



**THE PECULIAR STORY OF  
UNITED STATES V. MILLER**

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**INTRODUCTION**

On April 18, 1938, the Arkansas and Oklahoma state police stopped Jack Miller and Frank Layton, two washed-up Oklahoma bank robbers. Miller and Layton had an unregistered sawed-off

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shotgun, so the police arrested them for violating the National Firearms Act ("NFA"). Surprisingly, the district court dismissed the charges, holding the NFA violates the Second Amendment.<sup>1</sup> The Supreme Court reversed in *United States v. Miller*,<sup>2</sup> holding the Second Amendment does not guarantee the right to keep and bear a sawed-off shotgun as a matter of law.

Seventy years later, *Miller* remains the only Supreme Court opinion construing the Second Amendment.<sup>3</sup> But courts struggle to decipher its holding. Some find *Miller* adopted an individual right theory of the Second Amendment, some find it adopted a collective right theory, and some find it adopted a hybrid theory, protecting the right to possess a firearm in connection with militia service.<sup>4</sup> Most recently, in *Parker v. District of Columbia*, the D.C. Circuit concluded *Miller* assumed the Second Amendment protects an individual right to possess and use weapons "'of the kind in common use at the time,'" including handguns.<sup>5</sup>

Oddly, Second Amendment scholars have largely ignored *Miller*. While individual and collective right theorists alike claim *Miller* supports their position, most provide only a perfunctory account of the case. The few exceptions focus on the text of the opinion, rather than the history of the case, and the context in which it was decided.<sup>6</sup> All conclude *Miller* is an impenetrable mess.

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<sup>1</sup> *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1939), *rev'd*, 307 U.S. 174 (1939).

<sup>2</sup> *United States v. Miller*, 307 U.S. 174 (1939).

<sup>3</sup> Of course, other cases mention or allude to the Second Amendment. See, e.g., David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999).

<sup>4</sup> For the individual right theory, see *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). For the collective right theory, see *Silveira v. Lockyer*, 312 F.3d 1052, 1086-87 (9th Cir. 2003); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976). For the hybrid theory, see *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1274 & n.18 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

<sup>5</sup> *Parker v. District of Columbia*, 478 F.3d 370, 394 (D.C. Cir. 2007) (quoting *Miller*, 307 U.S. at 179) (emphasis omitted), *cert. granted*, 128 S. Ct. 645 (2007).

<sup>6</sup> See, e.g., Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, 65 LAW & CONTEMP. PROBS. 113 (2002).

This essay suggests the conventional wisdom is only half-right, because *Miller* did less than generally supposed. Part I presents a brief historiography of *Miller*. It argues scholars have not provided an entirely convincing account of the Supreme Court's holding in *Miller*, largely because they focus on the original meaning of the Second Amendment. Part II recounts the history of the case. It shows Jack Miller was a career criminal and government informant. It finds *Miller* was a Second Amendment test case arranged by the government and designed to support the constitutionality of federal gun control. And Part III analyzes *Miller* in light of this history.

This essay concludes that *Miller* is coherent, but largely irrelevant to the contemporary debate over the meaning of the Second Amendment. *Miller* was a Second Amendment test case, teed up with a nominal defendant by a district judge sympathetic to New Deal gun control measures. But the Supreme Court issued a surprisingly narrow decision. Essentially, it held that the Second Amendment permits Congress to tax firearms used by criminals. While dicta suggest the Second Amendment guarantees an individual right to possess and use a weapon suitable for militia service, dicta are not precedent.<sup>7</sup> In other words, *Miller* did not adopt a theory of the Second Amendment guarantee, because it did not need one.

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

Originally, courts and commentators alike found *Miller* inscrutable,<sup>8</sup> or maybe just unremarkable. In any case, they basically ignored it. In 1939, legal scholars were uninterested in anachronisms like the right to keep and bear arms. But as gun control became increasingly controversial, scholars began to debate the meaning of the Second Amendment and the nature of the right to keep and bear arms. Eventually, they produced remarkably sophisticated

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<sup>7</sup> See, e.g., *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006).

<sup>8</sup> See, e.g., *Cases*, 131 F.2d at 922 ("However, we do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go.").

and comprehensive competing accounts of its origins and ratification.

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

Unusually, for Second Amendment scholars, text and history are everything. Individual and collective right theorists alike focus on the original meaning of the Second Amendment, carefully parsing its origins, drafting, ratification, and implementation in the early republic. Indeed, originalism uniquely dominates Second Amendment scholarship.<sup>9</sup>

Why? Maybe the focus on originalism is tactical. Maybe it is strategic. Collective right theorists, in particular, may find originalist arguments less “embarrassing” than the alternatives.<sup>10</sup> Second Amendment scholarship does highlight the Talmudic niceties of constitutional law: Why is this right different from every other right? And maybe it is just circumstantial. After all, without clear precedents, what is left but original meaning? Regardless, courts are obliged to follow *Miller*, as far as it goes, whatever the Second Amendment originally meant.

Of course, both individual and collective right theorists still claim *Miller* supports their position. Individual right theorists generally emphasize that the Court addressed the merits of *Miller*’s Second Amendment claim, rather than dismissing it for lack of standing.<sup>11</sup> Some go further, and argue *Miller* simply failed to show

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<sup>9</sup> “For some reason, virtually everyone on both sides of the pro- and anti-gun Second Amendment debate tends to focus on text and history.” Glenn Harlan Reynolds, *The Second Amendment as a Window on the Framers’ Worldview*, 48 J. LEGAL EDUC. 597, 599 (1998).

<sup>10</sup> See generally Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (noting Hobson’s choice Second Amendment presents gun control supporters committed to the Bill of Rights).

<sup>11</sup> See, e.g., Denning & Reynolds, *supra* note 6, at 2.

short-barreled shotguns have military uses.<sup>12</sup> Collective right theorists highlight the Court's conclusion the Second Amendment "must be interpreted and applied" with the end of preserving the militia in view and argue the Second Amendment simply protects the right to serve in the militia.<sup>13</sup> Many note the absurd consequences of holding the Second Amendment protects only military firearms, rather than those actually used by civilians.<sup>14</sup> In the end, it's a stalemate. On its face, *Miller* does not clearly adopt either theory of the Second Amendment.

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

### A. JACKSON MILLER AND THE O'MALLEY GANG

Jackson "Jack" Miller<sup>15</sup> was a gambler, roadhouse owner, and small-time hood from Claremore, Oklahoma.<sup>16</sup> Born in about 1900, he grew into a hulking, 240-pound thug.<sup>17</sup> By 1921, he was in trouble with the law.<sup>18</sup> His troubles worsened on August 14, 1924, when he accidentally killed H.A. Secrest, a young court reporter from Tulsa, while working as a bouncer at the Oak Cliff Resort near Claremore.<sup>19</sup> Secrest was plastered and roughing up his date, so Miller decked him, breaking his jaw.<sup>20</sup> Unfortunately, Secrest died

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<sup>12</sup> See, e.g., Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 109 (1987).

<sup>13</sup> See, e.g., H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 420 (2000); and David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000).

<sup>14</sup> See, e.g., Michael C. Dorf, *What Does the Second Amendment Mean Today?*, in *THE SECOND AMENDMENT IN LAW AND HISTORY* 247, 250 (Carl T. Bogus ed., 2000).

<sup>15</sup> Also known as "J. J. Miller." *Gilmore v. United States*, 124 F.2d 537, 538 (10th Cir. 1942).

<sup>16</sup> *O'Malley Gang Trial Witness Slain*, MUSKOGEE DAILY PHOENIX, April 6, 1939, at 1.

<sup>17</sup> Miller was one-eighth Cherokee, and Oklahoma police called him a "big, yellow punk." *Officers Continue Without Clues In O'Malley Gang Witness Slaying*, MUSKOGEE DAILY PHOENIX, Apr. 7, 1939, at 1. See also *Claremore Man is Found Slain in Gang Killing*, TULSA DAILY WORLD, Apr. 6, 1939, at 1; *Robber Suspect to Get Immunity*, TULSA DAILY WORLD, Nov. 26, 1935, at 20.

<sup>18</sup> See *State v. Miller*, CR-21-03077B (D. Okla. Nov. 23, 1921).

<sup>19</sup> *Blow on Jaw Caused Death of Tulsa Man*, OKLAHOMAN, Aug. 29, 1924, at 18.

<sup>20</sup> *Id.*

of septicemia a couple of weeks later.<sup>21</sup> Miller turned himself in on September 11, 1924, and immediately posted \$5,000 bail.<sup>22</sup>

But Miller did not hit the major leagues until he joined the O'Malley Gang in 1934. The Depression was the golden age of Midwestern bank robbery, and the O'Malleys executed some of the era's most daring and successful heists. From 1932 to 1935 they claimed "most of the major bank robberies in the Southwest," hitting banks in Missouri, Arkansas, Kansas, and Illinois.<sup>23</sup> Originally known as the Ozark Mountain Boys, the gang consisted of a score of hoods, most of whom met in the Missouri State Penitentiary. A reporter christened them the O'Malley Gang after the dashing Leo "Irish" O'Malley, notorious for his sensational but remarkably inept kidnapping of August Luer. In fact, O'Malley was only a bit player.<sup>24</sup> The gang's real leaders were Dewey Gilmore, Daniel "Dapper Dan" Heady, and George Leonard "Shock" Short.<sup>25</sup>

In the summer of 1934, Short moved to a rented farmhouse outside of Claremore.<sup>26</sup> The rest of the gang soon followed. Heady recruited Miller as a "follow-up man" (lookout) and "wheelman" (getaway driver).<sup>27</sup> Then the O'Malleys got to work. On September 14, 1934, they hit the McElroy Bank and Trust in downtown Fayetteville, the oldest bank in Arkansas. While Miller and Art Austin circled the block, Gilmore, Heady, Virgil "Red" Melton, and Fred Reese broke into the bank before it opened, shanghaied the employees as they arrived, and made off with about \$5,700.<sup>28</sup>

Then, on December 22, 1934, the O'Malleys robbed two Okemah, Oklahoma banks at the same time, one of the few success-

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<sup>21</sup> *Id.*

<sup>22</sup> *Alleged Oak Cliff Guard Surrenders*, OKLAHOMAN, Sept. 12, 1924, at 1.

<sup>23</sup> Robert E. Bates, *Irish O'Malley and the Okemah Caper*, 12 OKLAHOMBRES 1, 3-6 (2001).

<sup>24</sup> What's more, "Leo O'Malley" was the alias of Walter Holland, who was born Walter Riley and adopted his foster parents' surname. See R.D. Morgan, *Irish O'Malley and the Ozark Mountain Boys* (unpublished manuscript, on file with the NYU Journal of Law and Liberty).

<sup>25</sup> Short was the wayward son of a prominent Galena, Missouri family and the brother of Missouri Congressman Dewey Short.

<sup>26</sup> See Morgan, *supra* note 24.

<sup>27</sup> *Robber Suspect to Get Immunity*, *supra* note 17.

<sup>28</sup> See Morgan, *supra* note 24. \$5,700 in 1934 dollars is the equivalent of about \$88,686 in 2007 dollars. See U.S. Department of Labor, *The Inflation Calculator*, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Sept. 6, 2007).

ful double heists in American history.<sup>29</sup> They drove a Plymouth and a Ford into Okemah at dawn, wore bandages concealing their faces, and struck shortly before the banks opened.<sup>30</sup> Gilmore, O'Malley, Short, and Russell Land Cooper hit the Okemah National Bank, while Heady, Melton, and Reese hit the First National Bank of Okemah.<sup>31</sup> Miller "was stationed at the Okemah city limits to guard against possible breakdowns and to pick up members of the gang if their autos failed."<sup>32</sup> Armed with pistols and machineguns, the O'Malleys bound and gagged the unsuspecting bank employees as they arrived, then forced a bank officer to open the safe. The Okemah National Bank yielded \$13,186 and the First National Bank of Okemah yielded \$5,491.25.<sup>33</sup> The police pursued, to no avail.

Miller returned to Claremore with his \$2,100 share of the Okemah job, half of which he kicked back to Gilmore on the sly.<sup>34</sup> But he soon grew restless. On the night of January 11, 1935, he and some friends decided to rob Joe Lewis's gas station and café in Salina, Oklahoma. Nineteen-year-old Percy Bolinger was alone behind the counter when Miller, Earnest Tennyson, Ray Anderson, Norman Hoch, Howard Bridwell, Cap Ellis, Bill Meyers, and Blue Culver sauntered in at about 2 a.m. They ordered coffee and started playing the slot machines. When they got unruly and started tilting the machines, Bolinger asked them to leave. The hoods returned a few hours later, accompanied by Jeff Armstrong, who promptly pistol-whipped Bolinger. They stole \$23.71 from the till and \$120 from four slot machines, which they dumped in Lake Cherokee.<sup>35</sup> A week later, the police arrested the whole crew in Claremore.<sup>36</sup> It was the beginning of the end for the O'Malleys.

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<sup>29</sup> *Five Bank Bandits to Trial Monday*, TULSA DAILY WORLD, Nov. 24, 1935, at 6; *Five to Face Trial in Raid*, OKLAHOMAN, Nov. 24, 1935, at 22. Today, Okemah is best known as Woody Guthrie's hometown.

<sup>30</sup> See Morgan, *supra* note 24.

<sup>31</sup> Gilmore v. United States, 124 F.2d 537, 538 (10th Cir 1942).

<sup>32</sup> *O'Malley Gang Trial Witness Slain*, *supra* note 16, at 4.

<sup>33</sup> Gilmore, 124 F.2d at 538.

<sup>34</sup> *Robber Suspect to Get Immunity*, *supra* note 17; *O'Malley Gang Trial Witness Slain*, *supra* note 16, at 4.

<sup>35</sup> Armstrong v. State, 68 P.2d 114, 114-17 (Okla. Crim. App. 1937).

<sup>36</sup> *Id.* at 115.

On May 3, 1935, the O'Malleys hit the City National Bank of Fort Smith, Arkansas, stealing about \$22,000.<sup>37</sup> It was their last big job. The police arrested Cooper as a likely suspect and struck gold. Cooper ratted out Gilmore, who was already on the lam. The police caught up with Gilmore on May 22, outside of Lancaster, Texas.<sup>38</sup> Gilmore sang too, fingering the rest of the gang. The police pinched O'Malley and Heady in Kansas City, where they'd rented a swanky pad from James Maroon.<sup>39</sup> O'Malley immediately confessed to the Luer kidnapping and was extradited to Illinois.<sup>40</sup> But the FBI took Heady to Muskogee, Oklahoma, to face federal charges on the Okemah job.<sup>41</sup> A couple of weeks later, the police nabbed Short in Galena, Missouri.<sup>42</sup> And on August 8, they caught up with Melton and Reese at a fishing camp in Taney County, Missouri.<sup>43</sup> The FBI took all three to Muskogee for trial.<sup>44</sup>

In the meantime, federal prosecutors indicted the O'Malleys in the Eastern District of Oklahoma.<sup>45</sup> The Oklahoma trial came first. Federal prosecutors charged Gilmore, Cooper, O'Malley, and Short with robbing the Okemah National Bank and Heady, Melton, and Reese with robbing the National Bank of Okemah.<sup>46</sup> All seven pleaded not guilty and the trial was set for October 16. But on October 2, the United States re-indicted the lot of them, added Jack Miller to both counts, and postponed the trial to November 25.<sup>47</sup> Miller soon flipped, confessing to his role in the Okemah job and turning state's evidence.

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<sup>37</sup> *Five Bank Bandits to Trial Monday*, *supra* note 29, at 6; *Five to Face Trial in Raid*, *supra* note 29, at 22; *Robber Suspect to Get Immunity*, *supra* note 17; *Luer Kidnapping Leader is Seized in Kansas City*, CHI. DAILY TRIB., June 1, 1935, at 3; *Federal Officers Will Attend Trial*, TULSA DAILY WORLD, November 24, 1935, at 6; *Irish O'Malley and the Okemah Caper*, *supra* note 23; see also Morgan, *supra* note 24.

<sup>38</sup> *Five Bank Bandits to Trial Monday*, *supra* note 29, at 6; Morgan, *supra* note 24.

<sup>39</sup> *Luer Kidnapping Leader is Seized in Kansas City*, *supra* note 37; Morgan, *supra* note 24.

<sup>40</sup> See Morgan, *supra* note 24.

<sup>41</sup> See *id.*

<sup>42</sup> *Federal Officers Will Attend Trial*, *supra* note 37, at 6.

<sup>43</sup> Morgan, *supra* note 24.

<sup>44</sup> *Federal Officers Will Attend Trial*, *supra* note 37, at 6.

<sup>45</sup> *Gilmore v. United States*, 124 F.2d 537, 538 (10th Cir. 1942); *Gilmore v. United States*, 129 F.2d 199, 201 (10th Cir. 1942).

<sup>46</sup> *Gilmore*, 124 F.2d at 538; *Gilmore*, 129 F.2d at 201.

<sup>47</sup> *Gilmore*, 129 F.2d at 201; *Okemah Bank Holdup Trial Begins Today*, OKLAHOMAN, Nov. 25, 1935, at 9.

Miller was the government's ace in the hole. To preserve the surprise, federal prosecutors sequestered him in the county jail until trial.<sup>48</sup> As soon as the trial began, Miller's lawyer H. Tom Kight announced, "Jack Miller, my client, will testify only on condition that he be granted complete immunity."<sup>49</sup> Judge Robert L. Williams agreed, on the condition Miller "gives a complete and truthful account of the crime."<sup>50</sup>

He did, and then some. "Miller, placed on the witness stand, identified the defendants as coconspirators and testified Dan Heady, charged with participation in the robbery of the First National bank approached him 'regarding robbery of some banks.' He testified the plan of robbing the Okemah banks was agreed upon and he was employed as a 'follow-up man.' He said he received \$2,100 as his share of the loot taken from the banks."<sup>51</sup> Miller's erstwhile companions branded him a "squealer," Cooper even requesting to leave the courtroom while Miller testified.<sup>52</sup>

The trial was over almost as soon as it started. On November 27, the jury convicted the seven defendants on all counts.<sup>53</sup> Williams acquitted Miller as promised, but added an admonishment. "You had a narrow escape this time . . . and you won't be so lucky again. Get into something honest and quit this gambling business."<sup>54</sup> Miller immediately returned to Claremore.<sup>55</sup>

Williams set a sentencing date of December 9, 1935. But on December 3, Heady's wife "Pretty Betty" slipped him a pistol during a visit. Heady used the pistol to break out of prison, escaping

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<sup>48</sup> *Five Bank Bandits to Trial Monday*, *supra* note 29, at 6; *O'Malley Gang Trial Witness Slain*, *supra* note 16, at 4.

<sup>49</sup> *Robber Suspect to Get Immunity*, *supra* note 17. Kight was a sometime state legislator from Claremore, elected as a Democrat to represent Rogers County in 1919, 1927, 1929, 1931, 1933, 1937, 1939, 1943. See *Simpson v. Hill*, 263 P. 635 (Okla. 1927).

<sup>50</sup> *Robber Suspect to Get Immunity*, *supra* note 17; *Okemah Bank Hearing Ends*, OKLAHOMAN, Nov. 27, 1935, at 2.

<sup>51</sup> *Robber Suspect to Get Immunity*, *supra* note 17.

<sup>52</sup> *O'Malley Gang Trial Witness Slain*, *supra* note 16, at 4.

<sup>53</sup> *Gilmore v. United States*, 124 F.2d 537, 538 (10th Cir. 1942); *O'Malley Gang Trial Witness Slain*, *supra* note 16, at 4.

<sup>54</sup> *Okemah Bank Convictions Heard*, OKLAHOMAN, Nov. 28, 1935, at 23; *O'Malley Gang Trial Witness Slain*, *supra* note 16, at 4.

<sup>55</sup> *Three Convicted of Bank Robbery*, TULSA DAILY WORLD, Nov. 28, 1935, at 8; *O'Malley Gang Trial Witness Slain*, *supra* note 16, at 4.

with Gilmore, Short, and Cooper, among others. During the jail-break, Heady shot Muskogee Chief of Detectives Ben Bolton, who died a couple of days later.<sup>56</sup> A huge posse of Oklahoma police and federal agents, aided by bloodhounds and observers in airplanes, tracked the fugitives to Pushmataha County into the Kiamachi Mountains near Clayton, Oklahoma.

On December 5, the posse caught Cooper while he was walking down a country road twelve miles north of Clayton.<sup>57</sup> And the next day, they found Heady and Gilmore in a farmhouse near Weathers, Oklahoma. When Heady and Gilmore refused to surrender, the police opened fire, killing Heady. Gilmore quickly gave up and led the police to Short, about a mile and a half away. Short was already dying, having been critically burned in an accidental fire the night before, and he drowned when a boat used to evacuate him accidentally capsized.<sup>58</sup> On December 9, Williams sentenced Gilmore, Cooper, O'Malley, Melton, and Reese to 25 years.<sup>59</sup>

Miller was terrified of the fugitive O'Malleys, so the FBI held him in a county jail during the manhunt.<sup>60</sup> They needed their snitch alive for the Arkansas trial. On January 10, 1936, federal prosecutors charged Dewey Gilmore, Russell Cooper, Otto Jackson, and Floyd Y. Henderson with robbing the McElroy Bank and Trust Company of Fayetteville and the City National Bank of Fort Smith, Arkansas.<sup>61</sup> At first, all four pleaded not guilty, but Gilmore flipped when Miller implicated him in the Fayetteville job, and the others quickly folded.<sup>62</sup> On January 14, Judge Hiram Heartsill Ragon sentenced Gilmore, Cooper, and Jackson to 25 years, and Smith to

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<sup>56</sup> *Four Are Slain in Day's Toll of Prison Escapes*, CHICAGO DAILY TRIBUNE, Dec. 4, 1935, at 1; *Tenn. Fugitive Captured After Mountain Chase*, CHICAGO DAILY TRIBUNE, Dec. 6, 1935, at 11.

<sup>57</sup> *Tenn. Fugitive Captured After Mountain Chase*, supra note 56; *Kill Fugitive, Shoot Another; Find One Dying*, CHICAGO DAILY TRIBUNE, Dec. 7, 1935, at 12.

<sup>58</sup> *Kill Fugitive, Shoot Another; Find One Dying*, CHICAGO DAILY TRIBUNE, supra note 57. Short was very popular in Galena - over 1,000 people attended his funeral - and his death was controversial. The police denied shooting him, but a Galena undertaker insisted he found several buckshot wounds in the corpse. See Morgan, supra note 24.

<sup>59</sup> *Gilmore v. United States*, 124 F.2d 537, 538 (10th Cir. 1942); *Gilmore v. United States*, 129 F.2d 199, 201 (10th Cir. 1942).

<sup>60</sup> *Claremore Man is Found Slain in Gang Killing*, supra note 17, at 1.

<sup>61</sup> *Gilmore v. United States*, 131 F.2d 873, 873-74 (8th Cir. 1942).

<sup>62</sup> *Officers Continue Without Clues In O'Malley Gang Witness Slaying*, supra note 17, at 4.

twelve.<sup>63</sup> And on February 14, Gilmore and Cooper got another 99 years for murdering Bolton.<sup>64</sup>

That was the end of the O'Malleys. Melton, Cooper, Gilmore, and Reese started in Leavenworth and ended up in Alcatraz.<sup>65</sup> O'Malley did his time in Illinois, but soon went mad and died in 1944. And Miller returned to his penny-ante ways. In 1937, the United States Fidelity and Guarantee Company sued him for the proceeds of the Okemah job, to little effect.<sup>66</sup> Eventually, he fell in with Frank Layton, another small-time Claremore hood.<sup>67</sup>

On April 18, 1938, the Arkansas and Oklahoma state police stopped Miller and Layton outside of Siloam Springs, Arkansas, en route from Claremore.<sup>68</sup> They had an unregistered, short-barreled shotgun in the car and apparently were "making preparation for armed robbery."<sup>69</sup> So the police arrested them.<sup>70</sup>

#### B. MILLER IN THE DISTRICT COURT

Miller and Layton ended up in Fort Smith, Arkansas, where United States Attorney for the Western District of Arkansas Clinton R. Barry charged them with violating the National Firearms Act. Barry knew all about Miller, as he had attended the O'Malley trials

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<sup>63</sup> *Crime*, CHIC. DAILY TRIB., Jan. 19, 1936, at A8; *O'Malley Gang is Sentenced*, OKLAHOMAN, Jan. 15, 1936, at 16.

<sup>64</sup> *Two of O'Malley Gang Get 99 Year Sentences*, CHIC. DAILY TRIB., Feb. 16, 1936, at 18.

<sup>65</sup> Several members of the O'Malley Gang ultimately served time in Alcatraz: Dewey E. Gilmore # 301, Russell Land Cooper # 304, Donnie Garrett # 314, Fred Reese # 321, Virgil Melton # 381. Letter from R.D. Morgan to author (May 10, 2005) (on file with author).

<sup>66</sup> *Return of \$11,647 In Loot is Sought*, OKLAHOMAN, Feb. 12, 1937, at 21.

<sup>67</sup> Layton was affiliated with Robert Trollinger of the Cookson Hills Gang and did time in the 1920s for helping the Henry Starr Gang rob a bank in Maize, Oklahoma. See Morgan, *supra* note 24.

<sup>68</sup> *Firearms Test Case Probable at Ft. Smith*, ARK. DEMOCRAT, Jan. 4, 1939, at 2; Telegram from Clinton R. Barry, United States Attorney for the Western District of Arkansas, to the Attorney General of the United States (Apr. 23, 1938) (National Archives and Records Administration),

<sup>69</sup> Telegram from Clinton R. Barry, United States Attorney for the Western District of Arkansas, to the Attorney General of the United States (Apr. 23, 1938) (National Archives and Records Administration),

<sup>70</sup> Indictment, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. June 2, 1938); Indictment, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. Sept. 21, 1938).

and seen Miller testify.<sup>71</sup> Barry was eager to ensure the government could prove an NFA violation. It is “[e]xtremely important this case be investigated by competent federal officers quickly before these parties released on bond to prove possession this weapon in Oklahoma immediately before arrest in Arkansas to show transportation.”<sup>72</sup> The United States Attorney’s office forwarded Barry’s request to the F.B.I. for investigation.<sup>73</sup>

Miller was scheduled to appear before the district court in Fort Smith during its next term, which began June 6, 1938.<sup>74</sup> While in prison, Miller returned to form, ratting out Joel Carson for murdering a hospital security guard in Little Rock, Arkansas.<sup>75</sup> On May 3, 1938, District Judge for the Western District of Arkansas Hiram Heartsill Ragon set Miller’s bail at \$2,000,<sup>76</sup> which D.A. Blackburn of Clarksville, Arkansas posted on May 16, 1938.<sup>77</sup>

On June 2, 1938, Miller and Layton were both indicted on one count of violating 26 U.S.C. § 1132(c) by transporting an un-taxed short-barreled shotgun in interstate commerce.<sup>78</sup> Both Miller and Layton pleaded guilty, but Ragon refused to accept their plea and appointed Paul E. Gutensohn as counsel.<sup>79</sup> On June 11, 1938,

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<sup>71</sup> *Robber Suspect to Get Immunity*, *supra* note 17.

<sup>72</sup> Telegram from Clinton R. Barry, United States Attorney for the Western District of Arkansas, to the Attorney General of the United States (Apr. 23, 1938) (National Archives and Records Administration).

<sup>73</sup> Memorandum for the Director, Federal Bureau of Investigation, Brian McMahon, Assistant Attorney General (Apr. 23, 1938) (National Archives and Records Administration).

<sup>74</sup> Recognizance, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. 1938).

<sup>75</sup> *Officers Continue Without Clues In O’Malley Gang Witness Slaying*, *supra* note 17, at 4; *Gangland Death Mystery Deepens*, TULSA DAILY WORLD, Apr. 7, 1939, at 1.

<sup>76</sup> Minutes, *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1938).

<sup>77</sup> Recognizance, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. 1938).

<sup>78</sup> Indictment, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. June 2, 1938).

<sup>79</sup> See *Firearms Test Case Probable at Ft. Smith*, *supra* note 68; *Murrey v. United States*, 138 F.2d 94, 99 (8th Cir. 1943) (noting “it was the practice of Judge Ragon to decline to accept a plea on a felony charge from a defendant until the Judge had ascertained whether or not the defendant desired counsel, and . . . it was the Judge’s custom to appoint counsel for defendants in criminal cases who were not represented by counsel and who desired counsel”). A member of the Fort Smith firm of Warner & Warner, Gutensohn graduated from the University of Oklahoma Law School in 1929 and joined the Arkansas Bar in February 1934. See, e.g., *Law Class of ’29 Plans Reunion*, OKLAHOMAN, Sept. 17, 1939, at 25; Richard W. Stevens & Aaron Zelman, *The U.S. v.*

Miller and Layton demurred to the indictment, claiming that it presented insufficient evidence of a transfer requiring payment of a tax and challenging the constitutionality of the NFA under the Second and Tenth Amendments.<sup>80</sup> Surprisingly, Ragon immediately issued a memorandum opinion sustaining the demurrer and quashing the indictment. He held that the NFA violates the Second Amendment by prohibiting the transportation of unregistered covered firearms in interstate commerce.<sup>81</sup>

*United States v. Miller* immediately became the first Second Amendment test case.<sup>82</sup> On September 21, 1938, Miller and Layton were both re-indicted on one count of violating 26 U.S.C. § 1132(j) for transporting an unregistered short-barreled shotgun in interstate commerce.<sup>83</sup> On January 3, 1939, Miller and Layton demurred again, claiming the NFA registration and taxation provisions violate the Second Amendment.<sup>84</sup> Ragon immediately re-issued the same memorandum opinion.<sup>85</sup> Miller and Layton were free men and promptly disappeared. The next day, Governor Bailey appointed Gutensohn to finish the term of State Senator Fred Armstrong, who had died on December 10, 1938.<sup>86</sup> The appointment sparked a political firestorm.<sup>87</sup>

### C. NATIONAL FIREARMS ACT

Enacted in 1934, the National Firearms Act taxed the manufacture, sale, and transfer of short-barreled rifles and shotguns, machine guns, and silencers; required registration of covered firearms;

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*Miller Revisited*, FIREARMS SENTINEL, Fall/Winter 1995, available at <http://www.jpfo.org/miller.htm> (last visited Sept. 6, 2007).

<sup>80</sup> Demurrer to Indictment, *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1938).

<sup>81</sup> Memorandum Opinion, *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1938).

<sup>82</sup> *Firearms Test Case Probable at Ft. Smith*, *supra* note 68; *National Firearms Act May Be Attacked as Invalid*, ARK. GAZETTE, January 5, 1939, at 2.

<sup>83</sup> Indictment, *United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. Sept. 21, 1938).

<sup>84</sup> Demurrer to Indictment, *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1939).

<sup>85</sup> *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark.), *rev'd*, 307 U.S. 174 (1939).

<sup>86</sup> *Matthews v. Bailey*, 131 S.W.2d 425, 430 (Ark. 1939); *see also* Charles Aikin, *State Constitutional Law in 1939-1940*, 34 AM. POL. SCI. REV. 700, 701-02 (1940).

<sup>87</sup> *No Governor Should Name a Legislator*, ARK. GAZETTE, Jan. 6, 1939 at 4 (arguing Arkansas Constitution prohibits appointment of legislators, requiring special elections instead).

and prohibited interstate transportation of unregistered covered firearms.<sup>88</sup> Nominally, it was a revenue act, levying a \$200 transfer tax on all covered firearms, as well as an annual license tax of \$200 on dealers, \$300 on pawnbrokers, and \$500 on manufacturers. In practice, it produced little revenue because it imposed prohibitive rates, often many times the value of the covered firearms.<sup>89</sup>

Of course, the NFA was really a ban disguised as a tax, intended to discourage the possession and use of covered firearms. "The gangster as a law violator must be deprived of his most dangerous weapon, the machine gun."<sup>90</sup> Modeled on the Harrison Narcotics Act, the NFA made covered firearms risky and expensive.<sup>91</sup> "We certainly don't expect gangsters to come forward to register their weapons and be fingerprinted, and a \$200 tax is frankly prohibitive to private citizens."<sup>92</sup> The Act was quite successful. While many people registered NFA firearms,<sup>93</sup> few legitimate dealers could afford to pay the license tax and even fewer legitimate buyers were willing to pay the transfer tax.<sup>94</sup> For example, Oklahoma po-

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<sup>88</sup> Act of June 26, 1934, Ch. 757, 48 Stat. 1236, currently codified as amended at 26 U.S.C. §§ 5801-72. The House Ways and Means Committee held hearings on the NFA in the spring of 1934. See *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. of Ways and Means*, 73rd Cong. 1-2 (1934).

<sup>89</sup> Apparently, the \$200 transfer tax was based on the average price of a machine gun. *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. of Ways and Means*, *supra* note 88, at 12. A typical shotgun cost about \$30 new or \$10 used. Adjusted for inflation, the \$200 transfer tax would amount to roughly \$3000 today. See U.S. Department of Labor, *The Inflation Calculator*, *supra* note 28.

<sup>90</sup> H.R. REP. NO. 73-1780, at 1 (1934).

<sup>91</sup> John Brabner-Smith, *Firearms Regulation*, 1 LAW. & CONTEMP. PROBS. 400, 406-07 (1934); Note, *Federal Legislation: National Firearms Act*, 98 U. PA. L. REV. 917, 918 (1950).

<sup>92</sup> *Registry of One Weapon Purchase in Year Shows Gangsters Flouting Firearms Tax*, N.Y. TIMES, Nov. 6, 1936, at 52.

<sup>93</sup> By 1937, about 16,000 short-barreled rifles and shotguns, 18,000 machine guns, and 700 silencers were registered under the NFA. *Urges Firearms Act to Include All Kinds*, N.Y. TIMES, May 5, 1937, at 13.

<sup>94</sup> In 1935, 25 manufacturers and dealers paid the license tax, but only one person paid the transfer tax. *Registry of One Weapon Purchase in Year Shows Gangsters Flouting Firearms Tax*, *supra* note 92, at 52.

lice saw dealers search for ways to get rid of NFA firearms.<sup>95</sup> The Tommy Gun Era was soon over.<sup>96</sup>

The NFA was a product of a long-standing push toward federal regulation of firearms. In 1927, Congress prohibited mailing most handguns, with limited success.<sup>97</sup> Several bills introduced in 1930 would have prohibited the transportation of certain firearms in interstate commerce.<sup>98</sup> But Attorney General Homer Cummings supported the NFA because it relied primarily on the tax power, ensuring its constitutionality.<sup>99</sup>

As originally proposed, the NFA also applied to pistols and levied a \$1000 tax on manufacturers and importers. However, after the NRA and other firearms associations opposed the inclusion of pistols at the public hearings, the restrictions on pistols were eliminated.<sup>100</sup> The Ways and Means Committee approved the bill without reservation, and the Finance Committee recommended amending the tax on manufacturers and importers to \$500, which the House accepted.<sup>101</sup> Congress explicitly disclaimed any intention to include "pistols and revolvers and sporting arms" because "there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction."<sup>102</sup>

Some gun control opponents suggested that the NFA was "sponsored by people who wish to compel all sportsmen to register their firearms and store them in armories when they are not being used for hunting or target purposes."<sup>103</sup> But even they generally conceded the Second Amendment permits federal regulation of ma-

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<sup>95</sup> *Rigid Act on Firearms Put in Force Here*, OKLAHOMAN, Sept. 7, 1934, at 5; *New Federal Act Discloses Arms Bristle in State*, OKLAHOMAN, Sept. 17, 1934, at 9.

<sup>96</sup> Note, *supra* note 91, at 918.

<sup>97</sup> 18 U.S.C. § 1715 (2000).

<sup>98</sup> See Stephen P. Halbrook, *Congress Interprets Second Amendment*, 62 TENN. L. REV. 597, 604-05 (1995); see also *Firearms: Hearing on H.R. 2569, H.R. 6606, H.R. 6607, and H.R. 11325 Before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce*, 71st Cong. 1-3, 7 (1930).

<sup>99</sup> *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. of Ways and Means*, *supra* note 88, at 6-8.

<sup>100</sup> Brabner-Smith, *supra* note 91, at 406; Note, *supra* note 91, at 917.

<sup>101</sup> S. REP. NO. 73-1444, at 1 (1934).

<sup>102</sup> H.R. REP. NO. 73-1780, at 1 (1934).

<sup>103</sup> G.A. Nelson, Letter to the Editor, *Objections Made to Firearms Act: Proposed Bill Viewed As Likely to Aid Our Criminals*, N.Y. TIMES, June 3, 1934, at E5.

chine guns and other 'gangster weapons.'<sup>104</sup> "No person outside our national defense units and police has any legal use for such weapons because they have no sporting or hunting value, being made for the sole purpose of taking human life."<sup>105</sup>

But Cummings was not content with the NFA. The New York Times reported that he considered federal regulation of pistols "the national government's next step in the war against crime," so in 1936 he circulated a proposed bill imposing a \$1 transfer tax on pistols and requiring registration.<sup>106</sup> The gradual expansion of federal gun control met with growing opposition. Thousands of gun owners wrote to the Ways and Means Committee objecting to the Federal Firearms Act, some invoking the Second Amendment.<sup>107</sup> Nevertheless, on June 30, 1938, Congress passed the Federal Firearms Act, regulating interstate commerce in firearms.<sup>108</sup>

#### D. JUDGE RAGON

The newspapers assumed Miller was a "test case of the National Firearms Act."<sup>109</sup> They were probably right. The government needed a Supreme Court precedent holding that federal gun control does not violate the Second Amendment. Ragon teed up the case.

Ragon did not really think the NFA violated the Second Amendment, and probably colluded with the government to create the ideal test case. His opinion is peculiar on its face, begging for an appeal. A memorandum disposition is appropriate when deciding a routine case, but not when holding a law facially unconstitutional.

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<sup>104</sup> See Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 168-70 (2001); Nelson, *supra* note 103.

<sup>105</sup> Nelson, *supra* note 103.

<sup>106</sup> *Pistol Control Sought*, N.Y. TIMES, Jan. 12, 1936, at E11; *Urges Firearms Act to Include All Kinds*, *supra* note 93, at 13.

<sup>107</sup> John W. Rankin, Letter to the Editor, WASH. POST, Apr. 9, 1938, at X6 (suggesting more than 20,000 people wrote the Ways & Means Committee in opposition). See also Raymond R. Camp, Op-Ed., *Wood, Field and Stream*, N.Y. TIMES, Mar. 10, 1938, at 25 (indicating that "rod and gun clubs are circulating petitions and drawing up resolutions to oppose" the act); Raymond R. Camp, Op-Ed., *Wood, Field and Stream*, N.Y. TIMES, Mar. 17, 1938, at 27.

<sup>108</sup> Federal Firearms Act, ch. 850, 52 Stat. 1250 (1938) (codified as amended at 15 U.S.C. §§ 901-909 (2007)) (repealed in 1968); Alfred M. Ascione, *Federal Firearms Act*, 13 ST. JOHN'S L. REV. 437, 438 (1939).

<sup>109</sup> *State Men Force Test of Arms Law*, OKLAHOMAN, Jan. 5, 1939, at 4.

And Ragon was the first judge to hold that a federal law violates the Second Amendment, even disagreeing with a Florida district court that had dismissed a Second Amendment challenge to the NFA.<sup>110</sup>

Before he became a judge, Ragon represented the Fifth District of Arkansas in Congress from 1923 to 1933.<sup>111</sup> As a congressman, he was a vocal advocate of federal gun control. In 1924, Ragon introduced an unsuccessful bill prohibiting the importation of guns in violation of state law,<sup>112</sup> and vigorously supported another bill prohibiting the mailing of most pistols, which eventually passed in 1927.<sup>113</sup>

Basically, Ragon wanted to prohibit firearms used by criminals, including pistols.<sup>114</sup> “I want to say that I am unequivocally opposed to pistols in any connection whatever. If you want something in the home for defense, there is the shotgun and the rifle, but a pistol is primarily for the purpose of killing somebody.”<sup>115</sup> And he specifically dismissed Second Amendment objections to federal gun control. “I cannot see that violence to the Constitution which my friend from Texas sees in this bill.”<sup>116</sup> If Arkansas could prohibit pistols, so could the United States.<sup>117</sup>

A prominent Democrat, Ragon endorsed Roosevelt in 1932 and helped push the New Deal through the Ways and Means

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<sup>110</sup> See *United States v. Adams*, 11 F. Supp. 216, 218-19 (S.D. Fla. 1935) (“The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights.” (holding Second Amendment “has no application” to NFA)).

<sup>111</sup> *Shadow of Ku Klux Klan Grows Larger in Congress and Nation*, N.Y. TIMES, Dec. 10, 1922, at 116 (Ragon was endorsed by the Ku Klux Klan and succeeded H.M. Jacoway). Apparently, he was a bit hotheaded, starting a fistfight with a man who called him a liar. *Telegraphic Dispatches*, WASH. POST, July 16, 1932, at 3.

<sup>112</sup> H.R. 6868, 68th Cong., 66 CONG. REC. 2282 (1924) (“a bill for the prevention of the shipment and transportation of certain firearms into a State, Territory, or District of the United States in violation of any law thereof”).

<sup>113</sup> 18 U.S.C. § 1715 (2000).

<sup>114</sup> 66 CONG. REC. 725, 734 (Dec. 17, 1924).

<sup>115</sup> *Id.* at 729.

<sup>116</sup> *Id.* at 734.

<sup>117</sup> *Id.* at 728-29 (“In the State of Arkansas, it is a violation of the law for a man to sell a pistol within that State. . . . This law has been, by the Supreme Court of the State of Arkansas, held constitutional, and you can not lawfully sell a pistol in the State of Arkansas.”).

Committee.<sup>118</sup> In return, Roosevelt made him a district judge.<sup>119</sup> The NFA was part of Roosevelt's New Deal program, enacted with broad support shortly after Ragon took the bench.<sup>120</sup> But the Federal Firearms Act of 1938 was stirring up popular opposition, much of it based on the Second Amendment.<sup>121</sup> The government needed to silence the complaints, and Miller was the perfect vehicle. Ragon had presided in an O'Malley prosecution, so he knew Miller was a crooked, pliable snitch, who wouldn't cause any trouble. And Gutensohn was a comer who knew the game and got his due. Ragon's memorandum opinion presented no facts and no argument. With no defense muddying the waters, it was the government's ideal test case.

#### E. MILLER IN THE SUPREME COURT

The test came quickly. On January 30, 1939, Barry appealed *Miller* directly to the Supreme Court.<sup>122</sup> Embroiled in the controversy concerning his contested appointment to the Arkansas State Senate,<sup>123</sup> Gutensohn did not object.<sup>124</sup> The Supreme Court accepted the government's appeal.<sup>125</sup>

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<sup>118</sup> *Ragon is Appointed to District Bench*, N.Y. TIMES, May 13, 1933, at 5; *Heartsill Ragon, Judge, Dies at 55*, N.Y. TIMES, Sept. 16, 1940, at 24.

<sup>119</sup> See John Kyle Day, *Bargain and Corruption, Arkansas Style: The Theft of the 1933 Special Congressional Election*, 2 CENT. ARK. HIST. REV. 1 (1999).

<sup>120</sup> See, N. Y. TIMES, March 21, 1932, at 4; *New Deal Victor in Court Tests*, N.Y. TIMES, May 30, 1937, at 39 (including Sonzinsky in list of victories). See also David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 664 (2000).

<sup>121</sup> Raymond R. Camp, Editorial, *Wood, Field and Stream*, N.Y. TIMES, Mar. 20, 1938, at 74. See also Camp, Op-Ed., *Wood, Field and Stream*, N.Y. TIMES, Mar. 17, 1938, at 27; Camp, Op-Ed., *Wood, Field and Stream*, N.Y. TIMES, Mar. 10, 1938, at 25; Rankin, *supra* note 107, at X6.

<sup>122</sup> *Assignments of Error, United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. Jan. 30, 1939); *Petition for Appeal, United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. Jan. 30, 1939). At that time, the United States could appeal criminal cases implicating a constitutional question directly to the Supreme Court under the Criminal Appeals Act, 18 U.S.C. § 682 (1907) and 28 U.S.C. § 345 (1940).

<sup>123</sup> *Matthews v. Bailey*, 131 S.W.2d 425, 430 (Ark. 1939); see also Aikin, *supra* note 18, at 701-02.

<sup>124</sup> *Notice of Service, United States v. Miller*, 26 F. Supp. 1002, No. 3926 (W.D. Ark. Jan. 30, 1939).

<sup>125</sup> *United States v. Miller*, 307 U.S. 174 (1939).

As usual, the Solicitor General's office drafted the government's brief.<sup>126</sup> In the absence of precedent, the government could not anticipate what theory the Court would adopt. Accordingly, it offered several reasonable but inconsistent arguments supporting the constitutionality of the NFA.

The government began by claiming the Second Amendment does not grant a new right, but prohibits Congress from infringing a common law right.<sup>127</sup> So what common law right does the Second Amendment protect? The government argued the Second Amendment "refers to the militia, a protective force of government; to the collective body and not individual rights."<sup>128</sup> In any case, it only guarantees the right to keep and bear arms "for lawful purposes," and certainly does not protect weapons used by criminals.<sup>129</sup> The NFA affects "weapons which form the arsenal of the gangster and desperado," and the Second Amendment "does not, we submit, guarantee to the criminal the right to maintain and utilize arms which are particularly adaptable to his purposes."<sup>130</sup>

Supreme Court Clerk Charles Cropley wrote to Gutensohn on March 15, informing him the Supreme Court had accepted the appeal and expected to hear oral argument on March 31.<sup>131</sup> Gutensohn wrote back on March 22, asking why he had not received the record or the government's brief and emphasizing that he represented Miller and Layton pro bono.<sup>132</sup> Cropley replied on March 25, informing Gutensohn that the government had submitted a typewritten brief and he could do the same. In the alternative, Cropley suggested the court could postpone oral argument until April 17.

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<sup>126</sup> See Warner W. Gardner, *Pebbles From The Path Behind*, reprinted in 9 GREEN BAG 2d 271, 273 (2006) (noting the Solicitor General's office generally had to draft briefs from scratch in appeals from the criminal division).

<sup>127</sup> Brief for the United States at 8-9, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696) ("The Second Amendment does not confer upon the people the right to keep and bear arms; it is one of the provisions of the Constitution which, recognizing the prior existence of a certain right, declares that it shall not be infringed by Congress. Thus the right to keep and bear arms is not a right granted by the Constitution and therefore is not dependant [sic] upon that instrument for its source.").

<sup>128</sup> *Id.* at 21.

<sup>129</sup> *Id.* at 20.

<sup>130</sup> *Id.* at 7, 8.

<sup>131</sup> Letter from Charles Elmore Cropley to Paul E. Gutensohn (March 15, 1939).

<sup>132</sup> Letter from Paul E. Gutensohn to Charles Elmore Cropley (March 22, 1939).

But on March 28, Gutensohn replied by telegram: "Suggest case be submitted on Appellants brief. Unable to obtain any money from clients to be present and argue case = Paul E Gutensohn."<sup>133</sup> He was probably relieved to be rid of Miller and Layton.

On March 30, 1939, seven justices of the Supreme Court heard oral argument in *United States v. Miller*. Chief Justice Hughes was ill,<sup>134</sup> and the newly appointed Justice Douglas was not confirmed until April 4. Gordon Dean represented the United States and no one represented Miller or Layton.<sup>135</sup> Two days later, Gutensohn finally received four copies of the government's brief.<sup>136</sup>

The decision came quickly. On May 15, 1939, Justice James Clark McReynolds "drawled from the bench: 'We construe the amendment as having relation to military service and we are unable to say that a sawed-off shotgun has any relation to the militia.'"<sup>137</sup> The unanimous vote was 8-0, as Justice Douglas was recused.

The papers were bemusedly pleased. The New York Times noted, "The record in the case of Miller and Dayton [sic] does not show for what purpose they were taking the sawed-off shotgun across State lines. Government officials felt, today, however, that the McReynolds decision had given them a new instrument with which to fight bank robbers, gangsters and other criminals, whose favorite arm is the sawed-off shotgun."<sup>138</sup> And Jackson soon asked Congress to enact legislation requiring the registration of all firearms, in order to foil subversives:<sup>139</sup> "It is to be particularly noted that the legislation, the enactment of which I recommend, would in nowise improperly limit the freedom of action of peaceful, law abiding persons. The contemplated legislation would not hamper or hinder any person from purchasing or possessing a firearm. It

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<sup>133</sup> Telegram from Paul E. Gutensohn to Charles Elmore Cropley (March 28, 1939).

<sup>134</sup> Paul A. Freund, *Charles Evan Hughes as Chief Justice*, 81 HARV. L. REV. 4, 39 (1967).

<sup>135</sup> *United States Supreme Court*, N.Y. TIMES, Mar. 31, 1939, at 42; *United States v. Miller*, 307 U.S. 174, 175 (1939).

<sup>136</sup> Notice of Service, *United States v. Miller*, 307 U.S. 174, No. 696 (Apr. 3, 1939).

<sup>137</sup> *Supreme Court Bars Sawed-Off Shotgun*, N.Y. TIMES, May 16, 1939, at 15.

<sup>138</sup> *Id.*

<sup>139</sup> *Proposes a Law to Register All Firearms in U.S.*, CHI. DAILY TRIB., May 30, 1940, at 5.

would merely require him to register the firearm and to record any transfer of the weapon.”<sup>140</sup>

#### F. POSTSCRIPT

In the meantime, Miller resurfaced. On April 3, 1939, Miller, Robert Drake “Major” Taylor, and an unidentified accomplice robbed the Route 66 Club, a Miami, Oklahoma dive.<sup>141</sup> Armed with shotguns, they stole about \$80, superficially wounding two bystanders in the process.<sup>142</sup> Apparently, it was an inside job. Earl “Woodenfoot” Clanton, the uncle of notorious bank robbers Herman and Ed “Newt” Clanton, owned the bar.<sup>143</sup> Taylor was a former associate of Newt Clanton’s,<sup>144</sup> and a peripheral member of the O’Malley Gang.<sup>145</sup>

At about 9 a.m. on April 3, two or three men in a car picked up Miller at his home in Ketchum, Oklahoma.<sup>146</sup> The next day, around noon, a farmhand named Fisher discovered Miller’s bullet-ridden corpse on the bank of the “nearly dry” Little Spencer Creek, nine miles southwest of Chelsea, Oklahoma.<sup>147</sup> Miller was shot four times with a .38, twice in the chest, once under the left arm, and once through the left arm. The .45 automatic next to him had been fired three times.<sup>148</sup> On April 6, someone found Miller’s torched 1934 sedan off a dirt road in the Verdigris River bottoms, about four

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<sup>140</sup> *Id.*

<sup>141</sup> Morgan, *supra* note 24. See also *Claremore Slayer Suspect Captured*, OKLAHOMAN, Oct. 9, 1939, at 13; *Prisoner is Halted in Flight Attempt*, OKLAHOMAN, Sept. 20, 1932, at 9 (recounting Taylor’s unsuccessful attempt to escape from custody in Missouri).

<sup>142</sup> *Former O’Malley Gangster to Start 10-Year Sentence*, OKLAHOMAN, Oct. 20, 1939, at 26.

<sup>143</sup> See Morgan, *supra* note 24.

<sup>144</sup> Taylor was sentenced to a 75-year term in McAlester Prison for first degree robbery. Taylor escaped on November 26, 1938. *Aide of O’Malleys Arrested in Texas*, MUSKOGEE DAILY PHOENIX, Oct. 9, 1939, at 1.

<sup>145</sup> *Id.*

<sup>146</sup> *Auto of Slain Gang Member Found Burned*, OKLAHOMAN, Apr. 7, 1939, at 4; *Officers Continue Without Clues In O’Malley Gang Witness Slaying*, *supra* note 17.

<sup>147</sup> *Claremore Man is Found Slain in Gang Killing*, *supra* note 17, at 1; *O’Malley Gang Trial Witness Slain*, *supra* note 16.

<sup>148</sup> *Claremore Man is Found Slain in Gang Killing*, *supra* note 17, at 1.

miles southeast of Nowata.<sup>149</sup> It was stripped and still smoldering. A farmer said he saw it burning shortly before noon on April 3.<sup>150</sup>

Taylor was a suspect in the investigation.<sup>151</sup> On October 8, 1939, Sheriff Ellis Summers arrested him in Kermit, Texas, after he got in a “fight with an oil field worker over a dice game.”<sup>152</sup> Ultimately, what happened on April 4 is unclear. Maybe Miller and Taylor disputed the proceeds of the robbery.<sup>153</sup> Maybe Taylor shot Miller for snitching on the O’Malleys.<sup>154</sup> In any case, Oklahoma charged Taylor with murder, but eventually dropped the charges for lack of evidence. Still, he pleaded guilty to armed robbery and got ten years in McAlester.<sup>155</sup>

On January 8, 1940, Layton pleaded guilty to the reinstated NFA charge and Ragon sentenced him to five years probation.<sup>156</sup> Ragon expected an appointment to the Eighth Circuit, but died suddenly of a heart attack on September 15, 1940.<sup>157</sup> Layton’s probation ended on January 29, 1944.<sup>158</sup> He died in 1967. Both Miller and Layton were buried at Woodlawn Cemetery in Claremore, Oklahoma.<sup>159</sup>

### III. INTERPRETING UNITED STATES V. MILLER

Both individual and collective rights theorists claim Miller adopted their position. But few Second Amendment scholars spend much time analyzing Miller, because few take it seriously. Most

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<sup>149</sup> *Officers Continue Without Clues In O’Malley Gang Witness Slaying*, *supra* note 17.

<sup>150</sup> *Auto of Slain Gang Member Found Burned*, *supra* note 146.

<sup>151</sup> See *Missouri Convict Sought in Slaying*, OKLAHOMAN, Apr. 20, 1939, at 15.

<sup>152</sup> *Claremore Slayer Suspect Captured*, *supra* note 141; see also *Aide of O’Malleys Arrested in Texas*, *supra* note 144.

<sup>153</sup> See generally *Missouri Convict Sought in Slaying*, *supra* note 151; *Claremore Slayer Suspect Captured*, *supra* note 141.

<sup>154</sup> See *Claremore Man is Found Slain in Gang Killing*, *supra* note 17, at 1; *Aide of O’Malleys Arrested in Texas*, *supra* note 144.

<sup>155</sup> *Former O’Malley Gangster to Start 10-Year Sentence*, *supra* note 142. Taylor later won a wild-cow milking award in the McAlester rodeo. See *Crowd of 24,000 Sees Rodeo in McAlester Prison*, OKLAHOMAN, Oct. 14, 1940, at 4.

<sup>156</sup> Probation Document, *United States v. Layton*, C-3917 (W.D. Ark. 1944).

<sup>157</sup> *Heartsill Ragon, Federal Judge in Arkansas, Dies*, OKLAHOMAN, Sept. 16, 1940, at 1; *Judge Heartsill Ragon*, ARK. DEMOCRAT, Sept. 16, 1940, at 8; *Ragon Rites Wednesday at Fort Smith*, ARK. DEMOCRAT, Sept. 16, 1940 at 1.

<sup>158</sup> Probation Document, *supra* note 156.

<sup>159</sup> See *Morgan*, *supra* note 24.

assume Justice McReynolds was either uninterested in, or incapable of drafting a competent opinion, and dismiss Miller as hopelessly opaque.<sup>160</sup> However, this consensus reflects the identity of the author as much as the quality of his opinion.<sup>161</sup> Many justices were poor draftsmen, but none are as universally despised as McReynolds.<sup>162</sup> The last of the "Four Horsemen," he is remembered only as a cranky bigot, notorious for shunning Justice Brandeis<sup>163</sup> and referring to blacks as "darkies."<sup>164</sup> Even his own, lone biographer characterized him as "an easy man to dislike . . . on occasion intolerant, cantankerous, and rude."<sup>165</sup>

And yet, McReynolds's peers were far more charitable.<sup>166</sup> Holmes considered him "acute."<sup>167</sup> Taft described him as "a man of real ability, and great sharpness of intellect."<sup>168</sup> Frankfurter despised him, but respected his abilities.<sup>169</sup> Even Brandeis conceded that McReynolds "is capable of effective writing."<sup>170</sup> The problem was "his studied avoidance of obiter, even when there may have been an alluring temptation to catch the public eye by some spectacular utterance."<sup>171</sup> Or rather, his "curious notion that opinions

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<sup>160</sup> David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 665 (2000) (claiming "the opinion itself says very little").

<sup>161</sup> See Robert W. Langran, *Why Are Some Supreme Court Justices Rated As "Failures"?*, 1985 SUP. CT. HIST. SOC'Y Y.B. 8, 10 (arguing many judges are ranked failures for ideological reasons).

<sup>162</sup> See Timothy S. Huebner, Book Review, 45 AM. J. LEGAL HIST. 346 (2001) (reviewing JOHN KNOX, *THE FORGOTTEN MEMOIR OF JOHN KNOX* (Dennis J. Hutchinson & David J. Garrow eds., 2002)) (noting that McReynolds "routinely ranks among the least effective or 'worst' justices in the Court's history").

<sup>163</sup> 9 ALEXANDER M. BICKEL, *A HISTORY OF THE UNITED STATES SUPREME COURT: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-21* 354 (1984).

<sup>164</sup> See JOHN KNOX, *THE FORGOTTEN MEMOIR OF JOHN KNOX* 51 (Hutchinson & Garrow eds., 2002).

<sup>165</sup> JAMES E. BOND, *I DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK McREYNOLDS* 135 (1992).

<sup>166</sup> R.V. Fletcher, *Mr. Justice McReynolds - An Appreciation*, 2 VAND. L. REV. 35, 45 (1948).

<sup>167</sup> BICKEL, *supra* note 163, at 355 (quoting Holmes-Laski Letters, I, 413).

<sup>168</sup> *Id.* (quoting letter from W.H. Taft to R.A. Taft, Feb. 1, 1925, Taft Papers).

<sup>169</sup> *Id.* at 356 (quoting Phillips ed, Felix Frankfurter Reminisces 101).

<sup>170</sup> Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 309.

<sup>171</sup> R.V. Fletcher, *supra* note 166, at 45.

were essentially superfluties anyway, and that the less said, the better."<sup>172</sup>

True to form, Miller is quite terse. The nine-page opinion consists primarily of lengthy quotations and string cites, anchored by a few paragraphs of crabbed analysis. Still, it was not an afterthought. Chief Justice Hughes usually assigned opinions at the Saturday conference after argument.<sup>173</sup> But Hughes fell ill in mid-March 1939 and did not return to the bench for several weeks, after Miller was argued and assigned.<sup>174</sup> As the most senior associate, McReynolds assigned cases in Hughes's absence. Apparently, he assigned Miller to himself, presumably because he considered it important.

The NFA found an unlikely champion in McReynolds, erstwhile foe of federal regulation. While McReynolds was a Democrat, he was no New Dealer. On the contrary, he was a Gold Democrat<sup>175</sup> who detested Roosevelt and the New Deal alike.<sup>176</sup> And he hated Attorney General Cummings, too. As the architect of Roosevelt's court-packing plan, Cummings added insult to injury by citing a superficially similar proposal McReynolds himself advanced in 1913.<sup>177</sup>

McReynolds knew gun control was part of the New Deal program. He knew Miller and Layton were gangsters. And he knew Miller was a Second Amendment test case. But he barely addressed the Second Amendment. Instead, he discussed the nature of the militia and the history of its governance. And he concluded the Second

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<sup>172</sup> Bickel, *supra* note 163, at 355.

<sup>173</sup> Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 17-18 (1949).

<sup>174</sup> Freund, *supra* note 134.

<sup>175</sup> OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 630 (Kermit Hall ed., 1992). Gold Democrats supported the gold standard in opposition to William Jennings Bryan's Free Silver movement.

<sup>176</sup> McReynolds considered Roosevelt "utterly incompetent," pointed to farm relief as "evidence of his mental infirmity and lack of stability," and attributed the New Deal to "the forces which control" Roosevelt, who "probably lacks brains to understand what he is doing." Freund, *supra* note 134, at 12 (quoting letters from Justice McReynolds to Robert P. McReynolds (Mar. 20, 1933 & Jan. 10, 1936) (on file with the University of Virginia Library)); Roosevelt reciprocated by snubbing McReynolds when he retired. R.V. Fletcher, *supra* note 166, at 45-46 (citing JAMES FARLEY, JIM FARLEY'S STORY: THE ROOSEVELT YEARS 83 (1948)).

<sup>177</sup> Knox, *supra* note 164, at 108 n.8.

Amendment does not protect short-barreled shotguns because they aren't militia weapons.

Oddly, McReynolds began by holding that the NFA does not violate the Tenth Amendment by infringing state police power. "Considering *Sonzinsky v. United States*, and what was ruled in sundry causes arising under the Harrison Narcotic Act[,] the objection that the Act usurps police power reserved to the States is plainly untenable."<sup>178</sup> But Ragon did not reach Miller's Tenth Amendment claim and the government did not brief it, so it was not properly before the court. Of course, *Sonzinsky* did indeed foreclose most Tenth Amendment objections to the NFA.<sup>179</sup> But McReynolds was notoriously punctilious about jurisdiction.<sup>180</sup> It is surprising he addressed the issue at all.

In fact, McReynolds alone thought the NFA does violate the Tenth Amendment. Today, Congress can regulate virtually anything under the Commerce Clause. But when Congress drafted the NFA in 1934, the Court prohibited federal regulation of intrastate commerce under the Commerce Clause.<sup>181</sup> Because Congress could not regulate directly under the Commerce Clause, it regulated indirectly under the Tax Clause. For example, the Harrison Narcotics Act effectively regulated narcotics by taxing them and enforcing the tax. The Supreme Court held such regulatory taxation did not infringe state police power, so long as it produced some revenue.<sup>182</sup>

The Four Horsemen and their predecessors disagreed.<sup>183</sup> They conceded Congress can both tax narcotics and punish tax evasion, but argued the Harrison Act is "beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is,

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<sup>178</sup> *United States v. Miller*, 307 U.S. 174, 177-78 (1939) (citations and footnote omitted).

<sup>179</sup> Some contemporary commentators noted that the NFA transfer tax and registration requirements were arguably more regulatory than the sales tax at issue in *Sonzinsky*. See *Recent Decisions*, 38 MICH. L. REV. 391, 403-04 (1939).

<sup>180</sup> According to Brandeis, "McR[eynolds] care[d] more about jurisdictional restraints than any of them..." Melvin I. Urofsky, *supra* note 170, at 317.

<sup>181</sup> See *Hammer v. Dagenhart*, 247 U.S. 251, 272-74 (1918).

<sup>182</sup> *United States v. Doremus*, 249 U.S. 86, 94 (1919).

<sup>183</sup> Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 574 (1997).

the reserved police power of the States.”<sup>184</sup> In other words, they thought regulatory taxes violate the Tenth Amendment.

For years, McReynolds continued to object to regulatory taxes on Tenth Amendment and due process grounds, gradually getting lonelier and lonelier.<sup>185</sup> Eventually, even he threw in the towel. In 1937, Max Sonzinsky, “a notorious East St. Louis fence,” challenged the NFA under the Tenth Amendment.<sup>186</sup> McReynolds joined the unanimous opinion upholding the law.<sup>187</sup> And in *Miller*, he relied on *United States v. Jin Fuey Moy*,<sup>188</sup> *United States v. Doremus*,<sup>189</sup> *Linder v. United States*,<sup>190</sup> *Alston v. United States*,<sup>191</sup> and *Nigro v. United States*,<sup>192</sup> the very cases in which he resisted the Harrison Act.

In any case, McReynolds began *Miller* by emphasizing the NFA satisfies the Tenth Amendment only because it is at least nominally a tax, rather than a regulation.<sup>193</sup> As the government pointed out, “even as to this class of firearms there is not a word in the National Firearms Act which expressly prohibits the obtaining, ownership, possession or transportation thereof by anyone if compliance is had with the provisions relating to registration, the payment of taxes, and the possession of stamp-affixed orders.”<sup>194</sup> So,

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<sup>184</sup> *Doremus*, 249 U.S. at 95 (White, C.J., dissenting).

<sup>185</sup> *See, e.g., Casey v. United States*, 276 U.S. 413, 420 (McReynolds, J., dissenting) (“The provision under which we are told that one may be presumed unlawfully to have purchased an unstamped package of morphine within the district where he is found in possession of it conflicts with those constitutional guaranties heretofore supposed to protect all against arbitrary conviction and punishment. The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary.”).

<sup>186</sup> Carl R. Baldwin, *The Impact of Judge Fred L. Wham*, SAINT LOUIS POST-DISPATCH, Feb. 16, 1967, at 3H.

<sup>187</sup> *Sonzinsky v. United States*, 300 U.S. 506 (1937). A couple of months later, McReynolds relied on the 10th Amendment again in his last-ditch dissent to *Steward Machine Co. v. Davis*, 301 U.S. 548, 598-99 (1937) (McReynolds, J., dissenting).

<sup>188</sup> 241 U.S. 394 (1916).

<sup>189</sup> 249 U.S. at 86.

<sup>190</sup> 268 U.S. 5 (1925).

<sup>191</sup> 274 U.S. 289 (1927).

<sup>192</sup> 276 U.S. 332 (1928).

<sup>193</sup> *United States v. Miller*, 307 U.S. 174, 176-78 (1939).

<sup>194</sup> Brief for the United States at 6-7, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696).

whatever it holds, *Miller* does not hold that Congress can regulate firearms directly.

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

McReynolds assumed the Second Amendment guarantees the right to keep and bear arms in order to ensure an effective militia exists. "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."<sup>195</sup> In other words, the Militia Clause empowers Congress to regulate the militia,<sup>196</sup> and the Second Amendment ensures it is armed.

Accordingly, McReynolds devoted most of Miller to analyzing the composition of the militia and the duties of militia service. After consulting "the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators," he concluded the militia consists of "all males physically capable of acting in concert for the common defense."<sup>197</sup> Essentially, everyone subject to conscription.<sup>198</sup> "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."<sup>199</sup> Like the Cooley treatise on which he relied, McReynolds assumed the militia "cannot exist unless the people are

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<sup>195</sup> *Miller*, 307 U.S. at 178.

<sup>196</sup> U.S. CONST. art I, § 8.

<sup>197</sup> *Miller*, 307 U.S. at 179.

<sup>198</sup> Today, the "organized militia" consists of the National Guard and Naval Militia and the "unorganized militia" consists of all current or prospective male citizens between 17 and 45. See 10 U.S.C. § 311 (2000).

<sup>199</sup> *Miller*, 307 U.S. at 179.

trained to bearing arms.”<sup>200</sup> A militiaman may own a firearm because he must know how to use one.

In other words, McReynolds assumed the Second Amendment guarantee ensures those subject to conscription may possess weapons suitable for militia service. And he held it does not protect NFA firearms as a matter of law, because they aren’t suitable for militia service. “In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”<sup>201</sup> A short-barreled shotgun is a weapon, but it is not a militia weapon, and the Second Amendment only protects militia weapons.

Essentially, McReynolds adopted the government’s fallback argument: the Second Amendment does not protect weapons used by criminals.<sup>202</sup> McReynolds often worked directly from the briefs, incorporating elements from them into his opinions.<sup>203</sup> In support of his holding in *Miller*, he cited only *Aymette v. State*, a Tennessee case holding the right “to keep and bear arms” doesn’t guarantee the right to carry a concealed bowie knife.<sup>204</sup> The government cited *Aymette* for the proposition that “the term ‘arms’ as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals.”<sup>205</sup> McReynolds agreed, concluding the Second Amendment only protects weapons reasonably related to militia service, not including

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<sup>200</sup> THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 429 (5th ed. 1883), cited in *United States v. Miller*, 307 U.S. 174, 182 n.3 (1939).

<sup>201</sup> *Miller*, 307 U.S. at 178.

<sup>202</sup> Brief for the United States, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696).

<sup>203</sup> *Knox*, *supra* note 164, at 142.

<sup>204</sup> *Aymette v. State*, 21 Tenn. (1 Hum.) 154 (1840).

<sup>205</sup> Brief for the United States at 18, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696).

short-barreled shotguns. But he did not specify which weapons the Second Amendment does protect or how it protects them.

McReynolds also adopted the government's argument that the Second Amendment did not create a right, but guaranteed a pre-constitutional common law right. "The Second Amendment does not *confer* upon the people the right to keep and bear arms; it is one of the provisions of the Constitution which, recognizing the prior existence of a certain right, declares that it shall not be infringed by Congress."<sup>206</sup> Notably, McReynolds's analysis of the militia relied exclusively on pre-ratification sources.<sup>207</sup> And he closed by linking the Second Amendment guarantee to state constitutional guarantees. "Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below."<sup>208</sup> Apparently, McReynolds assumed the scope of the Second Amendment guarantee depends upon the relevant state constitution. Or at the very least, the guarantees incorporated into the state constitutions illuminate the scope of the right guaranteed by the Second Amendment.

Of course, McReynolds generally assumed the Constitution simply protects common law rights. As he memorably put it in *Meyer v. Nebraska*, the Constitution guarantees "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law

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<sup>206</sup> *Id.* at 9-10 (emphasis in original).

<sup>207</sup> See *United States v. Miller*, 307 U.S. 174, 179-82 (1939) (citing WILLIAM BLACSTONE, 1 COMMENTARIES \*410; ADAM SMITH, 2 WEALTH OF NATIONS 186-202 (Edwin Cannan ed., Methuen 1904) (1776); 1 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE 17TH CENTURY, 498-526 (The MacMillan Company 1904); The General Court of Massachusetts, January Session 1784 (Laws and Resolves 1784, c. 55, pp. 140, 142); Act to Regulate the Militia, ch. 25, 1786 N.Y. Laws 220; Militia Act of 1785, ch. 1, 1785 Va. Acts 1.

<sup>208</sup> *Miller*, 307 U.S. at 182.

as essential to the orderly pursuit of happiness by free men.”<sup>209</sup> And it protects those common law rights against federal and state governments alike. “As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.”<sup>210</sup> And “liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”<sup>211</sup>

Basically, McReynolds believed in a reasonable Constitution. And a reasonable Constitution permits reasonable regulation. So the Second Amendment protects a weapon only if its possession and use “has some reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>212</sup> In other words, *Miller* held the common law right to keep and bear arms only protects weapons related to militia service, not including NFA firearms.<sup>213</sup> Congress can tax NFA firearms because the Second Amendment doesn’t protect them. But *Miller* did not explain what makes a weapon related to militia service. Nor did it explicitly adopt an individual or collective right theory of the Second Amendment. It did not have to. The NFA was reasonable on either theory, as it affected only unprotected weapons.

Some individual right theorists argue *Miller* held the Second Amendment guarantees an individual right to keep and bear any weapon with a military use. They claim the Court upheld the NFA only because *Miller* failed to present any evidence of the many military uses of short-barreled shotguns, including trench and jungle warfare.<sup>214</sup> But machine guns obviously had military uses. Surely *Miller* did not invalidate the NFA tax on machine guns sub

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<sup>209</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (internal citations omitted).

<sup>210</sup> *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

<sup>211</sup> *Meyer*, 262 U.S. at 399-400 (1923).

<sup>212</sup> *Miller*, 307 U.S. at 178.

<sup>213</sup> *Id.*

<sup>214</sup> See, e.g., Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 109 (1987).

silentio.<sup>215</sup> As the First Circuit recognized three years later in *Cases v. United States*, “the rule of the Miller case . . . would seem to be already outdated . . . because of the well known fact that in the so-called ‘Commando Units’ some sort of military use seems to have been found for almost any modern lethal weapon,” including short-barreled shotguns.<sup>216</sup>

Indeed, the government implicitly conceded NFA firearms have military uses. “It may be assumed that Congress, in inserting these provisions in the National Firearms Act, intended, through the exercise of its taxing power and its power to regulate interstate and foreign commerce, to discourage, except for military and law enforcement purposes, the traffic in and utilization of the weapons to which the Act refers.”<sup>217</sup> It nevertheless argued the Second Amendment does not protect NFA firearms because they “form the arsenal of the gangster and desperado.”<sup>218</sup>

The *Miller* Court agreed, concluding “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”<sup>219</sup> While short-barreled shotguns, machine guns, and silencers may have military uses, they aren’t appropriate for militia service. Nor will civilian use help preserve the peace. Relying on *Aymette*, the *Miller* Court assumed the Second Amendment only protects the right to possess weapons “usually employed in civilized warfare,” not “those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin.”<sup>220</sup>

Of course, short-barreled shotguns do have legitimate civilian uses, primarily protection and hunting small game. Pre-NFA, firearms manufacturers had long produced short-barreled shot-

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<sup>215</sup> See David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 666 (2000).

<sup>216</sup> *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

<sup>217</sup> Brief for the United States at 7, *United States v. Miller*, 307 U.S. 174 (No. 696).

<sup>218</sup> *Id.*

<sup>219</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939) (emphasis added).

<sup>220</sup> *Aymette v. State*, 21 Tenn. (1 Hum.) 154, 158 (1840).

guns, or their functional equivalent.<sup>221</sup> However, Miller's gun was homemade, as Stevens never produced a shotgun with a barrel shorter than 18 inches. And in any case, *Miller* assumed taxation, regulation, or even prohibition of NFA firearms is reasonable whether or not they have legitimate civilian uses. As is taxation, regulation, and prohibition of many other varieties of firearm. Miller assumed the Second Amendment only guarantees the right to possess and use a firearm suitable for militia service, not any particular firearm.

Some collective right theorists argue *Miller* held the Second Amendment only protects a collective right to form a militia, or even a state's right to maintain a militia.<sup>222</sup> Many courts have agreed.<sup>223</sup> But this reading is plainly untenable, because the Miller Court assumed Miller and Layton had standing to assert an individual right of some kind.

Arguably, an individual could assert a collective right to participate in militia service.<sup>224</sup> But Miller did not challenge the NFA as a limitation on his right to participate in militia service. He challenged his indictment for transporting an untaxed NFA firearm in interstate commerce. And the Court evaluated Miller's right to possess and use a particular firearm, not his right to join the militia. Everyone knew Miller and Layton were criminals, and unlikely militiamen. They certainly were not pinched during a muster. But the Court did not ask whether Miller and Layton intended to partici-

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<sup>221</sup> Commercial short-barreled shotguns were often marketed as "handy guns." One company sold the "Game Getter" - a single-shot short-barrel shotgun with a wire stock - to bicyclists.

<sup>222</sup> See generally H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (Duke University Press 2002).

<sup>223</sup> For the collective right theory: see *Silveira v. Lockyer*, 312 F.3d 1052, 1086-87 (9th Cir. 2003); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976). For the hybrid theory, protecting the right to own firearms in connection with militia membership: *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1274 & n.18 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

<sup>224</sup> See generally David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000).

pate in militia service. It only asked whether the Second Amendment protects NFA firearms.

Furthermore, McReynolds adopted a colloquial reading of the Second Amendment guarantee. Second Amendment scholars dispute the original meaning of the terms “keep” and “bear.” Individual right theorists claim “keep” meant private ownership.<sup>225</sup> Collective right theorists claim both terms meant military use.<sup>226</sup> But McReynolds assumed “keep” means “possess” and “bear” means “use.”<sup>227</sup> And “to possess and use” a weapon implies private ownership. Basically, McReynolds adopted a traditional, commonsense interpretation of the Second Amendment, assuming it guarantees an individual right to possess and use firearms, subject to reasonable regulation of time, place, and manner.<sup>228</sup>

Alternatively, a cynic could dismiss *Miller* as simply holding the Constitution doesn’t protect criminals. When the Supreme Court upheld the NFA in *Sonzinsky*, “Government attorneys hailed the decision as a material aid in the war against gangsters and gunmen.”<sup>229</sup> And as a former Attorney General, McReynolds surely appreciated the convenience of laws like the NFA. After all, everyone knew *Miller* and *Layton* were gangsters, and “a right exercised in morality” cannot “sustain a right to be exercised in immorality.”<sup>230</sup>

But McReynolds would not have gone along. Sure, he was a bigot. But he was a principled bigot. And his principles demanded neutrality. “That the State may do much, go very far, indeed, in or-

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<sup>225</sup> Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 140 (2007).

<sup>226</sup> See generally Saul Cornell, “Don’t Know Much About History”: *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 657-668 (2002); UVILLER & MERKEL, *supra* note 222; David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People to Keep and Bear Arms,”* 22 LAW & HIST. REV. 119 (2004):.

<sup>227</sup> “In the absence of any evidence tending to show that *possession* or *use* of a ‘shot-gun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to *keep* and *bear* such an instrument.” *United States v. Miller*, 307 U.S. 174, 178 (1939) (emphasis added).

<sup>228</sup> See, *id.* at 178-83

<sup>229</sup> *Court Takes Suits on Security Taxes; Test Cases on Alabama and Federal Acts Before High Tribunal Next Week*, N. Y. TIMES, Mar. 30, 1937, at 17.

<sup>230</sup> *Hoke v. United States*, 227 U.S. 308, 321 (1913).

der to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected."<sup>231</sup> For instance, he objected to the Harrison Act not only because he thought it infringed state police power, but also because he thought it violated due process by shifting the burden of proof to the accused.<sup>232</sup> While the government generally prosecuted only junkies and dealers, the Harrison Act permitted it to prosecute anyone it liked. And lots of people owned narcotics they purchased before Congress passed the Harrison Act.<sup>233</sup>

Ultimately, the *Miller* Court's reading of the Second Amendment simply reflected popular sentiment and conventional wisdom. In 1939, the federal government promoted widespread firearms ownership, providing surplus military rifles to the public in order to ensure civilians knew how to use firearms.<sup>234</sup> And most scholars assumed the Second Amendment guarantees an individual right to possess and use firearms, subject to reasonable regulation.<sup>235</sup>

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<sup>231</sup> *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

<sup>232</sup> See *Linder v. United States*, 268 U.S. 5 (1925); *Casey v. United States*, 276 U.S. 413, 420-21 (1928) (McReynolds, J., dissenting).

<sup>233</sup> *Casey*, 276 U.S. at 421 (McReynolds, J., dissenting) ("Probably most of those accelerated to prison under the present Act will be unfortunate addicts and their abettors; but even they live under the Constitution. And where will the next step take us? When the Harrison Anti-Narcotic Law became effective, probably some drug containing opium could have been found in a million or more households within the Union. Paregoric, laudanum, Dover's Powders, were common remedies. Did every man and woman who possessed one of these instantly become a presumptive criminal and liable to imprisonment unless he could explain to the satisfaction of a jury when and where he got the stuff? Certainly, I cannot assent to any such notion, and it seems worthwhile to say so.")

<sup>234</sup> See *Bellesiles*, *supra* note 104, at 168-170. The United States Army administered this program from 1916 to 1996. It is currently administered by the Civilian Marksmanship Program, a non-profit corporation created by Congress.

<sup>235</sup> *But see* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, in *THE SECOND AMENDMENT IN LAW AND HISTORY* 16, 24 (Carl T. Bogus ed., 2000). While Spitzer claims legal scholars uniformly accepted the collective right theory until 1960, most of the articles he cites simply conclude the right to possess firearms is subject to reasonable regulation.

### CONCLUSION

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

But what does *Miller* tell us about the meaning of the Second Amendment? Maybe nothing. Some believe precedent cannot bind the Constitution of a sovereign people.<sup>236</sup> Others believe the original meaning of a constitutional provision always trumps precedent.<sup>237</sup> Still others believe in an instrumental Constitution, to which precedent supplies only the contingent value of stability.<sup>238</sup> Nevertheless, faint-hearted originalists<sup>239</sup> and incrementalists<sup>240</sup> alike might find *Miller* useful, or even appealing. After all, it anticipates the status quo: federal, state, and local governments may reasonably regulate firearms, but may not prohibit them altogether. In other words, maybe McReynolds got it right, at least this once.

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<sup>236</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 247 (2004).

<sup>237</sup> See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 112 (2004).

<sup>238</sup> See generally RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 62 (Harvard University Press 2003).

<sup>239</sup> See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989).

<sup>240</sup> See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).