government pointed out, “even as to this class of firearms there is not a word in the National Firearms Act which expressly prohibits the obtaining, ownership, possession or transportation thereof by anyone if compliance is had with the provisions relating to registration, the payment of taxes, and the possession of stamp-

176 The “mere purchase or possession” of a taxed item “is not crime.” See *Casey v. US*, 276 U.S. 413, 420 (McReynolds, J., dissenting).

177 Carl R. Baldwin, *The Impact of Judge Fred L. Wham*, Saint Louis Post-Dispatch, Thursday, February 16, 1967.

178 *Sonzinsky v. United States*, 300 U.S. 506 (1937). A couple of months later, McReynolds relied on the 10th Amendment again in his last-ditch dissent to *Steward Machine Co. v. Davis*, 301 U.S. 548, 598 (1937) (McReynolds, J., dissenting).

179 241 U.S. 394 (1916).

180 249 U.S. 86, 94 (1919).

181 268 U.S. 5 (1925).

182 274 U.S. 289 (1927).

183 276 U.S. 332 (1928).

184 Appellant’s Br., 307 U.S. 704 (No. 696).

affixed orders.”¹⁸⁵ So, whatever it holds, *Miller* doesn’t hold Congress can regulate firearms directly.

The rejection of Miller’s Tenth Amendment claim highlights the implausibility of his Second Amendment claim. Miller couldn’t just argue the Second Amendment guarantees the right to possess and use NFA firearms. He had to claim it prohibits taxation of NFA firearms. Unsurprisingly, McReynolds found this claim unconvincing. Whether or not the Second Amendment guarantees an individual right to keep and bear arms, it hardly prohibits Congress from taxing particular weapons.

McReynolds assumed the Second Amendment guarantees the right to keep and bear arms in order to ensure an effective militia exists. “With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.”¹⁸⁶ In other words, the Militia Clause empowers Congress to regulate the militia,¹⁸⁷ and the Second Amendment ensures it is armed.

Accordingly, McReynolds devoted most of *Miller* to analyzing the composition of the militia and the duties of militia service. After consulting “the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators,” he concluded the militia consists of “all males physically capable of acting in concert for the common defense.”¹⁸⁸ Essentially, everyone subject to

¹⁸⁵ Appellant’s Br., 307 U.S. 704 (No. 696).

¹⁸⁶ *United States v. Miller*, 307 U.S. 174, 178 (1939).

¹⁸⁷ U.S. Const. Art I, § 8.

¹⁸⁸ *United States v. Miller*, 307 U.S. 174, 179 (1939).

conscription.¹⁸⁹ “And 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.”¹⁹⁰

Like the Cooley treatise on which he relied, McReynolds assumed the militia “cannot exist unless the people are trained to bearing arms.”¹⁹¹ A militiaman may own a firearm because he must know how to use one.

In other words, McReynolds assumed the Second Amendment guarantee ensures those subject to conscription may possess weapons suitable for militia service. And he held it doesn’t protect NFA firearms because they aren’t suitable for militia service. “In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”¹⁹² A short-barreled shotgun is a weapon, but it isn’t a militia weapon, and the Second Amendment only protects militia weapons.

Essentially, McReynolds adopted the government’s fallback argument: the Second Amendment doesn’t protect

189 Today, the “organized militia” consists of the National Guard and Naval Militia and the “unorganized militia” consists of all current or prospective male citizens between 17 and 45. See 10 U.S.C. § 311.

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

191 Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (5th ed. 1883) (1998) (cited in *United States v. Miller*, 307 U.S. 174, 182 n.3 (1939)).

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

weapons used by criminals.¹⁹³ McReynolds often worked directly from the briefs, incorporating elements from them into his opinions.¹⁹⁴ In support of his holding in *Miller*, he cited only *Aymette v. State*, a Tennessee case holding the right “to keep and bear arms” doesn’t guarantee the right to carry a concealed bowie knife.¹⁹⁵ The government cited *Aymette* for the proposition “the term ‘arms’ as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals.”¹⁹⁶ McReynolds agreed, holding the Second Amendment only protects weapons reasonably related to militia service, not including short-barreled shotguns. But he didn’t specify what weapons the Second Amendment protects or how it protects them.

McReynolds also adopted the government’s argument the Second Amendment didn’t create a right, but guaranteed a pre-constitutional common law right. “The Second Amendment does not *confer* upon the people the right to keep and bear arms; it is one of the provisions of the Constitution which, recognizing the prior existence of a certain right, declares that it shall not be infringed by Congress.”¹⁹⁷ Notably, McReynolds’s analysis of the militia relied exclusively on pre-ratification sources.¹⁹⁸ And

193 Appellant’s Br., 307 U.S. 704 (No. 696).

194 John Knox, *The Forgotten Memoir of John Knox* 142 (2002)

195 *Aymette v. State*, 21 Tenn. 154 (1840).

196 Appellant’s Br., 307 U.S. 704 (No. 696).

197 Appellant’s Br., 307 U.S. 704 (No. 696). (emphasis in original).

198 See *United States v. Miller*, 307 U.S. 174, 179-82 (1939) (citing Blackstone’s Commentaries, Vol. 2, Ch. 13, p. 409; Adam Smith’s *Wealth of Nations*, Book V. Ch. 1; ‘The American Colonies In The 17th Century’, Osgood, Vol. 1, ch. XIII; The General Court of Massachusetts, January Session 1784 (Laws and Resolves 1784, c. 55, pp. 140, 142); Act passed April 4, 1786 (Laws 1786, c. 25), the New York Legislature; General Assembly of Virginia, October, 1785 (12 Hening’s Statutes c. 1, p. 9 et seq.)).

he closed by linking the Second Amendment guarantee to state constitutional guarantees. “Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below.”¹⁹⁹

Apparently, he assumed the scope of the Second Amendment guarantee depends on the relevant state constitution. Or at the very least, the guarantees incorporated into the state constitutions illuminate the scope of the right guaranteed by the Second Amendment.

Of course, McReynolds generally assumed the Constitution simply protects common law rights. As he memorably put it in *Meyer v. Nebraska*, the Constitution guarantees “not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”²⁰⁰ And it protects those common law rights against federal and state governments, alike. “As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.”²⁰¹ And “liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable

199 *United States v. Miller*, 307 U.S. 174, 182 (1939).

200 *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

201 *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

relation to some purpose within the competency of the State to effect.”²⁰²

Basically, McReynolds believed in a reasonable Constitution. And a reasonable Constitution permits reasonable regulation. So the Second Amendment protects a weapon only if its possession and use “has some reasonable relationship to the preservation or efficiency of a well regulated militia.”²⁰³ In other words, *Miller* held the common law right to keep and bear arms protects weapons related to militia service, not including NFA firearms.²⁰⁴ Congress can tax NFA firearms because the Second Amendment doesn’t protect them. But *Miller* didn’t explain what makes a weapon related to militia service. Nor did it explicitly adopt an individual or collective right theory of the Second Amendment. It didn’t have to. The NFA was reasonable on either theory, as it affected only unprotected weapons.

Some individual right theorists argue *Miller* held the Second Amendment guarantees an individual right to keep and bear any weapon with a military use. They claim the Court upheld the NFA only because Miller failed to present any evidence of the many military uses of short-barreled shotguns, including trench and jungle warfare.²⁰⁵ But machine guns obviously had military uses. Surely Miller didn’t invalidate the NFA tax on machine guns *sub silentio*.²⁰⁶ As the First Circuit recognized three years later in *Cases v. United States*, “the rule of the Miller case . . . would seem to be already outdated . . .

²⁰² Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

²⁰³ United States v. Miller, 307 U.S. 174, 178 (1939)..

²⁰⁴ United States v. Miller, 307 U.S. 174, 178 (1939).

²⁰⁵ Brannon P. Denning and Glenn H. Reynolds, Enduring and Empowering: The Bill of Rights In the Third Millennium: Telling Miller’s Tale: A Reply to David Yassky, 65 Law & Contemp. Prob. 113, 120 (2002).

²⁰⁶ See David Yassky, The Second Amendment: Structure, History, and Constitutional Change, 99 Mich. L. Rev. 588, 666 (2000).

because of the well known fact that in the so-called ‘Commando Units’ some sort of military use seems to have been found for almost any modern lethal weapon,” including short-barreled shotguns.²⁰⁷

Indeed, while the government implicitly conceded NFA firearms have military uses. “It may be assumed that Congress, in inserting these provisions in the National Firearms Act, intended, through the exercise of its taxing power and its power to regulate interstate and foreign commerce, to discourage, *except for military and law enforcement purposes*, the traffic in and utilization of the weapons to which the Act refers.”²⁰⁸ It argued the Second Amendment doesn’t protect NFA firearms because they “form the arsenal of the gangster and desperado.”²⁰⁹

The *Miller* Court agreed, concluding “it is not within judicial notice that this weapon is any part of the *ordinary* military equipment or that its use could contribute to the common defense.”²¹⁰ While short-barreled shotguns, machine guns, and silencers may have military uses, they aren’t appropriate for militia service. Nor will civilian use help preserve the peace. Relying on *Aymette*, the *Miller* Court assumed the Second Amendment only protects the right to possess weapons “usually employed in civilized warfare,” not “those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and assassin.”²¹¹

207 131 F.2d 916, 922 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943).

208 Appellant’s Br., 307 U.S. 704 (No. 696) (emphasis added).

209 Appellant’s Br., 307 U.S. 704 (No. 696)

210 *United States v. Miller*, 307 U.S. 174, 178 (1939) (emphasis added).

211 *Aymette v. State*, 21 Tenn. 154 (1840).

Of course, short-barreled shotguns do have legitimate civilian uses, primarily protection and hunting small game. Pre-NFA, firearms manufacturers had long produced short-barreled shotguns, or their functional equivalent.²¹² However, Miller's gun was homemade, as Stevens never produced a shotgun with a barrel shorter than 18 inches. And in any case, *Miller* assumed taxation, regulation, or even prohibition of NFA firearms is reasonable whether or not they have legitimate civilian uses. As is taxation, regulation, and prohibition of many other varieties of firearm. *Miller* assumed the Second Amendment only guarantees the right to possess and use a firearm suitable for militia service, not any particular firearm.

Some collective right theorists argue *Miller* held the Second Amendment only protects a collective right to form a militia, or even a state's right to maintain a militia.²¹³ Many courts have agreed.²¹⁴ But this reading is plainly untenable, because the *Miller* Court assumed Miller and Layton had standing to assert an individual right of some kind.

Arguably, an individual could assert a collective right to participate in militia service.²¹⁵ But Miller didn't challenge the

212 Commercial short-barreled shotguns were often marketed as "handy guns." One company sold the "Game Getter" – a single-shot short-barrel shotgun with a wire stock – to bicyclists.

213 See, e.g., H. Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* (Durham: Duke University Press, 2002)

214 *Silveira v. Lockyer*, 312 F.3d 1052, 1086-87 (9th Cir. 2003); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (collective right theory); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1274 & n.18 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (hybrid theory protecting right to own firearm in connection with militia membership).

215 See David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588 (2000).

NFA as a limitation on his right to participate in militia service. He challenged his indictment for transporting an untaxed NFA firearm in interstate commerce. And the Court evaluated Miller's right to possess and use a particular firearm, not his right to join the militia. Everyone knew Miller and Layton were criminals, and unlikely militiamen. They certainly weren't pinched during a muster. But the Court didn't ask whether Miller and Layton intended to participate in militia service. It only asked whether the Second Amendment protects NFA firearms.

Furthermore, McReynolds adopted a colloquial reading of the Second Amendment guarantee. Second Amendment scholars dispute the original meaning of the terms "keep" and "bear." Individual right theorists claim "keep" meant private ownership.²¹⁶ Collective right theorists claim both terms meant military use.²¹⁷ But McReynolds assumed "keep" means "possess" and "bear" means "use."²¹⁸ And "to possess and use" a weapon implies private ownership. Basically, McReynolds adopted a traditional, commonsense interpretation of the Second Amendment, assuming it guarantees an individual right to possess and use firearms, subject to reasonable regulation of time, place, and manner.²¹⁹

216 Robert H. Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment, 25 L. & Hist. Rev. (2007) 139.

217 Saul Cornell, "Don't Know Much About History: The Current Crisis in Second Amendment Scholarship," Northern Kentucky University Law Review 29 (2002): 657–81; H. Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* (Durham: Duke University Press, 2002); and David Thomas Konig, "The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of 'the Right of the People to Keep and Bear Arms,'" Law and History Review 22 (2004): 119–59.

218 "In the absence of any evidence tending to show that *possession or use* of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to *keep and bear* such an instrument." United States v. Miller, 307 U.S. 174, 178 (1939) (emphasis added).

219 See *Aymette v. State*, 21 Tenn. 154 (1840).

Alternatively, a cynic could dismiss *Miller* as simply holding the Constitution doesn't protect criminals. When the Supreme Court upheld the NFA in *Sonzinsky*, "Government attorneys hailed the decision as a material aid in the war against gangsters and gunmen."²²⁰ And as a former Attorney General, McReynolds surely appreciated the convenience of laws like the NFA. After all, everyone knew Miller and Layton were gangsters, and "a right exercised in morality" cannot "sustain a right to be exercised in immorality."²²¹

But McReynolds wouldn't have gone along. Sure, he was a bigot. But he was a principled bigot. And his principles demanded neutrality. "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected."²²² For instance, he objected to the Harrison Act not only because he thought it infringed state police power, but also because he thought it violated due process by shifting the burden of proof to the accused.²²³ While the government generally prosecuted only junkies and dealers, the Harrison Act permitted it prosecute anyone it liked. And lots of people owned narcotics they purchased before Congress passed the Harrison Act.²²⁴

220 Court Takes Suits on Security Taxes, New York Times, Mar. 30, 1937, at 17.

221 *Hoke v. United States*, 227 U.S. 308, 322 (1913).

222 *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923)..

223 See *Linder v. United States*, 268 U.S. 5 (1925); *Casey v. United States*, 276 U.S. 413, 420-21 (1928).

224 "Probably most of those accelerated to prison under the present Act will be unfortunate addicts and their abettors; but even they live under the Constitution. And where will the next step take us? When the Harrison Anti-Narcotic Law became effective probably some drug containing opium could have been found in a million or more households within the Union. Paregoric, laudanum, Dover's Powders, were common remedies. Did every man and woman who possessed one of these instantly become a presumptive criminal and liable to imprisonment unless he could explain to the satisfaction of a jury when and where he got the stuff? Certainly, I cannot assent to any such notion, and it seems worthwhile to say so." *Casey v. United States*, 276 U.S. 413, 421 (1928).

Ultimately, the *Miller* Court's reading of the Second Amendment simply reflected popular sentiment and conventional wisdom. In 1939, the federal government promoted widespread firearms ownership, providing surplus military rifles to the public in order to ensure civilians knew how to use firearms.²²⁵ And most scholars assumed the Second Amendment guarantees an individual right to possess and use firearms, subject to reasonable regulation.²²⁶

CONCLUSION

So what did *Miller* hold? At a minimum, it held the Second Amendment permits Congress to tax firearms used by criminals. At the maximum, dicta suggests the Second Amendment protects an individual right to possess and use a weapon suitable for militia service. And in general, it implies the Second Amendment permits reasonable regulation of firearms. In any event, the Court left legislators a lot of wiggle room.

But what does *Miller* tell us about the meaning of the Second Amendment? Maybe nothing. Some believe precedent cannot bind the Constitution of a sovereign people.²²⁷ Others believe the original meaning of a constitutional provision always trumps precedent.²²⁸ Still others believe in an instrumental

225 See Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 *Crime & Just.* 137, 169-70 (2001). The United States Army administered this program from 1916 to 1996. It is currently administered by the Civilian Marksmanship Program, a non-profit corporation created by Congress.

226 While Spitzer claims legal scholars uniformly accepted the collective right theory until 1960, most of the articles he cites simply conclude the right to possess firearms is subject to reasonable regulation. See Robert J. Spitzer, *Lost and Found: Researching the Second Amendment in The Second Amendment in Law and History* (Carl T. Bogus ed. 2000) 16, 24.

227 See, e.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

228 See, e.g., Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

Constitution, to which precedent supplies only the contingent value of stability.²²⁹ Nevertheless, faint-hearted originalists²³⁰ and incrementalists²³¹ alike might find *Miller* useful, or even appealing. After all, it anticipates the status quo: federal, state, and local governments may reasonably regulate firearms, but may not prohibit them altogether. In other words, maybe McReynolds got it right, at least this once.

229 See, e.g., Richard A. Posner, *Law, Pragmatism, and Democracy* (2003).

230 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 863 (1989).

231 Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005).