Controlling Guns: A Call for Consistency in Judicial Review of Challenges to Gun Control Legislation

The topic of gun control[1] in the United States is controversial for several reasons. First, the scope and meaning of an individual's right to keep and bear arms, which is guaranteed by the Second Amendment to the United States Constitution,[2] has been unclear and has thus given rise to debate over an individual's right to possess arms.[3] Some attempts at controlling an individual's right to

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[1] *See* Diana J. Theos, Research Project, *Federal Firearm Legislation*, 6 HAMLINE L. REV. 409, 409 (1983). Theos stated that the initial enactment of federal gun control laws was made in the 1920's and 1930's. *Id.* Theos found that gun control laws later developed as crime prevention measures as evidenced by the passage of the Gun Control Act of 1968. *Id.* Theos proposed that opponents of the Gun Control Act of 1968, which curbed crime by restricting gun ownership, would rather see gun control legislation focus on punishing those who criminally use firearms instead of legislation which restricts gun ownership. *Id.* at 409-10. According to Robert Dowlut, "[g]un control laws have at least five political functions: (1) increase citizen reliance on government and tolerance of increased police powers and abuse; (2) facilitate repressive action by government; (3) help prevent opposition to government; (4) lessen pressure for major or radical reform; [and] (5) allow selective enforcement against dissidents." Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 82 (1989).

[2] U.S. CONST. amend. II. The Second Amendment reads in its entirety: "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." *Id.*

[3] *See* Bernard J. Bordenet, *The Right to Possess Arms: The Intent of the Framers of the Second Amendment*, 21 U. WEST. L.A. L. REV. 1, 4, 13-14, 16, 21 (1990). Bordenet concluded that arms possession is an undeniable right of citizenship. *Id.* at 29. According to Bordenet:

> If a state militia guarantee rather than an individual right of citizens to keep and bear arms were the purpose of the Second Amendment, it would have been totally unnecessary and irrelevant to include any guarantee of "the right of the people to keep and bear arms," since by its very nature a militia is necessarily an armed force and without arms it would be impossible to carry out its constitutional functions of suppressing insurrections and repelling invasions.

Id. at 14. Bordenet argued that the purpose of the Second Amendment is to guarantee "the right of the people to keep and bear arms so as to provide the foundation for a national militia" to protect the liberty and freedom of all citizens. *Id.* at 16. Bordenet found that a right to arms in general includes a right to keep arms in one's home, whether for self-defense or "possible militia use," as well as to protect individuals from government oppression. *Id.* at 29.

For a different interpretation of the right to keep and bear arms, see 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, 40 (1989). According to Ehrman and Henigan, the keeping and bearing of arms by individuals is not guaranteed by the Second Amendment for private, non-militia purposes. *Id.* at 40. The authors found that "[t]here is no evidence that the Framers discussed, much less intended, that the amendment provide a guarantee to individuals of a right to be armed

possess and carry guns through gun control legislation have succeeded,[4] while other attempts have failed due to lobbying efforts of groups such as the National Rifle Association (NRA).[5] A second obstacle to a consensus on the issue of gun control concerns the lack of an articulated standard balancing the extent of Congress's power under the Commerce Clause of the United States Constitution to control the movement of guns in interstate commerce with citizens' Second Amendment rights.[6] Furthermore, an under-

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for purposes unrelated to militia service." *Id.* at 7. Ehrman and Henigan argued that the language of the Second Amendment does not show an intention by the Framers to create an individual right to weapons outside of the realm of the military. *Id.* at 32. Instead, Ehrman and Henigan proposed that a right of the people to bear arms only exists as a means to defend the state. *Id.* at 33.

A further interpretation of the Second Amendment is that it grants a collective right of the state to maintain a militia as well as an individual's right to bear arms. David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 13 (1987). According to Hardy, the Second Amendment does not have one meaning but instead, the Second Amendment's "militia component and its right to bear arms recognition have in fact different origins and theoretical underpinnings." *Id.* at 3. As a result, Hardy proposed that the two components had to merge to become what is known as the Second Amendment. *Id.* at 3-4. Hardy argued that restricting the Second Amendment to only one interpretation is ignorant in light of the history of its formation. *Id.* at 59-60.

[4] *See* 18 U.S.C. §§ 921-930 (1988 & Supp. V. 1994) (setting forth the current version of the Gun Control Act of 1968); Brady Handgun Violence Prevention Act, H.R. 1025, 103d Cong., 1st Sess. 2, 3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1536, 1536-46, 1984-85 (footnotes omitted) (establishing "a national, five-working-day waiting period for the purchase of a handgun" and noting that the Brady Handgun Violence Prevention Act was developed in response to the epidemic of gun violence prevalent in the United States).

[5] *See* Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1104 (1991) (asserting that the NRA has been able to "frustrate the will of the nearly three-quarters of Americans who favor more rigorous controls over handguns"). Bogus found that the NRA is among this country's most powerful lobbies. *Id.* at 1156. Bogus argued that NRA supporters are able to combat proposed gun control legislation with letters, phone calls, and visits to various legislators, and by financial contributions to NRA's political action committee. *Id.* One of the NRA's strongest lobbying efforts came to fruition with the passage of the Firearms Owners' Protection Act. *See* H.R. 4332, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 1327. This act was partially designed to relieve firearms owners and dealers from any ownership burdens they experienced under the Gun Control Act of 1968. *Id.*

[6] *See* U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause reads in its entirety: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

The first case to interpret the meaning of the Commerce Clause was *Gibbons v. Ogden*, in which the Supreme Court suggested that the words of the clause "comprehend every species of commercial intercourse between the United States and foreign nations." 22 U.S. (9 Wheat.) 1, 193 (1824). The Court also determined that "[c]ommerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior." *Id.* at 194.

For a discussion of the courts' deference to administrative agencies in decisions concerning the movement of guns in interstate commerce, see David E. McCauley,

standing of the appropriate extent of gun control has also been complicated by the concept of controlling guns through products liability law, which holds gun manufacturers liable in tort to the victims of gun violence.[7]

The best arbiter of this controversy is the judicial branch of government, which is empowered to exercise judicial review over all challenged legislation.[8] Although the role of the judiciary is not

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Case Comment, *Administrative Law—Agency Discretion and Judicial Review*, 14 SUFFOLK TRANSNAT'L L.J. 198, 202-03 (1990) (citing Gun South, Inc. v. Brady, 877 F.2d 858, 862 (11th Cir. 1989)) (other citations omitted) (reviewing *Gun South* and demonstrating that the Gun Control Act of 1968, which regulates America's importation of firearms, allows only for importation of those weapons deemed appropriate for sporting purposes). For a discussion of Congress's power to control the movement of guns in interstate commerce pursuant to the Commerce Clause, see Charles R. Reddick, Note, *Interstate Commerce Nexus Requirement Defined For Firearm Possession By Felons*, 29 MERCER L. REV. 867, 867-68, 869, 872-73 (1978) (citing Scarborough v. United States, 431 U.S. 563, 575, 577 (1977)) (other citations omitted) (arguing that, under *Scarborough*, a felon can be convicted of unlawful possession of a firearm under § 1202 (a)(1) of the Gun Control Act of 1968 if the firearm had traveled in interstate commerce at some remote time).

7 *See* Bogus, *supra* note 5, at 1104-05. Bogus explored basic products liability principles and posited that manufacturer liability for the use of guns in criminal offenses and accidents grew out of these basic principles. *Id.* at 1105-28.

The first case to define the parameters of products liability law was Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 400-01 (Cal. 1962) (citations omitted). In *Greenman*, the California Supreme Court held that manufacturer liability is established where a plaintiff proves that he sustained an injury, while using a product for its intended use, because he was unaware that there was a defect in the design and manufacture that made the product unsafe. *Id.* at 901. For further discussion of the *Greenman* case, see DAN B. DOBBS, TORTS AND COMPENSATION 615-19 (2d ed. 1993).

One aspect of products liability law involves products with defective designs. *Id.* at 630 (citation omitted). In *Barker v. Lull Engineering Co., Inc.*, the Supreme Court of California defined the meaning of defective product design, noting that:

> a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or
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> (2) if, in light of the relevant factors . . . the benefits of the challenged design do not outweigh the risk of danger inherent in such design.

573 P.2d 443, 446 (Cal. 1978).

According to one commentator, banning handguns through products liability law may obstruct the constitutionally protected right of individuals to keep and bear arms. Stephen P. Halbrook, *Tort Liability for the Manufacture, Sale, and Ownership of Handguns?*, 6 HAMLINE L. REV. 351, 364-79 (1983). Halbrook recognized that some handguns, such as a traditionally-designed single action revolver, may not have sufficient safety mechanisms. *Id.* at 358-59. Halbrook argued, however, that tort law should not be used to eliminate the existence of handguns completely, but rather to ensure society's access to safe and reliable firearms. *Id.* at 364.

8 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-80 (1803) (establishing and explaining the concept of judicial review).

to amend the Constitution,[9] the judiciary can take an active role in formulating a solid and unyielding standard by which to interpret gun control legislation.[10] Unfortunately, thus far, when deciding cases that involve challenges to gun control laws, the judiciary has failed to fully examine the interplay between Second Amendment rights and the Commerce Clause, and has not considered the repercussions of attributing products liability law haphazardly to gun manufacturers.[11]

This Comment seeks to define the proper role of the judiciary in deciding cases that involve gun control issues, and proposes that much-needed gun control legislation can survive constitutional muster. Part I of this Comment examines the position that the judiciary has taken in the past with regard to Second Amendment challenges to gun control legislation. This Part suggests that the judiciary has done a disservice to both proponents and opponents of more effective gun control by misinterpreting and avoiding a more thorough analysis of the meaning of the Second Amendment. Part II examines the deferential position that the judiciary

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9 *See* U.S. CONST. art. V. With regard to the amendment process, Article V provides:

> 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; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Id.

10 *See* ALEXANDER HAMILTON, THE FEDERALIST No. 78, *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 179, 182 (Morton J. Frisch ed., 1985). Exploring the proper role of the courts as the third branch of government, Hamilton noted:

> It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.

Id.

11 *See* U.S. CONST. art. III, § 2, cl. 1. This provision outlines the role of the judiciary in the United States government and reads in pertinent part: "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." *Id.*

has taken in the past with regard to Commerce Clause challenges to gun control legislation and calls for the courts to balance Congress's Commerce Clause powers with individuals' Second Amendment rights when reviewing gun legislation created under the Clause. Part III discusses the propriety of the judiciary's extension of products liability principles to gun manufacturers as a means of effectuating gun control. In conclusion, Part IV summarizes and defines the role that the judiciary must play in deciding future cases that involve gun control measures.

I. JUDICIAL INTERPRETATION OF THE SECOND AMENDMENT

Historical evidence leading to the formation and adoption of the Second Amendment to the United States Constitution allows for different interpretations of the Amendment's meaning.[12] As a result, United States courts have rendered conflicting decisions re-

12 *See* Ehrman & Henigan, *supra* note 3, at 7-14. Ehrman and Henigan examined the historical underpinnings of the Second Amendment, which came from the English Bill of Rights of 1688 and qualified the right to bear arms with the added phrase, "'suitable to their conditions, and as allowed by law.'" *Id.* at 13 (quotation omitted). The authors then argued that the English tradition of regulating arms was adopted by the American colonists. *Id.* at 14. They found that the idea of regulating arms, especially in the military context, that was inherited from the English, was not forgotten with the adoption of an American Constitution and Bill of Rights. *See id.* at 20, 23-24, 32. As stated by Ehrman and Henigan, "[t]he background of the Second Amendment indicates that Congress did not intend to confer a broad 'individual' right to carry arms, outside of the military context." *Id.* at 32 (citation omitted). The authors proposed that the Framers designed the Second Amendment to ensure that an effective state militia existed to protect against a tyrannical federal government. *Id.* at 33. Ehrman and Henigan characterized the Second Amendment as granting each state the ability to establish and maintain an effective militia where the federal government so failed. *Id.* at 39. According to the co-authors, the Second Amendment protects the right of an individual to possess a firearm only where such possession is necessary to maintaining an effective state militia. *Id.*

Equally persuasive is the historical analysis that leads to a different interpretation of the Second Amendment. *See* Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255, 255 (1985). Halbrook examined the historical underpinnings of some of the first state bills of rights and argued that the intent of their framers regarding the right of the people to keep and bear arms was consistent with the intent of the framers of the Second Amendment. *Id.* at 255-314. Interestingly, Halbrook's thesis invites the interpretation that some courts in the first states may have interpreted their own provisions too narrowly for the right of the people to keep and bear arms by only allowing such a right for the collective or common defense. *See id.* at 260-63. Halbrook surmised that "the arms guarantees of the four state bills of rights which preceded the federal second amendment were intended to protect the right to keep arms and to bear arms individually for self-defense and in groups for militia purposes." *Id.* at 314. Finally, Halbrook emphasized that an individual right to personal weaponry was fundamental and unquestioned, unlike the rights of free press and religious issues which engendered much controversy. *Id.* at 314-15.

garding Second Amendment challenges to gun control laws.[13]

[13] *See* United States v. Cruikshank, 92 U.S. 542, 551-53 (1875). The *Cruikshank* case involved a 16-count indictment for conspiracy under § 6 of the Enforcement Act of 1870. *Id.* at 548 (citation omitted). In response to the second and tenth counts, the defendants asserted a Second Amendment right to keep and bear arms for a lawful purpose. *Id.* at 553. The United States Supreme Court rejected defendants' Second Amendment interpretation, finding that the Constitution does not guarantee the right to bear arms nor does such a right derive from any constitutional provision. *Id.* The Court also decided that the Second Amendment guarantees only that the right to keep and bear arms shall not be deprived by the government. *Id.* The Court reached these conclusions based upon the premise that no rights could be acquired under the Constitution unless the United States government had the authority to grant such rights. *Id.* at 551. Although the decision only made a brief reference to Second Amendment issues, the Court intimated that the right to bear arms for a lawful purpose exists independent of the Constitution. *See id.* at 553. One commentator has posited that the *Cruikshank* decision articulated that the Constitution guarantees, rather than grants, specific rights which predated its creation. Dowlut, *supra* note 1, at 71-72 (citation omitted).

The second United States Supreme Court decision involving Second Amendment interpretation was *Presser v. Illinois*. *See* 116 U.S. 252, 260, 264 (1886). Presser was charged with unlawful membership in an unauthorized group of men who paraded and drilled with arms in Chicago and represented themselves as a military organization without a license. *Id.* at 254. The Court upheld the Illinois statute proscribing Presser's conduct. *Id.* at 269. The Court decided that the Second Amendment limits only the power of Congress and the national government from infringing upon the right to keep and bear arms but does not limit the power of the states. *Id.* at 265 (citations omitted). According to the Court, the states' power would be limited only by the fact that the states could not prohibit the people from "keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security." *Id.* In effect, the *Presser* decision manipulated *Cruikshank* by minimizing the *Cruikshank* idea that the people must look to their States for the protection of their right to keep and bear arms. *See id.* Instead, *Presser* postulated that States could infringe upon Second Amendment rights unless arms were being used for the purpose of organizing a well-regulated militia. *See id.*

The Court's reasoning in *United States v. Miller* appears to have adopted some of the ideas of the *Presser* decision to formulate the scope of an individual's right under the Second Amendment. *See* 307 U.S. 174, 178-79, 182 & n.3 (1939) (citing *Presser*, 116 U.S. at 264-66) (other citations omitted). The *Miller* case involved the movement of a double barrel 12-gauge shotgun in interstate commerce. *Id.* at 175. The Court found that the Second Amendment only protects an individual's right to possess weapons if the weapon itself reasonably relates to the maintenance of a well-regulated militia or could serve the common defense. *Id.* at 178 (citation omitted). With narrow reasoning, the Court seemed to tailor its opinion based on the attributes of the double barrel 12-gauge shotgun, and intimated that unless a weapon could be viewed as one weapon for the common defense or military use, an individual had no right to possess it. *See id.*

According to Dowlut, the *Miller* decision failed to answer the obvious question of whether modern massive destruction weapons could be possessed by individuals where these weapons may be used by a military. Dowlut, *supra* note 1, at 74. Elaborating on this point, some have argued that the *Miller* holding was suspect because of its juxtaposition with the state's right view of the Second Amendment and its unclear analysis of the goal of a militia. *See* Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407, 1410-12, 1414 & n.30 (1992) (citing *Miller*, 307

Even more problematic than inconsistent decision-making is the courts' subsequent use of these contradictory rulings as sources for opinions in other gun control cases.[14] These inconsistencies stem

U.S. at 178-79) (other citations omitted). Wagner furthered that if the *Miller* holding was to be given its literal meaning, each individual would be permitted to keep and bear the kind of weaponry used by the modern military. *Id.* at 1447 (citations omitted).

[14] *See* Wagner, *supra* note 13, at 1446 (citations omitted) (stating that "lower federal courts have closed the door on constitutional scrutiny of individual possession of firearms by concluding, based on a misinterpretation of *Miller*, that there is no individual right to keep and bear arms"). The misinterpretation of *Miller* was evident in *Stevens v. United States.* Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971). In *Stevens*, the United States Court of Appeals for the Sixth Circuit stated that no express constitutional right exists for an individual to possess a firearm. *Id.* (citing *Miller*, 307 U.S. at 178). The defendant, Frank Stevens, was convicted in Kentucky for armed assault with intent to rob and for voluntary manslaughter constituting wilful and knowing possession of a firearm. *Id.* at 145. Stevens's crime was penalized under Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which criminalized the possession of firearms that have traveled in interstate commerce. *Id.* (citation omitted). Overgeneralizing, however, the court expressed that no individual right exists to possess a firearm, ignoring the aspect of the *Miller* decision which stated that an individual has a right to possess weapons if the weapon serves a military purpose. *See id.* at 149 (citing *Miller*, 307 U.S. at 178). Thus, even though Stevens' possession of a firearm could be constitutionally curtailed under the Commerce Clause, the court inaccurately added Second Amendment commentary on the right to keep and bear arms, and therefore documented a misinterpretation of *Miller. See id.*

The *Miller* decision was also done a disservice in *United States v. Nelsen.* United States v. Nelsen, 859 F.2d 1318, 1320 (8th Cir. 1988) (citations omitted). In *Nelsen*, the defendant, John Nelsen, was convicted of violating the Switchblade Knife Act of 1982. *Id.* at 1318 (citation omitted). Nelsen made Second Amendment and due process challenges to the Act. *Id.* at 1319. In regard to the Second Amendment challenges, the United States Court of Appeals for the Eighth Circuit briefly commented that no fundamental right to keep and bear arms has existed for at least 100 years. *Id.* at 1320 (citation omitted). The court also stated that cases have analyzed the Second Amendment only as it relates to the protection of state militias. *Id.* (citing *Miller*, 307 U.S. at 178) (other citations omitted). Thus, even though Nelsen was properly convicted on grounds independent of his right to keep and bear arms, the *Nelsen* decision documented an overgeneralization of the meaning of *Miller. See id.*

Other cases have found the *Miller* holding illogical in the present day of nuclear and more sophisticated weaponry and have consequently chosen to ignore it. *See, e.g.*, Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942) (finding the *Miller* proposition that individuals could keep and bear arms that served a military use to be inaccurate) (citation omitted), *cert. denied*, 319 U.S. 770 (1943), and *cert. denied*, 324 U.S. 889 (1945). The court found that as the technology of military weapons advanced with time, it would be inconceivable for a private person to possess such weapons. *Id.* Instead, the court argued that each Second Amendment case must be decided on its own facts. *Id.*

Additionally, in *United States v. Warin*, the Sixth Circuit Court of Appeals cited the decisions in *Miller*, *Cases*, and *Stevens*. *See* 530 F.2d 103, 105-06 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976). The court argued that *Miller* did not answer the question of the extent to which a military weapon could be regulated. *Id.* The court then agreed with the *Cases* argument that *Miller* did not set forth any general rules and that *Miller* should not be interpreted to suggest that individuals can possess any weapons

from confusion about the scope and historical foundation of the Second Amendment.[15]

It is not clear, however, whether the judiciary has truly attempted to analyze the meaning of the Second Amendment in reaching decisions or has merely chosen to ignore it to avoid political confrontation.[16] Regardless of the efforts or motivations of the judiciary, when courts have interpreted the Second Amendment in cases involving gun control challenges, the resulting decisions have failed to acknowledge the Amendment's origins.[17] As a result, the judiciary has failed to establish whether the Second Amendment confers a collective or an individual right to bear arms, thus particularly complicating review of Second Amendment challenges to gun control legislation.[18]

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used by the military in light of the existence of nuclear weapons. *Id.* at 106 (citations omitted). Then, the court stated that there was no doubt that the meaning of the Second Amendment is to guarantee a collective rather than an individual right to keep and bear arms. *Id.* (citing *Stevens*, 440 F.2d at 149). The court then returned to the proposition that "[i]t is also established that the collective right of the militia is limited to keeping and bearing arms, the possession or use of which 'at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Id.* (citing *Miller*, 307 U.S. at 178) (other citations omitted).

15 *See* Joyce L. Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 287-89 (1983). Malcolm found that the scholarly community is to blame for misinterpretation as opposed to the legal community. *Id.* at 287. Malcolm argued that the controversy turns on the correct interpretation of the Second Amendment and, therefore, to understand it, one must thoroughly examine how the English traditions, the English Bill of Rights, and the American Bill of Rights influenced the colonists. *Id.*

16 *See* Wagner, *supra* note 13, at 1457 (footnote omitted). Wagner argued that the federal courts have avoided reviewing gun control laws and have instead adopted the legal fiction that the Second Amendment merely affords states a right to maintain a militia. *Id.* Deciding that the *Miller* decision has been misinterpreted, Wagner opined that the reasoning of *Miller* itself was flawed because it was based upon an inaccurate interpretation of the term militia. *Id.* at 1411 (citations omitted). Wagner posited that *Miller* suggested that individuals would need to supply their own weaponry to organize a militia and therefore does not espouse a state's right view that denies an individual right to keep and bear arms. *Id.* at 1414 (citation omitted). Thus, Wagner found that any case which cites *Miller* for the proposition of a collective right to keep and bear arms renders an inaccurate interpretation of the Second Amendment. *Id.*

17 *See supra* notes 13 & 14 (listing cases which lack analysis of the Second Amendment's historical underpinnings). The United States Supreme Court cases addressing the Second Amendment have failed to interpret the Amendment with an understanding of its history and meaning. Kurt F. Kluin, *Gun Control: Is It a Legal and Effective Means of Controlling Firearms in the United States?*, 21 WASHBURN L.J. 244, 251 (1982). Disappointingly, Kluin found that courts have failed to differentiate between the Second Amendment's meaning and the reasons for its implementation by the first Congress. *Id.* at 247 (footnotes omitted). According to Kluin, the right to keep and bear arms has common law origins. *Id.* (citation omitted).

18 *Id.* at 245-46. Kluin proposed that the Second Amendment can be interpreted to grant two different kinds of rights: (1) an individual right to bear arms or (2) a

The judiciary fails to adequately serve its citizenry if it does not accurately review and interpret the scope of individuals' constitutional rights.[19] The erratic and ill-defined pattern of adjudication reflects a dire need for standardized decision-making.[20] The judiciary can begin to remedy inconsistencies by developing a final and conclusive interpretation of the Second Amendment.[21] Importantly, even a judiciary that favors gun control legislation can feel comfortable with an interpretation of the Second Amendment that grants both an individual and collective fundamental right to keep and bear arms, because that conclusion is historically

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collective right to bear arms. *Id.* In light of this, Kluin found that courts have rendered restrictive opinions concerning interpretation of the Second Amendment that have led to the phenomenon of the Second Amendment being interpreted as granting no rights to citizens. *Id.* at 246-47. Kluin opined that the Second Amendment has become meaningless because courts have failed to distinguish between its meaning and the reasons for its adoption. *Id.* at 247. Furthermore, Kluin argued that the United States Supreme Court has failed to establish a definitive ruling on the Second Amendment's meaning. *Id.* at 249. Consequently, state court decisions addressing the issue of the right to bear arms have been influenced by and parallel the amorphous Supreme Court reasoning. *Id.* at 253 (footnotes omitted).

19 *See* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 35 (2d ed. 1991). The authors enunciate the importance of judicial review for the American system of government.

> It is often suggested that the tension between judicial review and democracy would be eliminated, or at least sharply reduced, if judicial review were simply a mechanical process of deciding whether an act of Congress violated some decision made by the ratifiers of the Constitution. If the act of interpretation were essentially mechanical, and involved no exercise of discretion or will on the part of the judges, the problems of democracy would be minimized. In such circumstances, the judges would not be imposing their own value choices, but would instead be forcing current legislatures to conform to earlier choices made by the people.

Id.

20 *See* United States v. Butler, 297 U.S. 1, 62 (1936) ("When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.").

21 *See* Malcolm, *supra* note 15, at 289. Malcolm articulated that practically all legal scholars agree that an accurate interpretation of the Second Amendment is indispensable to resolving the controversy over gun ownership and that an accurate interpretation can only be achieved through a clarification of common law concepts. *Id.* History, according to Malcolm, reveals that the royal charters that created the American colonies assured potential English emigrants that they would enjoy all English liberties in the colonies. *Id.* (citation omitted). Malcolm argued that, as citizens of developing societies, the colonists needed to be armed to insure their survival. *Id.* (citation omitted). Malcolm found that, as descendants of the English legal traditions, the American colonists were imbued with an anti-authoritarian attitude. *Id.* at 290.

substantiated.[22]

To determine whether a right is expressly or impliedly fundamental, courts have examined the majestic generalities of the Bill of Rights and the Constitution, and have interpreted these generalities from either an originalist or non-originalist perspective.[23] The United States Supreme Court has found certain rights, such as the right to free speech, to be expressly fundamental because they are clearly stated in the Constitution.[24] The Court has found still other rights to be implicitly fundamental.[25] Any legislative burdens placed on fundamental rights are strictly scrutinized because fundamental rights are essential for the maintenance of individual liberties.[26] Nevertheless, the Court can uphold legislation that

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22 *See* Wagner, *supra* note 13, at 1448-49 (footnotes omitted). From an historical standpoint, Wagner proposed that upon the adoption of the Second Amendment to the United States Constitution, the framers clearly considered the right of the people to keep and bear arms to be "among the most fundamental of all rights." *Id.* at 1449 (citation omitted). Wagner found this right integral to the people's ability to protect themselves against governmental attempts to deprive them of their liberties. *Id.* at 1448-49 (footnotes omitted); *see also* Bordenet, *supra* note 3, at 29 (concluding that arms possession is an undeniable right of citizens); Dowlut, *supra* note 1, at 64 (citation omitted) (noting that James Madison wrote that "'the advantage of being armed' was a condition 'the Americans possess[ed] over the people of almost every other nation'"); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91, 93 & n.16 (1989) (stating that the Court recognized in *Robertson v. Baldwin* that "'the first ten amendments to the constitution . . . [were] to embody certain guaranties [sic] and immunities which we inherited from our English ancestors'") (citing Robertson v. Baldwin, 165 U.S. 275, 281 (1897)).

23 *See* STONE, *supra* note 19, at 759-68 (weighing an originalist approach to constitutional analysis that enforces clearly stated or implicit provisions, versus a non-originalist interpretation that permits courts to go beyond, and often contradict, the clear intentions of the Constitution's framers).

24 *See* U.S. CONST. amend. I. The First Amendment reads in its entirety: "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." *Id.* The Court has reasoned that free speech is protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (footnote omitted).

25 *See* STONE, *supra* note 19, at 814-23, 875 (citing Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (citations and quotations omitted) (announcing the right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (declaring the right to vote); Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (finding the right to produce offspring)).

26 Wagner, *supra* note 13, at 1447 (footnotes omitted). Wagner found that the Supreme Court developed the analytical principles of rational basis and strict scrutiny review to formulate its decisions in cases involving equal protection and fundamental rights violations. *Id.* at 1145 & n.205 (citations omitted). For an understanding of rational basis and strict scrutiny review, see Loving v. Virginia, 388 U.S. 1 (1967),

infringes upon a fundamental right if that burden meets the test of strict scrutiny; that is, if the legislation (1) serves a compelling governmental interest and (2) is narrowly tailored to meet that interest.[27] Notably, even though a fundamental right is strongly protected from government usurpation, it can be qualified and curbed when abused.[28]

Accordingly, it can be argued that the Second Amendment provides an express fundamental right to gun ownership.[29] It would seem, therefore, that gun control legislation must be subject to strict scrutiny review.[30] Even with this standard of review, however, comprehensive gun control legislation could survive a strict interpretation of the Second Amendment because, as with most fundamental rights, the right to keep and bear arms should be deemed a qualified right.[31]

Alternatively, to avoid the imposition of a strict scrutiny standard, restrictions on gun use and ownership may be subjected to a lower standard of review if the issue is analogized to the situation of

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which mandated strict scrutiny review for issues of a basic and fundamental nature, and United States v. Carolene Prods. Co., 304 U.S. 144 (1938), which established a rational basis review for issues of an economic/social nature.

27 *See* Wagner, *supra* note 13, at 1448. Wagner argued that governmental interest in preventing violent gun crimes is compelling, and legislation that is both compelling and narrowly tailored can survive strict scrutiny. *Id.* at 1458.

28 *See* Gitlow v. New York, 268 U.S. 652, 666-67 (1925) (citations omitted) (stating that those who abuse the freedom of speech by making "utterances inimical to the public welfare" may be punished by the state).

29 *See* U.S. CONST. amend. II. *But see* United States v. Warin, 530 F.2d 103, 106 (1976) (finding that the Second Amendment does not confer an express right to individual arms possession) *cert. denied*, 426 U.S. 948 (1976); Ehrman & Henigan, *supra* note 3, at 50-51 (citations omitted) (recognizing that courts have held that an individual right to keep and bear arms is not fundamental and therefore rational basis review is appropriate).

30 *See* Wagner, *supra* note 13, at 1458 (footnote omitted).

31 *See Gitlow*, 268 U.S. at 666-67, 669, 670 (citations omitted) (upholding the constitutionality of a statute abridging the First Amendment right to freedom of speech in the interest of the general welfare). Compare the right to keep and bear arms with the First Amendment right to free speech in *Gitlow*, in which Justice Sanford defined a qualified right as follows:

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

Id. at 666-67 (citations omitted). The principle of *Gitlow* that free speech is not an absolute right furthers the idea that even though some constitutional rights are fundamental, they may be infringed if the alternative would harm the general welfare. *See id.* at 666-70 (citations omitted).

content-neutral restrictions of free speech.[32] As free speech may be subject to certain time, place, and manner restrictions, gun use could conceivably be curtailed via narrowly tailored legislation which serves a significant governmental interest so long as alternative channels for use remain open.[33] In other words, gun ownership in our society should only be exercised in accordance with specific time, place, and manner restrictions.[34] Under this approach, a fundamental right to keep and bear arms may be curbed justifiably via an intermediate level of review.[35] It is the role of the judiciary to safeguard individuals' Second Amendment rights and to ensure that constitutionally sound and justifiable gun control legislation passes the appropriate level of scrutiny.[36]

II. JUDICIAL INTERPRETATION OF THE UNITED STATES CONSTITUTION, ARTICLE I, § 8, CL. 2

Historically, the judiciary has developed an evolving interpretation of the Commerce Clause by creating—and then abandoning—different standards by which to interpret its meaning, giving deference to Congressional legislation concerning the movement of guns in interstate commerce.[37] Throughout this cen-

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[32] *See* STONE, *supra* note 19, at 1257 (defining content-neutral restriction to mean a limit on the mode of expression without regard to the content or impact of speech).

[33] *See* United States v. Grace, 461 U.S. 171, 177 (1983) (articulating that "the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication'") (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)) (other citations omitted).

[34] *See id.* (quotations and citations omitted) (recognizing time, place, and manner restrictions as appropriate when narrowly drawn to achieve an important government interest).

[35] *See id.* (quotation and citations omitted) (permitting narrowly drawn, content-neutral restrictions on speech); *see also* Grayned v. Rockford, 408 U.S. 104, 117, 119, 121 (1972) (footnotes omitted) (upholding an anti-noise ordinance because it was narrowly tailored to further a municipality's compelling interest in an undisrupted school session).

[36] *See* HAMILTON, *supra* note 10, at 182-84. Hamilton defined the extent of judicial review as follows:

> The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body.

Id. at 183-84.

[37] *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) (interpreting the phrase "among the several States" to encompass commerce carried on between states and not solely intrastate trading).

With time, the judiciary accorded Congress greater deference by adopting other

tury, the judiciary had been willing to adapt an interpretation of the Commerce Clause to the needs of society, resulting in the creation of a workable standard by which to interpret the Clause's meaning.[38] The judiciary had been inclined to accord wide deference to the legislature, which served as an affirmation of the judiciary's understanding of Congress's power under that clause.[39] That

tests for deciding Commerce Clause cases. *See* Wickard v. Filburn, 317 U.S. 111, 124-25 (1942) (quotations omitted) (regulating the movement of goods in interstate commerce by Congress is valid when the goods have a substantial economic effect on the marketplace); Stafford v. Wallace, 258 U.S. 495, 518-19, 521 (1922) (regulating an activity by Congress is a valid exercise of power if it affects interstate commerce under the stream of commerce test); Champion v. Ames (Lottery Case), 188 U.S. 321, 357 (1903) (regulating the movement of goods deemed injurious to society is a valid exercise of Congressional Commerce Clause power under the pretext test). For further reading on these and other relevant cases, see STONE, *supra* note 19, at 151-94, wherein the author explores and analyzes the historical development of the Commerce Clause from the late nineteenth century through the formalist approach of the 1960s).

38 *See* United States v. Darby, 312 U.S. 100, 115 (1941) (citations omitted) (declaring the regulation at issue consistent with Congress's view of public policy regarding substandard labor conditions and interstate commerce). In *Darby*, Justice Stone questioned whether Congress could constitutionally prohibit (1) the shipment in interstate commerce of lumber manufactured by employees who received lower than minimum wage or work more hours per week than the prescribed maximum and (2) employment of workers, who produce goods that enter interstate commerce, at other than established salaries and hours. *Id.* at 108. Faced with a challenge to The Fair Labor Standards Act of 1938, the Court declared that regulations of interstate commerce are to be created and debated by the legislature without restriction by the courts. *Id.* at 115 (citations omitted). The Court furthered that the Tenth Amendment to the Constitution does not deprive the national government of the ability to exercise its granted powers when appropriate. *Id.* at 124 (citations omitted). Thus, the *Darby* Court showed signs of change in its Commerce Clause interpretation by upholding a prohibition of the interstate shipment of goods produced under substandard labor conditions. *See id.* at 115. For commentary on *Darby*, see STONE, *supra* note 19, at 190-94.

By 1945, the Court began a trend of deferring to Congress noting that the sole federalism-based limits on Congress inhered in the political process. *Id.* at 194. This deference was exemplified in 1981 with *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, in which the Court stated: "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational." 452 U.S. 264, 277 (1981).

More recently, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court gave even greater deference to Congressional action by dismissing any state claims of lost power and by highlighting the political process as an effective check on Congressional overreaching. *See* 469 U.S. 528, 550-54 (1985) (footnotes omitted). The Court, in overturning *National League of Cities v. Usery*, stated that "the principle and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 556, 557 (citing National League of Cities v. Usery, 426 U.S. 833 (1976)).

39 *See* Reddick, *supra* note 6, at 867 & n.2 (citations omitted) (analyzing the

trend halted, however, with the United States Supreme Court decision *United States v. Lopez*,[40] in which the Court failed to defer to the legislature and held that the Gun-Free School Zones Act of 1990 was an unconstitutional exercise of Congress's commerce power.[41]

Prior to *Lopez*, the judiciary properly adopted a deferential approach in *Scarborough v. United States*.[42] In *Scarborough*, the Supreme Court held that § 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968 supported a valid conviction of a felon found in possession of a firearm if that firearm had travelled in interstate commerce at any time.[43] The Court affirmed petitioner Scarborough's conviction under the statute based on the determination that the weapons he possessed had indeed travelled in interstate commerce at one time.[44] To reach this conclusion, the Court deferred to the legislative history of the statute.[45] The Court found that Congress intended the statute to have a broad effect.[46] Ac-

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Supreme Court decision in *Scarborough v. United States*, which involved a challenge to Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, and noting that the minimal requisite nexus between the Act and interstate commerce is satisfied by simply showing that a firearm has traveled in interstate commerce at any remote time).

40 United States v. Lopez, 115 S. Ct. 1624 (1995).

41 *Id.* at 1630-31, 1632. Chief Justice Rehnquist wrote the opinion of the court and stated that the Gun-Free School Zones Act is unconstitutional because it does not regulate an activity that has a substantial effect on interstate commerce. *Id.* at 1631. The Chief Justice found that the situation of guns in school zones is a criminal matter to be regulated by the States. *Id.* at 1631 & n.3. Moreover, the Justice stated that the government's brief conceded that "'[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone'". *Id.* Thus, the Court refused to hold the statute constitutional in the interests of federalism. *Id.* at 1632.

42 *See* 431 U.S. 563, 572 (1977). The petitioner, Scarborough, had been convicted previously of drug possession and subsequently was convicted of violating Title VII of The Omnibus Crime Control and Safe Streets Act of 1968 for possessing a Colt revolver, a Universal Enforcer, an M-1 carbine rifle, and a St. Etienne Ordinance revolver. *Id.* at 563-65, 566 & n.2 (citation omitted). For further commentary on *Scarborough*, see Reddick, *supra* note 6 , where the author interprets the meaning and speculates as to the effect of the Court's decision in *Scarborough*.

43 *Scarborough*, 431 U.S. at 566-67 (footnotes omitted).

44 *Id.*

45 *Id.* at 572 (quotation omitted). *See also* Reddick, *supra* note 6, at 872. Reddick noted that the Court analyzed the legislative intent of the statute, which revealed that "possession of a firearm by a convicted felon had been deemed to threaten not only commerce, but also other vital American institutions." *Id.* (citation omitted).

46 Reddick, *supra* note 6, at 872. Reddick analyzed the legislative impetus for the formulation of the statute and stated that Congress:

> simply hooked the statute into interstate commerce to serve as its constitutional base. . . . The Court noted that since most felons come into possession of firearms by clandestine means, it would be an almost impossible task for law enforcement officials to prove whether the felon actually came into possession of the firearm before or after his convic-

cordingly, the Court concluded that it was constitutional to deny Scarborough the right to possess a firearm that had travelled in interstate commerce at a remote time under the provisions of the statute although Scarborough had possessed the firearms before he was ever convicted.[47]

Similarly, the judiciary adopted a deferential approach in *Gun South, Inc. v. Brady*.[48] *Gun South* concerned GSI, a wholesale gun dealer that had been licensed by the Bureau of Alcohol, Tobacco, and Firearms to import firearms used for sporting purposes.[49] Despite GSI's permit to import AUG-SA rifles, the Secretary of the Treasury issued a temporary suspension of the importation of certain rifles, including the AUG-SA rifles.[50] The Court of Appeals for the Eleventh Circuit followed a provision of the Administrative Procedure Act,[51] which prescribed the standard of judicial review for government agency decisions.[52] The court upheld the decision of

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> tion. The remote nexus requirement was then summarized as the only means which "capture[s] the essence of Congress' intent."

Id. (citing *Scarborough*, 431 U.S. at 577).

47 *Scarborough*, 431 U.S. at 576-78. In the opinion, Justice Marshall explained that it was Congress's intent to reach the possession of firearms broadly. *Id.* at 577 (quotation omitted). With complete deference to the legislative intent of § 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968, Justice Marshall declared that "there is no question that Congress intended no more than a minimal nexus requirement." *Id.*

48 877 F.2d 858, 861 (11th Cir. 1989) (citations omitted).

49 *Id.* at 859. Prior to its legal dispute with the Secretary of the Treasury, GSI had applied for permits to import Steyr-Mannlicher AUG semi-automatic rifles in September 1988 and February 1989 after learning that the Bureau of Alcohol, Tobacco, and Firearms (ATF) had authorized the importation of these weapons for sporting purposes. *Id.* These permits were granted to GSI in October 1988 and February 1989. *Id.* They were suspended in March 1989 pursuant to a Bureau decision to re-examine its policy on banning the importation of all assault-type weapons regardless of sporting purpose. *Id.* Even though the suspensions were not supposed to be retroactive against pre-existing permits, GSI's shipment of rifles were seized by Customs Services at Birmingham Airport. *Id.* at 859-60.

50 *Id.* at 859. This suspension was ordered to allow the ATF time to decide whether certain rifles were actually suitable for sporting purposes, a pre-requisite for importation. *Id.*

51 5 U.S.C. § 706 (1988). According to David E. McCauley:

> The Administrative Procedures Act (APA) establishes the standard for judicial review of government agency decisions, such as the Secretary's decision on the importability of semi-automatic assault weapons. The APA provides that a reviewing court will not overturn an agency decision unless that decision was reached in an arbitrary, capricious, or unreasonable manner. If the agency enforcing a statute can give a rational basis for the decision it has made, then the courts must presume the decision to be valid, and may not replace it with another decision.

McCauley, *supra* note 6, at 202-03 (footnotes omitted).

52 *Gun South*, 877 F.2d at 861 (citations omitted). The court began the discussion of the opinion by emphasizing that a deferential standard of review must be applied

the Secretary of the Treasury to temporarily suspend permits for the importation of semi-automatic assault weapons, agreeing not only that the suspension was not done in an arbitrary, capricious, or unreasonable manner, but also that the temporary suspension was not a burden on interstate commerce.[53] In so doing, the court conceded that certain agency decisions impacting upon the importation of guns will be upheld when minimally reasonable.[54]

The judiciary should feel comfortable deferring to Congress on gun control questions that relate to the Commerce Clause because the meaning of the Clause has expanded with time, thus allowing for its application to gun control in local communities without infringing upon states' Tenth Amendment powers.[55] The judiciary must recognize that legislation with a Commerce Clause

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when reviewing an agency's action. *Id.* (citations omitted). Using a three-part inquiry, the court stated that the Bureau's temporary suspension of permits could be set aside only if the suspension (1) exceeded the Bureau's statutory authority, (2) violated a constitutional right, or (3) constituted an arbitrary or capricious action. *Id.* (citing 5 U.S.C.A. § 706(2)(A)-(C) (West 1977)). Under the deferential standard, the court presumed the validity of the suspension of importation permits. *Id.* (citation omitted).

[53] *Id.* at 864-65, 866, 869. *See* McCauley, *supra* note 6, at 198 (noting that the *Gun South* court held that deference must be given to the Secretary's decision to suspend importation permits if the Secretary reasonably feared that the assault rifles were not being used for sporting purposes). *Id.* (footnotes omitted). The controversy began when Gun South, Inc. ordered and was granted a permit for 800 AUG-SA rifles, which were considered sporting rifles. *Gun South*, 877 F.2d at 860. McCauley argued that *Gun South* alerts gun importers that their importation permits may be suspended at any time, even after weapons have been ordered and purchased. McCauley, *supra* note 6, at 206 (footnotes omitted). McCauley found that the Secretary of the Treasury needs to base the permit suspensions merely upon reasonable grounds such as public safety in order for the court to give it deference. *Id.* at 206-07 (footnote omitted).

[54] *Gun South*, 877 F.2d at 865 (citing 5 U.S.C. § 706(2)(A) (1977)). *See also* McCauley, *supra* note 6, at 204-05. McCauley noted that the court deferred to the ATF because the Bureau is best equipped to ascertain whether assault weapons are suitable for sport. *Id.* (footnotes omitted).

[55] *See* U.S. CONST. amend. X (providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

Prior to *Lopez*, the Gun-Free School Zones Act was not deemed an usurpation of state police power under the Tenth Amendment. *See* United States v. Glover, 842 F. Supp. 1327, 1328-29 (D. Kan. 1994). The defendant in *Glover* argued that the Gun Free School Zone Act was unconstitutional because it infringed upon the Tenth Amendment right of the states to control schools and education. *Id.* at 1328-29 (citations and footnotes omitted). The *Glover* court held the Gun Free School Zone Act constitutional under the Commerce Clause because Congress has the power to regulate activities affecting commerce. *Id.* at 1332, 1336-37 (citations omitted). The court also noted that gun control legislation need only meet rational basis review to survive constitutional muster. *Id.* at 1336-37 (citations omitted).

nexus need only pass rational basis review.[56] This review demands a means/ends nexus, which requires the judiciary to defer to the legislature and to uphold legislation when the means of that legislation is rationally related to the legislation's ends.[57] If rational basis review is not implemented when gun control legislation is premised upon the Commerce Clause, the judiciary will erode the meaning of the Clause that has consistently evolved over the course of this century.[58] Conjunctively, before the legislature can continue to take full advantage of the Commerce Clause nexus when formulating gun control legislation, it is imperative for the courts to articulate a final interpretation of the Second Amendment that reflects its history and meaning.[59] Once the meaning of the Sec-

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[56] *See* STONE, *supra* note 19, at 809 (instructing that rational basis review has been employed to uphold regulatory legislation affecting commerce) (quoting United States v. Carolene Prods., 304 U.S. 144, 152-53 (1938)). In *United States v. Carolene Prods. Co.*, the Supreme Court argued:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . . As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

304 U.S. at 153, 154 (quotations omitted); *see also* STONE, *supra* note 19, at 532-33 (proposing that the judiciary has traditionally employed rational basis review of equal protection questions for those classifications not drawn on a suspicious basis).

[57] STONE, *supra* note 19, at 545. For a thorough discussion of the means/ends nexus and rationality, see Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972-73). Gunther proposes that vigorous equal protection scrutiny would measure the acceptability of legislative means according to legislative purpose, rather than being based upon the individual value judgments of the Justices. *Id.* at 21.

[58] *See* United States v. Lopez, No. 93-1260, 1995 WL 238424, at *44 (Apr. 26, 1995) (finding that the Court could hold the Gun-Free School Zones Act constitutional by "apply[ing] pre-existing law to changing economic circumstances") (Breyer, J., dissenting). In the dissent, Justice Breyer found that the *Lopez* decision contradicts contemporary Supreme Court cases "that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence." *Id.* (Breyer, J., dissenting) (citing Perez v. United States, 402 U.S. 146, 154 (1971)) (other citations omitted). Justice Breyer concluded that "upholding this legislation would do no more than simply recognize that Congress had a "'rational basis'" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten." *Id.* at *47 (Breyer, J., dissenting).

[59] *See* Kluin, *supra* note 17, at 251 (footnote omitted) (noting the lack of Supreme Court case law addressing the historical meaning of the Second Amendment). Notably, *United States v. Hale* involved interpretation of both the Commerce Clause and the Second Amendment. 978 F.2d 1016, 1017 (8th Cir. 1992). In *Hale*, Wilbur Hale appealed his conviction for machine gun possession by arguing that the statute under which he was convicted had no nexus with interstate commerce and that his indictment violated his Second Amendment right to bear arms. *Id.* (citations omitted). The United States Court of Appeals for the Eighth Circuit found the statute to be

ond Amendment is clear, courts will then be able to determine the appropriate level of review by which to scrutinize legislation that is premised upon the Commerce Clause and later challenged on Second Amendment grounds.[60]

III. JUDICIAL INTERPRETATION AND FORMULATION OF PRODUCTS LIABILITY LAW

For the judiciary to assume a complete role when deciding gun control cases, it must evaluate the scope of current products liability law and decide the proper application of the law to gun manufacturers sued by victims of gun violence.[61] Products liability law developed through privity of contract principles[62] and the the-

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within Congress's commerce power. *Id.* at 1018. The court also found that a "claimant of Second Amendment protection must prove that his or her *possession* of the weapon was reasonably related to a well regulated militia." *Id.* at 1020 (citation omitted). The court stated that to protect Second Amendment rights to weapon possession a claimant must show that he belonged to a military organization or that use of a weapon was essential for his preparation for the military. *Id.* (citation omitted). The court determined that Hale did not prove a relationship between his weapon possession and "the preservation of a well regulated militia." *Id.*

60 *See* United States v. Edwards, 13 F.3d 291, 293, 295 (9th Cir. 1993) (citation omitted) (finding the Gun Free School Zones Act to be a permissible exercise of Congress's Commerce Clause power, and that the defendant lacked standing to challenge the Act as overbroad in its application to individuals driving past a school with a gun in the car).

61 *See* Halbrook, *supra* note 7, at 364 (noting numerous unresolved questions as to the scope and degree of manufacturer liability and the extent to which consumers should be protected). Halbrook characterized the trend to ban handgun ownership through products liability law as a strategy to "make it financially impossible to make, sell, or own handguns, should suppliers and consumers of this product be required to absorb all losses of all persons victimized with handguns." *Id.* at 351. Halbrook proposed that under a strict products liability theory, handguns would be deemed unreasonably dangerous or defective products. *Id.* Furthermore, Halbrook argued that such a theory denies any social utility of handguns for self-defense. *Id.* at 352. Accordingly, Halbrook proposed that tort law should be used not to endanger the existence of handguns in society, but to ensure that handguns are produced with sufficient safety mechanisms and reliability for individuals that wish to purchase them. *Id.* at 364.

62 DOBBS, *supra* note 7, at 609-10. Until *MacPherson v. Buick Motor Co.*, manufacturers were not liable to a plaintiff where the plaintiff did not purchase the product directly from the manufacturer. *Id.* (citing MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916)) (other citations omitted). In *MacPherson*, Justice Cardozo explained: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . . If [the manufacturer] is negligent, where danger is to be foreseen, a liability will follow." *Macpherson*, 111 N.E. at 1053. Thus, per *MacPherson*, a plaintiff, injured when the wheel of an automobile collapsed, could sue the manufacturer even though the plaintiff purchased the car from a retail dealer and not directly from the manufacturer. DOBBS, *supra* note 7, at 610.

ory of express and implied warranties.[63] Since those beginnings, products liability law has developed various nuances: manufacturer liability for defective products that result from production flaws;[64] manufacturer liability for defective design of products;[65] risk/utility analyses and limited manufacturer liability for unavoid-

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[63] DOBBS, *supra* note 7, at 611-12 (citation omitted). For an earlier interpretation of implied warranties, see Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960). *Hennigsen* rejected the privity rule and found that the attempts by a manufacturer and dealer to limit their liability by placing a warranty on their automobiles for replacement of defective parts within a specified time was not a valid disclaimer of liability. *Id.* at 76-84. The court further concluded that there was an implied warranty in addition to the express warranty for replacement of defective parts. *Id.* at 84. The New Jersey Supreme Court ultimately held that an implied warranty of use for a product's designated purpose extends from the manufacturer through the dealer to the consumer. *Id.*; *see also* DOBBS, *supra* note 7, at 612 (contending that since *Henningsen*, warranty theory has for the most part been replaced by a theory of strict liability in tort).

For a later interpretation of implied warranties, see Leichtamer v. American Motors Corp., 424 N.E.2d 568, 577, 578 (Ohio 1981). In *Leichtamer*, the plaintiffs were injured when the Model CJ-7 Jeep in which they were riding rolled over after negotiating a sloped hill. *Id.* The Ohio Supreme Court promulgated the following definition of implied warranties:

> The doctrine of "breach of implied warranty" as charged in the complaint does not depend upon proof of fault. A claim predicated upon breach of implied warranty proceeds upon a legal theory that one who provides a product impliedly represents to consumers or users of that product that it is a good or sound product. In the event it should thereafter develope [sic] that the product was not a sound or good product and a consumer or user thereof sustains an injury due to a defect therein, the manufacturer has breached its implied warranty.

Id. at 577 n.2. Ultimately, the court held the Jeep manufacturer liable in tort for the manufacture of this unreasonably dangerous product. *Id.* at 574.

[64] *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962). In *Greenman*, the plaintiff's wife bought him a Shopsmith power tool. *Id.* at 898. After properly operating the tool as a lathe, the plaintiff was seriously injured. *Id.* The Supreme Court of California found that the tool had been defectively manufactured and negligently constructed. *Id.* at 901. The court explained that: "The purpose of [imposing strict liability on the manufacturer] is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* (citation omitted); *see also* DOBBS, *supra* note 7, at 617-18 (surmising that the *Greenman* decision eliminated the privity problem of strict products liability by breaking away from the warranty theory).

Following the decision in *Greenman*, Dobbs stated that the American Law Institute adopted § 402A to the Restatement (Second) of Torts. *Id.* at 617. This section changed strict products liability through its three main components:

> (a) sellers are strictly liable for injuries; this meant that the injured consumer could recover without proving fault; (b) privity rules were abolished; this meant that the injured consumer could recover without privity; and (c) strict liability attached to products that were "defective" because they were unreasonably dangerous to the consumer.

Id. at 617-18. The phrase "unreasonably dangerous" is used to acknowledge that some products, such as a knife, are naturally dangerous and not defective. *Id.* at 628. A

ably unsafe products.[66] Generally, in assessing manufacturer liability, courts now apply a risk/utility test that entails a balancing of a product's usefulness with its potential harm to consumers.[67]

In *Burkett v. Freedom Arms, Inc.*,[68] the Oregon Supreme Court addressed the issue of imposing liability on a gun manufacturer

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plaintiff must prove that at the time a product left a defendant's hands it was defective, and when this is not proven, a plaintiff will be foreclosed from recovery. *Id.*

65 *See* DOBBS, *supra* note 7, at 630. Dobbs contrasted manufacturing defects with design defects, stating "[i]f a product is flawed, only a few products with flaws will be in circulation; but if a product is misdesigned, every one of the products represents a potential lawsuit against the manufacturer." *Id.* Dobbs cited *Leichtamer* for a definition of design defects and an explanation of the concept of unreasonably dangerous. *Id.* (citing Leichtamer v. American Motors Corp., 424 N.E.2d 568, 576-77 (Ohio 1981)). In *Leichtamer*, the Supreme Court of Ohio stated that a product has a design defect and is unreasonably dangerous when it fails to perform safely when used as intended. *Leichtamer*, 424 N.E.2d at 577 (footnote omitted).

66 *See, e.g.*, DOBBS, *supra* note 7, at 632, 634 (citing Knitz v. Minster Machine Co., 432 N.E.2d 814, 818 (Ohio 1982)). Dobbs compared the *Knitz* court's reasoning with *Cochran v. Brooke*'s unavoidably unsafe products analysis as defined in § 402A Comment k to the Restatement (Second) of Torts, and suggested that although phrased differently, the two analyses were effectively the same. *Id.* In *Cochran*, the court held that a manufacturer of chloroquine was not strictly liable for the plaintiff's almost total loss of vision that occurred after the plaintiff used the drug. *Id.* at 636 (citing Cochran v. Brooke, 409 P.2d 904, 906-07 (Or. 1966) (en banc); RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965)). Comment k to § 402A of the Restatement (Second) of Torts states in part:

> *Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . . The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. k. The *Cochran* court reasoned that imposing strict liability on drug manufacturers would have far-reaching consequences that the court could not feasibly impose. *Cochran*, 409 P.2d at 907.

67 *See* Bogus, *supra* note 5, at 1109. Courts today examine products in terms of the reasonableness of their dangers. *Id.* Courts often conduct a cost-benefit analysis wherein they balance the benefit of a product to the consumers against potential harm. *Id.* Courts have opted to use this risk-benefit analysis because the earlier consumer expectation test, wherein consumers had the responsibility of anticipating whether a product would be too dangerous for personal use, was unsound. *Id.* Through a risk-benefit analysis, courts decide that a product whose risks outweigh its benefits is unreasonably dangerous and therefore warrants imposition of strict liability. *Id.*

68 704 P.2d 118 (Or. 1985). For further commentary on *Burkett*, see Chris Laia, Developments in the Law, *Supreme Court Shoots Down Proposition that the Design, Manufacture, and Marketing of Small, Easily Concealable Handguns Constitutes an Abnormally Dangerous Activity*, 22 WILLAMETTE L. REV. 209, 212-13 (1986) (citations and footnotes omitted). Laia suggests that it may be possible to hold the user, rather than

when the plaintiff sued the manufacturer of a concealable gun.[69] The plaintiff had been seriously and permanently injured when an inmate shot him in the head with an easily concealable Freedom Arms handgun while attempting to escape from jail.[70] The Oregon Supreme Court held that the design, manufacture, sale, and marketing of a small, easily concealable handgun did not warrant imposition of strict liability on the manufacturer under Oregon law because such actions did not constitute an abnormally dangerous activity.[71] The court reasoned that the manufacturer's activities in developing the concealable gun were not inherently dangerous.[72] Moreover, the court declined to impose strict liability on the gun manufacturer because it did not want to create enterprise liability.[73] The court intimated, however, that the use of a gun may be

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manufacturer, of small, easily concealable handguns liable in tort under a strict liability theory. *Id.* at 212-13.

69 *Burkett*, 704 P.2d at 119.

70 *Id.* Plaintiff Burkett was injured by a .22 caliber single-action handgun commonly known as a Freedom Arms handgun. *Id.* This handgun is manufactured "so as to be concealable as a decorative item on the front of a large belt buckle." *Id.* This handgun was also offered for sale to the general public. *Id.*

71 *Id.* at 122. The court acknowledged that any prior Oregon decision which held that the use or storage of benign or dangerous substances may constitute an abnormally dangerous activity was based upon the danger inherent in those activities. *Id.* at 121. The court found no correlation between the use or storage of substances and the manufacture of small, easily concealable guns. *Id.* (citations omitted). In essence, the court intimated that the manufacturing process is not abnormally dangerous, and thus manufacturers cannot be held strictly liable where plaintiffs fail to specifically allege that there is an inherent and unreasonable hazard in the use of the product. *Id.* at 122.

72 *Id.* at 121-22 (citations omitted). The court stated that § 520 of the Restatement (Second) of Torts identifies six factors attributable to an abnormally dangerous activity. *Id.* at 120 (quoting RESTATEMENT (SECOND) OF TORTS § 520 (1965)). Section 520 provides:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1977).

73 *Burkett*, 704 P.2d at 122 (footnote and citation omitted). The Supreme Court of Oregon reached that conclusion based on the determination that the plaintiffs were attempting to impose strict liability on the manufacturers of a non-defective product without alleging that manufacturing is inherently dangerous. *Id.* at 121 (citations omitted). The court furthered that such an allegation is unprecedented in Oregon and all other jurisdictions that have been faced with such a question. *Id.* (citations omitted).

characterized as an abnormally dangerous activity because the danger in terms of usage, as opposed to the design, manufacture, and sale of guns, inheres in the activity itself.[74]

In *Kelley v. R.G. Industries, Inc.*,[75] the Maryland Court of Appeals also rejected the idea of holding gun manufacturers strictly liable under the abnormally dangerous activity analysis or the defective products analysis of § 402A of the Restatement (Second) of Torts.[76] In *Kelley*, Mr. Kelley was shot in the chest by an unknown assailant during an armed robbery of the grocery store in which he worked.[77] Kelley and his wife brought a tort action against the manufacturer and marketer of the handgun used in the commission of the crime.[78] The weapon at issue was a Saturday Night Special, an inexpensive, easily concealable, and unreliable gun frequently used by criminals.[79] The court found that imposition of liability on the manufacturer and marketer of the handgun would

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In regard to the concept of enterprise liability, the Supreme Court of Oregon stated:

> to hold one who designs, manufactures and sells a nondefective product strictly liable for the sole reason that the subsequent use or misuse of the nondefective product carries a grave risk of harm which cannot be avoided by due care would amount essentially to the imposition of enterprise liability. This court has rejected enterprise liability standing alone as a justification for the imposition of strict liability.

Id. at 122 (footnote and citation omitted).

74 *Id.* at 121. The court found Burkett's cause of action problematic because he never claimed that the use of a small, easily concealable handgun was an abnormally dangerous activity. *Id.*

75 497 A.2d 1143 (Md. 1985).

76 *Id.* 1147-48 (citations omitted). The Maryland Court of Appeals found that § 402A of the Restatement (Second) of Torts was inapplicable in *Kelley* because to apply, the gun would have to be defective when sold. *Id.* at 1148 (citations omitted). The court reasoned that the possibility of using a handgun to inflict injury in criminal activity does not render the weapon defective. *Id.* In conclusion, the court posited that one should not confuse the normal use and possible dangerousness of a product with that product's defective design. *Id.*

77 *Id.* at 1144.

78 *Id.* at 1144-45. The handgun used in the armed robbery was a Rohm Revolver Handgun model RG-38S, serial number 0152662, manufactured, marketed, assembled, and sold by Rohm Gesellschaft and its Florida based subsidiary, R.G. Industries. *Id.* The plaintiffs asserted several theories of recovery against defendants Rohm Gesellschaft and R.G. Industries. *Id.* at 1145. The first claim was strict liability for the manufacture of an abnormally dangerous handgun. *Id.* The second theory alleged that the handgun was defective in its marketing and design, which rendered it unreasonably dangerous. *Id.* The third and fourth claims asserted negligence and loss of consortium. *Id.*

79 *Id.* at 1153-54 (footnotes omitted). The court defined a Saturday Night Special as an innacurrate, unreliable, small, lightweight, cheap, poorly manufactured, easily concealable handgun with a short barrel, which is frequently used in criminal activity. *Id.*

fail under the general consumer expectation test[80] and found the risk/utility test inapplicable.[81] Alternatively, however, the court expressed that the common law should change with the times.[82] Accordingly, in the interest of public policy, the court was willing to carve out a separate category of liability for manufacturers of Saturday Night Specials, where the weapons were used in criminal activity to harm innocent persons.[83] The court concluded that in future cases involving injuries or deaths caused by weapons substantially resembling Saturday Night Specials, liability may be im-

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80 Phipps v. General Motors Corp., 363 A.2d 955, 958 (Md. 1976) (citation omitted). After discussing the various justifications for imposing strict liability, the *Phipps* court adopted Restatement (Second) of Torts § 402A. *Id.* at 958-63 (citations omitted). *Phipps* articulated the consumer expectation test as follows:

> For a seller to be liable under § 402A, the product must be both in a "defective condition" and "unreasonably dangerous" at the time that it is placed on the market by the seller. Both of these conditions are explained in the official comments in terms of consumer expectations. As Comment g explains, the requirement of a defective condition limits application of § 402A to those situations where "the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." An "unreasonably dangerous" product is defined in Comment i as one which is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

Id. at 959.

Following *Phipps*, the Maryland Court of Appeals stated in *Kelley* that a consumer would "expect a handgun to be dangerous, by its very nature, and to have the capacity to fire a bullet with deadly force." *Kelley*, 497 A.2d at 1148. The appellate court further noted that for a handgun to be defective, "there would have to be a problem in its manufacture or design, such as a weak or improperly placed part, that would cause it to fire unexpectedly or otherwise malfunction." *Id.*

81 *Kelley*, 497 A.2d at 1149. The court defined the risk-utility test as follows:

> [a] product may . . . be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.

Id., at 1149 (quoting Barker v. Lull Eng'g Co., 573 P.2d 443, 456 (1978)). The *Kelley* court concluded that where a handgun injured the person at whom it was fired, the weapon functioned as intended. *Id.* Thus, the court found that a risk/utility test should only be applied when a product malfunctions. *Id.*

82 *Id.* at 1150-51 (quotation and citations omitted). The court stated that "the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems." *Id.* (quotation omitted).

83 *Id.* at 1159. The court recognized that the Saturday Night Special has a minimally legitimate purpose in today's society due to its inaccuracy, unreliability, and poor manufacture. *Id.* (quotation omitted). The court also stated that the manufacturer or marketer of a Saturday Night Special knows that it is manufacturing or marketing a product primarily used in committing crimes. *Id.*

posed on a manufacturer, marketer, or retailer of such guns.[84]

It follows that the ultimate question to be asked by gun manufacturers and consumers is whether it is fair to hold gun manufacturers liable for providing consumers with exactly what they want.[85] An answer to this question requires consideration of fundamental fairness issues inherent in a risk/utility analysis.[86] In the interest of fairness, courts must analyze both the costs that handguns impose on society and their societal benefits.[87] It is unclear, however, whether courts want to apply a risk/utility analysis, or any strict liability analysis, when assessing gun manufacturer liability to the victims of gun violence.[88] It may be feasible for the judiciary to view the most appropriate scope of gun manufacturer liability to the victims of gun violence as follows: (1) liability for the creation of guns statistically documented as the ones most often utilized in criminal activities; (2) liability for the creation of guns without adequate warning and/or safety features; and (3) liability for guns created in such a manner that they foreseeably will be used in criminal activity (i.e. easily concealable, poorly made weapons).[89] Although

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84 *Id.* at 1160. The court progressively advocated imposing liability on manufacturers who market dangerous products with knowledge of their probable misuse, reasoning that such activity is unreasonable and irresponsible. *Id.* (footnote and citation omitted). For further commentary on *Kelley*, see Joshua M. Horwitz, Kelley v. R.G. Industries: *A Cause of Action for Assault Weapons*, 15 U. DAYTON L. REV. 125, 130 (1989) (footnotes and citations omitted). Horowitz discusses the *Kelley* court's application of the following three criteria:

> (1) the risk of the product to society outweighs its utility to society; (2) the foreseeability or knowledge by the maker or seller that the product is principally to be used in criminal activity; and (3) the relative degree of fault between the maker or seller and the innocent victim

Id. (citing *Kelley*, 497 A.2d at 1158-59).

85 *See* Bogus, *supra* note 5, at 1111-13 (footnotes omitted) (arguing that it is not necessarily unfair to hold a seller liable for providing a consumer with a product he wants when that product causes more harm than good to society).

86 *Id.* at 1112-13.

87 *Id.* at 1113. The costs include murders, suicides, accidental deaths, and the economic costs involved in treating survivors of attempts on their lives. *Id.* The benefits include self-protection and sport. *Id.* Bogus argued that his data revealed that handguns impose more of a burden on society than a benefit. *See id.* at 1112-13 (footnotes omitted).

88 *Id.* at 1148 (footnote omitted). According to Bogus, courts most frequently defer to the legislature on the issue of handguns and strict liability. *Id.* at 1149 (footnote omitted). Ironically, however, Bogus observed that the courts have ordinarily been responsible for the development of products liability theory and its application to many different products. *Id.* at 1150 (footnote omitted).

89 *See* Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153-54 (1985) (footnotes omitted). For further commentary regarding the imposition of tort liability on the manufacturers of Saturday Night Specials, see H. Todd Iveson, Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach*, 51 FORDHAM L. REV. 771, 790 (1983) (citations omitted) (footnote omitted) (stating that "[a] design defect may be

courts have developed products liability law and have applied it to the manufacture of such products as automobiles, tools, and drugs,[90] the courts may again be avoiding the opportunity to impose liability on gun manufacturers to avert political confrontation.[91]

IV. CONCLUSION

The judiciary fulfills a unique role in American government.[92] It serves as a check on both the executive and legislative branches in the interest of promoting democracy.[93] Ideally, the judiciary should be free from political influence and individual biases.[94] The judiciary, however, may not always wish to perform its role as arbiter of the nation's disputes, especially with regard to such con-

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established by showing that an entire product line is unreasonably dangerous"). Iveson articulated that a plaintiff may be able to prove that Saturday Night Specials are unreasonably dangerous by showing that the likelihood of using a weapon for a criminal purpose—because of the way in which it is designed—outweighs the benefits of having these guns available. *Id.* at 790 (citations omitted). In general, Iveson suggested that manufacturers of handguns may have breached a duty to a victim of criminal handgun misuse by: "1) failing to warn and instruct a handgun dealer or purchaser adequately; 2) negligently entrusting handguns to dealers or shippers; or 3) designing a type of handgun known as Saturday Night Specials." *Id.* at 784. According to Iveson, proper warnings or adequate instructions alert purchasers as to foreseeable dangers arising from misuse or proper handling for safe use. *Id.* at 785 (citations and footnotes omitted). Iveson argued that manufacturers must also learn of the sources of guns used for criminal purposes and the logistical methods of keeping these guns away from criminals. *Id.* at 786 (citations omitted).

90 *See* Leichtamer v. American Motors Corp., 424 N.E.2d 568, 576 (Ohio 1981) (quotation omitted) (defining manufacturers' liability for defective product design); Cochran v. Brooke, 409 P.2d 904, 907 (Or. 1966) (en banc) (limiting manufacturers' liability for unavoidably unsafe products); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900-01 (Cal. 1962) (citations omitted) (defining manufacturers' liability for producing defective products).

91 *See* Bogus, *supra* note 5, at 1150 (footnotes omitted). Bogus further intimated that the courts are hypocritical in avoiding imposition of liability on gun manufacturers because of impending political controversy, and noted that courts have imposed liability on manufacturers of other controversial products, such as the fertility drug, DES, organochlorine pesticides, and asbestos. *Id.* at 1152-53 (footnotes omitted). Bogus argued that some judges may avoid taking a clear stand on gun control for fear that commitment on such a controversial issue might label them as judicial activists and jeopardize their re-election. *Id.* at 1157 (footnotes omitted). According to Bogus, some judges might fear being accused of controlling tort law development, causing insurance premiums to rise, and inviting litigation. *Id.* at 1158 (footnotes omitted).

92 *See* U.S. CONST. art. III (enumerating the role and responsibilities of the judicial branch).

93 *See* HAMILTON, *supra* note 10, at 182 (conceptualizing judicial review).

94 *Id.*

troversial issues as gun control.[95] Therefore, the judiciary should devise and adopt a system of consistent standards to be used as guideposts when deciding cases that involve challenges to gun control legislation.[96]

A. *Second Amendment Challenges*

The judiciary must determine, based on historical evidence, the actual meaning, scope, and intent of the Second Amendment. Courts can achieve this by accepting the predominant interpretations of the Second Amendment and by dismissing those that are not substantiated by legislative intent.[97] By embracing a majority view of the Second Amendment gained through historical research, the judiciary would be able to decide Second Amendment challenges to gun control armed with knowledge of the intent of the Framers of the Constitution and the Bill of Rights.[98] Once the judiciary carefully analyzes historical data and reaches a consensus as to the true meaning of the Second Amendment, courts will no longer decide challenges to gun control legislation based upon whim or personal inclinations.[99]

It is probable that the judiciary has refused to render clear decisions in Second Amendment challenges to gun control laws so as to avoid involvement in the political controversy surrounding

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95 *See* Bogus, *supra* note 5, at 1153 (recognizing that the courts often try to avoid political entanglements).

96 Recently, Seton Hall University School of Law instituted a gun clinic, as part of its clinical program, in which students represent victims of gun violence. *See* Bulletin: SETON HALL SCHOOL OF LAW, SCHOOL OF LAW BULLETIN 45 (1995-97). As part of this program, students devise constitutional arguments for their clients based upon challenges to gun control laws. *Id.*

97 *See supra* notes 13 & 14 (tracing the inconsistent historical interpretation of the Second Amendment).

98 *See* Bordenet, *supra* note 3, at 1-2, 30 (footnotes omitted). Bordenet surmised from Supreme Court precedent that the guarantees of the Bill of Rights were to be broadly construed. *Id.* at 1-2 (citation omitted). In specific regard to the Second Amendment, Bordenet argued that the Framers of the Constitution debated incessantly over the right of individuals to keep and bear arms. *Id.* at 8-13. Bordenet stated that both James Madison and the First Congress rejected any suggestions that the Second Amendment be worded without a provision concerning the right of the people to bear arms. *Id.* at 14. Based upon historical documentation, Bordenet declared that the purpose of the Second Amendment was "to prevent the establishment of large standing armies by the federal government by guaranteeing the right of the people to keep and bear arms so as to provide the foundation for a national militia as the preferred armed service of the federal government to suppress insurrections and repel invasions." *Id.* at 16.

99 *See supra* notes 13-14 (illustrating the vast inconsistency in courts' approaches to gun control legislation challenges).

individual gun ownership.[100] In that sense, one must commend the judiciary for avoiding political entanglements.[101] On the other hand, by refusing to follow consistent standards in decision making, the judiciary has failed to properly review Second Amendment challenges to gun control legislation, succumbing to the political factions that oppose judicial activism.[102] The judiciary must realize that consistency and accuracy in Second Amendment interpretation is a proper exercise of judicial review.[103]

B. Commerce Clause Challenges

The judiciary had, until *Lopez*,[104] reviewed properly Commerce Clause challenges to gun control legislation and effectively had adhered to a standard of rational basis review in that vein.[105] In future cases involving a nexus between gun control and the Commerce Clause, the judiciary should give deference to legislative or agency decisions as seen in *Gun South*.[106] Continued deference to legislative regulations or statutes that have the effect of controlling guns in the marketplace is appropriate because the legislature has the capacity to debate the advantages and disadvantages of such legislation and ultimately to implement it.[107] Furthermore, the political process will serve as a check on any un-

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100 *See* Bogus, *supra* note 5, at 1156-64 (footnotes omitted). Bogus attributed the judiciary's reluctance to become involved in the gun controversy to several factors. *Id.* These factors include the large gun-consumer constituency, gun lobbies, judicial election concerns, criticism of judicial activism, backlash over tort reform, and influence of powerful interest groups. *Id.*

101 *See* HAMILTON, *supra* note 10, at 181-84 (discussing the necessary independence of the judiciary and emphasizing that the courts, in interpreting the law, serve as an intermediary between the people and their congressional representatives).

102 *See* Bogus, *supra* note 5, at 1156-64 (footnotes omitted) (exploring the various political influences that have swayed court opinions). Hamilton implored the judiciary to fulfill its role as a guarantor of the rights of the people as articulated by the Constitution. HAMILTON, *supra* note 10, at 182-83. Hamilton viewed legislation as subordinate to the meaning and intent of the Constitution's provisions. *Id.*

103 *But see* Bogus, *supra* note 5, at 1161 (noting that in this era of tort reform, it is unrealistic to assume that courts will be unaffected by political pressures, and explaining that courts' fears regarding judicial activism are to be expected).

104 United States v. Lopez, 115 S. Ct. 1624 (1995) (failing to defer to Congress by finding the statute in question unconstitutional).

105 *See, e.g.*, Gun South, Inc. v. Brady, 877 F.2d 858, 861 (11th Cir. 1989) (applying a rational basis test to a Commerce Clause challenge of gun control legislation).

106 McCauley, *supra* note 6, at 206 (footnote omitted) (arguing that "[a]s long as the agency bases its decision on reasonable grounds, the reviewing court should follow the deferential standard of review established by the APA").

107 *See* U.S. v. Darby, 312 U.S. 100, 115 (1941) (recognizing that regulations of interstate commerce are to be created and debated by the legislature without judicial interference).

reasonable exercises of legislative power by replacing those members of the legislature whose policies encroach upon the rights of the populace.[108]

In order to solidify a workable standard, the judiciary must continue to defer to the legislative branch on questions that involve gun control and interstate commerce. The judiciary must also recognize that ignoring the Second Amendment may impact negatively the viability of controlling guns through legislation premised upon the Commerce Clause, because too many possibilities for levels of review remain.[109]

C. *Products Liability Challenges*

Lastly, it is imperative that the judiciary create a guiding standard by which products liability principles can be reviewed when applied to gun manufacturers.[110] Based upon the lessons of the past, the judiciary should realize that standardless decision-making leads to inconsistency, confusion, and needless debate.[111] In deciding the scope and extent of liability for the design and manufacture of guns, the judiciary should impose a liability that balances the interests of manufacturers, public safety, and individual Second

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108 *See* Mark Udulutch, Note, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19, 43 (1989) (footnotes omitted) (stating that Congress often uses the Commerce Clause to draft gun control statutes because it is not difficult to create a rational argument that can receive deference from the courts). The judiciary has referred to the history of the clause when faced with challenges to gun control legislation, and has hooked its analysis in the clause as a constitutional rationale for banning firearm possession. *See* Reddick, *supra* note 6, at 872 (citation omitted). Therefore, the example of the judiciary's interpretation of Commerce Clause challenges to gun control legislation is instructive because it demonstrates that an understanding of a constitutional provision's historical meaning is essential to consistent analysis and decision making. *See supra* notes 37 & 38 (explaining the historical development of Commerce Clause analysis).

109 *See* Udulutch, *supra* note 103, at 33 (citing Perez v. United States, 402 U.S. 146, 156 (1971)) (other citations omitted) (finding that since *Perez v. United States*, courts defer to Congress on any rational argument that shows a nexus between commerce and the activity to be regulated).

110 *Cf.* Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 975-77 (1993) (footnotes omitted) (arguing that binding judicial review paralyses the legislature, weakens political movements, and fails to ensure positive social change). *See generally* Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339 (1987) (discussing the balance between predominant standards of judicial lawmaking and the conventional morality theory of judicial review which embraces the idea that courts interpreting moral questions frequently refer to prevalent community values).

111 *See supra* notes 13 & 14 (tracing the historical developments illuminating the inconsistent decision making).

Amendment rights.[112] The judiciary has assumed primary responsibility for molding products liability law and can continue to carve out nuances.[113]

The time has come for the judiciary to utilize all of its resources in dealing with the nation-wide problem of gun violence. One should not view this urging as a mere call for judicial activism but, rather, as a call to duty to the judiciary to rule consistently on gun control laws within constitutional parameters and pursuant to adopted standards. Should the judiciary fail to meet this obligation by refusing to adopt a unified and consistent approach to gun control analysis, a nation besieged by gun violence will be encouraged to control guns without judicial review, perhaps embracing nondemocratic alternatives.

Michelle Capezza

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112 *See Burkett v. Freedom Arms, Inc.*, 704 P.2d 118, 122 (Or. 1985) (recognizing the dangers of handguns but declining to impose enterprise liability); *see also* Halbrook, *supra* note 7, at 365 (suggesting that an individual can only exercise the right to keep and bear arms if arms exist in society). In the future, it may be possible to institute tort actions against the users of guns for engaging in inherently dangerous activities. *See Burkett*, 704 P.2d at 121 (suggesting that tort actions against gun users are a future possibility). While manufacturers may be more desirable as defendants in tort actions, successful suits under current law are unlikely because manufacturing is not an inherently dangerous activity. *See id.*

113 *See, e.g.*, Kelley v. R.G. Indus., Inc., 497 A.2d 1143 (Md. 1985) (carving out an exception to current restrictions on gun manufacturer liability for a limited type of handgun and reminding that the law, as a function of society, must seek justice in light of current circumstances and knowledge).