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Notes

GET A DIVORCE--BECOME A FELON: UNITED STATES V. EMERSON, 270 F.3D 203 (5TH CIR. 2001)

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"[I]f Americans ever forget that American Government is not permitted to restrain or coerce any peaceful individual without ***420** his free consent," or "if Americans ever regard their use of their natural liberty as granted to them by the men in Washington or in the capitals of the States," then the American "attempt to establish the exercise of human rights on earth is ended." [1]

I. Introduction

Imagine you are a hard working salesman and spend most of your time traveling making sales calls. You are married to a spouse you hardly see and are the parent of two kids you do not know. Your daily routine is driving around west Texas on hot summer days worrying about closing the next deal while feeling guilty about all the time you are not around your family. You desperately want to be a better spouse and parent; however, the economy is at an all time low, layoffs are at an all time high, and with a second mortgage on your home you should just feel thankful to have a job. In fact, the only true joy you feel anymore is on the rare occasion when you are able to get in some skeet shooting.

One day your spouse, fed up with your absence, fed up with struggling alone to take care of the home and kids, tells you, "I'm leaving." Taking the kids, they move across the state, and the next communication you get is a petition for divorce and a temporary restraining order ("TRO"). Your life has reached its lowest point. You are completely demoralized and devastated. You grab your shotgun and head to the range; maybe some skeet shooting will improve your mood.

As you head out the door, federal agents surround your house. You are thrown on the ground, handcuffed, and arrested. Unable to understand what is going on, you plead with the agent to tell you why you are being arrested. In a cold, conniving voice he responds--“Because you are getting a divorce.” Later, you learn that a federal statute forbids anyone subject to a restraining order from possessing a firearm.

When Mrs. Emerson filed for divorce, Mr. Emerson did not expect that he was subject to criminal prosecution by the federal government for owning a gun. [2] She was only seeking to get a divorce ***421** because her marriage was insupportable. [3] Instead, Mr. Emerson found that because of a federal statute [4] and his wife's application for a TRO, [5] he was stripped of his right to bear arms and was treated like a ***422** common felon. [6] Although the Fifth Circuit decided that the Second Amendment does protect an individual's right to bear arms, [7] it found that this right could be deprived based on the statute. [8]

> The true revolutionary course which must be followed toward a free world is a cautious, experimental process of further decreasing the uses of force which individuals permit to Government; of increasing the prohibitions of Government's action, and thus decreasing the use of brute force in human affairs. [9]

This note contends that the Fifth Circuit's analysis of the Second Amendment, though incomplete, was correct in concluding that it does protect an individual's right to keep and bear arms. However, the court's application of 18 U.S.C. § 922(g)(8) to Mr. Emerson as sufficient to support the deprivation of this right, even without an express finding of danger, is incorrect and grossly simplistic in light of current Tenth Amendment jurisprudence. Specifically, in Printz v. United States, the Supreme Court held unconstitutional another section of this statute, § 922(s)(2), because it violated principles of “dual sovereignty” by impressing state officers into the service of the federal government. [10] Part II examines the Supreme Court's interpretations of the Second Amendment. Part IV examines United States v. Emerson and argues that although the court's analysis of the Second Amendment is correct, it oversimplified the issue because Mr. Emerson failed to raise a Tenth Amendment argument. Part V views § 922(g)(8) under the lens of both the Tenth Amendment and the court's ruling that the Second Amendment protects an individual right ***423** to bear arms. Considering these together, it is clear that the statute unconstitutionally usurps the state's authority in family law matters. Part VI concludes this note by suggesting that future courts should always consider the limiting nature of the Tenth Amendment when examining challenges to federal statutes under the Second Amendment.

II. Background: Supreme Court Interpretations of the Second Amendment

A. Has the Second Amendment Been Interpreted to Confer an Individual or a Collective Right to Bear Arms?

Several Supreme Court important cases have addressed the Second Amendment. [11] The first Supreme Court case to address whether or not the Second Amendment conferred an individual right was United States v. Cruikshank. [12] Special interest groups have baselessly championed this case as showing that the Second Amendment does not confer an individual right to bear arms. [13] In fact, Cruikshank reinforces the “fundamental character” of the Second Amendment. [14] In Cruikshank, “a rioting band of whites burned down a Louisiana courthouse occupied by [a] group of armed blacks.” [15] The United States government indicted William Cruikshank for depriving African-Americans of the right to keep and bear arms. [16] Supreme Court Justice Bradley, delivering the opinion of the Court, dismissed the case because private conspiracy was not alleged to have been ***424** committed by reason of color, and there was no state action. [17] Since only private action was alleged, the Court determined that there was no federal jurisdiction. [18] However, even Cruikshank's attorney conceded that the right to keep and bear arms is a personal, natural right. [19] Cruikshank has been interpreted to represent three important tenants. Since the right to keep and bear arms predated the Constitution, it is an independent right that the States are bound to protect. [20] The Constitution only prevents the federal government from acting to abridge the right to keep and bear arms, not private action. [21] The decision

of the Court does not stand for a collective right but instead for an individual right. Because state action was not shown, the complainants were denied relief. [22]

The second Supreme Court case to address the Second Amendment was Presser v. Illinois. [23] Presser has been touted as ***425** precedent for the proposition that only states, not individuals, could organize and arm militias. "Specifically, it never suggested that the Second Amendment guaranteed a state right to maintain militias rather than an individual right to keep and bear arms." [24] Presser was charged with leading a parade of four hundred armed men through the streets in Chicago without a license. [25] The men were members of the Lehr und Wehr Verein, a corporation composed of German immigrants that promoted military exercise and good citizenship. [26] The Court held Presser guilty of organizing a private militia without authorization. [27] However, the Court's conclusion is only applicable to situations involving private armies and not the issue of the right of individuals to keep and bear arms. [28]

The most recent and applicable Supreme Court case to directly consider the Second Amendment is United States v. Miller. [29] Miller narrowly held that it was not within judicial notice that a sawed off shotgun was a militia weapon. [30] The defendants were convicted of transporting a shotgun, with a barrel of less than eighteen inches, in interstate commerce, which was a violation of the National Firearms Act of 1934. [31] The Court's upholding of the conviction confirms that a shotgun with a barrel of less than eighteen inches is not of such common knowledge as to be cognizable judicially without factual testimony. [32] Since the defendant did not even show, the Court indicated that insufficient evidence was presented to decide if such a weapon would qualify as proper military equipment. [33]

Next, the Miller Court defined militia from a historical understanding to include "all able-bodied men." [34] Lastly, the Court ***426** adopted Justice Story's concept of the interplay between the Second Amendment and the militia. [35] Justice Story considered the Second Amendment the "palladium of the liberties of the republic" and reiterated the fear that the founding fathers had for standing armies. [36]

B. What Is the Significance of the Second Amendment's Preamble?

The Second Amendment begins with a preamble that reads, "[a] well regulated Militia, being necessary to the security of a free State . . . ." [37] As a result of this phrase, the preamble has repeatedly been used as a basis for the proposition that the Second Amendment only confers a collective right to bear arms. [38] An opening preamble is unique to the Second Amendment and is not found among the other constitutional amendments; [39] however, a similar preamble can be found in the text of the Patents and Copyrights Clause. [40] So what purpose does the Second Amendment's preamble serve?

One of the most respected academics, Laurence Tribe, has maintained until recently, that the preamble functions only as a restriction on the federal government's ability to eliminate state ***427** militias and does not confer any individual right to bear arms. [41] The American Civil Liberties Union, the supposed paragon organization for individual rights, has even shared this reading. [42] This discussion of the preamble has at times focused on the term "militia," with some legal scholars arguing that "militia" refers to a collective right [43] while others maintain that history dictates that "militia" refers to every able-bodied citizen. [44] All of these arguments have a legitimate basis in textual or historical interpretations. However, a recent Supreme Court case sheds light on how any preamble should be construed.

The recent case of Eldred v. Ashcroft illuminates construction of preambular language. [45] The plaintiffs in Eldred alleged that they used, copied, reprinted, and sold works of art, literature, and film from the public domain. [46] They maintained that because

Congress extended the time for copyright protection, works since 1923 that would have been available for public use were no longer available and as a result they were harmed. [47] The plaintiffs argued that this violates the preamble. First, the extension of time does not promote "Progress of Science." [48] Second, it violates the preamble's language by creating an unlimited time that Congress may extend protection. [49]

The Supreme Court agreed with the district court in rejecting any such construction of the Copyright Clause. [50] The Court surmised that "the preamble itself places no substantive limit on Congress's legislative power." [51] As a result, the Court inferred that the preamble is not "an independently enforceable limit on Congress's power." [52] Construing this decision in light of Emerson, it seems that the preambular language of the Second Amendment is not relevant. No matter what the term "militia" might mean, Congress does not have ***428** the authority to interfere with the rights of the people to keep and bear arms.

Further, the Court stated that the "proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles." [53] The Second Amendment has closer proximity to the First Amendment than the Copyright Clause. Hence, if the Copyright Clause's placement creates this presumption of compatibility, then the same analysis should apply to the Second Amendment. Extending the logic of the Eldred Court, since the Second Amendment directly follows the First Amendment, this indicates that it is most compatible with the protection of free speech. Moreover, any interpretation pronouncing that the Second Amendment's preambular language indicates a collective right directly contradicts compatibility with free speech.

III. Facts and Procedural History

On August 28, 1998, Mrs. Emerson filed for divorce in a Texas district court. [54] The petition for divorce requested a temporary restraining order ("TRO") against Mr. Emerson because he allegedly threatened, over the telephone, to kill the man who was having an adulterous affair with Mrs. Emerson. [55] Two weeks later, the state judge issued an order forbidding Mr. Emerson from engaging in various acts of violence against Mrs. Emerson. [56] The order would expire on the signing of the final divorce decree or upon entry of another order of the court. [57]

On December 8, 1998, Emerson was indicted for unlawfully possessing a Beretta pistol while subject to a TRO, in violation of 18 U.S.C. § 922(g)(8). [58] Emerson moved to dismiss the indictment as a violation of the Second Amendment, the Due Process Clause of the Fifth Amendment, the Commerce Clause, and the Tenth Amendment. [59] "The district court held that dismissal of the indictment was proper on Second or Fifth Amendment grounds, but rejected Emerson's Tenth Amendment and Commerce Clause arguments." [60]

*429 IV. Analysis of the Case

The Fifth Circuit had to decide whether the trial court erred in dismissing an indictment brought under 18 U.S.C. § 922(g)(8), which forbids anyone subject to a state imposed domestic restraining order from possessing a firearm. The court found that the statute deprived the defendant of his constitutionally protected right to bear arms. [61]

After a careful analysis, the Fifth Circuit concluded that the Second Amendment does protect an individual right to keep and bear arms that are suitable as individual personal weapons, regardless of whether the individual is a member of a militia. [62] First, the Fifth Circuit held that 18 U.S.C. § 922(g)(8) did not violate the Fifth Amendment and as such, the district court erred in granting him relief on this ground. [63] Second, it found that the district court did not err in denying Emerson's motion to dismiss under the Commerce Clause. [64] Third, because Emerson did not brief the Tenth Amendment argument, the Fifth Circuit did not consider

it.[65] Fourth, the Fifth Circuit did an exhaustive examination of Emerson's Second Amendment argument. It meticulously researched the Second Amendment's precedent by analyzing major Second Amendment cases.[66] It analyzed the text of the amendment, phrase by phrase.[67] Lastly, it pedantically analyzed the history of the amendment from its introduction, through state ratification, to nineteenth century commentary.[68] In doing so, it specifically rejected the collective rights theories.[69] However, it also held that the temporary orders, as applied to Mr. Emerson, were sufficient to support the deprivation of his right to bear arms--even without finding a dangerous reason.[70]

***430 A. Stare Decisis and the Second Amendment**

The government fervently relied on United States v. Miller to argue that the Supreme Court has held that the Second Amendment only protects a collective right to bear arms.[71] In disagreeing with the government's position, the Fifth Circuit held that the Miller decision was based on its conclusion that a shotgun with a barrel of less than eighteen inches will not be assumed to be a proper military firearm.[72] As such, this is not a basis for the government's contention that the Second Amendment prohibits all but the military from bearing any firearms.[73] The Fifth Circuit decided that although the Miller decision does not support the government's contention,[74] Miller is indecisive as to the individual versus collective rights arguments.[75]

B. Textual Analysis of the Second Amendment

The Fifth Circuit analyzed the text of the Second Amendment, phrase by phrase, and completed an excellent textual analysis. The court first analyzed the words “the people” in order to determine if the words refer to individuals or to the states.[76] The court concluded that “the people” refers to “individual Americans.”[77] Considering that throughout the Constitution the phrase “the people” refers to individuals, the court found no evidence that it was meant to have a different connotation in the Second Amendment.[78] Next, the court reviewed how the phrase “bear arms” was used throughout the text of the Constitution.[79] The government argued that “bear arms” only applies to militia members during actual military service.[80] However, individual rights theorists, like Mr. Emerson, argue that it refers to any carrying of firearms, regardless of military service.[81] The Fifth Circuit concluded that “bear arms” means generally carrying a firearm.[82] Finally, the court reviewed the phrase “keep . . . arms” and concluded that the words do not limit the keeping of arms while in ***431** active military service.[83]

C. Historical Perspectives of the Second Amendment

The Anti-Federalists feared a centralized federal government would someday try to infringe on the fundamental rights of the people,[84] destroy the militia,[85] and amass a standing army that would tyrannize and oppress the American people.[86] As a result, the Anti-Federalists demanded the proposed Constitution be amended to include a Bill of Rights--recognition of the state's power to organize militias and a curtailment of the federal government's power to raise and support a standing army.[87]

The Federalists' response, unlike the Anti-Federalists, was only concerned with having the Constitution ratified.[88] In an attempt to assuage the concern that the federal government's standing army would oppress a defenseless people, the Federalists argued that a Bill of Rights was not necessary for two reasons. First, Americans were armed and could readily thwart any standing army; and second, a standing army would not be needed because the militia was readily available.[89]

The Fifth Circuit also reviewed the various state ratifications of the Constitution. In Pennsylvania, where the Federalists out-numbered the Anti-Federalists, the Constitution was approved with no changes.[90] However, the Fifth Circuit failed to mention that the Dissent of the Minority of the Convention demanded a declaration of rights.[91] The omission is important because

the Pennsylvania Convention minority were the first demands for a Declaration of Individual Rights, including the right to bear arms. [92]

***432** In Massachusetts, the Constitution also passed unchanged. [93] However, this was not due to a consilience of opinions in Massachusetts. [94] Anti-Federalist John Dewitt promulgated the position against ratification of the Constitution in a series he published in 1787. [95] William Symmes, also present at the convention, advised that without any protections the new government would become too fixed and powerful. [96] Samuel Adams even proposed an amendment that he thought would secure an individual right to bear arms. [97]

South Carolina also amended the Constitution without any alteration as to the Anti-Federalists fears. [98] This does not mean that the people of South Carolina were unconcerned with individual rights; accordingly, they added a preamble which assumed the existence of a right to keep and bear arms for the defense of life, liberty, and property. [99] The impetus for the preamble was Britain's 1774 embargo ***433** on arms shipments to the colonies. [100]

New Hampshire became the first state in which a majority voted for a bill of rights. [101] However, New Hampshire narrowly ratified the Constitution and proposed two additional amendments concerning the bearing of arms. [102] The New Hampshire proposal sparked Federalists to reason that since persons involved in an insurrection could be arrested, they could also be disarmed. [103]

Virginia also narrowly passed the Constitution and proposed twenty amendments. [104] The most fierce and effective proponents of an individual right to bear arms in Virginia were Patrick Henry and George Mason. [105] Henry considered that the only way to resist tyranny was the guaranteed possession of firearms. [106] He also did not support ***434** any attempt to give the federal government power to control the militia. [107] He was therefore opposed to any interference by Congress with the states' power to arm its populace. [108] George Mason urged for the adoption of a bill of rights through a letter he wrote to Thomas Jefferson in which he objected to the Constitution because it gave too much power to the federal government. [109] Zachariah Johnson supported a bill of rights because it would ensure that people left in full possession of their weapons, and thus would never be in danger of being religiously persecuted. [110] On June 25, 1788, the Virginia Convention ratified the Constitution with the "stipulation that 'every power, not granted thereby, remains with [the people of the United States], and at their will . . . .'" [111]

New York passed the Constitution by a margin of three votes and proposed thirty-three amendments. [112] Most of these concerned the structure of the government, but two declarations made it clear that the people were concerned with ensuring they would remain armed. [113] In the end, the New York Convention Chairman, Robert Yates, adopted the Virginia language with only slight changes. [114]

***435** North Carolina repudiated the Constitution and demanded amending it before ratification. [115] North Carolina demanded a declaration of rights "securing 'the unalienable rights of the people.'" [116] The Convention proposed two main amendments that would give the people the right to bear arms unfettered by the federal government and simultaneously prohibit the federal government from requisitioning the state's militia to its service. [117] So strong was North Carolina's antipathy towards surrendering the power of the people to the federal government that it refused to ratify the Constitution until several weeks after Congress passed the Bill of Rights. [118]

Rhode Island ratified the Constitution by a mere two votes, and only then with an appended bill of rights and twenty-one proposed amendments. [119] One amendment addressed their concerns about keeping arms and the other addressed the concerns over standing armies. [120] Interestingly, two days before the ratification, newspapers republished the state's declaration of natural rights. [121]

James Madison wrote the Second Amendment and it passed the House committee with only minor changes. [122] The Senate made three changes to the House version. First, the words "composed of the body ***436** of the people" were deleted. [123] Second, the words "the best" were replaced by "necessary to the." [124] Lastly, the religious language was wholly removed. [125]

After the Fifth Circuit in Emerson discussed the ratification process for each state, it reviewed the commentary on the Second Amendment by four of the best-known Constitutional scholars of the nineteenth century. These four scholars are St. George Tucker, William Rawle, Justice Story, and Thomas Cooley. The court discussed St. George Tucker's thoughts on the Second Amendment. [126] Tucker noted that the main difference between the American and the English Bill of Rights, regarding the carrying of arms, is that the American Bill of Rights applies more broadly to individuals than its English counterpart. [127] The court also reviewed William Rawle's commentary. [128] Rawle likewise thought the Second Amendment gave Americans more protection against the government than afforded to the English. [129] Rawle stated that the Second Amendment would prevent some of the unequal laws that had caused England much embarrassment. [130] The Emerson court observed that Justice Story also ***437** supported the Second Amendment. [131] Story was concerned that American indifference toward the Second Amendment would lead to frustration of the amendment's purpose--keeping the people armed. [132] Finally, the court quoted extensively from Thomas Cooley. [133] Cooley espoused that the Second Amendment was meant to guarantee the populace the right not only to keep arms, but also to have the right to learn to use them without interference from the government, thus precluding the federal government from keeping any standing army. [134]

V. History of the Tenth Amendment

A. A Brief History of the Commerce Clause

Any discussion involving the Tenth Amendment must at least touch on the Commerce Clause because this is the most widely applied enumerated power that Congress acts on. Throughout history, the expansion and narrowing of the Commerce Clause has been proportional to the narrowing and expansion of the Tenth Amendment. According to the Commerce Clause: "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." [135] How much power do these words give Congress? The answer depends upon which era of history one refers. From 1937 to the mid 1990's, Congress's power through the Commerce Clause was virtually limitless. [136] Three key decisions during the first half of the nineteenth century redefined the Courts' expansive interpretation of "commerce ***438** among the states." [137] As a result, for fifty-eight years not a single federal law was declared unconstitutional for exceeding the scope of Congress's regulatory power over commerce. [138] It was not until the 1990's that the Court began the task of limiting the scope of Congress's powers. [139] For the first time since 1937, the Court in United States v. Lopez declared a law unconstitutional as exceeding the scope of Congress's power to regulate commerce. [140] The law in question was 18 U.S.C. § 922(q)(1)(A) which it prohibited "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." [141] The Court held that § 922(q) exceeded Congress's Commerce Clause authority because it was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." [142] The Court went on to pronounce that § 922(q) "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." [143] Two years following

Lopez, the Supreme Court limited Congress's power to utilize the Tenth Amendment. According to the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [144] Is the Tenth Amendment only a reminder to Congress that it must have authority under the Constitution to act or is it a real limit on Congress that is judicially enforceable as a protection of states' sovereignty? [145] These questions define the history of the Tenth Amendment.

B. The Importance of New York v. United States

New York v. United States is undeniably one of the most important decisions concerning federalism and the Tenth Amendment. [146] The federal government passed the Low-Level ***439** Radioactive Waste Policy Amendments Act, mandating that states dispose of their radioactive waste. [147] The government used the "carrot and stick" approach by providing money if the states complied or commanding that they take title to the waste and incur liability if they refused. [148] The Supreme Court held that the "take title" provision was unconstitutional and violated the Tenth Amendment. [149] Citing the Federalist Papers, the Court wrote:

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.

Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. [150]

The Court reasoned that allowing the federal government to compel states in such ways would frustrate voters and democratic accountability. [151] The Court determined that "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." [152]

*440 C. The Printz Standard

In light of Printz, the Fifth Circuit's application of 18 U.S.C. § 922(g)(8) to Emerson as sufficient to support the deprivation of this right, even without an express finding of danger, is incorrect and overlooks Justice Thomas' concurring opinion in Printz. The Emerson court concluded that when Congress enacted § 922(g)(8), it assumed the section would not prohibit a party from possessing a firearm unless there was a showing of "a real threat or danger of injury to the protected party by the party enjoined." [153] The court then concluded that the restraining order issued pursuant to the Texas Family Code meets the same standards as 18 U.S.C. § 922(g)(8). [154]

In Printz v. United States, [155] the Supreme Court found that the Brady Handgun Violence Prevention Act set forth in 18 U.S.C. § 922 "violated the structure of the Constitution" in three important ways. [156] First, the statute intrudes upon state sovereignty. [157] The Court stated that the Constitution establishes a dual-sovereignty system in which the States retain "a residuary and inviolable sovereignty." [158] Several provisions of the Constitution refer to residual state sovereignty. [159] Printz

stated that this sovereignty forbids either the federal ***441** government or state governments from subjugating each other. [160] The Court in Printz opined that if the states lose their independence, then their sovereignty will be destroyed. [161] Because 18 U.S.C. § 922(s) allows the federal government to impress the service of police officers of all fifty states, it violates constitutional principles of federalism. [162]

Second, the statute violates the checks and balances system of the three branches of government. [163] Since the Constitution is clear that the Executive Branch carries out constitutional mandates, the Brady Act violates this directive by consolidating power within the Congress. [164] In short, the Brady Act transfers constitutional powers from the Executive Branch to the Legislative Branch without the associated check of removal. [165]

Finally, even if Congress is acting through an express power, it cannot merge this power with the Necessary and Proper Clause to usurp state sovereignty. [166] In other words, even if the Commerce Clause authorizes Congress to regulate interstate commerce, it does not authorize it to regulate the states in a sovereign capacity. [167] ***442** Therefore, Congress may not act pursuant to its express Commerce Clause powers and plunder the principles of state sovereignty concerning the Tenth Amendment. [168]

Justice Thomas filed a concurring opinion in Printz to emphasize that the federal government has limited powers. [169] Justice Thomas wrote that the Commerce Clause forbids Congress from regulating intrastate commerce. [170] He opined that the Second Amendment "contain[s] an express limitation on the Government's authority." [171] Justice Thomas stated that "[i]f, 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." [172] In a footnote he added that "[m]arshaling 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." [173]

Considering that Emerson decided the Second Amendment does protect individual rights to keep and bear arms, and according to Justice Thomas' concurring opinion in Printz, § 922(g)(8) violates the Tenth Amendment in two important ways. The section impermissibly regulates the ability of state judges to carry out family law, thereby usurping an area that has been traditionally reserved, for at least over a century, to the states. [174] Section 922(g)(8) also offends general principles of federalism by exceeding the power given to Congress through the Commerce Clause.

***443 D. 18 U.S.C. § 922(g)(8) Invades Areas Traditionally Reserved to the State**

The most recent Supreme Court case pertaining to the domestic relations exception to federal jurisdiction stated that "the federal courts have no jurisdiction over suits for divorce or the allowance of alimony." [175] The Ankenbrandt Court held that:
We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress's apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity." [176]

Before Ankenbrandt and based on the holding In re Burrus, Hisquierdo held that the entire area of family law is solely within the domain of the states. [177] The substance of the domestic relations exception is best illustrated by Burrus.

The Burrus case involved Louis B. Miller, a citizen of the state of Ohio, who was the father of Evelyn Estelle Miller. [178] Louis Miller's wife died, shortly after Evelyn's birth and as a result of Louis's death, Evelyn was taken, under doctor's orders, to the home of her grandparents, Thomas F. Burrus and Catherine Burrus, both citizens of Nebraska. [179]

After some time Miller remarried, prepared his home to take care of his child and demanded that the grandparents return her. [180] The grandparents repeatedly refused to give Miller his daughter back and he subsequently applied to the district court for a writ of habeas corpus to recover the care and custody of the child claiming that the grandparent's home was not fit for the child. [181] The district court issued the writ and demanded the return of the child; however, the grandparents stated that they had the right to continued custody because they had cared for her from birth, approximately eight or nine years. [182]

***444** After initially complying with the court order, the grandparents forcefully kidnapped the child from Miller while the two were traveling in Iowa and returned to Nebraska. [183] Subsequently, the grandparents were called back into the district court and the grandfather was imprisoned for contempt. [184] Burrus appealed his sentence on the ground that the district court did not have jurisdiction over him. [185] The Supreme Court held that even though the parties claimed diversity of citizenship in the proceeding in which the child was given to the father, that was not enough to grant jurisdiction. [186] The Court reasoned that family relations are governed, not by federal law, but by state law and as such, it is not within the province of the federal court to intrude. [187] The Court concluded its opinion by ordering the release of Burrus. [188]

Whatever In re Burrus has come to mean, Hisquierdo makes it clear that the federal government does not carry carte blanche to interfere with state law decisions in areas of family law. [189] Consequently, 18 U.S.C § 922(g)(8) supplants state law in the area of domestic relations. [190] It robs family law judges of the power over domestic relations cases by summarily labeling a person a felon who was unlucky enough to be subjected to a temporary restraining order. [191] This vastly alters the consequences imposed for violating a restraining order by depriving a person of their fundamental right to bear arms. As in Mr. Emerson's case, there was no showing he ever threatened his wife or child. In fact, the only allegation made by Mrs. Emerson was that Mr. Emerson, through a phone call, threatened the man with whom she was having the adulterous affair. [192] Because of this statute, Mr. Emerson forever becomes a felon and is stripped of his constitutionally protected right to self-defense, hunt, or visit the shooting range. [193] This is a major shift in power that has been imposed ***445** on the states by Congress.

E. 18 U.S.C. § 922(g)(8) Offends General Principles of Federalism

James Madison described the specific constitutionally authorized powers granted from the states to the federal government as:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. [194]

In fact, the text of the Tenth Amendment demonstrates the Founders out of fear of an autocratic government passed it. [195] The Tenth Amendment admonishes that any powers not delegated to the federal government belong either to the states or the people. [196] However, the Tenth Amendment does not delineate which powers are reserved to the states or delegated to the federal government. [197] Hence, one must look to another doctrine to understand the Tenth Amendment. The first article of the Constitution expresses the doctrine of enumerated powers. [198]

***446** Plainly, power resides in the first instance in the people, who then grant or delegate their power, reserve it, or prohibit its exercise, not immediately through periodic elections but rather institutionally--through the Constitution. The importance of that starting point cannot be overstated, for it is the foundation of whatever legitimacy our system of government can claim. [199]

Basically, if the power is not delegated to the federal government then it is either reserved to the states or the people--the federal government is impotent to act if the power has not been delegated to it. [200] The Tenth Amendment reiterates that the federal government must have the consent of the people to act. During the New Deal these reserved powers were greatly eviscerated by an administration bent on social regulation and wealth redistribution. [201] This has become the primary reason why the people of the United States no longer trust Washington. [202]

As the Court in Burrus stated, family law is exclusively the domain of the states. [203] Any intrusion by the federal government plunders the principles of federalism that our government's legitimacy is founded on. By its very nature § 922(g)(8) is a criminal statute that attaches to a domestic relations area of state law. The Supreme Court in Ankenbrandt stated:

> We conclude, therefore, that the domestic relations exception, as articulated by this Court since Barber, divests the federal courts of power to issue divorce, alimony, and child custody decrees. Given the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce ***447** and alimony decrees and child custody orders. [204]

Accordingly, § 922(g)(8) complicates a state judge's decision to issue a TRO to protect the marital property because of the resulting federal consequences.

In light of § 922(g)(8), a family law judge in Texas is now faced with three alternatives. First, he can issue the TRO to protect the marital property and not concern himself with the federal penalties that will attach. Second, he can refuse to issue the TRO and not concern himself with protecting the marital estate. Finally, he could attempt to draft a TRO that will protect the marital estate and not trigger § 922(g)(8). This usurps the state judges ability to manage the divorce proceeding.

VI. Conclusion

The Fifth Circuit correctly concluded that the Second Amendment does protect an individual's right to keep and bear arms. Its rejection of the collective rights theory is sound and unassailable. However, if 18 U.S.C. § 922(g)(8), in light of Printz, is sufficient to deprive an individual of a basic constitutional right with no findings of dangerousness, then the federal government has invaded an area of traditional state law. "The people never delegated to the federal government the power to prosecute ordinary, garden-variety gun crimes. As Alexander Hamilton put it in the Federalist Papers, 'the ordinary administration of criminal justice' belongs to the states." [205] The Fifth Circuit's ruling makes it difficult for law abiding gun owners to get a divorce in Texas without being subject to federal criminal prosecution. As such, 18 U.S.C. § 922(g)(8) offends general Tenth Amendment principles of federalism because it regulates the state in its sovereign capacity. [206]

Footnotes

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Award and the Clements, O'Neil, Pierce, & Nickens award for Best Article on Federal Law. He is a Langdell Scholar at South Texas College of Law and will graduate in May 2004.

1 Charlotte A. Twight, Dependent on D.C.: The Rise of Federal Control Over the Lives of Ordinary Americans 336 (2002) (quoting Rose Wilder Lane, The Discovery of Freedom 189 (1943)).

2 See United States v. Emerson, 46 F. Supp. 2d 598, 599 (N.D. Tex. 1999) (failing to caution Mr. Emerson that if a temporary restraining order was granted, he would be subject to federal criminal prosecution for the mere possession of a firearm).

3 Id.

4 Id. The federal statute at issue, 18 U.S.C. § 922(g)(8), states the following:
(g) It shall be unlawful for any person--(8) who is subject to a court order that--(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury....
Id. (citing 18 U.S.C. § 922(g)(8) (2000)).

5 For a discussion of TROs, see Law Offices of Raggio & Raggio P.L.L.C., How a Texas Divorce Case Works: Temporary Orders, at http:// raggiolaw.com/txart06.html (last visited Jun. 20, 2003). According to this publication:
There may be a need for court orders between the date the divorce is filed and granted. You may need a temporary restraining order (TRO) and temporary injunction to prevent the transfer or disposition of property and/or to prevent harassment. A TRO and a temporary injunction give the same relief which, often times is intended to maintain the “status quo” and preserve property. A TRO is only good for [fourteen] days, and is granted without notice to your spouse or a hearing. A temporary injunction is granted after notice and hearing (or agreement), and remains in effect until your divorce is granted. Realistically, temporary injunctions are routinely granted upon request, and are made mutual as to the parties.
Id. (emphasis added). The Senior Partner at Raggio & Raggio is Louise Raggio.
Mrs. Raggio, still practicing law at age [eighty-three], is considered a “pioneer in marital and family rights.” She has been called the “Mother of Family Law in Texas.” Her involvement in the Marital Property Act in 1967 “brought Texas into the [twentieth] century.” As chair of the State Bar of Texas' Family Law Section, she spearheaded the Family Code project in 1979, making Texas the first state with a unified family code. For that effort, she received the State Bar of Texas' highest honor and was the first woman elected Director to the Board of Directors of the State Bar of Texas in its more than 100-year history. On the national level, she served in influential leadership positions with the American Bar Association and the American Academy of Matrimonial Lawyers.
Mrs. Raggio is an inductee in the Texas Women's Hall of Fame and a recipient of numerous awards and honors, including the first from the Dallas Bar Association Outstanding Trial Lawyers Award, the prestigious Margaret Brent Award from the American Bar Association, a listing in The Best Lawyers in America, as well as having Southern Methodist University (SMU) in Dallas found a Lecture Series in her name.
Law Offices of Raggio and Raggio P.L.L.C., Firm Attorney's, Louise Raggio, at http://www.raggiolaw.com/raggio.htm. For a further discussion on TROs see Healy Law Offices, P.C., Don't Shoot Yourself in the Foot: Gun Laws You Need To Know, at www.healylaw.com/gun_cle.htm (Nov. 11, 1999).

6 Emerson, 46 F. Supp. 2d at 611. The court stated:
Under this statute, a person can lose his Second Amendment rights not because he has committed some wrong in the past, or because a judge finds he may commit some crime in the future, but merely because he is in a divorce proceeding. Although he may not be a criminal at all, he is stripped of his right to bear arms as much as a convicted felon.
Id.

7 United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001). The court iterated:
We agree with the district court that the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons and are not of the general kind or type excluded by Miller, regardless of whether the particular individual is then actually a member of a militia.
Id.

8 Id. at 264-65. (“However, for the reasons stated, we also conclude that the predicate order in question here is sufficient, albeit likely minimally so, to support the deprivation, while it remains in effect, of the defendant's Second Amendment rights.”).

9 Twight, supra note 1, at 334-35.

10 See Printz v. United States, 521 U.S. 898, 899-900 (1997).

11 Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right 162 (Indep. Inst. 1994) (1984).

12 See generally United States v. Cruikshank, 92 U.S. 588, 591-92 (1875) (stating that the Second Amendment restricts the powers of the federal government); see also Halbrook, supra note 11, at 156.

13 Halbrook, supra note 11, at 156.

14 Id.

15 Cynthia Leonardatos et al., Miller versus Texas: Police Violence, Race Relations, Capital Punishment, and Gun-Toting in Texas in the Nineteenth Century--and Today, 9 J.L. & Pol'y 737, 756 (2000-01).

16 Id. at 757.
One set of counts charged a conspiracy to deprive them of “the right peaceably to assemble together” and of “the right to keep and bear arms,” while another set of counts charged a murder of the two men while carrying out the conspiracy. Three of the defendants, including William J. Cruikshank, were convicted under the first set of counts and appealed.
Halbrook, supra note 11, at 156-57.

17 Halbrook, supra note 11, at 157. Justice Bradley stated:
The first count is for a conspiracy to interfere with the right “to peaceably assemble together....” This right is guaranteed in the first amendment to the constitution.... The [fourteenth] amendment declares that no state shall by law abridge the privileges or immunities of citizens of the United States. Grant that this prohibition now prevents the states from interfering with the right to assemble, as being one of such privileges and immunities, still, does it give congress power to legislate over the subject?... If the amendment is not violated, it has no power over the subject.
The second count, which is for a conspiracy to interfere with certain citizens in their right to bear arms, is open to the same criticism as the first.... In none of these counts is there any averment that the state had, by its laws interfered with any of the rights referred to....
Id.

18 Id.

19 Id. “‘The right of self-defense is a natural right; and the right to keep and bear arms for that purpose cannot be questioned.”’ Id.

20 Id. at 158.

21 Id. at 158-59.

22 Id. at 159.
Whatever its constitutional grounds, the Supreme Court chose not to protect the blacks' rights to free speech and its armed protection. Cruikshank came to symbolize, and perhaps to hasten, the end of Reconstruction. As noted by present-day historians Lee Kennet and James Anderson, “Firearms in the Reconstruction South provided a means of political power for many. They were the symbol of the new freedom for blacks.... In the end... the blacks were effectually disarmed.” And black historian W.E.B. DuBois contended that arms in the hands of blacks, and hence possible economic reform, aroused fear in the North and the South alike, resulting in such decisions as Cruikshank.... Current Supreme Court Justice Marshall has recently referred to Cruikshank and similar cases in these terms: “The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive provisions.”
Id.

23 Id.

24 Id. at 161.

25 Presser v. Illinois, 116 U.S. 252, 254-55 (1886).

26 Id. at 254. Lehr und Wehr Verein translates to “teaching and defense union.” Clayton E. Cramer, For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right To Keep and Bear Arms 130 (1994).

27 Presser, 116 U.S. at 264. The Court stated, “[b]ut a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state.” Id. at 265.

28 Id. at 265.

29 Halbrook, supra note 11, at 164 (discussing United States v. Miller, 307 U.S. 174 (1939)).

30 Cramer, supra note 26, at 191.

31 Halbrook, supra note 11, at 164-65. Since the defendants did not appear, the Court only heard the arguments of the U.S. attorneys. Id. at 165.

32 Id. at 165.

33 Id.

34 Id. at 166. The Court stated:
The signification attributed to the term Militia appears form the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. “A body of citizens enrolled for military discipline.” 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. Id.

35 Id. at 169.

36 Id. Halbrook emphasized that:
Those who argue that the U.S. armed forces and National Guard--both standing armies, whose weapons are owned by the federal government and not by the soldier--now take the place of the militia have a sense of confidence in standing armies and in the rulers that Justice Story would have considered na [ï]ve. Furthermore, the faith presupposed by such advocates in the armed state, and their concomitant lack of faith in the armed people, appears curious alongside their stress on the militia concept as a limitation on the right to bear arms and their constant reiteration that the Constitution's framers rejected the standing army, an institution such advocates find laudable. Justice Story's comments, endorsed by the U.S. Supreme Court, remain valid political philosophy today as much as ever. Id.

37 U.S. Const. amend. II.

38 Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 640 (1989).

39 Id. at 644.

40 U.S. Const. art. I, § 8, cl. 8 (setting out Congress's power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

41 Levinson, supra note 38, at 644.

42 Id.

43 Id. at 646.

44 Id. at 646-47; see also Halbrook, supra note 11, at 166.

45 See generally Eldred v. Ashcroft, 123 S. Ct. 769, 778 (2003) (holding that the Copyright Term Extension Act ("CTEA"), which extends the copyright term for all copyrights in existence by seventy years, did not violate the Copyright and Patent Clause's preamble which states that copyrights endure only for "limited Times").

46 Eldred v. Reno, 74 F. Supp. 2d 1, 2 (D.D.C. 1999).

47 Id. The preamble of the Copyright Clause vests power with Congress to extend copyright protection for the promotion of the "Progress of Science and useful Arts" only for "limited Times." U.S. Const. art. I, § 8, cl. 8.

48 Eldred, 123 S. Ct. at 784.

49 Id. at 777.

50 Id. at 778.

51 Id. at 777.

52 Id. at 784.

53 Id. at 788.

54 United States v. Emerson, 270 F.3d 203, 210 (5th Cir. 2001).

55 Id. at 210-11 n.1.

56 Id. at 211.

57 Id.

58 Id. at 211-12; see 18 U.S.C. § 922(g)(8) (2000) (forbidding anyone subject to a state imposed domestic restraining order to posses a firearm).

59 Emerson, 270 F.3d at 212.

60 Id.

61 Id. at 210; United States v. Emerson, 46 F. Supp. 2d 598, 614 (N.D. Tex. 1999).

62 Emerson, 270 F.3d at 264. "There is strong evidence that 'militia' refers to all of the people, or at least all of those treated as full citizens of the community." Levinson, supra note 38, at 646-47. Even Laurence Tribe now considers the Second Amendment to refer to an individual right and not a collective right. See Tony Mauro, Scholar's Shift in Thinking Angers Liberals, U.S.A. Today, Aug. 27, 1999, available at http:// www.tysknews.com/Depts/2nd_Amend/scholar_angers_liberals.htm (Oct. 10, 2003).

63 Emerson, 270 F.3d at 217.

64 Id.

65 Id. at 218.

66 Id. at 221-27 & nn.13-22.

67 Id. at 227-32 & nn.23-31.

68 See id. at 236-59 & nn.39-59 (giving a historical analysis of each state's ratification problems).

69 Id. at 260. The court defined the collective rights theory as a state's right. "[T]he Second Amendment does not apply to individuals; rather, it merely recognizes the right of a state to arm its militia." Id. at 218.

70 Id. at 261-62.

71 Id. at 221.

72 Id. at 224; see also Halbrook, supra note 11, at 165.

73 Emerson, 270 F.3d at 227 n.22.

74 Id. at 226.

75 Id. at 226-27.

76 Id. at 227.

77 Id. at 229.

78 Id. at 227-28.

79 Id. at 229-32.

80 Id. at 229.

81 Id.

82 Id. at 231.

83 Id. at 232. The court stated:
A "military" connotation is given to "bear" and to some extent to "arms" but not to "keep." Beyond such connection as may arise from the general type of weapon, no character of military status or activity whatever was required to come within the protected right to "keep... arms" that right was "unqualified ...."
Id. at 232 n.31.

84 Id. at 237.

85 Id. at 237-38.

86 Id. at 238-39.

87 Id. at 240.

88 Id.

89 Id.

90 Id. at 241.

91 Stephen P. Halbrook, The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment, 26 Val. U. L. Rev. 131, 142 (1991) (discussing the ratification history of the Second Amendment).

92 Id. at 142-43. These rights included:
That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.
Id.

93 Emerson, 270 F.3d at 241-42. Samuel Adams proposed an amendment, "'[a]nd that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms...." Id.

94 Halbrook, supra note 91, at 146-47.

95 Id. Dewitt said that a militia was composed of the yeomanry of the country and was therefore the buttress of free people. He feared that without the Second Amendment to check the federal government, Congress could, at their whim, disarm all of the United States. Id.

96 Id. at 147. Symmes stated that the new government "'shall be too firmly fixed in the saddle to be overthrown by any thing but a general insurrection."' Id.

97 Id. His proposal read,
And that the Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies... or to prevent the people from petitioning... the federal legislature, for redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.
Id.

98 Emerson, 270 F.3d at 242.

99 Stephen P. Halbrook, A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees 89 (1989). The preamble stated:
Hostilities having been commenced in the Massachusetts Bay, by the troops under command of General Gage, whereby a number of peaceable, helpless, and unarmed people were wantonly robbed and murdered, and there being just reason to apprehend that like hostilities would be committed in all the other colonies, the colonists were therefore driven to the necessity of taking up arms, to repel force by force, and to defend themselves and their properties against lawless invasions and depredations.
Id.

100 Id. at 88.

101 Halbrook, supra note 91, at 148.

102 Emerson, 270 F.3d at 242. The first amendment stated, "'[t]hat no standing army shall be kept up in time of peace, unless with the consent of three-fourths of the members of each branch of Congress."' The Second Amendment stated that "'Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."' Id.

103 Halbrook, supra note 91, at 150. Halbrook says:
This argument reflected the experiences of the Revolution, in that a Tory who could be tarred and feathered could be disarmed first, and a Redcoat who could be shot could surrender his person and weapons instead. There is no hint in Collin's discussion that Congress could pass any law restricting firearms ownership by law-abiding citizens.
Id.

104 Emerson, 270 F.3d at 242. The amendments stated:
That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided.... That no standing army, or regular troops, shall be raised, or kept up, in time of peace, without the consent of two thirds of the members present, in both houses.... That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion....
Id. at 242-43.

105 Halbrook, supra note 91, at 153. Together Patrick Henry and George Mason established the momentum for what became the Second Amendment and the entire Bill of Rights. Id.

106 Id. at 154. Patrick Henry's famous quote is as follows:

> "Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined.... Did you ever read of any revolution in a nation... inflicted by those who had no power at all?"

Id. at 154-55.

107 Id. at 155 ("[T]heir control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless....").

108 Id.
Are we at last brought to such an humiliating and debasing degradation, that we cannot be trusted with arms for our own defense? Where is the difference between having our arms in our own possession and under our own direction, and having them under the management of Congress. If our defence be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?
Id.

109 Id. at 158. Mason wrote:
There are many other things very objectionable in the proposed new Constitution; particularly the almost unlimited Authority over the Militia of the several States; whereby, under Colour of regulating, they may disarm, or render useless the Militia, the more easily to govern by a standing Army; or they may harass the Militia, by such rigid Regulations, and intolerable Burdens, as to make the People themselves desire it's Abolition.
Id.

110 Id. at 161.

111 Id.

112 United States v. Emerson, 270 F.3d 203, 243 (5th Cir. 2001).

113 Halbrook, supra note 91, at 163. The language read:
That the powers of the government may be reassumed by the people whensoever it shall become necessary to their happiness... That the people have a right to keep and bear arms; that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state.
Id.

114 Id. at 162.

115 Emerson, 270 F.3d at 243.

116 Halbrook, supra note 91, at 163.

117 Id. at 164. The proposed amendment states:
That the people have a right to keep and bear arms; that a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided... and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.
...
That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia... that... shall not be subject to martial law ....
Id.

118 Id.

119 Emerson, 270 F.3d at 244.

120 Id.

121 Halbrook, supra note 11, at 83. The published declaration stated, "'[t]hat the people have a right to keep and bear arms: That a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defense of a free state....'" Id.

122 Emerson, 270 F.3d at 246. Madison's version read: "'The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.'" Id. The House approved version that was forwarded to the Senate read: "'A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.'" Id. at 249.

123 Id. at 249.

124 Id.

125 Id. “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.

126 Emerson, 270 F.3d at 256. St. George Tucker stated the following:
This may be considered the true palladium of liberty.... The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.
Id.

127 Id. Tucker noted, “the English Bill of Rights, which only pertained to Protestants and even for those only as ‘suitable to their condition and degree.”’ Id.

128 Id. at 256. William Rawle stated:
[T]he militia form the palladium of the country.
The corollary, from the first position, is, that the right of the people to keep and bear arms shall not be infringed.
The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.
Id. at 256-57.

129 Id. at 257.

130 Id. Since only Protestants “suitable to their conditions” were allowed to carry a gun, English hunting laws became a disgrace. For instance, although Protestants were permitted to hunt game for their own survival, non-Protestants caught hunting would be forced to forfeit their guns. Thus, Rawle believed that the Second Amendment would preclude any attempts to disarm the American populace.
Id.

131 Id. at 257.
The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them.
Id.

132 Id. at 258.

133 Id. Thomas Cooley stated that “if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether.... The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms....” Id.

134 Id. The Second Amendment's purpose is “to preclude any necessity or reasonable excuse for keeping up a standing army. A standing army is condemned by the traditions and sentiments of the people, as being as dangerous to the liberties of the people....” Id. at 258-59.

135 U.S. Const. art. I, § 8, cl. 3.

136 See Erwin Chemerinsky, Constitutional Law 120 (Richard A. Epstein et al. eds., 2001).

137 Id. (These decisions were “NLRB v. Jones & Laughlin Steel Corp. in 1937, United States v. Darby in 1941, and Wickard v. Filburn in 1942.”).

138 Id. at 120.

139 Id. at 142.

140 United States v. Lopez, 514 U.S. 549, 561 (1995).

141 Id. at 551 (citing 18 U.S.C. § 922(q)(1)(a) (1988 & Supp. V)).

142 Id. at 561.

143 Id.

144 U.S. Const. amend. X.

145 Chemerinsky, supra note 136, at 99.

146 Erwin Chemerinsky, Justice O'Connor and Federalism, 32 McGeorge L. Rev. 877, 880 (2001).

147 Id.

148 Id.

149 Id.; New York v. United States, 505 U.S. 144, 188 (1992).

150 Id. at 188 (emphasis added).

151 Chemerinsky, supra note 146, at 880.

152 New York, 505 U.S. at 169.

153 Emerson v. United States, 270 F.3d 203, 262 (5th Cir. 2001).

154 Id. at 262-63.

155 Printz v. United States, 521 U.S. 898 (1997).

156 Stephen P. Halbrook, Commentaries on Law & Public Policy: 1997 Yearbook 57-60 (Robert W. McGee ed., 1998). This is a book chapter entitled Restoring the Tenth Amendment: Printz v. United States, written by Halbrook after he argued the Printz case to the Supreme Court. Id. at 48.

157 Id. at 57-58.

158 Id.
Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty that is reflected throughout the Constitution's text. The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people. The Federal Government's power would be augmented immeasurably and impermissibly if it were able to impress into its service--and at no cost to itself--the police officers of the [fifty] States.
Printz, 521 U.S. at 899 (citations omitted).

159 Printz, 521 U.S. at 919. For example:
[T]he guarantee of the State's territory (Art. IV, § 3), the Judicial Power Clause (Art. III, § 2), the Privileges and Immunities Clause (Art. IV, § 2), the provision for amendment by three-fourths of the States (Article V), and the Guarantee Clause (Art. IV, § 4). Residual state sovereignty was also implicit in Art. I, § 8, which conferred only discrete, enumerated powers, "which implication was rendered express by the Tenth Amendment."
Halbrook, supra note 156, at 58.

160 Halbrook, supra note 156, at 58 (stating that "[n]either sovereign, as the Federalist No. 39 stated, can give orders to the other: 'The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."').

161 Printz, 521 U.S. at 929.

It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "dragooned" into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.
Id. (citations omitted).

162 Halbrook, supra note 156, at 59.

163 Id.

164 Id. ("The Brady Act effectively transfers this responsibility to thousands of CLEOs in the [fifty] states, who are left to implement the program without meaningful Presidential control if indeed meaningful Presidential control is possible without the power to appoint and remove.").

165 Id. at 59-60.
The insistence of the Framers upon unity in the Federal Executive--to ensure both vigor and accountability--is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.
Printz, 521 U.S. at 922-23 (citations omitted).

166 Id. at 923-24.

167 Id. at 924.
Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.... [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.
Id. (citations omitted).

168 Id. at 933.

169 Id. at 936.

170 Id. at 937 ("Although this Court has long interpreted the Constitution as ceding Congress extensive authority to regulate commerce (interstate or otherwise), I continue to believe that we must 'temper our Commerce Clause jurisprudence' and return to an interpretation better rooted in the Clause's original understanding.").

171 Id. at 937-38.

172 Id. at 938.

173 Id. at 939 n.2 (citations omitted).

174 Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (holding that "'[i]nsofar as marriage is within temporal control, the States lay on the guiding hand. 'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'").

175 Ankenbrandt v. Richards, 504 U.S. 689, 693 (1992).

176 Id. at 700.

177 Hisquierdo, 439 U.S. at 581.

178 In re Burrus, 136 U.S. 586, 587 (1890).

179 Id.

180 Id.

181 Id.

182 Id. at 587-88.

183 Id. at 588.

184 Id. at 588-89.

185 Id. at 589.

186 Id. at 596.

187 Id. at 596-97. The Court stated "we know of no statute, no provision of law, [and] no authority thority [sic] intended to be conferred upon the district court of the United States to take cognizance of a case of this kind, either on the ground of citizenship, or on any other ground found in this case." Id. at 597.

188 Id.

189 See Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979).

190 See generally 18 U.S.C. § 922(g)(8) (2000) (forbidding anyone subject to a TRO from possessing a firearm).

191 Id.

192 United States v. Emerson, 46 F. Supp. 2d 598, 599 (N.D. Texas 1999).

193 See generally 18 U.S.C. § 922(g)(8) (2000) (The statute does not contain an exception for these activities.).

194 The Federalist No. 45 (James Madison), available at http:// memory.loc.gov/const/fed/fed_45.html (last modified May 20, 1996).

195 The Tenth Amendment states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

196 Id.; see also Kimberly C. Shankman & Roger Pilon, Reviving the Privileges or Immunities Clause To Redress the Balance Among States, Individuals, and the Federal Government, 3 Tex. Rev. L. & Pol. 1, 3 (1998-99).

197 See U.S. Const. amend. X.; see also Roger Pilon Ph.D., J.D. Senior Fellow and Director Center for Constitutional Studies Cato Institute Washington, D.C., Statement before the Subcommittee on Human Resources and Intergovernmental Relations Committee on Government Reform and Oversight United States House of Representatives (Jul. 20, 1995) available at http:// www.cato.org/ testimony/ct-fd720.html) [hereinafter Pilon].

198 See U.S. Const. art. I, § 1. ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); see also Michael B. Rappaport, Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions, 93 Nw. U. L. Rev. 819, 827 n.28 (1998-99). Rappaport states that:

Confirming that Congress is limited to its enumerated powers is only one function of the Tenth Amendment. A second function is to indicate that Congress's enumerated powers confer only limited authority. After all, there would be little reason to pass an amendment restricting Congress to its enumerated powers if they had unlimited scope. Thus, the common claim that the Tenth Amendment is a truism, is true of its first function, but not its second function. But even though the Tenth Amendment is more than a truism, it still does not justify the prohibition on commandeering (or any other immunity), because it fails to explain how this immunity can be derived from the language of Congress's enumerated powers.

Id. (citations omitted).

199 Pilon, supra note 197.

200 Id.; see also U.S. Term Limits Inc. v. Thornton, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

201 Pilon, supra note 197.

202 Id.

203 In re Burrus, 136 U.S. 586, 596-97 (1890). Burrus has been continuously upheld. See, e.g., Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992).

204 Ankenbrandt, 504 U.S. at 703.

205 See Gene Healy, The NRA Takes Aim at 10th Amendment, available at http://www.cato.org/cgi-bin/scripts/printtech.cgi/dailys/05-31-02.html (May 31, 2002).

206 See United States v. Emerson, 46 F. Supp. 2d 598, 614 (N.D. Tex. 1999).

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