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As every constitutional lawyer knows, the "working matter" of constitutional law scarcely embraces the entirety even of the notably short United States Constitution. No contemporary lawyers concern themselves with letters of marque and reprisal[1] or the quartering of troops in private homes.[2] To a significant extent, what counts as "working matter" is a function of Supreme Court decisions. For example, litigation based on the "privileges or immunities" clause of the Fourteenth Amendment[3] basically came to an end following the evisceration of that Clause in the aptly named *Slaughterhouse Cases*.[4]

For most practicing lawyers, the Second Amendment[5] is similarly absent from their professional radar screens, not least because the Supreme Court has basically ignored, at least since its 1939 decision in *United States v. Miller*,[6] the fact that it exists as part of the text of the Constitution that is presumably authoritative for the Court. As I have written elsewhere, "[t]he Supreme Court has almost shamelessly [and shamefully] re-

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* W. St. John Garwood and W. St. John Garwood Jr. Regents Chair in Law, University of Texas Law School. I regret deeply that I was unable to be at the "live symposium" at which the other essays in this issue were originally presented. I appreciate greatly the remarkable efforts by Adam Kunz in putting together the symposium and the kindness of the Brigham Young University Law Review in asking me to participate.

1. *See* U.S. CONST. art. I, § 8, cl. 11 (authorizing Congress to "grant letters of Marque and Reprisal").

2. *See* U.S. CONST. amend. III ("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.").

3. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

4. 83 U.S. (16 Wall.) 36 (1873).

5. "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." U.S. CONST. amend. II.

6. 307 U.S. 174 (1939).

fused to discuss" the meaning of the Second Amendment.[7] Although, no doubt, this judicial silence triggers most dismay among those who view themselves as "pro-gun," the most prominent of which are members of the National Rifle Association (NRA), the dismay should also be felt even by thoughtful proponents of gun control. The NRA, of course, is dismayed by the standard interpretation of *Miller*, that Congress has plenary power to regulate guns,[8] which it views as a profoundly wrong reading of the Constitution (and perhaps of *Miller* itself) that ought to be corrected as soon as possible. It is, presumably, similarly upset by the fact that the Second Amendment is one of the very few parts of the Bill of Rights that the Court has most definitely not been treated as "incorporated" against the States, even though the last full consideration of the application of the amendment to the States took place in 1875, long before the Court incorporated *any* part of the Bill of Rights against the States.[9] But even proponents of gun regulation ought to recognize that our polity has been poisoned by blithe dismissal by members of the legal elite—or at least that portion represented in most law schools and on the federal judiciary—of arguments made by pro-gun citizens, who might justifiably feel that they are treated as marginalized figures whose arguments are almost literally beneath notice.

Not to put too fine a point on it, it is insulting to treat *Miller* as the "last word" in interpreting a part of the Bill of Rights, given the conceptual revolutions that have occurred relative to almost all other parts of the Bill of Rights since 1939.[10] I dare say that no other 1939 case (or, even more certainly, no other

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7. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 653-54 (1989).

8. *See, e.g.*, Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995) (noting accurately that most interpretations of the Second Amendment by lower courts have read *Miller* to license practically all regulation relating to private use of guns).

9. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 553 (1875) ("This is one of the amendments that has no other effect than to restrict the powers of the National government.").

10. No one, for example, would rely on cases decided prior to 1940 to provide the "last word" not only as to whether the Bill of Rights even applies to the States (as of 1940, few of the rights spelled out in the first eight Amendments were thought to constrain the States), but also, for example, as to the scope even of those rights that were thought to apply to the states, such as the Free Speech Clause of the First Amendment.

case written by the egregious Justice McReynolds), is relied on so often by political liberals as providing a definitive statement about an important constitutional norm.

The point of my own Essay, *The Embarrassing Second Amendment*, as I have tried on occasion to explain to journalists who want me to take a strong substantive position, is that this wooden reliance on *Miller*, coupled with a refusal to confront seriously the arguments made by such thoughtful opponents of federal regulation of guns as Senator Orrin Hatch, is fundamentally disrespectful.[11] Part of what "due process" involves is a genuine dialogue with the citizenry, by which courts evidence a willingness to listen to, even if they do not necessarily agree with, arguments about issues that go to the heart of our constitutional polity. One should not be naive enough to believe that the Court would really be able to settle the issue of guns in American society were it to take a case and render a decision, any more than it has stilled the debate about abortion, affirmative action, or any other major issue that divides our polity. But at least with full ventilation of the various arguments, the losers might feel that they were finally being taken seriously. This is obviously not the situation when the Court almost insouciantly dismisses the Second Amendment from any place on its docket.[12]

The situation may be changing, though. For better or worse, the current Court seems willing to place back on the table a variety of issues that were thought to have been "settled" by post-New Deal jurisprudence. The most important evidence of this is surely the Court's recent decision in *Printz v. United States*,[13] which raised absolutely fundamental questions about the nature of the federal system while invalidating the so-called Brady Act[14] insofar as it "commandeered" state officials to enforce this national government program. The majority opinion, by Justice Scalia, treated the fact that the Brady Act concerned guns as almost irrelevant and instead focused on the theory of federalism. Consider, however, Justice Thomas's concurring opinion, the heart of which bears extended quotation:

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11. *See* Levinson, *supra* note 7.

12. *See, e.g.*, Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

13. 117 S. Ct. 2365 (1997).

14. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified in scattered sections of 18 U.S.C.).

I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. The First Amendment, for example, is fittingly celebrated for preventing Congress from "prohibiting the free exercise" of religion or "abridging the freedom of speech." The Second Amendment similarly appears to contain an express limitation on the government's authority. . . . This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. [FN2] As the parties did not raise this argument, however, we need not consider it here. 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." 3 J. Story, Commentaries § 1890, p. 746 (1833).

. . . .

FN2. Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the "right to keep and bear arms" is, as the Amendment's text suggests, a personal right. See, *e.g.*, J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 162 (1994); S. Halbrook, That Every Man Be Armed, The Evolution of a Constitutional Right (1984); Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236 (1994); Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); Cottrol & Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309 (1991); Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L.Rev. 204 (1983). Other scholars, however, argue that the Second Amendment does not secure a personal right to keep or to bear arms. See, *e.g.*, Bogus, Race, Riots, and Guns, 66 S. Cal. L.Rev. 1365 (1993); Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551 (1991); Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 Yale

> L.J. 661 (1989); Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. Am. Hist. 22 (1984). Although somewhat overlooked in our jurisprudence, the Amendment has certainly engendered considerable academic, as well as public, debate.[15]

This passage and accompanying footnote shows that finally there is one justice, of the four needed to grant a petition for certiorari, who recognizes the existence of the Second Amendment and the crying need for the contemporary Court to wrestle with its meaning. Justice Thomas' citation of articles on various sides presumably indicates his own open-mindedness as to the ultimate resolution and, indeed, underscores the need for full-scale adversarial presentation before the Court of the whole range of arguments. This obviously can occur only if the Court indeed recognizes that it must revisit the Amendment and stop treating *Miller* as dispositive.

Perhaps Justice Scalia chose to ignore the actual subject matter of the Brady Act because he had far bigger fish to fry (and the requisite number of votes to pour the hot oil) with regard to very broad issues of federal power and the so-called "unitary executive."[16] Ironically enough, although a decision striking down the Brady Act on Second Amendment grounds would have been far more of a doctrinal sensation, it would have in fact generated less confusion about general constitutional norms than did the actual decision in *Printz*, which, because of its sweeping comments about state autonomy and the ostensible Article II creation of a unitary executive, potentially calls into question vast aspects of the modern state.[17] Second Amendment invalidation of the Brady Act, on the other hand, would have little gravitational force regarding, say, the so-called "independent" agencies (not formally accountable to the President) or unfunded mandates imposed on the states, both of which are now open questions following *Printz*.

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15. *Printz*, 117 S. Ct. at 2385-86 & n.2 (Thomas, J., concurring) (first citation omitted).

16. *See generally id.* at 2378 (explaining the concept of the "unitary executive").

17. See, for example, the breathless article by Northwestern law professor Steven Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14, describing, and endorsing, that the Court's commitment to significant transformations of heretofore, or at least post-1937, settled constitutional understandings.

It is certainly worth noting, though, that Justice Scalia himself has also indicated a certain receptiveness to Second Amendment arguments. Thus he writes in his recent Tanner Lectures, *A Matter of Interpretation: Federal Courts and the Law*, that even if there would be "few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard," this would simply demonstrate

> that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may *like* the abridgement of property rights and *like* the elimination of the right to bear arms; but let us not pretend that these are not *reductions* of *rights*.[18]

Even more interesting is an extended footnote, replying to Professor Laurence Tribe's description of the Second Amendment as being simply "seemingly state-militia-based" rather than "supporting broad principles" of private ownership of guns.[19] Scalia notes "several flaws" with Tribe's argument, including the assumption that the word "militia" refers only to "'a select group of citizen-soldiers' . . . rather than, as the Virginia Bill of Rights of June 1776 defined it, 'the body of the people, trained to arms.'"[20] "It would also be strange," he goes on to say, "to find in the midst of a catalog of the rights of *individuals* a provision securing *to the states* the right to maintain a designated 'Militia.' Dispassionate scholarship suggests quite strongly that the right of the people to keep and bear arms meant just that."[21] Scalia concludes:

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18. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 43 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION].

19. Laurence H. Tribe, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 18, at 65, 71.

20. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 18, at 129, 136 n.13 (quoting JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 136, 148 (1994)). Scalia immediately goes on to note that "[t]his was also the conception of 'militia' entertained by James Madison," citing *The Federalist* No. 46 for support. *Id.*

21. *Id.* at 137 n.13 (citing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS (1994); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994)).

> It is very likely that modern Americans no longer look contemptuously, as Madison did, upon the governments of Europe that "are afraid to trust the people with arms," *The Federalist No. 46*; and the . . . Constitution that Professor Tribe espouses will probably give effect to that new sentiment by effectively eliminating the Second Amendment. But there is no need to deceive ourselves as to what the original Second Amendment said and meant. Of course, properly understood, it is no limitation upon arms control by the states.[22]

Scalia's final sentence is accurate, of course, only if one concludes that the Second Amendment is not referred to in the "privileges or immunities of Citizens of the United States" that states are forbidden to abridge as a result of the Fourteenth Amendment.[23] Professor Akhil Reed Amar, in his forthcoming book *The Bill of Rights: Creation and Reconstruction,* has presented extremely powerful evidence, however, that even if Scalia is correct in his interpretation of the 1791 version of the Second Amendment, he is incorrect in believing that the authors of the Fourteenth Amendment did not fully intend (and expect) the Amendment to be read as a limitation on states themselves.[24] After all, vividly present in the consciousness of the Republicans promoting the Amendment, and its protection of the "privileges or immunities" of United States citizenship, was the plight of the newly freed slaves in the South, many of whom vitally needed guns in order to protect themselves against white supremacists eager to maintain as much of the old order as possible. As Amar puts it, "The Founders' motto, in effect, was that if arms were outlawed, only the central government would have arms. In Reconstruction, a new vision was aborning: When guns

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22. *Id.*

23. U.S. CONST. amend. XIV, § 1.

24. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 254-56, 304-17 (forthcoming 1998) (unpublished pageproof manuscript on file with author) [hereinafter CREATION AND RECONSTRUCTION]. This is a greatly expanded version of his two seminal articles, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) and *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992). Amar's discussion of the Reconstructors' views of the Second Amendment is much more extensive in the book-length manuscript than in the initial articles. *See id.* at 1261-62; *see also* LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS 1871-1872 at 28, 60 (1996) (emphasizing the importance of the Klan to blacks' taking up arms and the attempt by U.S. Attorneys "to nationalize the Second Amendment").

were outlawed, only the Klan would have guns."[25] Thus the 1868 Framers, whatever might have been the case in 1789, were "focusing on *private* violence, and the lapses of *local* government rather than on the *public* violence orchestrated by *central* soldiers" who were perhaps part of a standing army representing a far-away national government.[26]

Along these lines, one might also take note of a footnote in a recent opinion written in *United States v. Gomez*[27] by Ninth Circuit Court of Appeals Judge Alex Kozinski, certainly one of the most interesting among sitting federal judges. The facts of the case were quite gripping: a felon had agreed to act as an informant against drug dealers, who in turn appeared to threaten his life. Gomez thereupon procured a firearm in order to defend himself. He was then indicted as a felon in possession of a firearm, and Gomez claimed the right to present a defense that his possession of the firearm was justified as a means of protecting himself against a serious threat of retaliatory violence. The Ninth Circuit agreed. Judge Kozinski included an extremely interesting footnote:

> 7. Indeed, 18 U.S.C. § 922(g)(1) [preventing the possession of a firearm by a felon] might not pass constitutional muster were it not subject to a justification defense. The Second Amendment embodies the right to defend oneself and one's home against physical attack. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L.Rev. 103, 117-120, 130 (1987) (Second Amendment guarantees right to means of self-defense); *see* Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 645-46 (1989) ("[I]t seems tendentious to reject out of hand the argument that one purpose of the [Second] Amendment was to recognize an individual's right to engage in armed self-defense against criminal conduct."). In modern society, the right to armed self-defense has become attenuated as we rely almost exclusively on organized societal responses, such as the police, to protect us from harm. *See Levinson*, 99 Yale L.J. at 656 ("[O]ne can argue that the rise of a professional police force to enforce the law has made irrelevant, and perhaps even counterproductive, the continuation of a strong notion of self-help as the remedy for crime."). The possession of firearms may

25. CREATION AND RECONSTRUCTION, *supra* note 24, at 266.
26. *Id.*
27. 92 F.3d 770 (9th Cir. 1996).

> therefore be regulated, even prohibited, because we are "compensated" for the loss of that right by the availability of organized societal protection. The tradeoff becomes more dubious, however, when a citizen makes a particularized showing that the organs of government charged with providing that protection are unwilling or unable to do so. *See Lund*, 39 Ala. L.Rev. at 123 ("The fundamental right to self-preservation, together with the basic postulate of liberal theory that citizens only surrender their natural rights to the extent that they are recompensed with more effective political rights, requires that every gun control law be justified in terms of the law's contribution to the personal security of the entire citizenry."). At that point, the Second Amendment might trump a statute prohibiting the ownership and possession of weapons that would be perfectly constitutional under ordinary circumstances. Allowing for a meaningful justification defense ensures that 18 U.S.C. § 922(g)(1) does not collide with the Second Amendment.[28]

Interestingly enough, the other two judges in the case, though concurring in the general opinion, explicitly refused to concur in this footnote. One of them, Judge Cynthia Holcomb Hall, noted that "[footnote 7] directly conflicts with our holding in *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) (holding that 'the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen')."[29] The other, Judge Michael Daly Hawkins, simply stated that footnote 7 "alludes to an interesting and difficult question [that] I would leave for another day."[30]

One might well expect Judge Kozinski to press this issue in some other case and thus force the Ninth Circuit to engage in full-scale reflection on the meaning of the Second Amendment. And if this happens, then one might find that Justice Scalia will be more than willing to join Justice Thomas in voting to bring the case before the Supreme Court. Just as much to the point, one might well expect either of these unusually contentious Justices to write vigorous dissents from denials of certiorari in which they would properly castigate their more timorous brothers and sisters on the bench for evading their duty to confront

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28. *Id.* at 774 n.7.
29. *Id.* at 778-79 (Hall, J., concurring).
30. *Id.* at 779 (Hawkins, J., concurring).

such obviously basic questions of constitutional interpretation. Indeed, it is not unthinkable that at least two of the ostensibly "liberal" Justices would join in granting certiorari precisely in order to gain a (predicted) majority opinion vindicating conventional legal opinion about the limited meaning of the Second Amendment. Whatever the motivation for enhanced attention by the Supreme Court, one could only applaud its willingness to finally recognize both the existence of the Second Amendment as part of the Constitution and the Justices' responsibility to offer their own contemporary gloss on its meaning. Even if it is scarcely likely that the Court could in fact satisfy all disputants, the general public debate could only be strengthened by the Court's signal that there was in fact something very serious to talk about, a welcome replacement for the insouciant dismissal it now appears to engage in whenever anyone actually suggests the relevance of the Second Amendment to contemporary policymaking.