

**INTERNATIONAL LAW AND THE UNITED  
STATES CONSTITUTION IN CONFLICT:  
A CASE STUDY ON THE SECOND  
AMENDMENT**

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I.	INTRODUCTION.....	2
II.	THE AMERICAN RIGHT TO BEAR ARMS .....	4
	A. <i>Legal Status</i> .....	6
	1. <i>History</i> .....	7
	2. <i>Text</i> .....	12
	3. <i>Case Law</i> .....	15
	B. <i>Cultural Status</i> .....	19
III.	THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND UNITED STATES MUNICIPAL LAW .....	26
	A. <i>The United States Constitution</i> .....	28
	B. <i>International Law</i> .....	29
	1. <i>Treaties</i> .....	30
	2. <i>Customary International Law</i> .....	31
	C. <i>Conflicts Between Treaties and the United States Constitution</i> .....	33
	1. <i>Conflicts Between Treaties and Municipal Law</i> ....	33
	2. <i>International Courts and United States Municipal Law</i> .....	34
	3. <i>United States Constitution and Treaties</i> .....	34

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2	<i>HOUSTON JOURNAL OF INTERNATIONAL LAW</i>	[Vol. 26:1
IV.	GLOBAL GUN CONTROL .....	40
	A. <i>Scope of "Small Arms and Light Weapons" and "Illicit Trafficking"</i> .....	41
	B. <i>Confrence on Illicit Trade in Small Arms</i> .....	43
	1. <i>United States Presence at the Small Arms Conference</i> .....	44
	2. <i>Agenda</i> .....	46
	3. <i>Documents</i> .....	46
	4. <i>Future</i> .....	49
	C. <i>Convention Against Transnational Organized Crime</i> .....	49
	1. <i>The Crime Convention</i> .....	50
	2. <i>The Protocol Against the Manufacturing of and Trafficking in Illicit Firearms, Ammunition and Related Materials</i> .....	51
V.	CONFLICTS BETWEEN INTERNATIONAL LAW AND UNITED STATES MUNICIPAL LAW .....	53
	A. <i>Jurisdiction</i> .....	53
	B. <i>Involvement of a Untied States Citizen Absent an International Element</i> .....	55
	C. <i>Choice of Law</i> .....	56
VI.	CONCLUSION: CONSEQUENCES OF THIS CONFLICT.....	59

## I. INTRODUCTION

International Law and the United States Constitution in Conflict: A case study on the Second Amendment

Small arms gun control is the subject of recent international focus and law. The right to bear arms carries a unique significance in American law and culture and now faces the possibility of conflict with international gun control. Left unchecked, international gun control will compromise a fundamental human right as viewed by U.S. citizens and much of the government. This discussion explains the United Nations recent efforts of international global gun control and

demonstrates how it conflicts with the American right to bear arms.

The first section of this article provides a description of the right to bear arms in the United States. It contains both the legal and cultural backgrounds of this fundamental right, as well as a description of the two most prominent theories concerning the Second Amendment. The second section provides a description of international law and United States domestic law and an analysis of the interaction between the two legal schemes. The third section provides a description of global gun control by detailing two recent conferences on the topic and focusing on international organizations and documents. This discussion focuses on the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, the United Nations Convention Against Transnational Organized Crime and its Protocol Against the Illicit Manufacturing of and Trafficking in Fire Arms, Their Parts and Components and Ammunition, and the potential International Criminal Court. The fourth section explains how conflicts between international law and a sovereign state's municipal law will be resolved. More specifically, it focuses on how global gun control conflicts with the United States legal and cultural right to bear arms. The fifth section predicts how the proposed international laws regarding gun control will conflict with the American right to bear arms. The conclusion of this Article then attempts to shed some light on issues of immediate concern, to predict how a conflict might arise in the future, and to recommend steps that may be taken to avoid such a conflict. The American right to bear arms plays a significant role in the balance of power between individuals, as well as between people and sovereigns, and any other political or social group. The Second Amendment was forged out of the Enlightenment's notion of natural rights during times of social and political oppression. Throughout recent history, the right to bear arms has played a significant political role in situations traditionally regarded as cases of "self-defense." Examples include: as a counterweight to governmental oppression; in situations between competing sovereigns; between political factions; and between individuals. Guns offer a counterbalance to any form of oppression, wherever the oppression falls—along the continuum from "between individual conflicts" to

“revolutions against sovereigns” to “conflicts between sovereigns.” With regard to use of force by sovereigns, “[a]ny use of military force . . . depends upon a calculation of both the benefits and costs of its use.”<sup>1</sup> The same reasoning is true for any use of force, whether it be that of an individual, government, political faction, or lynch mob.

In conclusion, the Second Amendment’s “Right to Bear Arms” intends to foster self-defense in all its forms as a human right. The right to bear arms—or lack thereof—alters the political balance between individuals, private groups, governmental organizations, local sovereigns (such as the states in the United States and the Lander in Germany), and federal sovereigns (such as the federal government in the United States). Gun ownership, as well as the lack of gun ownership, has had far reaching consequences. Some striking effects of gun control and gun ownership have occurred in the last fifty years, even in such “civilized” countries as the United States and Germany. The current effort to create substantive gun control at the international level raises astounding legal and political questions. The effects of international gun control are global and have an enormous impact on the rights and political power of individuals, as well as on sovereign states, global regions, supranational authorities, and perhaps, a quasi-world government. Conflicts between international law and legal and philosophical human rights of the United States should be anticipated and avoided.

## II. THE AMERICAN RIGHT TO BEAR ARMS

The right to bear arms carries great weight in the United States, both legally and culturally. Few, if any, symbols represent American history like the gun. Approximately 200 to 240 million guns are currently owned by 75 to 86 million Americans.<sup>2</sup> From the first colonizers of the New World to modern movies, many American heroes have carried and used

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1. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 116-18 (1987).

2. JOHN R. LOTT, JR., *MORE GUNS LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 1 (2d ed. 2000).

guns. The Revolutionary War remains a strong part of the American cultural fabric. Even now, at a time when the practicality and necessity of guns is at a low, there remains fierce opposition to gun control in the United States.

Pro-gun organizations and politicians are as popular as ever. The National Rifle Association touts a current roster of 4.3 million members<sup>3</sup> and placed first on *Fortune's* list of Washington's most powerful lobbying groups in the United States.<sup>4</sup> Renowned legal scholar, Sanford Levinson explained: "Campaigns for Congress in both political parties, and even presidential campaigns, may turn on the apparent commitment of the candidates to a particular view of the Second Amendment."<sup>5</sup> Some commentators have even gone so far as to claim that Al Gore's pro-gun-control stance cost him the Presidential election of 2000.<sup>6</sup> In addition,

Kristen Rand, Director of Federal Policy at the anti-gun Violence Policy Center, concede[d] that [during the 2000 presidential campaign,] the gun-control forces made a key mistake in pushing for the licensing of all new handguns, a proposal that went beyond any legislation pending in Congress. "What was not understood was what a real rallying cry licensing would be," she said]. For gun rights advocates, "licensing equals registration; registration equals confiscation."<sup>7</sup>

Although the Second Amendment Right to Bear Arms has not been exactly defined by the American legal system, the furor indicates that the Second Amendment remains significant, and that any more changes or further gun control deserve close scrutiny.

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3. National Rifle Association, *Firearm Facts*, at <http://www.nracentral.com> (last modified Oct. 9, 2003).

4. Jeffrey H. Birnbaum, *Fat & Happy in D.C.*, *FORTUNE*, May 28, 2001, at 95.

5. Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637, 641-42 (1989).

6. See, e.g., Jonathan Weisman, *For Pro-Bush Interest Groups, It's Wish List Time*, *USA TODAY*, Dec. 15, 2000, at A6 (noting that "[g]uns played a key role in Gore's loss of Arkansas, Tennessee and West Virginia . . .").

7. *Id.*

### A. *Legal Status*

The right to bear arms is contained in the Second Amendment of the United States Constitution. It 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>8</sup> The United States Constitution, being the “supreme Law of the Land” and the most important American legal document,<sup>9</sup> obviates the importance of the right to bear arms, whatever its scope. The right to bear arms, as found in the Constitution, is almost exclusively a western development and is in many ways unique to the United States.

The scope of the Second Amendment’s Right to Bear Arms has been and continues to be heavily debated. Whatever the scope of the right to bear arms, the right deserves debate and imposes some form of restraint on the legislative branch. The debate over what exactly the Second Amendment protects has exploded in recent years. Participants in the debate tend to fall into two camps: those who subscribe to the Standard or Individual Rights Theory;<sup>10</sup> and those who subscribe to the States’ or Collective Rights Theory.<sup>11</sup> Analysis of the right to bear arms tends to focus on the Second Amendment historically,

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8. U.S. CONST. amend. II.

9. U.S. CONST. art. VI, cl. 2.

10. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 319 (1991); Lund, *supra* note 1, at 104; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206-11 (1983); William Van Alstyne, Essay, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236, 1241-43 (1994).

11. Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4-5, 24 (2000); 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, 7 (1989); H. Richard Uviller & William G. Markel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi-Kent L. Rev. 403, 406-13 (2000); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 112 (2000); Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 235-36 (2000); Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 238, 241 (2000); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 292 (2000); Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 358 (2000).

textually, and through case law.

The Individual Rights theorists believe the right to bear arms is a fundamental right enjoyed by individual citizens and creates a Constitutional bar against a variety of gun control laws.<sup>12</sup> The Collective Rights theorists believe that the Constitution ensures only a right of the people, as a whole or of the States, and posits a weaker bar against governmental restrictions on gun ownership.<sup>13</sup> Under the Collective Rights Theory few, if any, gun control measures enacted by Congress would violate the United States Constitution.<sup>14</sup>

### 1. History

The history of the right to bear arms has been heavily scrutinized and is often the centerpiece of modern debate on the scope. This history flows from English gun restraints in the 1500-1600s, through the English Declaration in Rights of 1689, and to the Second Amendment of the United States Constitution.

Prominent Individual Rights theorists who focus on the historical development of the right to bear arms include Joyce Lee Malcolm and Steven P. Halbrook. Both Malcolm, in *To Keep and Bear Arms: The Origins of an Anglo-American Right*, and Halbrook, in *A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees*, present a historical background of the right and conclude that the Individual Rights Theory is the most accurate interpretation of history.<sup>15</sup>

Collective Rights theorists interpreting the history of the

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12. Uviller & Merkel, *supra* note 11, at 408.

13. *See id.* at 408-09.

14. Some of the scholars subscribing to the Collective Rights Theory do not believe the Second Amendment would pose any significant bar to legislation that restricts gun ownership. Ehrman & Henigan, *supra* note 11, at 7 (“[T]he amendment erect[s] no real barrier to federal or state laws affecting firearms . . . .”); Uviller & Merkel, *supra* note 11, at 429 n.94 (“[W]e are arguing that the Second Amendment should never become a vehicle for judicial imposition of restraints grounded in social theory on state or national legislatures’ abilities to regulate, restrict or prohibit possession of firearms for purely private purposes.”).

15. JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* ix-xii (1996); STEPHEN P. HALBROOK, *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES* vii-x (1989).

Second Amendment include Michael Bellesiles, Paul Finkelman, and Jack N. Rakove.<sup>16</sup> In *Gun Laws in Early America: The Regulation of Firearms Ownership 1607-1794*, Bellesiles argues that, contrary to popular belief (and assertions of the Individual Rights theorists), guns were heavily regulated by the government in early America and that universal ownership of guns in early America is a myth.<sup>17</sup> Finkelman argues that the Second and Tenth Amendments do not create or maintain “rights,” but rather, strike a balance between the federal and state governments.<sup>18</sup> Under either interpretation, the history of the Second Amendment is one of both political power and a human right to defense.

*a. Seventeenth Century England*

In the mid-seventeenth century, Charles II, King of England, chipped away at the liberties of English subjects to carry arms. Two examples are the Popish Plot in 1678 and the Rye House Plot in 1683. During the Popish Plot, Charles II disarmed Catholics who would not take an oath of “allegiance and supremacy.”<sup>19</sup> During the Rye House Plot, Charles II disarmed opposing Protestant leaders.<sup>20</sup> In 1685, Charles II died. His legacy included a few rights and liberties for the people as well as a large standing army.<sup>21</sup> After the death of Charles II, James II took the throne and disarmed the Protestant militia of Northern Ireland.<sup>22</sup> In 1687, James II declared the militia could only be called up at his direction and the lords lieutenant could

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16. Rakove provides a detailed Collective Rights historical perspective, as well as a critique of Joyce Lee Malcolm’s book. See Rakove, *supra* note 11, at 126-51.

17. See Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 L. & HIST. REV. 567, 567-89 (1998). Further analysis of Bellesiles’ work will be omitted due to the severity of critiques on his research methods. Following an academic panel investigation, Bellesiles resigned from Emory University, where he was a history professor. *Author of Gun History Quits After Panel Faults Research*, N.Y. TIMES, Oct. 27, 2002, at A26.

18. Finkelman, *supra* note 11, at 197.

19. MALCOLM, *supra* note 15, at 92.

20. *Id.*

21. *Id.* at 93-94.

22. *Id.* at 94, 96-97.



no longer call up the militia unilaterally.<sup>23</sup> In 1686, James II called for general disarmament under the Game Act of 1671; records do not indicate how successful this disarmament was, if at all.<sup>24</sup> A request went out in 1688 from seven prominent Englishmen to William of Orange to leave the Protestant fight in Europe and return to England to replace James II.<sup>25</sup> In what became the “Glorious Revolution,” William of Orange landed in Torbay and placed political pressure on James II to concede powers of the Crown.<sup>26</sup> On December 11, 1688, James II and his family fled to France.<sup>27</sup> Early in 1689, the House of Commons considered declaring William of Orange and his wife Mary the King and Queen of England.<sup>28</sup>

To avoid a tyrannical rule like that of Charles II and James II, English politicians called for express restraints on the Crown’s power as a requisite for William of Orange to take the throne.<sup>29</sup> Anthony Cary, the Lord Falkland, suggested “before you fill the Throne, I would have you [the House of Commons] resolve, what Power you will give the King, and what not.”<sup>30</sup> As a reaction to the encroachments upon their rights by Charles II and James II, the House decided to set out in writing the “rights and liberties”<sup>31</sup> of Englishmen.<sup>32</sup> A convention was called to draft the express reservations of liberty.<sup>33</sup> From this the Declaration of Rights was drafted and presented to William and Mary.<sup>34</sup> The Declaration of Rights contained thirteen rights of Englishmen, including the right to arms.<sup>35</sup> The English Bill of Rights of 1689 (English Bill of Rights) states: “the subjects which are Protestants, may have arms for their defence suitable to their

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23. *Id.* at 103.

24. *Id.* at 105.

25. *See id.* at 109-110.

26. *See id.* at 111-12.

27. *Id.*

28. *Id.* at 113.

29. *Id.*

30. *Id.*

31. BILL OF RIGHTS (U.K. 1689).

32. Malcolm, *supra* note 15, at 113-14.

33. *Id.* at 114-15.

34. *Id.* at 115.

35. *Id.*

conditions and as allowed by law.”<sup>36</sup>

There are alternate interpretations of this history. For Individual Rights theorist Malcolm, the English Bill of Rights “was to include a *right* for Englishmen to possess arms.”<sup>37</sup> For other legal scholars, it addressed the political balance of power inherent in private gun ownership but did not protect an *individual* right.<sup>38</sup> Rakove, in a critique of Malcolm, states “neither the language of the [English] Bill of Rights nor the doctrine of parliamentary supremacy readily supports the idea that the subject’s right to have arms lay beyond the sphere of legislative regulation.”<sup>39</sup> The most significant aspect of the English Bill of Rights is that regardless of the scope of the right—or whether it would be equivalent to the modern individual right or the modern collective right—for the first time the English Citizenry reserved a *right* against the Crown. Simply put, the citizens of England demanded that, in order for William of Orange to take power, he must acknowledge that the right to bear arms was essential to a balance of power between the Crown and the population at large.

*b. Colonial America*

Both Individual Rights theorists and Collective Rights theorists have detailed the history of Colonial America.<sup>40</sup> The English government ensured all immigrants arriving in America that they would be entitled to “all the rights of natural subjects, as if born and abiding in England.”<sup>41</sup> Tensions between the Crown and the Colonies rose greatly under King George III. On the crest of ever-increasing Royal Military presence, the

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36. BILL OF RIGHTS (U.K. 1689).

37. MALCOLM, *supra* note 15, at 114 (emphasis in original).

38. Erhman & Henigan, *supra* note 11, at 8-9; Uviller & Merkel, *supra* note 11, at 453-54.

39. Rakove, *supra* note 11, at 148.

40. Compare HALBROOK, *supra* note 15, at xiii, and MALCOLM, *supra* note 15, at 143-64 (providing a detailed historical analysis from the Individual Rights perspective), with Uviller & Merkel, *supra* note 11, at 461-95 (providing a detailed historical analysis from the Collective Rights perspective).

41. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 105-06 (Harper Torchbooks 1964) (1861).

Colonists began to arm themselves, and in 1775 war erupted between the Colonies and Great Britain. On July 4, 1776, the Declaration of Independence was issued. Among the grievances against the Crown listed as the foundation upon which the Colonies declared themselves “Free and Independent States” were keeping “among us, in times of peace, Standing Armies without the Consent of our Legislature,” and “quartering large bodies of armed troops among us.”<sup>42</sup>

The Colonies won independence from England. In the wake of their newly achieved liberty, each Colony adopted its own state constitution to replace its voided charter.<sup>43</sup> Drawing largely from the English Bill of Rights, many of the state constitutions contained a bill of rights regarding the right to bear arms.<sup>44</sup> Both Individual Rights theorists and Collective Rights theorists cite the various states’ bills of rights for support.<sup>45</sup> Between 1776 and 1783, Pennsylvania, North Carolina, Vermont, and Massachusetts adopted bills of rights containing “a ‘right to bear arms’ guarantee.”<sup>46</sup> During the same time frame, Virginia, Maryland, Delaware, and New Hampshire adopted bills of rights requiring the right to bear arms to facilitate a “well regulated militia.”<sup>47</sup> New York, New Jersey, South Carolina, Georgia, Connecticut, and Rhode Island did not adopt bills of rights into their constitutions, but commentators have argued “the political values expressed in those states were similar to those expressed in states with bills of rights.”<sup>48</sup> In their newly formed governments, the Colonies preserved the right to arms that had enabled them to overthrow English rule.

*c. The United States Constitution*

The drafters of the Bill of Rights also placed great emphasis on the right to bear arms. *The Federalist Papers*, printed in New

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42. THE DECLARATION OF INDEPENDENCE paras. 13, 16, 32 (U.S. 1776).

43. MALCOLM, *supra* note 15, at 146.

44. *Id.* at 146-50.

45. Compare *id.* (providing an Individual Rights interpretation), with Heyman, *supra* note 11, at 261-67 (providing a Collective Rights interpretation)

46. HALBROOK, *supra* note 15, at viii-ix.

47. See *id.*

48. *Id.* at ix.

York between 1787 and 1788, provide significant insight into the thought processes of the men who drafted the Constitution and the Bill of Rights.<sup>49</sup>

## 2. *Text*

Much of the debate over the meaning of the Second Amendment has focused on the specific language of the Amendment: “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>50</sup> When one considers the sheer volume of textual analysis on either side of the issue, the actual value of such technical textual analysis is debatable.

The Collective Rights Theory stresses the term “militia” from the Second Amendment, whereas the Individual Rights Theory stresses the term “the people” from the Second Amendment.

The framers’ use of a predicate in the Bill of Rights is somewhat unusual and fuels much of the disagreement over the scope of the operative statement. Collective Rights theorists argue that the goal of the operative statement, the preservation of a militia, is controlling and that without this goal the operative statement is ineffectual.<sup>51</sup> Alternately, Eugene Volokh argues: “the justification clause may aid construction of the operative clause but may not trump the meaning of the operative clause: To the extent the operative clause is ambiguous, the justification clause may inform our interpretation of it, but the justification clause can’t take away

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49. ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS vii-xxxii (Clinton Rossiter, ed., Mentor 1999) (1787) [hereinafter THE FEDERALIST PAPERS].

50. U.S. CONST. amend. II.

51. Finkelman, *supra* note 11, at 229-30 (“Congress . . . limit[ed] the right ‘to bear arms’—traditionally a phrase tied to military service—to collective service in the ‘well regulated militia.’”); Rakove, *supra* note 11, at 119-25; Dorf, *supra* note 11, at 300-01 (“To the extent that we are unsure what a right to keep and bear arms entails, the Second Amendment’s preamble provides guidance.”); Spitzer, *supra* note 11, at 356-58. After a discussion of the definition of militia and of the military context of the right, Spitzer “puts to rest the idea that the phrase ‘the people’ in the Second Amendment somehow means all of the people.” *Id.* at 358 n.49.

what the operative clause provides.”<sup>52</sup>

Individual Rights theorists argue “the people” is a phrase used throughout the Constitution, and its meaning should be read consistently throughout the document.<sup>53</sup> For example, the First and Fourth Amendments preserve rights for “the people”<sup>54</sup> and have been interpreted to apply to the citizenry.<sup>55</sup> As Nelson Lund points out:

[T]he Second Amendment does not even mention the right of the States to regulate the militia. Rather, it protects the ‘right of the people’ to keep and bear arms. This is exactly the same phrase used in the First Amendment and in the Fourth Amendment—in both cases the phrase clearly protects individuals’, not States’, rights.<sup>56</sup>

The legislative history surrounding the drafting of the Second Amendment does not clearly address whether the right was intended to apply to “the people”—regardless of affiliation to a militia—or that absent a militia, the right protects nothing.<sup>57</sup>

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52. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 807 (1998).

53. Levinson, *supra* note 5, at 645-46 (comparing the “the people” in the Second Amendment to “the people” in the Fourth Amendment).

54. U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); U.S. CONST. amend IV. (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

55. Levinson, *supra* note 5, at 645 (“It is difficult to know how one might plausibly read the Fourth Amendment as other than as protection of individual rights, and it would approach the frivolous to read the assembly and petition clauses as referring only to the right of state legislatures . . . .”); See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1163 (1991) (“[T]he Second Amendment was closely linked to the First Amendment’s guarantees of petition and assembly. One textual tip-off is the use of the loaded Preamble phrase ‘the people’ in both contexts, thereby conjuring up the Constitution’s bedrock principle of popular sovereignty . . . .”).

56. Lund, *supra* note 1, at 107.

57. 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1026, 1052, 1107, 1122, 1126, 1146, 1149, 1154, 1164 (detailing the House of Representatives and Senate debates surrounding the Second Amendment).

Considerable attention has been paid to the draft versions of both the English Bill of Rights and the Second Amendment to the United States Constitution. The *Journals of the House of Commons* recorded that during the drafting of the English Bill of Rights, “[t]he phrase ‘may provide and keep arms for their common defence’ had been altered to read ‘may have arms for their defence’ . . . .”<sup>58</sup> Collective Rights theorist are quick to point out that the enacted version contains the phrase “arms for their Defence suitable to their Conditions and as allowed by Law.”<sup>59</sup> Although the right protects the interests of an individual rather than the collective whole, some argue it may be abridged by legislation.<sup>60</sup> The United States Senate declined to add “for the common defense” to the “right to bear arms” clause of the Second Amendment.<sup>61</sup> The Second Amendment clearly states, “the right of the people to keep and bear Arms, shall not be infringed”<sup>62</sup> rather than “as allowed by law,”<sup>63</sup> making the omission of “common defense” in the United States Bill of Rights more significant than in the English Bill of Rights. The drafters were aware of the previous use of “as allowed by law” and it can be assumed that this phrase was not desirable.

The use of the word “militia” presents unique analytical problems because of its quasi-military origin. Over the last two centuries, the definition of militia has changed considerably. Congress passed the Militia Act of 1792 to organize the militia.<sup>64</sup> The Militia Act included every “able-bodied white male citizen[] ages eighteen to forty-five” in its definition of militia.<sup>65</sup> To strengthen the militias or “National Guards,” and narrow the scope of those in the militia, Congress passed the Dick Act.<sup>66</sup>

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58. MALCOLM, *supra* note 15, at 119.

59. See Uviller & Merkel, *supra* note 11, at 453 (citing BILL OF RIGHTS (U.K. 1689)).

60. *Id.* at 453-54.

61. 2 SCHWARTZ, *supra* note 57, at 1153-54; MALCOLM, *supra* note 15, at 161; Ehrman & Henigan, *supra* note 11, at 32-33; Heyman, *supra* note 11, at 277 n.216.

62. U.S. CONST. amend II.

63. BILL OF RIGHTS (U.K. 1689).

64. Ehrman & Henigan, *supra* note 11, at 35; see *id.* at 34-40 (providing a history of the United States Militia since 1789).

65. *Id.* at 35.

66. Militia Act of 1903, ch. 196, 32 Stat. 775; Ehrman & Henigan *supra* note 11,

Collective Rights theorists Ehrman and Henigan conclude: “. . .the National Guard, while viewed today as a ‘federal entity,’ is still the state militia during those times when it is not in federal service. This is so despite its federal pay and its federally owned equipment.”<sup>67</sup> But Individual Rights theorists contest this understanding of the Second Amendment. For example, Akhil Reed Amar acknowledges that the militia has changed over the years. For Amar, this is support for an Individualist interpretation because the militia now consists of “paid, semiprofessional, part-time volunteers . . .”<sup>68</sup> Thus, the National Guard of today is what would have been called a “select militia” by the framers and, as such, cannot be the focus of the Second Amendment.<sup>69</sup>

Representatives of both theories unravel the text of the Second Amendment according to modern standards and attempt to define the Right’s scope. Though their interpretations vary, both sides agree that the Right addresses the balance of political power.

### 3. Case Law

Only four United States Supreme Court cases have addressed the scope of the right to bear arms: *United States v. Miller*, *Miller v. Texas*, *Presser v. Illinois*, and *United States v. Cruikshank*.<sup>70</sup> These cases tend to fuel the debate on the scope of the right to bear arms, rather than settle any issues definitively. Notably, these cases were decided before the Court instituted the Incorporation Doctrine. Under the Incorporation Doctrine, the Court has protected individual rights and liberties by making the Bill of Rights applicable to the states through its interpretation of the Fourteenth Amendment.<sup>71</sup> Currently, all

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at 37. The official name of the Dick Act was the Militia Act of 1903. *Id.*

67. Ehrman & Henigan *supra* note 11, at 39.

68. Amar, *supra* note 55, at 1166.

69. *Id.* Since a “select militia” would perform the same function of a standing army, it could not be equivalent to “the people.” *See id.*

70. Cottrol & Diamond, *supra* note 10, at 310 n.3. *United States v. Miller*, 307 U.S. 174 (1939); *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876).

71. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 707-24 (1986)

amendments have been incorporated except for the Second, Third, Seventh and a portion of the Fifth.<sup>72</sup>

The Court's most extensive treatment of the Second Amendment is contained in *United States v. Miller*. Although commentators on both sides of the debate have cited *Miller* for support,<sup>73</sup> the Court does not directly address whether the Right is individual or collective. After a review of the constitutional provision giving Congress power over the militia, the Court noted that "the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion."<sup>74</sup> In upholding a firearms regulation statute against a Second Amendment claim, the Court concluded: "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>75</sup> Strangely, the decision seems to indicate that had the weapon been of a military nature, such as an anti-aircraft weapon, *Miller* would have had Second Amendment protection.<sup>76</sup> The *Miller* case is not a definitive statement on the scope of the right to bear arms.

The circuit courts have analyzed the scope of the Second Amendment more directly than the Supreme Court. Lower courts, following *Miller*, maintained the importance of the militia element of the Second Amendment. The Third Circuit, in *United States v. Tot*, held the Federal Firearms Act<sup>77</sup> did not

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(providing an overview of Incorporation Doctrine jurisprudence).

72. *Id.* at 721.

73. Both Cottrol & Diamond and Lund provide an Individual Rights interpretation. Cottrol & Diamond, *supra* note 10, at 310 n.3; Lund, *supra* note 1, at 110 ("[T]he Supreme Court correctly concluded that the Second Amendment protects an individual's right to keep and bear arms and thus rejected the untenable collective right[s] theory . . ."). Both Ehrman & Henigan and Spitzer each give a Collective Rights interpretation. Ehrman & Henigan, *supra* note 11, at 41 ("The Supreme Court's extensive discussion of the militia in *Miller*, moreover, reveals that the Court regarded the militia as a government directed and organized military force, not as a term synonymous with the armed citizenry at large."); Spitzer, *supra* note 11, at 368-69. Uviller & Merkel are Collective Rights scholars who maintain that *Miller* is "ambiguous." Uviller & Merkel, *supra* note 11, at 410.

74. *Miller*, 307 U.S. at 178-79.

75. *Id.* at 178.

76. Dorf, *supra* note 11, at 297.

77. 15 U.S.C. §§ 901-10 (1938) (repealed 1968).



violate the Second Amendment because the defendants' possession of a gun did not further the militia.<sup>78</sup> Under similar facts, the First Circuit reached the same conclusion.<sup>79</sup> The Sixth Circuit rejected a Second Amendment challenge to a Federal law requiring registration of machine guns in *United States v. Warin*.<sup>80</sup> The Gun Control Act of 1968 triggered a number of constitutional challenges in which each court upheld the statute.<sup>81</sup>

The Sixth Circuit has further held: "Since the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."<sup>82</sup> In *United States v. Johnson*, the Fourth Circuit also held the Second Amendment protects the collective right.<sup>83</sup> The most sweeping acceptance of the Collective Rights Theory comes from *Quilici v. Village of Morton Grove*, where the Seventh Circuit held that the Second Amendment applies to the preservation of the militia and upheld a local ban on handguns.<sup>84</sup>

More recently, and perhaps as evidence of a shift in reasoning, is the Fifth Circuit's decision in *United States v. Emerson*.<sup>85</sup> After an extensive discussion, the Court upheld the statute under which Emerson was charged, but held that the

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78. *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, *Tot v. United States*, 319 U.S. 463 (1943).

79. *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942).

80. *United States v. Warin*, 530 F.2d 103, 108 (6th Cir. 1976).

81. Ehrman & Henigan, *supra* note 11, at 45; Gun Control Act of 1968, 18 U.S.C. §§ 921-930.

82. *Stevens v. U.S.*, 440 F.2d 144, 149 (6th Cir. 1971).

83. *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) ("[T]he Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'" (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

84. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270-71 (7th Cir. 1982) ("[I]t seems clear that the right to bear arms is inextricably connected to the preservation of a militia."), *cert denied*, 464 U.S. 863 (1983).

85. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002). It should be noted that with the recent nature of the decision, prior commentary did not place much significance on the Northern District of Texas' opinion, *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999).

Second Amendment protects an individual's right to bear arms.<sup>86</sup> The Fifth Circuit concluded: "We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training."<sup>87</sup>

Furthermore, there is disagreement between certain members of the Supreme Court and the Federal Circuit Courts concerning the scope of the Second Amendment. Justice Scalia interprets "the Second Amendment as a guarantee that the federal government will not interfere with the individual's right to bear arms for self-defense."<sup>88</sup> In *Printz v. United States*, Justice Thomas stated: "[A] growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."<sup>89</sup>

Few argue that the Second Amendment ensures an individual the right to own all personal weapons—such as anti-tank missiles or machine guns. Likewise, few argue that the Second Amendment is moot.<sup>90</sup> Which level of scrutiny, if any, the Supreme Court would utilize when determining whether a gun control statute passes constitutional muster is unknown. Levels of scrutiny applied to other amendments, such as the First and Fourteenth are probably a strong indicator of how the Court will review Second Amendment law.<sup>91</sup>

The fundamental goal of the Second Amendment is defense of persons. Whether defense against criminals, foreign nations, or one's own nation, the Second Amendment intends to ensure that the use of force is countered with at least the possibility of reciprocal force. Any international gun control that will affect a

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86. *Emerson*, 270 F.3d at 264-65.

87. *Id.* at 260.

88. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 136 n.13 (Amy Gutmann ed., 1997).

89. *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring).

90. In the Collective Rights camp there are those who believe the Second Amendment offers no burden on gun control legislation. *See supra*, note 14.

91. *See* Wade Maxwell Rhyne, Note, *United States v. Emerson and the Second Amendment*, 28 HASTINGS CONST. L.Q. 505, 532-35 (2001) (discussing levels of Supreme Court scrutiny); *see also* Lund, *supra* note 1, at 122-30.

U.S. citizen's right to bear arms should receive no less than domestic legislation because of the underlying goal of the Second Amendment.

*B. Cultural Status*

The right to bear arms, rooted in the governmental excess of England and forged under the governmental oppression of the Revolutionary War, encompasses a right to defense. Both the Individual Rights Theory and the Collective Rights Theory agree that the right to arms is a significant element in the balance of power among individuals and between citizens, people, and their sovereigns.

The philosophical underpinnings of the right to bear arms can be found in such writings as John Locke's *The Second Treatise of Government*, William Blackstone's *Commentaries on the Laws of England*, and *The Federalist Papers*.<sup>92</sup> The enlightenment influence is present in the United States Constitution, Second Amendment scholarship, and the Universal Declaration of Human Rights.<sup>93</sup>

William Blackstone listed five "auxiliary" rights that included the right to bear arms.<sup>94</sup> He stated that the right to bear arms in the English Bill of Rights "is, indeed, a public [sic] allowance, under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."<sup>95</sup> Blackstone viewed the right to bear arms as encompassing both a right to personal self-defense and as a check against government oppression.<sup>96</sup> As with many other

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92. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); WILLIAM BLACKSTONE, *COMMENTARIES; THE FEDERALIST PAPERS*, *supra* note 49.

93. The Enlightenment was an intellectual movement in the 17<sup>th</sup> and 18<sup>th</sup> centuries during which political theories based on natural rights were developed. 4 *ENCYCLOPEDIA BRITANNICA, INC., THE NEW ENCYCLOPEDIA BRITANNICA* 504 (1989).

94. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*141-44 (stating the five auxiliary rights are: right to parliament, limitation of the king's prerogatives, due process of law, right to petition and right to bear arms).

95. *Id.* at \*143-44.

96. MALCOLM, *supra* note 15, at 130.

sources of right to bear arms scholarship, both the Individual Rights theorists and the Collective Rights theorists have cited Blackstone for support. Blackstone is widely regarded as “undoubtedly the most important of the eighteenth-century jurists and commentators to discuss the right to arms.”<sup>97</sup> Individual Rights theorists have labeled Blackstone a great supporter of the Individual Rights Theory stating: “Blackstone emphatically endorsed the view that keeping arms was necessary both for self-defense, ‘the natural right of resistance and self-preservation,’ and ‘to restrain the violence of oppression.’”<sup>98</sup> Collective Rights theorists attack this position.<sup>99</sup> Ehrman and Henigan argue that Blackstone clearly acknowledges that the right contained in the English Bill of Rights was expressly limited to “as allowed by law,” and that Blackstone listed the right to arms as a lesser, auxiliary right rather than an absolute right.<sup>100</sup> This distinction between absolute rights and auxiliary rights is not lost on Steven Heyman, who explains: “Blackstone’s ‘absolute rights’ correspond to the classic natural rights of life, liberty, and property. The right to arms, on the other hand, is not an ‘absolute right’ but is one of the ‘auxiliary subordinate rights of the subject.’”<sup>101</sup> But Heyman provides, for Blackstone: “Individuals do retain a right to defend themselves against imminent violence, for ‘[s]elf-defense . . . is justly called the primary law of nature,’ and ‘is not, neither can it be, in fact, taken away by the law of society.’”<sup>102</sup>

The duality of the Second Amendment as both a right to self-

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97. Cottrol & Diamond, *supra* note 10, at 1011; MALCOLM, *supra* note 15, at 130 (“Blackstone’s comments on [the right to bear arms] are of the utmost importance since his work immediately became the great authority on English common law in both England and America.”).

98. MALCOLM, *supra* note 15, at 130; *see also* Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 93 (1992); Lund, *supra* note 1, at 120 n.41.

99. *See, e.g.*, Ehrman & Henigan, *supra* note 11, at 9-10; *see also* Heyman, *supra* note 11, at 253-60 (stating “in fact, Blackstone provides even less support for an individualist interpretation of the right to bear arms than does Locke”).

100. Ehrman & Henigan, *supra* note 11, at 10.

101. Heyman, *supra* note 11, at 254.

102. *Id.* at 255 (quoting Blackstone).

defense and as a check on government<sup>103</sup> has been endorsed by a number of modern scholars.<sup>104</sup> Discussing the Individual Rights Theory, Robert J. Cottrol and Raymond T. Diamond state:

[T]he framers of the Second Amendment intended to protect the right to bear arms for two related purposes. The first of these was to ensure popular participation in the security of the community, an outgrowth of the English and early American reliance on posses and militias made up of the general citizenry to provide police and military forces. The second purpose was to ensure an armed citizenry in order to prevent potential tyranny by a government empowered and perhaps emboldened by a monopoly of force.<sup>105</sup>

Similarly Lund states: “[T]he right of personal self-defense was already comprehended in the Framers’ concept of ‘the common defense.’”<sup>106</sup> Reconciliation between these two seemingly distinct purposes appears possible only when viewed in light of the political and social climates prevailing when the Second Amendment was drafted. At this point in history, most U.S. citizens lived in rural areas where self-defense was needed because of hostility on the Western Frontier and the lack of a professional police force.<sup>107</sup> Though counterintuitive, the drafters

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103. Robert Spitzer eloquently explains:

[I]n 1960, an article published by Stuart R. Hays raised two new Second Amendment arguments that would appear often in subsequent articles. One argument asserted that the Second Amendment supported an individual or personal right to have firearms (notably for personal self-defense), separate and apart from citizen service in a government militia. The second novel argument was that the Second Amendment created a citizen ‘right of revolution’ . . . Hays rested these two arguments primarily on his assertion that the English tradition defined the ‘right to bear arms’ as incorporating both a right of revolution and a right of personal self-defense.

Spitzer, *supra* note 11, at 366 (footnotes omitted).

104. Amar, *supra* note 55, at 1163; Cottrol & Diamond, *supra* note 10, at 314; Lund, *supra* note 1, at 113-14, 116; Rhyne, *supra* note 91, at 533.

105. Cottrol & Diamond, *supra* note 10, at 314.

106. Lund, *supra* note 1, at 118.

107. *Id.* at 117-18 (suggesting that early America’s rural culture may have created a belief in its citizens that the new government would not interfere with their

included the people's right to rebel against the government in the Constitution. The drafters had experienced a revolution against an oppressive government, so in drafting the Constitution they provided the people an option should the government they were creating likewise become oppressive.<sup>108</sup> The change in situation has not changed the essential balance achieved through private ownership of guns; internationally this balance is even more important.

Collective Rights theorists divide the two purposes cited by Individual Rights theorists, and use them as evidence of inconsistency; they see justifying this duality as a daunting task. Collective Rights theorists rely on a lack of evidence to target the self-defense claims of Individual Rights theorists.<sup>109</sup> Likewise, Collective Rights theorists seize upon the right to rebel against one's government—the "insurrectionist" theory—and target it as legally inconsistent.<sup>110</sup> In some of the strongest language, Robert J. Spitzer states: "The idea that vigilantism and armed insurrection are as constitutionally sanctioned as voting is a proposition of such absurdity that one is struck more by its boldness than by its pretensions to seriousness."<sup>111</sup>

Undoubtedly, the right to bear arms effects political power in a variety of situations. Instead of the theory being "insurrectionist," it is perhaps a recognition of the balance that is achieved through an armed citizenry. As stated previously, these situations include cases of self-defense; right to bear arms as a counter-weight to governmental oppression; in situations between competing sovereigns; tension between political factions; and between political factions and individuals. Guns shape the dynamic of human oppression, whether it be

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right to self-defense).

108. Amar, *supra* note 55, at 1163.

109. For example, Heyman states: "[T]he recorded debates over the [Second] Amendment in the First Congress . . . give no indication that the Amendment was meant to protect an individual right to have arms for one's own purposes, or outside the context of the militia." Heyman, *supra* note 11, at 277.

110. Spitzer, *supra* note 11, at 359, 361; *see also* Heyman, *supra* note 11, at 277 ("[S]upporters of the individual right interpretation are forced to argue that the Amendment 'was meant to accomplish two distinct goals': to secure an individual right to arms and to recognize the importance of the militia.").

111. Spitzer, *supra* note 11, at 362.

individual encounters or revolutions. “Any use of military force, however, depends upon a calculation of both the benefits and costs of its use.”<sup>112</sup> The same reasoning applies to any use of force—whether it be that of an individual, government, political faction, or lynch mob.

Striking examples of the effects of gun ownership arise out of major societal struggles occurring over the last two hundred years: the experience of African-Americans during slavery, Reconstruction, the Jim Crow era, the Civil Rights Movement, and the experience of Jews in Nazi Germany.

Robert Cottrol and Raymond Diamond trace the history of African-Americans in the United States from the Revolution through modern day in *The Second Amendment: Toward an Afro-Americanist Reconsideration*.<sup>113</sup> They argue that “[t]his right [to possess arms], seen in the eighteenth century as a mechanism that enabled a majority to check the excesses of a potentially tyrannical national government, would for many blacks in the twentieth century become a means of survival in the face of private violence and state indifference.”<sup>114</sup> For African-Americans, the threat of violence came not only from the federal government, but also from state governments, private groups, and individuals.<sup>115</sup> Perhaps worse was the fact that the government did not protect African-Americans from racial violence. In Colonial America, an elite, armed, white population maintained political and social control over a diverse cultural landscape through sheer force.<sup>116</sup> Shortly after the ratification of the Second Amendment, Congress passed the Uniform Militia Act which “called for the enrollment of every free, able-bodied white male citizen between the ages of eighteen and forty-five into the militia.”<sup>117</sup> Throughout the Antebellum experience, gun control laws in the southern states limited free African-Americans and slaves’ access to guns. In the northern states, during this time, African-Americans were subjected to acts of

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112. Lund, *supra* note 1, at 115.

113. See Cottrol & Diamond, *supra* note 10, at 323-58.

114. *Id.* at 348-49.

115. See *id.* at 349-58.

116. See *id.* at 323-24.

117. *Id.* at 331.

aggression in the form of “race riots and mob violence.”<sup>118</sup> Between 1882 and 1968, 3,446 African-Americans were lynched.<sup>119</sup>

In a limited number of cases, African-Americans were successfully able to use firearms in self-defense.<sup>120</sup> In fact:

[A] case can be made that a society with a dismal record of protecting a people has a dubious claim on the right to disarm them. Perhaps a re-examination of this history can lead us to a modern realization of what the framers of the Second Amendment understood: that it is unwise to place the means of protection totally in the hands of the state, and that self-defense is also a civil right.<sup>121</sup>

Active governmental gun control, even when exercised to fight crime and regulate hunting, always shifts political power to a degree—even if only creating a need for additional police officers. As Blackstone suspected of the English government: “. . . prevention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . is a reason oftener meant than avowed . . . .”<sup>122</sup>

Nazi Germany used gun control laws to weaken the political strength of the Jews in the same manner the gun control laws of the United States weakened African-Americans. In 1928, an arms control bill was sent to the Reichstag and passed.<sup>123</sup> “The purpose and goal of the law at hand was to get firearms that [had] done so much damage from the hands of unauthorized persons and to do away with the instability and ambiguity of the law that previously existed in this area.”<sup>124</sup> Ironically: “the press objected that the law failed to regulate weapons for hitting or

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118. *Id.* at 336, 340.

119. *Id.* at 351-52; STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* 5 (1988).

120. *See* Cottrol & Diamond, *supra* note 10, at 353.

121. *Id.* at 361.

122. 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*412.

123. Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 *ARIZ. J. INT'L & COMP. L.* 483, 488-89 (2000).

124. *Id.* at 489-90. (quoting Reichskommissar Kuenzer, *Das Gesetz über Schusswaffen und Munition*, *DEUTSCHE ALLGEMEINE ZEITUNG*, Apr. 12, 1928, at 1).



stabbing, truncheons, and brass knuckles . . . .”<sup>125</sup> Generally, “the 1928 law was seen as deregulatory to a point but enforceable, in contrast to a far more restrictive albeit unenforceable order.”<sup>126</sup> This gun control law was later used by the Nazis to disarm opposing political groups, Jews, and other minorities.<sup>127</sup> In 1933, according to a Bavarian ordinance:

The units of the national revolution, SA, SS, and Stahlhelm, offer every German man with a good reputation the opportunity to join their ranks for the fight. Therefore, whoever does not belong to one of these named units and nevertheless keeps his weapon without authorization or even hides it, must be viewed as an enemy of the national government and will be held responsible without hesitation and with the utmost severity.<sup>128</sup>

On November 7, 1938, a German-Jewish refugee attempted to assassinate the German Ambassador to France.<sup>129</sup> In reaction, the German police raided and disarmed Jews in Berlin.<sup>130</sup> On November 10, 1938, Nazi officials issued the following order: “Persons who, according to the Nurnberg Law, are regarded as Jews, are forbidden to possess any weapon. Violators will be condemned to a concentration camp and imprisoned for a period of up to 20 years.”<sup>131</sup> Simply put, “over a period of several weeks, Germany’s Jews had been disarmed. The process was carried out both by following a combination of legal forms and by sheer lawless violence. The Nazi hierarchy could now more comfortably deal with the Jewish question without fear of resistance.”<sup>132</sup> Between 1933 and 1945, the Nazis committed genocide resulting in the death of more than 15 million people, including roughly six million Jews, ten million Slavs, and over

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125. *Id.* at 489.

126. *Id.* at 491.

127. *See id.* at 498-99.

128. *Id.* at 498-99 (citing an ordinance passed by the provisional Bavarian Minister of the Interior).

129. *Id.* at 513.

130. *Id.*

131. *Id.* at 517 (citing a decree issued by SS Reichsfuhrer Himmer).

132. *Id.* at 527.

300,000 Gypsies and 200,000 homosexuals.<sup>133</sup>

The Second Amendment's Right to Bear Arms is intended to foster self-defense in all forms. Gun ownership, or the lack thereof, has far reaching consequences. Whether or not a right to bear arms exists alters the political balance between individuals, private groups, governmental organizations, local and federal sovereigns. The current move to create substantive gun control on an international level raises astounding legal and political issues. Even if one accepts the weakest interpretation of the Second Amendment,<sup>134</sup> the fact that U.S. citizens' rights are being affected at the international level should be addressed. Even ardent supporters of the Collective Rights Theory must address the stress created by the potential of a non-legislative, extra-constitutional interference with the Second Amendment. The effects of international gun control will be global and will have an enormous impact on the rights and political power of individuals, as well as on nation states, global regions, supranational authorities, and perhaps a quasi-world government.

### III. THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND UNITED STATES MUNICIPAL LAW

Defining the relationship between international law and the domestic law of sovereign nations, also referred to as "municipal law," presents novel legal questions. Municipal law and international law are founded on different forms of authority. The differences in form and source can make the systems simply incompatible.

Municipal law is explicit in that the law is passed by a sovereign and applied to citizens within an enclosed system. Enclosed systems establish the method of creation, form, and legal weight of all law promulgated the system. Questions of

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133. David E. Weiss, Note, *Striking a Difficult Balance: Combating the Threat of Neonazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 899, 901 n.9 (1994).

134. For example, Dorf argues that the Second Amendment does not protect an individual's right to bear arms and counters that "[t]here is no reason to think that the legislative process currently excludes the perspectives of those who oppose various forms of firearm regulation." Dorf, *supra* note 11, at 333.

legislation drafting, dispute resolution, legislative interpretation, and enforcement of legislation are answered according to the system.

Conversely, international law is not passed by a sovereign, but rather results from an agreement between sovereign states. Until recently, international law resembled contract law between nation-states—absent any common superior or independent body for adjudication and appeal in cases of disagreement.<sup>135</sup>

The Permanent Court of International Justice defined traditional international law as “govern[ing] relations between independent States. The rules of law binding upon sovereign States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . .”<sup>136</sup> However, with the rise of “new international law,” “international law’s modern emphasis on human rights has increasingly concerned itself with the regulation of a state’s relationship with its own citizens, an area of regulation traditionally understood as exclusively within the sovereignty of individual nation-states.”<sup>137</sup>

Analysis of international law by traditional standards is difficult and open to debate. International law does not have an enclosed system. Essential aspects of predictability and even legitimacy change over time. The continuous change in structure creates serious rifts in international law. The legal weights, method of passage, and dispute resolution are not established in any uniform way. Such simple aspects as to whom the particular law applies and the shape of jurisdiction change without warning.

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135. See Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 79-83 (2000). Ku provides an analysis of the delegation of federal power to international organizations, including a synopsis of the change from “traditional international law” to “new international law.” *Id.* at 79-88. Ku borrows the term “new international law” from Paul Stephan. *Id.* at 79 n.21. Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1155, 1556-22 (1999) (describing “The New International Law”).

136. The S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A/B) No. 10, at 18 (Sept. 7).

137. *Id.*

Agreements between sovereign states take a variety of forms. Breach of international agreements and irreconcilable disagreements were traditionally dealt with in the same manner as other disagreements between sovereign states. For decades, sovereign states adhered to treaties out of convenience and moral obligation. When a sovereign state no longer wanted to abide by the treaty, it simply stopped and faced the discontent of the other obligated states. With the creation of the League of Nations and then the United Nations,<sup>138</sup> international law changed dramatically. The United Nations evolved into a supranational authority. Now, with more international organizations, agencies, courts, and even “peace-keeping” troops, treaties are increasingly enforced.

#### A. *The United States Constitution*

The United States Constitution is the “supreme Law of the Land.”<sup>139</sup> The laws of the United States are the result of the Constitution.<sup>140</sup> The Constitution forms three branches of government: the legislative, the executive, and the judicial. The Legislative Branch passes legislation;<sup>141</sup> the Judicial Branch settles disputes and interprets legislation;<sup>142</sup> the Executive Branch enforces legislation and holdings of the Judicial Branch.<sup>143</sup> Issues of execution and adjudication are settled prior to drafting of legislation.

Forms of United States municipal law include constitutional law, both federal and state legislation, executive orders, administrative rules and regulations, and case law. Each of these laws hold a predetermined status. Legislation can be repealed and amended. Lower court cases may be overturned. Supreme Court cases may be overruled by subsequent Supreme Court cases. Within the Constitution itself, there are provisions

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138. The United States joined the United Nations on October 24, 1945. Charter of the United Nations and the Statute of the International Court of Justice, Jun. 26, 1945, 59 Stat. 1031, 1031, 3 Bevans 1153, 1153.

139. U.S. CONST. art. VI, cl. 2.

140. *Id.*

141. *Id.* at art. I, § 1.

142. *Id.* at art. III, § 2.

143. *Id.* at art. II, § 1.

for amending the document.<sup>144</sup> A predictable hierarchy, dependent on precedent, solves most legal problems that arise—such as creation of laws, enforcement of laws, jurisdictional issues, and conflicts of laws. An appeals process handles disputes. The Supreme Court is the final say on the meaning of the Constitution.<sup>145</sup>

The Constitution discusses treaties in Article II, Section 2, granting the President “power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .”<sup>146</sup> In Article III, Section 2, the Constitution gives federal courts jurisdiction over cases “arising under” treaties.<sup>147</sup>

### *B. International Law*

International law has two primary sources— treaties and customary international law. Arguably, neither of these sources adhere to the American principles of self-determination, representative government, and separation of powers.<sup>148</sup> International law’s lack of foundation in these concepts makes analysis difficult for anyone with a basis in these ideals. International law remains useful and effective, and allows for progress in ways achievable only through international law. However, the high rate of change in the administration of international law makes analysis even more difficult. In the United States, the Constitution was drafted, debated and adopted. Few, if any, international instruments are given such permanence by those whom the instruments bind. Additionally, instruments may take on roles in international law that were

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144. *Id.* at art. V.

145. *Id.* at art. III, § 2, cl. 1. *Marbury v. Madison*, 5 U.S. 137, 173-180 (1803) (interpreting the scope of the federal courts’ Art. III power).

146. U.S. CONST. art. II, § 2, cl. 2.

147. *Id.* at art. III, § 2, cl. 1.

148. U.S. citizens are often uninformed and the parties that draft international law are often not elected. Even when the signing official is elected, such as the United States President, U.S. citizens generally do not expect for their personal rights and obligations to change by treaty. This indicates that “[f]irst, international delegations place an unusually heavy strain upon the ideal of political accountability that animates much of the Constitution’s structural design. Second, international organizations lack an independent source of political legitimacy.” Ku, *supra* note 135, at 77.

not originally intended. For example, the President of the French Republic, Jacques Chirac, stated in September 2000: "The Charter of the United Nations has established itself as our 'World Constitution.' And the Universal Declaration of Human Rights adopted by the General Assembly in Paris in 1948 is the most important of our laws."<sup>149</sup> This analogy to a constitutional system may be attractive, and even desirable, but is inaccurate.

### 1. *Treaties*

Treaty is the term used for the variety of explicit agreements between sovereign states. In 1969, the Vienna Convention on the Law of Treaties (Vienna Convention) was drafted to set out general rules of international law for the drafting and implementation of treaties.<sup>150</sup> The Vienna Convention defines "treaty" as "an international agreement concluded between states in written form and governed by international law . . . ."<sup>151</sup>

In the United States, due to the duality of municipal law and international law, a treaty is not automatically considered in effect simply upon its signing.<sup>152</sup> Sovereign states and international bodies respect that a signing state representative may have to submit the final treaty to his or her domestic authority for approval;<sup>153</sup> for example, in the United States, a treaty is valid once it is ratified by the Senate.<sup>154</sup> By signing, a sovereign state indicates an intention to ratify or at least consider, and thus to abide by, a treaty.<sup>155</sup> The Vienna Convention stipulates: "A State is obliged to refrain from acts that would defeat the object and purpose of a treaty when . . . [i]t

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149. Winston Nagan, *The Rule of Law—Lofty Idea and Harsh Reality* (Dec 12, 2000), at <http://www.unodc.org/palermo/convmain.html> (citing President Jacques Chirac).

150. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, 333 [hereinafter Vienna Convention].

151. *Id.* at 331-33.

152. *See id.* at 335-36; *see also* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 71 (1988).

153. *See* Vienna Convention, *supra* note 150, at 335-36; *see also* JANIS, *supra* note 152, at 17-18.

154. U.S. CONST. art. II, § 2, cl. 2.

155. *See* Vienna Convention, *supra* note 150, at 336.

has signed the treaty . . . .”<sup>156</sup> If after signing, a sovereign state determines it will not ratify the treaty, the sovereign state is obligated to revoke its signature and make its intentions known.<sup>157</sup>

## 2. *Customary International Law*

Customary international law is one of the terms used to describe implied legal tenants that bind parties.<sup>158</sup> It is often founded on the expectation that states will continue to follow a pattern of behavior.<sup>159</sup> International lawyers see this as an implicit obligation to act consistently. The Statute of the International Court of Justice, Article 38, cites “international custom, as evidence of a general practice accepted as law . . . .”<sup>160</sup> The most striking characteristic of customary international law is that it can be nonconsensual.<sup>161</sup> A state may observe a practice with no intention of obligating itself to follow that practice in the future, yet find itself bound.<sup>162</sup> The key to customary international law is determining when a pattern of activity becomes legally binding. Not surprisingly, questions of what constitutes “legally binding” typically arise out of disputes.

A more controversial creation of international law is a customary international law that is binding because of its international acceptance, regardless of the actions of any particular sovereign state.<sup>163</sup> In other words, customary international law may legally bind a sovereign state that has never made an affirmative act of acquiescence.<sup>164</sup> If a practice becomes customary internationally, international organizations

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156. *Id.*

157. *Id.* at 346-48. This assumes that the treaty contains a termination provision. *See id.* If a treaty contains no such provision, it is only conditionally “subject to denunciation or withdrawal.” *Id.* at 345.

158. JANIS, *supra* note 152, at 4-5.

159. *Id.* at 4-5, 36, 39.

160. Statute of the International Court of Justice, Jun. 26, 1945, Ch. II, Art. 38, 59 Stat. 1031, 1060.

161. *See* JANIS, *supra* note 152, at 28.

162. *See id.* at 35-36.

163. *See id.* at 46-48.

164. *See id.*

and courts can declare the practice binding on all states.<sup>165</sup>

There is great controversy over what provides evidence of customary international law. Examples include the behavior of sovereign states involved; written instruments that demonstrate the sovereign states intent; and legal writings such as court decisions and articles written by legal scholars.<sup>166</sup> Increasingly, the recommendations of international organizations are used as evidence of customary international law even when the international organization has not been delegated *any* legislative or rulemaking power.<sup>167</sup>

In the United Nations Charter, the General Assembly of the United Nations is intended to “initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification . . . .”<sup>168</sup>

This scheme is problematic to those who believe in the separation of powers and in representative government.<sup>169</sup> The United Nations, an amorphous international organization, creates and accredits the bodies responsible for these studies. For example, the General Assembly requested the Secretary-General to conduct a study which would form the basis of both the Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (Small Arms Conference) and the Conference’s subsequent Programme of Action.<sup>170</sup> The Secretary-

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165. *See id.*

166. *See id.* at 41-42.

167. *See id.* at 43-44.

168. U.N. CHARTER art. 13(1)(a).

169. A relevant and representative example of disproportionate representation by Non-Government Organizations (NGOs) can be found in the summaries of statements made by NGOs. A United Nations press release quote[d] Mary Leigh Blek, a representative of the Million Mom March, who “believed that the United States’ position expressed during the ministerial segment [of the United Nations Conference on the Illicit Trade in Small Arms] represented ‘a minority view of a minority government,’ . . . [and] sought to set the record straight.” Press Release, United Nations, United Nations Conference on the Illicit Trade in Small Arms 8<sup>th</sup> Meeting (AM) (Jul. 16, 2001), at <http://www.un.org/News/Press/docs/2001/DC2792.doc.htm> [hereinafter U.N. Press Release]. Blek also stated that “the head of the United States delegation to this Conference does not represent the thinking of the American public.” *Id.*

170. UNITED NATIONS, UNITED NATIONS CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, REPORT OF GROUP OF



General appointed “governmental experts” to assist him in conducting this study.<sup>171</sup> Likewise, those “non-governmental” organizations (NGOs) that wanted to take part in the Conference had to be accredited by the United Nations.<sup>172</sup> The same governmental or non-governmental groups tend to play a role in drafting the instrument of the convention. The results of these studies are increasingly being used as evidence of customary international law.<sup>173</sup>

C. *Conflicts Between Treaties and the United States Constitution*

1. *Conflicts Between Treaties and Municipal Law*

Two theoretical approaches have been used to analyze conflicts between international law and municipal law: the “dualist approach” and the “monist approach.” The dualist approach views international law and municipal law as occupying two separate spheres.<sup>174</sup> Under this approach international law does not affect the domestic legal order.<sup>175</sup> The monist approach “views the international legal order and all national legal orders as component parts of a single ‘universal legal order’ in which international law has a certain supremacy.”<sup>176</sup> The United States follows a dualist approach. The dualist approach is becoming problematic as treaties and domestic laws are increasingly addressing the same subject matter. A further complication is the growing use of international courts to settle these matters.

In the case where a treaty conflicts with municipal law, an international court will hold the international law as overriding, whereas a municipal court may hold the municipal law superior.

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GOVERNMENT EXPERTS, at 1, U.N. Doc. A/CONF.192/2 (2001) [hereinafter SMALL ARMS].

171. *Id.*

172. UNITED NATIONS, REPORT OF THE UNITED NATIONS CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, at 5, U.N. Doc. A/CONF.192/15 (2001) [hereinafter CONFERENCE REPORT].

173. *See id.* at 3.

174. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 553-88 (2d ed. 1966).

175. *See id.*

176. JANIS, *supra* note 152, at 86.

For example, if a treaty conflicts with the United States Constitution, the Supreme Court will hold that the treaty is invalid. If the same conflict came before an international court, it would hold that the treaty was binding. These competing legal systems are on a road to conflict. Predictions are endless and the possibility begs dozens of daunting questions, such as legal legitimacy and executive and enforcement mechanisms.

### 2. *International Courts and United States Municipal Law*

International courts such as the International Criminal Court (ICC) and the International Court of Justice (ICJ) will look to international law in applying legal rules. The Vienna Convention recognizes the general international law principal of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be preformed by them in good faith.”<sup>177</sup> The Vienna Convention further states, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . . .”<sup>178</sup> The ICJ has addressed potential conflicts between an effective treaty and a municipal constitution, holding that “a state cannot adduce as against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”<sup>179</sup> When the party affected is a citizen or even a corporation, rather than the state in which the citizen lives, the same would hold true. Thus, it is unlikely that an American citizen that is protected by the Second Amendment can assert this right for protection in an international court.

### 3. *United States Constitution and Treaties*

The Constitution clearly anticipated the federal government entering into treaties, but does not appear to have anticipated the extent to which treaties would have domestic ramifications. The Constitution states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

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177. Vienna Convention, *supra* note 150, at 339.

178. *Id.*

179. Advisory Opinion No. 44, Treatment of Polish Nationals in Danzig, 1932 P.C.I.J. (ser. A/B) No.44, at 24 (Feb. 4).

Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>180</sup>

At first glance, one might conclude treaties are equal in weight to the Constitution because they are both the “supreme Law of the Land.” Both the U.S. constitutional structure and case law illustrate that this view is untenable.

*a. Constitutional Structure*

The structure of the U.S. government holds the Constitution superior to treaties. The procedural adoption methods of legislation, treaties, and constitutional amendments demonstrate that treaties are equivalent to legislation. Thus, just as legislation that violated the Constitution is void, treaties that violate the Constitution are also invalid.

U.S. legislation requires passage by a majority of the House of Representatives and of the Senate and ratification by the President.<sup>181</sup> Treaties are drafted and passed in the reverse order, however. The Executive Branch conducts international relations.<sup>182</sup> When the President deems appropriate, he may sign a treaty with another sovereign state.<sup>183</sup> For the treaty to be effective, the President must submit it to the Senate, who then must ratify the treaty by a two-thirds vote.<sup>184</sup>

A variety of conclusions may be drawn from the procedural differences in the adoption of legislation and treaties. Approval by the President is necessary for both treaties and legislation.<sup>185</sup> While a bill’s passage in both houses of Congress is necessary for the adoption as legislation, only the Senate’s approval is required to ratify a treaty.<sup>186</sup> The House of Representatives has no part in effectuating treaties.

The most significant structural difference is the branch that drafts the document. Statutes are drafted by legislators,

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180. U.S. CONST. art. VI, cl. 2.

181. *Id.* at art. I, § 7, cl. 2.

182. *Id.* at art. II, § 2, cl. 2.

183. *See id.*

184. *Id.*

185. *See id.* at art. I, § 7, cl. 2; *see also id.* at art. II, § 2, cl. 2.

186. *Id.*

whereas treaties are drafted by the Executive Office.<sup>187</sup> This is a strong indication that the founding fathers believed the subject of treaties would primarily be relations between states, and would not directly affect the rights and obligations of citizens.

The method of amending the Constitution is expressly provided for in the Constitution. Article V reads:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .<sup>188</sup>

Adopting such a stringent method of amending the Constitution would not make sense if the President and the Senate could change the Constitution by simply adopting a treaty.

*b. United States Case Law*

U.S. case law is in agreement. The Supreme Court held that the Constitution is superior to treaties. Any treaty that violates the Constitution is void and unenforceable.

The Court, in *Reid v. Covert*, has held: "This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty."<sup>189</sup> The Court further held:

Article VI, Supremacy Clause of the Constitution declares: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme

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187. *Id.*

188. *Id.* at art. V.

189. *Reid v. Covert*, 354 U.S. 1, 17 (1957). "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government." *The Cherokee Tobacco*, 78 U.S. 616, 620-21 (1870).

Law of the Land . . . .” There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in “pursuance” of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.<sup>190</sup>

In *DeGeofroy v. Riggs*, the United States Supreme Court clarified the scope that treaties might take, holding:

The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent.<sup>191</sup>

Notably, treaties do not inherently override legislation. In *Whitney v. Robertson* the Court held:

By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of

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190. *Reid*, 354 U.S. at 16-17.

191. *DeGeofroy v. Riggs*, 133 U.S. 258, 267 (1890).

legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other . . . .<sup>192</sup>

A variety of conclusions may be drawn from the constitutional structure and the case law. First, the protections contained in the Bill of Rights cannot be infringed upon by treaties. Just as the federal and state governments cannot violate people's rights through legislation, the federal government may not do so through treaties. The President may revoke or he may breach a treaty and Congress may pass legislation that voids a treaty.

It is the federal government's job to ensure that no foreign political body usurps the authority of the U.S. government. Although Congress may delegate power to various bodies, such as administrative agencies, all delegations of power are subject to the Constitution and review by the Court. The U.S. government may not grant power to a foreign polity to violate the rights of U.S. citizens. International organizations or groups of sovereign states cannot violate the Bill of Rights with regard to events occurring within the United States, because they lack political legitimacy. Any attempt to do so is an attempt to usurp power from the U.S. government and U.S. citizens and should be strictly scrutinized by both the U.S. government and its citizenry.

The Constitution and the United States Supreme Court ensure that cases and controversies arising on U.S. soil will be heard in U.S. courts.<sup>193</sup> The Constitution reads: "The judicial

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192. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see Edye v. Robertson*, 112 U.S. 580, 598 (1884).

193. It should be noted that some international courts claim jurisdiction over U.S. Citizens. *See UNITED NATIONS, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, at 10, U.N. Doc. A/CONF.183/9\* (1998) [hereinafter *ROME STATUTE*]. This is seemingly in violation of the United States Constitution. Although relevant, discussion of the constitutionality of international courts is beyond the scope of this article. For scholarship addressing such a proposition, see Kristafer Ailslienger, *Why the United*

Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>194</sup> More importantly, it says:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>195</sup>

In other words, the federal court system shall hear all cases arising in the United States, whether under color of state law, federal law, constitutional law or treaties. The court system also hears all cases between U.S. citizens and “foreign States, Citizens or Subjects.”<sup>196</sup> Furthermore, when a valid state or federal court system has jurisdiction, U.S. citizens are entitled to a trial by a domestic court.<sup>197</sup> In *Ex Parte Milligan*, the Supreme Court held: “One of the plainest constitutional provisions was . . . infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.”<sup>198</sup> Assertion of jurisdiction over a United States citizen for a case arising in the United States by an international court is arguably a usurpation of the United States political power and sovereignty.

If a case arose before the Supreme Court where an American citizen were alleged to have violated a treaty, the citizen could

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*States Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 WASHBURN L.J. 80 (1999).

194. U.S. CONST. art. III, § 1.

195. *Id.* at art. III, § 2, cl. 1., amended by U.S. CONST. amend. XI.

196. *Id.*, amended by U.S. CONST. amend. XI.

197. *See Ex Parte Milligan*, 71 U.S. 2, 122, 140-41 (1866).

198. *Id.* at 122.

argue that the treaty violated the Constitution, and was thus unenforceable. The Court has jurisdiction over such an issue and would make the decision. As the final interpreter of the Constitution, no appeal would be available to either party.

Those treaties that directly alter a U.S. citizen's rights and obligations, and subject him or her to potential suits abroad, should be heavily scrutinized by the President and Senate and should require activating legislation to go into effect. The U.S. government must amend the Constitution if it wishes to adopt a treaty that would violate the United States Constitution.

When U.S. citizens are subject to suit under international agreements in either a domestic or international court, treaties are equivalent to legislation; therefore, the process for adoption of treaties should reflect that of legislation. Input from citizens and elected officials would ensure a representative form of government. Lastly, greater precautions and attention would avoid a potentially disastrous conflict between the fundamental rights of United States citizens and international law.

#### IV. GLOBAL GUN CONTROL

Global gun control has been at the forefront of international politics and has recently found outlets for the creation of substantive international law. These international laws purport to be non-binding, but also purport to require states to implement stricter gun control laws domestically. The Secretary-General of the United Nations submitted a report clearly stating his view on the role of international law and gun control.<sup>199</sup> *The Report of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled "Small Arms"* (Small Arms Report) summarized the Secretary-General comments to the Millennium Assembly of the United Nations:<sup>200</sup>

[T]he task of effective proliferation control in the field of small arms and light weapons is made far harder than it needs to be because of irresponsible behavior on the part of some States and lack of capacity by others,

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199. SMALL ARMS, *supra* note 170, at 1-30.

200. *Id.* at para. 17.



together with a lack of transparency that is characteristic of much of the arms trade. He concludes that these weapons need to be brought under the control of States, and that States should exercise such control in a responsible manner, including exercising appropriate restraint in relation to accumulations and transfers of small arms and light weapons.<sup>201</sup>

A. *Scope of “Small Arms and Light Weapons” and “Illicit Trafficking”*

Several arms control treaties that relate to nuclear weapons and national defense have been passed and signed by the United States. These treaties relate to weapons owned by governments, and do not significantly affect the rights and obligations of citizens within sovereign states party to the treaty or subject U.S. citizens to suits in international courts.

More recently, movements have been made to address international problems of small arms. Often these problems include internal instability and fighting, as well as criminal activity. The language used to describe the arms in these discussions is often military related. However, the language also tends to include more common terms such as explosives and ammunitions.<sup>202</sup> Without reading the definitions of “small arms”<sup>203</sup> and “light weapons,”<sup>204</sup> one may conclude that the proposed agreements would apply only to machine guns, anti-aircraft missiles, and other weapons that in the United States are typically reserved for government ownership. In reality, however, the definition of small arms is so expansive one wonders what exactly is excluded from this definition and why the word military is so often used. The phrase “small arms”

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201. *Id.*

202. SMALL ARMS, *supra* note 1709, at 25.

203. *Id.* at 26. “Small arms” include: “revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns.” *Id.*

204. *Id.* “Light weapons” include: “heavy machine guns, hand-held, under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of calibers of less than 100mm.” *Id.*

applies to all guns, including pistols, revolvers, shotguns, and rifles used for hunting.

Likewise, terms such as “illicit arms” and “illicit trade” are used.<sup>205</sup> Upon first impression, “illicit” appears to describe gun smuggling and/or trafficking to criminals. When one analyzes the documents one quickly learns that the use of such words as illicit and illegal are at best amorphous. What qualifies as illicit or illegal varies greatly and is open to change and re-definition by those utilizing the term. The drafters of the United Nations Report have included a term they can redefine over time to suit changing needs, even to the extreme that illicit places no limitations on the word or words illicit describes. At worst, illicit is simply a description intended to place all arms transactions in a negative light.

For example, the United Nations defines small arms, light weapons, and illicit trafficking.<sup>206</sup> The definition of small arms reads: “The category of small arms includes revolvers and self-loading pistols, rifles and carbines . . . .”<sup>207</sup> Illicit trafficking is: “understood to cover those international transfers in small arms and light weapons, their parts and components and ammunition, which are unauthorized or contrary to the laws of any of the States involved, and/or contrary to international law.”<sup>208</sup> Under this set of definitions, small arms and light weapons include all guns. Illicit trafficking includes all those transactions that are international in scope and that violate a law, whether it be the municipal law of a state, a treaty, or customary international law. The phrase “contrary to international law” is particularly expansive considering much of it is in the drafting phase and the ease with which it can be changed.

Furthermore, the desire to end all private gun ownership worldwide is a final goal of many international law participants. This desire is often hidden or lightly shrouded, but sometimes it is flaunted. On July 16, 2001, at a meeting of NGOs at the

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205. *Id.* at 25.

206. *Id.* at 25-26.

207. *Id.* at 26.

208. *Id.* at 25.

United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Amparo Mantilla De Ardila of the Fundación GAMMA IDEAR, Colombia said: “We must overlook the differences between the licit and illicit trade in small arms and light weapons. Weapons are almost always associated with injuries and death. Whoever possesses such arms not only uses them for self-defence, but also for assaults.”<sup>209</sup>

*B. Conference on Illicit Trade in Small Arms*

The goal of global gun control came to fruition in the summer of 2001, in the form of a conference in New York, New York. On December 15, 1999, the General Assembly of the United Nations, through resolution 54/54 V, requested that the Secretary-General conduct a study to determine “the feasibility of restricting the manufacture and trade of such weapons to manufacturers and dealers authorized by States, which will cover the brokering activities, particularly illicit activities, relating to small arms and light weapons, including transportation agents and financial transactions . . .” and to submit same at a conference to be held in 2001.<sup>210</sup> On July 9–20, 2001, the Small Arms Report was submitted to the Small Arms Conference.<sup>211</sup> A preparatory committee for the Small Arms Conference drafted a document entitled *Draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (Draft).<sup>212</sup> The Draft set out a plan of action, whereby those sovereign states adopting its Programme of Action would, through municipal and international law, institute greater control over guns.<sup>213</sup>

Between July 9–13, 2001, the Small Arms Conference held

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209. U.N. Press Release, *supra* note 169.

210. SMALL ARMS, *supra* note 170, at 1.

211. *Id.* at 1.

212. UNITED NATIONS, PREPARATORY COMMITTEE FOR THE UNITED NATIONS CONFERENCE ON ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, DRAFT PROGRAMME OF ACTION TO PREVENT, COMBAT, AND ERADICATE THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, at 1, U.N. Doc. A/CONF.192/PC/L.4/Rev.1\* (2000).

213. *Id.* at 3-7.

a general exchange of views, and heard statements of attending sovereign states, international organizations, and United Nations organizations.<sup>214</sup> On July 16, 2001, the Small Arms Conference heard statements from NGOs.<sup>215</sup> After negotiation, the Small Arms Conference edited and finalized the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (Programme).<sup>216</sup> On July 20, 2001, the Small Arms Conference adopted the Programme.<sup>217</sup> The municipal and international laws by the Programme should be heavily scrutinized because its recommendations potentially do, or will, violate the Second Amendment and fundamental legal beliefs held by citizens of the United States.

1. *United States Presence at the Small Arms Conference*

The United States sent a participant to the Small Arms Conference, who expressed concerns over international plight, but was unable to fully consent to or comply with the Draft because of the United States' right to bear arms.

On July 9, 2001, John R. Bolton, Under Secretary of State for Arms Control and International Security Affairs, spoke at the Plenary Session.<sup>218</sup> Bolton expressed concern over the domestic legal ramifications of the Draft.<sup>219</sup> Citing John Ashcroft, Attorney General of the United States, Bolton explained: "[T]he Second Amendment protects an individual right to keep and bear arms."<sup>220</sup> He then listed those aspects of

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214. For a complete list of attending states by date and meeting, see CONFERENCE REPORT, *supra* note 172, at 1-3.

215. *Id.* at 3.

216. *Id.* at 6.

217. *Id.*; UNITED NATIONS, CONFERENCE OF THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, DRAFT PROGRAMME OF ACTION TO PREVENT, COMBAT AND ERADICATE THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, U.N. Doc. A/CONF.192/L.5/Rev.1 (2001).

218. Press Release, John R. Bolton, Under Secretary of State for Arms Control and International Security Affairs, *Statement to the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (July 9, 2001), at [http://www.un.int/usa/01\\_104.htm](http://www.un.int/usa/01_104.htm).

219. *Id.*

220. *Id.*

the Draft that the United States could not support.<sup>221</sup> Among others, these aspects included “measures that would constrain legal trade and legal manufacturing of small arms and light weapons” and “measures that prohibit civilian possession of small arms.”<sup>222</sup>

Bolton presented the official position of the U.S. government. Bolton explained that the United States was constitutionally precluded from giving support to the Programme in its current form.<sup>223</sup>

It is worth noting that in addition to the states’ official representatives, a number of NGOs appeared at the Small Arms Conference to participate in the discussions.<sup>224</sup> On a list of 177 NGOs requesting accreditation in accordance with Draft Rule 64, at least 26 were from the United States.<sup>225</sup> These NGOs offered non-state-sponsored, but respected opinions on the Programme.<sup>226</sup>

After alteration to appease the United States and finally the adoption of the final Programme, the President of the Conference submitted a short statement scolding the United States and, in accordance with several delegations’ requests, included it in The Report sent to the General Assembly.<sup>227</sup> He explained in his statement:

While congratulating all participants for their diligence in reaching this new consensus, I must, as President, also express my disappointment over the [Small Arms] Conference’s inability to agree, due to the concerns of one State, on language recognizing the need to establish and maintain controls over private ownership of these deadly weapons and the need for preventing sales of

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221. *Id.*

222. *Id.*

223. *See id.*

224. *See* CONFERENCE REPORT, *supra* note 172, at 2.

225. United Nations, *List of Non-government Organizations Requesting Accreditation in Accordance with Draft Rule 64*, at <http://disarmament2.un.org/cab/smallarms/ngolist.htm> (last visited Oct. 19, 2003).

226. *See* UN Press Release, *supra* note 169.

227. *See* CONFERENCE REPORT, *supra* note 172, at 23.

such arms to non-State groups.<sup>228</sup>

Thus, although the approved Programme is in closer adherence with the Second Amendment than the Draft had been, the goal of the Arms Convention, the United Nations, the sovereign state participants, and the drafters of the Programme is express and clear. As the Arms Convention continues to meet, its final goal of outlawing private gun ownership contradicts the right of United States citizens to keep and bear arms.

## 2. *Agenda*

Since its conception, one focus of the Arms Convention has been stricter gun controls that limit private gun ownership. This goal presents difficulties for the United States, where the right to bear arms is protected by the Constitution and is widely respected as an inherent human right. Among other “options/solutions” listed in the Report included: 1) “[s]trengthening of national controls on the legal manufacture, acquisition and transfer of small arms and light weapons . . .” and 2) “[p]rohibition of unrestricted trade and private ownership of small arms and light weapons specifically designed for military purposes, such as automatic guns.”<sup>229</sup>

Goals to restrict private gun ownership create serious conflicts in the United States. Many sovereign states are in agreement that limiting or eliminating private gun ownership is necessary and now face the task of implementation. In the United States, not only does no such consensus exist, but many citizens feel that the government has already, without the addition of gun control treaties, overstepped its bounds regarding the control of private gun ownership.

## 3. *Documents*

As of January 1, 2002, the Programme is the primary international gun control law. The Programme is intended to assist member states in creating and implementing municipal

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228. *Id.*

229. SMALL ARMS, *supra* note 170, at 11 (citing Small Arms: note by the Secretary-General, U.N. GOAR, 54th Sess., Provisional Agenda Item 76(f), at 22, U.N. Doc. A/54/258 (1999)).

and international law. The stated goal of the Programme is the eradication of illicit trade in small arms and light weapons.<sup>230</sup> The Programme is open for signature to interested states.

The Programme is divided into four parts.<sup>231</sup> The first part, *The Preamble*, sets out in general terms the intent of the Convention.<sup>232</sup> Among a variety of calls for intensified control of gun possession by sovereign states, manufacture and trade, *The Preamble* recognizes the importance of “the inherent right to individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations.”<sup>233</sup> Thus, the scope, weight, and definition of this right is not that of the Second Amendment, but rather a right defined by international law. The following paragraph of the Programme reaffirms the sovereign state’s “right . . . to manufacture, import and retain small arms for its self-defense and security needs . . . .”<sup>234</sup> Noticeably absent is any acknowledgement that private individuals have a right to own arms.

The second part of the Programme, *Preventing, Combating and Eradicating the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, is divided into national, regional and global measures.<sup>235</sup> The second paragraph calls for sovereign states: “[t]o put in place, where they do not exist, adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction and over the . . . transit or retransfer of such weapons . . . .”<sup>236</sup>

Some of the more striking measures required by the national level section include:

To establish . . . national coordination agencies . . . responsible for policy guidance, research and monitoring of efforts to prevent, combat and eradicate the illicit

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230. CONFERENCE REPORT, *supra* note 172, at 9.

231. Only the first, second, and fourth parts will be discussed in this note.

232. CONFERENCE REPORT, *supra* note 172, at 7-9.

233. *Id.* at 7. For further discussion of Article 51, see *infra* notes 270-79 and accompanying text.

234. CONFERENCE REPORT, *supra* note 172, at 7.

235. *Id.* at 10-14.

236. *Id.* at 10.

trade in small arms and light weapons in all its aspects . . . .

To establish or designate . . . a national point of contact to act as liaison between States on matters relating to the implementation of the Programme of Action . . . .

To ensure that comprehensive and accurate records are kept for as long as possible on the manufacture, holding and transfer of small arms and light weapons under their jurisdiction . . . .

To put into place and implement adequate laws . . . to ensure the effective control over the export and transit of small arms and light weapons, including the use of authenticated end-user certificates and effective legal and enforcement measures.<sup>237</sup>

Measures required at the regional level include “information-sharing among law enforcement, border and customs control agencies . . . .”<sup>238</sup>

One measure called for at the global level is “[t]o strengthen the ability of States to cooperate in identifying and tracing in a timely and reliable manner illicit small arms and light weapons.”<sup>239</sup>

The fourth part, *The Follow-up to the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, calls for a follow-up conference and a convening of sovereign states on a biennial basis to “consider the national, regional and global implementation of the Programme of Action . . . .”<sup>240</sup> The fourth part also calls for “examining the feasibility of developing an international instrument to enable States to identify and trace in a timely and reliable manner illicit small arms and light weapons . . . .”<sup>241</sup>

These governmental controls on the ownership and trade of guns are in many ways similar to proposals of the United States Congress, which have been vigorously opposed and are

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237. *Id.* at 10-11.

238. *Id.* at 13.

239. *Id.* at 14.

240. *Id.* at 16.

241. *Id.* at 17.



unpopular among U.S. citizens. Those who oppose domestic gun control based on a belief in personal liberty and self-defense would be even more opposed to gun control sanctioned by an even larger less-democratic entity, such as the United Nations.

#### 4. *Future*

There is no indication that the Small Arms Conference and its members are moving in a policy direction closer to that of the United States. Based on the intensity of disapproval aimed at the United States, at the first meeting of the Conference, one expects that international politics will instead push for both municipal legislation and international law to end private gun ownership.

#### C. *Convention Against Transnational Organized Crime*

The Arms Convention is paralleled by a second effort at global gun control. The second effort is an elaboration of the United Nations Convention against Transnational Organized Crime (Palermo Convention).<sup>242</sup> The Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime drafted a gun control protocol and attached it to the text of the original convention for adoption by the United Nations General Assembly (the Protocol).<sup>243</sup> A ninth session convened in Vienna, June 5-16, 2000.<sup>244</sup>

The Small Arms Report and the Programme both reference the Protocol. The first page of the Small Arms Report states:

At the global level two important processes are under way. First, the United Nations General Assembly process, supported by expert studies, has reached the stage of preparing for the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, scheduled to be held in New York from 9 to 20 July 2001. In Vienna, under the aegis of the

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242. Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, U.N. Commission on Crime Prevention and Criminal Justice, 55th Sess., Agenda Item 105, at 102, U.N. Doc. A/55/383 (2000) [hereinafter Ad Hoc Committee Report].

243. *Id.* at 1-2.

244. CONFERENCE REPORT, *supra* note 172, at 7.

Commission on Crime Prevention and Criminal Justice, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime is working on a draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.<sup>245</sup>

Paragraph 20 of the Programme reads:

*Recognizing* that the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, establishes standards and procedures that complement and reinforce efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects.<sup>246</sup>

These two efforts are inseparable and are aimed at accomplishing the same two goals: the global control of guns and the eradication of private gun ownership. Strikingly, the Programme approvingly references the standards and procedures in the Protocol, which have yet to be negotiated.

### 1. *The Crime Convention*

The web page of the Palermo Convention states that it “is the first legally binding UN instrument in the field of crime.”<sup>247</sup> It requires that sovereign states party to the Palermo Convention pass domestic laws that establish four criminal offenses.<sup>248</sup> These crimes are defined in a typically amorphous fashion that leaves the elements of the crimes open to interpretation and evolution. The four crimes are: 1) participation in an organized criminal group; 2) money laundering; 3) corruption; and 4) obstruction of justice.<sup>249</sup> The Palermo Convention’s website reads: “It is hoped that upon

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245. SMALL ARMS, *supra* note 170, at 6-7.

246. CONFERENCE REPORT, *supra* note 172, at 9.

247. United Nations, *United Nations Convention Against Transnational Organized Crime*, at <http://www.unodc.org/palermo/theconvention.html> (last visited Oct. 19, 2003) [hereinafter *Palermo Convention*].

248. *Id.*

249. Ad Hoc Committee Report, *supra* note 242, at 27-30, 43.

ratification [t]he [Palermo] Convention will emerge as the main tool of the international community for fighting transnational crime.”<sup>250</sup>

Primary goals of the Palermo Convention, as stated on the web page are: “1) [b]oosting the exchange of information among nations on patterns and trends in transnational organized crime; 2) [c]ooperating with relevant international and non-governmental organizations; [and] 3) [c]hecking periodically on how well countries are implementing the treaty . . . .”<sup>251</sup>

The Palermo Convention states that one of its first protocols will be gun control.<sup>252</sup> These goals are problematic when applied to private gun ownership within the United States.

2. *The Protocol Against the Manufacturing of and Trafficking in Illicit Firearms, Ammunition and Related Materials*

An optional protocol of the Palermo Convention is under negotiation and deals with the illicit manufacturing of and trafficking in firearms.<sup>253</sup> According to its web site, the *Protocol Against the Manufacturing of and Trafficking in Illicit Firearms, Ammunition and Related Materials* (Manufacturing Protocol) intends to require states to act in the following ways: “1) [p]ass new laws aimed at eradicating the illegal manufacturing of firearms, tracking down existing illicit weapons and prosecuting offenders; 2) [c]ooperate to prevent, combat and eradicate the illegal manufacturing and trafficking of firearms; 3) [t]ighten controls on the export and import of firearms; 4) [e]xchange information about illicit firearms.”<sup>254</sup>

In hopes of furthering the Manufacturing Protocol, sovereign state parties are required to pass new laws in order to:

1. Criminalize the manufacturing and trafficking of

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250. *Palermo Convention*, *supra* note 247.

251. United Nations, *After Palermo: An Overview of what the Convention and Protocols Hope to Accomplish*, at <http://unodc.org/palermo/sum1.html> (last visited Oct. 19, 2003) [hereinafter *After Palermo*].

252. *Palermo Convention*, *supra* note 247.

253. *Id.*

254. *After Palermo*, *supra* note 251.

illegal firearms;

2. Confiscate firearms that have been illegally manufactured or trafficked;
3. Hold information for ten years that is needed to trace and identify illicitly manufactured and trafficked firearms, including the manufacturer's markings, country and date of issuance, date of expiry and countries of export or import;
4. Register and approve brokers for the manufacture, export, import or transfer of firearms;
5. Mark each firearm, when manufactured, with a serial number as well as the manufacturer's name and location; and
6. Mark confiscated firearms kept for official use.<sup>255</sup>

The Manufacturing Protocol also comments upon the transfer of illicit firearms. In hopes of preventing illicit trade, sovereign state parties are required to "adopt new controls including . . . [r]efusing to allow the transit, re-export, retransfer or transshipment of firearms to any destination without written approval from the exporting country and licenses from receiving nations . . . ."<sup>256</sup>

The goals and required measures of the Manufacturing Protocol are related to those contained in the Arms Conference and are equally problematic under U.S. law. The Programme, in its final form, focuses primarily on data collection and regulation. Alternatively, the Manufacturing Protocol introduces the aggressive notion that improper data collection and violations of regulations may be criminal, and that sovereign states will be obligated to prosecute violations. These controls place substantial burdens on private gun ownership and enable potential disarmament.

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255. *Id.*

256. *Id.*

## V. CONFLICTS BETWEEN INTERNATIONAL LAW AND UNITED STATES MUNICIPAL LAW

In examining the conflict between international law and United States municipal law, the first concern is to whom will the treaties apply? The answer is indefinite, and depends on jurisdiction and applicability of the international law at issue. Choice of law is also a concern.

### A. Jurisdiction

Discussions at a symposium entitled *The Rule of Law in the Global Village: Issues of Sovereignty and Universality*<sup>257</sup> (Symposium) held in Palermo during the Palermo Convention are telling. University of Florida Professor Winston Nagan introduced the theme and delivered a speech focusing on sovereignty.<sup>258</sup> In his speech he targeted traditional notions of sovereignty as dangerous and suggested that because organized crime is a danger to sovereignty, sovereignty should be sacrificed to international organizations.<sup>259</sup> Among other statements, Nagan said: "Organized crime is thus a clear and present threat to the sovereignty of the state when based on the authority of the people."<sup>260</sup> Nagan's solution is "cooperative sovereignty," for which he does not provide a useful definition.<sup>261</sup> He determined: "[T]here is a changing idea of the relationship of the international Rule of Law to the idea of state sovereignty. The expression of cooperative sovereignty in this kind of treaty is a vital and important constitutional principle of the new

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257. United Nations, *The Rule of Law in the Global Village—Issues of Sovereignty and Universality* (Dec. 12-14, 2000), at <http://www.unodc.org/Palermo/rolsched.htm>.

258. The theme of the Symposium was "The Rule of Law—Lofty Idea and Harsh Reality." *Id.*

259. Winston Nagan, *The Rule of Law—Lofty Idea and Harsh Reality*, 1, 2-5 (2000), at <http://www.unodc.org/palermo/nagen.doc>.

260. *Id.* at 3.

261. *See id.* at 5. The principle of cooperative sovereignty recognizes the limits of traditional sovereignty and sees the prospect of indeed strengthening the sovereignty of the state through cooperation to realize common objectives and common interests. *Id.* at 11.

millennium.”<sup>262</sup> Nagan confronted the United States’ opposition to the Rome Statute’s creation of the ICC.<sup>263</sup> He concluded that the United States is “motivated by political factors as well as security concerns . . . [and] . . . is also highly influenced by the recrudescence of the idea of ‘sovereignty’ and the concern that international obligations are corrosive of this idea.”<sup>264</sup> When expansion of a court’s jurisdiction will conflict with fundamental freedoms of U.S. citizens, such as the right to bear arms, the United States should be concerned.

Mark Gibney, of the University of North Carolina, also presented a paper at the Symposium, where he stated:

It is within this context of changing notions of state sovereignty, but also changing ideas about our relationship and our responsibilities to others, that the principle of universal jurisdiction must be viewed. Universal jurisdiction allows any nation to prosecute offenders of certain crimes even when the prosecuting state lacks a traditional nexus with either the crime, the alleged offender, or the victim.<sup>265</sup>

However shocking it may be to U.S. citizenry, Gibney concludes:

[O]ne would be hard pressed to find a recent international criminal convention that does not provide for universal jurisdiction. Moreover, many of these conventions now mandate jurisdiction, rather than using the permissive ‘may’. In sum, we live in a world where the notion of universal jurisdiction is not only commonly<sup>266</sup> accepted, but seemingly honored and promoted.

Gibney closes with a call for a “*real* system of universal jurisdiction” and an international court where individuals may bring suit against their sovereign state.<sup>267</sup>

The ICC is perhaps the best example of the progressive and

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262. *Id.* at 5.

263. *Id.* at 6.

264. *Id.*

265. Mark Gibney, *The Rule of Law and Universal Jurisdiction*, 1-2, at <http://www.odccp.org/palermo/markgibney.doc> (last visited Oct. 14, 2003).

266. *Id.* at 3.

267. *Id.* at 8-9.

ambitious jurisdictional reach of international courts. The Rome Statute establishes the preconditions to the exercise of ICC jurisdiction in Article 12:

[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court . . .:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.<sup>268</sup>

*B. Involvement of a United States Citizen Absent an International Element*

How might these hurdles be overcome when they involve U.S. citizens? Who may be a party to a suit arising out of international gun control laws?

First, who might file a suit? One can imagine a sovereign state, who is a party to the international agreements, filing suit. Additional possibilities include foreign nationals, foreign corporations, or international organizations. For example, the Rome Statute states: "The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."<sup>269</sup> One may presume that adjudicating international criminal law is one of the ICC's fundamental functions and that allowing a non-state party to file a complaint with international prosecutors is necessary for that function.

Second, who might a suit be brought against? A sovereign state is the most likely answer; however, a suit might be brought against an individual, a corporation, or other non-state entity. It is unlikely that the United States would be a party due to its unique position as the most powerful nation in the world. U.S. citizens, corporations, and non-state entities, however,

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268. ROME STATUTE, *supra* note 193, art. 12.

269. *Id.* art. 4.

should not feel so protected. In an ever-increasingly global world, even those actors located within the United States may have ties to member states or conduct to connect them to activities occurring in member states.

Assuming the ICC decides to enforce the current international gun controls, perhaps as customary international law, the gun controls will only apply to those within ICC jurisdiction reached through member states of the Rome Statute. Current international corporate structures demonstrate the complexities of who is subject to international treaties.

One can imagine a member state freezing the assets of a corporation or individual located in the United States until that individual or corporation abides by international gun controls. Violations could include such simple acts as not making guns in accordance with international norms, not keeping internationally-approved transactional histories of guns, or even refusing to report data about gun ownership to an international organization, a private organization, or a foreign state.

This last element, the control of data, is the most sensitive and the most prominent. Once data is collected and handed over, it cannot be retracted, nor is there any practical way—absent an enforcement mechanism—to prevent the entity in possessing the data from sharing it with whomever it pleases.

### *C. Choice of Law*

If the United States were to give express consent to global gun control, or if gun control becomes customary international law, it would potentially conflict with the United States Constitution. The question then becomes: Which law will triumph?

It simply depends. If the United States Supreme Court or other domestic court hears the case, the treaty may be held invalid because it violates the Constitution.

If, however, an international court, such as the ICC or the ICJ considers the question, international law will take precedence. The party found in violation of an international law, although believing the United States Constitution and its Bill of Rights protects her, will be held accountable—perhaps even criminally accountable. The very notion of a U.S. citizen



standing trial in an international court is controversial. Critiques of the international courts have focused on jurisdictional and constitutional conflicts. In particular, U.S. critics focus on the lack of Bill of Rights protection in international courts.<sup>270</sup>

The United Nations Charter and the Universal Declaration of Human Rights contain significant elements of personal liberty owing to the Enlightenment tradition. The United Nations Charter states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>271</sup>

Although Article 51 recognizes “the inherent right of individual or collective self-defense,”<sup>272</sup> it is immensely narrow, bizarrely bureaucratic, and de facto gives the Security Council greater power. First, the armed attack that triggers the right to self-defense must be against a member of the United Nations.<sup>273</sup> This “right” would only apply to sovereign states.<sup>274</sup> Second, the Article requires a report to the Security Council.<sup>275</sup> One can only imagine that when a party asserts its “inherent right of . . . self-

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270. *E.g.*, Ailslieger, *supra* note 193, at 80; Lee A. Casey & David B. Rivkin, Jr., *The International Criminal Court vs. the American People*, BACKGROUND, Feb. 5, 1999, at 3-5, at <http://www.heritage.org/Research/InternationalOrganizations/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14960>.

271. UN CHARTER art. 51

272. *Id.*

273. *Id.*

274. *See id.*

275. *Id.*

defense,”<sup>276</sup> it is not particularly worried about the reporting requirement. Third, the Article reaffirms the Security Council’s “authority . . . to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”<sup>277</sup> One might try to assert this protection in an international court in a way analogous to asserting a right in the United States Supreme Court. International law, however, does not follow a constitutional structure.

In a somewhat typical rebuttal to Article 51’s assertions, Benoit Muracciole, from the Coalition Francais France, emotionally appealed to a group of NGOs<sup>278</sup> at the Small Arms Conference when he stated:

For a week now, some governments have cited Article 51 of the Charter on the sovereign rights of States to self-defence as the definitive reason for not taking concrete steps aimed at controlling the illicit trade in small arms and light weapons. But what will happen when there is no one left to defend and no State borders to protect because all our citizens have been killed by rapidly proliferating small arms?<sup>279</sup> We should all remember that before Article 51, the Charter elaborates certain other important principles, namely, those that call for development and protection of human rights. Specifically, Article 26 calls for the establishment of an arms control regime.<sup>280</sup>

Article 26 states:

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world’s human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the

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276. *Id.*

277. *Id.*

278. See U.N. PRESS RELEASE, *supra* note 169.

279. There is no indication of whether Muracciole was being facetious, ironic, disingenuous, or had simply made an erroneous calculation that would indicate so many people were dying as to run the risk of wiping out a huge segment of the world’s population.

280. U.N. PRESS RELEASE, *supra* note 169.

Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.<sup>281</sup>

The Universal Declaration of Human Rights also contains a submerged version of a right to rebellion in the third recital of the preamble: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . ." <sup>282</sup> It also makes other "Enlightenment connections using the words 'inherent' and 'inalienable.'" <sup>283</sup> During the drafting convention, and after extensive discussion and refinement, the right to rebel was relegated to the preamble and, like Article 51 of the United Nations Charter, does not carry any explicit legal weight.<sup>284</sup>

## VI. CONCLUSION: CONSEQUENCES OF THIS CONFLICT

The gun control measures created in the Small Arms Conference and in the Palermo Convention would, at a minimum, raise serious constitutional concerns in the United States. Both the Individual Rights and the Collective Rights Theories would place obstacles in the path of international gun control. The Individual Rights Theory would create an individual civil right for United States citizens that could not be infringed upon by either domestic or international laws.

The Collective Rights Theory, although a weaker protection against domestic laws, would still serve as a protection against infringement by authorities outside of the United States. Many of those in the Collective Rights camp view the executive and legislative branches as protectors of the Second Amendment. This view does not anticipate disarmament by an international body. The ways that the rights of private gun owners in the

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281. U.N. CHARTER art. 26.

282. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

283. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 313 (1999).

284. *See id.* at 308. For an extensive discussion of the evolution of the right to rebel as contained in the Universal Declaration of Human Rights, see *id.* at 302-20.

United States could be infringed upon are endless. The ability of domestic entities—such as executive administrations, legislative bodies, or individual legislators—courts, and even the Constitution to protect rights is weakening in the face of international attack.

Clearly, a final goal of eliminating private gun ownership would violate the Second Amendment. Criminal enforcement of data collection and the sharing of this information with other sovereign states, private organizations, supranational organizations, and international organizations, uniform marking and licensing of all transfers, present constitutional dilemmas. Measures that are acceptable domestically, if taken internationally, would be unacceptable. If domestic, traditional, sovereign states are kept in check by a right to self-protection, that right is only more essential to protect against a world government or political entity. Lack of a separation of powers and a representative international government brings this dangerous reality into sharp focus.

The popularity of global gun control measures to sovereign states other than the United States is increasingly evident. The vigor for gun control remains strong. Global gun control measures will go into effect in sovereign states that adopt the treaties implementing gun control laws. The United States has not adopted any of these treaties and is unable to do so because they call for the enactment of laws that conflict with the United States Constitution.

The possibility of conflict does not stop there. There are a variety of ways that gun control laws could affect the rights and obligations of parties in the United States. If the President signed a treaty on gun control, it would indicate to the international community that the United States intends to abide by gun control laws, with or without ratification from the Senate. To avoid this situation, no United States President should sign either of these treaties.

A second way gun control laws could affect U.S. parties is in the event that gun control becomes a customary international law. Even if the United States did not sign either agreement, the United States may inadvertently lead to the agreements' acceptance as customary international law by abiding by them,

even if only as a matter of convenience. In the eyes of an international court, the United States, by following the agreement mandates, consents to be bound by the agreements in the future. To avoid accidental consent, the United States must expressly state that, as a nation, it does not consent to the gun control agreements, and that any activity consistent with the agreements is not in recognition of the agreements' legal status. If the United States does not make such an express statement to the international community, it may be expected to maintain any and all gun control measures adopted.

A third and more abstract manner that gun control measures could affect U.S. parties is through nonconsensual customary law. Nonconsensual customary international law may arise as a result of international practice. International practice may be evidenced by events not recognized in the United States, but eventually held binding on it. For example, the Small Arms Conference and the Palermo Convention have placed international gun control in the consciousness of the international community. In many ways, the international community is in agreement on gun control, with the exception of the United States. The respect and adherence by numerous countries to strict gun control adds weight to the notion that a common understanding of how sovereign states must deal with private gun ownership can be established—with or without every country's consent.

The issues above have yet to come before a court and there does not appear to be an analogous situation that lends itself to analysis. Nevertheless, any conflict between international law and the United States Constitution should be anticipated, scrutinized, and avoided.