

# University of Richmond Law Review

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Volume 25 | Issue 3

Article 5

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1991

## The Second Amendment: A Study of Recent Trends

Michael T. O'Donnell  
*University of Richmond*

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### Recommended Citation

Michael T. O'Donnell, *The Second Amendment: A Study of Recent Trends*, 25 U. Rich. L. Rev. 501 (1991).  
Available at: <http://scholarship.richmond.edu/lawreview/vol25/iss3/5>

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# NOTES

## THE SECOND AMENDMENT: A STUDY OF RECENT TRENDS

### I. INTRODUCTION

The second amendment of the Constitution of the United States reads: "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>1</sup> The interpretation of these twenty-seven words has generated considerable debate since they were first declared in force in 1791.<sup>2</sup> Despite a growing argument over the true meaning of the amendment, the Supreme Court has been reluctant to provide a definitive interpretation of the second amendment and thus give it the recognition it merits.

Presently, the United States is trapped between its noble and historic notions of individuals' rights and the grim reality of an age of unprecedented civil violence. Patrick Henry once stated, "[t]he great object is that every man be armed . . . Every one who is able may have a gun."<sup>3</sup> This sentiment is understandable and admirable. Now, however, many Americans wish that the founding fathers had placed a little more emphasis in the second amendment on the kind of individuals who could own firearms and less on the simple ability of an individual to have a gun. The right to possess a gun that was established by the second amendment has been exercised for centuries by countless Americans. Although the exact number of guns currently existing in the United States is unknown, it has been estimated that there is more than one gun for every two people.<sup>4</sup>

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1. U.S. CONST. amend. II. The capitalization and punctuation of the second amendment are not consistently reported. See Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, n.1 (1987).

2. SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY, THE RIGHT TO KEEP AND BEAR ARMS, S. REP. NO. 522-3, 97th Cong., 2nd Sess. 1 (1982) [hereinafter REPORT]. "There is probably less agreement, more misinformation, and less understanding of the right to keep and bear arms than any other current controversial constitutional issue." *Id.* at 28 (quoting AMERICAN BAR ASSOCIATION, Background Report on Firearms Control).

3. REPORT, *supra* note 2, at v.

4. *Lock and Load for the Gunfight of '89*, U.S. NEWS AND WORLD REP., Mar. 27, 1989 at 9.

On March 28, 1991, the tenth anniversary of his shooting by John W. Hinckley, Jr., former President Ronald Reagan expressed his support for the Brady Bill,<sup>5</sup> a federal law requiring a seven-day waiting period for handgun purchases.<sup>6</sup> This shift by Reagan, a member of the National Rifle Association ("NRA") who generally followed the NRA's views, is seen as a major victory for the proponents of gun control.<sup>7</sup>

Both Congress and the state legislatures have been slowly moving toward controlling gun ownership in the United States and the courts have virtually side-stepped the issue. It is hoped that Reagan's support will be the catalyst necessary to bring about some significant changes in this area of gun control.<sup>8</sup>

The purpose of this note is not to give an in depth history of the second amendment and the intent of its drafters.<sup>9</sup> Rather, this note will give an overview of how the Supreme Court has interpreted the amendment. This note will then examine the recent trend towards restricting the individual's right to own certain firearms that has been taking place in both the courts and the legislatures.

## II. THE RIGHT TO BEAR ARMS: INDIVIDUAL OR COLLECTIVE?

A deeply polarized debate as to whether the second amendment provides individuals, as opposed to the people as a whole, the right to bear arms has long existed. Many state constitutions, as well as the federal constitution, recognize that the people have some right to bear arms.<sup>10</sup> It is the interpretation of the extent of this right which has caused the debate to become so hotly contested. Therefore, before one may effectively analyze the judicial interpretations of the second amendment, it is necessary to understand the difference between the opposing philosophies.

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5. See *infra* note 108.

6. The New York Times, March 29, 1991, at A1, col. 1.

7. *Id.* at A11.

8. *Id.*

9. For several good studies that do provide such an in depth history, see Bordenet, *The Right to Possess Arms: The Intent of the Framers of the Second Amendment*, 21 U. WEST L.A. L. REV. 1 (1990); Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789 (1982); Hardy, *supra* note 1; Moncure, *Who is the Militia—The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1 (1990).

10. For example, VA. CONST. art. I, 13 reads:

[t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

For a listing of thirty-seven such constitutional excerpts, see Caplan, *supra* note 9, at 790-93 n.8.

### A. *The Individual Rights Theory*

Those who support the theory of individual rights focus almost exclusively on the second amendment's latter part, which reads "the right of the people to keep and bear arms, shall not be infringed."<sup>11</sup> Indeed, pro-gun groups such as the NRA which are very supportive of the individual rights theory, are content to completely ignore the previous part of the amendment.<sup>12</sup>

Individual rights proponents regard the reference to the militia in the second amendment as nothing more than a justification for the individual right. Indeed, they emphasize that the second amendment was adopted in an era when all able bodied men were required by state law to furnish their own arms.<sup>13</sup> This calls into question the original intent of the drafters of the document. Often, the following passage from James Madison, the drafter of the second amendment, is offered as evidence of his intent: "[T]he advantage of being armed . . . the Americans possess over the people of all other nations . . . Notwithstanding the military establishments in the several Kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."<sup>14</sup> Although this statement seems to support the idea that the right to bear arms was intended to be exercised by the people, it does not suggest that the term "the people" is to be interpreted as individuals, rather than as the collective society.

An early commentator, publishing in 1825, noted that under the second amendment:

The prohibition is general. No clause in the Constitution could by a rule of construction be conceived to give to Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if in blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.<sup>15</sup>

The second amendment does not specify whether it is the federal government or the state governments, or both which are prohibited from infringing on the right of the people to bear arms. A staunch supporter of the individual rights theory would undoubtedly argue that neither the

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11. U.S. CONST. amend. II.

12. The National Rifle Association ("NRA"), founded in 1871, has about three million members and an operating budget of 86 million dollars. Above their headquarters in Washington, D.C. are these words: "The right of the people to keep and bear arms shall not be infringed." King, *Sarah and James Brady; Target: The Gun Lobby*, N.Y. Times, Dec. 9, 1990, § 6, at 82, col. 2-3.

13. Bordenet, *supra* note 9, at 22.

14. REPORT, *supra* note 2, at v (quoting THE FEDERALIST No. 26 (J. Madison)).

15. REPORT, *supra* note 2, at vii (quoting RAWLE, "VIEW OF THE CONSTITUTION" (1825)).

state nor the federal government may infringe on the right. Under this view, however, a logical conclusion would be that an individual has a right to own machine guns, missiles or whatever "arms" he or she wishes to possess. The result could be not one standing army, but countless standing armies; this could not have been the intent of the drafters.

Although the Supreme Court has never definitively stated whether the right to bear arms is individual or collective, case law strongly indicates that the Court favors the notion of a collective right. This is not to say that all courts have followed such an interpretation of the second amendment. Indeed "no fewer than twenty-one decisions by the courts of our states have recognized an individual right to keep and bear arms, and a majority of these have not only recognized the right but invalidated laws or regulations which abridged it."<sup>16</sup> Furthermore, at least one federal appellate court has agreed that the second amendment stands for the individual's right to keep and bear arms.<sup>17</sup>

Needless to say, the debate over the right of the states to place reasonable limitations on the individual's right to bear arms continues to this day. It now appears however, that courts are starting to accept the notion that states can place certain limitations on the rights of individuals to make, own and use certain weapons. The American Civil Liberties Union explains its interpretation of the Court's position in its Policy No. 43:

The Union agrees with the Supreme Court's long-standing interpretation of the Second Amendment that the individual's right to keep and bear arms applies only to the preservation or efficiency of a "well-regulated militia." Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected.<sup>18</sup>

Despite the fact that courts have recognized some form of gun regulation as constitutionally permissible, many people contend that "[d]raconian gun control measures, such as a total ban on the private possession of firearms, would . . . be unconstitutional."<sup>19</sup>

Those in favor of a collective rights interpretation argue that the "right of the people," in the second amendment refers to a right of society as a whole. A potent argument against this interpretation however, is that the same words are used in the first and fourth amendments<sup>20</sup> and are univer-

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16. *Id.* at vi.

17. Bordenet, *supra* note 9, at 27; *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943). The court in *Cases* was determining whether a .38 caliber Colt type revolver could have a reasonable relationship to the preservation and efficiency of a well-regulated militia. The court stated that the federal government could only prohibit weapons without such a relationship. *Cases*, 319 U.S. at 922-23.

18. REPORT, *supra* note 2, at 28 (quoting American Civil Liberties Union Policy No. 43).

19. Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 122 (1987).

20. U.S. CONST. amend. I & IV. The first amendment deals with the right of free speech

sally accepted as suggesting an individual right. Since the second amendment is sandwiched between the first and the fourth Amendments and all three were drafted by the same man, one could easily derive the conclusion that the words were intended to have a uniform meaning in all three.

### B. *The Collective Rights Theory*

Proponents of the collective rights interpretation of the second amendment strongly emphasize its first part, which states "a well regulated militia, being necessary to the security of a free state."<sup>21</sup> The basis of the collective rights theory is that the individual possesses the right to bear arms because he is an integral part of a free state's security.<sup>22</sup> "The collective rights theory of the right to bear arms was born in the 1905 decision of the Kansas Supreme Court in *Salina v. Blaksley*."<sup>23</sup> In *Salina*, the court explained that the relevant section of the Bill of Rights of Kansas referring to the right of the people "to bear arms for their defense and security' refers to the people as a collective body."<sup>24</sup>

Although the United States Supreme Court has never used such definitive language, an analysis of the cases reveals that the Court has virtually always felt that the right to bear arms is strongly tied to the security of a free state, and therefore, is of a collective nature.

### III. SECOND AMENDMENT CASES BEFORE THE SUPREME COURT

The federal government did not start to regulate firearms until Congress passed the National Firearms Act in 1934.<sup>25</sup> Before this, the Supreme Court had few opportunities to interpret the second amendment. In fact, the second amendment's entire history before the Court can be gleaned from a handful of cases. This is surprising considering that the meaning of the second amendment is not intrinsically clear.<sup>26</sup> Given its

and the fourth amendment prohibits wrongful search and seizure.

21. U.S. CONST. amend. II.

22. I have used the word "he" intentionally because it suggests a problem with the collective rights theory. If individuals are permitted to own "arms" solely because they are members of the militia, the question remains if this suggests that the right can only be exercised by men. The militia and reserve militia have traditionally been comprised of men. Women, however, are also members now if they are United States citizens and commissioned officers in the National Guard. See 10 U.S.C. § 311(a) (1988).

23. Caplan, *supra* note 9, at 823 (discussing *Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905)).

24. *Salina v. Blaksley*, 72 Kan. 230, 231, 83 P. 619, 620 (1905).

25. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C.A. §§ 5801-72 (West 1989) (this act established a tax on certain transactions involving specified firearms and restricted the importation and interstate transportation of such weapons).

26. See, Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 644 (1989).

unclear meaning, one would have expected that the Court would have seized some opportunity to provide an unambiguous interpretation of the exact bounds of the right to bear arms.

In *Dred Scott v. Sanford*,<sup>27</sup> the Court indirectly indicated that the right to bear arms is an individual right. In *Dred Scott*, the Court held that African-Americans were not citizens of the United States and the respective states could not make them citizens. In rationalizing its decision, the Court described the rights of American citizens that would have had to be given to African-Americans if the Court held otherwise. The Court stated that such a decision:

would give to persons of the negro race, who are recogni[z]ed as citizens in any one state . . . the right to enter every other [s]tate, whenever they pleased . . . full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.<sup>28</sup>

This language suggests that the right to keep and bear arms is an individual right that travels with each citizen wherever he or she may go. Such a right is ostensibly unrelated to a "well regulated militia."

The first case in which the Supreme Court dealt more directly with the second amendment was *United States v. Cruikshank*,<sup>29</sup> which involved two African-American men who had their firearms seized by a large group of Klansmen in Louisiana. Several of these Klansmen were convicted of crimes including conspiracy to deprive African-Americans of their constitutional right to keep and bear arms. Although this was essentially a civil rights case, the Court did rule on the right of individuals to bear arms. The Court stated that the limitations found in the second amendment serve only to restrict the powers of the federal government and are not applicable to state governments.<sup>30</sup> Since the Constitution established no individual right to bear arms, the right could not have been violated.<sup>31</sup> In short, regarding the right of bearing arms for a lawful purpose, the Court noted that:

[T]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.<sup>32</sup>

A decade later, the Supreme Court heard *Presser v. Illinois*,<sup>33</sup> which

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27. *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

28. *Id.* at 417 (emphasis added).

29. 92 U.S. 542 (1875).

30. *Id.* at 553.

31. *See id.*

32. *Id.*

33. 116 U.S. 252 (1886).

involved a defendant who led a parade of several hundred armed men through Chicago, without a license. The intent of the group was to intimidate various groups of immigrants. When charged with parading without a permit, the defendant claimed that he was protected under the second amendment. The Court reaffirmed the position it had taken in *Cruikshank*, and explained that the right to bear arms is not an individual right granted by the Constitution.<sup>34</sup> The Court continued:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the [s]tates, and, in view of this prerogative of the general government, as well as of its general powers, the [s]tates cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.<sup>35</sup>

The above passage suggests that a state may not disarm its citizens.<sup>36</sup> It is important to note however, that this is not because the citizens have an individual right to bear arms. Rather it is because they belong to the federal militia and the states are prohibited from disarming the federal militia.

Perhaps the least significant second amendment case is *Miller v. Texas*,<sup>37</sup> in which a convicted murderer asserted that the state of Texas had violated his second, fourth, fifth and fourteenth amendment rights.<sup>38</sup> In unanimously dismissing his claim, the Court again stated that the second amendment did not apply to state action.<sup>39</sup>

Perhaps the most significant of the second amendment cases is *United States v. Miller*.<sup>40</sup> Miller and a friend were charged under section 11 of the 1934 National Firearms Act with carrying a double-barrelled, sawed-

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34. *Id.* at 265.

35. *Id.* (emphasis added). It is interesting to note that even today all able-bodied men 17 to 44 are members of the unorganized militia. 10 U.S.C.A. § 311 (West 1983).

36. The sentence after the quotation reads: "But, as already stated, we think it clear that the sections under consideration do not have this effect." *Id.* at 265-66. It is curious that the Court would establish a limitation on the states' rights to disarm its citizens, outside of the Constitution, and then proceed to explain that the sections of the Constitution do not have this effect anyway.

37. 153 U.S. 535 (1894).

38. Miller was convicted of murder on July 23, 1892. He then appealed to the Court of Criminal Appeals of Texas, the court of last resort in criminal cases, where the judgment was affirmed. After a motion for rehearing was denied, the defendant executed a writ and challenged the Texas statute prohibiting a person from carrying a dangerous weapon. It was by authority of this statute that the court instructed the jury that if the defendant was on the street carrying a pistol, he was violating the law. *Id.*

39. *Id.* at 538.

40. 307 U.S. 174 (1939).



off, twelve gauge shotgun across state lines from Oklahoma to Arkansas.<sup>41</sup> The district court held that section eleven of the National Firearms Act violated the second amendment and thus quashed the indictment.<sup>42</sup> Although the state of Texas appealed the decision directly to the Supreme Court, the defendants failed to appear and did not file a brief before the Court.

*United States v. Miller* is of particular importance not only because it is the only second amendment case decided in this century, but also because it is also the only case decided by the Supreme Court in which it actually interprets the second amendment.<sup>43</sup> The Court ruled that:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. *Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.*<sup>44</sup>

Commentators have demonstrated that this holding is insignificant standing alone, because sawed off and short barreled shotguns are actually commonly used as military weapons.<sup>45</sup> Nonetheless, *Miller* does suggest that a new approach is to be used in determining which firearms are to be protected by the second amendment.<sup>46</sup>

The *Miller* Court accepted the plain meaning of "militia" as

comprised [of] all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.<sup>47</sup>

Significantly, the Court held for a particular firearm to warrant the protection of the second amendment, the firearm must have some reasonable relationship to a well regulated militia.<sup>48</sup> This holding can be viewed as a

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41. *Id.* at 175.

42. *Id.* at 177.

43. See Lund, *supra* note 19, at 109.

44. *Miller*, 307 U.S. at 178 (emphasis added).

45. See Lund, *supra* note 19, at 109.

46. See REPORT, *supra* note 2, at 92; Note, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 AM. J. CRIM. LAW. 143, 169 (1989).

47. 307 U.S. at 179. The last part of the statement is interesting because it suggests that the Court anticipated (or at least was aware of the potential for) advancements in weaponry. A literal interpretation would support the idea that individuals today should be permitted to keep and bear any weapons that would be of use to the militia. Fortunately, this interpretation is not at issue.

48. *Id.* at 178.

logical compromise between the individual rights theory and the collective rights theory. The Court recognized the right of individuals to possess firearms, but created the limitation that the firearms must serve the collective purpose. One can only guess if this holding would have differed had the defendants presented their side of the argument.

Over thirty years after the *Miller* decision, the Supreme Court revisited the second amendment and the *Miller* case in *Adams v. Williams*.<sup>49</sup> While discussing complications arising from search and seizure, Justice Douglas wrote in his dissent:

A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment. . . There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.<sup>50</sup>

There is little danger that one might misinterpret the words of Justice Douglas. He indicated quite clearly that the right to keep and bear arms is collective in nature and is designed to support the militia. Even more clear is his strong belief that since this right is collective, a state can regulate the extent to which its citizens can exercise it.

Finally, in *Lewis v. United States*,<sup>51</sup> the Court upheld the 1968 Gun Control Act and stated in a telling footnote, "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties."<sup>52</sup> The Court cited *Miller* as support for this conclusion.<sup>53</sup> Thus, as recently as 1980, the Supreme Court has indicated that the *Miller* requirement, that firearms have some reasonable relationship to the preservation or efficiency of a well regulated militia, is still in effect, therefore making the right to keep and bear arms a collective right that is subject to regulation.

49. 407 U.S. 143 (1972).

50. *Id.* at 150 (Douglas, J., dissenting). Douglas then quoted from *Miller*:

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.

*Id.* at 150-51 (quoting *Miller*, 307 U.S. 174, 178-79).

51. 445 U.S. 95 (1980).

52. *Id.* at 65, n. 8.

53. *Id.*

## IV. RECENT COURTS OF APPEALS DECISIONS

The two most notable recent courts of appeals decisions concerning this issue are *Quilici v. The Village of Morton Grove*,<sup>54</sup> and *Farmer v. Higgins*.<sup>55</sup> *Quilici* involved a challenge to a local ordinance banning handguns. On June 8, 1981, the Chicago suburb of Morton Grove, Illinois banned handguns.<sup>56</sup> There were exclusions in the ordinance providing that police officers, jail and prison authorities, members of the armed forces and licensed gun collectors and gun clubs could possess and use handguns.<sup>57</sup> Both the Illinois Supreme Court and the Seventh Circuit Court of Appeals held that the ordinance was a proper exercise of Morton Grove's police power.<sup>58</sup> Although the case was appealed to the Supreme Court, it declined to hear the case and thus allowed the lower court's decision to stand.<sup>59</sup> The decision of the Seventh Circuit stated that there is no individual right to keep and bear arms under the second amendment.<sup>60</sup> This then, would appear to be yet another nail in the coffin of the 'individual rights' interpretation of the second amendment.

Most recent was the case of *Farmer v. Higgins*.<sup>61</sup> The case has been called the "first ban on firearms possession by law-abiding citizens in American history."<sup>62</sup> Farmer was a gun collector who applied to the Bureau of Alcohol, Tobacco and Firearms ("ATF") in October of 1986 for permission to legally make and register a machine gun for his personal collection.<sup>63</sup> The ATF denied Farmer's application in February of 1987 on the ground that the Firearms Owners' Protection Act of 1986 prohibits

54. 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

55. 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 753 (1991).

56. See *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1171 (N.D. Ill. 1981).

57. 695 F.2d at 263-64, n.1. It was proposed that the city of Richmond adopt a similar ordinance. The law would make it illegal for residents of public housing to own guns. See Potter, *Panel Lays Way for Compromise on Gun Ban*, Richmond News Leader, Jan. 31, 1991, at 13, col. 1.

58. 695 F.2d at 269.

59. 464 U.S. 863 (1983).

60. 695 F.2d at 270.

61. 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 753 (1991).

62. See Isikoff & Markus, *Justices Decline to Consider Challenge to U.S. Machine Gun Ban*, Wash. Post, Jan. 15, 1991, at A3; see also *A Right to Machine Guns?*, Wash. Post, Jan. 15, 1991, at A20, where it is stated:

The Supreme Court in the past has found no constitutional bar to legislation requiring the registration of handguns or prohibiting the sale of firearms to convicted felons, the mentally incapacitated and other groups thought to be especially dangerous when armed. But when Congress prohibited future private ownership of machine guns in 1986, the National Rifle Association thought it had a stronger case to bring before the justices. That law, says the NRA, is the first ban in American history on firearms possession by law-abiding citizens, and because it is such a sweeping restriction, it violates the Second Amendment. Yesterday the Supreme Court declined to consider that argument.

63. 907 F.2d at 1042.

the making and manufacture of new machine guns for possession by private individuals.<sup>64</sup> Farmer then filed an action for a declaratory judgment and for a writ of mandamus.<sup>65</sup> Whereupon, "a U.S. District Court judge in Georgia initially emasculated the law by giving its plain meaning a tortured interpretation"<sup>66</sup> and then ordered the Bureau to process Farmer's application or issue the requested permit.<sup>67</sup>

Upon appeal to the Eleventh Circuit the sole issue in *Farmer* was whether title 18 U.S.C.A § 922(o) of the United States Code prohibits the private possession of machine guns not lawfully possessed prior to May 19, 1986.<sup>68</sup> The Eleventh Circuit reversed the district court's decision and held that section 922(o) does prohibit such possession.<sup>69</sup> On January 14, 1991, the Supreme Court declined to hear the case without comment.<sup>70</sup>

The *Farmer* case is significant not only because it is the first case to allow an uncompromising restriction on the possession of certain firearms by law abiding citizens, but also because the Eleventh Circuit focused exclusively on Congressional intent in its decision. Significantly, this implies that the court either did not consider the second amendment at all or did not consider it applicable. The court stated "we have considered Farmer's remaining arguments and find them to be without merit."<sup>71</sup> Perhaps it is in this brief statement that we see the court settling the second amendment issue. This is a strong indication that the views expressed by the Supreme Court in cases such as *United States v. Miller*,<sup>72</sup> and *Lewis v. United States*,<sup>73</sup> are so well established now that lower courts no longer feel that they must give much credence to certain second amendment arguments. In denying *certiorari* to the case, the Supreme Court was in essence "declining to consider arguments by the National Rifle Association and other pro-gun advocates that the prohibition is an unconstitu-

64. *Id.*; see Firearms Owners Protection Act, Pub. L. No. 99-308, § 102(9), 100 Stat. 449, 452-53 (1986) (codified at 18 U.S.C.A. § 922(o) (West Supp. 1990)).

65. *Farmer*, 907 F.2d at 1042.

66. *A Right to Machine Guns?* *supra* note 62, at A20.

67. *Farmer*, 907 F.2d at 1042.

68. *Id.* at 1043. The United States Code at 18 U.S.C.A. § 922(o) (West Supp. 1990) states: (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machine gun that was lawfully possessed before the date this subsection takes effect.

69. *Farmer*, 907 F.2d at 1045.

70. 111 S. Ct. 753 (1991).

71. *Farmer*, 907 F.2d at 1045.

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

73. 445 U.S. 55 (1980).

tional infringement on the right to keep and bear arms."<sup>74</sup> When considering the "reasonable relationship" test of *Miller*,<sup>75</sup> it is interesting to note that *Farmer* permits the prohibition of the kind of firearms that could perhaps best serve the militia. This apparent inconsistency is undoubtedly an attempt by the court both to protect the existence of the militia and to allow the legislature to put some curb on the number of dangerous weapons available to the general public.

## V. INCREASE IN CRIME AND PUBLIC CONCERN

Before considering the approach taken by Congress concerning the nature of the right to bear arms, it is essential that one review pertinent historical trends. The United States has always been a comparatively violent country. As of late, however, the number of violent crimes committed with handguns has reached epidemic proportions.<sup>76</sup> In 1988, the last year for which such statistics are available, 8,915 people were murdered with handguns in the United States.<sup>77</sup> In a December 1990 *New York Times* article entitled *Many Cities Setting Records for Homicides in Year*, it was observed that "[g]uns and drugs were cited most often as reasons for the increases, but many law-enforcement officials and social scientists are beginning to question something more fundamental, the value that American society places on life."<sup>78</sup> In 1989, Congress recognized the connection between guns, drugs and violent crimes and created the Antidrug, Assault Weapons Act of 1989 ("Weapons Act").<sup>79</sup> The Weapons Act was an attempt to reduce the use of semiautomatic firearms by violent criminals, particularly those involved in the drug trade.

Criminal reliance on firearms is well documented.<sup>80</sup> However, in this age of increasingly strict gun laws, where do they get the firearms? Unfortunately, the answer to this question strikes close to home:

In one analysis, the Federal Bureau of Alcohol, Tobacco and Firearms found that 96 percent of the guns used in crimes in New York City were pur-

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74. Isikoff & Markus, *supra* note 62, at A3.

75. *Miller*, 307 U.S. at 178.

76. For a chart displaying the number of people murdered (and the number murdered with firearms and handguns specifically) from 1980 to 1987 see Note, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. LAW 19, 20 (1989).

77. King, *supra* note 12, § 6, at 80, col 2. The same study indicates that in 1988, seven people were killed with handguns in Britain; nineteen in Sweden; fifty-three in Switzerland; and eight in Canada. *Id.*

78. N.Y. Times, Dec. 9, 1990, § 1, at 41, col. 3.

79. THE ANTIDRUG, ASSAULT WEAPONS LIMITATION ACT OF 1989, S. REP. NO. 160, 101st Cong., 1st Sess. 6-8 (1989).

80. For a study of in-depth interviews over a three year period starting in 1982 with more than 1,874 imprisoned felons, see J. WRIGHT & P. ROSSI, ARMED AND CONSIDERED DANGEROUS (1986).

chased outside the city and almost exclusively outside the state. The same is true in Washington, where one can buy a gun just over the line in Virginia. Virginia, Florida and Georgia form the biggest source of illegal handguns in the East.<sup>81</sup>

George N. Metcalf, Assistant U.S. Attorney in Richmond explained in 1989 that "people come into a gun shop with a Virginia driver's license and the ink is barely dry. . . . They buy half a dozen guns with cash, get into a car with New York license plates, and they are gone."<sup>82</sup> Thus, although the gun laws of some states may render the purchase of guns a difficult process there, it is an obstacle easily surmounted by a half day's car ride to another state with less strict gun laws. Without a uniform gun control law that applies in all states, such situations will continue to exist.

While it may be true that crimes committed with firearms are concentrated in urban areas, the gun problem is national in scale. With violent crime on the rise, perhaps it is only a matter of time before *all* areas of the country are "under siege." Then, a militia may truly be needed. The predicament our country finds itself in now can hardly be what the drafters of the second amendment wished, regardless of whether they intended the right to bear arms to be of a collective or individual nature.

Not surprisingly, the grim prospect of increasing violence has led to the formation of several groups who are intent on forcing changes in laws so as to make it more difficult to obtain guns.<sup>83</sup> These groups, as well as private citizens, have been putting steady pressure on the legislators to change the laws regarding gun ownership.<sup>84</sup> In response to this pressure, pro gun groups, such as the NRA and the Citizens Committee for the Right to Keep and Bear Arms, have also instituted a massive lobbying effort opposing all restrictive gun control legislation.<sup>85</sup>

The media has also played an active role in the debate over gun control. *Time* magazine gave the issue a cover story<sup>86</sup> and the debate has been featured in the *New York Times Sunday Magazine*.<sup>87</sup> As with all controversial issues, the media influences the public not only with what it chooses to publish, but with what it chooses not to publish.

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81. King, *supra* note 12, § 6, at 82, col. 4.

82. Lacayo, *Running Guns up the Interstate*, TIME, Feb. 6, 1989. Virginia has already attempted to rectify that situation. See *infra* note 93 and accompanying text.

83. Perhaps the most influential is Handgun Control Inc., 1225 Eye Street, NW, Suite 1100, Washington, D.C. 20005.

84. "In April, 1989, an NBC/Wall Street Journal poll found that seventy-four percent of Americans believed that the federal government should ban the sale of assault rifles in the United States." See Note, *supra* note 46, at 157.

85. "Given its war chest and membership, the N.R.A. has long vied with the American Medical Association as Washington's most powerful lobby." King, *supra* note 12, § 6, at 82, col. 2.

86. Church, *The Other Arms Race*, TIME, Feb. 6, 1989, at 20.

87. King, *supra* note 12, § 6, at 43, col. 2.

The NRA is fully aware of the power of the media and of public opinion. To combat them, the NRA strongly opposes all attempts at gun control. For example in Virginia, the NRA galvanized its members into expressing their opposition to a recently proposed bill which would have made recently purchasing a handgun even more difficult. Virginia already has in place a system whereby the backgrounds of all potential gun purchasers are instantly checked before any sale is made.<sup>88</sup> In 1991, however, a bill was proposed<sup>89</sup> that would have required a three day waiting period before anyone could purchase a handgun in the state. This bill would have undoubtedly significantly decreased the number of out-of-staters who travel to Virginia for the sole purpose of purchasing handguns. For law-abiding state residents, the requirement would have been a minor inconvenience which would have been greatly outweighed by its positive effects. Nonetheless, Virginia members of the National Rifle Association took out a full page advertisement in the *Richmond News Leader* speaking against the bill. The advertisement quoted an editorial of the same newspaper that had appeared only four days before and read: "While waiting periods once were necessary to provide background checks, computerized searches have rendered waits obsolete. . . . [The 3-day waiting period referendum (H.B.1989) is] a useless bill that has the appearance of being tough on crime."<sup>90</sup> Undoubtedly, the outcry of the NRA and its members played a significant role in the failure of the bill.<sup>91</sup>

## VI. RECENT LEGISLATIVE ACTION

Congress and many state legislatures have been passing or attempting to pass laws that would in one manner or another, restrict the use and ownership of firearms. Granted, not all of these laws will have the same effect or be implemented to the same degree.

Many states have implemented some form of waiting period before an individual is permitted to purchase a firearm. For example, California and Oregon have a 15-day waiting period while several other states have shorter waiting periods.<sup>92</sup> Perhaps the most modern approach is that now practiced by the state of Virginia.

On November 1, 1989, Virginia implemented its background check system.<sup>93</sup> In essence, when a person attempts to purchase a gun, the dealer

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88. VA. CODE ANN. § 18.2-308.2:2 (Repl. Vol. 1988).

89. H.B. 1989, Va. Gen. Ass. (1991). This bill failed in a vote of 55-42. See, Gore & Hardy, *Gun Referendum Bill Shot Down*, Richmond Times-Dispatch, Feb. 5, 1991, at 5, col. 1.

90. Richmond News Leader, Feb. 1 1991 at 9.

91. See Gore & Hardy, *supra* note 89, at 5, col. 1.

92. Handgun Control, Inc. (Pamphlet), *States With Handgun Purchase Laws* (available from Handgun Control, Inc., 1225 Eye Street, N.W., Suite 1100, Wash., D.C. 20005).

93. See VA. CODE ANN. § 18.2-308.2:2 (Repl. Vol. 1988).

calls the state police who then run a computerized check on the individual.<sup>94</sup> This procedure does not require very much time and it has halted 1,475 sales of guns, or roughly 1.6 percent of the 90,655 firearms transactions that were checked since the program went into effect.<sup>95</sup> Additionally, the procedure has enabled the police to capture eight prospective buyers who were fugitives from justice, including one individual who was wanted for murder.<sup>96</sup> As mentioned, Virginia attempted to supplement this already effective program with an additional three-day waiting period.<sup>97</sup> Although the three-day waiting period was rejected, the attempts of Virginians to strengthen their gun laws is one example of how the separate states are recognizing the menacing problem that easy access to guns creates and how they are attempting to prevent "blood running in the streets like some Third World capital."<sup>98</sup> The present Virginia system, although not perfect,<sup>99</sup> was approved with the backing of both gun control advocates and the NRA and became a focus of the debate in Congress over federal handgun legislation.<sup>100</sup>

There has been considerable activity on a national level as well. There have been many attempts to ban or put restrictions on particular types of weapons, usually automatic or semi-automatic weapons. The Firearms Owners' Protection Act of 1986,<sup>101</sup> which was in dispute in the *Farmer v. Higgins*<sup>102</sup> case, is an example of such an attempt. In effect, the Act prohibits the making and manufacture of new machine guns for possession by private persons.<sup>103</sup> The United States Court of Appeals for the Eleventh Circuit found that the Act does properly prohibit the manufacture and ownership of such weapons.<sup>104</sup>

The Restricted Weapons Act of 1990<sup>105</sup> is another example of how Congress is attempting to control the situation. This Act was submitted to

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94. *Id.*

95. N.Y. Times National, May 5, 1991, at 29, col. 1.

96. Handgun Control, Inc. (Pamphlet), *Brady Bill Will Catch Felons* (available from Handgun Control, Inc., 1225 Eye Street, N.W., Suite 1100, Wash., D.C. 20005).

97. See H.B. 1989, Va. Gen. Ass. (1991).

98. Senator Warren Rudman (R-N.H.) suggested that this would be the case in Washington D.C. unless there was a federal takeover of the city's police department. *Lock and Load for the Gunfight of '89*, *supra* note 4, at 9.

99. Potential buyers in Virginia are required to present two forms of identification. However, as the buyer is checked against state and federal records, if the buyer gives false information, there is nothing state officials can do. Also, for offenses committed out of state, Virginia must rely on files maintained by the Federal Bureau of Investigation. These records are considered of "dubious quality." See N.Y. Times National, May 5, 1991, at 29, col. 1.

100. *Id.*

101. 18 U.S.C.A. § 922(o) (West Supp. 1990).

102. 907 F.2d 1041 (11th Cir. 1990).

103. 18 U.S.C.A. § 922(o) (West Supp. 1990).

104. *Farmer*, 907 F.2d at 1045.

105. H.R. 4225, 101st Cong., 2d Sess. 101-621 (1990).



the Committee on the Judiciary to amend title 18 of the United States Code.<sup>106</sup> In essence, the Act would greatly restrict the use and ownership of "restricted weapons" such as semi-automatic rifles which have no legitimate connection to sport.<sup>107</sup>

Perhaps the most widely known gun control bill is the Brady Bill,<sup>108</sup> which has been around since 1987 and has received considerable attention from both the media and the pro-gun lobby. The bill, which was named for Jim Brady, the White House press secretary struck in the head with an exploding bullet during John Hinckley's attempted assassination of President Reagan, establishes a national seven-day waiting period for the purchase of handguns.<sup>109</sup> This period will allow local law enforcement to conduct background checks on all handgun purchasers who purchase from licensed dealers. Within one day of the proposed transfer, the dealer would be required to provide a copy of the purchaser's sworn statement to the chief law enforcement officer where the purchaser resides. The sworn statement, which must be verified by some form of picture identification, will include all relevant information on the purchaser. If the dealer does not get a negative response, the sale may go through at the end of the seven days. If an individual requires access to a handgun because of a threat to his or her life or the life of a member of his or her household, local law enforcement may waive the seven-day waiting period.<sup>110</sup> In reference to the Brady Bill, former President Ronald Reagan remarked that "it's just plain common sense that there be a waiting period to allow local law-enforcement officials to conduct background checks on those who wish to purchase handguns."<sup>111</sup>

In 1988, Rep. William McCollum proposed an amendment to the Brady Bill.<sup>112</sup> The amendment would substitute a national "instant" check system for the Brady Bill's seven-day waiting period.<sup>113</sup> Although this amendment was rejected by the House Judiciary Committee, it was ulti-

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106. The United States Code at 18 U.S.C. § 922 (b)(4) (1988) in particular deals with unlawful acts concerning restricted firearms. Private citizens in the United States cannot purchase any of these assault weapons because they are capable of fully automatic fire. Weapons capable of fully automatic machine gun fire have been regulated heavily in the United States since 1934 and private sale or possession of these weapons has been completely banned since May, 1986. See 18 U.S.C. 922(o) (1998).

107. There are often problems in defining which weapons fit into which category. For a good discussion of the definition problem as it affects "assault weapons," see Note, *supra* note 46.

108. S. 1236, 101st Cong., 1st Sess. (1989).

109. *Id.* at § 2(a).

110. *Id.*

111. N.Y. Times, Mar. 29, 1991, at A1, col. 1.

112. Handgun Control, Inc. (Pamphlet), *Summary of New McCollum Substitute* (available from Handgun Control, Inc., 1225 Eye Street, N.W., Wash., D.C. 20005) [hereinafter Handgun Control, Inc.].

113. *Id.*

mately enacted in place of the Brady Bill.

On November 21, 1989, Jim Brady testified before a Senate judiciary subcommittee on behalf of the Brady Bill.<sup>114</sup> On July 24, 1990, the House Judiciary Committee ordered the Brady Bill favorably reported by a vote of twenty-seven to nine.<sup>115</sup> At this time, Rep. McCollum proposed another amendment that, although it was rejected, is expected to resurface when the Brady Bill is again considered.<sup>116</sup> In late October, the Brady Bill was bottled up in the House of Representatives and never reached the floor.

The new McCollum substitute has three sections.<sup>117</sup> First, by October 1, 1992, licensed firearm dealers in all fifty states must have in full operation place of purchase telephone check systems for all firearm purchases, or the states will lose their federal justice assistance funding.<sup>118</sup> An alternative but adequate system already in place will satisfy the amendment. Second, by October 1, 1996, all states must require drivers' licenses to contain a fingerprint of the licensee or they will lose their federal justice assistance funding.<sup>119</sup> Dealers would then use the fingerprints to do background checks. If a dealer failed to do so, he would forfeit his federal firearms license. Third, beginning October 1, 1991, states would be required to spend 5% of their federal justice assistance funds to computerize and update their criminal justice records.<sup>120</sup>

A more significant substitute for the Brady Bill was proposed by Representative Harley D. Staggers, Jr., a Democrat from West Virginia.<sup>121</sup> Opponents of the Brady Bill have embraced Staggers' proposal and look to the Virginia system as an example of how a nationwide system of background checks would function. In essence, Staggers would like to establish a national information center which would do computer checks of criminal records maintained by the Federal Bureau of Investigation.<sup>122</sup>

On May 8, 1991, the Brady Bill passed the House of Representatives.<sup>123</sup> The Bill will then go to the Senate where its future is uncertain. However President Bush "has said that he would veto any gun-control measure that is not part of a comprehensive anti-crime legislation that stiffens criminal penalties."<sup>124</sup> Thus, if either the Brady Bill or a substi-

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114. N.Y. Times, Dec. 9, 1990 (Magazine) at 45.

115. Handgun Control, Inc., *supra* note 112.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. N.Y. Times National, May 5, 1991, at 29.

122. *Id.*

123. N.Y. Times, May 9, 1991, at A1, col. 1. "The 239-to 186 vote came after four hours of intense, sometimes emotional debate during which supporters of the waiting period portrayed the vote as a major repudiation of the National Rifle Association . . . ." *Id.*

124. *Id.*

tute is approved by the Senate, and not vetoed by the President, some drastic changes will be taking place in the manner in which firearms are bought and sold in the United States. The Supreme Court's virtual silence on the issue seems to be an indication to both the federal and the state governments that reasonable restrictions placed on the purchase and ownership of firearms do not violate the second amendment.

## VII. CONCLUSION

It is unlikely that either the violence in the streets or the struggle in the courts over the right to bear arms will end anytime soon. However, the public, the media, and the law-makers are becoming increasingly aware of the problem. As both the Congress and the state legislatures take measures to limit the availability of firearms, the courts are allowing these limitations to take effect. As the "collective rights" idea moves from theory to practice, there will hopefully be a change in the way Americans view violent crime.

*Michael T. O'Donnell*