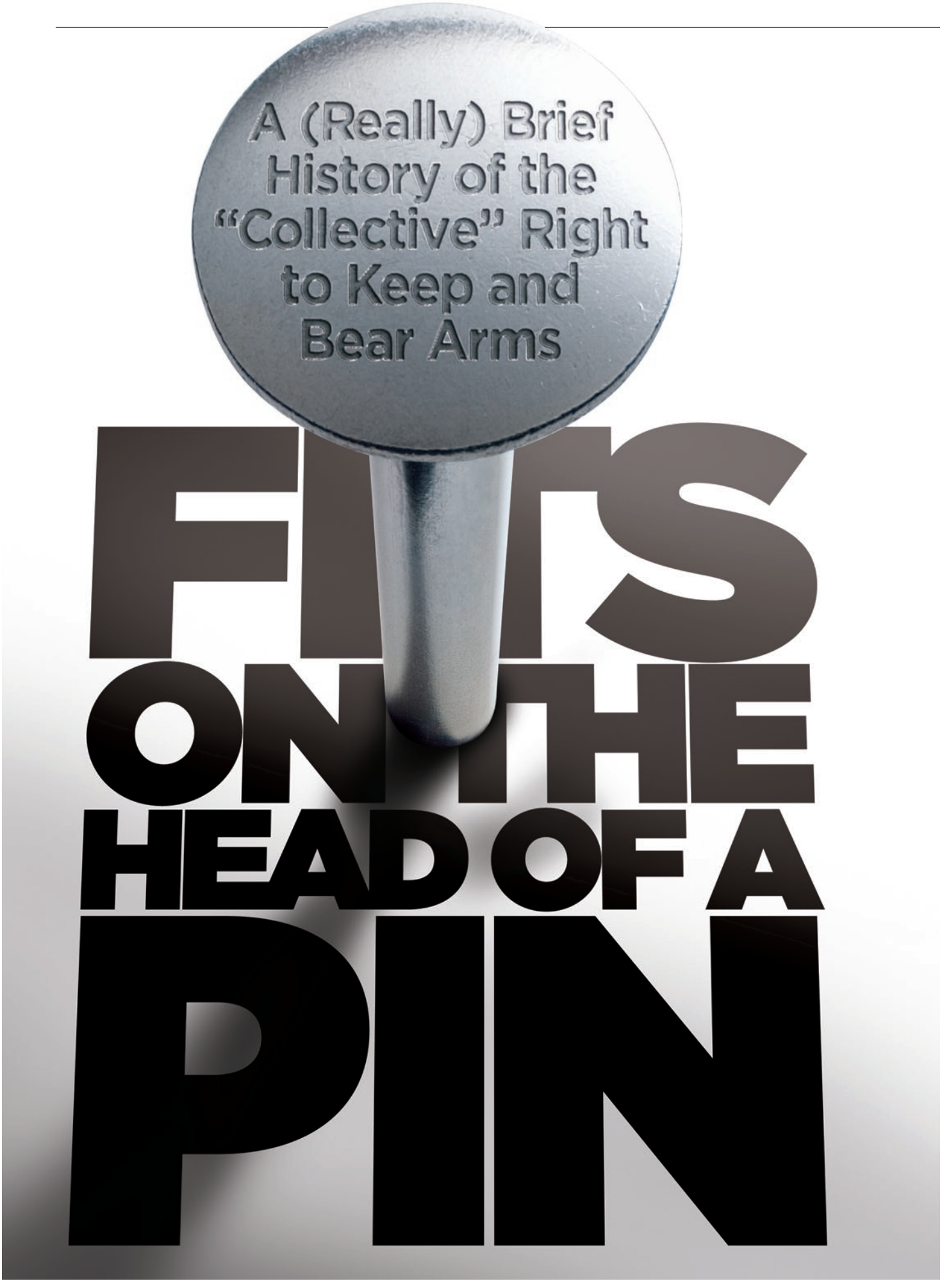
A (Really) Brief History of the "Collective" Right to Keep and Bear Arms
FITS ON THE HEAD OF A PIN

Brief enough to fit on the head of a pin because not a single one of these 19th-century Supreme Court cases supports a "collective" right. In spite of that fact, media and gun-ban groups continue to insist that the U.S. Supreme Court once found for a "collective" right—but, alas, history tells a very different story.

COVER STORY

by DAVID B. KOPEL

As the Supreme Court prepares to hear the case of *District of Columbia v. Heller*, involving the District's bans on handguns and on self-defense with any firearm, gun prohibition advocates claim that the Second Amendment has no modern relevance because it protects only the "collective right" of state governments to control their own militias, or that it protects only the "narrow individual right" of National Guardsmen who are actively engaged in Guard duty. » In reality, however, the Supreme Court's Second Amendment cases from the 19th century entirely refute the prohibitionists' claims about legal history.

Houston v. Moore The first case in which the Supreme Court mentioned the Second Amendment was *Houston v. Moore*, in 1821. During the War of 1812, Mr. Houston refused to appear for federal militia duty. He thereby violated a federal statute, as well as a Pennsylvania statute that was a direct copy of the federal statute. When Houston was prosecuted and convicted in a Pennsylvania court martial for violating the Pennsylvania statute, his attorney argued that only the federal government, not Pennsylvania, had the authority to bring a prosecution; the Pennsylvania statute was alleged to be a state infringement of the federal powers over the militia.

When the case reached the Supreme Court, both sides offered extensive arguments over Article I, section 8, clauses 15 and 16 of the Constitution, which grant Congress extensive powers over the militia. Responding to Houston's argument that congressional power over the national militia is absolute (and therefore Pennsylvania had no authority to punish someone for failing to perform federal militia service), the state's lawyers retorted that congressional power over the militia was shared with the state power. They pointed to the Tenth Amendment, which reserves to the states all powers not granted to the federal government.

If the purpose of the Second Amendment were to guard state government control over the militia, then the Second Amendment ought to have been the heart of Pennsylvania's argument. Instead, Pennsylvania resorted to the Tenth Amendment to make the "state's right" point. Quite plainly, the Pennsylvania government lawyers relied on the Tenth Amendment, rather than the Second, because the Tenth guarantees states' rights, and the Second guarantees an *individual* right.

Justice Bushrod Washington delivered the opinion of the court, holding that the Pennsylvania law was constitutional because Congress had not forbidden the states to enact such laws enforcing the federal militia statute.

Justice Joseph Story, a consistent

supporter of federal government authority, dissented. He argued that the congressional legislation punishing militia resisters was exclusive, and left the states no room to act.

Deep in the lengthy dissent, Justice Story raised a hypothetical: What if Congress had not used its militia powers? If Congress ignored the militia, could the states act? "Yes," he answered:

"If, therefore, the present case turned upon the question, whether a state might organize, arm and discipline its own militia, in the absence of, or subordinate to, the regulations of congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of a like paramount authority to Congress; and if not, then it is retained by the states. The Fifth [sic] Amendment to the constitution, declaring that '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,' may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns, the reasoning already suggested."

After acknowledging that the Second Amendment (mislabeled the "Fifth Amendment" in a typo) was probably irrelevant, Justice Story suggested that to the extent the Second Amendment did matter, it supported his position.

Justice Story's dissent is inconsistent with the collective rights theory that the Second Amendment reduces Congress's militia powers. Immediately after the Second Amendment hypothetical, Justice Story stated that if Congress actually did use its Article I powers over the militia, then congressional power was exclusive. There could be no state control, "however small." If federal militia powers, when exercised, are absolute, then the collective rights theory that the Second Amendment limits federal militia powers is incorrect.

Scott v. Sandford In the 1857 *Dred Scott* case, the Supreme Court ruled that a free black man could not be an American citizen. Writing for the majority, Chief Justice Roger Taney listed the unacceptable (to him) consequences of black citizenship: Black citizens would have the right to enter any state, to stay there as long as they pleased, and to go where they wanted within that state at any hour of the day or night. Further, black citizens would have "the right to … full liberty of speech in public and private upon all subjects which [a state's] own citizens might meet; to hold public meetings upon political affairs and to keep and carry arms wherever they went."

Thus, Chief Justice Taney claimed that the "right to … keep and carry arms" (like the "right to … full liberty of speech," the right to interstate travel, and the "right to … hold public meetings on political affairs") was a right of *American citizenship*. The obvious source of these rights is the United States Constitution. While the right to travel is not textually stated in the Constitution, it has been found there by implication. The rest of the rights mentioned by the Taney majority are rephrasings of explicit rights contained in the Bill of Rights. Instead of "freedom of speech," Justice Taney discussed "liberty of speech," instead of the right "peaceably to assemble," he discussed the right "to hold meetings," and instead of the right to "keep and bear arms," he discussed the right to "keep and carry arms."

The *Dred Scott* case also held that Congress had no power to outlaw slavery in a territory, as Congress had done in the 1820 Missouri Compromise, for the future Territory of Nebraska. Chief Justice Taney's discussion began with the universal assumption that the Bill of Rights limited congressional legislation in the territories:

"No one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the territory peaceably to assemble and to petition the government for redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against itself in a criminal proceeding."

From the unanimous agreement that Congress could not infringe the Bill of Rights in the territories, Taney concluded that Congress could not infringe the property rights of slave owners by abolishing slavery in the territories.

The Taney Court obviously considered the Second Amendment as one of the constitutional rights belonging to *individual* Americans. The "collective rights" Second Amendment could have no application in a territory, since a territorial government is by definition not a state government. And since Chief Justice Taney was discussing individual rights that Congress could not infringe, the only reasonable way to read the chief justice's quote of the Second Amendment is as a reference to an *individual* right.

So according to *Cruikshank*, the individual's right to arms is protected by the Second Amendment, but not created by it, because the right derives from natural law.

United States v. Cruikshank An important part of Congress's work during Reconstruction was the Enforcement Acts, which criminalized private conspiracies to violate civil rights. Among the civil rights violations that especially concerned Congress was the disarmament of Freedmen by the Ku Klux Klan and similar gangs.

After white rioters burned down a Louisiana courthouse that was occupied by a group of armed blacks (following

the disputed 1872 elections), the whites and their leader, Klansman William Cruikshank, were prosecuted under the Enforcement Acts. Cruikshank was convicted of conspiring to deprive the blacks of the rights they had been granted by the Constitution, including the right peaceably to assemble and the right to bear arms. In *United States v. Cruikshank*, decided in 1876, the Supreme Court held the Enforcement Acts unconstitutional. Section five of the new Fourteenth Amendment did give Congress the power to prevent interference with rights granted by the Constitution, the court said. But the right to assemble and the right to arms were not rights granted or created by the Constitution, because they were *fundamental human rights* that pre-existed the Constitution:

"The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source … from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection."

A few pages later, the court made the same point about the right to arms as a fundamental human right:

"The right … of bearing arms for a lawful purpose … is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this … means no more than it shall not be infringed by Congress … leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called … the 'powers which relate to merely municipal legislation … .'"

So according to *Cruikshank*, the individual's right to arms is protected by the Second Amendment, but not created by it, because the right derives from natural law. The Second Amendment protects that right only against violations by the federal government (and federal entities such as the District of Columbia), but not against violations by private citizens.

Presser v. Illinois In the late 19th century, many state governments violently suppressed peaceful attempts by workingmen to unionize. In response, some workers created self-defense organizations. Consequently, some state governments, such as Illinois, responded with laws against armed public parades.

Defying the Illinois law, an organization of German working-class immigrants held a parade in which one of the leaders carried an unloaded rifle. At trial, the leader—Herman Presser—argued that the Illinois law violated the Second Amendment.

In 1886, the Supreme Court ruled against him unanimously. First, said the court, the Illinois ban on armed parades "does not infringe the right of the people to keep and bear arms." This holding was consistent with traditional common law boundaries on the right to arms, which prohibited terrifyingly large assemblies of armed men.

Further, the Second Amendment by its own force is "a limitation only upon the power of Congress and the national government, and not upon that of the states." (Twentieth century cases have abandoned this view with respect to most other provisions of the Bill of Rights.)

Logan v. United States In *Logan*, a mob had kidnapped a group of prisoners being held in the custody of federal law enforcement. The issue before the court in 1892 was whether the prisoners, by action of the mob, had been deprived of any of their federal civil rights.

The court held that there had been no deprivation of federal civil rights, because the mob consisted of private persons, not government officials. The court explicitly relied on the *Cruikshank* ruling, and explained again that the First and Second amendments *both* recognize preexisting fundamental *individual* human rights, rather than creating new rights. Both amendments should be interpreted similarly, and both amendments protect persons from government action, but not from private action. The *Logan* case thus reinforces the principle from *Cruikshank* that the Second Amendment is an individual right comparable to the First Amendment.

Want More Proof?

In fact, the Supreme Court also viewed the Second Amendment as an individual right in several 20th century cases. For a complete rundown of those rulings, see Kopel's 2003 feature story "The Supreme Court and the Second Amendment," now online at **www.nranews.com**.

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realized that the invaders were police officers. Miller killed one of the intruders during the shoot-out.

During Miller's murder trial, the prosecutor asserted to the jury that Miller had been carrying a gun illegally. Upon conviction of murdering the police officer, Miller appealed, and his case reached the Supreme Court in 1894. He claimed that the Second Amendment negated the Texas statute against concealed carrying of a weapon.

The Supreme Court unanimously disagreed: A "state law forbidding the carrying of dangerous weapons on the person … does not abridge the privileges or immunities of citizens of the United States." Moreover, as in the *Presser* case, the Second Amendment, like the rest of the Bill of Rights, only operated directly on the federal government, and not on the states: "[T]he restrictions of these amendments (Second, Fourth and Fifth) operate only upon the federal power."

Brown v. Walker In an 1896 case involving the scope of the Fifth Amendment right against self-incrimination, Justice Stephen Field, the strongest civil liberties advocate of the Supreme Court during the 19th century, wrote a dissent that argued that all constitutional rights ought to be liberally construed. He explained:

"The freedom of thought, of speech and of the press; the right to bear arms; exemption from military dictation; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment, are, together with exemption from self-crimination, the essential and inseparable features of English liberty. Each one of these features had been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the Constitution, and the contests were fresh in the memories and traditions of the people at that time."

This is just the opposite of prohibitionist assertions that the Second Amendment is less fundamental than the first. Justice Field's paragraph is not a list of state powers; it is a list of *personal rights* won at great cost.

Robertson v. Baldwin In 1897, the Supreme Court refused to apply the Thirteenth Amendment (forbidding slavery) to merchant seamen who had jumped ship, been caught and been impressed back into maritime service without due process. The court explained that the Thirteenth Amendment's ban on involuntary servitude, even though absolute on its face, contained various implicit exceptions. In support of the finding of an exception to the Thirteenth Amendment, the court argued that the Bill of Rights also contained unstated exceptions:

"The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well-recognized exceptions

In other words, the court said that **the Second Amendment was just like the First, Fourth and Fifth amendments:** an *individual* right that contained certain implicit exceptions.

arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (Article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (Article 2) is not infringed by law prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (Article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or the verdict was set aside upon the defendant's motion … Likewise, the self-incrimination clause did not bar a person from being compelled to testify against himself if he were immune from prosecution; and the confrontation clause did not bar the admission of dying declarations."

In other words, the court said that the Second Amendment was just like the First, Fourth and Fifth amendments: an *individual* right that contained certain implicit exceptions. Just as libel was not protected by the First Amendment, concealed carry was not protected by the Second Amendment. However, both rights clearly belong to individuals. And because militiamen carry their weapons openly, rather than concealed, the fact that the *Robertson* court felt a need to carve out a concealed carry exception to the Second Amendment shows that the individual right protects all citizens, and is not limited solely to militiamen on duty.

All of the Supreme Court's 19th century cases involving the Second Amendment treated the amendment as an *individual* right—which protected citizens from being disarmed by the federal government while allowing restrictions on the carrying of firearms in public places.

That's probably not something you'll hear on this evening's news.