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# The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry

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# The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry

WILLIAM L. MCCOSKEY\*

## INTRODUCTION

In America today, there are few issues as polarizing as the issue of guns.<sup>1</sup> Whether in the media, popular entertainment, sports, or daily life, guns evoke strong feelings among most Americans.<sup>2</sup> High-profile acts of gun violence such as the Columbine High School and the Long Island train shootings have done much to sway attitudes about whether guns are inherently too unsafe for Americans to own.<sup>3</sup> Many Americans perceive an ever-increasing cycle of violence in our streets and, rightly or wrongly, many consider guns to be at the heart of the problem.<sup>4</sup> These strong feelings about guns have led to greater legislative efforts to reduce the number of guns available to the public.<sup>5</sup> Organizations such as the National Rifle Association (“NRA”) and Hand Gun Control, Inc.<sup>6</sup> have waged multimillion dollar lobbying efforts to affect the

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1. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* 1 (1998) (describing the polarization of viewpoints in American society concerning gun ownership). See generally *THE GUN CONTROL DEBATE: YOU DECIDE* (Lee Nisbet ed., 2001) (providing a collection of essays from all perspectives that offers a thorough analysis of the divisiveness of gun control issues in America).

2. Lee Nisbet, *Introduction*, in *THE GUN CONTROL DEBATE: YOU DECIDE*, *supra* note 1, at 11 (providing an excellent overview of the strong viewpoints of Americans for or against guns and gun control).

3. See Roger Rosenblatt, *Get Rid of the Damned Things*, reprinted in *THE GUN CONTROL DEBATE: YOU DECIDE*, *supra* note 1, at 108. See generally *THE GUN CONTROL DEBATE: A DOCUMENTARY HISTORY* 103 (Marjolijn Bijlefeld ed., 1997) (introducing numerous public opinion polls reflecting views of gun ownership).

4. See generally DENNIS P. ROSENBAUM ET AL., *THE PREVENTION OF CRIME: SOCIAL AND SITUATIONAL STRATEGIES* 90-93 (1998) (presenting statistics concerning Americans’ beliefs about the link between crime and guns); *Guns in America: What Must Be Done*, reprinted in *THE GUN CONTROL DEBATE: YOU DECIDE*, *supra* note 1, at 112; Barbara Kantrowitz, *The New Age of Anxiety*, reprinted in *THE GUN CONTROL DEBATE: YOU DECIDE*, *supra* note 1, at 117.

5. See, e.g., Violent Crime Control and Law Enforcement Act, 18 U.S.C. § 921 (1994). This law is commonly referred to as the “assault-weapons ban.” See James Bovard, *The Assault-Weapons Scam*, *FREEDOM DAILY*, March & April 1996, reprinted in *THE TYRANNY OF GUN CONTROL* 15 (Jacob G. Hornberger & Richard M. Ebeling eds., 1997); see also 18 U.S.C. § 922(g) (1994); Pub. L. No. 103-159 (1993) (the Brady Handgun Violence Prevention Act).

6. In 2001, Handgun Control, Inc. changed its moniker to The Brady Campaign to Prevent Gun Violence. See *The Lobby Report: A Semiannual Newsletter of Changes Made*, *THE GOVERNMENT AFFAIRS YELLOW BOOK* (July 6, 2001) at <http://www.leadershipdirectories.com/fmgayb3.htm>.

outcome of gun control legislation or the course of national elections.<sup>7</sup> Whatever the average American may think about guns, clearly the United States is unique in comparison with other Western nations because so large a proportion of the population is armed.<sup>8</sup> The prevalence of guns in America will likely ensure that the controversy over guns and gun violence remains at the center of policy debate.

America's big cities have long suffered from urban violence such as gang warfare, and too often guns are involved in such violence.<sup>9</sup> The cost to urban America of the high levels of gun violence has a dimension beyond the cost in lives—big cities are also shouldering a huge financial burden in medical costs and the cost of greater policing efforts in response to the violence.<sup>10</sup> In the past several years, many large municipalities have responded to this trend by filing suit against gun manufacturers.<sup>11</sup>

It is not surprising that municipalities would pursue this tactic, especially in light

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7. See, e.g., Analysis: What is the NRA?, at <http://news.bbc.co.uk/1/hi/world/americas/332555.stm> (Mar. 1, 2000) (noting that the NRA's 1995 lobbying budget amounted to "around \$30 million," and that in 1998, "the NRA succeeded in seeing 247 preferred candidates elected out of 310 races" for seats in the Congress).

8. See LOTT, *supra* note 1, at 1 (estimating that "75 to 86 million people [in America] own a total of about 200-240 million guns"). See generally DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? (1992) (contrasting American gun ownership history, attitudes, and levels with those of several other civilized nations).

9. See RAYMOND B. FLANNERY, JR., VIOLENCE IN AMERICA 74 (2000) (arguing that guns and drugs are an integral feature of urban gang-related crime); see also Nisbet, *supra* note 1, at 13 (citing federal crime statistics estimating that in 1993 alone, of 39,595 Americans killed with guns, handguns accounted for approximately 71%, or 27,726, of the killings).

10. See Jon S. Vernick & Stephen P. Teret, *New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws*, 36 HOUS. L. REV. 1713, 1715-16 (1999) ("The lifetime medical costs of firearm-related injuries occurring in 1994 has been estimated at \$2.3 billion, of which nearly half . . . was paid through public funds."); see also Winifred Weitsen Boyle, Comment, *There's No Smoking Gun: Cities Should Not Sue the Firearm Industry*, 25 U. DAYTON L. REV. 215, 219 (2000) ("Cities are no longer simply counting bodies when focusing on the damage associated with guns. . . . [They] are now viewing the issue from the pocketbook perspective . . .").

11. Thomas F. Segalla, *Governmental and Individual Claims in Gun Litigation and Coverage*, in INSURANCE COVERAGE IN THE NEW MILLENNIUM at 363, 379-97 (ALI-ABA Course of Study, Jan. 13, 2000). Following New Orleans's lead, the following municipalities have filed suit against the gun industry since October 30, 1998: Bridgeport, Connecticut; Atlanta, Georgia; Chicago, Illinois; Cook County, Illinois; Miami-Dade County, Florida; Cleveland, Ohio; Cincinnati, Ohio; Philadelphia, Pennsylvania; Detroit, Michigan; Wayne County, Michigan; Newark, New Jersey; San Francisco, Berkeley, Sacramento, Los Angeles and Los Angeles County, Compton, West Hollywood, San Mateo County, and Alameda County, California; St. Louis, Missouri; Camden County and Camden, New Jersey; Boston, Massachusetts; Gary, Indiana; and Wilmington, Delaware. *Id.* Pittsburgh, Pennsylvania, Providence, Rhode Island, and New York City expressed interest in joining the increasing tide of litigation. See *id.*

A number of these lawsuits were subsequently dismissed; discussion of the dispositions of these and other municipal cases may be found *infra* Part III.

of the largely successful legal battles against the tobacco industry in recent years.<sup>12</sup> To be sure, there are theoretical similarities between the litigation against the tobacco industry and the growing wave of litigation against the gun industry. Like the plaintiff states in the tobacco litigation, the plaintiff cities in the recent gun litigation may point to the huge costs in terms of health care costs consequent to use of the defendants' products, and may actually hope to recover similar money damages.<sup>13</sup> As will be shown in this Note, however, the municipalities often have underlying motives that do not correspond to the financial motives of the states in the tobacco litigation.<sup>14</sup> Moreover, in contrast to the tobacco suits, the municipal lawsuits against the gun industry have troubling constitutional implications, regardless of the applicable tort theories underlying the various suits. That is, unlike tobacco, guns have a constitutionally protected status in America.<sup>15</sup>

Much has been written about the substantive and procedural strengths and weaknesses of municipal lawsuits against the gun industry; much of this material centers on the merits of this litigation under tort law.<sup>16</sup> In contrast, little has been written on the subject of the constitutional implications of antigun litigation by municipalities, perhaps because defendant gun manufacturers have rarely asserted the Second Amendment as a defense against municipal claims.<sup>17</sup> This Note will explore

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12. See Carl T. Bogus, *Gun Litigation and Societal Values*, 32 CONN. L. REV. 1353, 1361-62 (2000) (proposing that "tobacco litigation has made gun litigation possible"); see also Vernick & Teret, *supra* note 10, at 1745 (suggesting that tobacco litigation has made other lawful products susceptible to a similar strategy); Jerry J. Phillips, *The Relation of Constitutional and Tort Law to Gun Injuries and Deaths in the United States*, 32 CONN. L. REV. 1337, 1348 (2000) (proposing that both cigarettes and guns are "unlikely to be made safe after leaving the manufacturer's hands").

13. Bogus, *supra* note 12, at 1365-66 ("By November 1998, the tobacco industry settled these cases, agreeing to pay the states . . . a total of \$242.8 billion.").

14. See *infra* Part III.

15. Because the Second Amendment specifically mentions a right to keep and bear arms, guns are necessarily protected to a certain extent by the Constitution, whether under a collective or individual rights theory. See Phillips, *supra* note 12, at 1337.

16. See, e.g., Timothy A. Bumann, *A Products Liability Response to Gun Control Litigation*, 19 SETON HALL LEGIS. J. 715 (1995); Traci O. Peterson, Comment & Note, *Legislation or Litigation: How Do We Solve the Problem of Gun Violence in Our Communities?*, 68 UMKC L. REV. 483 (2000).

17. See Phillips, *supra* note 12, at 1339 ("Curiously, the Second Amendment . . . [has] not usually been raised as [a] defense[] in [lawsuits against gun manufacturers]."). In fact, the very idea of invoking the amendment as a defense against such lawsuits has been ridiculed by those supporting these lawsuits. See, e.g., Daryl Lindsey, *Gun Smoke: Can the Unprecedented Legal Challenge to Gun Manufacturers Withstand the Counterattack of the NRA and Bob Barr?*, SALON (Mar. 11, 1999), at <http://www.salon.com/news/1999/03/11newsb.html> (citing an interview with Tom Diaz, a senior policy analyst at the antigun Violence Policy Center). When asked if the gun manufacturers were protected by the Second Amendment, Diaz responded, "The Second Amendment argument . . . is just fruitless—it's probably the most bogus articulation of all." *Id.*

Interestingly, in November 1999, the Second Amendment Foundation, with help from constitutional law professors nationwide, filed suit against the U.S. Conference of Mayors and the mayors of many cities involved in antigun litigation. See Edward Winter Trapolin,

how these lawsuits may implicate the Second Amendment in light of the recent ground-breaking Fifth Circuit case, *United States v. Emerson*,<sup>18</sup> in which for the first time in history a federal appeals court concluded that there is an individual right to keep and bear arms under the Second Amendment.<sup>19</sup>

Part I of this Note will briefly analyze the text of the Second Amendment and the subsequent treatment by the United States Supreme Court, lower courts, and legal scholars representing the modern interpretations of the amendment. Part II will evaluate the dramatic development in Second Amendment jurisprudence exemplified by *Emerson*, which in turn may have a profound impact on finally settling the question of whether Americans have a constitutionally recognized individual right to keep and bear arms. In addition, Part II will consider the debate over the applicability of the Second Amendment to the states through incorporation via the Fourteenth Amendment.<sup>20</sup> Part II will ultimately conclude that the weight of authority supports the view that the Framers intended the Second Amendment to guarantee an individual right to keep and bear arms, that the right is secured against the states via incorporation, and that the Fifth Circuit in *Emerson* properly came to its conclusion.<sup>21</sup>

Part III begins with a summary of the short history of municipal lawsuits against the gun industry. This summary will consider the various theories of tort liability under which the plaintiff municipalities have proceeded, and will briefly evaluate the outcomes of a sampling of such cases. This Note will consider the motives of plaintiff municipalities beyond seeking damages under the traditional tort theories underlying these lawsuits. These motives, this Note will argue, are especially important in light of the constitutional implications of these lawsuits.

Finally, Part III will explore these implications in light of *Emerson*. These lawsuits

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Comment, *Sued into Submission: Judicial Creation of Standards in the Manufacture and Distribution of Lawful Products—The New Orleans Lawsuit Against Gun Manufacturers*, 46 LOY. L. REV. 1275, 1292 (2000). The suit alleged among other things that the defendants, by their litigation, “conspired ‘to violate civil and constitutional rights, including the First, Second and Ninth Amendments . . . .’” *Id.* at 1292-93 (emphasis added).

18. 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

19. *Id.* at 260. A more detailed analysis of *Emerson* follows in Part II.

20. See, e.g., *Presser v. Illinois*, 116 U.S. 252 (1886) (containing conflicting language concerning the incorporation of the Second Amendment to the states via the Fourteenth Amendment). Compare Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982) (finding incorporation in *Presser*), with Martin C. Ashman, *Handgun Control by Local Government*, 10 N. KY. L. REV. 97 (1982) (finding no incorporation in *Presser*).

21. It would be an understatement to say that *Emerson*, representing the law of only one federal circuit court of appeals and coinciding with but one view of the meaning of the Second Amendment, does not provide the final word on this. To attempt to give full justice to the debate over the meaning of the Second Amendment would require a lengthy exegesis beyond the confines of this Note. At any rate, the academic writings debating the differing interpretations of the amendment are extensive. See, e.g., *Emerson*, 270 F.3d at 218 n.9, 220 n.12 (providing an excellent index to much more thorough academic writings devoted to the differing interpretations of the Second Amendment). This Note provides an abbreviated analysis of the evolution of the two main opposing theories of the Second Amendment, culminating in the recent *Emerson* decision, and ultimately concludes that the individual rights theory is the correct one. See *infra* Part I.

are troubling—aside from any tort law ramifications—because the lawsuits amount to abuse of court process that may violate constitutional rights. Part III will consider, by analogy to the First Amendment, the ramifications of antigun litigation by the government. This Part will also briefly consider the extent to which antigun litigation improperly substitutes for legitimate legislative means of policing or restricting gun ownership. In other words, even if individual ownership of guns is subject to restriction under the United States Constitution,<sup>22</sup> antigun litigation has the practical effect of usurping the legislatures' proper role in enacting such restrictions.

The municipal lawsuits take on a new dimension in light of the individual rights theory espoused by the Fifth Circuit in *Emerson* and the ascendant view in academia that the Second Amendment protects an individual right to bear arms. This Note will illustrate the constitutional fallacies of the cities resorting to the courts as a means of effectively banning gun ownership. Whether one agrees with individual gun ownership in America as a *policy* matter, the proper way to address gun violence problems is through legislation, or possibly by amending the Constitution—not through a frivolous manipulation of the legal system that amounts to an end-run around the legislatures and the Constitution.

### I. THE BATTLE OVER THE MEANING OF THE SECOND AMENDMENT

For a constitutional provision that at first glance has reasonably clear language, the Second Amendment is subject to widely varying interpretations. The 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."<sup>23</sup> Many different readings of the true meaning of the Second Amendment exist, but the various interpretations may be broadly divided into two camps: the individual rights theory and the collective rights theory.<sup>24</sup> In general, the individual rights theorists believe that

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22. In *Emerson*, the Fifth Circuit concluded that the Constitution protected an individual right to keep and bear arms, but the right is subject to *reasonable* restrictions. See *infra* Part II.B for a discussion of *Emerson*.

23. U.S. CONST. amend. II.

24. See, e.g., Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995). Professor Reynolds separates the two opposing theories broadly into the "Standard Model" (individual rights theories) and "non-Standard Model" (all non-individual rights theories), *id.* at 462-64. See also David B. Kopel, *The Supreme Court's Other Thirty-Five Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 100-04 (1999); Anthony Gallia, Comment, "Your Weapons, You Will Not Need Them." *Comment on the Supreme Court's Sixty-Year Silence on the Right to Keep and Bear Arms*, 33 AKRON L. REV. 131, 136 (1999).

It should be noted that not all theories of the Second Amendment may be neatly divided into the individual rights or collective rights categories. See, e.g., David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991). Professor Williams argues that the Second Amendment guaranteed the right of a virtuous and universal citizen militia to keep and bear arms, but today's gun-owning society is neither united by virtue nor universal. *Id.* at 590-94. Because the conditions present at the time of the drafting of the Second Amendment are nonexistent today, the basic purpose of the amendment cannot be fulfilled today. "[The Framers] did not intend to leave the universality of the militia to the chance decision of every citizen to arm herself." *Id.* at 593; see also

the Second Amendment protects the right of individual citizens to keep and bear arms,<sup>25</sup> while the collective rights theorists argue that the right to keep and bear arms is a collective right belonging to the people as a whole.<sup>26</sup> To add to the confusion, the Supreme Court has been mostly and conspicuously silent on the extent of the right for the over two hundred years since the ratification of the Second Amendment. In fact, the most complete Supreme Court treatment of the Second Amendment was decided in 1939, and this decision did nothing to conclusively settle the issue.<sup>27</sup> In light of this silence and the differing interpretations of lower courts, legal scholars, and interest groups, the rights secured by the Second Amendment have been viewed in very different ways. Until fairly recently, however, many constitutional scholars simply ignored or marginalized the Second Amendment as relatively unimportant in the study of constitutional law.<sup>28</sup>

This Part will explore the varying theories of the meaning of the Second Amendment. Because of the huge body of writings that comprise the academic debate over the meaning of the amendment, this exploration in no way can adequately cover the entire spectrum of the debate. However, this Part will generally summarize the interpretation debate by contrasting the views of the lower courts since the Supreme Court's decision in *Miller* with the evolving doctrine in academia. This Note will consider the ground-breaking *Emerson* case, the rationale of which aptly summarizes the varying interpretations of the meaning of the Second Amendment and holds that

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Reynolds, *supra*, at 486.

25. See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). See generally JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994) (arguing that the American people inherited a tradition of an individual right to keep and bear arms from an English heritage).

26. See, e.g., Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 58 (1989) (arguing that the Second Amendment guarantees an outmoded, collective right of arms ownership to the states' militias); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995) (arguing that the Second Amendment protects only a collective right, and that the individual rights theory is nothing more than a politically derived invention of modern special interests).

27. See *United States v. Miller*, 307 U.S. 174 (1939). *Miller* is infamously ambiguous, and it is frequently cited by both sides in the Second Amendment debate. See Eugene Volokh et al., *The Second Amendment as Teaching Tool in Constitutional Law Classes*, 48 J. LEGAL EDUC. 591, 604 (1998) (discussing the use of *Miller* as a teaching tool, Professor Volokh describes the case as "deliciously and usefully ambiguous"). The limited scope of *Miller* is discussed later in this Part. For a detailed analysis of what the Supreme Court has said about the Second Amendment in *Miller* and in thirty-five other cases, see generally Kopel, *supra* note 24 (providing case-by-case excerpts of language concerning the meaning of the Second Amendment).

28. See Levinson, *supra* note 25, at 640 ("[Legal scholars have relegated the Second Amendment] to footnotes; it becomes what a deconstructionist might call a 'supplement' to the ostensibly 'real' Constitution that is privileged by discussion in the text."). The study of the Second Amendment is a relatively recent phenomenon. While there probably is not a single explanation for the rising interest in the Second Amendment, it seems likely that the sharp increase in gun violence (and subsequent gun control laws) is a likely cause. See Reynolds, *supra* note 24, at 461.

the individual rights view is the correct one. Ultimately, this Part concludes that the scholarly evidence supporting the individual rights theory is most persuasive, and that this view is well supported by the Fifth Circuit *Emerson* decision.

### A. Court Interpretations of the Second Amendment

Any meaningful interpretation of constitutional provisions necessarily looks to the text of the Constitution itself. Thus, modern Second Amendment theorists, whether of the individual or collective rights bent, point to support for their respective views in the text of the Second Amendment, the writings of various constitutional Framers, and other interpretational constructs.<sup>29</sup> Many legal scholars have meticulously parsed the words of the amendment, considered the context of the amendment in comparison to other provisions of the Constitution, and evaluated the history of the Constitution, coming down as either individual or collective rights advocates.<sup>30</sup> Traditional historians have recently entered the fray, arguing that the cultural history of Americans points either to one or the other interpretation.<sup>31</sup> Police officers,<sup>32</sup> prominent jurists,<sup>33</sup> and attorneys of the Justice Department,<sup>34</sup> have issued their proclamations for, or

29. See Levinson, *supra* note 25 at 640. Professor Levinson discusses six approaches (“modalities”) of constitutional argument used by both sides: textual, historical, structural, doctrinal, prudential, and ethical. *Id.* at 643.

30. *Id.* at 643-51.

31. See, e.g., MALCOLM, *supra* note 25 (offering a historian’s argument that Americans inherited an individual right to keep and bear arms from our English forebears); MICHAEL A. BELLESILES, *ARMING AMERICA* (2000) (offering a historian’s analysis supporting collective rights theory by attempting to debunk progun claims that gun ownership was common in early America).

32. See David B. Kopel, *Background Checks and Waiting Periods*, in *GUNS, WHO SHOULD HAVE THEM?* 53, 66 (David B. Kopel ed., 1995) (indicating that in a survey of police officers in the South, “90.1 percent thought the United States Constitution guaranteed the right of law-abiding citizens to own guns”).

33. In 1991, retired Chief Justice Warren E. Burger said of the Second Amendment: “[The amendment] has been the subject of one of the greatest pieces of fraud ... on the American people by public interest groups that I have ever seen in my life .... [The NRA] has misled the American people ... [and] they have had far too much influence on the Congress ....” *The MacNeill/Lehrer News Hour* (PBS television broadcast, December 16, 1991); see also *Adams v. Williams*, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting) (“A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment. . . . Our decisions belie that argument, for the Second Amendment . . . was designed to keep alive the militia.”). *But see* Kopel, *supra* note 24 (providing numerous Supreme Court Justice quotations that support an individual right to keep and bear arms).

34. Even among prominent attorneys for the United States, there is hardly consensus as to the meaning of the Second Amendment. See, e.g., Transcript of Oral Arguments, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), at <http://www.akrepublicans.org/22ndleg/pdf/infosjr01720392001.pdf> (last visited Nov. 21, 2001). William B. Mateja, Attorney of the United States, responded thus to questions of the three-judge panel of the Fifth Circuit:

*Judge Garwood:* You are saying that the Second Amendment is consistent with a position that you can take guns away from the public? You can restrict



against, the individual right to keep and bear arms.

But the members of the Supreme Court, whose opinions are obviously the most important in interpreting the meaning of the Second Amendment, have remained conspicuously silent on the issue in comparison to their voluminous treatments of other portions of the Bill of Rights.<sup>35</sup> The rigorous debate in scholarly and nonscholarly circles on the meaning of the Second Amendment will be largely moot if and when the Supreme Court rules conclusively on the meaning of the amendment. Because the Fifth Circuit recently articulated a view in *Emerson* contrary to the expressed views of other federal circuits, however, it is possible that the Court may eventually resolve any circuit split and conclusively decide the issue. The Court, however, has successfully evaded confronting the issue squarely.<sup>36</sup>

To date, however, the most complete Court treatment of the scope of the Second Amendment took place in 1939, in *United States v. Miller*.<sup>37</sup> In *Miller*, two men were charged with violations of the National Firearms Act ("NFA")<sup>38</sup> by transporting a sawed-off shotgun<sup>39</sup> across state lines. The defendants claimed that the NFA violated

ownership of rifles, pistols and shotguns from all people? Is that the position of the United States?

*Mateja*: Yes.

*Judge Garwood*: Is it the position of the United States that persons who are not in the National Guard are afforded no protections under the Second Amendment?

*Mateja*: Exactly.

*Id.*

Then-Solicitor General Seth Waxman confirmed that the views expressed by Mr. Mateja indeed reflected the position of the United States as supported by "the Supreme Court and eight United States Courts of Appeals [that] have considered the scope of the Second Amendment and have uniformly rejected arguments that it extends firearms rights to individuals . . . ." Letter from Seth Waxman, Solicitor General of the United States, to Anonymous Recipient (Aug. 22, 2000), at <http://www.rkba.org/federal/doj/waxman-emerson.html> (last visited Mar. 2, 2002). Compare the views of Mateja and Waxman with those of current Attorney General John Ashcroft: "[L]et me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms." Letter from John Ashcroft, Attorney General of the United States, to James J. Baker, Executive Director of the National Rifle Association (May 17, 2001), at <http://www.nra.org/images/Ashcroft.pdf> (last visited Mar. 2, 2002).

For a more recent exposition of the current Justice Department's official view concerning the Second Amendment, see *infra* note 149.

35. See Herz, *supra* note 26, at 77 & n.74 ("For more than fifty years, the Supreme Court has consistently refused to expound on *Miller*. The Court has denied certiorari in at least nine cases in which the lower courts relied on *Miller* to reject Second Amendment challenges."). But see Kopel, *supra* note 24 (recounting in detail the statements of various Supreme Court Justices supporting an individual right, and suggesting that "the Court has not been so silent as the conventional wisdom suggests").

36. See, e.g., Gallia, *supra* note 24, at 134. The Supreme Court recently chose not to review the Fifth Circuit's *Emerson* decision. See *infra* note 149 and accompanying text.

37. 307 U.S. 174 (1939).

38. 26 U.S.C. §§ 5801-5872 (1994).

39. A shotgun with a barrel length less than eighteen inches is a firearm as defined under the National Firearms Act, *id.* § 5845, the transportation of which is in violation of the National Firearms Act. *Id.* § 5861.

the Second Amendment, and the district court agreed, quashing the government indictment.<sup>40</sup> On appeal, the Court reversed and remanded the case back to the district court, finding that the Second Amendment did not protect the right to keep and bear a weapon such as a sawed-off shotgun.<sup>41</sup> Justice McReynolds, writing for the Court, observed:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>42</sup>

Ironically, this treatment has been seized upon by both sides to find support for their respective interpretations of the Second Amendment.<sup>43</sup> Some individual rights theorists claim that, if anything, the Court's language in *Miller*—relating to whether a sawed-off shotgun would serve a "military" purpose in furtherance of the common defense—suggests that individuals have the right to bear arms that are military in nature (and therefore "assault weapon" bans would be unconstitutional).<sup>44</sup> Collective rights theorists claim that *Miller* shows that the Second Amendment "must be interpreted and applied to 'assure the continuation and render possible the effectiveness' of state militias, not to assure the continuation (or creation) of a nation armed with military weapons for personal protection."<sup>45</sup>

The confusion surrounding *Miller* has given lower courts plenty of ammunition to interpret the Second Amendment (or to push it aside altogether) as they see fit. For example, in *Quilici v. Village of Morton Grove*, the Seventh Circuit expressly rejected an Illinois man's Second Amendment challenge of a local ordinance banning handgun possession.<sup>46</sup> The court held that "the right to keep and bear arms is inextricably connected to the preservation of a militia," reasoning that "this is precisely the manner in which the Supreme Court interpreted the Second Amendment in [*Miller*]."<sup>47</sup> Because handguns were not "military weapons," the city's ordinance banning

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40. *Miller*, 307 U.S. at 177.

41. *Id.* at 178.

42. *Id.*

43. Indeed, virtually *all* relevant case law has "been embraced by both sides in the gun control debate." Reynolds, *supra* note 24, at 496; *see also* Volokh et al., *supra* note 27.

44. *See* Levinson, *supra* note 25, at 654-55 ("Ironically, *Miller* can be read to support some of the most extreme anti-gun control arguments, e.g., that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that are clearly relevant to modern warfare including . . . assault weapons.").

45. *See* Herz, *supra* note 26, at 68-69 (arguing that the Court's express language evaluating the appropriateness of the sawed-off shotgun for use in a "militia" clearly reflects a collective right as part of a state-organized military unit); *see also* Ashman, *supra* note 20.

46. 695 F.2d 261 (7th Cir. 1983).

47. *Id.* at 270.

handguns did not violate the Second Amendment.<sup>48</sup>

The federal courts, to varying degrees, have similarly fixated on the "militia" wording of the Second Amendment and interpreted *Miller* to mean that there is no individual right to keep and bear arms.<sup>49</sup> With the exception of the district court and court of appeals decisions in *Emerson*, the federal courts that have considered the scope of the Second Amendment have taken the view that the amendment extends only to the protection of a collective right in the context of membership in state militias.<sup>50</sup>

### B. Evolving Interpretations of the Second Amendment

Despite *Miller* and its lower court progeny, a sizeable and growing bloc in academia maintains that the Second Amendment affords an individual right to arms.<sup>51</sup> Most of these academic arguments hinge on the respective meanings of "the people" and of "militia" in the wording in the Second Amendment.<sup>52</sup> Individual rights theorists emphasize the word "people," and place less emphasis on the mention of "militia," and thus are more likely to argue that the mention of "militia" simply reinforces the

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48. *Id.*

49. See, e.g., *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996) (stating that the Second Amendment right to bear arms is held by the states, not private citizens); *Love v. Peppersack*, 47 F.3d 120 (4th Cir. 1995) (stating that the Second Amendment does not confer an absolute individual right); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976) (stating that the Second Amendment guarantees a collective right, not an individual right); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942) (stating that the federal government may restrict keeping and bearing of arms by a single individual); see also *Herz*, *supra* note 26, at 74 ("Every federal appellate decision since *Miller* has rejected the broad-individual-rights position and focused instead on whether use of a weapon was related to maintenance of a well-regulated militia.").

50. See the cases listed *supra* note 49. See also *United States v. Emerson*, 270 F.3d 203, 217-21, 218 nn.10-11 (5th Cir. 2001).

51. See David B. Kopel & Richard E. Gardiner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 741 (1995), available at <http://www.westlaw.com>. Kopel and Gardiner assert:

While the legal academy may be divided in regard to the constitutionality of particular gun control, there are few subjects on which legal scholarship is as unanimous as the original intent of the Second Amendment. There is not a professor of law in the United States in the last twenty-five years who has signed his name to a law journal article asserting that the Second Amendment was not intended to recognize an individual right.

*Id.*; see also *Emerson*, 270 F.3d at 220 ("The individual rights view has enjoyed considerable academic endorsement, especially in the last two decades."); cf. Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHL.-KENT L. REV. 349, 381 (recognizing that while there is a growing body of pro-individual rights articles in academia, there are extensive writings taking the contrary view, and the pro-individual rights view is by no means the dominant view of the Second Amendment in academia).

52. For contrasting views, see, for example, Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991), and Dennis A. Henigan, *Arms, Anarchy, and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991).

Framers' fears of a standing army in the hands of a despotic federal government.<sup>53</sup> Historian Joyce Lee Malcolm succinctly summarized this argument:

The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defence. . . .

....

The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public. . . .

....

The clause concerning the militia was not intended to limit ownership of arms to militia members, or [to] return control of the militia to the states, but rather to express the preference for a militia over a standing army.<sup>54</sup>

Thus, under this interpretation, the "militia" refers not to a specialized body of armed individuals (such as a modern National Guard unit<sup>55</sup>), but instead to the commonly held view that an armed populace, or "militia," was the surest way of protecting freedom.<sup>56</sup>

Extensive writings by the Framers of the Constitution and the subsequent Bill of Rights further support the individual rights view of the meaning of "militia." James Madison, in *The Federalist* No. 46, wrote that he considered an armed populace a sure safeguard against the evils of a standing army.<sup>57</sup> George Mason said, "Who are the militia? They are the *whole people*, except a few public officers."<sup>58</sup> Tench Coxe wrote, "The militia, *who are in fact the effective part of the people at large*, will render many troops *quite unnecessary*. They will form a powerful check upon the regular troops, and will generally be sufficient to overawe them."<sup>59</sup> For a standing army to rule, wrote Noah Webster, "the people must be disarmed."<sup>60</sup>

These views of various Framers show that armed individual citizens comprised the "militia" that the Framers felt was so necessary to protecting the freedom of the country from the evils of an unrestrained standing army. These views also tend to cast doubt on the collective rights theorists' belief that the modern-day National Guard fulfills the "militia" reference. The collective rights view becomes especially tenuous when one considers the Supreme Court's holding in *Perpich v. Department of*

53. See, e.g., LES ADAMS, *THE SECOND AMENDMENT PRIMER* 113-27 (1996) (summarizing late eighteenth-century views on the need to protect the newly formed country from a tyrannical standing army).

54. MALCOLM, *supra* note 25, at 162-63.

55. *Id.*

56. See Williams, *supra* note 24, at 589 ("Those who support a states rights view of the militia seek to identify the Amendment's militia with the National Guard . . . . The universal militia . . . was the people under another name . . . . As the National Guard is not universal, it cannot serve as a substitute.")

57. ADAMS, *supra* note 53, at 100.

58. *Id.* at 102 (emphasis added).

59. *Id.* at 104 (emphasis in original).

60. *Id.* at 105.

*Defense*,<sup>61</sup> in which the Court recognized that the federal government has final authority over the use and deployment of the states' National Guard units.<sup>62</sup> It seems unlikely that the Framers, who so distrusted a "standing army" under the control of the federal government, would embrace the idea that "militia" equates to the National Guard, especially when the federalization of the National Guard places them in the same category as a standing army.<sup>63</sup>

The meaning of "the people" in the text of the Second Amendment has also been the subject of vigorous debate. Some collective rights theorists claim that "the people" has a collective connotation.<sup>64</sup> For example, one common variation on this theme argues that state constitutions "regularly used 'man' or 'person' in regard to 'individual rights such as freedom of conscience' whereas the use in those constitutions of the term 'the people' in regard to a right to bear arms is intended to refer to the 'sovereign citizenry' collectively organized."<sup>65</sup> As Professor Sanford Levinson points out, however, "such an argument flounders . . . upon examination of the federal Bill of Rights itself and the usage there of the term 'the people' in the First, Fourth, Ninth, and Tenth Amendments."<sup>66</sup>

Professor Levinson's point is further supported by the Supreme Court's opinion in *United States v. Verdugo-Urquidez*,<sup>67</sup> a case that evaluated the extent of Fourth Amendment application to noncitizens who had no connection to the United States. Chief Justice Rehnquist, for the majority, wrote:

The "people" seems to have been a term of art employed in select parts of the Constitution . . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people" . . . . While this textual exegesis is by no means conclusive, it suggests that "the 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.<sup>68</sup>

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61. 496 U.S. 334 (1990).

62. *Id.* at 348 ("Notwithstanding the brief periods of federal service, the members of the state Guard unit continue to satisfy [the] description of a militia.").

63. See STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 169 (2d ed. 1994). Halbrook points out that

[t]hose who argue that the U.S. armed forces and National Guard—both standing armies, whose weapons are owned by the federal government and not by the soldier—now take the place of the militia have a sense of confidence in standing armies and in the rulers that Justice Story would have considered naive.

*Id.* Halbrook refers to Justice Story's exposition stressing "the right of the citizens to keep and bear arms has justly been considered[] as the palladium of the liberties of the republic." *Id.* (quoting JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* 708 (1833)).

64. See Gallia, *supra* note 24, at 137, 144-46.

65. See Levinson, *supra* note 25, at 645.

66. *Id.*

67. 494 U.S. 259 (1990).

68. *Id.* at 265.

Chief Justice Rehnquist's comments reinforce the notion that it would be absurd to read the First and Fourth Amendments, with their references to "the people," as anything other than protecting *individual* rights.<sup>69</sup> As Professor Levinson points out, "[i]t is difficult to know how one might plausibly read the Fourth Amendment as [anything] other than a protection of individual rights."<sup>70</sup> Similarly, "it would approach the frivolous to read the assembly and petition clause as referring only to the right of state legislatures to meet and pass a remonstrance directed to Congress or the President against some government act."<sup>71</sup>

Even in the face of such strong evidence supporting the individual rights view, lower courts have found it all too easy to apply a collective rights reading of *Miller* to sidestep the growing view in academia that the Second Amendment secures an individual right.<sup>72</sup> Courts have uniformly disposed of Second Amendment defenses in criminal firearms cases by holding that the government did not infringe defendants' rights because any rights under the Second Amendment were collective rights held by states, not individual rights held by citizens.<sup>73</sup> In 1999, however, a federal district court decision in Texas marked a significant departure from conventional judicial treatment and brought the Second Amendment rights controversy to the center of the judicial stage.

## II. EMERSON AND THE INDIVIDUAL RIGHTS THEORY

### A. The Emerson Bombshell Part One

In *United States v. Emerson*,<sup>74</sup> the district court considered the question of whether the Second Amendment provides an individual right to keep and bear arms. Emerson, the defendant, had been placed under a temporary restraining order as part of a form

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69. Kopel and Gardiner further argue that [u]nless one is prepared to argue that the First Amendment "right of the people peaceably to assemble" protects only National Guard meetings, and the Fourth Amendment "right of the people" to freedom from unreasonable searches guarantees only the security of National Guard footlockers, it is impossible to coherently maintain that the Second Amendment "right of the people" belongs to the National Guard or the states, rather than to the people . . . .

Kopel & Gardiner, *supra* note 51, at 740; *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992) (rejecting the notion that the Fourteenth Amendment "liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments.")

70. Levinson, *supra* note 25, at 645.

71. *Id.*

72. *See supra* note 49 and accompanying text.

73. *Id.*

74. 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd*, 270 F.3d 203 (5th Cir. 2001), *cert denied*, 122 S. Ct. 2362 (2002) (mem.). The Fifth Circuit reversed the district court's dismissal of the charges against Emerson. *See infra* text accompanying notes 137-45. The Fifth Circuit affirmed the district court as to its finding that the Second Amendment guaranteed an individual right to keep and bear arms. *Id.*

order frequently used in Texas divorce proceedings.<sup>75</sup> Unbeknownst to Emerson, he was then subject to federal criminal prosecution “merely for possessing a firearm while being subject to the order.”<sup>76</sup> He was later charged with violation of 18 U.S.C. § 922(g)(8),<sup>77</sup> which precludes gun possession by individuals under restraining orders that prohibit harassment, stalking, or threats, among other things.<sup>78</sup> Emerson moved to dismiss the indictment, claiming that the federal statute is an unconstitutional exercise of congressional power in violation of the Second, Fifth, and Tenth Amendments, as well as the Commerce Clause.<sup>79</sup>

With regard to his Second Amendment claim, Emerson asserted that he had a constitutionally guaranteed right to keep and bear arms.<sup>80</sup> The government responded that “it is ‘well settled’ that the Second Amendment creates a right held by the States and does not protect an individual right to bear arms.”<sup>81</sup> The court, acknowledging that this was a case of first impression in the Fifth Circuit, held that the Second Amendment indeed guaranteed an individual right to keep and bear arms.<sup>82</sup> Judge Cummings wrote, “The rights of the Second Amendment should be as zealously guarded as the other *individual* liberties enshrined in the Bill of Rights.”<sup>83</sup> In expressly finding that an individual right existed, Judge Cummings departed from the commonly assumed, narrow holding of *Miller*—and the holdings of other federal courts, such as those of the First, Fourth, Sixth, and Ninth Circuits. These interpretations held that the Second Amendment guarantees a collective right, not an individual right.<sup>84</sup>

What immediately set *Emerson* apart from other lower court decisions concerning

75. *Id.* at 599.

76. *Id.*

77. 18 U.S.C. § 922 (1994 & Supp. V 1999) provides in relevant part:  
(g) It shall be unlawful for any person—

....

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of [same], or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; . . . . To ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

78. *Emerson*, 46 F. Supp. at 599.

79. *Id.*

80. *Id.* at 600.

81. *Id.*

82. *Id.*

83. *Id.* at 610.

84. *Id.* at 607-08 (emphasis added).

the Second Amendment was Judge Cummings's extensive analysis of the alternative meanings of the amendment. While other courts had been quick to jump on the narrow collective rights reading of *Miller* in quickly dispensing with any individualist reading of the Second Amendment,<sup>85</sup> Judge Cummings undertook a detailed textual, historical, and structural analysis to conclude that the amendment does, in fact, guarantee an individual right to arms. He stressed that the Court in *Miller* "did not answer the crucial question of whether the Second Amendment embodies an individual or collective right to bear arms."<sup>86</sup> Because the Court placed great emphasis on whether a sawed-off shotgun had any reasonable relationship to the preservation or efficiency of a well regulated militia, it was clear that the Court "chose a very narrow way to rule on the issue of gun possession under the Second Amendment, and left for another day further questions of Second Amendment construction."<sup>87</sup> Thus, Judge Cummings concluded, "[i]t is difficult to interpret *Miller* as rendering the Second Amendment meaningless as a control on Congress."<sup>88</sup>

Finally, Judge Cummings concluded that prudential "concerns about the social costs of enforcing the Second Amendment must be outweighed by considering the lengths to which the federal courts have gone to uphold other rights in the Constitution."<sup>89</sup> Because the "rights of the Second Amendment should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights," Judge Cummings found § 922(g)(8) to be unconstitutional because it allowed the government to deprive Emerson of his constitutional rights without any particularized findings that Emerson posed a threat of future violence.<sup>90</sup> In addition, because Emerson had no notice that he was subject to federal criminal prosecution for firearms possession upon being placed under a divorce proceeding restraining order, "it [was] unfair to hold him accountable for his otherwise lawful actions."<sup>91</sup> Thus, § 922(g)(8) violated Emerson's Fifth Amendment due process rights as well, because the statute is "an obscure, highly technical statute with no *mens rea* requirement . . ."<sup>92</sup>

A storm of controversy erupted in the immediate aftermath of the district court decision. Many collective rights theorists criticized what they saw as an erroneous departure from clear case law in an attempt to create a new right where one did not exist.<sup>93</sup> The individual rights theorists, however, were quick to applaud Judge

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85. See, e.g., *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1983).

86. *Emerson*, 46 F. Supp. 2d at 608.

87. *Id.* at 608-09.

88. *Id.* at 608.

89. *Id.* at 610.

90. *Id.* Judge Cummings distinguished this deprivation of Second Amendment rights from the felon-in-possession statute, 18 U.S.C. § 922(g)(1), because "once an individual is convicted of a felony, he has by his criminal conduct taken himself outside the class of law-abiding citizens who enjoy full exercise of their civil rights." *Id.* at 611.

91. *Id.* at 612.

92. *Id.* at 613.

93. See, e.g., Chris Newton, *Legal Scholars Debate Landmark Second Amendment* [sic] *Ruling in Texas*, ASSOCIATED PRESS, Sept. 7, 1999, available at <http://www.reporternews.com/1999/texas/legal0907.html>. A Harvard law professor joined fifty-one other legal scholars in signing onto an amicus brief denouncing Judge Cummings' interpretation of the Second Amendment, remarking, "That decision and the opinion were a



Cummings's ruling as taking an intellectually honest view of the meaning of the Second Amendment.<sup>94</sup> The district court's decision attracted much attention from both sides in the debate, and when the government appealed the decision, the attention focused on the Fifth Circuit.

### B. *The Emerson Bombshell Part Two*

Emerson's case went to a three-judge panel of the Fifth Circuit.<sup>95</sup> The federal government challenged the district court's dismissal on Second and Fifth Amendment grounds.<sup>96</sup> Emerson argued that the court should affirm the district court's dismissal because § 922(g)(8) requires that the "predicate court order include an explicit finding that the person enjoined posed a credible threat of violence" and that the predicate order be supported by "sufficient evidence before the court . . . to sustain such a finding."<sup>97</sup> The court rejected Emerson's arguments as to the construction of § 922(g)(8), using standard rules of statutory construction and legislative history.<sup>98</sup>

The court then turned to the district court's holding that prosecuting Emerson for violation of § 922(g)(8) would deprive him of his Fifth Amendment due process rights.<sup>99</sup> The court agreed with the district court that "a certain *mens rea* is required" because there is nothing "inherently evil or suspect" about firearms ownership.<sup>100</sup> However, the court rejected the district court's conclusion that Emerson's due process rights were violated because he lacked specific notice that he was in violation of "an obscure criminal provision" for merely possessing a firearm while subject to a restraining order.<sup>101</sup> The court found that two Supreme Court cases helped to clarify the requisite *mens rea* required of criminal statutes in order to pass due process muster.<sup>102</sup> The cases stood for the proposition that it is not necessary that a defendant know that possession of a machine gun is unlawful, he must only know that the weapon possessed was a machine gun.<sup>103</sup> Because Emerson clearly knew that he possessed a firearm of the kind covered by the statute (when he purchased his pistol

major shot across the bow. This is the first decision to say that the Second Amendment prohibits Congress from imposing special laws concerning gun ownership. That is why his decision is so worrisome." *Id.* The Brady Campaign to Prevent Gun Violence labeled the Emerson decision a "[r]enegade [d]ecision." The Second Amendment, at <http://www.bradiycampaign.org/facts/issuebriefs/second.asp>.

94. See, e.g., Nelson Lund, *Taking the Second Amendment Seriously*, WEEKLY STANDARD, July 24, 2000, at 21. Professor Lund praised Judge Cummings, stating that it "is time for the courts to stop substituting ill-considered policy preferences for the legally binding wisdom embodied in the Constitution." *Id.* at 26.

95. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert denied.*, 122 S. Ct. 2362 (2002) (mem.). The panel included Circuit Judges Garwood, DeMoss, and Parker.

96. *Id.* at 212.

97. *Id.* at 213.

98. *Id.* at 213-15.

99. *Id.* at 215-17.

100. *Id.* at 216-17.

101. *Id.* at 215-16.

102. *Id.* at 216 (citing *Bryan v. United States*, 524 U.S. 184 (1998), and *Staples v. United States*, 511 U.S. 600 (1994)).

103. *Id.* at 216-17.

he signed a federal form that gave notice of prohibitions covered by § 922(g)(8)) the court held that Emerson's due process rights were not violated.<sup>104</sup> Thus, the court found that the district court erred in granting Emerson's motion to dismiss the indictment because it violated his due process rights.<sup>105</sup>

The court, having quickly dispensed with Emerson's Fifth Amendment due process arguments, next turned to Emerson's Second Amendment defense. This portion of the Fifth Circuit's opinion is extraordinary; where Judge Cummings embarked on a lengthy and scholarly exploration of the meaning of the Second Amendment, Judge Garwood—writing for the Fifth Circuit panel—filled over seventy pages of his opinion with a detailed analysis of the Second Amendment that dwarfed Judge Cummings's memorandum opinion.<sup>106</sup>

Judge Garwood first gave a quick overview of the differing interpretations of the Second Amendment<sup>107</sup> before turning to the doctrine of *stare decisis* in attempting to find the correct interpretation. Judge Garwood engaged in a thorough exploration of the meaning of the Supreme Court's *Miller* decision.<sup>108</sup> Rather than resorting to a conclusory and perfunctory restatement of what conventional Second Amendment doctrine in the courts had read *Miller* to mean,<sup>109</sup> Judge Garwood looked beyond the Court's language to the actual brief submitted by the government in that case. The government's brief included two basic arguments, the first a restatement of the sophisticated collective rights model,<sup>110</sup> and the second an assertion that the Second Amendment relates only to "the right of the people to keep and bear arms for lawful purposes" and for military purposes pursuant to the common defense (and thus sawed-off shotguns or machine guns, banned by the NFA, have no legitimate use in the hands of private individuals).<sup>111</sup>

Judge Garwood looked to the actual language of the *Miller* holding and concluded that the Court had decided the case on the basis of the government's second argument, not the first.<sup>112</sup> Judge Garwood also noted that the *Miller* opinion did not even

104. *Id.* at 216-17. The court also quickly affirmed the district court's conclusions in rejecting Emerson's Commerce Clause and Tenth Amendment arguments. *Id.* at 217-18.

105. *Id.* at 217.

106. Many observers suspected that the Fifth Circuit's decision would be lengthy and detailed—the court heard oral arguments in June of 2000 and did not issue its decision until October of 2001.

107. While this Note divides the competing theories into the individual rights and collective rights camps, Judge Garwood divided the competing theories into three camps: the states' rights/collective rights model (arguing that the Second Amendment protects the right of states to arm their militias); the sophisticated collective rights model (arguing that there is only a limited individual right for members of an organized militia); and the individual rights model. *See Emerson*, 270 F.3d at 218-19.

108. *Id.* at 221. See *supra* notes 37-42 and accompanying text for a discussion of *Miller*.

109. See generally Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996) (arguing that, for a variety of reasons, lower courts have misread or misapplied the Court's actual holding in *Miller*).

110. *Emerson*, 270 F.3d at 222.

111. *Id.* at 222-23.

112. *Id.* at 224 (quoting language from *Miller*). "In the absence of any evidence tending to show [that a sawed-off shotgun] . . . has some reasonable relationship to the preservation or

question whether either of the defendants in the case were members of an organized militia, thus further reinforcing his conclusion that the Court in *Miller* rejected the government's first argument.<sup>113</sup> Finally, Judge Garwood noted that the *Miller* opinion defined the militia as comprising "all males physically capable of acting in concert for the common defense . . . bearing arms supplied by themselves."<sup>114</sup> This definition precludes any definition of the militia as "individuals . . . [that] might be actively engaged in actual military service or . . . those who were members of special or select units."<sup>115</sup>

Thus, Judge Garwood concluded, *Miller* does not support either a collective rights or sophisticated collective rights interpretation of the Second Amendment.<sup>116</sup> Judge Garwood noted that the court was "mindful that almost all of [its] sister circuits have rejected any individual rights view of the Second Amendment."<sup>117</sup> However, all of the other circuits have rejected this view "either on the erroneous assumption that *Miller* resolved the issue or without sufficient articulated examination of the history and text of the Second Amendment."<sup>118</sup> Judge Garwood then examined the text of the Second Amendment—specifically, the meanings of "the people," "bear arms," and "keep . . . arms," in addition to the words of the amendment taken as a whole.<sup>119</sup> He concluded that the words "the people" have the same meaning within the Second Amendment as within the First and Fourth Amendments.<sup>120</sup> Throughout the Constitution, Judge Garwood noted, "'the people' have 'rights' and 'powers,' but federal and state governments only have 'powers' or 'authority,' never 'rights.'"<sup>121</sup> Therefore, he concluded, "the people," as used in the Constitution (including the Second Amendment) refers to individual Americans.<sup>122</sup>

Similarly, Judge Garwood looked to historical uses of "bear arms" to determine whether the phrase refers only to militia members or whether it also extends to carrying of arms by civilians.<sup>123</sup> Judge Garwood concluded that the phrase "bear arms" is consistent with the use of "the people" in the amendment and thus cannot be limited only to members of the military or militia.<sup>124</sup> "Keep . . . arms" is also devoid of a military connotation, Judge Garwood concluded.<sup>125</sup> "The plain meaning of the right

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efficiency of a well regulated militia . . . the Second Amendment [does not] guarantee the right to keep and bear such an instrument." *Id.*

113. *Id.*

114. *Id.* at 225.

115. *Id.* at 226.

116. *Id.*

117. *Id.* at 227.

118. *Id.*

119. *Id.* at 227-32

120. *Id.* at 227-29.

121. *Id.* at 228. Judge Garwood also pointed to previous pronouncements by the Supreme Court as to the meaning of "the people" in cases such as *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). See *Emerson*, 270 F.3d at 228; see also *supra* notes 67-69 and accompanying text.

122. *Emerson*, 270 F.3d at 229.

123. *Id.* at 229-32.

124. *Id.* at 231-32.

125. *Id.* at 232.

. . . to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service or as a member of a select militia such as the National Guard."<sup>126</sup>

Finally, Judge Garwood turned to the text of the Second Amendment as a whole and concluded that the "[amendment's] substantive guarantee is not suggestive of a collective rights . . . interpretation, and the implausibility of [such an interpretation] is enhanced by . . . the [amendment's] placement within the Bill of Rights."<sup>127</sup> Judge Garwood argued that the preamble of the Second Amendment—"A well-regulated Militia, being necessary to the security of a free State"—fails to mandate "what would be an otherwise implausible collective rights . . . interpretation of the amendment."<sup>128</sup> Thus, Judge Garwood summarized, "there is no need to torture the meaning of [the amendment's] substantive guarantee into the collective rights . . . model which is so plainly inconsistent with the [amendment's] text[] [and] its placement within the bill of rights."<sup>129</sup>

Judge Garwood next turned to the lengthiest and most detailed portion of his opinion, an analysis of American history leading to the adoption of the Second Amendment.<sup>130</sup> His historical analysis included the Federalist and Anti-Federalist views concerning the purpose and scope of the newly proposed Constitution, and focused on their debates with respect to providing for arming the people and the existence of any federal standing army.<sup>131</sup> Judge Garwood summarized the ratification debates in the states that had not simply ratified the initially proposed Constitution, which contained no guarantee of the right of the people to be armed.<sup>132</sup> His analysis shifted to the debates surrounding the proposal of the addition of a bill of rights to the Constitution, including the Second Amendment.<sup>133</sup>

Judge Garwood's lengthy recounting of the debates over the wording of the Second Amendment provides a thorough exploration of the Framers' reasoning and intent concerning the meaning of the amendment. A major theme recurring throughout the historical debates concerned the necessity of the people to protect their liberties from the evils posed by a standing army.<sup>134</sup> In addition, the writings of constitutional scholars of the nineteenth century further provided support for the individual rights interpretation.<sup>135</sup> Judge Garwood concluded: "We have found no historical evidence that the Second Amendment was intended to convey militia power to the states, limit the federal government's power to maintain a standing army, or applies only to members of a select militia while on active duty."<sup>136</sup>

Judge Garwood finalized the court's analysis of the Second Amendment by holding

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126. *Id.*

127. *Id.*

128. *Id.* at 233.

129. *Id.* at 236.

130. *See id.* at 236-60.

131. *See id.* at 236-40.

132. *See id.* at 241-44.

133. *See id.* at 244.

134. *See id.* at 255.

135. *See id.* at 255-59 (citing writings by St. George Tucker, William Rawle, Justice Joseph Story, and Thomas Cooley all supporting the individual rights interpretation).

136. *Id.* at 260.

that “[a]ll of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans.”<sup>137</sup> The court rejected the collective rights model and held, “consistent with *Miller*, that [the Second Amendment] protects the rights of individuals, including those not [a member of active military service or a militia] to privately possess and bear their own firearms.”<sup>138</sup>

Applying the court’s holding to Emerson, Judge Garwood qualified the individual right under the Second Amendment:

Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.<sup>139</sup>

Because Emerson’s Second Amendment defense was grounded on his argument that the restraining order contained no express finding that he posed a credible threat to his wife or child, Judge Garwood concluded that Emerson had conceded that if such findings were present and adequately supported he could—consistent with the Second Amendment—be precluded from possessing a firearm.<sup>140</sup>

Although concerned with the lack of express findings in Emerson’s case, the court ultimately found Emerson’s argument unpersuasive.<sup>141</sup> Judge Garwood found that the enactment of § 922(g)(8) proceeded on Congress’s assumption that local laws would not violate the “almost universal rule of American law” that temporary injunctions issue only when there is a likelihood that irreparable harm will occur.<sup>142</sup> Because Texas law met these minimum general standards, and the order at issue was not so “transparently invalid” as to justify collateral review of the Texas court’s order by the federal court, the district court’s finding that § 922(g)(8) violated the Second Amendment could not stand.<sup>143</sup>

Thus, the Fifth Circuit agreed with Judge Cummings’s holding that the Second Amendment protects an individual right to keep and bear arms, but concluded that Emerson’s Fifth Amendment due process rights had not been violated and the restraining order was sufficient, “albeit likely minimally so,” to support deprivation of Emerson’s Second Amendment rights.<sup>144</sup> The court therefore reversed the district court’s dismissal on Second and Fifth Amendment grounds, and remanded the case back to the district court.<sup>145</sup>

The Fifth Circuit decision affirming Judge Cummings’s holding of a Second

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137. *Id.*

138. *Id.*

139. *Id.* at 261 (emphasis in original).

140. *See id.*

141. *See id.*

142. *Id.* at 261-62.

143. *Id.* at 264.

144. *Id.* at 264-65.

145. *See id.* at 265.

Amendment individual right<sup>146</sup> immediately prompted commentary from both sides of the Second Amendment debate. For example, the Brady Center to Prevent Gun Violence declared, “[T]he court’s suggestion that the Second Amendment guarantees an individual right to be armed for reasons unrelated to militia service is based on a gross distortion of American constitutional history and the prior rulings of the U.S. Supreme Court.”<sup>147</sup> Conservative columnist Michael Barone predicted that in the wake of the Fifth Circuit decision, “it will surely be very difficult for any conscientious Supreme Court justice to write, as other federal appeals judges have, that the Second Amendment is just about the National Guard and that there is no individual right to keep and bear arms.”<sup>148</sup>

Despite Mr. Barone’s perhaps hopeful suggestion that the Supreme Court might soon revisit the Second Amendment, the Court recently declined, without comment, to review the Fifth Circuit’s decision.<sup>149</sup> It appears that the Court was able to continue

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146. It should be noted that Judge Parker wrote a special concurrence in *Emerson*, concurring in all parts of Judge Garwood’s opinion except for Section V, in which Judge Garwood concluded that there is an individual right to keep and bear arms under the Second Amendment. *See id.* at 272. Judge Parker labeled this portion of the opinion as dicta, and wrote:

The determination whether the rights bestowed by the Second Amendment are collective or individual is entirely unnecessary to resolve this case and has no bearing on the judgment we dictate by this opinion. The fact that the 84 pages of dicta contained in Section V are interesting, scholarly, and well written does not change the fact that they are dicta and amount to at best an advisory treatise on this long-running debate.

*Id.* (emphasis added). However, the court could just as easily have found no individual right and summarily dismissed Emerson’s argument; Judge Garwood’s so-called “dicta” appears to be an effort to actually give meaning to *Miller* and engage in an intellectually honest Second Amendment analysis instead of merely falling back on the sort of perfunctory, conclusory analysis in which other courts have engaged. *See Denning, supra* note 109.

147. Press Release, Brady Center to Prevent Gun Violence, *Brady Center Criticizes Fifth Circuit Interpretation of the Second Amendment in Emerson Case* (Oct. 17, 2001), available at <http://www.bradycampaign.org/press/release.asp?Record=353>.

148. Michael Barone, *A Decision of Historic Importance*, U.S. NEWS & WORLD REP., Oct. 19, 2001, available at [http://www.usnews.com/usnews/opinion/baroneweb/mb\\_011019.htm](http://www.usnews.com/usnews/opinion/baroneweb/mb_011019.htm).

149. 122 S. Ct. 2362 (2002) (mem.). In urging the Supreme Court not to grant Emerson’s petition for certiorari, the current Justice Department reversed “decades of official government policy on the meaning of the Second Amendment.” Linda Greenhouse, *Justice Dept. Reverses Policy on Meaning of Second Amendment*, N.Y. TIMES, May 7, 2002, at A1. The new view, expressed in footnotes within Justice Department briefs filed in opposition to certiorari in Emerson’s case and another gun-related case, *see id.*, stated that the Constitution “broadly protects the rights of individuals to own” firearms. *Id.* The Solicitor General, Theodore Olson, argued that the Court should not hear either appeal: “[E]ven accepting an individual right to bear arms, the application of the laws at issue in both cases reflected the kind of narrowly tailored restrictions by which that right could reasonably be limited.” *Id.* The Solicitor General’s office explained that, contrary to the views expressed in the (Clinton) Justice Department brief to the Fifth Circuit, *see supra* note 34, the “current position of the United States ... is that the Second Amendment more broadly protects the rights of individuals, including persons who are not [militia or military members] ... to possess and bear their own firearms, subject to reasonable restrictions ....” Greenhouse, *supra* (emphasis added).

its habitually deft avoidance of the issue, thus adding more confusion to the ongoing interpretation debate.<sup>150</sup> If the Court does eventually grant certiorari in order to resolve the apparent circuit split regarding the Second Amendment, it is impossible to say how the Court will rule, although it is instructive to read what some of the Justices have written on the issue. In their respective opinions, both Judge Cummings and Judge Garwood referenced writings by Justice Thomas and Justice Scalia that seem to favor an individual rights view.<sup>151</sup> Additionally, as shown, much of the scholarly writings (even by academics inclined to dislike guns) seem to also favor the individual rights view.<sup>152</sup>

The Second Amendment analysis in *Emerson* closely tracks the writings of the Framers on the subject of the individual right to keep and bear arms. The Court should similarly consider the intent of the Framers if and when it rules on the issue. At the very least, the Court should embark on a detailed scholarly exploration in the same way the Fifth Circuit did in *Emerson*, rather than putting forth a vague opinion, as the Court did in *Miller*, or a conclusory opinion, as have the various lower federal courts that have assumed away any individual right. As it stands, the preponderance of the historical evidence supports the individual rights theory, and it will be difficult for the Court to ignore the extensive analysis set forth in *Emerson*.<sup>153</sup> Clearly, however, the *Emerson* decision marks a landmark reversal of the trend of lower courts to casually dismiss individual rights theories of the Second Amendment. The growing body of academic writings supporting the individual rights theory has been greatly bolstered by the Fifth Circuit opinion, and the problems of municipal lawsuits against the gun industry have taken on a new *constitutional* dimension.

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150. See Gallia, *supra* note 24, at 133-34.

151. See, e.g., *United States v. Emerson*, 46 F. Supp. 2d 598, 609 (quoting Justice Thomas's concurrence in *Printz v. United States*, 521 U.S. 898 (1997)). "This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme . . . runs afoul of that Amendment's protections." *Printz*, 521 U.S. at 938 (Thomas, J., concurring).

Judge Cummings also references writings by Justice Scalia supporting the conclusions of Joyce Lee Malcolm. *Emerson* 46 F. Supp. 2d at 609 (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 137 n.13 (Amy Gutmann ed. 1997)). "It would . . . be strange to find in the midst of a catalog of the rights of individuals a provision securing to the states the right to maintain a designated 'Militia.' Dispassionate scholarship suggests quite strongly that the right of the people to keep and bear arms meant just that." *Id.* (citing *MALCOLM*, *supra* note 25).

For more Second Amendment language from members of the Rehnquist Court, see Kopel, *supra* note 24, at 112-31.

152. See *supra* Part I.

153. It is important to point out, however, that a constitutional guarantee of an individual right to keep and bear arms would by no means be absolute. Even if the Court rules in favor of the individual rights theory, it is clear that all individual rights are qualified rights subject to restrictions, as suggested by the Fifth Circuit. See *supra* text accompanying note 139. What may constitute reasonable restriction of arms ownership is beyond the scope of this Note.

### C. The Incorporation Problem

In considering whether municipal lawsuits against the gun industry implicate Second Amendment rights, it is not enough to stop with the debate over the meaning of the amendment itself. As with other provisions of the Bill of Rights, the Second Amendment was originally intended to restrict action by the federal government, not by state governments. The Fourteenth Amendment, drafted after the Civil War, was designed to enforce fundamental citizen rights against the states.<sup>154</sup> The Fourteenth Amendment has been used to extend individual rights from the Bill of Rights against infringement by the states as well.<sup>155</sup> The Supreme Court has used this tactic—known as incorporation—to hold that certain guarantees under the Bill of Rights, such as individual rights under the First and Fourth Amendments, are to be applied against the states.<sup>156</sup> The Court, however, has avoided expressly incorporating the Second Amendment under the Fourteenth Amendment.<sup>157</sup>

Obviously, incorporation turns on the interpretation of the right granted by the Second Amendment. If the collective rights theorists are correct, incorporation seems inapplicable, as it has historically protected individual rights under the Bill of Rights against restriction by the states. If the individual rights theorists are correct, it is curious to ponder why the Court has avoided expressly incorporating an individual right—the right to keep and bear arms—under the Fourteenth Amendment.

Collective rights theorists, in opposition to incorporation, may point to the Court's ruling in *United States v. Cruikshank*,<sup>158</sup> in which the Court deemed that the Second Amendment "means no more than that it shall not be infringed by Congress" and that it "is one of the amendments that [only] restrict[s] the powers of the national government."<sup>159</sup> Subsequently, in *Presser v. Illinois*,<sup>160</sup> the Court reiterated this point in ruling that the Second Amendment did not prevent the State of Illinois from restricting the rights of men "to drill or parade with arms" unless as part of a regular, organized state militia.<sup>161</sup>

As Professor Levinson points out, however, the Court did not decide the first

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154. The amendment reads: "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 its laws." U.S. CONST. amend. XIV § 1.

155. See, e.g., Levinson, *supra* note 25, at 652-54.

156. See, e.g., STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876* xi n.6 (1998). Halbrook cites the following examples of cases incorporating Bill of Rights freedoms through the Fourteenth Amendment: *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Robinson v. California*, 370 U.S. 660 (1962); *Wolf v. Colorado*, 338 U.S. 25 (1949); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Gitlow v. New York*, 268 U.S. 652 (1925); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). See *id.*

157. Amanda B. Hill, Note, *Ready, Aim, Sue: The Impact of Recent Texas Legislation on Gun Manufacturer Liability*, 31 TEX. TECH. L. REV. 1387, 1430 (2000).

158. 92 U.S. 542 (1875).

159. *Id.* at 553.

160. 116 U.S. 252 (1886).

161. *Id.* at 267.



“incorporation” case, *Chicago, Burlington and Quincy Railroad Co. v. Chicago*,<sup>162</sup> until eleven years after *Presser*, and it would be impossible to guess what the Justices in *Cruikshank* and *Presser* thought about incorporating *any* of the Bill of Rights as of the time those cases were decided.<sup>163</sup> Thus,

[t]he obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception. Why, that is, should *Cruikshank* and *Presser* be regarded as binding precedent any more than any of the other “pre-incorporation” decisions refusing to apply given aspects of the Bill of Rights against the states?<sup>164</sup>

It appears that any modern exclusion of the Second Amendment from incorporation would have to rest on the premise that the amendment guarantees only a collective right. Most likely, the incorporation question will only be answered if and when the Supreme Court rules conclusively on the meaning of the Second Amendment. However, the Court has expressly held that “[t]o view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.”<sup>165</sup> If the Court someday affirms the individual rights view as espoused in *Emerson*, surely the Court would conclude that the Second Amendment should be incorporated against the states as have other individual rights under the Constitution.

The accumulated academic and historical evidence, articulated in great detail in *Emerson*, strongly suggests that the Second Amendment *does* guarantee an individual right to keep and bear arms; that individual right, like the individual rights guaranteed by other provisions of the Bill of Rights, should be incorporated into the Fourteenth Amendment. As such, municipalities, as governmental actors under the states, must be subject to constitutional scrutiny when their lawsuits against the gun industry implicate the rights of Americans to keep and bear arms. The next Part explores this concept.

## II. MUNICIPAL LAWSUITS AND THE SECOND AMENDMENT

Municipal lawsuits against the gun industry are premised on various theories of tort.<sup>166</sup> The substantive or procedural merits of these tort theories are largely irrelevant

162. 166 U.S. 226 (1897).

163. Levinson, *supra* note 25, at 653.

164. *Id.*; see also Reynolds, *supra* note 24, at 498 (stating that *Presser* was “[d]ecided in an era when incorporation . . . was not the law [and thus is] of dubious authority today”).

165. Kopel & Gardiner, *supra* note 51, at 743.

166. The plaintiff municipalities generally proceed under three broad categories of alleged liability:

- (1) Firearms manufacturers and dealers employ improper distribution methods [that] result in firearms being sold in an “illegitimate” secondary market,
- (2) Manufacturers employ “unsafe” designs [that] permit “unauthorized” persons to use the firearms, and
- (3) The manufacture and sale of handguns constitutes a “public nuisance.”

James H. Warner, *Municipal Anti-Gun Lawsuits: How Questionable Litigation Substitutes for*

in evaluating the Second Amendment implications of these lawsuits. As such, it is perhaps more important to read between the lines to find the actual purpose of most of these lawsuits. There are troubling indications that the motivation behind these municipal lawsuits has more to do with restricting the ability of people to have guns, and less to do with the desire to collect damages designed to offset the financial costs of gun violence and to punish tortfeasors in the traditional sense. But it is important to note that even if the motives to collect damages to pay the costs of gun violence are in good faith, the effects of such lawsuits still directly implicate the Second Amendment rights of Americans.

This Part explores constitutional aspects of the fairly recent and novel attempts by municipalities to bring suit against gun manufacturers. Although many of these lawsuits have not fared well in court, the mediocre track record of these cases thus far is largely a result of plaintiffs' failure to carry their burden under theories of tort.<sup>167</sup> Considering *Emerson* and the Fifth Circuit's detailed and thorough endorsement of the individual rights theory of the Second Amendment, these lawsuits carry troubling constitutional implications to be explored as part of ongoing litigation over guns. As the Fifth Circuit noted in *Emerson*, the limits of reasonable legislation restricting firearms has yet to be considered. This Part concludes that abusive litigation tactics by the cities that could result in de facto gun bans by judicial fiat (bans that would extend well beyond municipal boundaries) must surely fall into the category of the unreasonable.

#### A. Opening the Floodgates: *Hamilton v. Accu-Tek*<sup>168</sup>

For years, the only lawsuits against gun manufacturers were filed on behalf of private individuals, and these suits were largely unsuccessful.<sup>169</sup> Generally, in these product liability suits, the plaintiffs failed to carry the day because courts have held that guns are not defective products because they actually work as intended.<sup>170</sup> Despite the failure of the vast majority of individual plaintiffs to win these lawsuits, "a number of municipal governments, perhaps emboldened by the apparent success of the lawsuits against tobacco firms, have filed suits."<sup>171</sup> This trend received an enormous boost by the outcome at the trial level in *Hamilton v. Accu-Tek*, the first time that gun

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*Legislation*, 10 SETON HALL CONST. L.J. 775, 776 (2000).

167. For an excellent critique of the failings of the tort theories upon which these plaintiffs rely, see H. Sterling Burnett, *Suing Gun Manufacturers: Hazardous to Our Health*, 5 TEX. REV. L. & POL. 433, 467-477 (2001). Burnett suggests that allowing the large-scale litigation assault on guns is a violation of the "well-established principle in tort law: [that] manufacturers are usually not responsible for the criminal misuse of their products." *Id.* at 467. To ignore this principle will allow the courts to "be crushed under a tide of new lawsuits and it will not be long before the extremists among us try to use the law to shut industrial civilization down." *Id.* For a contrasting, more optimistic view, see generally Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547 (1999).

168. 62 F. Supp. 2d 802 (E.D.N.Y. 1999), *vacated by* 264 F.3d 21 (2d Cir. 2001).

169. See Warner, *supra* note 166, at 775 (noting that a string of suits filed on behalf of individual plaintiffs over a decade ago were largely unsuccessful).

170. See Peterson, *supra* note 16, at 483.

171. See Warner, *supra* note 166, at 775.

manufacturers *as an industry* were held liable in tort.<sup>172</sup>

In *Hamilton*, the plaintiffs were the estates of six individuals killed by handguns, plus an injured survivor and his mother.<sup>173</sup> Originally, forty-nine gun manufacturers were named defendants, but the number of defendants was later reduced to twenty-five.<sup>174</sup> The remaining defendants manufactured the majority of the handguns sold in the U.S. market.<sup>175</sup> The plaintiffs' complaint alleged a number of theories of liability, such as negligent marketing and distribution practices, and based their case on a mass tort theory.<sup>176</sup> No evidence connected the weapons used in the crimes to any specific defendant.<sup>177</sup> The plaintiffs argued that handguns could be easily obtained, regardless of restrictive gun control laws, and this ease of access, according to the plaintiffs, was proof of the negligent marketing practices of the defendants.<sup>178</sup>

Judge Weinstein concluded that it was possible to show that an illegal market for handguns led to the killings, and the case went to the jury.<sup>179</sup> Eventually, the jury found that fifteen of the gun manufacturers were liable, and that nine of the defendants were liable for the injuries of some of the plaintiffs.<sup>180</sup> One of the survivors received \$3,950,000, but the amount was later reduced to \$520,000.<sup>181</sup> The jury used a market share method to apportion damage amounts among the defendants.<sup>182</sup> The upshot of the *Hamilton* case is that the jury found that the defendant gun manufacturers "knew or should have known that they were oversupplying the legitimate market, thereby creating a pool of weapons available for the illegitimate market."<sup>183</sup> The manufacturers flooded the market in neighboring areas with less-restrictive gun laws, with the inevitable result that the guns would make their way into the hands of criminals in areas with tougher gun control laws.<sup>184</sup>

The gun manufacturers appealed the verdict, and on appeal the Second Circuit certified two questions concerning novel issues of New York tort law to the New York Court of Appeals: Whether gun manufacturers owed the plaintiffs a duty to avoid negligent marketing and distribution of firearms, and if so, whether and how the market-share theory of damages would apply in the case.<sup>185</sup>

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172. Peterson, *supra* note 16, at 487.

173. 62 F. Supp. 2d at 808.

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.* at 808-10.

178. *See Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1313-14 (E.D.N.Y. 1996).

179. *Id.* at 1330.

180. *See Hamilton*, 62 F. Supp. 2d at 808.

181. *Id.* at 811.

182. *See Peterson*, *supra* note 16, at 489. Under the market share theory of liability, all of the manufacturers of a fungible product may be held liable for injuries caused by the product; the rule arose from litigation over cancer caused by the drug DES. *See Vandall*, *supra* note 167, at 558-59. Applying market share liability, gun manufacturers would be held liable in proportion to their sales in a particular market, because weapons used in crimes are often never recovered. *See id.*

183. Gallia, *supra* note 24, at 157.

184. *Id.*

185. *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 46 (2d Cir. 2000).

The New York Court of Appeals considered the questions and unanimously answered both in the negative.<sup>186</sup> Considering the first question, the court noted as an initial matter that “[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from hurting others, even where as a practical matter defendant can exercise such control.”<sup>187</sup> After considering several theories by which the plaintiffs asserted that the defendants owed them a duty, the court concluded that the defendants did not owe any such duty.<sup>188</sup>

The court also made short work of the market-share liability theory imposed by Judge Weinstein. The court distinguished Judge Weinstein’s reliance on the application of market share liability in prior New York cases involving the drug DES.<sup>189</sup> In those cases, the market-share liability was appropriate because “DES was a fungible product and identification of the actual manufacturer that caused the injury to a particular plaintiff was impossible.”<sup>190</sup> In contrast, the guns used to injure the plaintiffs were not fungible, nor were the marketing tactics of each of the defendant gun manufacturers equally negligent, thus the novel market-share theory of liability was not appropriate.<sup>191</sup>

Having received the response of the New York Court of Appeals, the Second Circuit concluded that the New York court’s answers to the certified questions were definitively responsive.<sup>192</sup> The Second Circuit opinion noted that it must bear in mind “that the highest court of a state ‘has the final word on the meaning of state law.’”<sup>193</sup> The court then went on to brush aside the plaintiffs’ remaining arguments, including assertions that the New York Court of Appeals answers were not responsive and that the court’s deference to the state court violated jurisdictional principles.<sup>194</sup> Because the New York Court of Appeals found no duty on the part of the defendants, the Second Circuit reversed the judgment of the district court.<sup>195</sup>

The jury verdict in the *Hamilton* trial caused quite a stir in the legal community, and the outcome encouraged numerous municipalities to file or consider suit.<sup>196</sup> For the first time, a crack appeared in the gun industry’s collective armor, and municipalities were eager to take advantage of this turn of events. It is too soon to tell whether the recent reversal of the *Hamilton* verdict will dampen the spirits of litigation-hungry municipalities. What is most important about the *Hamilton* case is that the gun industry became exposed to massive liability under novel theories of tort law, and

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186. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001).

187. *Id.* at 1061.

188. *See id.* at 1061-66.

189. *See id.* at 1061-62.

190. *Id.*

191. *See id.* at 240-42.

192. *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 25 (2d Cir. 2001).

193. *Id.* at 29 (quoting *County of Westchester v. Comm’r of Transp.*, 9 F.3d 242, 245 (2d Cir. 1993) (per curiam) (quoting *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 84 (2d Cir. 1991)).

194. *See id.* at 29-31.

195. *Id.* at 32.

196. *See Gallia, supra* note 24, at 158 n.190 (listing several cities desiring to file similar suits in the immediate aftermath of *Hamilton*, including Philadelphia, Los Angeles, San Francisco, and Gary, Indiana).

municipalities were thereafter encouraged to file suit against gun manufacturers. However, while the private plaintiffs in *Hamilton* sought financial compensation for their respective losses, motives of a different sort were lurking behind the publicly announced purpose of many municipalities to seek damages for high costs of gun violence.

### B. Gun Control Through Litigation

Many lawsuits against the gun industry are at least partly motivated by the desire of the plaintiffs to bankrupt the gun industry—"to make the manufacture and sale of firearms so costly that the industry would give up."<sup>197</sup> With few exceptions, courts have recognized these lawsuits for what they are—cynical attempts to seek *judicial* legislation that effectively bans guns in the absence of action by the legislatures.<sup>198</sup> For example, one of the plaintiffs in *Hamilton* admitted that the case "was never about money"; the main goal of the suit was to achieve policy changes.<sup>199</sup> This concept carries over into the motivations behind the municipal lawsuits. For example, municipal governments that are dissatisfied with their state legislature's efforts to restrict gun ownership could bring suit against the gun industry in order to bring financial pressure to bear.<sup>200</sup> The very threat of huge liability or even the costs of preparing for litigation could force gun industries to stop marketing to the public altogether—this result would amount to an outright ban on the sale of guns to the public, the equivalent of a legislative ban on guns. But, as one shrewd commentator noted, "the idea that courts should act because legislatures, or the public, have been intimidated by the 'gun lobby' . . . [shows a] misunderstanding of political branches of the government' and how [government] works."<sup>201</sup>

The words of some of the players involved in the municipal lawsuits reveal the true motivations behind these suits. In 1998, Chicago Mayor Richard Daley filed suit against the firearms industry, alleging that the gun industry "created a public nuisance by 'trafficking' a large number of guns into Chicago," with knowledge that the guns would end up in criminals' hands.<sup>202</sup> Daley, however, cut right to the point when he

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197. Kopel & Gardiner, *supra* note 51, at 750.

198. *See id.*

199. Peterson, *supra* note 16, at 502-03. While the plaintiff in *Hamilton* was a private plaintiff, her admission aptly illustrates the concept of seeking judicial action in the absence of favorable policy legislation. Although action by private plaintiffs cannot violate Americans' Second Amendment rights, Americans ought to be suspicious of legal action by any plaintiff—private or government—that has as its purpose the restriction of constitutional rights with which the plaintiff does not agree. *See generally* Kopel & Gardiner, *supra* note 51.

200. *See* Warner, *supra* note 166, at 775-76 ("[I]t appears that the ulterior motive behind [private and municipal] lawsuits was the desire, by the anti-gun movement, to use the courts to restrict the private ownership of handguns, since it was not possible to do so through legislation.")

201. Peterson, *supra* note 16, at 503 (quoting Philip D. Oliver, *Rejecting the "Whipping-Boy" Approach to Tort Law: Well-Made Handguns Are Not Defective Products*, 14 U. ARK. LITTLE ROCK L. REV. 1, 5 (1991)) (omissions and first and second alteration in original; third alteration added).

202. Hill, *supra* note 157, at 1412.

admitted that the purpose of the lawsuit was to hit them “right where it hurts—in their bank accounts.”<sup>203</sup> Chicago may indeed bear costs from gun violence, but the mayor’s remarks show that an underlying (perhaps the primary) motive for the suit was simply to bankrupt the gun industry through the courts.<sup>204</sup>

Chicago’s situation well illustrates the motives of many of the municipal plaintiffs. Chicago has extremely restrictive gun laws—handgun sales and private ownership of handguns not lawfully registered prior to 1982 are prohibited.<sup>205</sup> However, despite the severe restrictions on the legal ownership of firearms in Chicago, the city apparently suffers from violent crime involving the use of firearms. The lawsuit filed on behalf of Chicago alleged that the firearms manufacturers flooded areas just beyond the city’s boundaries (areas with less-restrictive gun laws) with the knowledge that these excess weapons would eventually make their way to Chicago to be used in crimes.<sup>206</sup> If this theory is correct, it suggests that Mayor Daley and other officials of the city of Chicago were frustrated by the fact that the Illinois Legislature (and perhaps the smaller government entities adjacent to the city) had not enacted gun control legislation as severe as the legislation enacted by Chicago itself. Massive damage awards or even the threat of highly expensive litigation would achieve the de facto equivalent of such strict gun control by bludgeoning gun manufacturers into submission—and, of course, the litigation could have the added benefit of enriching the city’s coffers along the way.

Strategies like Mayor Daley’s may be nothing more than shrewd maneuvering within the confines of acceptable litigation to achieve good faith results, such as the massive litigation against the tobacco industry seeking to recover healthcare costs. But the gun industry is nowhere near the financial juggernaut that is the tobacco industry. To compare, in 1998 the annual sales for the entire gun industry totaled about \$1.4 billion, while the tobacco companies racked up approximately \$45 billion.<sup>207</sup> It seems clear that the motive of at least some of the municipalities is to take advantage of the relative financial weakness of the gun industry. The plan is to get “so many lawyers to launch so many lawsuits so fast in so many places that the firearm industry simply splinters and disintegrates.”<sup>208</sup> Indeed, Philadelphia Mayor Ed Rendell called for “as many as one hundred suits to be filed on the same day to overwhelm the industry.”<sup>209</sup> Another observer explained that if “they can get 20 suits going on, they could raise the cost to the gun manufacturers to \$1 million a day.”<sup>210</sup>

There is some indication that big cities recognize the value of this tactic. Gun

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203. *Id.* at 1413.

204. *Id.*

205. See Jill R. Baniewicz, Note, *Is Hamilton v. Accu-Tek a Good Predictor of What the Future Holds for Gun Manufacturers?*, 34 IND. L. REV. 419, 438 (2001).

206. See *id.* In order to substantiate the city’s claims, the Chicago Police Department embarked on “Operation Gunsmoke,” in which undercover police officers conducted a sting operation against gun shops just outside the city limits. See Segalla, *supra* note 11, at 382. Allegedly, undercover “agents without proper I.D. purchased handguns from dealers after bragging they would use the firearms in criminal enterprises or resell them to drug gangs.” *Id.*

207. Segalla, *supra* note 11, at 369.

208. Hill, *supra* note 157, at 1413.

209. *Id.*

210. Baniewicz, *supra* note 205, at 444 (quoting remarks by Cardozo law professor Lester Brickman).

litigation was a hot topic of discussion at the U.S. Conference of Mayors in 1999.<sup>211</sup> A concerted effort to unite and crush the gun industry is further indicated by private efforts by organizations such as the Center to Prevent Handgun Violence and the Firearms Litigation Clearing House, both actively offering assistance via the Internet and encouraging municipalities to file suit.<sup>212</sup> The massive damage awards sought by municipal plaintiffs also seem to support this tactic of swamping the gun industry with bankrupting claims. Chicago, for example, sought \$433 million in damages,<sup>213</sup> and Boston's complaint sought "at least \$100 million."<sup>214</sup> While Mayor Rendell's call for one hundred simultaneous suits has not yet occurred,<sup>215</sup> it is easy to see how such a strategy would be financially debilitating for the gun industry. Providing further evidence of the willingness of municipal plaintiffs to take a page out of the successful tobacco play book (seeking overwhelming damages), New Orleans retained the law firm of Gauthier, Downing, LaBarre, Besler, & Dean, high-profile veterans of the tobacco litigation.<sup>216</sup> Such veterans of the tobacco litigation know full well that the firearms industry has nowhere near the deep pockets of the tobacco defendants.

While the gun industry has not yet been driven into mass bankruptcy, it is apparent that the mere threat of massive litigation has had an effect. In the wake of the surge of municipal litigation, Colt Manufacturing, a leading gun manufacturer, announced that it would stop marketing guns to the civilian market, perhaps fearing exposure to massive liability.<sup>217</sup> Other manufacturers have already gone bankrupt because of the costs of litigation.<sup>218</sup> Perhaps the most conspicuous casualty to date of the threat of

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211. Segalla, *supra* note 11, at 377-78.

212. *Id.* at 378.

213. *Id.* at 382.

214. *Id.* at 386.

215. *Id.*

216. See Trapolin, *supra* note 17, at 1286 & n.71.

217. See Segalla, *supra* note 11, at 369-70; see also Adam Cohen, *Are Lawyers Running America?*, TIME, July 17, 2000, at 25 (indicating that Colt dropped civilian marketing and focused instead on military and police markets); Burnett, *supra* note 167, at 481 (stating that Colt was "unable to get loans . . . because banks were unwilling to finance the manufacturer with lawsuits hanging over its head which 'could be worth zero, or a trillion dollars.'). Perhaps as a result of the recent failures of the municipal lawsuits, Colt has apparently gotten back in the business of marketing firearms to the civilian public. See Massad Ayoob, *What's Happening to Colt? An Interview with General William Keys, USMC (Ret.), CEO of Colt's*, HANDGUNS, Feb. 2002, at 52 ("[W]e're happy to sell any of the rifles and any of the handguns to any private citizen who is eligible to buy one.").

218. See Segalla, *supra* note, 11 at 370; see also Kopel & Gardiner, *supra* note 51, at 768 (describing Maryland Court of Appeals decision imposing strict liability on a manufacturer of "Saturday Night Specials" that subsequently went out of business). The court's decision was later nullified by state legislation, but the gun manufacturer went out of business in the meantime—a result "cheered as a model by gun prohibition strategists." *Id.*

Kopel and Gardiner also mention the demise of a company that manufactured the infamous "Hell-Fire Device," a device that attached to the trigger of semi-automatic firearms and offered "[Walter] Mittyish owners the 'feel' of automatic weapons fire without actually making the gun fire automatically." *Id.* at 769. The manufacturer declared bankruptcy after being sued in a lawsuit "orchestrated by the Center to Prevent Handgun Violence." *Id.* The company's president explained that "since we cannot afford the huge legal fees required to defend this

massive litigation was Smith & Wesson, which signed a highly publicized settlement agreement in 2000.<sup>219</sup>

The agreement contained a number of provisions, including a Smith & Wesson pledge to develop “smart gun” technology and more sophisticated safety innovations.<sup>220</sup> And, in a move that caused even more controversy, Smith & Wesson agreed to require any dealer of its firearms to abide by certain restrictions, such as a strict code of conduct and a requirement that no such dealer will “handle high capacity magazines or assault weapons, nor sell any Smith & Wesson product to anyone who has not taken a certified firearms safety class or passed a safety exam.”<sup>221</sup> The company admitted that the agreement was necessary to avoid closing shop altogether.<sup>222</sup> The agreement was noteworthy in that it was at least partially motivated by the threat of the federal government’s involvement via the Department of Housing and Urban Development (“HUD”) in suits against unnamed members of the gun industry.<sup>223</sup>

As an immediate result of Smith & Wesson’s agreement, a number of cities dropped the gun manufacturer from their lawsuits; thirteen other cities, however, went forward with their original claims against Smith & Wesson despite the manufacturer’s agreement.<sup>224</sup> On the positive side for Smith & Wesson, local, state, and federal law enforcement agencies began giving preference to the embattled gun manufacturer in the award of weapon purchase contracts.<sup>225</sup> In addition, exemplifying the coercive pressure brought to bear against gun companies that stood their ground against signing similar agreements, a number of state attorneys general initiated antitrust investigations against these companies and other organizations that had boycotted Smith & Wesson in protest of the company’s having broken ranks with other embattled gun manufacturers.<sup>226</sup>

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ridiculous claim, and since a successful defense would still put us out of business, we are left with no alternative other than closing the doors.” *Id.* (quoting *Suit Causes Hellfire Bankruptcy*, FIREARM BUS., Nov. 1, 1994, at 5).

219. See Bogus, *supra* note 12, at 1357. Smith & Wesson’s agreement was a “pact with [HUD], the Department of the Treasury, the New York and Connecticut Attorneys General, and the mayors of many of the cities suing the gun industry at that time.” Burnett, *supra* note 167, at 481.

220. See Burnett, *supra* note 167, at 482. For a complete description of each element of the agreement, see *id.* at 481-82.

221. *Id.* at 482.

222. Hill, *supra* note 157, at 1413-14.

223. See Bogus, *supra* note 12, at 1357-58. HUD magnanimously announced that Smith & Wesson’s agreement would make further lawsuits against the company in the future “unnecessary.” Burnett, *supra* note 167, at 483.

224. See Trapolin, *supra* note 17, at 1291.

225. See *id.* at 1293. HUD Secretary Andrew Cuomo called on “federal agencies and the nation’s police departments to favor companies that signed agreements [like Smith & Wesson’s].” Burnett, *supra* note 167, at 483.

226. See Trapolin, *supra* note 17, at 1292. In an ironic twist to the travails of Smith & Wesson, the company endured a concerted boycott campaign by many hard-line progun groups and individuals who labeled the embattled gun company “Slick & Worthless.” See Tanya Metaksa, *Slick & Worthless*, available at <http://downloads.slingshots.com/slickless.html>. The gun industry “turned its back on Smith & Wesson”; the mounting litigation costs and boycott pressures induced the company’s British owner to sell the company in May 2001. See Burnett,



In the years following the rush on the courts, the claims of many municipalities have met with failure. The trial verdict in *Hamilton*, the case that excited so much attention among antigun organizations and big city mayors, was reversed by the Second Circuit. Similarly, lawsuits brought by New Orleans, Bridgeport, Philadelphia, and other cities have resulted in defeat for the plaintiffs.<sup>227</sup> However, as of the time of this writing, a number of lawsuits are still pending at various stages, and with the stakes so high, any one lawsuit resulting in massive damages against the defendants could bankrupt the gun industry.<sup>228</sup> The following sub-Part considers the practical and constitutional effects of the continuing litigation.

*C. How Will the People Acquire the Arms They  
Have a Right to Keep and Bear?*

Those who believe that the Second Amendment guarantees an individual right to keep and bear arms may be comforted by the cities' relative lack of success thus far in the courts. However, they should not let such failures—which seem to be largely confined to either procedural deficiencies or substantive failings under tort law—blind them to the very real constitutional considerations that arise out of the lawsuits. Criticisms of the effort to bankrupt the gun industry should go beyond merely attacking the lawsuits as frivolous, or as substantively flawed on the issue of causation.<sup>229</sup> As already suggested, the municipal lawsuits at the very least may be an improper attempt to use the judicial system to do an end-run around legislatures. But an even more troubling feature is that the end-run represented by these lawsuits directly affects the Second Amendment rights of Americans. Even if the defendant gun manufacturers end up prevailing on the merits in court, the prohibitively large expenses of fighting every municipal lawsuit will likely coerce manufacturers to agree to restrictive settlement terms, to stop marketing guns to the civilian market, or to go bankrupt.<sup>230</sup> These results will eventually have the practical effect of denying Americans the constitutional right to keep and bear arms.

In the past, courts have been reluctant to allow the judiciary to be used to decide

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*supra* note 167, at 482-83 & nn.227-28.

227. See, e.g., *Philadelphia v. Beretta U.S.A. Corp.*, 217 F.3d 415 (3d Cir. 2002) (dismissing suit because of remote causation and lack of standing); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001) (ruling that Bridgeport and its mayor lacked standing to bring suit); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001) (ruling that New Orleans's suit was properly barred by a state statute preempting lawsuits by Louisiana cities).

228. The Web site for the International Action Network on Small Arms ("IANSA"), a supporter of the municipal litigation, has a complete listing of current and pending lawsuits as of October 11, 2001. See International Action Network on Small Arms, *Gun Lawsuits: The Industry's Deceptive Scoreboard*, at [http://www.iansa.org/news/2001/oct\\_01/gun\\_law.htm](http://www.iansa.org/news/2001/oct_01/gun_law.htm). Interestingly, the IANSA Web site illustrates that the acrimony over the lawsuits even extends to conflicts over whether antigun or progun interests have been served by the results of the municipal litigation—IANSA accuses progun groups of attempting to cast outcomes of most of the litigation as favorable to the gun manufacturer defendants. See *id.*

229. See, e.g., *Bumann*, *supra* note 16. For a good summary of causation issues pertaining to the municipal suits, see generally *Vandall*, *supra* note 167.

230. See generally *Baniewicz*, *supra* note 205.

issues best left to legislative deliberation.<sup>231</sup> Federal courts, in particular, have been particularly vigilant against the idea that courts should legislate gun policy.<sup>232</sup> For example, in *Martin v. Harrington & Richardson*,<sup>233</sup> the Seventh Circuit noted that the "right of private citizens in Illinois to bear arms is protected by . . . the Illinois Constitution."<sup>234</sup> To impose liability on the sale of handguns, the court held, would "in practice drive manufacturers out of business[] [and] would produce a handgun ban by judicial fiat in the face of the decision by Illinois to allow its citizens to possess handguns."<sup>235</sup> Similarly, in *Wasylow v. Glock, Inc.*,<sup>236</sup> a federal district court declared that the legislature is the proper body to make policy decisions relating to gun control.<sup>237</sup> Mere frustration with the failure of the legislature to enact legislation to curb handgun violence should not be enough to justify judicially created policy changes, the court concluded.<sup>238</sup> Many state courts have come to the same conclusion.<sup>239</sup>

This litigation, or the threat of such litigation, therefore, effectively substitutes for legitimate legislative action. Americans should be suspicious of efforts by private parties or the government to seek policy objectives through recourse to the courts when such parties are unable to achieve their objectives through appropriate legislative means. Moreover, the courts rejecting such litigation as improper usurpation of legislative functions did not have the benefit of any clear judicial precedents affirming an individual right to keep and bear arms. The Fifth Circuit's *Emerson* decision represents a significant change in how these lawsuits should be evaluated and its rationale may provide a potent defense against this type of litigation.

Thus, it appears that the pressures brought to bear by these lawsuits have constitutional implications beyond economic coercion. This becomes more apparent by analogizing the guarantees of the First and Second Amendments. The First Amendment, for example, has been ruled a fundamental right, in light of the fact that it enumerates rights "explicitly or implicitly guaranteed by the Constitution."<sup>240</sup> The text of the Second Amendment arguably makes a similar explicit or implicit guarantee, especially considering the well-supported individual rights view articulated by the Fifth Circuit in *Emerson*. David Kopel and Richard Gardiner have made the same argument using the classic First Amendment case *New York Times Co. v. Sullivan*,<sup>241</sup> which spawned "The Sullivan Principles," the doctrine which allows the courts to "impose restrictions on traditional torts to protect Constitutional rights."<sup>242</sup>

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231. See Burnett, *supra* note 167, at 464.

232. See *id.* at 465.

233. 743 F.2d 1200 (7th Cir. 1984).

234. *Id.* at 1204.

235. *Id.*

236. 975 F. Supp. 370 (D. Mass. 1996).

237. *Id.* at 380-81.

238. See *id.*

239. For a description of some of these cases, see Burnett, *supra* note 167, at 465-66.

240. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

241. 376 U.S. 254 (1964).

242. Kopel & Gardiner, *supra* note 51, at 737. The Court held that "[W]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage[s] . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Sullivan*, 376 U.S. at 277 (emphasis added). The Court

In *Sullivan*, the plaintiff was a public official suing the *New York Times* for publishing a libelous story about the plaintiff.<sup>243</sup> The Supreme Court sharply restricted the common law tort remedy of libel because of the potential danger of abusive civil litigation infringing the exercise of a constitutional right.<sup>244</sup> According to Kopel and Gardiner, *Sullivan* in part stood for the proposition that public officials have broad immunity from suits over statements made in the course of official duties.<sup>245</sup> Similarly, citizens who criticize government officials also enjoy broad immunity.<sup>246</sup> The government immunity concept should also apply to tort protection of the Second Amendment. Kopel and Gardiner explain:

Governments are immune from suit for failure . . . to protect citizens from crime. Governments are similarly immune from suit by victims who were injured by criminals who were given early release on parole. Accordingly, it would be highly inappropriate for the government, through the courts, to make it *economically impossible* for persons to own handguns for [defense] . . . . If the Judiciary will not question the government's civil immunity for failure to protect people, the government's courts certainly should not let themselves become a vehicle that deprives people of the [means] to protect themselves.<sup>247</sup>

For the government or the judiciary to allow common law torts to infringe constitutional rights "amounts to unlawful state action that is barred by the Fourteenth Amendment . . . [and the] judiciary has an affirmative obligation to prevent such infringement."<sup>248</sup>

Kopel and Gardiner analyze the scope of the Second Amendment by analyzing the textual guarantees of the amendment; their analysis follows a path similar to the analysis of Judge Cummings and Judge Garwood in their respective opinions.<sup>249</sup> As did the *Emerson* courts, Kopel and Gardiner conclude that the Second Amendment guarantees an individual right to keep and bear arms, and "like the freedom of speech and the press, [that right] is an enumerated Constitutional right entitled to judicial protection."<sup>250</sup> Thus, the guarantees of the Second Amendment, like other recognized fundamental rights, ought to be incorporated against the states and rigorously defended.

The economic impossibility of owning a gun could become a reality if the municipalities are permitted to carry forward their avalanche of questionable lawsuits. Unlike First Amendment free speech rights, which people are born with the means to exercise, the Second Amendment necessarily requires an outside means to enable its

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reined in litigation that would infringe constitutional rights; courts should similarly rein in frivolous attempts to restrict the Second Amendment.

243. *Sullivan*, 376 U.S. at 256-59.

244. Kopel & Gardiner, *supra* note 51, at 737.

245. *Id.* at 747.

246. *Id.*

247. *Id.* at 748 (emphasis added).

248. *Id.* at 773.

249. *See id.* at 738-41. Compare this analysis with the judges' analyses *supra* Parts II.A. and II.B.

250. Kopel & Gardiner, *supra* note 51, at 743.

exercise. In other words, if there is a right to keep and bear arms, it seems a stretch to suggest that this right extends only to the natural weapons we are born with—fists, feet, and teeth. Truly, “[w]hile all other animals are born with defensive weapons which they cannot remove, humans are born with the capacity for reason and the physical ability to make [arms] to protect themselves.”<sup>251</sup>

Without commenting on the wisdom (let alone the constitutionality) of big city laws that essentially ban private gun ownership, the municipal lawsuits against the gun industry clearly have the effect of imposing an indirect sort of gun control extending beyond municipal boundaries. One can envision how large money damage awards in only a few trials could effectively shut down a substantial portion of the gun industry. This would amount to an elimination of the means by which millions of Americans would exercise their constitutional rights—“[i]f there are no guns because manufacturers are driven out of business, then it would be impossible for an individual to own or to bear a gun.”<sup>252</sup> While there are undoubtedly many who would cheer this result, Americans should be wary of assuming away a very real constitutional right by virtue of their policy views. Just as Americans should cherish the First Amendment for protecting even unpopular speech, so should they cherish their rights protected by the Second Amendment (even if they choose not to exercise them) and be suspicious of efforts to render these rights meaningless.<sup>253</sup>

One could argue that even if the gun industry did go out of business, and there were therefore no *new* guns on the market, the fact that there are well over 200 million guns in America already ensures that there will be plenty left over for people to have to exercise their Second Amendment rights. Aside from the fact that government-induced scarcity would drive up the prices on the remaining “grandfathered” guns, it seems disingenuous to suggest that exercise of a constitutional right should depend on previously existing channels. This would be analogous to the Supreme Court in *Sullivan* having come out the opposite way by recognizing the expansive defamation standard argued for by the plaintiff. Such a result would effectively shut down startup of new newspapers because of fears of liability, leaving the Court to appease an outraged public by reassuring that there are more than enough existing newspapers in operation (with adequate insurance and highly paid lawyers) to print news and views, and thus everyone’s rights under the First Amendment are amply protected.

Luckily for the gun manufacturers, many states have taken steps to curb the potential abuses coming from these municipal lawsuits.<sup>254</sup> These preemptive measures include legislation by states to preclude their municipalities from pursuing litigation against

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251. Stephen P. Halbrook, *Tort Liability for the Manufacture, Sale, and Ownership of Handguns?*, 6 *HAMLIN L. REV.* 351, 382 (1983).

252. Hill, *supra* note 157, at 1432.

253. Kopel and Gardiner point out that, in response to their attempt to analogize the First and Second Amendments, it could be argued that speech does not harm people, but guns do. See Kopel & Gardiner, *supra* note 51, at 748. However, the authors point out that “[t]he holocaust ended with gas chambers, but began with words, the words of hat[er]mongers like Hitler . . . . Even so, Nazi speech, not to mention dangerous philosophy, is protected under the Constitution, as is sexually oriented speech which promotes sexism and rape.” *Id.* at 748. It would seem to be an especially specious argument to declare that the First Amendment has value and the Second Amendment does not because guns kill people and words do not.

254. Peterson, *supra* note 16, at 497-98.

the gun industry. Other measures have been introduced in the United States Congress to achieve similar ends on a national scale.<sup>255</sup> But, as argued earlier, only a few high-dollar judgments or settlements in isolated areas of the country could render all such preventive measures moot. These legislative efforts, though well-intentioned, are subject to short-sighted political whim. At any rate, any honest assessment of the scope of the Second Amendment by the Court that undertakes as thorough an analysis as those of Judge Cummings and Judge Garwood would render such legislative efforts unnecessary. The courts must make a serious effort to abide by the Sullivan Principles and protect the Second Amendment from unreasonable litigation in the same way that the courts have zealously protected the First Amendment. The judiciary must affirmatively fight efforts to coopt the legal system in an effort to bypass any disfavored provisions of the Constitution.

### III. CONCLUSION

The debate over whether the Second Amendment guarantees an individual right to keep and bear arms will continue to simmer, at least until the Supreme Court resolves the issue once and for all. The weight of academic authority leans in the direction of an individual rights meaning. Along with the two *Emerson* decisions, the only thorough judicial analyses of the Second Amendment to date, this recent trend of authority suggests that the amendment should be afforded the full protection that other fundamental rights in the Bill of Rights enjoy. For this reason, the courts should be as suspicious of improper attempts to restrict Second Amendment freedoms as they are of threats to First Amendment freedoms, or any other individual rights under the Constitution.

Without question, municipal lawsuits against the gun industry have the potential to directly infringe the rights of Americans to keep and bear arms. In sum, the "harassment lawsuits . . . will risk chilling the exercise of Second Amendment rights."<sup>256</sup> The Fifth Circuit in *Emerson* properly recognized that the amendment protects an individual right to keep and bear arms. The Supreme Court made the right decision in *Sullivan*, when it ruled that common law tort claims should not be allowed to infringe our constitutional rights. The courts should look to these holding and restrict the ability of municipal plaintiffs to infringe Second Amendment rights through massive litigation against the gun industry.

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255. *Id.* at 499.

256. Kopel & Gardiner, *supra* note 51, at 774.