

July 2015

"Your Weapons, You Will Not Need Them." Comment on The Supreme Court's Sixty-Year Silence On The Right to Keep and Bear Arms

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Gallia, Anthony (2000) ""Your Weapons, You Will Not Need Them." Comment on The Supreme Court's Sixty-Year Silence On The Right to Keep and Bear Arms," *Akron Law Review*: Vol. 33 : Iss. 1 , Article 6.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol33/iss1/6>

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THE RIGHT TO KEEP AND BEAR ARMS

**“YOUR WEAPONS, YOU WILL NOT NEED THEM.”¹
COMMENT ON THE SUPREME COURT’S SIXTY-YEAR SILENCE ON
THE RIGHT TO KEEP AND BEAR ARMS**

I. INTRODUCTION

“Luke, I am your father.”² These words are perhaps the only things more memorable in George Lucas’ futuristic trilogy *Star Wars*,³ than the weapons which young Jedi Knights like Luke Skywalker used to battle the Emperor, Darth Vader and the powerful Forces of the Dark Side. The Light Saber, “weapon of a Jedi Knight, not as clumsy or random as a blaster, an elegant weapon for a more civilized age,”⁴ when not being used to combat these forces of evil and destruction, can be seen garnishing the waistband of any Jedi. Did the Federation⁵ not have a Second Amendment issue to resolve? Was Luke Skywalker a member of some space-age militia? Or, did the Federation, and not the Supreme Court of the United States, finally resolve the conflict surrounding the Second Amendment?

Although not as heavily debated as in the early 1990’s,⁶ perhaps due to

¹ STAR WARS: THE EMPIRE STRIKES BACK, (20th Century Fox 1980). These were the words the aging and frail Jedi Master Yoda said to the young Jedi Knight, Luke Skywalker in STAR WARS: THE EMPIRE STRIKES BACK, Part Two of George Lucas’ epic trilogy. *Id.* As Skywalker departed to face his darkest fears - an out-of-body confrontation with the Forces of the Dark Side, personified by the evil Darth Vader - he soon became aware that his weapon was useless in this imagined duel. *Id.* But one day, he would face Vader, more electronics and twisted metal than human, where his weapon would be needed to fight for his life. *Id.* “<http://www.starwars.com>”, for a more comprehensive analysis, including illustrations and background information of the entire *Star Wars* saga. See *Official Star Wars Web Site* (visited Apr. 10, 1999).

² THE EMPIRE STRIKES BACK (20th Century Fox 1980). As the inevitable showdown finally arrives, Vader echoes these words to the young Skywalker adding, to the already classic conflict of good versus evil, the tragic, life and death battle between father and son. *Id.*

³ See *supra* note 1.

⁴ STAR WARS (20th Century Fox 1977). Obi Wan Kenobi, Jedi Master and teacher of the apprentice Skywalker, describes the weapon to a yet-to-be Jedi Knight, Luke Skywalker.

⁵ The Old Republic is the governing body in Lucas’ trilogy. STAR WARS (20th Century Fox 1977).

⁶ Cf. William A. Walker, *The Privilege To Keep and Bear Arms: The Second Amendment and Its Interpretation*. By Warren Freedman, 88 MICH. L. REV. 1409, 1410-411 (1990) (book review) (criticizing Freedman’s book *The Privilege to Keep and Bear Arms* because of Freedman’s Abbelief in the absurdity of the pro-gun position, and his insistence of a collective nature of the Second Amendment right control the

debate"); Debra Dobray and Arthur J. Waldrop, *Regulating Handgun Advertising Directed at Women*, 12 WHITTIER L. REV. 113 (1991) (discussing the constitutional considerations of regulating gun advertising directed towards women and what legal remedies may be available to the FTC to regulate such advertisements); Thomas M. Moncure, *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991) (noting the current debate over use of particular handguns for hunting or sporting purposes misses the intended aim of the Second Amendment); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1268-87 (1991) (analyzing the distribution of weapons on a nation-wide level); Catherine L. Calhoun, Case Comment, 25 SUFFOLK U. L. REV. 797 (1991) (responding to the 11th Circuit interpretation of Section 102(9) of the National Firearms Act allowing private person who obey the . . . Act's application and registration requirements to manufacture and possess machine guns"); David C. Williams, *Civic Republicanism and the Citizen Militia: the Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (addressing the meaning that the Second Amendment would bear in a modern republican interpretation"); Gregory Inskip, *Our Right to Bear Arms*, 8 WTR DEL. LAW. 21 (1991) (arguing that the right of American citizens to keep and bear arms, including assault rifles is Constitutionally protected); Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-American Reconsideration*, 80 GEO. L.J. 309 (1991) (exploring the Afro-American and American subcultures experiences of being less able to rely on state protection in light of Second Amendment issues); Dominic R. Massaro, *To Keep and Bear Arms: The Sovereign Prerogative of Distributing Power*, 64 FEB N.Y. ST. B.J. 6 (1992) (noting Second Amendment restrictions on duly enacted gun control legislation have not proven convincing to our courts"); Markus Boser, *Go Ahead, State, Make Them Pay: An Analysis of Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313 (1992) (arguing that imposing strict liability [on firearms manufacturers] is a productive and constitutional means for states and localities to lesson the menace of dangerous firearms"); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, (1992) (using principles from the Ninth Amendment to suggest an individual right to arms in the Second Amendment); Jay R. Wagner, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent is there an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407 (1992) (analyzing the debate between proponents and opponents of gun control legislation, particularly the Brady Bill); Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Rifles*, 10 YALE L. & POL'Y REV. 488 (1992) (suggesting that existing information strongly supports a ban on assault weapons"); James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947 (1992) (describing the United States Supreme Court's ruling on the meaning of the Militia Clause as prejudiced"); Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992) (attempting to dissect the rhetoric encompassing the issue of gun control); Robert A. O'Hare, Jr. and Jorge Pedreira, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHN'S L. REV. 179 (1992) (examining the constitutional right to keep and bear arms and the

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the distraction of the issues *de jure*,⁷ the conflict surrounding the Second Amendment has yet to be resolved. And the confrontation between proponents and opponents of gun control legislation seems to be heating up once again.⁸ Many states have begun bringing suit against gun manufacturers on product liability claims,⁹ stirring up what will no doubt be the next round in the continuing battle over the interpretation of the Second Amendment. Despite the lingering controversy, the Supreme Court has once again, decided not to tackle the issue of the exact interpretation of the Second Amendment and the right of the people to keep and bear arms.¹⁰ Do they not have the

controversy surrounding assault weapon legislation”).

⁷ This nation's attention was recently enthralled with the second impeachment trial in its history of a President. President Bill Clinton's fate rested in the hand of Senators whom, while trying to determine the exact procedures of an impeachment hearing, attempted to decide whether having an improper sexual affair with a White House intern was a high crime or misdemeanor.” Meanwhile, in an attempt to divert the short attention span of the American public, in what seemed to be a segment from the movie *WAG THE DOG* (New Line Cinema 1997), our nation's leaders decided dropping bombs on Iraq would cure the evil that lurks in the Third World. And a jury decided to give \$107 million to abortion clinics and abortion doctors for unlawful threatening while abortion activists who published the *The Nuremberg Files*,” an anti-abortion web site that was removed from the internet after the jury verdict, claimed giving that money to abortion doctors is like giving money to Hitler. Sam Howe Verhovek, *Creators of Anti-Abortion Web Site Told to Pay Millions*, N.Y. Times, Feb. 3, 1999, at A9 (defying the injunction of the judge could result in criminal prosecutions of web site supporters and fines up to \$1,000 a day).

⁸ See *infra* Part VII.

⁹ See *infra* Part VII.

¹⁰ See e.g., *Love v. Peppersack*, 47 F.3d 120 (4th Cir. 1995), *cert. denied*, 516 U.S. 813 (1995) (declining to consider the issue of whether the Second Amendment applies to the states through the Fourteenth Amendment or whether the Second Amendment imposes any limitations on governmental authority to regulate firearms).

Along with deciding not to entertain a Second Amendment case, the Court has also declined review of many of the nations hottest controversies:

(1) Government-paid School Vouchers: *Jackson v. Benson*, 578 N.W.2d 602 (1998), *cert. denied*, 119 S.Ct. 466 (1998). The Court refused to review a Wisconsin case dealing with the issue of whether government-paid school vouchers can be used to pay for parochial tuition. *Id.*

(2) Affirmative Action: *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1003 (1996). The U.S. Court of Appeals for the Fifth Circuit ruled that using race as a factor in admissions and financial aid in order to achieve diversity in the student body was impermissible. *Id.* The Supreme Court denied review which has resulted in state universities in Texas, Louisiana and Mississippi abandoning affirmative action programs that are legal for admission in other circuits. *But see* *Lesage v. State of Texas*, 158 F.3d 213 (5th Cir. 1998), *petition for cert. filed*, 67

answer? Are they simply refusing to give it? Do they not want us to have it?

The Supreme Court has not entertained a case involving the Second Amendment¹¹ since 1939 when the Court decided *U.S. v. Miller*.¹² In *Miller*,¹³ two men were charged with unlawfully transporting an unregistered sawed-off shotgun from Oklahoma to Arkansas¹⁴ in violation of the National Firearms Act.¹⁵ Writing for the majority, Justice McReynolds opined that regulating the transfer, in interstate commerce, of shotguns whose barrel lengths were less than eighteen inches and capable of being concealed did “not violate [the] constitutional provision . . . of [the right of the] people to keep and bear arms”¹⁶ It was the opinion of the Court that these regulations did not have a “reasonable relationship between such weapons and a well-regulated militia.”¹⁷ That was it. What bearing does the Court’s decision in *Miller*¹⁸ have on an individual’s right to keep and bear arms? Sawed-off shotguns don’t have a reasonable relationship with a well-regulated militia? For sixty years, the Court has remained silent on the Second Amendment, on any further interpretation of *Miller*,¹⁹ and on whether there actually is an individual right to keep and bear arms.²⁰

U.S.L.W. 3469 (U.S. Jan. 11, 1999) (No. 98-1111).

(3) Separation of Church and State: *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 2370 (1998). In a hotly disputed decision, the Utah Federal Court of Appeal held that forcing a Jewish school student to sing Christian songs did not violate the students First Amendment Rights. *Id.* Again the Supreme Court denied certiorari of the issue. *Id.*

¹¹ AA well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

¹² 307 U.S. 174 (1939) (Justice Douglas took no part in the consideration or decision of the case).

¹³ *Id.*

¹⁴ *Id.* The charge also included transporting a firearm in interstate commerce without having . . . a stamp-affixed written order for the firearm.” *Id.*

¹⁵ National Firearms Act 1 et seq., 26 U.S.C.A. (I.R.C. 1939) § § 2700 et seq., 3260 et seq.; U.S. Const. amend. II.

¹⁶ *Miller*, 307 U.S. at 178.

¹⁷ *Id.*

¹⁸ *U.S. v. Miller*, 307 U.S. 174 (1939).

¹⁹ *Id.*

²⁰ David B. Kopel, et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV 1177, 1178-80 (1995). The authors correctly note that the Second Amendment has been discussed in dicta in two recent Supreme Court decisions: *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (Blackmun, Stevens, White, Scalia, Thomas, JJ., and Rehnquist, C.J., concurring in the judgment and dissenting in part) (emphasizing that the scope of the due process clause is not limited to the precise terms of the specific guarantees elsewhere provided in the Constitution . . . [such as] the freedom of speech, press,

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No other provision in the U.S. Constitution has so conspicuously evaded the Court's review²¹ while fostering such heated public dispute,²² thorough scholarly debate,²³ and incongruous court decisions,²⁴ as the Second

and religion; the right to keep and bear arms"); and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (noting that "A people protected . . . by the First and Second Amendments . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). However, since the time of the Kopel article, the Court has once again suggested in dicta that the Second Amendment may support an individual right theory, *Printz v. United States*, 117 S.Ct. 2365, 2385 (1997) (supporting the position that the Second Amendment does guarantee an individual right).

²¹ An often cited example would be the Third Amendment, which states: "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III. A case involving a Third Amendment issue has never been decided by the Supreme Court.

²² See Thomas B. McAfee and Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Tradition, History, or Precedent Stand in the Way?*, 75 N.C.L. REV. 781, n.19 (1997). See also The Associated Press, *Mom, Gun-Rights Advocates Clash*, N.Y. TIMES, Feb. 18, 1999. Suzzann Wilson, mother of one of the students killed in the Jonesboro school shooting and supporter of the proposed legislation which would make gun owners criminally responsible if children use accessible guns to hurt or kill someone, exchanged verbal insults with gun control opponents whom were criticizing the same state legislation. *Id.* Wilson was quoted as saying "A[t]his is not about the Second Amendment; this is about parents burying their children." *Id.* See also, Katharine Q. Seelye, *Gun-Control Advocates Threaten Liability Bill*, N.Y. TIMES, July 7, 1998, at A1 and Michael J. Ybarra, *A Town's Gun Permits Bring Cash and Controversy*, N.Y. TIMES, Feb. 9, 1996, at A14.

²³ See DAVID CRUMP ET AL., *CASES AND MATERIALS ON THE CONSTITUTIONAL LAW*, 141 (2d ed. Supp. 1995). (emphasizing the poor construction of the Second Amendment making the determination of what, if anything, the Militia clause modifies); see Keith A. Ehrman and Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 32 (1989) (arguing that if the drafters of the Second Amendment wanted to guarantee an individual right to bear arms, they would not have included the militia clause); Todd Barnett, *Gun Control laws Violate the Second Amendment and May Lead to Higher Crime Rates*, 63 MO. L. REV. 155 (1998) (arguing that the Second Amendment guarantees the right of citizens to possess firearms for personal protection and thus should be interpreted as creating a fundamental right in individuals); see David E. Murley, *Private Enforcement of the Social Contract: Deshaney and the Second Amendment Right to Own Firearms*, 36 DUQ. L. REV. 15, 16 (1997) (affirming the interpretation that the Second Amendment implies individuals have a right to "Armed self-defense"); Harold S. Herd, *A Re-Examination of the Firearms Regulation Debate and Its Consequences*, 36 WASHBURN

Amendment. Much has changed in the United States since 1939. Medical science has advanced from the days of the Carboloc Smoke Ball²⁵ to the multi-organ transplant.²⁶ Scientific technology has advanced from the time of the first "horse-less carriage"²⁷ to the arrival of man on the moon.²⁸ Legal

L.J. 196, 198 (1997) (expressing the need for congressional determination of the need for and the scope of firearms regulation"); Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 108-12 (1997) (detailing several standards of review applicable under the Second Amendment); Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 STAN L. & POL'Y REV. 25, 30 (1997) (noting the Framers main concern in adoption of the Second Amendment was a concern of the right to self-defense); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 408 (1998) (arguing that the Second Amendment lives two lives: one in the law and the other in politics, public policy, and popular culture"); Steven H. Gunn, *A Lawyer's Guide to the Second Amendment*, 1998 B.Y.U. L. REV. 35, 46 (1998) (emphasizing that the Second Amendment only prevents the federal government from interfering with state militia's); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989) (suspecting that the absence of legal explanation of the Second Amendment stems from the opposition of private gun ownership and perhaps the subconscious fear that altogether plausible, perhaps even winning, interpretations of the Second Amendment would present real hurdles to those . . . supporting prohibitory regulation").

²⁴ See e.g., *Quilici v. Motron Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (upholding the validity of an ordinance prohibiting the possession of handguns even though a right to bear arms was held to constitutionally extend to individuals rather than limited to the people as a collective body); *Rabbitt v. Leonard*, 413 A.2d 489, 490 (Conn. 1979) (observing that the Second Amendment was to assure the continuation and effectiveness of the state militia); *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. App., 1980) (holding the Second Amendment granted individual citizens the right to bear arms for self-defense); *but cf.* *Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905) (holding that a state constitutional provision did not consider individual rights); *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976) (concluding that the state provision was not directed to guaranteeing individual ownership or possession of weapons); *Chief of Police v. Moyer*, 453 N.E.2d 461, 464 (Mass. 1983) (holding that a statute requiring a citizen to have a license to carry firearms was not unconstitutional).

²⁵ *Carlill v. Carboloc Smoke Ball Co.*, 1 Q. B. 256 (1893).

²⁶ See ORGAN TRANSPLANTATION - CURRENT MEDICAL AND MEDICAL-LEGAL STATUS: THE PROBLEMS OF AN OPPORTUNITY (Alfred M Sadler, Jr. and Blair L. Sadler, eds. 1969), see also, GEORGE E. SALE, THE PATHOLOGY OF ORGAN TRANSPLANTATION (1990).

²⁷ See FRANK ERNEST HILL, THE AUTOMOBILE: HOW IT CAME, GREW, AND HAS CHANGED OUR LIVES, (1967), (detailing life in American society before the invention of the automobile, discussing the design, creation and growth of the automobile industry, and emphasizing the impact of the automobile on modern day society as well as impacts of the automobile on the future). See also, JOSEPH H. WHERRY, AUTOMOBILES OF THE WORLD: THE STORY OF THE DEVELOPMENT OF THE AUTOMOBILE, (1968).

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doctrines like “equal but separate”²⁹ have been obliterated in favor of notions of racial equality.³⁰ The sole certainty with regard to the Second Amendment and the “right of the people to keep and bear arms” however, remains that it is unlawful to transport an unregistered, sawed-off shotgun in interstate commerce³¹ because sawed-off shotguns do not have a reasonable relationship with a well-regulated militia.³²

Interpretation of the Second Amendment can be divided into two different schools of thought; individual rights theorists, and collective rights theorists. Individual rights theorists argue that the Second Amendment creates a right in every person to keep and bear arms.³³ Collective rights theorists advance the position that the Second Amendment creates a collective right in the people as a whole.³⁴ The purpose of this comment is to emphasize the controversy surrounding the Second Amendment and the need for guidance on the issue by the United States Supreme Court. Part II of this article

²⁸ WILLY LEY, *THE CONQUEST OF SPACE*, (1951). HERMANN OBERTH, *MAN INTO SPACE: NEW PROJECTS FOR ROCKET AND SPACE TRAVEL* (G.P.H. DeFreville *trans.*, 1957).

²⁹ In 1896, the Supreme Court announced in its decision of the case of *Plessy v. Ferguson*, 163 U.S. 537, that segregation of the races is reasonable if based upon the established custom, usage, and traditions of the people in the state. This doctrine has become known in U.S. history as “separate but equal.” See *id.* In a superincumbent dissenting opinion, Justice Harlan opined

[o]ur constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.

The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559.

Fifty-eight years later, the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), abolished the doctrine of “separate but equal,” emphasizing that segregation of children in public schools based solely on their race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.*

³⁰ See *Brown v. Board of Education*, 347 U.S. 483; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *United States v. Fordice*, 505 U.S. 717 (1992) (Scalia, J., concurring in the judgment in part, dissenting in part).

³¹ *United States v. Miller*, 307 U.S. 174, 178 (1939).

³² *Id.* But cf. Linda Greenhouse, *High Court Agrees to Decide Just What Congress Meant When It Said Carrying Arms*, N.Y. TIMES Dec. 13, 1997, at A13 (analyzing the decision of the Supreme Court to decide whether “carrying arms” actually means that a weapon has to be within immediate reach of the person possessing the gun in order for it to be considered carried within the meaning of 18 U.S.C.A. 924 (c) (1998)).

³³ See *infra* Part II(A).

³⁴ See *infra* Part II(B).

discusses the text of the Second Amendment to the Constitution and analyzes the two main positions, that of individual rights theorists,³⁵ and collective rights theorists.³⁶ Part III discusses the history and tradition of the Second Amendment.³⁷ Part IV lays out the various positions taken on the actual intent of the Framers.³⁸ Part V provides a brief discussion of the treatment of the Second Amendment by the Supreme Court and federal courts.³⁹ Part VI analyzes the various policy arguments presented by both supporters and opponents of gun control laws.⁴⁰ Part VII focuses on the recent trends evolving in the continuing battle over the right to keep and bear arms.⁴¹

II. THE TEXT OF THE SECOND AMENDMENT

The only issue not disputed with regard to the Second Amendment is the actual language of the Amendment itself. The Second Amendment states: "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."⁴² However, before the Second Amendment to the Constitution was even ratified, debate raged over what the exact wording of the Amendment should be.⁴³ Accepting the Amendment as poorly constructed,⁴⁴ the present key to interpreting its language focuses on whether "the right to keep and bear arms" is an individual or a collective right.⁴⁵

Proponents of the individual right theory advance the position that the Second Amendment guarantees "people", as individual members of society, the right to keep and bear arms.⁴⁶ Whereas, proponents of the collective right theory maintain that the Second Amendment narrowly defines the term "militia"

³⁵ See *infra* Part II(A).

³⁶ See *infra* Part II(B).

³⁷ See *infra* Part III.

³⁸ See *infra* Part IV.

³⁹ See *infra* Part V.

⁴⁰ See *infra* Part VI.

⁴¹ See *infra* Part VII.

⁴² U.S. CONST. amend. II.

⁴³ See e.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 240-44 (1984); Bogus, *supra* note 23, at 323-75 and accompanying text; David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007, 1022-37 (1994).

⁴⁴ *Id.*

⁴⁵ McAfee and Quinlan, *supra* note 22, at 805.

⁴⁶ Robert Harman, Note and Comment, *The People's Right to Bear Arms What the Second Amendment Protects: An Analysis of the Current Debate Regarding What the Second Amendment Really Protects*, 18 WHITTIER L. REV. 411, 413 (1997). Probably the most influential and well-known proponent of the individual right theory is the National Rifle Association (NRA). *Id.*

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to include “only current members of the National Guard, Army Reserve Corps., and other government sponsored military forces.”⁴⁷

A. *Individual Right*

As Robert Harman⁴⁸ notes, the National Rifle Association (NRA)⁴⁹ and the majority of American citizens⁵⁰ believe that the Second Amendment creates an individual right for all people to keep and bear arms.⁵¹ Although others disagree, Harman further believes that the majority of legal scholars throughout the United States endorse the individual right theory.⁵² Individual rights

⁴⁷ *Id.* at 415. See also, Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 42 (1984) (defining the collective right theory).

⁴⁸ Harman, *supra* note 46, at 413.

⁴⁹ See e.g., OSHA GRAY DAVIDSON, *UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL* (1998); JACK ANDERSON, *INSIDE THE NRA: ARMED AND DANGEROUS* (1996); JOSH SUGARMANN, *NATIONAL RIFLE ASSOCIATION: MONEY, FIREPOWER & FEAR*, (1992). See also, Katharine Q. Seelye, *National Rifle Association Is Turning to World Stage to Fight Gun Control*, N.Y. TIMES, April 2, 1997, at A12 (dramatizing the mounting concern in much of the world over gun violence and analyzing the possible effects that regulations may have on gun owners in the United States and on the American gun trade).

⁵⁰ See McAfee and Quinlan, *supra* note 22 at n. 29. McAfee and Quinlan cite several polls including Bob Baker, *The Times Poll: Nation Divided on What Law Should Allow*, L.A. TIMES, Dec. 14, 1991, at A28 (finding that 62% of American citizens believe the right to own a firearm is guaranteed by the Constitution); Ingrid Groller, *The Armies of America*, PARENTS' MAGAZINE, Sept. 1990, at 28 (finding that 53% of American believe the Second Amendment guarantees individual citizens the right to own a firearm); and Gordon Witkin et al., *The Fight to Bear Arms*, U.S. NEWS & WORLD REPORT, May 22, 1995, at 28 (emphasizing that the fact that 75% of American are in favor of an individual right to keep and bear arms). *Id.* See also, Kates, *supra* note 43, at n. 11. (detailing a 1975 national poll in which the individual right theory was favored by 70% of the respondents). Cf. Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 961-62 (citing a 1975 Gallup Poll in which registration of firearms was favored by 67% of respondents).

⁵¹ *Id.*

⁵² See Harman, *supra* note 46, at 413. Harman notes that the majority of legal scholars advance the individual right theory. *Id.* See also Kopel, *supra* note 20, at n.2 (arguing that “[v]irtually all of the scholarship of the last twenty years concurs that the Second Amendment was originally intended to guarantee an individual right”);, STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS* viii (1998). However, there is some dispute as to which position the majority of legal scholars actually advocate. Bogus, *supra* note 23, at 318 (stressing

theorists define “militia” broadly to include all members of the population whether or not any one particular citizen is a member of a military faction.⁵³ Support for the individual right theory stems from the interpretation of other Amendments to the United States Constitution.⁵⁴

As Stephen Halbrook notes, the Fourteenth Amendment protects individual rights to personal security and personal liberty from state violation.⁵⁵

The Supreme Court has broadened these protections, by incorporating the Bill of Rights⁵⁶ through the Fourteenth Amendment,⁵⁷ to include nearly all of the freedoms listed in the Bill of Rights.⁵⁸ The Court, however, has never specifically mentioned the intent of the framers regarding the Second Amendment.⁵⁹ All substantive rights explicitly enumerated in the first eight amendments⁶⁰ are fundamental rights protected, or incorporated, by the Fourteenth Amendment.⁶¹ This being the case, why should the Second

the majority of the work advancing the individual right theory stems from “a small band of true believers who belong not merely to the individual rights school of thought but a particular wing commonly called ‘insurrectionist theory’”[sic.] See also, Kates, *supra* note 43, at 206-7 (advancing the position that the individual right theory is the minority position of legal scholars).

⁵³ For example, the state militia. See Kates, *supra* note 43, at 206-7.

⁵⁴ In particular, individual rights theorists argue that the Second Amendment creates a fundamental right which, as with other fundamental rights, should be incorporated to the people through the Fourteenth Amendment. See HALBROOK, *supra* note 52, at viii. (citing the case of *Griswold v. Connecticut*, 384 U.S. 479, 485 (1965)).

⁵⁵ *Id.*

⁵⁶ U.S. CONST. amend. I-X.

⁵⁷ The particular provision of the Fourteenth Amendment that guarantees rights to citizens against infringement by the state is the Due Process Clause which states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws

U.S. Const. amend. XIV. (emphasis added).

⁵⁸ HALBROOK, *supra* note 52, at Preface n.6. (citing specific examples of Bill of Rights freedoms incorporated through the Fourteenth Amendment including; *Chicago, B.&Q.R.Co. v. Chicago*, 166 U.S. 226 (1897); *Gitlow v. New York*, 268 U.S. 652 (1925); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Robinson v. California*, 370 U.S. 660 (1962); *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

⁵⁹ *Id.* at vi-viii.

⁶⁰ See e.g., Third Amendment, *supra* note 21 and accompanying text.

⁶¹ HALBROOK, *supra* note 52, at 199 n.65. (noting that that Third Amendment, prohibiting the quartering of troops in homes during times of peace, is the only substantive Bill of Rights guarantee not explicitly recognized as being incorporated

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Amendment not share equal grounds with the other Bill of Rights guarantees?
“Incorporation of the Second Amendment [through] the Fourteenth Amendment
logically follows from the Court’s pronouncements concerning the individual
right to keep and bear arms as a fundamental right.”⁶²

through the Fourteenth Amendment by the Court).
⁶² *Id.* at 192.

The Ninth Amendment⁶³ offers further support that the Second Amendment does in fact create a fundamental right. Randy Barnett argues that the Ninth Amendment creates a textual home for unenumerated rights.⁶⁴ The Ninth Amendment protects these unenumerated rights,⁶⁵ A which might be inadvertently omitted or subsequently discovered⁶⁶ against invasion by the government. This argument furthers the contention that the Supreme Court should include the right of self-defense⁶⁷ as a right, as fundamental as one's decision to refuse medical treatment.⁶⁸

There is further support for the proposition that the Second Amendment guarantees an individual right of the people to keep and bear arms. Three times in the last ten years the Supreme Court has offered indirect support for the proposition that the Second Amendment does creates an individual right.⁶⁹

1. The Dicta Of It.

- a. *United States v. Verdugo-Urquidez*

Following the arrest of a Mexican citizen and U.S. resident who was believed to be a leader of an organization created for the purpose of smuggling drugs into the United States, the Drug Enforcement Administration (DEA) searched and seized documents from the suspects home.⁷⁰ The District Court granted the suspect's motion to suppress the evidence, "concluding that the Fourth Amendment, which protects "the people' against unreasonable searches and seizures, applied to the searches."⁷¹ The court further found that "the DEA agents had failed to justify" the search of the premises without a warrant.⁷² The court of appeals affirmed and the Supreme Court granted review.⁷³ Justice Rehnquist noted that the Preamble to the U.S. Constitution "declares that the Constitution is ordained and established by "the People of

⁶³ "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

⁶⁴ Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988).

⁶⁵ Specifically the rights to life, liberty and property. *Id.*

⁶⁶ See McAfee and Quinlan, *supra* note 22, at n.382.

⁶⁷ As well as a right to carry firearms. *Id.* at 886.

⁶⁸ *Id.* n. 399 (citing *Washington v. Harper*, 494 U.S. 210, 221-23 (1990), a decision that recognized a liberty interest in refusing unwanted medical treatment imposed in a prison setting).

⁶⁹ See *infra* Part II(A)(1).

⁷⁰ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260 (1990).

⁷¹ *Id.* at 259 (emphasis added).

⁷² *Id.*

⁷³ *Id.*, (cert. granted, *United States v. Verdugo-Urquidez*, 490 U.S. 1019 (1989)).

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the United States.”⁷⁴ Specifically mentioning the term “people” in the Second Amendment, Justice Rehnquist opined that the term “suggests that “the people’ protected . . . by the Second Amendment, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of the community.”⁷⁵

b. Planned Parenthood v. Casey

In 1992, abortion clinics and physicians brought suit in opposition to the Pennsylvania Abortion Control Act,⁷⁶ challenging the Act on due process grounds.⁷⁷ Justice O’Connor, writing for the Court,⁷⁸ referred to the promise guaranteed in the United States Constitution that “there is a realm of personal liberty which the government may not enter.”⁷⁹ This realm of personal liberty guaranteed by the Constitution “cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.”⁸⁰ These liberties, which include the freedom of speech, press, and religion, *the right of the people to keep and bear arms*, and the freedom from unreasonable searches and seizures, guarantee “freedom from all substantial arbitrary impositions and purposeless constraints.”⁸¹ These interests require a state to exercise a heightened degree of scrutiny in order to justify abridgement of any

⁷⁴ 494 U.S. at 265.

⁷⁵ *Verdugo-Urguidez*, 494 U.S. at 265 (relying on *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) in noting that aliens, attempting to enter this country by unlawful means, are not entitled to First Amendment protections because they do not become people to whom these rights are secured by the Constitution of the United States).

⁷⁶ Act of July 11, 1982, Pub.L. 476, codified in 18 PA. CONS. STAT. §3201-3220. The Act required doctors before performing an abortion to (1) provide information to a woman seeking an abortion to dissuade her from continuing with the abortion and imposed a waiting period of at least 24 hours between the information and the abortion; (2) consent of at least one parent, or a judge’s order for a minor before having an abortion; (3) a signed statement by a married woman stating that her husband was notified, her husband was not the father, she was forcibly impregnated, or she would be harmed physically if she informed her spouse; (4) a showing of a “medical emergency” that would in effect excuse compliance with any of the foregoing requirements, and (5) a public report on every abortion, detailed information on the facility, physician, patient, and steps taken to comply with the Act. *Id.*

⁷⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁷⁸ The majority opinion was actually co-authored by Justices O’Connor, Kennedy, and Souter. *Id.*

⁷⁹ *Id.* at 847.

⁸⁰ *Id.* at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan J., dissenting from dismissal on jurisdictional grounds.).

⁸¹ *Id.* (emphasis added).

of these liberties.⁸²

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c. *Printz v. United States*

⁸² *Id.*

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More recently, the Supreme Court decided the case of *Printz v. U.S.*⁸³ In *Printz*, a county sheriff in Montana⁸⁴ brought suit to enjoin the enforcement of the provisions of Brady Handgun Violence Act⁸⁵ which imposed

⁸³ 117 S.Ct. 2365 (1997) (Thomas J., concurring) (noting that the decision in *U.S. v. Miller*, 307 U.S. 174 (1939) “did not . . . attempt to define, or otherwise construe, the substantive right protected by the Second Amendment”). *Id.* at n.2.

⁸⁴ Jay Printz, county sheriff for Ravalli County, Montana as well as Richard Mack, county sheriff for Graham County, Arizona brought separate actions challenging the constitutionality of the Brady Act’s provisions. *Id.* at 2369.

⁸⁵ 18 U.S.C.A. §922 (Supp. 1999) (amended 1998). Under the Brady Act, firearms dealers who wish to transfer handguns must first: (1) receive from the purchaser a statement containing the name, address and date of birth of the proposed purchaser along with a sworn statement that the purchaser is not included in any of the prohibited classes of purchasers in section 922(s)(3) of the Act; (2) the dealer must verify the identity of the purchaser by examining certain valid identification listed in

requirements on chief law enforcement officers of the states. In a split decision, the Court of Appeals for the Ninth Circuit found the provisions of the Brady Act unconstitutional.⁸⁶ After granting certiorari,⁸⁷ the Supreme Court affirmed.⁸⁸

section 922(s)(1)(A)(i)(II); and (3) provide the chief law enforcement officer of the purchasers state with notice of the contents along with a copy of the Brady Form sections 922(s)(1)(A)(i)(III) and (IV). *Id.* Further, the dealer must wait five business days before completing the sale of the firearm unless the dealer is notified by the chief law enforcement officer that there is no reason to believe that sale would be illegal. *Id.* The Brady Act does “create two significant alternatives to the foregoing scheme.” Printz, 117 S.Ct. at 2369. “A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, section 922(s)(1)(C), or if state law provides for an instant background check, section 922(s)(1)(D).” *Id.* Unless firearms dealers meet one of these requirements, the chief law enforcement officers are required to perform the duties set forth in the Brady Act. *Id.*

⁸⁶ Mack v. United States, 66 F.3d 1025 (9th Cir. 1995) *overruled by*, Printz v. United States, 117 S. Ct. 2365.

⁸⁷ Printz v. United States, 518 U.S. 1003 (1996) (granting cert.).

⁸⁸ Printz v. United States, 117 S. Ct. 2365 (1997).

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In his concurring opinion, Justice Thomas specifically addressed the Second Amendment issue.⁸⁹ “The Second Amendment similarly appears to contain an express limitation on the government’s authority.”⁹⁰ Stating that *U.S. v. Miller*⁹¹ was in no way an attempt to determine the exact nature of the *substantive right* protected by the Second Amendment,⁹² Justice Thomas agreed that the Court “has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment.”⁹³ Justice Thomas further suggested that if the Second Amendment does guarantee a personal right to keep and bear arms, there is a strong argument that the Government’s regulatory scheme, “as it pertains to the purely intrastate sale or possession of firearms, runs afoul of [the Second] Amendment’s protections.”⁹⁴

Three times in the last ten years, three separate Justices have *suggested* an individual right to keep and bear arms.⁹⁵ Although these *suggestions* remain dicta in cases whose ultimate issues pertain to different matters, it seems clear that individual Justices believe there is an individual right to keep and bear arms, yet that ultimate issue has yet to be decided.

B. Collective Right

The majority of “collective right” theorists advance the position that the Second Amendment is merely anachronistic⁹⁶ in nature.⁹⁷ Thomas McAfee and Michael Quinlan argue that this anachronistic approach can be divided into three categories.⁹⁸ The first position rests on the notion that the Second

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 307 U.S. 174 (1939).

⁹² *Printz*, 117 S. Ct. 2365.

⁹³ *Id.*

⁹⁴ *Id.* Justice Thomas further noted that “perhaps at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms ‘has justly been considered, as the palladium of the liberties of a republic.’” *Id.*

⁹⁵ Emphasis added.

⁹⁶ “Anachronism: (1) Representation of someone as existing or something happening in other than the chronological, proper, or historical order. (2) One that is out of its proper chronological order.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 65 (3rd ed. 1992).

⁹⁷ McAfee and Quinlan, *supra* note 22, at 783-805 and accompanying text. This anachronistic approach follows the reasoning that the Second Amendment was drafted because of the nature of the environment in colonial America but that it has, in effect, no bearing on modern society because the present state of America is much different than in the colonial period. *Id.* at 738-89. Harman, *supra* note 46, at 414-15.

⁹⁸ McAfee and Quinlan, *supra* note 22, at 799-801.

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Amendment pertains strictly to militias and not to guns themselves.⁹⁹ Thus, the fact that the traditional notion of the militia no longer exists,¹⁰⁰ there is no reason to even invoke the Second Amendment¹⁰¹ because it has no direct bearing on the gun control issues.¹⁰² On its face, this argument is inconsistent with the actual text of the Second Amendment. Nothing in the language of the Amendment suggests that it pertains solely to militias.¹⁰³ The Amendment clearly states “the right of the *people* to keep and bear arms shall not be infringed.”¹⁰⁴

Secondly, collective rights theorists advance the position that the issue of whether the Second Amendment guarantees an individual right to keep and bear arms has already been resolved, rendering moot any further debate over the issue.¹⁰⁵ Proponents of this argument believe that gun rights lobbyists have simply “fabricated” claims of an individual right guaranteed by the Second Amendment.¹⁰⁶ This argument relies on an idealistic interpretation of *Miller*¹⁰⁷ to conclude that the Supreme Court has decided the issue. Nowhere in *Miller* did the Court address the substantive right of the people to keep and bear arms.¹⁰⁸ The fact that collective rights theorists believe that the issue has been resolved is simply incorrect.¹⁰⁹

Lastly, collective rights theorists acknowledge that traditionally under the Second Amendment, citizens did have a personal right to keep and bear arms however, because the concept of a general militia no longer exists,¹¹⁰ the

⁹⁹ *Id.*

¹⁰⁰ *Id.* at n. 47. Specifically the authors are referring to traditional notions of colonial militia’s “necessary for the security of free state,” or the modern National Guard. *Id.* There is no question that militias do still exist, but these modern militias do not share the same threats as those of their colonial counterparts. Regardless of the notion of militia, the collective rights theorists believe that the Second Amendment rights has no bearing on the gun issues itself thus rendering the argument irrelevant. *Id.*

¹⁰¹ *Id.* (“according to this view, the right to keep and bear arms still exists, but as with the Third Amendment right not to have soldiers quartered in your home, it has no relevance”).

¹⁰² *Id.*

¹⁰³ “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ McAfee and Quinlan, *supra* note 22, at 799-800.

¹⁰⁶ *Id.* at n. 47 (quoting Andrew Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U.L. REV. 57, 128 (1995)).

¹⁰⁷ *United States v. Miller*, 307 U.S. 174 (1939).

¹⁰⁸ *Id.*

¹⁰⁹ See McAfee and Quinlan, *supra* note 22, at n. 374.

¹¹⁰ *Id.* at 800. This general concept of militia included “all adult males who [made] up the political communities within the states” *Id.* at 800-01.

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personal right to arms likewise no longer exists.¹¹¹ Collective Rights theorists argue that the fact that citizens in modern society don't share or understand the same concerns under which the founding father's drafted the Second Amendment,¹¹² in much the same way, the central purpose for the Second Amendment is no longer applicable to modern society.¹¹³ At the core of this position lies the argument that modern interpretation of the Second Amendment means something completely different than it did at the time the Amendment was drafted.¹¹⁴

Assuming, *arguendo*, that this argument has merit, it does not negate the need for interpretation of the exact substantive right guaranteed by the Second Amendment. The modern world may very well be completely different than the world in which our founding fathers drafted and ratified the Constitution of the United States but that does not automatically void certain provisions of the document because people believe they may no longer be applicable. The drafters of the Constitution no doubt anticipated provisions of the Constitution may need to be changed therefore included in the Constitution a provision to make those changes if and when necessary, it's called Article V.¹¹⁵

The very fact that these competing positions do exist, each having strong connections to history, tradition and policy arguments, should persuade the Supreme Court to address the issue. However, at least for the time being, the debate is confined to legal scholars, gun control activists and opponents, and every Luke Q. Skywalker interested in having exactly what the Constitution allows or prohibits.

III. THE HISTORY AND TRADITION OF THE SECOND AMENDMENT

Because so much of this country's history and tradition can be traced

¹¹¹ *Id.*

¹¹² That is to say the idea of a militia being necessary to the security of a free state.

Id.

¹¹³ *Id.*

¹¹⁴ *Id.* at 802.

¹¹⁵ Article V to the Constitution of the United States states:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislature of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intent and Purposes, as part of this Constitution, when ratified by the Legislature of three fourths of the several States

U.S. CONST. art. V.

back to our forefathers, an analysis of the Second Amendment would scarcely be complete without a basic understanding of the development of the right to keep and bears arms in England.¹¹⁶ A provision guaranteeing the right to have arms was expressly contained in the English Bill of Rights of 1689.¹¹⁷ The English right to possess weapons was not only a privilege but also a duty.¹¹⁸ Joyce Lee Malcolm proposes several purposes of the English Bill of rights with regard to weapons including enabling English citizens to provide for their common defense;¹¹⁹ affording a means of self defense to individual citizens ;¹²⁰ permitting citizens to aid law enforcement in capturing and detaining criminals;¹²¹ and finally, and arguably most important, protecting individual liberties from the threat of tyranny by the government.¹²²

The people's right to keep arms protected the right of all individuals to possess firearms as a means of defense.¹²³ The English right was not limited to maintaining militias or other armed forces, but provided for an individual right to carry arms.¹²⁴ Thus the right of the English citizen, both individually as well as collectively, to bear arms for self-defense and revolution against an oppressive government, became part of the English common law guarantee.¹²⁵

However, the English legislature attempted to limit this right by prohibiting

¹¹⁶ For a thorough discussion of the English Bill of Rights and analysis of the history of the English tradition to bear arms, see STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (2d. ed. 1994).

¹¹⁷ JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* at iv (1994).

¹¹⁸ *Id.* at 1-11.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See HALBROOK, *supra* note 116, at 44.

¹²³ *Id.* *But cf.* Bogus, *supra* note 23, at 376-379. Bogus argues that Malcolm's theory of an individual right in England is misplaced. *Id.* Bogus' position is that in order for Malcolm's theory to succeed, one must believe that the removal of the common defense provision created a new right, not previously in existence in England. *Id.* Bogus finds this position to be contrary to the intent of Parliament, which unanimously agreed that no new rights were being created by the Declaration of Rights. *Id.*

¹²⁴ See HALBROOK, *supra* note 52 at 44 explaining that this individual right developed primarily in response to prosecutions of those who rode armed to terrify the king's subjects and who possessed arms in violation of the gun laws. In response to these prosecutions, which were based on statutes supportive of monarchical power and unequal privilege, the courts acquitted defendants whose only alleged offense was the bare possession of firearms since having arms per se was a liberty allowed by the common law.

Id.

¹²⁵ HALBROOK, *supra* note 116, at 44.

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Irishmen and Scotsmen from possessing arms unless they could be “expected to support English domination.”¹²⁶ It was against this backdrop that the Framers of the United States Constitution sought to determine, define and delineate the rights that would be guaranteed to the citizens of colonial America.

IV. THE FRAMER’S INTENT OF THE SECOND AMENDMENT

The British monarch attempted to impose similar provisions as they did against the Irish and the Scotsmen, against the American colonists.¹²⁷ The colonists however, believed they were guaranteed the same common-law rights,¹²⁸ as their British counterparts and “sought to preserve their ancient liberties.”¹²⁹ The provisions of the English Bill of Rights provided our founding fathers the framework for the first ten amendments to the United States Constitution.¹³⁰ The founding father’s sought to protect rights they believed were guaranteed to them under the English Bill of Rights, including the right to arms.¹³¹ When the time arrived for actual confrontation in the Americas, the colonists used the very weapons that the British monarch sought to prohibit to fight for their eventual freedom.¹³² In the ensuing 200 plus years, weapons have had a profound impact on life in America.¹³³

Positions on the Framers intent of the Second Amendment, however, are as varied as the number of years since the Court’s decision in *Miller*.¹³⁴ Although most scholars do not agree on the exact interpretation of the Second Amendment,¹³⁵ or intent of the Framers, most do agree that the seeds of the Second Amendment to the United States Constitution were planted by the English Bill of Rights of 1689.¹³⁶ Following the acceptance of the English Bill of

¹²⁶ *Id.* at 54.

¹²⁷ *Id.*

¹²⁸ Including the right to keep and carry arms.

¹²⁹ HALBROOK, *supra* note 116, at 54.

¹³⁰ See MALCOLM, *supra* note 117, at iv.

¹³¹ HALBROOK, *supra* note 116, at 55.

¹³² *Id.*

¹³³ See *infra* notes 167-175 and accompanying text.

¹³⁴ See e.g. Vandercoy, *supra* note 43, at 1010-37.

¹³⁵ See *supra* note 6.

¹³⁶ “That the Subjects, which are Protestants, may provide and keep Arms, for their common defense.” MALCOLM, *supra* note 117, at ix and 118. See also, Harman, *supra* note 46, at 417, (explaining the revision of the original draft by elimination of the common defense provision and replacement of two phrases serving as restrictions on the right to keep and bear arms. The provision ultimately stated: “that the Subjects which are Protestants may have Arms for their Defense suitable to their Conditions and as allowed by Law.”). See also Bogus, *supra* note 23, at 377 (agreeing with

Rights as a pattern for a colonial constitution, the controversy in colonial America was divided among the Federalists and the Anti-Federalists.¹³⁷

A. *The Federalists View*

Following the submission of the United States Constitution for ratification in 1787, the Federalists,¹³⁸ skeptical of the proposed bill of rights, believed that the right to arms was premised on the right to revolution.¹³⁹ Supporters of the proposed Constitution argued that “it conferred no federal power to deprive the people of their rights, because there was no explicit grant of such power and because the state declarations of right would prevail.”¹⁴⁰ These supporters promised all individuals that the right to keep and bear arms would be more than a paper right¹⁴¹ and argued against the proposed Bill of Rights being included in the Constitution.¹⁴² They guaranteed that this individual right “would render an armed citizenry [in the United States] more powerful than any standing army.”¹⁴³

B. *The Anti-Federalist View*

The Anti-Federalists argued that without a Bill of Rights protecting the creation of standing armies,¹⁴⁴ a state of disarmament would occur leading the entire population into oppression.¹⁴⁵ Anti-Federalists argued for ratification of a Constitution that included a Bill of Rights.¹⁴⁶

Throughout the debate over ratification of the United States Constitution was the generally accepted understanding that the right to keep

Malcolm that the Second Amendment is a derivation of the English Bill of Rights of 1689).

¹³⁷ See HALBROOK, *supra* note 116, at 65-72.

¹³⁸ For a thorough discussion of the Federalist position, see *id.* at 66.

¹³⁹ *Id.* at 67. “[i]f the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right to self-defense which is paramount to all positive forms of government, . . .” *Id.* (quoting THE FEDERALIST NO. 28, at 173 (Alexander Hamilton) (Random House 1937)) “. . . [I]ittle more can reasonably be aimed at, with respect to the people at large than to have them properly armed and equipped; . . .” *Id.* (quoting THE FEDERALIST NO. 29, at 178-79 (Alexander Hamilton) (Random House 1937)).

¹⁴⁰ HALBROOK, *supra* note 116, at 68.

¹⁴¹ *Id.* at 69.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Including state militias. See *Id.*

¹⁴⁵ HALBROOK, *supra* note 52, at 69.

¹⁴⁶ *Id.* at 70.

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and bears arms was an individual right.¹⁴⁷ However, a debate ensued over whether a written bill of rights¹⁴⁸ should be included in the Constitution, and whether a provision guarding against standing armies or select militia's was necessary."¹⁴⁹

V. PRECEDENT AND THE SECOND AMENDMENT

A. *Supreme Court Cases*

The United States Supreme Court has directly addressed the Second Amendment issue four times in its history.¹⁵⁰ In every one of these decisions, the Court, following its decision in *Barron v. Mayor of Baltimore*,¹⁵¹ has held that

¹⁴⁷ *Id.* at 72. “[I]t was absolutely necessary to carry arms . . . that it was in the law of nature to every man to defend himself, and unlawful for any man to deprive him of those weapons for self defense.” *Id.* at n.115. (quoting the BOSTON INDEPENDENT CHRONICLE, Oct. 25, 1787.)

¹⁴⁸ Which included the right to keep and bear arms. HALBROOK, *supra* note 52, at 73.

¹⁴⁹ *Id.*

¹⁵⁰ Specifically, the Court decided three other cases before *United States v. Miller*, 307 U.S. 174 (1939):

U.S. v. Cruikshank, 92 U.S. 542 (1875). The Defendants were indicted for conspiracy under the sixth section of the Enforcement Act (16 Stat. 140) for “banding together, with intent unlawfully and feloniously to injure, oppress, threaten, and intimidate two” African American citizens. *See id.* at 544. In addressing the Second Amendment issue, the Court held that the Second Amendment “is one of the Amendments that has no other effect than to restrict the powers of the national government, 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 [police powers].” *See id.* at 553.

Presser v. Illinois, 116 U.S. 252 (1886). The Defendant was indicted for a violation of Article 11 of the Military Code of Illinois (Act May 28, 1879; Laws 1876, 192) which prohibited men from associating together as a military company or organization. *Id.* at 253. Again addressing the Second Amendment issue, the Court held that the Second amendment “is a limitation only upon the power of Congress and the national government, and not upon that of the state.” *See id.* at 265. The Second Amendment has no other effect. *Id.*

Miller v. Texas, 153 U.S. 535 (1894). The Defendant was indicted for murder, found guilty and sentenced to death. *Id.* The Defendant brought suit claiming that the Texas statute prohibiting the carrying of dangerous weapons infringed upon his right as a citizen of the United States and was in conflict with the Second Amendment. *Id.* Briefly discussing the Second Amendment issue, the Court once again held that “it is well settled that the restrictions of the [Second Amendment] operate only upon the federal power, and have no reference whatever to proceeding in state courts.” *See id.* at 538.

¹⁵¹ 32 U.S. 243 (1833). The issue decided in *Barron* dealt with rights that were not

the rights created by the Bill of Rights were not enforceable against the states.¹⁵² However, the holdings of these cases do not have an actual relationship to the issue of incorporation of the Second Amendment in light of the Court's decision in later cases.¹⁵³ Thus an argument that the Second Amendment either creates or prohibits an individual right, based on precedent, appears to be an issue that the Court has yet to decide. More importantly however, is the question of whether the Second Amendment guarantees a fundamental right to every citizen through incorporation of the Fourteenth Amendment.¹⁵⁴

B. Federal Court Cases

Since 1939, federal courts have adopted the position that the Second Amendment creates a state's right.¹⁵⁵ A state's right approach follows the reasoning that the "the Second Amendment right "to keep and bear arms" applies only to the right of the state to maintain a militia and not to the individuals right to bear arms."¹⁵⁶ The majority of federal courts follow this position.¹⁵⁷ However, this position appears to be inconsistent with the Supreme Court's holding in *Miller*.¹⁵⁸ In *Miller*, the Supreme Court held that the right to keep and bear arms was a right retained by citizens who "were expected to appear bearing arms supplied by themselves . . ." ¹⁵⁹ not by the state.

VI. POLICY AND THE SECOND AMENDMENT

What is proffered as the single most convincing argument for prohibiting citizens from keeping and bearing arms is the violence that is so prevalent in modern society. One need only obtain a daily newspaper to find the most recent crime perpetrated with the assistance of a gun.¹⁶⁰ The

enforceable against the states and not directly or indirectly with the Second Amendment. *Id.*

¹⁵² *Id.* at 247.

¹⁵³ See HALBROOK *supra* note 52, at 182-99.

¹⁵⁴ See *supra* Part II(A).

¹⁵⁵ See Wagner *supra* note 9, at 1409. (citing Stevens v. United States, 440 F.2d 144 (6th Cir. 1971), holding that the Second Amendment protects the rights of states to arm organized military units).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1413-14 (listing the First, Third, Fourth, and Eighth Circuit Courts of Appeals, as well as a District Court for the Southern District of Texas as applying the state's rights approach when addressing issues of Second Amendment interpretation). For a more detailed list of Circuit Court decisions addressing the Second Amendment and the interpretation of *Miller*, see *id.* at n. 32-39.

¹⁵⁸ United States v. Miller, 307 U.S. 174 (1939).

¹⁵⁹ *Id.* at 178-79.

¹⁶⁰ See e.g., David W. Chen, *Lawsuit Against a Village Tests the Limits of Gun*

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violence is no longer just a problem in heavily populated urban areas. Random killings,¹⁶¹ elementary and high school shootings resulting in mass deaths¹⁶² and children wreaking havoc on their family members have thrust “Small Town America’ into the national spotlight.¹⁶³ And these crimes that draw the attention

Liability, N.Y. TIMES, Feb. 20, 1999, at B3 (discussing the murder of Charles Campbell, age 37 in October 1996. Campbell was fatally shot by an off duty police officer during an altercation involving a parking space. The off-duty officer, Richard D. DiGuglielmo was convicted of murder and sentenced to twenty years to life in prison); David Firestone, *Louisiana Shooting Kills 3 at Church and One at Home*, N.Y. TIMES, Mar. 12, 1999, at A14. (analyzing the shooting deaths of several church goers by a twenty-two year old homeless man named Shon Miller who “kicked open the church doors during a Wednesday night Bible class and started shooting, killing three people and wounding four, two critically”); *Maryland Man Kills Wife at Courthouse*, N.Y. TIMES, Mar. 12, 1999, (describing a routine divorce proceeding as calm followed by violence as a jilted former husband shot his estranged wife to death and critically wounded her daughter in a courthouse parking lot just moments after the woman was granted the divorce); *Man Dies in Shootout at University*, N.Y. TIMES, Mar. 15, 1999 (discussing the shooting death of a former student at Indiana State University who fired on school officers after being stopped for an alleged burglary).

¹⁶¹ See e.g., Ted A. Oshodi, *City’s Crime Statistics Show Toll Handguns Take*, THE COLUMBUS DISPATCH, Mar. 11, 1994, at 11A (analyzing statistics that show the use of handguns in committing crimes is rising to the level with car accidents as a cause of death in the United States); Donn Esmonde, *Carnage Proves It Is Mad to Allow Private Handguns*, THE BUFFALO NEWS, Jan. 7, 1994, at local section (expressing disgust with the amount of killings which involved the use of handguns in the Buffalo area); Susan Glick, *It’s Not The F.B.I.’s ‘Unknown’ Assailants Doing the Killing, It’s Guns*, THE ARIZONA REPUBLIC, Jan. 3, 1995, at B5. (concluding that for the first time in history more people are killed by strangers than by family members or friends); Editorial, *The Gun Craze Must Stop*, N.Y. DAILY NEWS, May 3, 1995, at 28 (discussing the ramifications of the aftermath of the Oklahoma City bombing).

¹⁶² See Ellen Freudenheim, *Sounding the Alarm on Kids and Guns*, THE CHICAGO TRIBUNE, May 1, 1998, at 22 (calling for a national protest of gun violence against children as a result of the shooting deaths of several school students in Jonesboro by other classmates with high powered rifles); Editorial, *School Guns; Progress Noted, But Younger Trend a Fear*, THE COMMERCIAL APPEAL (Memphis, TN), June 5, 1998, at A16 (emphasizing the “chilling upward trend among elementary school children who go to class armed”); Lizabeth Cardenas, *Schools Invest in Gun Safety; Three Districts Order Videos Despite Lack of Area Accidental Shootings*, THE DALLAS MORNING NEWS, Apr. 10, 1997, at 1H (discussing a proactive reduction in gun violence by several school districts ordering videos stressing the dangers of handguns); Joe Carroll, “*Silent Marches Mark Growing Concern About Children’s Access to Guns*,” THE IRISH TIMES, May 2, 1998, at 15.

¹⁶³ See Fox Butterfield, *Guns Blamed for Rise in Homicides by Youths in the 80’s*, N.Y. TIMES, Dec. 10, 1998, at 29 (quoting statistics from Professor James Alan Fox,

of the world to previously unheard of towns are typically committed with the assistance of a handgun.¹⁶⁴ Proponents of gun control legislation typically blame the rise in the level of violent crime on the increase in the number of guns in society.¹⁶⁵

The core of the policy argument for stricter gun control focuses on the rationale that the United States is the only democracy in the modern world that does not impose strict gun control laws.¹⁶⁶ Advocates of stricter gun control laws argue that as a direct result of these lenient laws, the United States suffers a much higher crime rate than those democracies that [do] impose strict gun controls.¹⁶⁷ Proponents of stricter gun control laws, advance the position

Dean of the College of Criminal Justice at Northwestern University saying that “the rate of homicide by juveniles 14 to 17 years old jumped from 8.5 per 100,000 in 1984 to 30.2 per 100,000 in 1993, then declined to 16.5 per 100,000 in 1997.” *Id.* Also emphasizing that “virtually all the increase in homicides by juveniles in the late 1980’s was attributable to crimes committed with handguns, not to a change in the nature of teen-agers”). See generally, FRANKLIN ZIMRING, *AMERICAN YOUTH VIOLENCE* (1998).

¹⁶⁴ See e.g., Ann Landers, *Children and Handguns Make For a Poor Mix*, THE CHICAGO TRIBUNE, Jan. 19, 1991, at 22 (expressing concern over the number of children under the age of eighteen who are killed by handguns each year in suicides, homicides and accidents); John Sanko and Sue Lindsay, *State High Court Upholds Law on Kids and Guns; Juveniles Accused of Carrying Handguns Can Be Denied Bail*, DENVER ROCKY MOUNTAIN NEWS, Mar. 14, 1995, at 6A. (reinforcing the intolerance of children who use handguns to commit crimes).

¹⁶⁵ See e.g., Michael Janofsky, *New Program in Richmond is Credited for Getting Handguns Off Streets*, N.Y. Times, February 10, 1999 (crediting Project Exile for helping reverse years of rising crimes rates in Richmond by moving gun offenses into the federal system); Seelye, *supra* note 19, and accompanying text; Egan, *infra* note 205, and accompanying text.

¹⁶⁶ See DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY*, 13 (1992) (Prometheus Books).

¹⁶⁷ See *id.* Specifically Kopel discusses the gun controls in other countries:

Japan: The Japanese government does allow a small amount of the civilian population to possess guns. *Id.* at 20. Guns that are permitted include shotguns used for hunting and for skeet and trap shooting, but the gun owner must first submit a lengthy license application. *Id.* at 20 and footnote 2. Handguns and rifles are illegal in Japan and no one may possess, use or even hold a firearm without the proper license. *Id.* As a direct result of these strict laws, gun violence in Japan is almost non-existent. *Id.* at 21. “Japan experiences an average of less than 200 annual violent crimes committed with a handgun,” most of which are committed by members of Japanese organized crime groups. See *id.* Cf., Mary Jordan, *Japan Clamors for Stricter Gun Laws; Though Shooting Deaths Still Rare by U.S. Standards, Citizens Concerned*, The Washington Post, A23, March 16, 1997.

Great Britain: Great Britain requires gun owners to apply for a special license and gun owners must prove to British authorities that the “possession of firearms will not

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that adopting stricter gun control laws in the United States¹⁶⁸ would certainly

endanger public safety.” See *id* at 59 (quoting former U.S. Supreme Court Justice Lewis Powell). Of all the homicides in Great Britain, approximately 8% are committed with the assistance of some form of a weapon. *Id. But cf.*, Sarah Lyall, *Britain May Forbid Private Ownership of Most Handguns*, *The N.Y. Times*, A1, October 17, 1996.

Canada: Canada has one of the highest gun ownership rates in the world but also employs a uniform federal system of gun control laws stricter than those of the United States. *Id.* at 136. The Canadian system separates guns into two groups, long guns and restricted guns. *Id.* at 144. More dangerous guns, like handguns, are subjected to more intense controls under the restricted weapons classification. *Id.* Restricted weapons include all handguns and “bad” long guns. *Id.* After implementation of this new system in 1978, crime rates involving the use of handguns dropped significantly. *Id.* at 151.

Australia: The majority of the Australian continent follows strict handgun policies. *Id.* at 197. Members of target-shooting groups, government employees, bank security guards and people who show necessity for owning a gun professionally may acquire licenses to own pistols. *Id.* Handgun hunting is illegal in Australia. *Id.* However, unlike other countries, certain Territory’s experience higher crime rates involving the use of handguns than the United States. *Id.* at 211.

¹⁶⁸ New Zealand: In 1983, New Zealand police persuaded the government to change the existing gun laws to require persons wishing to purchase rifles and shotguns to apply for a license and pass a safety test. *Id.* at 238. Individual permits to buy ammunition became obsolete under the Act. *Id.* at 239. Purchasers of handguns are required to register a description of the weapon along with the serial number with the local police department. *Id.* “Crime rates involving firearms in New Zealand is relatively rare.” See *id.* at 243. “There are fewer than one hundred firearms-related robberies, homicides, and attempted homicides per year.” See *id.* (citing Charles I. H. Forsyth, “The Reduction of Firearms-Related Injuries in New Zealand,” speech delivered at *Firearms Control: How Do We Reduce Firearms-Related Injuries in N.Z.?* symposium sponsored by Public Health Association of New Zealand, Dunedin, August 15, 1991; Charles I.H. Forsyth, “Firearms Statistics,” *New Zealand Guns*, January/February 1992, p.6).

Jamaica: In 1974, Jamaica implemented the most severe gun control legislation ever attempted by a democratic nation in passing the Gun Court Act and the Firearms Act. *Id.* at 257-59. These two Acts virtually outlawed all private ownership of guns and ammunition. *Id.*, at 257-60. “Licensed gun owners were allowed to retain their guns, but [were] not [allowed] to acquire new ones.” See *id.* Defendants, arrested and charged with a gun offense were detained, tried and sentenced within a seven-day period. *Id.* Murder of all types fell by fourteen percent, but shootings with criminal intent and other crimes involving the use of handguns, after experiencing an initial drop, returned to previous levels and remained constant. *Id.* at 262-63.

Switzerland: When the Swiss government decides to purchase new weapons for their military, they sell the old weapons to the public as well as subsidize the purchase of ammunition. *Id.* at 283. No special permits or purchase procedures are required to

lower crime rates.¹⁶⁹

However, support for this position may be unjustified. For example, Switzerland, which has one of the highest rates of gun ownership in the world,¹⁷⁰ distributes weapons¹⁷¹ to its civilian population yet experiences a virtually no gun crime.¹⁷² The crime rates involving the use of guns in Switzerland are much lower than other countries that employ much stricter gun controls¹⁷³ and much lower than crime rates in the United States.¹⁷⁴ Further, countries that impose stricter gun control laws,¹⁷⁵ after experiencing an initial decline in gun-related crime, typically see the crime rates rise to the same levels experienced before the stricter gun control laws were enacted.¹⁷⁶

purchase long guns, but to purchase a handgun, a purchase certificate issued by a governmental authority remains the sole requirement. *Id.* Firearms purchase certificates are issued to “every adult applicant who is not a criminal, mentally infirm, or otherwise unfit.” See *id.* (citing Intercantonal Agreement, article 5, para. 1: Library of Congress (1981), p. 169). Murder rates involving the use of handguns is only fifteen percent of the rate in the United States, “. . . far below the Canadian, Australian, New Zealand, and Jamaican homicide rates and equal to or slightly higher than the Japanese and English homicide rates.” *Id.* at 286.

¹⁶⁹ Similar to the strict gun control laws in other democracies. See Kopel *supra* note 173 (quoting Sarah Brady, chairperson of Handgun Control, Inc., as saying “[w]e are the only civilized nation in the world without a good gun law and we are the most violent [nation] in the West”). See also, Jesse Leavenworth, *Stress, Access to Guns Blamed for Rise in Violence; As Attitudes Change, Workplace Becoming a Danger Zone*, The Hartford Courant, A7, March 7, 1998; Opinion, *Ban Gun Sales to Minors, Homicides Involving Teenagers Are on the Rise*, The San Diego Union Tribune, Pg. B-6, November 5, 1993. *But cf.*, Lisa D. Scott Bellevue, *Gun-Safety Law B Legislator Shows Existing Law Adequate in Unsafe Gun Use*, The Seattle Times, March 5, 1999 (disagreeing with a bill that restricts citizens and potentially limits people’s ability to defend themselves).

¹⁷⁰ See Kopel, *supra* note 166, at 278 and accompanying text.

¹⁷¹ Especially assault weapons, see *id.*

¹⁷² See *id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* *But cf.* Fox Butterfield, *New Data Point Blame at Gun Makers*, N.Y. Times, A4, November 28, 1998 (challenging the view that the majority of guns used to commit are stolen with evidence from Federal law enforcement personnel that handguns enter the black market almost immediately after being purchased from licensed dealers), Paul Valentine, *Study Shows Overall Decline in Handgun-Related Deaths in D. C.; Handgun-Related Deaths Shows an Overall Decline*, The Washington Post, C1, March 26, 1981 (indicating an overall decline in handgun-related deaths and violence in the District of Columbia after the imposition of stricter gun control laws).

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VII. THE LATEST TREND

In what appears to be the stepchild of the tobacco litigation,¹⁷⁷ the new wave in firearms litigation involves cities and counties bringing suit¹⁷⁸ against gun manufacturers and distributors claiming that manufacturers and distributors market and distribute handguns negligently.¹⁷⁹ Unlike the tobacco companies, the gun manufacturers do not seem as willing to settle.¹⁸⁰ The

¹⁷⁷ See Phillip Morris, Inc., 123 F.3d 103 (2nd Cir. 1997); Commonwealth of Massachusetts v. Phillip Morris, Inc., 942 F.Supp. 690 (D. Mass. 1996). See e.g. State of Texas v. American Tobacco Company, 14 F.Supp.2d 956 (E.D. Texas 1997) (bringing action was not limited to statutory causes but could include common law action based on quasi-sovereign interests). See also New Jersey Carpenters Health Fund v. Phillip Morris, Inc., 17 F.Supp.2d 324 (D. New Jersey 1998); City and County of San Francisco v. Phillip Morris, Inc., 1998 WL 230980 (N.D.Cal. 1998); Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. Times, A4, December 24, 1998 (quoting Mayor Alex Penelas of Miami-Dade County stating that “the success of the tobacco litigation had a tremendous impact on us. Before, people thought the tobacco industry was untouchable, and the same with the gun industry. Now there is a ray of hope, and it’s time to send the bill for gun deaths and injuries to the gun makers.”). Cf. The Associated Press, *Florida Smokers’ Lawsuit Buried*, N.Y. Times, February 18, 1999. In Florida, Stanley Rosenblatt and his wife, law partner Susan Rosenblatt have filed suit on behalf of an estimated five-hundred thousand Florida residents. *Id.* The Rosenblatts are seeking \$200 billion in damages stemming from smoking related injuries. *Id.*

¹⁷⁸ On behalf of relatives of murder victims and handgun opponents.

¹⁷⁹ *But see*, B. Drummond Ayres, Jr., *Gun Maker on Mayhem: That Is Not Our Doing*, N.Y. Times, A1, March 19, 1994 (rejecting the contention that stricter regulation of gun dealers and gun buyers would reduce injuries and deaths as a result of gun violence and rejecting the argument that if manufacturers would stop producing “high-powered, rapid firing semiautomatic rifles and handguns, there would be a sharp decline in shooting deaths and injuries because those firearms are the criminals’ weapons of choice”).

¹⁸⁰ In Minnesota, a case against the tobacco companies proceeded all the way to closing arguments before the tobacco industry settled the case for \$6.6 billion in May of 1998. *But cf.* Steven A. Holmes, *N.R.A. Sues to Challenge New Database on Sale of Guns*, N.Y. Times, A3, December 2, 1998 (hoping to block a Federal database of gun purchasers generated from new instant background checks of people buying guns). Katharine Q. Seelye, *National Rifle Association is Turning to World Stage to Fight Gun Control*, N.Y. Times, A1, April 2, 1997; Leslie Wayne, *Colt’s Best Defense: In Difficult Times, a Gun Maker Tries to Counterattack*, N.Y. Times, C2, March 12, 1999 (noting Colt’s strategy to combat the recent litigation against gun manufacturers and Colt’s acquisition of Saco Defense of Maine, a maker of grenade launchers and light military weapons, as well as Colt’s acquisition of Ultra-Light Arms, a maker of expensive hunting rifles).

United States District Court in Brooklyn was the setting for the case of *Hamilton v. Accu-Tek*,¹⁸¹ a potentially precedent-setting lawsuit against the gun manufacturing industry.¹⁸² The underlying argument in the complaint was that manufacturers and distributors oversupplied weapons dealers in states with less strict gun control laws.¹⁸³ The result being that these weapons find their way into the hands of criminals in cities, counties and states with tougher gun control laws.¹⁸⁴ Supporters of the suits based their negligence claims on the premise that gun manufacturers and distributors “knew or should have known that they were oversupplying the legitimate market, thereby creating a pool of weapons available for the illegitimate market.”¹⁸⁵

A. Traditional Suits

Traditionally, suits were brought against gun manufacturers and distributors by attempting to hold them liable for intentional killings by focusing on the marketing of a single weapon used to commit a crime.¹⁸⁶ Typically

¹⁸¹ 1998 WL 903473 (E.D.N.Y. 1998).

¹⁸² In the case of *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996), the suspect, charged with the fatal shooting 17-year-old Njuzi Ray, was acquitted. *Id.* Spurned by the fact that nobody else was ever charged, arrested or convicted for the crime, Freddie Hamilton, the boy’s mother, and relatives of five other people killed in shootings in New York City and Yonkers are seeking reparations from the gun industry in the case of *Hamilton v. Accu-Tek*, 1998 WL 903473 (E.D.N.Y. 1998). The plaintiffs main theory alleges that the defendants negligently market their handguns in certain parts of the country which allow these guns to make their way into the hands of criminals in other states, like New York, who use them to kill and wound innocent people. *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* See also, Joseph P. Fried, *Trial Beginning in Major Attack on Gun Makers*, N.Y. Times, A1, January 6, 1999 (explaining the claims brought by gun control advocates as well as the families on whose behalf suit was filed).

¹⁸⁶ See e.g., *Mavilia v. Stoeger Industries*, 574 F.Supp 107, 109-11 (D. Mass. 1983) (dismissing the claims for wrongful death because (1) Massachusetts product liability law is derived from implied warranty and therefore encompasses no separate strict products liability doctrine; and (2) the gun used to commit the crime was not inherently defective thus the manufacturer could not be held liable under a products liability claim even though the firing resulted in the wrongful death of an innocent bystander). *Delahanty et al. v. Hinckley*, 686 F.Supp 920, 928-30 (D.C. 1986) (holding that the manufacturer and distributor of a handgun that injured several people in a presidential assassination attempt could not be held strictly liable). See e.g., *Shipman v. Jennings Firearms Inc.*, 791 F.2d 1532, 1533-34 (11th Cir. 1986) (holding (1) Florida law did not permit manufacturer and distributor liability where weapon had no design defects and performed exactly as it was intended; (2) despite claims that manufacturer and distributor were negligent in failing to exercise reasonable care in

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defeated in these suits, families of the victims and opponents of guns have shifted the focus of the present litigation to the negligent distribution, or “collective liability” theory.¹⁸⁷ Although the federal judge in *Hamilton*¹⁸⁸ dismissed the charges against the fifteen handgun wholesalers named in the suit, plaintiffs attorneys continued to press the issue against the manufacturers.¹⁸⁹ The result was a \$1.4 billion jury verdict against the gun manufacturers.¹⁹⁰ As a result of the first suit to successfully hold gun manufacturers liable for negligent distribution, other states are following suit.¹⁹¹

marketing its weapons by distributing guns to owners who may possibly misuse them, manufacturer and distributor was not liable in negligence; and (3) ultra-hazardous activity doctrine did not invoke a strict liability cause of action). See e.g., *Armijo v. Ex Cam Inc.*, 656 F.Supp 771, (D. New Mexico 1987) (deciding that New Mexico courts would not impose liability on handgun manufacturers for misuse of their weapons by criminals; and that the ultra-hazardous activity doctrine and negligence theory would not be invoked because there is some degree of risk that a criminal may use a weapon). See also, *Bubalo v. Navegar, Inc.*, 1997 WL 337218 (N.D. Ill. 1997); *Richman v. Charter Arms Corporation*, 571 F.Supp. 192 (E.D. Louisiana 1983); *Martin v. Harrington and Richardson, Inc.*, 746 F.2d 1200 (7th Cir. 1984).

¹⁸⁷ See *supra* note 194, and accompanying text. This ‘collective liability’ theory uses the approach that all gun manufacturers, not just the manufacturer who sold a particular weapon used to commit a crime, are liable for oversupplying the markets that have lenient gun control laws knowing that these guns will find their way into the black market of areas where purchasing guns is more difficult. *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Joseph P. Fried, *Nine Gun Makers Called Liable for Shootings*, N.Y. TIMES, A1, February 12, 1999. See also, Fox Butterfield, *Verdict Against Gun Makers Likely to Prompt More Lawsuits*, N.Y. Times, B2, February 13, 1999 (noting several cities including Philadelphia, Los Angeles, San Francisco and Gary, Indiana will file similar suits).

¹⁹¹ The City of Chicago filed suit against nearly forty gun manufacturers, distributors and retailers. The suit alleges that the industry giants have knowingly flooded suburban stores with more weapons than the market could legally absorb. The City claims that this oversupply of weapons flows into Chicago, which boasts some of the most restrictive gun control laws in the country. The \$433 million suit, brought by Chicago Mayor Richard M. Daley relies on claims similar to the case of *Hamilton v. Accu-Tek* (1998 WL 903473 (E.D.N.Y. 1998)). Cities like Philadelphia, Pennsylvania, Boston, Massachusetts, Bridgeport, Connecticut, Miami, Florida, and San Francisco, California are also considering similar suits. In Los Angeles, the City Council is debating whether to join the cities already suing gun manufacturers for oversupplying handguns in certain markets contributing to the violence. At the same time, Los Angeles City Council is weighing the benefits of legislation aimed at restricting handgun purchases to one a month. The Associated Press, *Los Angeles Weighs Limits on Gun Sales and a Suit Against Manufacturers*, N.Y. TIMES, A1, January 18,

The present controversy has also attracted the attention of top officials in the United States Government¹⁹² who seem eager to join the fight.¹⁹³

B. *The New Wave in Litigation*

Louisiana has added a new twist to this recent wave of litigation as unique as the City of New Orleans itself. The City of New Orleans is attempting to sue many of the same manufacturers, claiming gun makers have failed in their duty to provide adequate safety devices on their weapons.¹⁹⁴ In particular, the City is arguing that the manufacturers improperly warned people that guns are dangerous.¹⁹⁵ Although Louisiana has some of the most lenient gun-control laws in the United States,¹⁹⁶ there is no telling how a jury may find with this inadequate safety device argument as a result of the recent verdict against the gun industry.¹⁹⁷

1999. See also, Barry Meier, *Victims Can Sue Gun Makers Over Sales, Judge Rules*, N.Y. Times, A1, May 3, 1996; Joseph P. Fried, *Lawyers for Shooting Victims Clash with Top Gun Makers*, N.Y. TIMES, B5, January 7, 1999 (representing the families of six people killed with illegally possessed handguns, attorney Elisa Barnes was quoted in her opening statement as saying “[t]he defendants here, the manufacturers and distributors of handguns knowingly failed to take the most basic precautions and action to minimize the likelihood that their guns would cause injuries and loss at the hands of individuals who, in New York State, we say are not permitted to have guns”); Fox Butterfield, *Verdict Against Gun Makers Likely to Prompt More Lawsuits*, N.Y. TIMES, B2, February 13, 1999.

¹⁹² See e.g., Robert Pear, *Clinton Proposes Extending Controls to Gun Shows*, N.Y. TIMES, Section 1 p.3, February 7, 1999 (urging Congress to “require background checks for all people who bought firearms at gun shows and flea markets, regardless of whether the sellers were commercial gun dealers”). *But cf.*, Adam Clymer, *House Approves Repealing of Ban on Assault Guns*, N.Y. TIMES, March 23, 1999. After several hours of often furious debate, advocates of the repeal of the ban on assault weapons, argued that the ban was ineffective in reducing violent crimes and only made it more difficult for innocent Americans to protect themselves. *Id.* Despite the warning from House Democrats that the decision to repeal the ban would likely have detrimental effects in the November election, House Republicans voted to repeal the 1994 ban on the manufacture of nineteen semiautomatic weapons and high-capacity ammunition clips by a vote of two hundred and thirty nine to one hundred and seventy three. *Id.*

¹⁹³ *Id.*

¹⁹⁴ See e.g., Editorial, *Hit the Target, Not the Weapon*, THE INDIANAPOLIS NEWS, A18, November 19, 1998 (analyzing the strategy of cities like New Orleans which is attempting to hold gun manufacturers and distributors liable for not properly warning people that guns are dangerous).

¹⁹⁵ *Id.*

¹⁹⁶ See McAfee and Quinlan, *supra* note 22, at footnote 19.

¹⁹⁷ See *supra* note 189 and accompanying text.

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Some States have already initiated counterattacks against the growing number of lawsuits that cities are attempting to file against gun manufacturers.¹⁹⁸ The NRA is eager to help.¹⁹⁹ Positioning themselves to do battle against this new wave of litigation against manufacturers, Georgia has become the first state to adopt legislation shielding gun makers from product liability suits brought by cities and counties.²⁰⁰ As support for these product

¹⁹⁸ See e.g., Drummond Ayres, Jr., *The 1997 Election: Washington State; Gun-Control Measure is Decisively Rejected*, N.Y. TIMES, A4, November 6, 1997 (focusing on the amount of time, effort and resources that the NRA and other gun legislation opponents devote to television and billboard advertising in an effort to thwart the initiatives gun legislation proponents); Timothy Egan, *Struggle Over Gun Control Laws Shifts to States and Tests N.R.A.*, N.Y. TIMES, A1, October 13, 1997 (noting the various position of states such as Massachusetts, Washington and Florida in dealing with proposed laws that would effectively ban the sales of certain models of guns); B. Drummond Ayres, Jr., *California Advances Ban on Cheap Handguns*, N.Y. TIMES, A2, June 5, 1997 (analyzing the effects of the Massachusetts law banning the manufacture and sale of "Saturday Night Specials" had on the California State Senate who voted to pass a "bill that seeks to ban the manufacture and sale of the small and easily concealed handguns, which are typically made of cheap materials, have few safety features and are favored by many criminals since they sell for as little as fifty dollars"); Fox Butterfield, *Maine Case Shows Both Sides of '94 Gun Law*, N.Y. TIMES, A1, December 14, 1996 (emphasizing the fact that most people who have been found to be ineligible to purchase handguns under the provision of the Brady Act have, at some point committed a crime involving a gun); Michael J. Ybarra, *A Town's Gun Permits Bring Cash and Controversy*, N.Y. TIMES, A1, February 9, 1996 (detailing the controversy between the chief of police in Isleton, California and the Attorney General who twice has frozen the chief's right to issue weapons permits).

¹⁹⁹ See Steven A. Holmes, *N.R.A. Sues to Challenge New Database on Sale of Guns*, N.Y. TIMES, A3, December 2, 1998. The N.R.A., the nations most powerful gun lobbyist group has brought suit to enjoin the F.B.I. from keeping records of gun transactions in an effort to determine if gun dealers are following the law and to check "for fraud and abuse of the system." See *id.* Joined by certain privacy groups, the N.R.A. is claiming that the Brady Law, the authority under which background checks are done, specifically bans the Federal Government from compiling and retaining such records. *Id.* Wayne LaPierre, executive vice president of the N.R.A. was quoted as saying "I think, for a number of reasons, starting with the work load, the monetary savings and the fact that they have not been proved to be a problem, we ought to look at scaling the law down and knocking out rifles and shotguns." See *id.*

²⁰⁰ See David Firestone, *Georgia Legislature Would Forbid Cities to Sue Gun Makers*, N.Y. TIMES, A1, February 9, 1999. Firestone discusses the rapid movement of the Georgia laws that would prevent cities filing lawsuits against gun manufacturers. *Id.* Both houses of the Georgia legislature passed the bills with strong bipartisan support, the Senate voting forty-four to eleven, the House voting one hundred and forty-six to

liability lawsuits rises, support for Georgia's legislation which seeks to prohibits them, is also finding increasing support.²⁰¹

Allowing citizens to sue gun manufacturers and distributors for the negligent, reckless or criminal actions²⁰² of others does little to solve the dispute over the exact interpretation of the Second Amendment. These suits are as effective in resolving the Second Amendment dispute as allowing smokers to bring suit against tobacco manufacturers to resolve the cancer issue.²⁰³ Perhaps the courts should also require families of victims killed by drunk drivers to bring suits against automobile manufacturers and distributors for oversupplying the market with their automobiles. Should we hold the Federal Government responsible for people who commit suicide by jumping off the nearest bridge?

VIII. CONCLUSION

Call it embarrassing,²⁰⁴ call it politically incorrect,²⁰⁵ call it anachronistic,²⁰⁶ just don't call the issues surrounding the Second Amendment, and the right of the people to keep and bear arms resolved. This nation was founded by gun-toting colonists more than willing to take up arms in defense of the freedoms they believed to be guaranteed by the very people who sought to suppress those freedoms.²⁰⁷

Following the Supreme Courts interpretation of other Amendments to the Constitution,²⁰⁸ there is strong argument for the proposition that Second Amendment creates a fundamental right in all citizens as individuals to keep

twenty-five. *Id.* James Baker, director of the N.R.A.'s lobbying arm, the Institute for Legislative Action, was quoted as saying "[t]his is the beginning of a long, arduous process that we wish we didn't have to engage in, but we are going to devote a lot of time and resources to it." *See id.* "In the next year, I think we can probably get twenty-five or thirty more states to do the same thing." *See id.*

²⁰¹ Soon after Georgia adopted legislation banning lawsuits against gun manufacturers for product liability, Louisiana's Governor Mike Foster publicly supported the ban at a Baton Rouge civic club less than a day after the Georgia law became effective. *See* The Associated Press, *Louisiana Governor Wants to Shield Gunmakers*, N.Y. TIMES, February 11, 1999. Foster was quoted saying the "Louisiana believe[s] in Second Amendment rights." *See id.*

²⁰² *See supra* note 198, and accompanying text.

²⁰³ *See supra* note 187, and accompanying text.

²⁰⁴ *See* Levinson *supra* note 23, and accompanying text.

²⁰⁵ *See* H ALBROOK *supra* note 52, and accompanying text.

²⁰⁶ *See* McAfee and Quinlan *supra* note 22, and accompanying text.

²⁰⁷ *See* HALBROOK, *supra* notes 52 and 129, and accompanying text.

²⁰⁸ *See supra* Part II(A), and accompanying text.

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and bear arms.²⁰⁹ Further, incorporation of other Constitutional Amendments through the Fourteenth Amendment suggests that the Second Amendment should be incorporated as well. The founding father's left many issues to be resolved by their sons and daughters, and resolve them we should. Whether one believes the Second Amendment to be embarrassing, politically incorrect, or anachronistic, the simple truth is that it is as important to our history as the founding of this nation itself. As such, the Second Amendment deserves the attention of the Supreme Court in deciding exactly what the Amendment guarantees. For now, put away your weapons Luke Skywalker, we're not sure if you can use them or even carry them!

Anthony Gallia

²⁰⁹ *Id.*