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ARTICLE

TESTING THE STATES' RIGHTS SECOND AMENDMENT FOR CONTENT: A SHOWDOWN BETWEEN FEDERAL ENVIRONMENTAL CLOSURE OF FIRING RANGES AND PROTECTIVE STATE LEGISLATION

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The last decade has witnessed notable changes in the dialogue about gun rights. A majority of recent scholarship supports the view that the United States Constitution recognizes an individual right to possess firearms.¹ It is now the position of the United States Government that the Second Amendment protects an individual's right to arms.² The Fifth Circuit Court of Appeals has produced the most exhaustive analysis of the Second Amendment ever by a federal court and concluded that it guarantees an individual right.³ Professor Laurence Tribe, author of the influential treatise *American Constitutional Law*, has gone from dismissing the Second Amendment in a footnote to claiming that

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1. See Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 192-97 app. 1 (1997) (listing articles and books supporting the individual rights view of the Second Amendment); Don B. Kates, Jr., Editorial, *Right to Own Guns Has Scholarly Support*, NAT'L L.J., Apr. 12, 1993, at 12 (stating that the vast majority of law review articles published since 1980 on the Second Amendment adopt an "individuals'-right view"). But see Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 385 app. (2000) (arguing that a count starting from 1900 generates a nearly even split between scholars). A running list of law journal articles treating the Second Amendment appears at <http://www.saf.org/AllLawReviews.html>.

2. See *Silveira v. Lockyer*, 312 F.3d 1052, 1065 n.14 (9th Cir. 2002) (discussing Brief for the United States in Opposition to Petition for Certiorari at 19 n.3, *United States v. Emerson*, 270 F.3d 203 n.3 (5th Cir. 2001) (No. 01-8780), available at <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf>). The individual right perspective represents a reversion to the Government's historic position. See Dave B. Kopel, *An Army of One*, NAT'L REV. ONLINE, May 29, 2001, available at <http://www.nationalreview.com/kopel/kopelprint052901.html> (showing that Attorneys General from the administrations of Andrew Jackson and Abraham Lincoln through Franklin Roosevelt took the individual rights view).

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

it guarantees an individual right.⁴ Even Senator Charles Schumer, long a vigorous opponent of gun rights, claims to believe that Americans have a constitutionally protected right to individual firearms.⁵

Of course, there remains opposition to the individual rights view. Support for it in the legal academy is by no means unanimous.⁶ More importantly, the position of most lower federal courts is and has been that the Second Amendment only protects an amorphous state right to arms. These decisions declare effectively that individual Americans could be constitutionally disarmed if Congress developed the will to do it.

Scholars have criticized the states' rights Second Amendment (SRSA) on a number of fronts: that it rests on early spurious lower federal court interpretations of the Supreme Court's single direct treatment of the Second Amendment, *United States v. Miller*,⁷ rather than on *Miller* itself;⁸ that it is difficult to square the SRSA with the text of Article I, Section 8⁹ and Article I,

4. See Christopher Chrisman, Note, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439, 441-42 (2001) (describing the shift in Professor Tribe's view from the previous to current edition of his treatise).

5. See Gilbert Cranberg, Editorial, *Ashcroft Is Dogged in Reshaping Bill of Rights*, DES MOINES REG., June 22, 2002, at 11A (Senator Charles Schumer, New York Democrat: "While some may not believe it, I believe in the Second Amendment. I do not agree with those who think the Second Amendment should be interpreted almost in a nonexistent way just for militia."). It is unclear whether the Senator would say this is a change of position. He certainly championed the states' rights position advanced by Handgun Control Inc.'s Dennis Henigan, when two colleagues and I testified before him in 1995. See *The Second Amendment and the Need for Congressional Protection: Testimony Before the House Comm. on Judiciary, Subcomm. on Crime*, 104th Cong. (Apr. 5, 1995) (statement of Robert J. Cottrol, Raymond T. Diamond and Nicholas J. Johnson), available at 1995 WL 151923; *Statement of Dennis A. Henigan, General Counsel, Handgun Control, Inc., Before the House Comm. on Judiciary, Subcomm. on Crime*, 104th Cong. (Apr. 5, 1995), available at 1995 WL 150025.

6. Some scholars would even contest the assertion that the standard model is shared by most constitutional scholars. If we count constitutional scholars generally, rather than just those who have studied and written about the Second Amendment, the individual rights view might not be the dominant position.

7. 307 U.S. 174 (1939).

8. See, e.g., Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 962-63 (1996) [hereinafter Denning, *Can the Simple Cite Be Trusted?*]. See also David B. Kopel, *The Supreme Court's Thirty-five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999) (suggesting that the Court has not been as silent on the Second Amendment as some claim).

9. See U.S. CONST. art. I, § 8, cl. 15-16 (assigning to the federal government the power of "calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers and the Authority of training the Militia according

Section 10¹⁰ of the Constitution; and especially that it has been given no positive content, but is merely a makeweight used to reject individual rights claims.¹¹ Nonetheless, lower federal courts hew to the states' rights view. What has been lacking is a concrete test of whether the SRSA is more than just the residue of rejected individual rights claims. That is what I propose to test here.

What could it mean to protect a state's right to keep and bear arms? Some things seem too outlandish to gain much traction. One of the policy criticisms of the SRSA is that it appears to protect the establishment of independent state armies. Some have argued that this possibility makes the SRSA theoretically more dangerous than the individual rights view. (Imagine Arkansas circa 1955 with its own heavy artillery and air power). Still, the danger seems remote. Gun crime by individual perpetrators is real and present. It is understandable that those who see lawful ownership of firearms as a driving factor in gun crime might accept the theoretical danger of an Arkansas Air Force in exchange for the ostensible benefits of banning private firearms.¹² Short of a controversy over the legitimacy of the Arkansas Air Force, it has been difficult to consider circumstances that would put the SRSA to the test.

This Article poses a practical test to plumb the content of the states' rights view—a test that does not depend on the seemingly remote showdown of muscle. Rather I suggest a conflict of bureaucracies that already has emerged, though it has not fully matured: a conflict between federal environmental legislation that is violated by the deposit of discharged lead projectiles and state legislation protecting the primary places where the people actually bear arms—shooting ranges.¹³

All across America, individuals practice the art of the gun at ranges that are, to various degrees, sanctioned, supported, and protected by state legislation, regulation, and dollars. They are the primary places where citizens gather in groups to learn and practice gun safety and develop proficiency. Millions of rounds per year are fired at non-military shooting ranges.¹⁴ Ranges provide general firearms training, youth gun safety training, hunter qualification classes, organized competition, and promote recreational shooting. Many of these ranges

to the discipline prescribed by Congress”).

10. See U.S. CONST. art. 1, § 10 (“No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . .”).

11. See Denning, *Can the Simple Cite Be Trusted?*, *supra* note 8.

12. I say ostensible benefits here to acknowledge the debate over the utility of gun regulations that prevent law-abiding citizens from owning or carrying firearms. See, e.g., Gordon Witkin, *Should You Own A Gun*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 24, 30 (describing the research of Gary Kleck and Arthur Kellermann).

13. Though it is perhaps the ultimate conflict, our dispute over the manner and rate of consumption of the biosphere presents a less acutely dangerous context in which to examine whether the states' rights view is more than a makeweight.

14. See EPA, BEST MANAGEMENT PRACTICES FOR LEAD AT OUTDOOR SHOOTING RANGES, at I-1 (Jan. 2001) (EPA-902-B-01-001) [hereinafter EPA, RANGE BMPs], available at <http://www.epa.gov/region02/waste/leadshot/download.htm>.

operate in partnership with the federal government through the longstanding Civilian Marksmanship Program (CMP), which sponsors participation in the United States Army high-power rifle course of fire and sales of surplus, semiautomatic battle rifles to qualifying civilian participants and clubs.¹⁵ While hunters sometimes fire guns in their often solitary pursuit, the range is where the community of armed citizens comes together and where core principles of an armed citizenry are communicated.¹⁶

It is instructive then to consider the manner in which federal environmental legislation threatens ranges, and the methods that states have and might further protect ranges from claims that shooting is incompatible with modern environmental and aesthetic sensitivities. If the states' rights view has any real substance, those who tender it must grapple with the idea that states can trump powerful federal environmental statutes with range protection legislation grounded in the SRSA.

But activating the SRSA will require more than legislation declaring ranges immune from lead pollution liability. The scattered doctrinal guidance offered by states' rights judges over the years demands a more explicit militia-centered invocation of the SRSA. How precisely states choose to invoke the SRSA to pursue their already established goals of range protection may vary. But one predictable approach is adding to existing range protection measures a state CMP that tracks the federal program.

This effort to satisfy the requirements of the SRSA would also have another effect. In addition to furthering range protection, it would protect a variety of other things, some of which strike at the heart of gun control policies dear to those who advance the SRSA. By forcing states to reinforce existing range protection measures with a CMP-type structure, the SRSA triggers a test of its own content and unleashes doctrinal and policy problems that some have bet would never arise.

Part I describes the federal environmental threat to shooting ranges. Subparts A through D offer a detailed treatment of the environmental legislation that is summarized at the beginning of Part I. Part II distills the lower federal courts' state centric view of the Second Amendment. Part III sets up and critiques the conflict between a state centric Second Amendment and federal environmental regulation. Part IV assesses the politics and policy implications of range protecting state CMPs.

15. See *infra* notes 137-45 and accompanying text.

16. The starting rules are:

All guns are always loaded.

Never let the muzzle cover anything you are not willing to destroy.

Keep your finger off the trigger until your sights are on the target.

Be sure of your target.

JEFF COOPER, *THE ART OF THE RIFLE* 15-16 (1997).

I. THE FEDERAL ENVIRONMENTAL REGULATORY THREAT TO FIRING RANGES

The discharge of firearms can trigger literal violations of three federal environmental statutes: The Clean Water Act (CWA),¹⁷ the Resource Conservation Recovery Act (RCRA)¹⁸ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or “Superfund”).¹⁹ Environmental Protection Agency (EPA) policy has been, up to now, fairly consistent under each of these statutes. While the discharge of firearms might technically violate all three, EPA has exercised its discretion to set enforcement priorities in a fashion that has left ranges relatively unimpaired.²⁰

Because environmental statutes are written very broadly, it is fairly common and administratively necessary for EPA to establish a hierarchy of enforcement priorities. For example, EPA has determined that individual households who undeniably fit the technical definition of responsible parties under the Superfund law are exempt from liability on the basis that the volume of hazardous substances they discharge is generally *de minimus*.²¹ Similarly, under the CWA, any discharge of a pollutant into “waters of the United States” without a permit is a technical violation of the Act.²² Thus, the thousands of young swimmers who urinate in recreational waters each year have technically violated the CWA,²³ but have not been enforcement priorities. On the other hand, the millions of head of livestock who do essentially the same thing have received very close EPA scrutiny and are subject to detailed regulations.²⁴ Firing ranges have been treated within this framework. Wherever one might think firing ranges should fit in the hierarchy of priorities, they have up to now appeared to row appeared fairly low.

But ranges have not been entirely ignored. Ranges vary in their

17. 33 U.S.C. §§ 1251-1387 (2000).

18. 42 U.S.C. §§ 6901-6992k (2000).

19. *Id.* §§ 9601-9675.

20. Often this involves determinations that activity is *de minimus* or not within EPA’s discretionary, regulatory jurisdiction, as opposed to its typically broader statutory jurisdiction. *See, e.g., infra* note 54.

21. On Jan. 11, 2002, President Bush signed H.R. 2869, the Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118, which contains significant relief from CERCLA liability for eligible small businesses and nonprofit organizations for generation of municipal solid waste (MSW). This legislation basically provides CERCLA liability relief to mom-and-pop businesses and schools. In some respects, it codifies EPA’s February 5, 1998, MSW policy of generally exempting small generators of MSW. However, EPA’s MSW policy did not prevent private party claims against such entities. *See* B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996); B.F. Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1992). Through the Small Business Liability Relief Act, Congress has exempted these small generators from private party actions.

22. *See, e.g.,* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985).

23. *But see* United States v. Plaza Health Labs., Inc., 3 F.3d. 643, 647 (2d Cir. 1993).

24. *See* 40 C.F.R. §§ 122.1-122.23 (2004) (regulating concentrated animal feeding operations).

environmental impact. High-use commercial ranges have different environmental impacts than small club facilities. As discussed below, the Remington Arms facility on Long Island Sound was one of the first ranges closed by federal environmental law. But most ranges are not as elaborate as the Remington facility, and in many instances, EPA can make a sound environmental decision that the range presents a technical violation but no real environmental threat.²⁵

But EPA is not the sole steward of the broad environmental protections Congress has established over the past three decades. All the statutes discussed here contain citizens' suit provisions permitting some type of private party enforcement.²⁶ The significance of these provisions is highlighted in the EPA guidance document Best Management Practices for Lead at Outdoor Shooting Ranges (Range BMPs):

Citizen groups have been the driving force behind most legal actions taken against outdoor ranges. These groups have sued range owners/operators under federal environmental laws. Two of EPA's most comprehensive environmental laws, the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA), specifically provide citizens with the right to sue in cases in which the environment and human health are threatened. *These citizen suits have been highly effective in changing the way ranges operate*, even when out-of-court settlements have been reached.²⁷

These citizens' suit provisions differ in the details, but broadly speaking, they authorize private party actions for statutory (and sometimes regulatory) violations EPA has not pursued. Thus, even a firing range EPA deems to have little environmental impact may be restricted or closed by actual or threatened private party litigation attacking technical violations of federal law.

A. Clean Water Act Litigation Against Ranges

The CWA prohibits any discharge of *pollutants* from a *point source* into

25. This decision presents an across the board political problem. When EPA makes determinations of safety in any context, it is a relative one and a political one. For example, a commonly stated safe level of exposure to toxics is one-in-one-million risk of cancer. It is a purely political determination that this is an acceptable risk. For the one in a million person who loses this bet, the exposure level clearly is not safe. But if pushing the risk to zero requires elimination of certain beneficial economic activities, like the production of steel or paper, we quickly understand why regulatory exposure levels establish acceptable risk rather than total safety.

26. CERCLA contains provisions allowing private party polluters to seek compensation from contributing polluters and cost recovery where the private plaintiff is not a polluter. *See* 42 U.S.C. §§ 9607-9613 (2000). Its explicit citizen's suit provision, 42 U.S.C. § 9659, is newer, seems more limited, and has been less widely utilized than the provisions under RCRA and the CWA.

27. EPA, RANGE BMPs, *supra* note 14, at I-6 (emphasis added).

waters of the United States without a permit.²⁸ It defines pollutant broadly to include even foreign rock, sand or dirt.²⁹ At its most extreme, pollutant has been defined to capture New York City's introduction of Hudson River water into a reservoir holding cleaner water from the Catskills watershed.³⁰ Lead projectiles and clay targets used at trap, skeet, and sporting clays ranges, therefore easily trigger a violation of the CWA if they come to rest in waters of the United States.

As a result of years of jurisdiction expanding litigation, "waters of the United States" is defined so broadly that the CWA applies even where there is no water. In litigation over the Army Corp of Engineers' jurisdiction to protect "wetlands" (land that supports plants that only grow in areas periodically inundated by water) under section 404 of the CWA, courts have defined "waters of the United States" to include places that often are totally dry.³¹ A recent Supreme Court decision concluding that wetlands truly isolated from flowing waters of the United States cannot be brought within Congress's jurisdiction merely through the presumption that they are used by migratory birds in flight across state lines has diminished the reach of the CWA somewhat.³² However, thousands of ranges still impact undeniable waters of the United States and adjacent wetlands.

The model "point source" of pollution is a pipe running from a factory and discharging into a river. While there is authority holding that humans cannot themselves be point sources³³ (maybe excluding the urinating swimmer), the concept generally has been interpreted so aggressively that the barrel of a gun easily can be made to fit within the definition of point source.

The citizens' suit provisions of the CWA were successfully invoked against a trap and skeet range in *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club*.³⁴ In compliance with United States Fish and Wildlife Service (USFWS) regulations, the NYAC range had switched from lead shot (deemed toxic by USFWS) to steel shot. However, the court found that even non-toxic steel shot, along with clay target debris, falls within the CWA's broad definition of pollutant.³⁵ The court also found that the target throwing machines, the shooting platforms, and the range itself were point sources of discharge into waters of the United States and enjoined the un-permitted operation of the

28. 33 U.S.C. § 1362(12) (2000). The statute itself refers to "navigable waters" but this has been interpreted to mean more broadly, "waters of the United States." See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

29. 33 U.S.C. § 1362(6).

30. See *Catskill Mountains Chapter of Trout Unlimited, Inc., v. City of New York*, 273 F.3d 481, 491-92 (2d Cir. 2001).

31. See, e.g., *Riverside Bayview Homes, Inc.*, 474 U.S. at 130 (defining "wetlands" subject to the CWA's jurisdiction).

32. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

33. See *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993).

34. No. 94 Civ. 0436 (RPP), 1996 WL 131863 (S.D.N.Y. Mar. 22, 1996).

35. *Id.* at *15.

range.³⁶

*Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*³⁷ is discussed below for the example it provides about citizen's suits under RCRA.³⁸ But it also adds something to our understanding of CWA citizens' suits. The CWA claim in *Remington Arms* technically was dismissed because the CWA requires citizens to show that there is a *continuing violation* of the Act in order to sustain their claim. By the time of the litigation, the range had closed.³⁹ However, as suggested in EPA's Range BMPs the pre-litigation dynamic may be typical. There are virtually no defenses under the CWA. Faced with invocations of the CWA, ranges have few options and may concede the fight before it ever really starts.⁴⁰

Perhaps more foreboding for ranges subject to CWA jurisdiction is the long-term assessment in EPA's Range BMPs. Prominent at the beginning of the document is the disclaimer that the guidance creates no substantive or procedural rights, even for ranges that follow the recommended BMPs. Still, the guidance urges that ranges should manage spent lead projectiles toward the end of recycling. If done properly, this *might* avoid violations of RCRA and CERCLA, but the CWA is another matter. The Range BMPs warn that "shooting into water bodies or wetlands is NOT an option for ranges that want to survive in the future."⁴¹

B. Resource Conservation Recovery Act Litigation Against Ranges

It is uncommon for sophisticated parties to raise a credible defense that a regulatory program is just too complicated to be enforced, but RCRA has generated exactly that. In *United States v. White*,⁴² the defendant made a powerful vagueness argument presenting, among other things, the view of an EPA Assistant RCRA Administrator that only five people in the Agency really understand the core definition, "hazardous waste," that drives the entire

36. *Id.* at *14.

37. 989 F.2d 1305 (2d Cir. 1993).

38. *See infra* notes 59-61 and accompanying text.

39. *Remington Arms*, 989 F.2d at 1312.

40. *See* EPA, RANGE BMPs, *supra* note 14, at I-6 (noting the effectiveness of citizens' suits in modifying range activity even where settlements have been reached). Individual shooting at private sites or shots taken while hunting also might be technical violations of the CWA. I give less attention to this scenario. While it might produce a later generation of the conflict I posit here, it is a more tenuous plaintiff's claim, presents a less immediate threat to bearing arms, and is less likely to generate a state legislative response any time soon. While such a case would permit an interesting defense under the individual rights view of the Second Amendment, it is the States' rights view I am interested in here, and the best test of that is direct state/federal conflict.

41. *Id.* at II-4 (emphasis in original). This guidance was developed initially by EPA Region II, and subsequently adopted as National Guidance.

42. 766 F. Supp. 873 (E.D. Wash. 1991).

regulatory program.⁴³ Parsing the statute and the regulations is, in the words of then Judge Starr, a “mind-numbing journey.”⁴⁴ Fortunately, we do not need to understand all of its complexities in order to appreciate RCRA’s threat to firing ranges.

RCRA is a regulatory statute. It is designed to enable and sometimes prompt EPA to develop a “cradle-to-grave” scheme regulating hazardous wastes. The statute takes up about a quarter inch of U.S. Code. The regulations comprise three thick volumes of the Code of Federal Regulations.⁴⁵

RCRA has been subject to much criticism. The Reagan administration found it far too expensive and under-enforced it.⁴⁶ But, objections to RCRA are not

43. Defendant elicited the following observation from Don R. Clay, EPA Assistant Administrator for the EPA Office of Solid Waste and Emergency Response:

RCRA is a regulatory cuckoo land of definition. [RCRA] is *very* complex. I believe we have five people in the agency who understand what “hazardous waste” is. What’s hazardous one year isn’t—wasn’t hazardous yesterday, is hazardous tomorrow, because we’ve changed the rules. You have a waste that in one state is hazardous and in another isn’t because they haven’t adopted a rule yet. It is a legal statutory framework rather than logical, based on concentration and threat type of thing.

Id. at 882. The defense failed because the particular violation was uncommonly easy to perceive through the mire of jargon and counterintuitive definitions.

44. *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987). The confusion begins immediately with a statutory definition of solid waste that includes some liquids and gases. *Id.*; *see also* 42 U.S.C. § 6903(27) (2000). Whether a solid waste is really disposed of (and thus another step toward being regulated) is complicated by the paradox that Congress sought to encourage recycling (because it reduces waste) and that EPA often desires to regulate recycling (because recycling can produce environmental hazards). *Am. Mining Cong.*, 824 F.2d at 1189. Consequently, EPA has produced a set of extraordinarily complex rules that control when reuse or recycling of certain materials is exempt from RCRA and when it is regulated. *Id.* Finally, the set of rules that govern whether the discarded solid waste is also hazardous requires both a lawyer and a chemist (hazardousness depends in part on the result of chemical tests to determine if the waste manifests characteristics like corrosivity, ignitability, reactivity, or toxicity) to decipher. This short description is a gross oversimplification of the complexity of RCRA.

45. RCRA is one of the more striking examples of Congress delegating away essentially full lawmaking powers. If only five people in EPA understand RCRA regulations, it is a safe bet that no one elected to Congress does. Sadly, this seems all too common. *See* Jacob Sullum, *Blindman’s Rule*, reasonline (Feb. 21, 2003), at <http://www.reason.com/sullum/022103.shtml> (commenting sarcastically that many in Congress who voted for McCain-Feingold campaign finance reform seem shocked to learn how it actually operates and speculating how often members of Congress vote on bills they fail to read).

46.

The early implementation of the RCRA regulatory program was characterized by turmoil. The Reagan Administration, which assumed office in January 1981, targeted the RCRA program as excessively costly. The EPA attempted to nullify or weaken some of the regulations that had already taken effect, and in some cases was forced to reinstate the original regulations . . . causing confusion, uncertainty, and the appearance

entirely political or economic. RCRA over-regulates in the sense that it fails to make detailed distinctions between risks posed by different grades of hazardous waste (you are either in or out).⁴⁷ It also under-regulates through the creation of numerous exceptions. For example, the various poisons that appear in household waste are exempt from RCRA's strenuous hazardous waste disposal requirements. This hazardous household waste continues to go to landfills, many of which will leak and become future hazardous cleanup problems.

RCRA liability hinges on two threshold questions. First, is a substance actually a "solid waste" and is it "disposed of?" This first basic question remains the subject of much conflict.⁴⁸ Second, is the substance (once deemed a solid waste) actually hazardous. Wastes are hazardous for basically two reasons: either they appear on one of EPA's lists of hazardous wastes,⁴⁹ or they exhibit hazardous characteristics of ignitability, corrosivity, reactivity, or toxicity.⁵⁰ The toxicity characteristic is only relevant for a limited number of substances including lead. A discarded substance containing lead is tested to determine whether it will leach enough lead to kill test organisms within a specified period. If so, the waste fails the toxicity characteristic and falls within RCRA's regulatory net.

Like many regulatory agencies post *Chevron*,⁵¹ EPA has broad discretion to interpret its enabling statute, draft consistent regulations, and set regulatory priorities. Within this range of discretion, EPA might deem lead projectiles themselves to be the regulated waste, or the mixture of receiving media (berm soil or sediment) and projectiles to be the regulated waste. Depending on that choice, the outcome of the toxicity testing and EPA's regulatory strategy for ranges, the results might vary. Currently, EPA guidance for outdoor shooting ranges focuses on management practices that permit lead reclamation and recycling with an eye toward future development of non-toxic projectiles.⁵²

of mismanagement. Ultimately, the EPA administrator, Anne Gorsuch, resigned and her Assistant Administrator responsible for the RCRA and CERCLA programs, Rita Lavelle, was ridiculed and convicted of perjuring herself before Congress.

MAXINE I. LIPELES, ENVIRONMENTAL LAW, HAZARDOUS WASTE 4 (3d ed. 1997).

47. William F. Pedersen, Jr., *The Future of Federal Solid Waste Regulation*, 16 COLUM. J. ENVTL. L. 109, 120-21 (1991).

48. This is understandable. Once a waste falls into RCRA, the price of disposal increases dramatically. Moreover, even after disposal at a hazardous waste facility, the paper trail RCRA creates exposes the discharger to subsequent potential liability under Superfund. Since "disposal" is a decision partly controlled by the waste producer, EPA has worried that everything from beneficial recycling to outright scams will permit hazardous waste to escape regulation. Litigation about the true meaning of disposal is the natural outcome. See *Am. Mining Cong.*, 824 F.2d at 1180 n.1.

49. See 40 C.F.R. § 261.31-33 (2004).

50. *Id.* § 261.21-24.

51. *Chevron U.S.A., Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

52. EPA notes that the U.S. Fish and Wildlife Service phased in a ban of lead shot for waterfowl hunting over the period 1986-1991. EPA, RANGE BMPs, *supra* note 14, at app. B. Steel,

However, like the CWA, RCRA includes citizens' suit provisions that allow private parties to force litigation even where EPA has deemed firing ranges a low priority.⁵³ In *Connecticut Coastal Fisherman's Ass'n v. Remington Co.*, plaintiffs claimed that operation of the Remington shotgun range constituted disposal of hazardous waste without a treatment, storage, or disposal ("TSD") permit.⁵⁴ The district court ruled that the lead shot and clay targets were RCRA solid wastes, that the lead shot was a hazardous, and declined to rule on whether the clay target debris was hazardous.⁵⁵

On appeal, the Second Circuit requested a post-argument amicus brief from EPA on whether normal firing range debris constitutes "discarded material" (and thus "solid waste") and agreed with much of EPA's position.⁵⁶ The court embraced EPA's view that while lead shot is technically hazardous, firing ranges are not facilities that manage hazardous wastes subject to EPA promulgated RCRA regulations;⁵⁷ they do not require RCRA permits and cannot be sued by citizens for operating without a permit.

However, the court concluded that shooting ranges do remain within the statutory jurisdiction of RCRA.⁵⁸ Thus, while not subject to a citizen's suit for violating EPA regulations requiring TSD permits, ranges still can be sued by citizens under RCRA's statutory provisions if they pose an imminent and substantial threat to human health or the environment.⁵⁹ EPA's current view, expressed in its Range BMPs, is that the capacity of a range to recover and reclaim spent lead projectiles will determine its exposure to citizens' imminent hazard suits.⁶⁰

C. Superfund Litigation Against Ranges

CERCLA emerged in the wake of the Love Canal disaster and was a testament to the fact that major gaps still existed in the scheme of federal environmental regulations. With the National Environmental Policy Act⁶¹

tungsten and bismuth shot have been approved by USFWS as an alternative to lead shot. The viability of these alternatives for rifles and pistols is an open question. Switching to non-lead projectiles might avoid a RCRA violation but non-lead alternatives discharged into water are still literal violations of the CWA. See *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

53. See 42 U.S.C. § 6972 (2000) (authorizing citizen suits against those whose handling of solid or hazardous waste may present an imminent and substantial endangerment to health or the environment).

54. 989 F.2d 1305, 1309, 1313 (2d Cir. 1993).

55. *Id.* at 1310.

56. *Id.*

57. *Id.* at 1316.

58. *Id.*

59. *Id.* at 1315-16.

60. See EPA, RANGE BMPs, *supra* note 14, at I-7.

61. 42 U.S.C. § 4321 (2000).

(NEPA), Clean Air Act⁶² (CAA), CWA, and RCRA in place, some had argued that the loopholes in the federal scheme of pollution control had been closed. It was not an unfounded boast. All environmental media (air, water, and land) and federal decision making (through NEPA environmental impact statements) were basically covered. But Love Canal revealed a deficiency where a hazardous disposal site was detected and the polluter had disappeared.

CERCLA established a federal fund, the "Superfund," to fill the gap. It also established a separate scheme of liability that made "owners, operators, arrangers and transporters" of hazardous substances essentially jointly and severally liable for the cleanup of facilities where those substances are released. Every presumption works against the responsible parties under CERCLA, so much so that clients or litigants familiar with traditional tort conceptions of liability are stunned to learn how wide CERCLA's net is. Liability without causation⁶³ and joint and several liability⁶⁴ regardless of the level of hazard are, to the uninitiated, among the more surprising aspects of CERCLA. Early on, Judge Wright observed that a defendant who disposed of a penny in a landfill (copper, a common constituent in rifle and pistol bullets, is a CERCLA hazardous substance) was at least jointly and severally liable for the cost of cleaning up the entire mess.⁶⁵

CERCLA's citizens' suit provisions are relatively new, and potentially more narrow in scope than RCRA's or the CWA's provisions. Most of the recorded litigation under CERCLA has depended instead on EPA's decision to order a cleanup by a potentially responsible party or to clean up the release itself and pursue responsible parties for the costs.⁶⁶ Over the last thirty years, defendants have lost a long line of cases challenging EPA's ever expanding conception of responsible parties and ever tighter interpretation of the already limited statutory defenses. In most instances today, liability is clear, and rather than being litigated, is settled through an administrative consent order.

62. *Id.* § 7401.

63. Because of the difficulty of fingerprinting waste to show that a defendant's waste was the precise substance discharged, CERCLA has been interpreted to require only that the defendant sent waste to the site, waste of that type was found at the site, and there has been a discharge of hazardous substances at the site. The government need not show that it was the defendant's particular waste that was discharged. The reasoning is that once a leak has occurred, the mere fact that a defendant's waste is at the site adds to the cleanup problem. *See, e.g.,* *United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988).

64. For example, in *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992), defendant argued that its water-based paint waste contained hazardous substances in concentrations less than those in the paper on which the briefs before the Court were printed, less even than in "clean dirt." Yet the court still held against Alcan.

65. *See* *United States v. Conservation Chem. Co.*, 619 F. Supp 162, 196 (W.D. Mo. 1985). Also surprising is the fact that one may be ordered to conduct a cleanup, face penalties for refusing, and barred from judicial review of the cleanup order until EPA decides to take enforcement action, often well after the questioned cleanup is finished. 42 U.S.C. § 9613 (2000).

66. *See* EPA, RANGE BMPs, *supra* note 14, at I-12,13.

EPA's Range BMPs give an example of the typical case administered through consent order. The basis for agency action was the determination that lead is a hazardous substance under CERCLA. In *Southern Lakes Trap and Skeet Club Site, Lake Geneva, Wisconsin*, EPA and USFWS required the owners and operators of the range to perform remedial work at the site and pay one million dollars of cleanup costs.⁶⁷ The range closed permanently.

Another example illustrates the possibility of federal power trenching on state interests that is useful for our purposes. In *Walter L. Kamb v. United States Coast Guard*.⁶⁸ Kamb, as property guardian, brought a CERCLA cost recovery action against the California Highway Patrol, the City of Fort Bragg, and Mendocino County to recover the costs of cleaning up lead residue at a property that had been used as a rifle, pistol, and shotgun firing range. The court ruled that defendants were responsible parties but deferred apportionment of liability.⁶⁹ Thus, not only private parties but also state agents and political subdivisions may be deemed directly liable under CERCLA for cleanup costs in amounts that ultimately will prevent all but the most deeply insured from sponsoring, owning, or using firing ranges.

D. EPA Range Policy

EPA's firing range policy is like gun ownership under the SRSA. Firing ranges survive as a political matter, dependent on generous exercise of government discretion. EPA's Range BMPs express only non-binding policy priorities⁷⁰ and certainly have not deterred private party actions resulting in range closures.⁷¹ As discussed above, citizens' actions are an imminent threat to range survival.⁷² Moreover, EPA itself has closed ranges using CERCLA and declared

67. See *id.* at I-11; see also Notice of Lodging of Consent Decree Pursuant to CERCLA and RCRA; Lake Geneva Assocs. et al., 63 Fed. Reg. 55409-02 (Dep't Justice Oct. 15, 1998), Damage Assessment Plan: Southern Lakes Trap and Skeet Club, Lake Geneva, WI, 58 Fed. Reg. 39229-02 (Dep't Interior July 22, 1993).

68. See EPA, RANGE BMPs, *supra* note 14, at I-11; 869 F. Supp. 793 (N.D. Cal. 1994).

69. 869 F. Supp. at 799.

70. See EPA, RANGE BMPs, *supra* note 14, at Notice page.

71. For other examples of RCRA litigation including EPA action, see, e.g., *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998); *Rowlands v. Pointe Mouillee Shooting Club*, 959 F. Supp. 422 (E.D. Mich. 1997), *rev'd*, 182 F.3d 918 (6th Cir. 1999) (unpublished opinion); *In re Training Range and Impact Area, Mass. Military Reservation*, No. RCRA I-2001-0014, 2001 EPA RJO LEXIS 4 (EPA Office of Regional Jud. Officers, April 5, 2001); *In re Lackland Training Annex*, No. RCRA VI-311-H, 1995 EPA ALJ LEXIS 45 (EPA Office of Admin. Law Judges, May 12, 1995). For other CWA litigation, see, e.g., *Puerto Rico v. Rumsfeld*, 180 F. Supp. 2d 145 (D.D.C. 2001); *Stone v. Naperville Park District*, 38 F. Supp. 2d 651 (N.D. Ill. 1999).

72. This is not unusual. Much environmental regulation, regardless of who is in the White House, is prompted by private party law suits. Whether it is enforcement through individual use of citizens' suit provisions or litigation driven rule-making, critics call the progression from EPA missing a statutory deadline, to lawsuits by public interest groups against EPA, to judicial decisions

ranges that shoot over water an endangered species.

We have then one side of a state/federal conflict about the primary places where Americans bear arms. As demonstrated below, the other side of the conflict is basically in place, with troublesome details in the wings.

II. FEDERAL COURTS, STATES' RIGHTS, AND THE SECOND AMENDMENT

Second Amendment scholars call the individual rights view of the Second Amendment the standard model. In the past two decades there has been a great deal of scholarship supporting the standard model, and some notable converts to the view that notwithstanding the subordinate clause ("a well regulated militia, being necessary to the security of a free state"),⁷³ it is just not credible to transform the independent clause ("the right of the people to keep and bear Arms, shall not be infringed")⁷⁴ into a right of the states.⁷⁵ Nonetheless, a consistent line of lower federal court decisions say just that.

These decisions are grounded ostensibly on the 1939 Supreme Court decision in *United States v. Miller*.⁷⁶ The defendant, Jack Miller, was indicted for possession of an unregistered, untaxed, sawed-off shotgun in violation of the 1934 National Firearms Act. The district court dismissed the charge against Miller on the grounds that the pertinent section of the 1934 Act violated the Second Amendment.⁷⁷ By the time the case was argued before the Supreme Court, Jack Miller was missing. The government argued the case unopposed.

Superficially, *Miller* is a paradox. The Court plainly maintains that weapons protected by the Second Amendment must bear some reasonable relationship to

or settlements imposing a duty to act as initially required by statute "regulation by litigation". See, e.g., ROBERT V. PERCIVIL ET AL., ENVIRONMENTAL REGULATION: LAW SCIENCE AND POLICY 685 (3d ed. 2000) (describing the litigation and settlement that lead to EPA compliance with congressional instructions to develop health based standards for toxics discharges into surface waters). However the deference mandated by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 856 (1984), on technical matters such as the details of RCRA's regulatory scheme (as opposed to explicit timetables for rulemaking or other express congressional instructions) suggests that EPA's current decision to rely on technology and lead reclamation and recycling to deal with the range discharge problem is probably immune from agency-forcing attack by private plaintiffs. But see Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 374 (1994) (suggesting that reliance on text is supplanting deference).

73. U.S. CONST. amend. II.

74. *Id.*

75. See *supra* note 1. Eugene Volokh explains that prefatory language like the subordinate clause "[a] well regulated militia" was common in the language of state constitutions at the time and was never interpreted as a strict limitation on the independent clause. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

76. 307 U.S. 174 (1939).

77. *Id.* at 177.

the preservation or efficiency of a well regulated militia.⁷⁸ But just as plainly, it embraces the traditional view that the militia is the body of the people bearing their own private arms.⁷⁹ And while the district court decision was reversed, the case also was remanded for determination of the utility of the sawed-off shotgun for militia purposes.⁸⁰

While this has produced a generally credible division of opinion among scholars about the meaning of *Miller*, the lower federal courts through a series of decisions beginning in 1942, have washed this troublesome duality almost completely out of *Miller*. The recent decision in *United States v. Emerson*, ruling that the Second Amendment protects an individual right to arms and giving more analytical attention to the matter than virtually the entire balance of district and circuit court opinions, is a nearly singular exception.⁸¹ Although some members of the Supreme Court have indicated their belief that the Second Amendment protects an individual right,⁸² there is still doubt that the Court will take a Second Amendment case.⁸³ So the states' rights cases stand. The question is what do they stand for.

Since no state assertion of Second Amendment rights has been litigated, the SRSA has been, up to now, a cursory explanation of the right of the people to keep and bear arms that typically precedes a conclusion that the Constitution does not protect private firearms. But this description need not and should not define the doctrine. Our first hope must be that nearly sixty years of federal court decisions developing the SRSA have established something more than a makeweight.

So what to make of the states' rights view? The few scholars who have pursued it seriously speculate without much judicial guidance that it means states retain the right to maintain instruments of war. Don Kates and Glenn Reynolds engage the idea as a thought experiment and advance a number of arguments suggesting the states' rights view cannot be squared with the constitutional text governing the respective roles of the federal and state governments regarding the

78. *Id.* at 178.

79. *Id.* at 179.

80. *Id.* at 183.

81. 270 F.3d 203, 260 (5th Cir. 2001); *see also* *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002).

82. Chief Justice Rehnquist's opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), explains that "the people," as used in the First, Second, Fourth, Ninth and Tenth Amendments, is a "term of art" referring to "a class of persons who are part of a national community." Justice Thomas's concurrence in *Printz v. United States*, 521 U.S. 898, 936-37 (1997), indicates he might see an individual right in the text of the Second Amendment. Justice Scalia seems to find the right of the people to keep and bear arms to mean just that. *See* Antonin Scalia, *Vigilante Justices: The Dying Constitution*, NAT'L REV., Feb. 10, 1997, at 32, 32-33 ("We may like . . . the elimination of the right to bear arms; but let us not pretend that these are not reductions of rights.").

83. *See Silveira*, 312 F.3d at 1075 (noting that the Court has been unwilling to dive into the troubled waters of Second Amendment interpretation).

militia and that it is a dubious idea as a matter of policy.⁸⁴ On the policy front they argue, for example, that the possibility of armed tension between the federal military and a state military body (equipped presumably with modern military armament like artillery and air power) is much more worrisome than anything resulting from the “people” bearing their private firearms.⁸⁵ States’ rights advocates, policy makers and many American citizens on the other hand, seem to find the idea of a state exercise of the right to keep and bear arms much less problematic as a practical matter.

Maybe this view is a function of the marginalization of the states in the last several generations. Certainly it ignores our history of broad state autonomy, our Civil War, and the state/federal showdowns of the civil rights era.⁸⁶ However, with the exception of the *Emerson* decision, scholarly critiques arguing the worrisome policy implications of the SRSA have not shaken the lower federal courts’ commitment to the position.⁸⁷

Several progressively more stringent renditions of the states’ rights view can be extracted from the case law culminating in the recent Ninth Circuit Court of Appeals decision in *Silveira v. Lockyer*.⁸⁸ Each rendition starts nominally with *Miller* and then evolves into something quite different from what the *Miller* opinion actually says.⁸⁹

84. Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States’ Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1739 (1995). See also *infra* notes 141, 144-45, and 155 (showing that the text of the Constitution dealing explicitly with militia rights makes the SRSA superfluous or means the SRSA implicitly repealed Article 1, Section 8).

85. Reynolds & Kates, *supra* note 84, at 1750-52. Today, the individual rights view of the Second Amendment means less that government will be overthrown through force and more that drastic infringements of liberty will have a prohibitively high cost. The furor over Waco and Ruby Ridge show that the capacity of the federal government to successfully use force against American citizens is quite limited. See, e.g., DAVID T. HARDY & REX KIMBALL, THIS IS NOT AN ASSAULT: PENETRATING THE WEB OF OFFICIAL LIES REGARDING THE WACO INCIDENT (2001). However, if citizens do not have guns, the dynamic changes drastically in favor of government, since the threat of force is a more effective tool domestically than the actual use of it. With a disarmed population, the threat is more fearsome and government is more able to achieve its ends through less than lethal violence. The capacity to push the conflict to lethal confrontation (even without the ability to win that confrontation) is the important federal-power-limiting function of the individual right.

86. As for the future, who knows? The platform of the Alaska Independence Party (which has major party status in the state) includes strong support of the right to keep and bear arms and the goal of Alaskan independence. ALASKAN INDEPENDENCE PARTY, PLATFORM, available at <http://www.akip.org/platform.html> (last updated Mar. 29, 2003). See also Jon Dougherty, *Alaskan Party Stumps for Independence*, WORLDNETDAILY.COM (Feb. 25, 2001), available at http://www.worldnetdaily.com/news/article.usp?ARTICLE_ID=21840.

87. For example, *Silveira* acknowledges *Emerson* and the recent scholarship, but still hews the states’ rights view. *Silveira*, 312 F.3d at 1069.

88. *Id.*

89. Brannon Denning maps the pre-*Silveira* evolution from the early to current cases. Brannon P. Denning, *Gun Shy: The Second Amendment as an “Underenforced Constitutional*

Sketching the superficial paradox of *Miller*, I highlighted the Court's conclusions that there was no evidence that the sawed-off shotgun had some reasonable relationship to the militia, and that the militia constitutes all able-bodied male citizens.⁹⁰ If one stops at this point, *Miller* remains a puzzle. But there is clarification in the fact that in remanding the decision, the Court gave fairly explicit instructions regarding the proof that would be necessary to sustain a claim under the Second Amendment. The Court suggested two ways the reasonable relationship to the militia might be but was not established. Defendants might show: 1) that the weapon is part of ordinary military equipment, or 2) that its use could contribute to the common defense.⁹¹ Since defendants won at the district court without presenting such evidence and the Court was not willing to take judicial notice that the shotgun satisfied these criteria, remand was necessary.

Recall now the threshold matter that the Court recognized as undisputed—*viz.*, the membership of defendants in the militia. The Court embraced the traditional definition of the militia, as “comprised of all males physically capable of acting in concert for the common defense . . . expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”⁹²

A straight forward construction of *Miller* suggests, then, two stages of analysis: first, an easy question of whether an individual is a member of the militia (very easy except where the claim is made by a woman, or a very young, very old, or disabled male);⁹³ and, second, whether the possession and use of the weapon has some reasonable relationship to “the preservation or efficiency” of

Norm,” 21 HARV. J.L. & PUB. POL’Y 719 (1998) [hereinafter Denning, *Gun Shy*]; Denning, *Can the Simple Cite Be Trusted?*, *supra* note 8. Denning claims that the dominant judicial view of *Miller* stems from illegitimate and contemptible abuse of judicial power. Denning, *Gun Shy*, *supra*, at 735. His criticism of the process employed in the states’ rights cases is beside the point for the purpose of this Article, but his mapping of the cases provides a more detailed view of the renditions of the states’ rights view than is presented here.

90. See *supra* notes 79-80 and accompanying text.

91. *United States v. Miller*, 307 U.S. 174, 178 (1939) (citing *Aymette v. Tennessee*, 21 Tenn. (2 Hum.) 154, 158 (1840)).

92. *Id.* at 179.

93. Congress has defined the unorganized militia as all able-bodied male citizens at least seventeen years of age and under forty-five years of age and women citizens who are members of the National Guard. 10 U.S.C. § 311 (2000). *Miller* suggests that militia membership was limited by age for males. It seems to exclude females. *Miller*, 307 U.S. at 179. Robert Cottrol and Raymond Diamond illustrate that historically the militia commonly excluded free blacks and slaves. They emphasize, however, that the *people* to whom the right extends (under the individual rights view) are a broader class than the *militia*. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEORGETOWN L.J. 309, 331 (1991); see also David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (1998) (discussion of extensive nineteenth century sources identifying the militia as virtually the entire male population bearing their own private arms) [hereinafter Kopel, *The Second Amendment in the Nineteenth Century*].

the militia.⁹⁴ This second requirement might be satisfied by showing that the weapon is part of the ordinary military equipment of the time, or that it could contribute to the common defense.⁹⁵

After more than sixty years of lower court citations of *Miller* for the proposition that the Second Amendment contains no individual right to arms, the straightforward interpretation of *Miller* is highly contestable. However, the first lower court decision in which *Miller* was interpreted, *Cases v. United States*,⁹⁶ shows that the “straightforward” two phase interpretation is entirely sound. We also learn that the *Cases* court deemed this straightforward interpretation bad social policy, rejected it as affording too much protection to a wide range weapons, and affirmed the conviction of the defendant by grafting onto the Second Amendment, a previously unknown state of mind requirement.

In *Cases*, the court wrestles with the two-phase *Miller* analysis and concludes that as a rule of general application it unwisely protects an extremely wide range of firearms possession.

At any rate the rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well known fact that in the so called “Commando Units” some sort of military use seems to have been found for almost any modern lethal weapon. In view of this, if the rule of the *Miller* case is general and complete, the result would follow that, under present day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus.⁹⁷

Concluding that *Miller* does not offer a general and complete rule for interpreting the Second Amendment, the court ruled that *Cases* possessed the gun “simply on a frolic of his own and without any thought or intention of contributing to the efficiency of [a] well regulated militia.”⁹⁸ Having failed this intent requirement, *Cases* failed to raise a legitimate Second Amendment claim. While the *Cases* standard cannot be found in *Miller*, it has generated its own following⁹⁹ and thus constitutes one established rendition of the SRSA.

Eight years after *Miller*, the Third Circuit rendered an important Second Amendment decision in *United States v. Tot*.¹⁰⁰ *Tot* was convicted of violating

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

95. *Id.*

96. 131 F.2d 916 (1st Cir. 1942).

97. *Id.* at 922.

98. *Id.* at 923.

99. *See, e.g., United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

100. 131 F.2d. 261 (3d Cir. 1942), *rev'd*, 319 U.S. 463 (1943) (reversed on grounds that the presumption in the Federal Firearms Act that the gun was received by defendant in interstate commerce after the effective date of the act violated due process). Though *Tot* was reversed on other grounds, it continues to be cited for its Second Amendment analysis. *See Engblom v. Carey*

a federal law that prohibited the possession of a gun that could accommodate a silencer. He raised the Second Amendment as a defense, claiming he was experimenting with modifications to the gun with the aim of offering the improved weapon as a prototype for consideration by the government for military use. *Tot*'s claim might have satisfied the state of mind requirement of *Cases*, but the court imposed a more rigorous test. With citations to dubious sources,¹⁰¹ the court concluded:

It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment . . . was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.¹⁰²

On this view of the Second Amendment, something more than the showing *Tot* was prepared to make is required to sustain a claim. What precisely this showing might be, we are left to wrestle with. For now it is sufficient to acknowledge *Tot* and its progeny¹⁰³ as providing a more burdensome rendition of the Second Amendment than either *Cases* or *Miller*.

The fullest and most recent exposition of the SRSA appears in *Silveira v. Lockyer*.¹⁰⁴ *Silveira* is notable for two things (weaknesses,¹⁰⁵ perhaps, but still pillars of this most stringent rendition of the SRSA) that add some texture to the position taken in *Tot*. First, the court simply ignores the declaration in *Miller* that the militia is the body of the people bearing their own private arms, and concludes that nominal membership in the militia (like that enjoyed by millions of Americans under 10 U.S.C. § 311) confers nothing particular in the way of

522 F. Supp. 57, 71 (S.D.N.Y. 1981).

101. Steve Halbrook shows that “not a single original source quoted in *Tot* substantiates its assertion that the Second Amendment ‘was not adopted with individual rights in mind’” and “at least two of the [sources] directly contradict the *Tot* thesis.” STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 190-91 (1984).

102. *Tot*, 131 F.2d at 266.

103. *See, e.g., Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996).

104. The decision acknowledges that most of the previous SRSA cases rest on very thin analysis. *Silveira v. Lockyer*, 312 F.3d 1052, 1063-64 (9th Cir. 2002) (“Like other courts, we reached our [earlier] conclusion regarding the Second Amendment’s scope largely on the basis of the rather cursory discussion in *Miller*, and touched only briefly on the merits of the debate *Miller*, like most other cases that address the Second Amendment, fails to provide much reasoning in support of its conclusion.”). *See also* Denning, *Can the Simple Cite Be Trusted?*, *supra* note 8 at 989 (criticizing district court cases that give a simple citation to *Miller* but apply the rulings of *Cases* or *Tot*).

105. Some of the analytical weaknesses of *Silveira* are laid out in both the majority and concurring opinions of the recent Ninth Circuit opinion in *Nordyke v. King*, 319 F.3d 1185 (9th Cir.), *reh’g denied*, 364 F.3d 1025 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 60 (2004).

individual rights.¹⁰⁶ Second, the court discerns from the words “bear arms” that the verbs in the Second Amendment have a peculiarly military cast that only the state can satisfy.¹⁰⁷ Because “bear” connotes military function and appears with “keep” (although second in order), the court concludes that the meaning of “keep” is a mystery that, in any case, must be construed consistent with the state grounded military connotation of “bear.”¹⁰⁸ The Second Amendment, therefore, does not protect any private “keeping” of arms.

Thus, in the view of the Ninth Circuit, a successful assertion of the Second Amendment requires the direct imprimatur of the state; any bearing of arms must be explicitly authorized by the state for purposes of pursuing the state’s interest in militia preparedness. Any keeping of arms by private parties on the model of the traditional militia of the whole described in *Miller*, would again require some sort of explicit state authorization related to the militia (something more than a general acknowledgment that a citizen is a member, technically, of the militia).

I will suggest below why if it is to mean anything at all, the SRSA of *Silveira* must at least privilege particular types of state legislation protecting shooting ranges from federal environmental closure; how if it protects this, it is difficult to avoid protecting a broader range of related arms bearing; and how existing federal gun control legislation is more at risk from state assertions of rights under the SRSA than from an individual right subject to reasonable regulation.

III. STATE ENVIRONMENTAL IMMUNITY LEGISLATION AND CIVILIAN MARKSMANSHIP PROGRAMS TRACKING THE FEDERAL CMP

It is now a common observation that the gun debate reflects a broader cultural divide.¹⁰⁹ In some places the idea of America as a “Nation of Riflemen” resonates deeply.¹¹⁰ In others, this will be a phrase heard for the first time and its meaning will be difficult to stomach.

This cultural divide leads to surprises—notably for our purposes, surprises for those outside the gun culture. Many people who believe they do not know anyone who owns a gun are flabbergasted to learn that on average, there is a gun

106. *Silveira*, 312 F.3d at 1063 n.11 (citing *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977)). The Tenth Circuit rejected defendant’s claim that because the Kansas Constitution defined him as a member of the Kansas Militia, he had a right to own an unregistered machine gun. *Oakes*, 564 F.2d at 387 (citing KANSAS CONST. art. VIII, § 1 (militia as able bodied males between eighteen and forty-five)). Citing *Miller*, the court concluded, “[t]o apply the amendment so as to guarantee appellant’s right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy.” *Id.*

107. *Silveira*, 312 F.3d at 1073-74 nn.28-31.

108. *Id.* at 1075.

109. See Johnson, *supra* note 1; Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53 (2002).

110. See, e.g., JAMES B. WHISKER, *THE CITIZEN SOLDIER AND UNITED STATES MILITARY POLICY* 2 (1979).

in nearly every other American household.¹¹¹ They are equally astounded to learn the range of measures state legislatures have taken to support and protect the gun culture. Thirty-eight states have legislation liberally granting citizens the right to carry concealed firearms. Eight more states have restrictive concealed carry schemes.¹¹² More than forty states have preempted municipalities from

111. See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 51-52 (1991) (listing surveys from the 1980s and 1990s which estimated the number of households owning any type of gun to be 40-52%); Don B. Kates & Henry E. Schaffer et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 572 (1995) (noting a 110% “increase in handgun ownership in the 20 year period 1973-1992”). I have been writing about gun rights long enough now that it is not unusual for men in these circles (so far it always has been men) to approach me and say they are closeted gun rights supporters. Several have, in strictest confidence, even disclosed the dirty secret that they actually own a gun.

112. See generally Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995).

Because we are generalizing about state laws that are not uniform, there is disagreement at the margins about precisely how to characterize every state. Ian Ayres and John J. Donohue, III criticize that John Lott has classified Alabama and Connecticut as “shall issue” states while Handgun Control, Inc. calls them “may issue” states. See Ian Ayres & John J. Donohue III, *Nondiscretionary Concealed Weapons Laws: A Case Study of Statistics, Standards of Proof, and Public Policy* (n.d.) (reviewing JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 1 n.2 (1998)), available at <http://islandia.law.yale.edu/ayers/pdf/lottreview.pdf#search='ian%20ayres%20nondiscretionary%20concealed%20weapons%20laws'>.

The basic distinction for our purposes is states where an ordinary citizen can obtain a license to carry without any special showing other than a general interest in self-defense. Thirty-five state laws are explicitly non-discretionary (“shall issue”). Alabama is technically discretionary, but it is essentially shall issue in practice. Applicants denied a permit in Alabama would likely be denied one in a shall issue state for the same reason. The NRA has called this “reasonable may issue.” See NRA, GUIDE TO RIGHT-TO-CARRY RECIPROCITY AND RECOGNITION 2 (Jan. 2005), available at <http://www.nraila.org/recmap/recguide.pdf>. Connecticut and Iowa operate a similar liberal discretionary or “reasonable may issue” schemes. *Id.* at 4, 6.

The NRA generally excludes states like New Jersey from the list of right to carry states, even though New Jersey for example grants a limited number (about 1,000 in 1995 mainly to security guards) of permits. See Abby Goodnough, *Concealed Weapons: A Senator Says Their Time Has Come*, N.Y. TIMES, May 19, 1996, at 13NJ8. The full list of states with restrictive permitting systems are California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island.

The four absolute non issue states technically are Nebraska, Kansas, Illinois, and Wisconsin. However, Wisconsin’s inclusion on this list is now controversial since the Wisconsin Supreme Court has ruled that in some circumstances, the statute barring concealed carry must yield to “reasonable exercise of the [vintage 1998] constitutional right to keep and bear arms for security.” See *State v. Hamdan*, 665 N.W.2d 785, 790 (Wis. 2003). In 2004, the Wisconsin legislature came within one vote of overriding the governor’s veto of a shall issue concealed carry bill.

For purpose of our count, I will start with the classification used by the gun control group Join Together Online.

passing firearms regulations that are more stringent than state law.¹¹³ Although these state preemption statutes arguably already prevent covered municipalities from suing gun manufacturers,¹¹⁴ nineteen states have passed legislation specifically blocking municipalities from suing gun manufacturers for the criminal misuse of their products.¹¹⁵ Forty-four states have constitutional provisions that protect an individual right to arms in language that generally brooks no argument about it being some collective right that does not apply to individual citizens.¹¹⁶ These state constitutional guarantees are not moribund

With the recent passage of a shall issue handgun law in Ohio, the number of states that have eased restrictions on concealed gun carrying has risen to 35 [shall issue states]. But in the face of this onslaught, four heartland states are holding fast to their long-time laws that prohibit the carrying of concealed guns by people other than police officers. [These four], Illinois, Kansas, Nebraska, and Wisconsin . . . stand apart not only from the shall issue states but from the 11 "may issue" states . . .

Dick Dahl, *Four States Holding to "No Issue" Handgun Laws*, JOIN TOGETHER ONLINE, June 28, 2004, at <http://www.jointogether.org/gv/news/features/reader/0%2C2061%2C572284%2C00.html>.

Adding the liberal, reasonable may issue/effectively shall issue states Alabama, Iowa, and Connecticut yields the NRA's 38 right to carry states and the claim that "[s]ixty-four percent of Americans live in RTC states." See NRA, FACT SHEET, RIGHT TO CARRY 2005 (Mar. 17, 2005), available at <http://www.nraila.org/issues/FactSheets/Read.aspx?ID=18>.

113. James H. Warner, *Municipal Anti-gun Lawsuits: How Questionable Litigation Substitutes for Legislation*, 10 SETON HALL CONST. L.J. 775, 776 (2000). Because state laws are not uniform there is disagreement about their impact. Americans for Gun Safety puts the number of preemption statutes at forty. Americans for Gun Safety Foundation, *Gun Glossary*, at <http://www.campaignadvantage.com/services/websites/archive/agsfoundation/glossary.html#preemption> (last visited Apr. 22, 2005). David Kopel explains some of the disagreement and lists the preemption number at forty-four states. See David B. Kopel, *Limited Preemption of Firearms Laws: A Good Step for Civil Rights*, Second Amendment Project (Mar. 11, 2003), at <http://www.davekopel.com/2A/IB/limited-preemption.htm>.

114. See *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 889 (E.D. Pa. 2000) (interpreting 18 PA. CONS. STAT. ANN. § 6120).

115. Jon S. Vernick & Julie Samia Mair, *State Laws Forbidding Municipalities from Suing the Firearm Industry: Will Firearm Immunity Laws Close the Courthouse Door?*, 4 J. HEALTH CARE L. & POL'Y 126, 134-35 (2000); see also Annie Tai Kao, Note, *A More Powerful Plaintiff: State Public Nuisance Lawsuits Against the Gun Industry*, 70 GEO. WASH. L. REV. 212, 223 (2002).

116. See generally David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 823, 823 (2002) [hereinafter Kopel, *State Constitutions*]. See also David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 512-14 n.390 (1997). The latest provision, Wisconsin's 1998 constitutional amendment, is discussed in Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 WIS. L. REV. 249. Two of these state guarantees (Kansas and Massachusetts) have been interpreted as collective rights. See *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976), *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905).

artifacts. Twenty of them were adopted or strengthened in the last forty years, most recently in 1998.¹¹⁷ Forty state legislatures have passed laws protecting shooting ranges from noise nuisance lawsuits and other claims.¹¹⁸

117. See, e.g., NEB. CONST. art. I, § 1 (affirming the right to bear arms for defense of self and family, for the common defense, and for hunting and recreation); NEV. CONST. art. 1, § 11 (affirming “the right to keep and bear arms” for security, defense, lawful hunting, and recreation); N.H. CONST. pt. 1, art. 2-a (“All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.”); W. VA. CONST. art. III, § 22 (affirming the right of citizens to bear arms for defense of family, self, and state, and for recreation and hunting). See Kopel, *State Constitutions*, *supra* note 116, at 824 for a description of the twenty most recent amendments and reaffirmations.

118. The following are statutes that protect shooting ranges from such claims. ALA. CODE § 6-5-341 (2002); ALASKA STAT. § 16.55.020 (Michie 2001) (broad affirmative support for ranges and shooting); ARIZ. REV. STAT. § 17-273 (2001) (broad affirmative support for ranges); CAL CIV. CODE § 3482.1 (West 2003) (noise nuisance exemption); COLO. REV. STAT. § 13-21-111.8 (2001) (immunity against claims by range users who assume risk of injury); CONN. GEN. STAT. § 22a-74a (2001) (noise nuisance immunity); FLA. STAT. ch. 823.16 (2001) (exemption from specified rules and nuisance actions); GA. CODE ANN. § 41-1-9 (1996) (noise nuisance exemption); IDAHO CODE § 55-2601 (Michie 2004) (noise nuisance immunity); IDAHO CODE § 36-412A (Michie 2002) (education programs); IND. CODE ANN. § 14-22-31.5-6 (West 2002) (limiting liability for noise pollution); IOWA CODE § 657.9 (2002) (immunity where plaintiff comes to the nuisance); KAN. STAT ANN. § 58-3222 (Supp. 2003) (noise nuisance immunity); KY. REV. STAT. ANN. § 237.210 (Banks-Baldwin 2002) (general and noise nuisance immunity); LA. REV. STAT. ANN. § 30:2055.1 (West 2003) (noise nuisance immunity); ME. REV. STAT. ANN. tit. 17, § 2806 (West 2002) (limiting claims where plaintiff comes to the nuisance); MD. CODE ANN., CTS. & JUD. PROC. § 5-403.1 (2002) (limiting claims where plaintiff comes to the nuisance); MASS. GEN. LAWS ch. 214, § 7B (2002) (limiting liability for noise nuisance); MICH. COMP. LAWS § 691.1542 (2002) (limiting applicability of noise regulations); MISS. CODE ANN. § 95-13-1 (2002) (immunity from noise regulations); MONT. CODE ANN. § 76-9-101 (2002) (general protection and endorsement of ranges: “[i]t is the policy of the state of Montana to provide for the health, safety, and welfare of the citizens of the state by promoting the safety and enjoyment of the shooting sports among the citizens of the state and by protecting the locations of and investment in shooting ranges for shotgun, archery, rifle, and pistol shooting”); MONT. CODE ANN. § 45-8-111(5) (2002) (immunity from noise nuisance); NEV. REV. STAT. § 40.140 (2002) (noise nuisance immunity); N.H. REV. STAT. ANN. § 159-B:1 (2002) (noise nuisance immunity); N.M. STAT. ANN. § 17-8-2 (Michie 2002) (noise nuisance immunity); N.Y. GEN. BUS. LAW § 150 (McKinney 2002) (establishing affirmative defenses against noise nuisance liability); N.C. GEN. STAT. § 14-409.46 (2002) (noise nuisance immunity); N.D. CENT. CODE § 42-01-01.1 (2002) (noise nuisance immunity); OHIO REV. CODE ANN. § 1533.85 (Anderson 2002) (noise nuisance immunity); OKLA. STAT. tit. 63, § 709.2 (2003) (noise nuisance immunity); OR. REV. STAT. § 467.131 (2001) (noise nuisance immunity); 35 PA. CONS. STAT. § 4501 (Michie 2002) (noise nuisance immunity); S.C. CODE ANN. § 31-18-40 (Law. Co-op 2002) (providing for immunity from noise control regulations); S.D. CODIFIED LAWS § 21-10-28 (Michie 2002) (declaring that a shooting range is not a nuisance); TENN. CODE ANN. § 39-17-316 (2002) (noise nuisance immunity); TEX. LOC. GOV'T CODE ANN. § 250.001 (Vernon 2002) (noise nuisance immunity); UTAH CODE ANN. § 47-3-3 (2003) (noise nuisance immunity); VT. STAT. ANN. tit. 10,

At least one state has protected shooting ranges from, *inter alia*, environmental liability for lead discharges. Alabama Code section 6-5-341 (“Alabama 341”) immunizes shooting ranges from lead pollution liability (as well as noise pollution liability and claims based on attractive nuisance).¹¹⁹ Alabama 341 does not expressly invoke the Second Amendment. It is not even clear that it articulates an intention to immunize firing ranges from federal environmental legislation. Alabama 341 immunizes ranges from rules and regulations of “any governmental body limiting levels of lead occurring in the

§ 5227 (2003) (noise nuisance immunity); VA. CODE ANN. § 15.2-917 (Michie 2002) (immunity from local noise ordinances); W. VA. CODE § 61-6-23 (2003) (noise nuisance immunity); WIS. STAT. § 895.527 (2002) (noise nuisance or regulation immunity); WYO. STAT. ANN. § 16-11-102 (Michie 2002) (noise nuisance immunity).

119. ALA. CODE § 6-5-341 (2002).

...

(2) Notwithstanding any other provision of law, any person, firm, or entity who operates or uses a sport shooting range in this state shall not be subject to civil liability or criminal prosecution in any matter relating to noise or noise pollution or lead or lead pollution resulting from the operation or use of the range if the range is being operated between the hours of 9:00 a.m. and 9:00 p.m. and if the range has been in existence prior to 1990 or is in compliance with any noise or lead control laws or ordinances that applied to the sport shooting range and its operation on August 1, 2001, or at the time the sport shooting range came into existence, whichever event occurs first.

(3) Any person, firm, or entity who operates or uses a sport shooting range is not subject to an action for nuisance and is not subject to injunction to stop the use or operation of the shooting range on the basis of noise or noise pollution or lead or lead pollution if the range is being operated between the hours of 9:00 a.m. and 9:00 p.m. and if the range has been in existence prior to 1990 or is in compliance with any noise control or lead control laws or ordinances applying to the sport shooting range and its operation on August 1, 2001, or at the time the sport shooting range came into existence, whichever event occurs first.

(4) Except as expressly provided herein, nothing in this section nor the common law doctrine of attractive nuisance shall create any duty of care or grounds for liability toward any person using the property of another for a sport shooting range.

(c) No public street or alley shall be opened through a tract of property used or occupied as a sport shooting range, unless the necessity of the street or alley is first established by verdict of a jury upon a showing of extreme need and impossibility of redirecting or rerouting the street or alley to accommodate the sport shooting range.

(d) Rules or regulations adopted by any governmental body limiting levels of noise in terms of decibel level which may occur in the atmosphere shall not apply to a sport shooting range exempted from liability under this section.

(e) Rules or regulations adopted by any governmental body limiting levels of lead occurring in the atmosphere shall not apply to a sport shooting range exempted from liability under this section.

Id. § 6-5-341(b)(2)-(4)(e).

atmosphere.”¹²⁰ It defines “governmental body” seemingly by reference to state entities only.¹²¹ Moreover, because Alabama 341 only provides immunity from laws or regulations governing atmospheric lead, the federal statutes already discussed arguably do not conflict with it.

These problems aside, it is doubtful that a “states’ rights” federal court would consider the very general language in Alabama 341 as an invocation of the SRSA. Given the hostility of federal courts toward the Second Amendment, it is easy to imagine a court dismissing claims that Alabama 341 trumps RCRA on Second Amendment grounds with a *Cases*-style argument that no intention toward militia purposes was expressed by the legislature.¹²² Similarly, a court

120. *Id.* § 6-5-341(e).

121. *Id.* § 6-5-341(a)(1) & (e). This still raises the potential for conflict with state agencies exercising delegated federal authority to enforce the CWA or RCRA. It is common for federal environmental law to be enforced this way. *See generally* Nicholas J. Johnson, *EPCRA’s Collision with Federalism*, 27 IND. L. REV. 549 (1994) (discussing the boundaries of cooperative federalism under which states enforce federal law).

122. *See Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (imposing an intent requirement on an individual litigant); *supra* notes 97-100 and accompanying text (discussing *Cases*). If the lower federal courts had not been so hostile to a substantive Second Amendment, it would be tempting to advance the argument that the Second Amendment (even the states’ rights version) is self-implementing, i.e., that it needs no explicit legislative invocation. Consequently, the argument would continue, existing state laws that have the effect of protecting militia activity by preserving ranges (even if constitutional protection is not explicitly claimed in the statutory text) should be protected under the SRSA. Why should we care that the legislature explicitly invoked the Second Amendment? Do we impose a threshold procedural requirement that the legislature invoke the Tenth Amendment, or that individuals invoke the First Amendment in order to enjoy constitutional protection? Infringement is infringement, regardless of whether there is an explicit legislative assertion of the SRSA.

One can imagine this argument fatally encumbered by many other questions, particularly in circuits like the Ninth Circuit that already have shown a willingness to ignore inconvenient aspects of the meager guidance the Supreme Court has given on this matter. *See supra* notes 105-08 and accompanying text (criticizing *Silveira* for ignoring Miller’s definition of the militia). Can the question ever arise without state sponsorship? What type of state sponsorship is necessary? Must the conflicting federal statute trench on state property, or is it enough that the federal statute impairs shooting activity that the state has decided to protect? How much difference does the asserted reason for enactment of the state legislation make?

In a neutral tribunal, one might attempt with some optimism the claim that basic range protection measures like Alabama 341 should be protected under the SRSA. Indeed, if courts treated the Second Amendment the way they treat the First, one might *confidently* assert that Alabama 341 and the like were constitutionally privileged against federal impairment. However as Professor Powe illustrates, there is a vast difference in the way courts have treated the First and Second amendments. *See* L. A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997) (comparing the First and Second Amendments, using standard interpretive tools to suggest how constitutional interpretation is affected by judges’ preferences for certain rights). I concede that perhaps no one can be neutral on the question of how to secure basic

might easily conclude as in *Tot*,¹²³ that the militia connection is too remote and cannot be presumed. Or, drawing on *Silveira*,¹²⁴ or the “intermediate” Tenth Circuit standard of *United States v. Oakes*,¹²⁵ a court might conclude that something less perfunctory, more organized, and more clearly related to the goals of an organized, regulated state military force is required to trigger the SRSA.¹²⁶

Alabama will have to do more if its lead immunity legislation is to trump federal environmental law on Second Amendment grounds. *Silveira*, *Oakes*, *Cases*, *Tot*, and a firm line of district court “dittos” demand it. And this might be the end of the story.

The common intuition is probably that legislation sufficient to satisfy the demands of *Silveira* and similar cases is, as a practical matter, highly unlikely - its probability of occurrence roughly equivalent to the danger of the earlier mentioned Arkansas Air Force. At least this is the bet that gun control advocates, who advance the SRSA, seem to have made.¹²⁷ But, the common intuition changes when we consider that existing and long standing federal legislation provides a model that, when grafted onto Alabama 341, squarely meets the demands of *Silveira*. It also injects a number of other factors into the dynamic that makes gun prohibitionists’ wager on the SRSA a sucker’s bet.

safety from violent attacks.

123. *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev’d*, 319 U.S. 463 (1943).

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

125. 564 F.2d 384, 387 (10th Cir. 1977) (imposing an intermediate standard).

126. Alaska and Montana go the farthest in general support of bearing arms but without an explicit assertion of the Second Amendment and without obvious reference to protecting state arms-bearing from federal impairment. Section 16.55.020 of the Alaska statutes provides:

Powers of department. In the discharge of its duties under AS 16.55.010, the Department of Fish and Game may

(1) provide, through a departmental coordinator, technical assistance to municipalities, communities, and organizations;

(2) make grants to municipalities and organizations as provided in AS 16.55.030

(A) to develop and operate public shooting ranges and facilities; and

(B) to operate programs involving education and training in the safe use of firearms.

ALASKA STAT. § 16.55.020 (Michie 2002). Montana makes a similar statement of policy, but again without specific articulation of intent to resist federal impairment of its policy goals on Second Amendment grounds. MONT. CODE ANN. § 76-9-101 (2002).

It is the policy of the state of Montana to provide for the health, safety, and welfare of the citizens of the state by promoting the safety and enjoyment of the shooting sports among the citizens of the state and by protecting the locations of and investment in shooting ranges for shotgun, archery, rifle, and pistol shooting.

127. It is very difficult to find a record of government officials, anyone from the gun control lobby, or anyone at all arguing why we should prefer the substantive policy implications of the SRSA. “States’ rights” usually just appears as an answer to why the “right of the people to keep and bear arms” does not mean individual people have a right to arms. The expectation seems to be that the SRSA will have no residual substantive impact.

For over 100 years, the Federal Civilian Marksmanship Program (CMP)¹²⁸ has pursued the distant ideal of America as a nation of riflemen.¹²⁹ Established in 1903 at the prompting of Secretary of War Elihu Root, the program authorized and funded shooting clubs, national shooting competitions, a program for selling surplus U.S. military arms and ammunition to civilians, and encouraging civilian training and practice with military arms at affiliated gun clubs and U.S. government owned ranges.¹³⁰ Until 1996, the program was funded out of the Pentagon budget and operated under the authority of the Department of the Army.¹³¹ Today, the functions of the CMP remain the same, but the Office of the Director of Civilian Marksmanship (DCM) is now a federal corporation.¹³²

In recent decades, the primary rifle sold to civilians through the CMP program has been the .30 caliber, semiautomatic, M-1 Garand, the rifle George Patton called the finest battle implement ever devised.¹³³ Citizens who wish to purchase a Garand through the DCM must comply with a variety of requirements including completing the course of fire in officially sanctioned hi-power rifle matches run by qualifying gun clubs following federal military firing discipline.¹³⁴ Participants at these matches may use rifles and ammunition supplied to the club through the DCM. After qualifying and undergoing a background check, individuals may purchase a surplus Garand and surplus .30 caliber ammunition, with the goal that they will continue to practice and compete.¹³⁵ The Director of Civil Marksmanship estimates that CMP programs

128. 36 U.S.C. § 40721 (2000).

129. See WHISKER, *supra* note 110 at 2.

130. CIVILIAN MARKSMANSHIP PROGRAM, 2003 ANNUAL REPORT (Nov. 15, 2005) (information from inside back cover) [hereinafter 2003 CMP ANNUAL REPORT], available at http://www.odcmp.com/Annual_report.htm.

131. *Id.* at 6.

132. *Id.* A detailed description of the current program is available in the 2003 CMP Annual Report.

133. *Id.* at 8, 10. The Garand was the standard U.S. battle rifle in World War II. It fires a .30 caliber bullet, essentially the 30.06 hunting round. Ballistically, Garand ammunition is superior to the .223 caliber round fired through the M-16 issued to modern troops. Its velocity is lower than that of the .223, but its energy, due to the heavier projectile, is greater. Master gunner Jeff Cooper states, "The classic 30.06 of the United States will do anything that a rifle may be called upon to do, which includes the taking of all forms of live targets, from prairie dogs to Alaskan moose." COOPER, *supra* note 16 at 12. In contrast, many states prohibit use of the .223, for deer hunting because it is unlikely to produce a clean kill and more likely to produce a lightly wounded, long suffering animal who will not be recovered by the hunter. Cooper commonly dismisses the .223 as a "poodle shooter" (referring to the popularity of the round among ranchers for shootings "varmits" like prairie dogs). A semiautomatic version of the army M-16 is available to citizens through the DCM on a more limited basis. See 36 U.S.C. § 40729(a)(3) (2000); see also Civilian Marksmanship Program, *Frequently Asked Questions*, at <http://www.odcmp.com/faqs.htm> (last visited Feb. 26, 2005).

134. 2003 CMP ANNUAL REPORT, *supra* note 130, at 10.

135. See 36 U.S.C. §§ 40721-733 (2000).

reach two million people annually.¹³⁶

Given the longevity of the federal CMP, it is somewhat surprising that no direct state counterparts exist. Perhaps, this is because the federal program has, up to now, served federal, state, and individual goals adequately. Perhaps it is because, until relatively recently, the individual right to arms was relatively unthreatened as a practical, if not a strictly legal matter. Some may find it remarkable that the federal CMP can exist without there having been a concerted campaign from somewhere in “blue America,” mobilizing opposition to the government sale of “assault rifles” and attempting to scrap the CMP.¹³⁷

One can just as easily imagine their counterparts in “red America” either preemptively supplementing their laws with state CMPs or replacing a dismantled federal program with one administered by the state—something the SRSA seems to encourage. For states like Alabama, that already have expressed the aim to protect ranges from lead pollution closure, all that is left to do is follow the instructions laid down by *Silveira*. It is simply a matter of grafting onto Alabama 341 an essential duplicate of provisions governing the federal CMP. The legislation might look something like this:¹³⁸

*The Alabama Range Protection, Militia Discipline and
Civilian Marksmanship Program.*
Alabama Code 223

In pursuit of a well regulated militia and intending to exercise its rights granted under the Second Amendment of the United States Constitution to the fullest extent, the legislature of Alabama does hereby establish the Alabama Civilian Marksmanship Program (“Alabama CMP”), pursuant to which:

(A) Alabama CMP participants shall have all rights and privileges that are and have been enjoyed by members of Federal CMP programs established pursuant to 36 U.S.C. § 40722 and its predecessor sections (“Federal CMP”),¹³⁹ and shall pursue the firing discipline and competition protocol of the

136. CIVILIAN MARKSMANSHIP PROGRAM, CMP CATALOG 2 (Summer 2005), available at <http://www.odcmp.com/Forms/catalog.pdf>.

137. Efforts in this direction have not been concerted. See John Mintz, *M-1 Rifle Giveaway Riles Gun Control Proponents*, PLAIN DEALER (Cleveland) May 9, 1996, at 14A, available at 1996 WL 3550238.

138. I propose here a skeleton of legislation that would satisfy even the Ninth Circuit’s articulated criteria. It is interesting to consider how claims based on Alabama 223 would be treated in the Fifth Circuit, which has said that the Second Amendment establishes not only militia rights but also an intertwined individual right to self-defense. See *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). For one thing, the Fifth Circuit would be more likely than the Ninth to grant individuals standing to raise claims under 223 style legislation.

139. Cf. 36 U.S.C. § 40722 (2000).

Federal CMP to the extent adopted in regulations established by the Governor.

(B) Eligible participants shall include members of the militia as defined by federal law in 10 U.S.C. § 311, and any other citizen of the state, not otherwise disqualified, who assents to militia membership and discipline by complying with Alabama CMP regulations established by the Governor.¹⁴⁰

(C) The Alabama CMP shall coexist with and be independent of the Federal CMP.

(D) The Alabama CMP shall establish and recognize rifle clubs at any shooting ranges that operate consistent with regulations established by the Governor or any club already qualified under the Federal CMP.¹⁴¹

(E) Shooting ranges already protected pursuant to Alabama Code § 6-5-341 or by regulations established by the Governor under this section, shall, pursuant to the Second Amendment of the United States be immune from impairment of operation or closure under any federal, state, or local environmental protection legislation or regulations or any common law tort action.

(F) State funding shall be provided for purchase of targets and ammunition to be distributed without charge or sold at cost to clubs or individuals qualifying under regulations established by the Governor.¹⁴²

(G) The Governor shall establish regulations providing for sale of semiautomatic center-fire rifles by the State of Alabama to citizens of the State who qualify under either the Federal CMP program or the State CMP.¹⁴³

(H) Rifles available for sale under section (G) shall include the M-1 Garand as currently equipped under the Federal CMP, the semiautomatic AR-15, the Springfield M1A or other semiautomatic versions of the Federal Department of Army model M-14, and any other .30 or .22 caliber center-fire semiautomatic rifle similar to one currently or previously adopted as an infantry

140. *Cf. id.* § 40723.

141. *Cf. id.*

142. *Cf. id.* §§ 40728-730.

143. *Cf. id.* § 40731.

rifle by a NATO country or that is deemed by the Governor to be suitable for rifle practice, competition, or militia activity.¹⁴⁴

(I) Citizens who wish to participate in the Alabama CMP shall not be required to purchase rifles or ammunition from the State, and are authorized to use qualifying rifles and ammunition already in their possession, or rifles and ammunition that they purchase from sources other than the State of Alabama.

IV. STATE CMPs AND THE STATES' RIGHTS SECOND AMENDMENT

So, is Alabama 223 enough to force SRSA courts to infuse their creation¹⁴⁵ with positive content? There are some superficial objections that would suggest even here, that SRSA extends no actual rights. But at bottom, legislation like Alabama 223, produces the conclusion that finally we have something the SRSA must protect. Indeed, it turns out that the range of things on this list of protected States' rights are, as a policy matter, equally or more troubling than anything threatened by the individual rights view.

A. The Basic Content of the Modern Militia Right

Alabama 223 is exactly the type of legislation the state centric Second Amendment must privilege against conflicting federal law. It represents the basic minimum necessary to trigger the SRSA - military enough to satisfy *Silveira*, but practically one of the most innocuous exercises of the SRSA possible. The point is underscored by comparison to a very early adjudication of a state's militia prerogatives (one that interestingly makes no mention of the Second Amendment).¹⁴⁶

In 1838, the Supreme Judicial Court of Massachusetts was asked by the Governor to advise on whether the state might create exemptions from militia service mandated by federal laws (Militia Acts of 1792 and 1803) established under Article I, Section 8 of the Federal Constitution.¹⁴⁷ The 1838 federal militia obligation puts Alabama 223 in perspective:

[The federal law provides] that each and every free, white, able-bodied, male citizen of the respective States, resident therein, who shall be of the

144. *Cf. id.* §§ 40731-732.

145. David Kopel claims that the SRSA "made its first appearance in a concurring opinion in an 1842 Arkansas decision upholding a law against carrying concealed weapons against a challenge under the Arkansas Constitution and the Second Amendment." Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 93, at 1422.

146. There is a rich discussion about the respective rights and powers of states and the federal government to arm, organize and control the militia. The discussion is grounded exclusively in the text of the original constitution. It does not once mention the Second Amendment. *In re Opinion of the Justices*, 39 Mass. 571, 572 (1838).

147. *Id.*

age of eighteen years and under the age of forty-five years, (except as is hereinafter excepted,) shall severally and respectively be enrolled in the militia by the captain, &c. It is then made the duty of every captain to enrol[l] every such citizen who shall arrive at the age of eighteen years, or shall come to reside within his bounds, (except as before excepted,) and he shall, without delay, notify such citizen of the said enrol[l]ment.

It is further provided, in the same section, that every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket, &c. and shall appear so armed, accoutred and provided, when called out to exercise or into service. . . . The plain effect of the [federal statute is] . . . that all those who are enrolled, are subject and bound to do some important duties, amongst which are the duties of keeping themselves at all times armed and provided, and that of appearing so armed when called out to exercise.¹⁴⁸

The Massachusetts court answered affirmatively that the state may create exceptions to service under the federal militia statute.¹⁴⁹ The telling thing is the analysis. The court's decision is grounded on the federal militia power under Article 1, Section 8, the text of the federal statute, and the practice under it allowing states to create exceptions from service.¹⁵⁰ The court does not even acknowledge the existence of the Second Amendment. If the Second Amendment actually meant what the *Silveira* line of cases said it means, the Massachusetts court's analysis would have rested solidly on Second Amendment grounds.

Alabama 223 would not be as intrusive as the 1838 federal approach. It would make appearance and practice with the rifle voluntary. It would not mandate, but again would make voluntary and would facilitate the purchase of a military style rifle. It would provide for a place to practice and develop proficiency with that rifle, but it would not force the citizen to appear for exercises. It would protect all of the above from infringement by federal law that threatens the places and tools of militia training—the guns and the ranges.¹⁵¹ A state might choose to do more, but Alabama 223 comprises the basic things we

148. *Id.* at 572-73.

149. *Id.* at 576.

150. *Id.* at 575.

151. In this respect, Alabama 223 might conflict with Article 1 Section 8, in the way Kates and Reynolds argue is inevitable under the SRSA. *See Reynolds & Kates, supra* note 84, at 1739 (suggesting that the SRSA is hard to square with the federal and state balance of the constitutional text). But since the States' rights courts have ignored that problem, we must as well. The other, comical option is that a court might first advance the SRSA and then conclude that it does not even confer any state rights beyond those already established in Article 1, Section 8 (thus making the Second Amendment totally superfluous). One can only hope that no court would be willing to go that far. *But see Denning, Can the Simple Cite Be Trusted?, supra* note 8, at 962 (criticizing dishonesty of judicial analysis claiming to rely on *Miller*, but actually applying later circuit court authority).

should expect from states under the SRSA.

B. Objections to Second Amendment Protection of Firing Ranges

One superficial issue provides nominal cover for those seeking to uphold federal environmental law against a CMP style state assertion of militia rights. The question is whether a state militia defense against environmental closure of a shooting range is any different from the failing claim of the newspaper publisher that it should be exempt from federal hazardous waste disposal regulations because they burden publishing. The answer is yes. The difference is crucial. Federal environmental laws do not close down newspapers. They increase the cost of operation, as do other regulations and taxation. The regulations do not say that the practice of putting print to page is illegal.

___ In the context of Alabama 223 the discharge of the projectile into the environment is an open and direct violation of the CWA, RCRA, and CERCLA. These statutes bar the core activity—a state program of bearing of arms—protected by the SRSA.

This is mildly contentious because of divisions about what the Second Amendment means. Arguably, outdoor range closures would not prevent individuals from training for armed self-defense. The option of indoor ranges that would permit practice with inherently lower powered handguns would remain available, and indoor ranges are more manageable from an environmental perspective (though more dangerous for the users who are exposed to greater concentrations of airborne lead). However, rifle practice with say, the M-1 Garand is not viable at an indoor range. Certainly an indoor range would not accommodate the competition and training mandated under the federal CMP to occur each year at Camp Perry, Ohio.¹⁵² But, even if such a range could be found or constructed, restricting rifle shooting to such a place would be the equivalent of closing offending newspapers on the rationale that less offensive ones remain open.

C. Republican Virtue

Even some collective rights theorists implicitly acknowledge the role ranges play in the state centric Second Amendment. For example, David Williams's conception of the Second Amendment exalts republican virtue, that requires the kind of collective training activities that will happen, if at all, in places like shooting ranges.¹⁵³ While Williams ultimately opposes a substantive Second Amendment, his call to republican virtue is one of the first principles a states' rights advocate serious about doctrinal content must embrace. The range is one of the best places in modern America where the republican values of the virtuous

152. See 36 U.S.C. § 40725 (2000); 2003 CMP ANNUAL REPORT, *supra* note 130, at 11 (showing and describing the mile long firing range where CMP national matches have been held since 1907).

153. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 592 (1991).

armed citizenry have a chance of being developed and sustained.¹⁵⁴

The states' rights judges bump against this idea. They acknowledge the framers' preference for the militia over the standing army, even while criticizing the militia as an idealized institution whose military effectiveness was doubted by even those who championed it.¹⁵⁵ The *Silveira* court, for example, painted the entire scene as quaint, idealistic, and probably irrelevant to the modern world.¹⁵⁶ However, the underlying virtues of discipline, responsibility for one's decisions, and awareness of how individual actions can dramatically affect the group remain vital. There is perhaps no other place where community duty, self-discipline, and the intertwined nature of our responsibilities are as clearly illustrated. A breach of community obligations at the range can be disastrous and everyone knows it. It is a venue saturated with guns, and yet a place where one feels secure from the random acts of violence that afflict the public space generally.

D. Bearing Arms, Keeping Arms, and a Militia State of Mind

Alabama 223 would be about the most innocuous possible SRSA-protected bearing of arms. In the extreme, bearing arms connotes confrontation.¹⁵⁷ But at its most basic, bearing arms equates to using and developing proficiency with them, taking the rifle¹⁵⁸ (according to *Silveira*, military rifles) to the place explicitly designed for the safe discharge of it and practicing. Whatever may be the outer limits of "bearing arms," taking a rifle to the range and shooting at a paper target is at its core.

It is possible to object that Alabama 223 is not sufficiently militaristic to satisfy *Silveira*. But that objection would ignore the professed intent of the state legislature, the express decision to facilitate proficiency with military rifles and firing discipline, and the example of the parallel federal program.¹⁵⁹ Moreover, it would be odd indeed for those so obviously concerned about the violence policy implications of the Second Amendment to object that a particular type of arms bearing is not quite militaristic or confrontational enough to qualify under the SRSA.

A similar objection that Alabama 223 does not establish sufficient order, e.g., a structure of officers and protocols, ignores the explicit command of Article I,

154. Kopel & Little, *supra* note 116.

155. *Silveira v. Lockyear*, 312 F.3d 1052, 1078-79 nn.36-37 (9th Cir. 2002).

156. *Id.* at 1076-77 nn.34, 36.

157. *Id.* at 1072-73 (arguing its military connotation).

158. A more innocuous military rifle (those pieces of wood that the junior ROTC uses in parades) would really not be a rifle at all.

159. The 2003 CMP Annual Report notes that the program has been praised for producing higher quality military recruits. 2003 CMP REPORT, *supra* note 130, at 6 (citing a 1966 Department of the Army Study by Arthur D. Little). James Whisker's presentation of the Arthur D. Little report shows that the clear aim of the federal CMP program was militaristic. WHISKER, *supra* note 110 at 38. It is plausible to criticize that the federal CMP is not cost effective. But, no fair assessment can deny its military pedigree. *Id.* See also Kopel & Little, *supra* note 116 at 490.

Section 8 of the Constitution, which reserves to the states the appointment of militia officers and training of the militia according to the discipline prescribed by Congress.¹⁶⁰

Alabama 223 would be entirely consistent with *Miller*'s definition of militia. The state's decision to trust its citizens to keep their own arms, some sold to them by the state, some not, would solve the *Silveira* court's difficulty discerning what the Second Amendment possibly could be mean by the word "keep."¹⁶¹ The militia is the body of the people, "expected to appear bearing arms supplied by themselves" which they quite naturally *keep* at home.¹⁶²

160. This ultimately raises the criticism that the SRSA is incoherent; that it cannot be squared with the remaining Constitutional text. See *supra* note 152. If Congress were to order a discipline that trumped the state CMP per Article I, Section 8, would states' rights judges claim that the Second Amendment implicitly repealed Article I, Section 8? If not, then the Second Amendment under the states' rights view is entirely superfluous, adding nothing not already in the constitutional text. *Silveira* seems to conclude that Article I, Section 8 was implicitly repealed by the Second Amendment. "[W]e believe that the most plausible construction of the Second Amendment is that it seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms and forbids the federal government to interfere with such exercise." *Silveira*, 312 F.3d at 1075. This construction strips Congress of its Article I, Section 8 powers and simultaneously grants states much broader militia powers. The problem is there is no evidence that the Second Amendment was designed to repeal Article I, Section 8. William Van Alstyne goes further:

In recent years it has been suggested that the Second Amendment protects the "collective" right of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.

William Van Alstyne, Essay, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1243 n.19 (1994).

161. *Silveira*, 312 F.3d at 1074. After much analysis supporting its view that "bearing" arms is particularly militaristic and thus a state function, the court, perhaps sensing difficulty, concluded, "[t]he reason why [the] term [keep] was included in the amendment is not clear. . . . In the end, however, the use of the term 'keep' does not appear to assist either side in the present controversy." *Id.* The court simply ignored the explanation based on the unambiguous conclusion in *United States v. Miller*, 307 U.S. 174, 178 (1939).

162. *Miller*, 307 U.S. at 179. One clear thing about *United States v. Miller* is its definition of militia. It is consistent with the Court's determination in *Presser v. Illinois*, 116 U.S. 252, 265 (1886), that "the American people" constitute the reserved military force or reserve militia of the United States." It also reflects the federal statutory definition that places the unorganized militia at the base of the hierarchy of American military forces of standing army, national guard, unorganized militia. 10 U.S.C. § 311 (2000). James Whisker's history of the militia shows the militia as citizens armed with their own weapons, useful primarily as a defensive force in venues close to their homes. WHISKER, *supra* note 110 at 2. Even David Williams, though unsympathetic to the Second Amendment, recognizes that the framers considered the entire population the militia.

Members of the Alabama CMP would even satisfy the state of mind requirement of *Cases* through assent to standards established by the state CMP administrator. The state's militia aim would be established explicitly in the preamble to the legislation and through the evident military character of the arms and firing discipline.¹⁶³ Alabama 223 affirms that firing ranges are perhaps the only places where citizens can even come close to the ordered use and training with firearms that seem to be the core of the states' rights view.

D. The Politics and Policy Implications of State Range-Protecting CMPs

So far, citizens have not sought and legislatures have not passed legislation like Alabama 223. This is in part because politically, the individual rights view of the Second Amendment has been on the ascent. Tens of millions of Americans think they have a right to arms and savvy operators have concluded that for now, gun prohibition is a loser political issue.¹⁶⁴ But things change. If the states' rights view eventually carries the day, we should not doubt that in a society where on average there is a gun in every other house,¹⁶⁵ representative legislatures will pass laws that reflect the range-protection/CMP measures described in Alabama 223. Indeed, even without a shift in favor of gun prohibition, the growing threat of federal environmental closure of ranges may alone be enough to prod legislatures toward 223 style laws. Certainly range-protecting CMP legislation is a small step to take for a legislature that already has debated and passed concealed carry legislation, barred municipal law suits against gun makers, preempted local gun control measures, affirmed an unambiguous constitutional right to individual firearms, or immunized ranges from noise nuisance and lead contamination closure.

If the SRSA will not uphold state range-protecting CMP legislation against conflicting federal laws, then it is time to call the SRSA a fraud.¹⁶⁶ But if it does

For Williams it is the failure to achieve the ideal, a consequence of individual choices to eschew arms and political choices to abandon militia discipline, that renders the Second Amendment anachronistic. Williams, *supra* note 153, at 588-90.

163. See 2003 CMP ANNUAL REPORT, *supra* note 130.

164. Witkin, *supra* note 12, at 24 (reporting that 86% of men and 67% of women support the right to individual gun ownership). Typically candid James Carville has said, "I don't think there is a Second Amendment right to own a gun. But I think it's a loser political issue." Chris W. Cox, *Don't Be Fooled*, THE AM. RIFLEMAN, Oct. 2002, at 22. See also Evelyn Theiss, *Gun Lobby Shot Down Democrats in Congress*, PLAIN DEALER (Cleveland), Jan 14, 1995, at 1A ("[T]he fight for the assault-weapons ban cost 20 members their seats in Congress . . . The NRA is the reason the Republicans control the House.") (quoting President Clinton); Departing California Congressman Anthony Beilens said this: "We unnecessarily lost good Democratic members because of their votes on the Brady bill and semiautomatic assault weapon ban. . . . [T]hey will have but a modest effect out there in the real world. It was not worth it at all." Greg Pierce, *Inside Politics*, WASH. TIMES, Nov. 9 1995, at A6.

165. See *supra* note 112.

166. Compare *Silveira*, 312 F.3d at 1063 (quoting Warren Burger, *The Right to Bear Arms*,

contain enough substance to uphold such legislation, what are the other policy implications and how do they compare to the evident problems of the *de facto* right to arms environment in which we now operate?

First, while most would acknowledge that the bulk of existing federal gun control legislation is valid under the individual rights view,¹⁶⁷ a substantive SRSA is more problematic. One of the core federal regulatory principles of modern gun control would not survive even as a superficial matter. The BATF's "suitable for sporting use" regulatory import criteria, drawn from the 1968 Gun Control Act,¹⁶⁸ would fall quickly in the face of a state CMP focused on providing citizen access to militia rifles. A congressional ban on "assault rifles" also would fall to the recognition that the core value of the SRSA is to permit states to equip their citizens with military style rifles.¹⁶⁹

On the other hand, the SRSA might permit a total ban on any handguns not explicitly protected by state CMP legislation. One can imagine a federal/state dispute where Washington aims to ban a class of handguns, arguing that they have no militia use, and a state decides to provide access to them under its CMP. It is unclear whether a court should apply an objective standard, meaning that the state's designation of a weapon as militia type would not automatically make it so. The court might instead consider what handguns are and have been used by military forces and perhaps even the liberty taken by officers to carry non-regulation sidearms. But that fair dispute is in sharp contrast to the state decision to give citizens access to semiautomatic versions of basic infantry rifles on a list of banned assault weapons. Whether by state designation or objective assessment, these rifles are the primary tools protected under the SRSA.

Other questions would be more difficult. Might existing state legislation authorizing concealed carry be incorporated into CMP legislation? Would such a measure trump federal efforts to control access to particular handguns or concealed carry generally?

These state/federal conflicts will not appear everywhere. They are less likely to emerge in "blue" America and more likely to appear in "red" America - places that have robust gun cultures where legislatures already have passed liberalized concealed carry and other gun rights legislation. Blue America, under full-blown federal gun control legislation, might move closer to the *de jure* disarmament

PARADE MAG., Jan. 14, 1990, at 4 (claiming the individual rights view is a fraud)).

167. The Fifth Circuit decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), is a good example. While the Court recognized an individual right to arms, Mr. Emerson was recently sentenced to two and one half years in prison for violating a federal gun law the court said remains valid under the individual rights view. See *Ex-husband Sentenced to Prison on Gun Charge*, DESERET NEWS (Salt Lake City), Jan. 25, 2003, at A9.

168. 18 U.S.C. §§ 921-931 (2000). See also *United States v. Posnjak*, 457 F.2d 1110 (2d Cir. 1972).

169. Congress amended the 1968 Gun Control Act with the Crime Control Act of 1994, adding restrictions on the sale of certain magazine fed, centerfire, semiautomatic rifles. 18 U.S.C. §§ 921-922. A summary of the 1994 Act appears in *National Rifle Ass'n v. Magaw*, 132 F.3d 272 (6th Cir. 1997). The ban expired in 2004.

similar to the Washington, D.C. model so admired by gun control advocates. In red America, and relatively split states,¹⁷⁰ citizens might enjoy even greater access to arms than they have now.

Calls would continue for legislation limiting access to firearms in red states, so as to lessen black or gray market traffic of arms from there into blue states.¹⁷¹ However, under the SRSA a state's interest in providing its citizens access to militia arms would weigh heavily against the validity of federal legislation. Thus, currently advocated gun control measures aimed at reducing the flow of firearms from easier access states to more difficult access states—*e.g.*, the one gun a month proposal that might survive scrutiny under the individual rights view, would be more quickly struck down in the face of conflicting state CMP legislation.

Even aspects of the 1934 Gun Control Act stand weaker against a conflicting state CMP advanced under the SRSA.¹⁷² The 1934 Act is the primary federal statute that restricts ownership of machine guns. It controls ownership through registration, taxation, tracking regulations and related amendments that restrict manufacture of new machine guns,¹⁷³ but does not absolutely bar citizens from having fully automatic firearms. A state statute giving citizens greater access to machine guns or simply permitting manufacture of new ones subject to the existing scheme of federal regulations is exactly the type of legislation the SRSA would uphold against federal infringement.

Congress might make a plausible case of commerce power to regulate sporting firearms and that might include some that are marginally suitable for military use.¹⁷⁴ But, primary protection of the SRSA would extend to exactly the set of firearms that have been attacked for their purported lack of sporting qualities. Under the SRSA, pistol grips, bayonet lugs, flashiders, folding stocks, and other evil accouterments would be transformed into reliable signals of SRSA

170. Blue Philadelphia and Pittsburgh border a Red "T" comprising the northern half and center of the state, meaning that Pennsylvania's designation may hinge partly on general turn-out and partly on whether a particular election has more deeply spurred the state's large population of hunters and NRA members or its urban population. This assessment ignores the interesting group of voters who span both categories.

171. I use gray market here to suggest that we might disagree about how to categorize honest people who seek access to contraband weapons for self-defense. I have argued elsewhere that even without the Second Amendment, we might extract an individual right to arms for self-defense from the Ninth Amendment. Since the Ninth Amendment affirms rather than creates rights, whether courts or Congress have recognized the right might be beside the point. See Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

172. See Reynolds & Kates, *supra* note 84, at 1749-57 (explaining how taking states' rights seriously leads to the conclusion that state legislation following, for example, the Swiss model of citizens keeping state provided automatic rifles, would trump conflicting federal legislation).

173. Pub. L. No. 73-474, 48 Stat. 1236. See also Kopel & Little, *supra* note 116, at 542-43 nn.572-74.

174. This is the lament in *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

protected firearms.

There are many other vexing questions imbedded in any guarantee of a state right to arms. Many seem very distant. The states' rights view raises the question whether states may possess highly destructive weapons. It poses a slightly more realistic version of the absurdity that is often levied against the individual rights view—*viz*, are states permitted by the Second Amendment to have and perform tests with nuclear weapons?¹⁷⁵ Equally remote, at least today, does bearing arms mean that states are permitted to form highly lethal military units to conduct maneuvers as a show of muscle (a sort of domestic gun-ship diplomacy using Blackhawk helicopters instead of dreadnaughts) with the intent of influencing Washington in some state/federal conflict?

It is easy to imagine other difficulties generated by a substantive SRSA. It is difficult though, to understand why gun prohibitionists or anyone else would automatically prefer this basket of problems to those that accompany our current environment of *de facto* individual rights.

CONCLUSION

The states' rights Second Amendment remains the dominant view of the lower federal courts. For the moment no state legislation has emerged to precisely test its content. But things change. The same states that have adopted a host of gun rights legislation eventually may see range-protecting CMP statutes as proper and necessary supplements to their existing laws. If the lower federal courts honestly apply the states' rights doctrine they have developed over the last sixty years, these state CMP laws will trump a variety of conflicting federal statutes. Perhaps those who have bet heavily that the SRSA will facilitate the wave of gun control measures they pine for should reconsider.

175. In contrast, the arms protected under the individual rights view might very plausibly be limited to those commonly held by individual citizens with an upper boundary of the standard issue infantry rifle.