

THE DEPARTMENT OF JUSTICE'S POSITION ON THE SECOND  
AMENDMENT: ADVANCING THE NATION'S INTEREST OR  
PUTTING THE NATION AT RISK?

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Quote: I understand that being Attorney General means enforcing the laws as they are written, not enforcing my own personal preference. It means advancing the nation's interest, not advocating my personal interest.

John Ashcroft<sup>1</sup>

Based on his close ties to the gun lobby and his strong support for their agenda, it is difficult to have confidence that Senator Ashcroft will fully and fairly enforce the nation's gun control laws and not seek to weaken them.

Senator Edward Kennedy<sup>2</sup>

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.

Second Amendment of the United States Constitution<sup>3</sup>

INTRODUCTION

In the United States, there has been fierce debate over the Second Amendment and the scope of the right that it protects. Pro-gun enthusiasts as well as some academics and historians have fervently argued that the Second Amendment protects an individual's right to bear arms.<sup>4</sup> Subscribing to the "individual rights" view, they argue that the Second Amendment grants an individual the right to possess and use firearms for any purpose, subject only

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1. *Confirmation Hearing on the Nomination of John Ashcroft to be Attorney General of the U.S.: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 46 (2001) (statement of John Ashcroft, Attorney General Designee), available at <http://frwebgate.access.gpo.gov> (last visited Sept. 2, 2003).

2. *Nomination of John Ashcroft to be Attorney General of the United States—Continued*, 147 CONG. REC. S839, 852 (daily ed. Jan. 31, 2001) (statement of Sen. Kennedy), available at <http://access.gpo.gov> (last visited Sept. 2, 2003).

3. U.S. CONST. amend. II.

4. See generally Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (advocating individual rights view); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (advocating individual rights view).

to limited government regulation.<sup>5</sup> On the other side of the debate are gun control advocates, other academics and scholars who believe that the Second Amendment only protects the right to bear arms when related to a well-regulated state militia.<sup>6</sup> Their view can be characterized as the “collective rights” interpretation of the Second Amendment.<sup>7</sup> This group believes that the Second Amendment protects the people’s right to maintain effective state militias, but does not afford any type of individual right to own or possess weapons.<sup>8</sup>

Despite all the debate over the Second Amendment, the Supreme Court has been surprisingly silent over the years on the scope of the right guaranteed by the Second Amendment. In *United States v. Miller*,<sup>9</sup> the lone case to specifically address the Second Amendment, the Court held that the Second Amendment did not protect possession of a sawed-off shotgun since the gun was not suitable for use in the militia.<sup>10</sup> Because the Court’s rather cryptic holding only addressed the sawed-off shotgun at issue and was silent as to whether there were any guns that would be protected, both proponents of the individual rights view and of the collective rights view have argued that *Miller* supports their positions.<sup>11</sup>

Notwithstanding the Supreme Court’s relatively limited jurisprudence interpreting the Second Amendment, until last year, the great majority of federal circuit courts interpreted the Second Amendment to protect the right to bear arms only in connection with a well-regulated militia, citing *Miller* in support of their holdings.<sup>12</sup> For decades, the Department of Justice agreed

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5. See *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2002).

6. Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 294 (2000) (advocating collective rights view); 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 (Fall 1989) (advocating collective rights view); Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103, 124 (2000) (advocating collective rights view); David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588 (2000) (advocating collective rights view).

7. See *Silveira*, 312 F.3d at 1060. There is a third interpretation of the Second Amendment that is also related to the militia, referred to as the limited individual rights group. See *id.* This group believes that the Second Amendment does confer an individual right to bear arms so long as that possession bears a reasonable relationship to militia service. *Id.* While both the collective rights and limited individual rights views are tied to the militia, the collective rights view is much more predominant than the individual rights view. See *id.*

8. *Id.*

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

10. *Id.* at 178.

11. See *infra* text accompanying notes 42-74.

12. See *infra* notes 42-51 and accompanying text.

with the militia interpretation as well.<sup>13</sup> Thus, while academics, National Rifle Association (“NRA”) members, gun control advocates, and politicians feverishly argue over what the Second Amendment means, in the courts at least, it was well settled that the Second Amendment only protected a right to bear arms having some relation to a well-regulated militia. This position also was clear among federal prosecutors who argued the militia interpretation when prosecuting convictions under federal gun laws.

A crucial turning point in the legal debate on the Second Amendment occurred in 2001 when the Fifth Circuit decided *United States v. Emerson*.<sup>14</sup> While that case upheld the defendant’s conviction for possessing a firearm while subject to a domestic violence restraining order in violation of a federal statute, for the first time a federal circuit court found that the Second Amendment more broadly protected an individual’s right to bear arms.<sup>15</sup> Soon after *Emerson* was decided, Attorney General John Ashcroft, ignoring other federal court precedent and prior Department of Justice policy, officially switched the Department of Justice’s stance on the Second Amendment, agreeing with the Fifth Circuit that the Second Amendment more broadly protects the rights of individuals.<sup>16</sup>

Ashcroft’s policy switch has prompted criminal defense lawyers throughout the country to move federal court judges to dismiss the gun charges against their clients, based on the Department’s new position that the Second Amendment more broadly protects the rights of individuals.<sup>17</sup> Government lawyers have been put in a conflicted position since, when prosecuting a conviction under a gun law, they have to essentially argue against themselves, promoting the individual rights view of the Justice Department, while at the same time arguing to uphold federal gun laws.

Thus far, these Second Amendment challenges have been rejected by federal courts, largely because the appellate court precedent in every circuit but the Fifth Circuit still interprets the Second Amendment under the militia

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13. Dennis A. Henigan, *Ashcroft’s Bad Aim: What is Going on with the Justice Department and Guns?*, LEGAL TIMES, July 29, 2002 at 35, available at <http://www.law.com>; Tony Mauro, *Behind the U.S. Switch on Gun Rights: Ashcroft is Seen as the Moving Force*, NAT’L LAW J., May 13, 2002, at A1.

14. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

15. *Id.* at 260.

16. Memorandum from John Ashcroft, Attorney General, United States, to all United States Attorneys (Nov. 9, 2001) [hereinafter Ashcroft, Memorandum to United States Attorneys], available at <http://www.handgunfree.org/HFAMain/topics/secondamendment/ashcroft-memo.htm> (last visited Sept. 3, 2003).

17. *Silveira v. Lockyer*, 312 F.3d 1052, 1065 (9th Cir. 2002); Adam Liptak, *Revised View of 2nd Amendment is Cited as Defense in Gun Cases*, N.Y. TIMES, July 23, 2002, at A1.

interpretation.<sup>18</sup> However, this Comment argues that Ashcroft's policy switch may weaken the government's ability to prosecute Second Amendment challenges, putting our nation's gun laws at risk of being declared unconstitutional.

Part I of this Comment will provide background on how the courts have handled Second Amendment claims by discussing the Supreme Court's and federal courts' Second Amendment jurisprudence. Part II will discuss how the Department of Justice has interpreted the Second Amendment in the past when prosecuting Second Amendment challenges and how Ashcroft officially changed the government's position on the Second Amendment. Finally, Part III will discuss how Ashcroft's individual rights interpretation may make our nation's gun laws vulnerable to attack. It will examine Second Amendment challenges that have arisen since the government's change in interpretation, discuss how courts, generally speaking, handle constitutional claims, and explore the conflicted position the new policy puts federal prosecutors in when handling these challenges.

## I. COURTS AND THE SECOND AMENDMENT

### A. *The Supreme Court and the Second Amendment*

The Supreme Court has considered a direct Second Amendment challenge to a federal firearms statute just once in *United States v. Miller*.<sup>19</sup> In *Miller*, the government appealed to the Supreme Court after the United States District Court for the Western District of Arkansas dismissed indictments charging Defendants in violation of the National Firearms Act for transporting an unregistered double barrel 12-gauge shotgun in interstate commerce.<sup>20</sup> The district court held that the section of the Act making it unlawful to transport an unregistered firearm in interstate commerce was unconstitutional.<sup>21</sup> The Supreme Court reversed the district court's ruling, holding that the Second Amendment did not protect possession of the weapon at issue because it was not suitable for use in the militia.<sup>22</sup> The Court stated:

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18. See Liptak, *supra* note 17.

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

20. *Id.* at 175, 177.

21. *Id.* at 177.

22. *Id.* at 178.

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.<sup>23</sup>

The Court discussed the role of the militia at the time the Constitution was adopted, stating that “[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.”<sup>24</sup> While there has been debate about the scope of the right in *Miller*,<sup>25</sup> the Court’s wording in *Miller* strongly implies that the Second Amendment does not grant an individual right to possess and use firearms for purposes unrelated to a militia, thus rejecting the traditional individual rights view.<sup>26</sup>

The only Supreme Court case after *Miller* in which the Court discussed the scope of the Second Amendment occurred in dicta in *Lewis v. United States*.<sup>27</sup> The Court in *Lewis* held that a federal statute prohibiting felons from possessing a firearm was constitutional, despite the fact that the predicate felony conviction may be subject to collateral attack on constitutional grounds.<sup>28</sup> In upholding the conviction, the Court noted in a footnote that “[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties,” citing *Miller* in support of that statement.<sup>29</sup> This statement in *Lewis*, like *Miller*, strongly implies that the Court rejects the individual rights theory.<sup>30</sup>

While no other Supreme Court opinions have directly addressed the scope of the Second Amendment, in several recent opinions, Supreme Court Justices have mentioned the Second Amendment in concurring and dissenting opinions, giving conflicting viewpoints of the scope of the Second Amendment.<sup>31</sup> In a recent opinion examining the constitutionality of a gun control statute, the Ninth Circuit provides a good summation of these Justices’

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23. *Id.*

24. *Id.*

25. *See* *United States v. Emerson*, 270 F.3d 203, 221-27 (5th Cir. 2001); *infra* text accompanying notes 42-74.

26. *See* *Silveira v. Lockyer*, 312 F.3d 1052, 1061 (9th Cir. 2002).

27. *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

28. *Id.* at 65.

29. *Id.* at 65 n.8.

30. *See Silveira*, 312 F.3d at 1061-62.

31. *See id.* at 1062-63.

statements regarding the Second Amendment.<sup>32</sup> First, the Ninth Circuit cites Justice Douglas' (joined by Justice Thurgood Marshall) dissent in *Adams v. Williams*:

There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a state may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.<sup>33</sup>

Douglas' strong language regarding the regulation of pistols seems to indicate that he would support a collective rights interpretation of the Second Amendment and does not believe the Second Amendment provides any fundamental individual right to bear arms. Next, the Ninth Circuit discusses Justice Stevens' dissent in *United States v. Lopez*,<sup>34</sup> in which the Court held that Congress exceeded its authority under the Commerce Clause by enacting the Gun Free School Zones Act.<sup>35</sup> The Ninth Circuit argues that Justice Stevens' dissent in *Lopez*, while not mentioning the Second Amendment, "strongly implied that he believes that it offers no obstacles to the federal government's ability to regulate firearms . . . ."<sup>36</sup> The court quotes Stevens' dissent:

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use . . . .<sup>37</sup>

The Ninth Circuit then points to Justice Thomas' concurrence in *Printz v. United States*,<sup>38</sup> where the Court held unconstitutional a federal requirement that state officers perform background checks on gun purchasers because it violated the Tenth Amendment. The Ninth Circuit suggests that Justice Thomas may support the individual rights view.<sup>39</sup> Justice Thomas stated:

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32. *Id.*

33. *Id.* at 1062 (quoting *Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting)).

34. *United States v. Lopez*, 514 U.S. 549 (1995).

35. *Silveira*, 312 F.3d at 1062.

36. *Id.*

37. *Id.* (quoting *Lopez*, 514 U.S. at 602-03 (Stevens, J., dissenting)).

38. *Printz v. United States*, 521 U.S. 898 (1997).

39. *Silveira*, 312 F.3d at 1062-63.

This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to “keep and bear arms,” a colorable argument exists that the Federal Government’s regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment’s protections. As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms “has justly been considered, as the palladium of the liberties of a republic.”<sup>40</sup>

Finally, the Ninth Circuit points out Chief Justice Warren Burger’s highly publicized comments about the Second Amendment that he made after his retirement:

In an interview, former Chief Justice Burger stated that the traditional individual rights view was: “one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I’ve ever seen in my lifetime. The real purpose of the Second Amendment was to ensure that state armies—the militia—would be maintained for the defense of the state. The very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires.”<sup>41</sup>

In sum, although the exact scope of the right protected by the Second Amendment is not entirely clear from the Supreme Court’s limited jurisprudence on the Second Amendment, the Court’s holding in *Miller* and its dicta in *Lewis* strongly imply that the Second Amendment right must relate to the militia in some way, and that the Court rejects the individual rights view of the Second Amendment.

#### *B. Federal Circuit Courts and the Second Amendment*

Despite reliance on *Miller* by both proponents of the individual rights view and those supporting the collective rights militia view, until the Fifth Circuit’s decision in *Emerson*,<sup>42</sup> federal circuit courts rejected the traditional individual rights theory, holding that the Second Amendment does not guarantee a right to keep and bear arms that have no “reasonable relationship to the preservation or efficiency of a well-regulated militia,” citing *Miller* in support.<sup>43</sup>

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40. *Id.* (quoting *Printz*, 521 U.S. at 938-39 (Thomas, J., concurring) (citation omitted)).

41. *Id.* at 1063 (quoting Warren E. Burger, *The Right to Bear Arms*, *PARADE MAG.*, Jan. 14, 1990, at 4).

42. 270 F.3d 203 (5th Cir. 2001).

43. *See, e.g.*, *United States v. Friel*, No. 92-2418, 1993 U.S. App. LEXIS 20718, at \*4 (1st Cir.

Federal appellate courts have relied on *Miller* in upholding convictions for violations of 18 U.S.C.S. § 922(o), a statute criminalizing the possession or transfer of machine guns.<sup>44</sup> For example, in *United States v. Rybar*,<sup>45</sup> Appellant was convicted for selling a machine gun in violation of 18 U.S.C.S. § 922(o). Relying on *Miller*, Appellant argued that the arrest violated his Second Amendment right to keep and bear arms because the machine guns he was arrested for possessing had some military utility. The Third Circuit said: “The *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its “possession or use” and militia-related activity. [Appellant] has not demonstrated that his possession of the machine guns had any connection with militia-related activity.”<sup>46</sup> Appellant challenged *Miller*’s interpretation of the Second Amendment, and the Third Circuit said:

As one of the inferior federal courts subject to the Supreme Court’s precedents, we have neither the license nor the inclination to engage in such freewheeling presumptuousness. In any event, this court has on several occasions emphasized that the Second Amendment furnishes no absolute right to firearms. Federal attempts at firearms regulation have also consistently withstood challenge under the Second Amendment.<sup>47</sup>

Also, in *United States v. Wright*,<sup>48</sup> the Eleventh Circuit affirmed Appellant’s conviction for possessing machine guns. The court stated that the Second Amendment does not grant “constitutional protection to an individual whose possession or use of machineguns . . . is not reasonably related to an organized

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Aug. 17, 1993) (upholding defendant’s felony conviction for possessing firearms) (“The Supreme Court plainly has held that the Second Amendment . . . applies only to firearms having a ‘reasonable relationship to the preservation or efficiency of a well regulated militia . . . .’” (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939))). See also *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (“[T]he [Second] [A]mendment does not confer an absolute individual right to bear any type of firearm. . . . Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right.”); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (affirming appellant’s convictions for violations of federal firearms statutes). The Second Circuit stated “the right to possess a gun is clearly not a fundamental right.” *Id.* at 128. “[I]n the absence of evidence showing that firearm has ‘some reasonable relationship to the preservation or efficiency of a well regulated militia,’ Second Amendment does not guarantee right to keep and bear such a weapon.” *Id.* (quoting *Miller*, 307 U.S. at 178).

44. E.g., *United States v. Rybar*, 103 F.3d 273, 285 (3d Cir. 1996); *United States v. Wright*, 117 F.3d 1265, 1272-74 (11th Cir. 1997).

45. *Rybar*, 103 F.3d 273 (3d Cir. 1996).

46. *Id.* at 286 (quoting *Miller*, 307 U.S. at 178) (citations omitted).

47. *Id.* (citations omitted).

48. *Wright*, 117 F.3d at 1265.



state militia.”<sup>49</sup> Federal appellate courts have also relied on *Miller* when upholding convictions for violating 18 U.S.C.S. § 922(g)(8)-(9), which prohibits the possession of firearms by people who are subject to a domestic violence order or who have been convicted of domestic violence.<sup>50</sup> Finally, an appellate court has relied on *Miller* and *Lewis* in upholding Appellant’s conviction for violating 18 U.S.C.S. §§ 922(g)(1)(k), prohibiting possession of firearms after a felony conviction and possession of firearms with obliterated serial numbers.<sup>51</sup>

Despite substantial appellate precedent supporting the militia view of the Second Amendment, in *Emerson*, the Fifth Circuit became the first federal appellate court to interpret the Second Amendment as granting an individual right to bear arms.<sup>52</sup> Defendant, Timothy Joe Emerson, was arrested after he pulled a Beretta pistol from his desk drawer, cocked it and pointed it at his wife and daughter.<sup>53</sup> He was indicted for violating 18 U.S.C.S. § 922(g)(8), part of the federal Violence Against Women Act that prohibited a person subject to a domestic violence restraining order from possessing a firearm while subject to that order.<sup>54</sup> The United States District Court for the Northern District of Texas held that the federal statute at issue was unconstitutional on its face under the Second Amendment and as applied to Defendant under the Due Process Clause of the Fifth Amendment.<sup>55</sup> The Fifth Circuit reversed the lower court, rejecting the lower court’s holding that the Second Amendment prohibited Emerson from being indicted for possessing guns while under a domestic violence restraining order.<sup>56</sup> Although the court

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49. *Id.* at 1267.

50. *See, e.g.*, *United States v. Napier*, 233 F.3d 394, 402-03 (6th Cir. 2000) (affirming Appellant’s conviction for possession of firearms while subject to a domestic violence order); *see also* *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (affirming Appellant’s conviction for possession of firearms since Appellant was convicted of domestic violence) (“Whatever questions remain unanswered, *Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia.”).

51. *See* *United States v. Baer*, 235 F.3d 561, 564 (10th Cir. 2000) (stating that the Supreme Court has held, “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’” (quoting *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (quoting *Miller*, 307 U.S. at 178))).

52. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

53. Brief for the United States in Opposition at 3, *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001) (No. 01-8780), *cert. denied*, 536 U.S. 907 (2002) [hereinafter *Emerson Brief*], available at <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.html> (last visited Sept. 15, 2003).

54. *Emerson*, 270 F.3d at 210, 212-13.

55. *Id.* at 210.

56. *Id.*

found that the gun control law at issue did not violate the Second Amendment as applied to Emerson, it held that the Second Amendment:

[P]rotects the rights of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*.<sup>57</sup>

The court qualified this individual right to bear arms stating that it “does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.”<sup>58</sup> In applying the “individual rights view” to Emerson, the Fifth Circuit concluded that the restraining order at issue, “is sufficient, albeit likely minimally so, to support the deprivation, while it remains in effect, of the defendant’s Second Amendment rights.”<sup>59</sup>

In reaching its conclusion that the Second Amendment protects individual rights, the *Emerson* court examined the government’s brief in the *Miller* case.<sup>60</sup> It argued that the government made two legal arguments in its brief. First, the right secured by the Second Amendment is “only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.”<sup>61</sup> Second, the government argued:

While some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property as well as the right of the people to bear them collectively, the cases are unanimous in holding that the term “arms” as used in constitutional provisions refers only to those weapons which are ordinarily used for military or *public defense purposes* and does not relate to those weapons which are commonly used by criminals. . . . That the foregoing cases conclusively establish that the Second Amendment has relation only to the *right of the people to keep and bear arms for lawful purposes* and does not conceivably relate to weapons of the type referred to in the National Firearms Act cannot be doubted. Sawed-off shotguns, sawed-off rifles and machine guns are clearly weapons which can have no legitimate use in the hands of private individuals.<sup>62</sup>

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57. *Id.* at 260.

58. *Id.* at 261.

59. *Id.* at 264-65.

60. *Id.* at 221-24.

61. *Id.* at 222 (citations omitted).

62. *Id.* at 222-23 (emphasis added) (citations omitted).

The *Emerson* court concluded that the *Miller* case was decided upon the government's second argument.<sup>63</sup> The court argued that the *Miller* Court does not support a militia interpretation.<sup>64</sup> However, then the Fifth Circuit pointed out that it did not base its analysis on the assumption that the *Miller* Court did, in fact, support the individual rights interpretation of the Second Amendment as opposed to a militia interpretation.<sup>65</sup> Because the court believed that *Miller* did not resolve the issue, it analyzed the Second Amendment's history and language in concluding that the Second Amendment more broadly protects the rights of individuals.<sup>66</sup> Across the nation, pro-gun enthusiasts and proponents of the individual rights view celebrated the Fifth Circuit's opinion although any hope they had that the other federal circuit courts would accept the individual rights view was short-lived.

Despite the *Emerson* court's in-depth analysis of *Miller* and the history of the Second Amendment, in *Silveira v. Lockyer*,<sup>67</sup> the Ninth Circuit recently rejected the Fifth Circuit's individual rights interpretation and its view of *Miller*.<sup>68</sup> It upheld Defendant's conviction for violating the state's assault weapon ban, concluding that the Second Amendment confers a collective right to arm state militias, not an individual, personal right to possess guns.<sup>69</sup> As a result, it held that individuals lack standing to assert Second Amendment challenges.<sup>70</sup> Like the *Emerson* court, the Ninth Circuit took an in-depth review of the Second Amendment. In reaching its conclusion, the court extensively examined Supreme Court discussion of the Second Amendment, and it noted other federal circuit courts' interpretations of the Second Amendment, including the *Emerson* opinion.<sup>71</sup> The court conceded that *Miller* "did not . . . definitively resolve the nature of the right that the Second Amendment establishes."<sup>72</sup> Therefore, the court's decision was "guided by additional factors—the text and structure of the amendment, an examination of the materials reflecting the historical context in which it was adopted, and a review of the deliberations that preceded the enactment of the

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63. *Id.* at 224.

64. *Id.* at 226.

65. *Id.* at 227.

66. *Id.* at 226-27.

67. 312 F.3d 1052 (9th Cir. 2002).

68. *Id.* at 1065 n.13.

69. *Id.* at 1056.

70. *Id.* at 1066-67.

71. *Id.* at 1060-66.

72. *Id.* at 1086.

amendment—considered in a manner that comports with the rationale of *Miller*.<sup>73</sup>

In concluding that the collective rights militia view was the correct interpretation of the Second Amendment, the *Silveira* court rejected the Fifth Circuit's analysis of *Miller*:

In the view of the *Emerson* court, the Supreme Court's opinion in *Miller* adopted the government's second argument, and not its first, which is not an unreasonable conclusion. That conclusion does not, however, lead to the result the Fifth Circuit then reaches. In our view, the government's second argument supports . . . the [militia interpretation], but not the traditional individual rights doctrine that the Fifth Circuit adopts. Moreover, in an attempt to reconcile its position with *Miller*, the Fifth Circuit modifies that doctrine by asserting that certain undefined types of arms are excluded from the amendment's coverage. *Miller* suggests that the arms protected by the amendment, if any, are those related to militia service, but *Emerson* strays far from that view. While it is unclear precisely what types of arms the Fifth Circuit would deem included or excluded, *Emerson's* conclusion that the Second Amendment protects private gun ownership so long as the weapons have "legitimate use in the hands of private individuals," represents a far different approach from that stated in *Miller*. In our view, the Fifth Circuit's decision is incompatible with the Supreme Court ruling.<sup>74</sup>

## II. ATTORNEY GENERAL ASHCROFT AND THE SECOND AMENDMENT

### A. Department of Justice Policy: Pre-Emerson

Prior to *Emerson*, the Department of Justice followed the majority of federal courts, taking the position that the Second Amendment protects only gun possession related to the preservation of a well-regulated militia.<sup>75</sup> In fact, while *Emerson* was pending before the Fifth Circuit, the Department of Justice filed an *amicus curiae* brief on behalf of the United States of America. A portion of this brief was restated in an ethics complaint made against Ashcroft to the Inspector General.<sup>76</sup> In it the government argued:

In striking down Section 922(g)(8) as unconstitutional under the Second Amendment . . . the District Court broke with the long-standing rule of *stare decisis*. Every modern-day

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73. *Id.*

74. *Id.* at 1064-65 n.13 (citation omitted).

75. See sources cited *supra* note 13.

76. Letter from Michael D. Barnes, President, Brady Center to Prevent Gun Violence and Scott Harshbarger, President, Common Cause, to Glenn A. Fine, Inspector General, United States Department of Justice and Joyce E. Peters, Bar Counsel, Board on Professional Responsibility, District of Columbia Court of Appeals at 2 (July 3, 2001) [hereinafter Letter from Barnes to Fine], available at <http://www.gunlawsuits.org/downloads/070301complaint/complaint.pdf> (last visited Sept. 15, 2003).

federal court charged with reviewing the constitutionality of a firearms statute against a direct Second Amendment challenge, including the Supreme Court in *United States v. Miller*, the Fifth Circuit, and nearly every federal court of appeals, has determined that possession of the firearm must be “reasonably related” to the preservation or efficiency of the militia before the Second Amendment will shield such possession.<sup>77</sup>

*B. Ashcroft Notifies the NRA of His Personal Belief Regarding the Second Amendment*

Despite the Supreme Court and federal circuit court precedent supporting the militia interpretation of the Second Amendment, as well as the longstanding Department of Justice policy supporting the militia view made pointedly clear in the government’s brief in *Emerson*, Attorney General Ashcroft sent a letter to the NRA expressing his personal view of the Second Amendment nearly five months before *Emerson* was decided by the Fifth Circuit.<sup>78</sup> Supporting the traditional individual rights view in his letter, Attorney General Ashcroft said,

let me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms. While some have argued that the Second Amendment guarantees only a “collective” right of the States to maintain militias, I believe the Amendment’s plain meaning and original intent prove otherwise.<sup>79</sup>

The fact that Ashcroft wrote this letter to the NRA on Department of Justice letterhead while *Emerson* was pending before the Fifth Circuit, prompted the Brady Center to Prevent Gun Violence and Common Cause to file a complaint against Ashcroft for “violat[ing] numerous ethical guidelines.”<sup>80</sup> Specifically they alleged that Ashcroft violated American Bar Association Model Rule 1.7(b), which requires attorneys to remain loyal to their clients’ interests and prohibits conflicts of interest.<sup>81</sup> Also, they alleged that Ashcroft violated Model Rule 3.6(a) which “prohibit[s] extrajudicial statements substantially likely to materially prejudice a judicial proceeding.”<sup>82</sup> The complaint conceded that “[a]rguably, the Attorney General has broad discretion, as a

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77. *Id.* (emphasis added).

78. See letter from John Ashcroft, Attorney General, United States, to James Jay Baker, Executive Director, National Rifle Association (May 17, 2001), available at [http://www.gunlawsuits.org/downloads/070301complaint/ashcroft\\_letter.pdf](http://www.gunlawsuits.org/downloads/070301complaint/ashcroft_letter.pdf) (last visited Sept. 15, 2003).

79. *Id.*

80. See Letter from Barnes to Fine, *supra* note 76, at 1.

81. *Id.*

82. *Id.*

political appointee, to advocate controversial legal positions.”<sup>83</sup> However, it argued that Ashcroft’s public letter to the NRA, containing arguments “utterly inconsistent” with the analysis contained in the *amicus* brief filed by the government in the *Emerson* case, “pose[d] a substantial risk of undercutting [the government’s] position before the Court.”<sup>84</sup> Further, the complaint pointed out that while it would have been inappropriate for any attorney representing the United States to write such a letter to the NRA, “Mr. Ashcroft’s position as Attorney General exacerbates these improprieties, because of his influence, the publicity attendant to his remarks, and the fact that he can reasonably be perceived as stating the official legal position of the United States.”<sup>85</sup>

*C. Ashcroft Sends a Memo to Federal Prosecutors: Second Amendment Protects an Individual Right*

After the Fifth Circuit decided *Emerson*, Ashcroft wasted no time in reversing the Department of Justice’s longstanding policy of interpreting the Second Amendment under the militia view, to reflect the individual rights view that he had announced publicly to the NRA. On November 9, 2001, less than a month after the Fifth Circuit issued the *Emerson* decision, Ashcroft sent a memorandum to all United States Attorneys noting that the Fifth Circuit affirmed in *Emerson* that the Second Amendment protects individual rights.<sup>86</sup> Ashcroft pointed out that the existence of an individual right to possess firearms:

Does not mean that reasonable restrictions cannot be imposed to prevent *unfit persons* from possessing firearms or to restrict possession of firearms *particularly suited to criminal misuse*. In my view, the *Emerson* opinion, and the balance it strikes, generally reflects the correct understanding of the Second Amendment. . . . The Department can and will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws. The Department has a solemn obligation both to enforce federal law *and* to respect the constitutional rights guaranteed to Americans.<sup>87</sup>

Ashcroft’s memorandum clearly requires federal prosecutors to promote the “individual rights” view he supports when arguing gun conviction cases

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83. *Id.* at 2.

84. *Id.* at 3.

85. *Id.* at 4 (citations omitted).

86. Ashcroft, Memorandum to United States Attorneys, *supra* note 16.

87. *Id.* (emphasis added).

across the country. However, it is not clear how federal prosecutors are supposed to strike the balance between “enforc(ing) federal law” and “respect[ing] the constitutional rights guaranteed to Americans.” Ashcroft did inform federal prosecutors that the individual right is not absolute. However, it is not clear what Ashcroft considers to be a reasonable restriction, the types of groups he believes are “unfit” to possess a firearm, nor what guns can be restricted because they are “particularly suited to criminal misuse.”

*D. Government’s New Position is Noted in Supreme Court Briefs*

Ashcroft’s individual rights view of the Second Amendment was quietly solidified as the official Department of Justice position on May 6, 2002. On that date, Solicitor General Theodore B. Olson submitted two briefs to the Supreme Court containing footnotes that stated:

[T]he current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse.<sup>88</sup>

This was the first time the Department of Justice, speaking for the federal government, made clear in a formal filing its position that the Second Amendment grants an individual the right to bear arms.<sup>89</sup> Olson acknowledged that the briefs represented a shift in government policy since, when the two cases were argued before separate appellate courts, “the government argued that the Second Amendment protects only such acts of firearm possession as are reasonably related to the preservation or efficiency of the militia.”<sup>90</sup>

Despite applying the individual rights interpretation, Olson argued that the defendants’ Second Amendment challenges did not warrant the Supreme Court’s review.<sup>91</sup> In the *Emerson* brief, he argued for the Court to affirm the

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88. Emerson Brief, *supra* note 53, at 19 n.3; Brief for the United States in Opposition at 5 n.2, *Haney v. United States*, 264 F.3d 1161 (10th Cir. 2001) (No. 01-8272), *cert. denied*, 536 U.S. 907 (2002) [hereinafter Haney Brief], available at <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf> (last visited Sept. 12, 2003).

89. Edward Walsh, *U.S. Argues for Wider Gun Rights: Supreme Court Filing Reverses Past Policy*, WASH. POST, May 8, 2002, at A1.

90. *Id.*

91. Emerson Brief, *supra* note 53, at 21; Haney Brief, *supra* note 88, at 6-7.

Fifth Circuit's reasoning that prohibiting firearm possession for those subject to a domestic violence restraining order is a permissible limitation.<sup>92</sup> In *Haney*, he argued that the individual rights view does not prevent a statutory ban on private possession of machine guns.<sup>93</sup> Further, in the *Emerson* brief, Olson pointed out that "the government is aware of [no case], in which a court of appeals has found . . . any other federal statutory restriction on private gun possession--to be violative of the Second Amendment."<sup>94</sup>

These briefs provide no guidance regarding the scope of the right protected by the government's new individual rights interpretation. Clearly, the government believes that the Second Amendment does not protect an individual who is subject to a domestic violence restraining order, nor does it allow an individual to possess a machine gun. It is interesting that Olson pointedly notifies the Court that no federal gun law has been found to violate the Second Amendment.<sup>95</sup> Does that mean that while espousing the individual rights view, in reality, the government believes that no person's individual right would be impeded by a federal gun statute? While the Supreme Court refused to hear both *Emerson* and *Haney*, the debate over the Second Amendment and whether it protects an individual right to keep and bear arms has continued with renewed fervor since *Emerson* and the Department of Justice's official switch in policy.<sup>96</sup> Although Ashcroft may have intended the change in policy to be little more than a political move to placate supporters of the individual rights view, the policy may weaken the government's ability to prosecute Second Amendment challenges to our nation's gun laws.

### III. EFFECTS OF ASHCROFT'S POLICY SWITCH

#### *A. Defendants Across the Country Cite the New Policy as a Defense to Gun Convictions*

Since the Department of Justice's policy switch, criminal defense lawyers in firearm prosecutions around the country have been quick to cite the government's individual rights interpretation in arguing that their clients'

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92. Emerson Brief, *supra* note 53, at 19.

93. Haney Brief, *supra* note 88, at 5-6.

94. Emerson Brief, *supra* note 53, at 19.

95. *Id.*

96. See Linda Greenhouse, *Justices Reject Cases on Right to Bear Arms*, N.Y. TIMES, June 11, 2002, at A24.



constitutional right to bear arms was violated.<sup>97</sup> For example, by the end of September 2002, defendants had filed more than thirty-six Second Amendment challenges to gun possession laws in the District of Columbia alone.<sup>98</sup> Probably the most notorious defendant whose lawyers cited the Department of Justice's current position is John Walker Lindh.<sup>99</sup> Just a week after Olson formally clarified Ashcroft's individual rights interpretation of the Second Amendment in the *Haney* and *Emerson* briefs, Lindh's lawyers argued that his firearms charges should be dismissed and cited the Justice Department's new individual rights interpretation.<sup>100</sup> While the gun charges easily survived against John Walker Lindh, Second Amendment challenges made throughout the country by considerably more sympathetic defendants convicted of firearms violations may not always be so easily dismissed.

At this time, the effect that Ashcroft's individual rights view will have on gun laws is unknown.<sup>101</sup> Since the Supreme Court refused to hear *Emerson* and *Haney*, *Miller* still stands, and whatever the scope of that decision might be, in every federal circuit except for the Fifth Circuit, there is no personal right to bear arms that are not related to a well-regulated militia.<sup>102</sup> Also, as Solicitor General Olson pointed out in his *Emerson* brief to the Supreme Court, no federal gun law restricting private gun possession has ever been struck down by the federal courts.<sup>103</sup> On one hand, federal courts in every circuit but the Fifth Circuit may ignore the government's new position and follow the precedent of their respective circuits, like the *Silveria* court did in reaffirming its collective rights view of the Second Amendment.<sup>104</sup> On the

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97. See *Silveira v. Lockyer*, 312 F.3d 1052, 1065 (9th Cir. 2002) ("The reversal of position by the Justice Department has caused some turmoil in the lower courts, and had led to a number of challenges to federal statutes relating to weapons sales, transport, and possession, including a heavy volume in the district courts of this circuit."); Greenhouse, *supra* note 96; Liptak, *supra* note 17; Neely Tucker & Arthur Santana, *D.C. Handgun Ban Challenged in Court: Attorneys in 2 Cases Cite Ashcroft Stance on 2nd Amendment*, WASH. POST, May 30, 2002, at A1.

98. Dahlia Lithwick, *Gun Crazy*, SLATE MAG., Sept. 26, 2002, available at LEXIS, News Group File, All (last visited Sept. 15, 2003).

99. *Id.*; Greenhouse, *supra* note 96.

100. Henigan, *supra* note 13.

101. Dennis A. Henigan, Remarks at James Madison University, The Second Amendment: Then and Now (Mar. 14, 2002), available at <http://www.gunlawsuits.com/defend/second/031402.asp> (last visited Aug. 19, 2003).

102. See Press Release, Brady Center to Prevent Gun Violence, Ashcroft Weakens Justice Department's Ability to Enforce and Defend Gun Laws by Officially Reversing DOJ's Position on the Second Amendment (May 7, 2002), available at <http://www.gunlawsuits.org/features/press/release.asp?Record=396> (last visited Aug. 19, 2003).

103. *Emerson Brief*, *supra* note 53, at 19.

104. *Silveira v. Lockyer*, 312 F.3d 1052, 1094 (9th Cir. 2002).

other hand, Ashcroft's individual rights view may convince judges to take a closer look at the gun laws at issue and assess whether the gun law is sufficiently "reasonable" or if the firearm involved is "particularly suited to criminal misuse."<sup>105</sup> And, district judges in the Fifth Circuit, in following *Emerson* precedent, will have to apply the individual rights interpretation of the Second Amendment when Second Amendment challenges are made. If a court adopts the individual rights view, the standard of review that the court applies to evaluate the Second Amendment challenge will likely affect how vulnerable our federal gun statutes are to attack.

*B. An Individual Right to Bear Arms—A Fundamental Right or Something Less?*

*1. Supreme Court Review of Constitutional Challenges Generally*

Generally speaking, when a court examines a particular statute to determine if it is constitutional, it usually applies: 1) a rational basis, 2) a strict scrutiny, or, less frequently, 3) an intermediate review standard.<sup>106</sup> In many constitutional challenges, the standard of review that the court chooses is critical, as it will likely determine whether the statute at issue will be upheld. For example, when the rational basis standard is applied, the burden of persuasion is usually on the individual challenging the government's action to prove: 1) that the government was not pursuing a legitimate governmental objective and 2) that there was no rational relation between the law that the government chose and the government's objective.<sup>107</sup> This is a very heavy burden for an individual to meet, and if a court applied this standard to a statutory restriction on private gun possession, the statute is almost certain to be upheld.<sup>108</sup> On the other hand, if the court applied strict scrutiny, the government would have the burden of persuasion and would have to convince the court that: 1) it is pursuing a compelling interest and 2) that the statute is

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105. See Henigan, *supra* note 13.

106. See *infra* notes 107-26 and accompanying text.

107. See *Whalen v. Roe*, 429 U.S. 589, 597-98 (1977) (upholding New York's maintenance of a computerized database of users of certain prescription drugs); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488-91 (1955) (upholding an Oklahoma statute preventing opticians from fitting eyeglass lenses into frames without a prescription from an ophthalmologist or optometrist); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 (1938) (upholding federal prohibition on the interstate shipping of filled milk).

108. See cases cited *supra* note 107.

narrowly tailored to meet its objectives.<sup>109</sup> Essentially, that often means proving that there are no less restrictive means to meet the government's goal.<sup>110</sup> Therefore, when a court applies strict scrutiny to a statute, the law is almost always struck down.<sup>111</sup> Finally, a court could apply an intermediate level of review in which the burden would likely be on the government to prove that: 1) the government is pursuing an "important" objective and 2) that the means the government chose are "substantially related" to the important government objective.<sup>112</sup> If a court applied intermediate scrutiny to a statutory restriction on private gun possession, it would be more likely to be upheld than it would be struck down.<sup>113</sup>

Usually the level of scrutiny a court applies depends on whether the right being restricted is a fundamental right, as opposed to a more ordinary liberty right. For example, in the area of substantive due process, the rational basis standard is usually applied unless some fundamental right has been restricted.<sup>114</sup> When fundamental rights such as certain parental,<sup>115</sup> marriage,<sup>116</sup> and sex/child-bearing rights<sup>117</sup> are restricted, a court will apply strict scrutiny. Likewise, in equal protection claims, courts will apply a rational basis standard<sup>118</sup> unless the classification at issue relates to a suspect classification, such as race,<sup>119</sup> or a fundamental right such as voting,<sup>120</sup> court access,<sup>121</sup> or

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109. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

110. *See, e.g., id.* at 388-91.

111. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

112. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976).

113. *United States v. Virginia*, 518 U.S. 515, 573-74 (1995) (Scalia, J., dissenting).

114. *See, e.g., Zablocki*, 434 U.S. at 388.

115. *See generally* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding unconstitutional state statute requiring children to attend public schools, preventing them from attending private and parochial ones).

116. *See generally* *Zablocki*, 434 U.S. at 374 (1978) (holding unconstitutional Wisconsin law restricting the rights of a parent to remarry who was subject to a court order to support a minor child).

117. *See generally* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming "essential holding of *Roe v. Wade*" but modifying a woman's right to choose an abortion by allowing states to restrict abortion as long as they do not place an "undue burden" on the woman's right to choose); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman's right to privacy is a fundamental right and that the legislature has a limited right to regulate abortions depending on what trimester a woman is in); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding unconstitutional law permitting contraceptives to be distributed only by registered physicians and pharmacists, and only to married persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding unconstitutional Connecticut law forbidding the use of contraceptives and the aiding or counseling of others in their use).

118. *See generally* *Railway Express Agency Inc. v. New York*, 336 U.S. 106 (1949) (affirming a New York City traffic regulation banning the placing of advertising on vehicles, except those advertising the owner's own products).

119. *See generally* *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (holding that any

right to travel,<sup>122</sup> in which case the court will apply strict scrutiny. An intermediate review standard is applied in a smaller number of contexts in equal protection claims where the challenged classification involves a semi-suspect trait such as gender<sup>123</sup> or illegitimacy.<sup>124</sup> Also, the Court has applied a slightly more stringent version of the rational basis test to classifications involving unpopular groups such as the mentally retarded<sup>125</sup> or gays and lesbians,<sup>126</sup> which suggests that legislators may have been biased in enacting the laws at issue.

## 2. *Characterizing the Right Protected by the Second Amendment*

In evaluating the effect that the individual rights view may have on our nation's gun laws, an important issue is whether this right will be characterized as a fundamental right or some lesser liberty right. If the Second Amendment protects an individual, fundamental right, courts may apply strict scrutiny, which would make gun control laws more vulnerable to attack. However, if the individual right were not a fundamental right, then courts may

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governmental action that is explicitly race-based must be necessary to achieve a compelling governmental interest); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that racial discrimination violated the Equal Protection Clause only where it is a product of a discriminatory purpose); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding unconstitutional a Virginia statute prohibiting marriage between a white and a non-white); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding the discrimination illegal because the only reason for its existence was hostility to petitioner's race and nationality).

120. *See generally* *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (holding unconstitutional an annual poll tax imposed as a prerequisite for voting).

121. *See generally* *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that denial of access to divorce was a violation of the plaintiffs' due process rights when parties seeking divorce could not afford sixty dollar filing fee).

122. *See generally* *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that by requiring a one-year waiting period before a state would provide welfare benefits, the state was impairing the "fundamental right of interstate movement").

123. *See generally* *United States v. Virginia*, 518 U.S. 515 (1996) (holding that Virginia's policy of excluding women from VMI was a violation of women's equal protection rights); *Craig v. Boren*, 429 U.S. 190 (1976) (holding unconstitutional an Oklahoma statute which forbade the sale of "3.2% beer" to males under the age of 21, and to females under the age of 18, since the statute denied equal protection to males aged 18 to 20).

124. *See generally* *Clark v. Jeter*, 486 U.S. 456 (1988).

125. *See generally* *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985) (holding unconstitutional a Texas city's denial of a special use permit for the operation of a group home for the mentally retarded).

126. *See generally* *Romer v. Evans*, 517 U.S. 620 (1996) (holding unconstitutional on equal protection grounds a Colorado statute prohibiting all legislative, executive, or judicial action designed to protect homosexuals).

choose to apply a lesser level of scrutiny, making gun control laws less likely to be struck down.

The language the Fifth Circuit used in *Emerson* indicates it evaluated the Second Amendment challenge under some type of heightened scrutiny, as it held that the Second Amendment protects individual rights, but “that does not mean that those rights may never be made subject to any *limited, narrowly tailored specific exceptions or restrictions*.”<sup>127</sup> This language indicates that the court believed that the statute in *Emerson* was narrowly tailored enough to meet the government’s compelling interest in enacting that section of the Violence Against Women Act. However, the court did not label the right as a fundamental right, which is usually indicative of strict scrutiny, signifying that the court may have applied a more intermediate form of scrutiny.

It is not clear from the language used in Ashcroft’s memorandum, or that used in Olson’s Supreme Court briefs, how fundamental a right the government believes the Second Amendment protects. Nor is it obvious what level of scrutiny the government believes should be applied to that right. Interestingly, in *Emerson*’s petition to the Supreme Court, he argued that the Fifth Circuit failed to apply strict scrutiny to his challenge.<sup>128</sup> In the government’s brief, Olson refuted *Emerson*’s argument, stating “the court of appeals did not purport to apply a relaxed standard of review.”<sup>129</sup> To support his argument, Olson cited the Fifth Circuit’s language, “an individual’s right to possess a firearm is subject to ‘*limited, narrowly tailored specific exceptions or restrictions*.’”<sup>130</sup> Also, Olson cited the Fifth Circuit’s conclusion that “the nexus between firearm possession by the party so enjoined and the threat of lawless violence, is sufficient, though likely barely so, to support the deprivation, while the order remains in effect, of the enjoined party’s Second Amendment right to keep and bear arms.”<sup>131</sup> However, Olson concluded this section of his brief by stating that, “[i]n any event, the court’s analysis produced a result that is consistent with the decisions of other courts of appeals that have upheld the constitutionality [of the statute at issue].”<sup>132</sup> Therefore, Olson argued that the *Emerson* court applied a more stringent standard of review which, at least, was stronger than

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127. *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (emphasis added).

128. *Emerson Brief*, *supra* note 53, at 21.

129. *Id.*

130. *Id.* (quoting *Emerson*, 270 F.3d at 261 (emphasis added) (“[T]hat does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions.”)).

131. *Id.* (quoting *Emerson*, 270 F.3d at 264).

132. *Id.*

a mere rational basis standard. However, regardless of the level of scrutiny the court applied, Olson argued the analysis reached a result consistent with other appellate courts—who, of course, have evaluated the constitutionality of this statute under the militia interpretation.<sup>133</sup> Olson’s argument is circular, since he explains that his position is consistent with decisions where courts did not apply a heightened level of scrutiny to the constitutional claims, because those courts each analyzed the claims under the assumption that the defendant had no individual right to bear arms.

It is also unclear from Ashcroft’s language in his memorandum to the United States Attorneys what level of scrutiny he would argue that a court should apply. He states that “the existence of this individual right does not mean that *reasonable restrictions* cannot be imposed to prevent *unfit persons* from possessing firearms or to restrict possession of *firearms particularly suited to criminal misuse*.”<sup>134</sup> At first glance, the fact that he does not label the right as fundamental, coupled with the language “reasonable restrictions” seems to suggest a less stringent level of scrutiny, more akin to the rational basis standard of review. If rational basis is applied, the Second Amendment right protected by Ashcroft’s individual rights interpretation amounts to a mere liberty interest. Since gun ownership has always amounted to a mere liberty interest, Ashcroft’s change in policy was little more than a symbolic step, likely undertaken to please supporters of the individual rights view. However, his reference to preventing “unfit persons” from possessing firearms and restricting possession of “firearms particularly suited to criminal misuse” may indicate that he means that the government would have a compelling or substantial interest to restrict individuals’ Second Amendment rights if they were “unfit” or the firearm at issue was “particularly suited to criminal misuse.” Therefore, Ashcroft may be arguing that a heightened form of scrutiny should apply to Second Amendment challenges. However, this position may still be largely symbolic on Ashcroft’s behalf since he may not foresee any occasion where the federal gun laws would not meet a heightened form of scrutiny. Even if Ashcroft’s policy switch was little more than a political step, he may have compromised our nation’s gun laws in requiring federal prosecutors to promote the individual rights interpretation.

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133. See *supra* notes 42-51 and accompanying text.

134. Ashcroft, Memorandum to United States Attorneys, *supra* note 16 (emphasis added).

*C. Federal Prosecutors Face Conflicted Position*

Regardless of what level of scrutiny a court applies to a Second Amendment challenge, Ashcroft has deprived federal prosecutors of making the strongest argument to these challenges that was made by past government lawyers—simply, that the Second Amendment only protects a right reasonably related to a well-regulated militia.<sup>135</sup> Instead, federal prosecutors face the conflicted position of complying with Ashcroft's charge both to "enforce federal law *and* to respect the constitutional rights guaranteed to Americans."<sup>136</sup> Therefore, federal prosecutors must promote the view that individuals have a right to bear arms, at least in some situations, while essentially arguing against themselves that each particular defendant challenging his conviction under the Second Amendment is not protected by the Second Amendment.

The Justice Department's briefs filed so far underscore the conflicted position that federal prosecutors face under the new policy. In one case, a defendant was indicted for possessing an unregistered firearm in the District of Columbia and challenged his conviction under the Second Amendment.<sup>137</sup> In its brief, the government prosecutors noted that controlling legal precedent in the District of Columbia interpreted the Second Amendment as not conferring an individual right to be armed.<sup>138</sup> Arguably weakening their position, the prosecutors then pointed out that the precedent "contains reasoning that is inconsistent with the position of the United States as to the scope of the Second Amendment."<sup>139</sup> In briefs filed elsewhere the government has argued, similar to Olson's arguments to the Supreme Court, that each particular defendant or weapon is not protected by its individual rights interpretation of the Second Amendment.<sup>140</sup> For instance, in one brief filed in a San Francisco case where the defendant made a Second Amendment challenge to his gun conviction, the government stated, "[it] does not concede that the Second Amendment creates a fundamental individual right for felons

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135. See *supra* text accompanying notes 76-77.

136. Ashcroft, Memorandum to United States Attorneys, *supra* note 16.

137. See Henigan, *supra* note 13, at 35.

138. *Id.*

139. *Id.*

140. See Liptak, *supra* note 17, at A12.

to bear arms, or for anyone to bear arms” like the machine guns that were at issue in that case.<sup>141</sup>

Thus far, in the District of Columbia and across the nation, Second Amendment challenges made subsequent to the Justice Department’s policy change have not been successful, despite the conflicted position federal prosecutors face when crafting their arguments.<sup>142</sup> However, it remains to be seen if federal prosecutors will be able to construct strong arguments to dismiss such challenges in future cases. It may be that Ashcroft’s adoption of the individual rights view was simply a move to please the NRA and gun-rights enthusiasts, and Ashcroft did not foresee a Second Amendment challenge that would actually encroach on what he considers to be an individual right. However, what may have been simply a political move by Ashcroft may have placed our nation’s gun laws in jeopardy.

#### CONCLUSION: PUTTING THE NATION AT RISK

In the United States, injury and death from guns constitute a major public health problem. Gun-related deaths are the second leading cause of injury death in the United States,<sup>143</sup> with almost eighty gun-related deaths occurring every day.<sup>144</sup> This epidemic is not just claiming lives, either. The fiscal costs to our nation are astronomical as well. For example, a 1994 study found that the lifetime medical costs associated with firearm injuries and deaths were *\$2.3 billion*,<sup>145</sup> and a more recent study estimated the direct costs (e.g. medical, productivity) and social costs (e.g. quality of life, emotional) of gun violence to be *\$80 billion per year*.<sup>146</sup> The latter study found that approximately 49% of the costs of gun-related injuries and deaths are paid by the public.<sup>147</sup>

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141. *Id.*

142. *See Analysis: Gun control opponents planning to file a lawsuit seeking to overturn Washington, DC’s, ban on handgun ownership and possession*, NPR: MORNING EDITION, Dec. 26, 2002, available at 2002 WL 3190629.

143. Sherry L. Murphy, *Deaths: Final Data for 1998*, NAT’L VITAL STATS. REPS. (CDC), July 24, 2000, at 10.

144. *See* Donna L. Hoyert et al., *Deaths: Final Data for 1999*, NAT’L VITAL STATS. REPS. (CDC), Sept. 21, 2001, at 10.

145. Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447, 453 (1999).

146. PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS 113 (2000).

147. Cook, *supra* note 145, at 452-53.



High profile episodes of gun violence like the school shootings that plagued the nation during the late 1990s and early 2000s, along with the sniper attacks in the District of Columbia metro area that occurred in Fall 2002, fuel the public debate over how to combat this problem. Legislators argue whether it is better to enforce existing gun control laws or to enact stronger ones. Interestingly, despite the fact that many people think the Second Amendment grants them an individual right to bear arms,<sup>148</sup> there is strong public support for enacting more comprehensive gun control laws such as stricter regulation of the sale of guns,<sup>149</sup> banning the manufacture, sale, and possession of “Saturday Night Specials” and assault weapons,<sup>150</sup> limiting handgun sales to at most one per month;<sup>151</sup> subjecting private gun sales to background checks;<sup>152</sup> requiring mandatory registration of handguns;<sup>153</sup> and allowing only gun stores, rather than individuals, to obtain licenses to sell guns.<sup>154</sup> However, whether our nation combats this epidemic by better enforcing our current gun laws or enacting stronger, more comprehensive gun control laws, in either case, the laws will not help solve the problem if they are vulnerable to Second Amendment attacks. During his nomination hearings, John Ashcroft pledged to advance the nation’s interest and not to push his own personal agenda. Ashcroft may personally believe that the Second Amendment more broadly protects an individual’s right to bear arms. However, with the high rate of gun-related deaths and injuries facing our nation, which is taking valuable human lives and costing the public billions of dollars, one has to wonder if that viewpoint is really in the nation’s interest. By switching the government’s interpretation of the Second Amendment and weakening federal prosecutors’ arguments, Ashcroft may have made our current gun control laws vulnerable to Second Amendment challenges, as well as made it tougher for legislators to enact stronger gun control laws in the future. Time will tell whether his interpretation of the Second Amendment will really advance the nation’s interest or, instead, place it more at risk.

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148. Robert J. Blendon et al., *The American Public and the Gun Control Debate*, 275 JAMA 1719, 1720 (1996).

149. Jon S. Vernick et al., *Public Opinion Polling on Gun Policy*, HEALTH AFFS., Winter 1993, at 202-03.

150. *Id.*

151. *Id.* at 205; Stephen P. Teret et al., *Support for New Policies to Regulate Firearms: Results of Two National Surveys*, 339 NEW ENG. J. MED. 813, 816 (1998).

152. Blendon et al., *supra* note 148, at 1720.

153. *Id.*; Vernick et al., *supra* note 149, at 203-04.

154. Teret et al., *supra* note 151.