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**THE UNITED STATES SECOND AMENDMENT AND  
CIVIL DISOBEDIENCE**

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### *Abstract*

Civil disobedience is becoming increasingly relevant as movements across the world emerge in support of what protesters see to be a worthy cause. This has resulted in lengthy debates about what exactly civil disobedience is. While these debates are important, this paper instead tries to bring together two highly debated topics by exploring the legal nexus between civil disobedience and the Second Amendment in the United States of America. This is done by addressing the connections of civil disobedience to both the Second Amendment's historical justifications and to recent movements against it. The paper shows that while there are some issues presented by the non-violence, non-revolution and illegality components of civil disobedience, a legal relationship between the Second Amendment and civil disobedience can be found. That is, the paper shows how the Second Amendment provides not a right to resist, revolution, or rebellion but rather a right to civil disobedience. This is shown by connecting the underlying principles of the Second Amendment and civil disobedience, which include the right of the people to form citizens' militias and the right to popular resistance. Oppressive government regimes are also something that both civil disobedience and the historical justifications of the Second Amendment aim to prevent, supporting the argument that the Second Amendment provides a right to civil disobedience. The paper also shows that, in recent times, the Second Amendment has attracted significant controversy, maintaining its connection to civil disobedience via protest movements against its very existence.

### *Key Words*

United States of America; Second Amendment; right to bear arms; civil disobedience; gun control; gun violence

## *I Introduction*

Civil disobedience is as interesting as ever with protest action popping up all over the world. This paper takes a historical approach to civil disobedience by addressing how the right to bear arms in the United States of America (United States), commonly referred to as the Second Amendment, is related to it. There is no shortage of discussion around the Second Amendment and this paper aims to address this controversial right in a different light. This will involve assessing the historical justifications behind the Second Amendment and the legal nexus between it and civil disobedience, as well as how the Second Amendment has led to a series of displays of civil disobedience in recent times. Analysis will also be conducted as to the potential legal relationship between the Second Amendment and revolution in comparison to civil disobedience. This analysis is required due to several references from historians and scholars to revolution and rebellion in respect of the Second Amendment. The right to resist will also be addressed. This analysis will show how the Second Amendment provides a right to civil disobedience and not a right to resist, revolution, or rebellion.

The paper will address the above observations by firstly looking at the historical interpretations of the Second Amendment, followed by an examination of how civil disobedience has been defined in the literature and which definitions the Second Amendment is most likely to align with. This will include briefly outlining the different frameworks of civil disobedience, beginning with the classic liberal conceptions and moving to the radical democratic ones. Following this, a brief comparison to revolution will be made. Analysis will then be conducted as to the relationships between the Second Amendment, revolution and the right to resist, followed by a separate discussion on civil disobedience. Part of this analysis will also include addressing the issues of non-violence and illegality and the problems that they pose for arguing that the Second Amendment provides a right to civil disobedience.

This topic deserves attention because of the controversial nature of the Second Amendment which has led to consistent debate and impacted the lives of those in one of the world's most powerful nations. Finding a legal nexus with civil disobedience may help to clarify why the Second Amendment was created, while shining light on modern grievances may reveal how it has failed and itself led to civil disobedience. This topic can also show areas where the current popularised definitions of civil disobedience are weak. Examples of this will be seen with the non-violence and illegality requirements present in most definitions of civil disobedience.

## *II History of the Second Amendment and Its Interpretations*

The United States Constitution, in respect of the Second Amendment, states that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed”.<sup>1</sup> In its history, the meaning and application of the Second Amendment has been disputed.<sup>2</sup> Early on, there were few cases surrounding the Amendment and the only significant case before the Supreme Court suggested that the right was only tied to state militia use of some firearms.<sup>3</sup> The notion of militia is at the forefront of the history of the Second Amendment and becomes important in finding that it provides a right to civil disobedience. In the twenty-first century, the United States courts began to conclude that the Amendment was tied to state militias and military use of firearms, but some courts maintained that the Amendment provided an individual right to possess firearms.<sup>4</sup> The discussion surrounding the meaning of the Second Amendment has always been split into these two camps, one who sees the right as individual and the other who sees it as collective.<sup>5</sup> Each interpretation has a different implication in terms of the connection between the Second Amendment and civil disobedience and the way in which the Amendment can be argued to provide a right to civil disobedience.

An important Supreme Court case, *Heller*, has somewhat settled the debate (at law) as to whether the Second Amendment provides a collective military right or an individual right, after deciding that the Second Amendment protects an individual right to possess firearms.<sup>6</sup> In *Heller*, the Court was careful to say that this right was not unlimited and that it did not extend to carrying arms for any sort of confrontation.<sup>7</sup> This has been interpreted by scholars as meaning that a right is provided to the individual to bear arms for purposes which are historically lawful.<sup>8</sup> The Court explained this by stating that if we interpret the right to only be for use of weapons as a member of an organised militia and thus taking the collective right approach, then this does not provide for the existence of a “citizens’ militia” to safeguard

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<sup>1</sup> United States Constitution, amend II.

<sup>2</sup> “Amdt2.1 Overview of Second Amendment, Right to Bear Arms” Constitution Annotated <[https://constitution.congress.gov/browse/essay/amdt2-1/ALDE\\_00000408/](https://constitution.congress.gov/browse/essay/amdt2-1/ALDE_00000408/)>.

<sup>3</sup> *United States v Miller* 307 L Ed 1206 (S Ct 1939) at 178; also see above n 2.

<sup>4</sup> Above n 2.

<sup>5</sup> David C Williams *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic* (Yale University Press, 2003) at 15.

<sup>6</sup> *District of Columbia v Heller* 554 L Ed 2d 637 (S Ct 2008) at 595.

<sup>7</sup> At 595.

<sup>8</sup> Above n 2.

against tyranny.<sup>9</sup> However, this does not mean that the debate is sufficiently settled amongst scholars and historians. Regardless, this explanation clearly still favours an approach that looks at the historical justifications for the Second Amendment, which are inherently collective, in the sense that it supports an interpretation allowing for citizens to collectively guard against tyranny. Therefore, it will be important to look less into whether the right is individual versus collective and more at the general justifications for the Amendment, as is focused on in these cases. This will allow us to continue to look more at the radical democratic scholars whose conceptions of civil disobedience more closely align with the Second Amendment, thus strengthening the argument that the Second Amendment provides a right to civil disobedience. In doing this, it will be important to explicitly analyse the apparent intentions of the Framers of the United States Constitution against the concept of civil disobedience.

The Second Amendment was informed by the early experience of military authority in the United States.<sup>10</sup> During the Founding-era in the United States, local communities had citizen militias which provided a common defence and professional armies were treated with suspicion.<sup>11</sup> The Declaration of Independence stated, as a grievance against King George III, that he had “affected to render the Military independent of and superior to the Civil power”,<sup>12</sup> suggesting that, at the time, the military were expected to be separate from and superior to the citizens. Including this grievance in the Declaration of Independence indicates that colonists were not happy with this. This is relevant because civil power is a necessary element of civil disobedience. Without civil power, which is what provides citizens with the ability to influence the government, civil disobedience would be ineffective. Several states codified the constitutional right to bear arms emphasising this sentiment, such as Pennsylvania, who declared that standing armies are dangerous to liberty and that the military should be governed by the civil power.<sup>13</sup> However, this part of the Declaration of Independence could also be interpreted as suggesting that the military should be subject to the power of the government, suggesting that it is the government who hold civil power, not the citizens. The Constitution also maintained provisions allowing for the establishment and funding of an army, but fear grew that these provisions provided the federal government too much power and risked

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<sup>9</sup> At 600.

<sup>10</sup> “Amdt2.2 Historical Background on Second Amendment” Constitution Annotated <[https://constitution.congress.gov/browse/essay/amdt2-2/ALDE\\_00013262/](https://constitution.congress.gov/browse/essay/amdt2-2/ALDE_00013262/)>.

<sup>11</sup> Above n 10.

<sup>12</sup> The Declaration of Independence, paras 13-14 (US 1776).

<sup>13</sup> Above n 10.

liberty.<sup>14</sup> It is with this background in mind that Professor David Williams formulated an original legal meaning of the Second Amendment. He put it as this:<sup>15</sup>

... To ensure that the Body of the People is prepared to resist a corrupt central government, the Body of the People shall have the right to keep and bear arms.

This legal meaning supports the argument that the Second Amendment provides a right to civil disobedience and analysis as to why this is will be conducted below.

### *A Historical Context*

It is important to put the Second Amendment and its creation and justifications into its historical context. The origins of the Second Amendment can be traced back to ancient Roman and Florentine times, but its largest influence was likely to have been the development of a national militia in England.<sup>16</sup> As mentioned, organised militia were treated with suspicion at the time the Second Amendment was created, which is likely why the establishment of a national militia in England spurred the United States on to create this right.<sup>17</sup> It is also important to recognise that this right was born not long after the American Revolution which occurred between 1775 and 1783.<sup>18</sup> The American Revolution itself was initiated following Britain's attempts at asserting more control over the United States, including through the imposition of taxes.<sup>19</sup> Colonists began to see armed rebellion as their only recourse.<sup>20</sup> It is in this context that we must assess the justifications of the Second Amendment, which could be interpreted as having been instilled out of fear of a similar situation to the American Revolution reoccurring. This supports the argument that the Second Amendment provides a right to civil disobedience rather than rebellion or revolution, as its purpose is to give civil power to avoid such recurrences, not to encourage them. It is also now widely accepted that the keeping of a "well regulated Militia" via a right to bear arms effectively means that citizens can defend their state in response to any threats of federal tyranny and is required to distribute the power equally between the people and the government.<sup>21</sup> Importantly, the context in the United States has shifted dramatically

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<sup>14</sup> Above n 10.

<sup>15</sup> David C Williams, above n 5, at 69.

<sup>16</sup> Patrick J Charles "Second Amendment: United States Constitution" (13 June 2023) Britannica <<https://www.britannica.com/topic/Second-Amendment>>.

<sup>17</sup> Patrick J Charles, above n 16.

<sup>18</sup> Willard M Wallace "American Revolution: United States history" (4 July 2023) Britannica <<https://www.britannica.com/event/American-Revolution>>.

<sup>19</sup> Willard M Wallace, above n 18.

<sup>20</sup> Willard M Wallace, above n 18.

<sup>21</sup> Patrick J Charles, above n 16.

from what it was post American Revolution. This is reflected in the more recent civil disobedience movements against the Second Amendment, discussed in section VI of this paper.

### *B Historical Movements*

One movement which is relevant to both the Second Amendment and civil disobedience is the Black Panther movement which was made up of “local people” who formed the Black Panther Party.<sup>22</sup> The party’s founders recruited local people who were “black brothers and sisters off the block”, this extended from working mothers to those who found themselves wrapped up in the criminal justice system.<sup>23</sup> The party was therefore made up of people from different walks of life, with varying levels of income and education.<sup>24</sup> Members were drawn to the party for several reasons but one standout reason was for the party’s armed stance.<sup>25</sup> For context, this movement began in the 1960s with one of the first recruits, Sherwin Forte, joining the party in 1967.<sup>26</sup> Forte was coming from a place of frustration with the local police brutality and was an admirer of Malcom X, who will be discussed later in this paper.<sup>27</sup> Forte was also drawn to the self-defence aspect of the Black Panthers which was supported by the idea of having “the same tools that the oppressor had – guns”.<sup>28</sup> He also chose to abstain from fighting for the United States in the Vietnam war, stating that “I didn’t see the Vietnamese as the enemy. I saw the enemy as racist America”.<sup>29</sup> Forte and others started engaging in sessions where they discussed being drafted into the war and the Black man in America, which led to him joining the Panthers.<sup>30</sup> One of the early actions conducted by the Black Panthers involved monitoring the Oakland Police Department while equipped with tape recorders, cameras, law books and, of course, firearms.<sup>31</sup> The Panthers believed that this provided them with the ability to intervene when police officers were making arrests if those officers did so unlawfully or began using excessive force.<sup>32</sup> The goal of these early actions was to educate the Black community about their legal rights and to legitimise self-defence.<sup>33</sup> Crowds were drawn to sights of young Black men openly carrying guns and asserting their right to bear arms while conducting protest

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<sup>22</sup> Jeanne Theoharis and Komozi Woodard *Groundwork: Local Black Freedom Movements in America* (New York University Press, New York, 2005) at 304.

<sup>23</sup> At 304.

<sup>24</sup> At 304.

<sup>25</sup> At 304-305.

<sup>26</sup> At 305.

<sup>27</sup> At 305.

<sup>28</sup> At 305.

<sup>29</sup> At 305.

<sup>30</sup> At 305.

<sup>31</sup> At 306.

<sup>32</sup> At 306.

<sup>33</sup> At 306.



action.<sup>34</sup> In one specific action, Panthers asserted that the police should not be the aggressors of violence, as has been witnessed by actions of police brutality.<sup>35</sup> The local police were surprised to see youths bearing arms, but had no legal authority to disarm them, due to their Second Amendment rights.<sup>36</sup> This is where we start to see the connections between the Black Panther movement, the Second Amendment, and civil disobedience.

Eventually, the Panthers extended to become not just a local organisation but a larger social movement, with one protest action involving the group leading an armed delegation of 30 people to Sacramento, California to oppose a Bill which prohibited openly carrying firearms in public.<sup>37</sup> The Black Panther's strongly supported the right to bear arms due to the state of police brutality and senseless assassinations of activists like Martin Luther King.<sup>38</sup> The key thing to assess here is whether the way that these Panther's describe their Second Amendment rights relates to civil disobedience at all. Clearly the actions the group took part in were a form of civil disobedience, even under some of the more liberal definitions, but their main focus in exercising their right under the Amendment was not on civil disobedience but rather on the historically contentious topic of self-defence. Another problem with their protests is that they often led to some form of violence which put them on the FBI's watch list, with the FBI naming them the "most violence-prone organization of all the extremist groups not operating in the United States".<sup>39</sup> However, we must treat this comment with caution given the political and social climate in the United States during the 1960s and '70s. Further, whilst violence was present, this was not necessarily linked to the use of firearms.

Malcolm X is relevant to this discussion as he was well-known for his civil activism in the United States in the 1960s and '70s.<sup>40</sup> He has been referred to as a significant figure in the Black nationalist movement,<sup>41</sup> which is why members of the Black Panthers were inspired by him. Relevantly, Malcolm X has also been widely quoted as saying "If we don't do something real soon, I think you'll have to agree that we're going to be forced either to use the ballot or

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<sup>34</sup> At 306.

<sup>35</sup> At 306.

<sup>36</sup> At 306.

<sup>37</sup> At 307.

<sup>38</sup> At 308.

<sup>39</sup> At 309.

<sup>40</sup> Lawrence A Mamiya "Malcolm X: American Muslim leader" (3 July 2023) Britannica <<https://www.britannica.com/biography/Malcolm-X>>.

<sup>41</sup> Lawrence A Mamiya, above n 40.

the bullet”.<sup>42</sup> This is where we begin to see Malcolm’s desperate attempts at civil disobedience coinciding with an armed response, even if only used in a metaphorical manner. Malcolm has been seen to take an approach to civil disobedience which allows for higher levels of violence than some previously mentioned theorists, referring to non-violence as a ridiculous philosophy.<sup>43</sup> Malcolm is considered a human rights activist who argued for the restoration of human dignity of the oppressed “by any means necessary”,<sup>44</sup> and saw retaliatory violence as essential in communicating with those who oppose Black civil rights.<sup>45</sup> Malcolm often did this through his teachings rather than direct civil disobedient actions and spread his beliefs beyond the United States when he visited Mecca and Africa.<sup>46</sup> Doctrines invoking the use of “any means necessary” have been said to both generate fear and advocate for the use of force in attempting to gain social justice.<sup>47</sup> Clearly this could link to the ability and right to bear arms and potentially encourage the use of firearms if it is for the purpose of fighting oppression. Though, it is relevant to note that some have referred to Malcolm not as a civil disobedient but rather a “moral revolutionary”.<sup>48</sup>

### *III What is Civil Disobedience?*

With the background to the Second Amendment in mind, this section will address the question of what civil disobedience is. There are many different conceptions of civil disobedience, ranging from the mainstream liberal accounts of Carl Cohen and John Rawls, to the more radical democratic accounts of Robin Celikates and Hannah Arendt. Some conceptions provide better support for the argument that the Second Amendment provides a right to civil disobedience, particularly those addressing democracy and politics. What I mean by this is that some theorists believe that civil disobedience is a key component of modern democracy, just as the Framers of the constitution may have seen the Second Amendment. Further, some theorists refer heavily to the political components of civil disobedience which is also a strong theme of the discussion surrounding the Second Amendment. Specific theorists that do this will be introduced and explained further below. Importantly, several theorists may address democracy and politics in reference to civil disobedience in differing ways.

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<sup>42</sup> Malcolm X “The Ballot or the Bullet” (Cleveland, Ohio, 3 April 1964).

<sup>43</sup> James H Cone “Martin and Malcolm on Nonviolence and Violence” (2001) 49 *Phylon* 173 at 181.

<sup>44</sup> Ali Khan “Lessons From Malcolm X: Freedom by Any Means Necessary” (1994) 38 *Howard LJ* 79 at 80.

<sup>45</sup> James H Cone, above n 43, at 179.

<sup>46</sup> At 181.

<sup>47</sup> Ali Khan, above n 44, at 80.

<sup>48</sup> At 79.

To begin, Cohen sees civil disobedience as “an illegal public protest, non-violent in character”.<sup>49</sup> He further includes several justifications of civil disobedient behaviour, the most well-known being his utilitarian justification.<sup>50</sup> Rawls famously defined civil disobedience as “a public, nonviolent, and conscientious act contrary to law usually done with the intent to bring about a change in the policies or laws of the government”.<sup>51</sup> Importantly, Rawls maintains that civil disobedience involves:<sup>52</sup>

... a public act which the dissenter believes to be justified by this conception of justice, and for this reason it may be understood as addressing the sense of justice of the majority in order to urge reconsideration of the measures protested and to warn that, in the sincere opinion of the dissenters, the conditions of social cooperation are not being honoured.

Rawls focuses his definition on the justifications and political nature of civil disobedience in his attempts to define the concept. Cohen and Rawls provide two classic liberal accounts of civil disobedience which are often construed narrowly.

In contrast, Celikates sees civil disobedience as an “intentionally unlawful and principled collective act of protest”.<sup>53</sup> That act of protest must also be done to pursue the political aim of changing specific laws, policies or institutions in a way that is civil.<sup>54</sup> Celikates’ definition leaves room for civil disobedience to be conducted in private, largely influenced by increasing digital disobedience, and for the possibility of violence.<sup>55</sup> Celikates’ definition takes a particularly political view, with him stating that those engaging in civil disobedience continue to act as citizens.<sup>56</sup> He goes further by stating that they exemplify what it means to be a citizen because they reassert their “political agency against politically entrenched and often invisibilized forms of domination, exclusion, or marginalization”.<sup>57</sup> Celikates directly challenges the ideas of Rawls by stating that virtually all aspects of Rawls’ definition are

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<sup>49</sup> Carl Cohen “Civil Disobedience and the Law (1966)” 21 Rutgers L Rev 1 at 3.

<sup>50</sup> At 7.

<sup>51</sup> John Rawls “The Justification of Civil Disobedience” in Aileen Kavanagh & John Oberdiek eds *Arguing About Law* (Routledge, London, 2009) 244 at 247.

<sup>52</sup> At 248.

<sup>53</sup> Robin Celikates “Democratizing Civil Disobedience” (2016) 42 Philos Soc Crit 982 at 985.

<sup>54</sup> At 985.

<sup>55</sup> At 983-984.

<sup>56</sup> At 985-986.

<sup>57</sup> At 986.

controversial, with specific reference to the uncertain aspect of publicity and the problematic requirement of non-violence in modern times.<sup>58</sup>

Similarly, Arendt describes civil disobedience as an open violation of the law performed in public which is done so in the name and for the sake of a group.<sup>59</sup> Another requirement from Arendt is that there is non-violence.<sup>60</sup> Arendt sees violence as turning the civil disobedient into a rebel, or at least justifies them being called this.<sup>61</sup> Arendt takes a particularly “American” approach to civil disobedience, which is helpful in strengthening the legal relationship with the Second Amendment. She specifically said that:<sup>62</sup>

“Ever since the Mayflower Compact was drafted and signed under a different kind of emergency, voluntary associations have been the specifically American remedy for the failure of institutions, the unreliability of men, and the uncertain nature of the future.”

The Mayflower Compact was a document signed on an English ship in 1620 prior to it entering into Massachusetts.<sup>63</sup> The Mayflower Compact is considered the first “framework of government” written and enacted in the United States.<sup>64</sup> What Arendt is likely saying is that this is the first sign of the United States using collective action to remedy failures of institutions which can be seen as the beginning of civil disobedience globally. Arendt also refers to the First Amendment by stating that civil disobedience can be tuned to necessary and desirable preservation or restoration of the status quo, which is the preservation of rights guaranteed in the First Amendment.<sup>65</sup>

Another theorist who looks at civil disobedience from an American perspective is Henry Thoreau. Thoreau was an American philosopher and political activist in the 1800s and his writings drew heavily on his experiences as an American citizen.<sup>66</sup> For example, Thoreau asked “How does it become a man to behave toward the American government today? I answer, that

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<sup>58</sup> At 983.

<sup>59</sup> Hannah Arendt “Civil Disobedience” in *Crises of the Republic* (Harvest Books, 1972) 51 at 75-76.

<sup>60</sup> At 76-77.

<sup>61</sup> At 76.

<sup>62</sup> At 102.

<sup>63</sup> “Mayflower Compact: North America [1620]” Britannica <<https://www.britannica.com/topic/Mayflower-Compact>>.

<sup>64</sup> Above n 63.

<sup>65</sup> Hannah Arendt, above n 59, at 75.

<sup>66</sup> Rick Anthony Furtak “Henry David Thoreau” (30 June 2005) <<https://plato.stanford.edu/entries/thoreau/>>.

he cannot without disgrace be associated with it".<sup>67</sup> However, when drawing on Thoreau we must be careful as many theorists see him not as a civil disobedient but as a revolutionist. Cohen is one of those theorists, stating that while Thoreau's actions in refusing to pay his taxes and then accepting his punishment may appear to be civil disobedient conduct, Thoreau's writing makes it clear that he was intending to completely repudiate government authority.<sup>68</sup> Important to Cohen was the fact that Thoreau wanted the individual to be recognised as a "higher and independent power".<sup>69</sup> Thoreau also says himself:<sup>70</sup>

All men recognize the right of revolution; that is, the right to refuse allegiance to, and to resist, the government, when its tyranny or its inefficiency are great and unendurable.

Analysis as to what Thoreau meant by this will be conducted in part IV of this paper.

While this paper will not focus on trying to attach a specific definition of civil disobedience to the Second Amendment, the radical democratic conceptions by the likes of Celikates and Arendt are more appropriate to keep in mind during the general analysis. If we take a classic liberal view of civil disobedience, the historical justifications for the Second Amendment may appear to be more revolutionary. However, if we take a radical democratic approach, we may see more clearly how the Second Amendment provides a right to civil disobedience.

Lastly, in order to sufficiently connect the central ideas of civil disobedience to the historical justifications of the Second Amendment and thus show a legal nexus, it will be helpful to set out what I believe are the key ideas of civil disobedience. While not all theorists agree on a definition of civil disobedience, the general consensus is that civil disobedience is an act of protest that is against a law, or set of laws, seen by the protestor to be oppressive or wrong in some way. It is because the law being protested is considered oppressive or wrong, that the protest action, though illegal, can be justified. As mentioned, many civil disobedience theorists have a strong political backing to their conceptions of civil disobedience and I also see, as a key underlying principle, that civil disobedience is an action done to protest against political domination and corruption.

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<sup>67</sup> Henry David Thoreau "Civil Disobedience" in *Civil Disobedience: Resistance to Civil Government* (The Floating Press, Auckland, 2009) 1 at 8.

<sup>68</sup> Carl Cohen, above n 49, at 3.

<sup>69</sup> At 3.

<sup>70</sup> Henry David Thoreau, above n 67, at 8.

### *A Comparison to Revolution*

Whilst conducting background research into the justifications of the Second Amendment, it became clear that there are many references to revolution and rebellion. However, labelling something as revolution or rebellion does not necessarily make it so. It is important to address this issue because many civil disobedience theorists specifically distinguish revolution from civil disobedience. Cohen, for example, stressed that the difference between the two is that revolution seeks to overthrow or repudiate government authority, while civil disobedience does not.<sup>71</sup> Depending on the way that the justifications of the Second Amendment are interpreted, it could be seen as giving “the people” the ability to overthrow the government and thus align more closely with revolution than civil disobedience. Cohen does not see those who seek to place themselves above the law and who reject the system of laws as civil disobedients.<sup>72</sup> This perspective requires analysis of whether those taking up their Second Amendment rights under the historical justifications reject the system of laws or not. This is difficult because the right itself is a law and, by invoking it, it would be hard to say that they reject the system of laws that gives them this very right. This supports the argument that the Second Amendment provides a right to civil disobedience and not revolution. This is despite the terminology used by many historians and researchers. The issue of revolution will be discussed further below.

## *IV The Second Amendment, Revolution and the Right to Resist*

The above discussions introducing both the historical justifications and interpretations of the Second Amendment and civil disobedience raised the potential argument that the Second Amendment provides a right to revolution. This section will address this further by looking at the relationship between revolution and the Second Amendment. Rebellion will also be addressed given its close relationship to revolution. Discussion will also be had as to the potential legal relationship between the Second Amendment and the right to resist.

### *A The Second Amendment and Revolution*

As discussed, most civil disobedience theorists explicitly distinguish civil disobedience from revolution. This creates a consequential problem for finding a legal relationship between civil disobedience and the Second Amendment, given a lot of the background literature refers to revolution and rebellion in reference to the Second Amendment. Firstly, it is important to

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<sup>71</sup> Carl Cohen, above n 49, at 3.

<sup>72</sup> At 3-4.

recognise that these terms are often mislabelled and agreement is rarely reached as to which activists fit into what camp. For example, there is disagreement between theorists over whether Henry Thoreau, Martin Luther King Jr and Mahatma Gandhi are civil disobedients or revolutionists. Celikates said of Thoreau, King and Gandhi that it is important to look at whether they actually appealed to the sense of justice of the majority and asked for change to the system, and if they did not, what this would mean for our definitions of civil disobedience.<sup>73</sup> Celikates also discusses King's statement that "The thing to do is get rid of the system", which suggests doubt as to his civil disobedient status.<sup>74</sup> However, on my reading of Celikates, it seems more that he doubts the plausibility of the existing definitions of civil disobedience rather than the status of these three well-known political figures. Regardless, this shows a good example of the wide-ranging interpretations of revolution and civil disobedience and their respective definitions.

The Oxford dictionary defines revolution as "overthrow of an established government or social order by those previously subject to it; forcible substitution of a new form of government".<sup>75</sup> This definition also indicates that, in its early use, revolution was referred to as rebellion, suggesting that the two words are synonymous.<sup>76</sup> This supports an argument that perhaps authors may be misinterpreting revolution and rebellion, and mistakenly using the term "revolution" in place of civil disobedience. However, the terms "revolution" and "rebellion" have had varying interpretations from authors, weakening the support from the dictionary definition for this argument. For example, the abstract of one piece of research on this issue states that "there are many rebellions, fewer successful rebellions, and extremely few social revolutions".<sup>77</sup> This sentiment is retained throughout the paper with the argument that some rebellions are distinguished from other rebellions and that rebellions and revolutions are matters of degree.<sup>78</sup> That paper specifically proposes that a rebellion is something that may or may not turn into a revolution, putting it into a sort of timeline of actions.<sup>79</sup> This suggests an interpretation that rebellion and revolution are in fact two different concepts. Other scholars have argued that revolution is not something that either occurs wholly or does not occur at all,

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<sup>73</sup> Robin Celikates, above n 53, at 984.

<sup>74</sup> At 985.

<sup>75</sup> "Revolution" (Revised 2010) Oxford English Dictionary  
<[https://www.oed.com/dictionary/revolution\\_n?tab=meaning\\_and\\_use#25564040](https://www.oed.com/dictionary/revolution_n?tab=meaning_and_use#25564040)>.

<sup>76</sup> Above n 75.

<sup>77</sup> Erich Weede and Edward N Muller "Rebellion, Violence and Revolution: A Rational Choice Perspective" (1998) 35 *Journal of Peace Research* 43 at 43.

<sup>78</sup> At 44.

<sup>79</sup> At 54.

suggesting that even small and partial actions can be attributed to revolution.<sup>80</sup> It has also been proposed that there are several dimensions of revolution split into how revolution occurs and the outcomes of revolution, which are both similarly the subject of debate.<sup>81</sup> This is all to illustrate that the definitions of revolution, rebellion and even civil disobedience are highly contested. Therefore, references between the Second Amendment and revolution or rebellion must be treated with caution.

Despite these differing definitions and understandings of revolution and rebellion, both have been discussed in regard to the Second Amendment by several scholars. This is understandable given the Second Amendment came soon after the American Revolution, as discussed above. While some connections between the Second Amendment, revolution and rebellion can be debunked through definitional argument, others are almost irrefutable. One movement dubbed the militia or “patriot” movement in the United States is so extreme that it could quite easily support a legal relationship between revolution and the Second Amendment.<sup>82</sup> The militia movement argue to be modern defenders of the United States Constitution, more specifically, they claim to be defending the Second Amendment.<sup>83</sup> The movement believes that they have a right to make a revolution against a tyrannical government and they are simply exercising it,<sup>84</sup> but is this what the Second Amendment really provides them? Relevant to later discussion is that militia ideologists also share some beliefs with the National Rifle Association.<sup>85</sup> Scholars have assessed the interpretation of the Second Amendment by the militia movement and argued that the historical interpretation is both correct and incorrect.<sup>86</sup> Professor Williams argues that the militia movement are accurate in some of their understanding of the Framers’ intentions for the Second Amendment.<sup>87</sup> This includes their understanding that the Framers would endorse the belief that the federal government should be feared, and that people should be armed to protect against a tyrannical central government and, in extreme circumstances, to stage a revolution.<sup>88</sup> To do this, the militia movement believe that the people must be organised into

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<sup>80</sup> J Milton Yinger and Mark N Katz “Revolution: Refining its Defining” (2001) 30 *International Journal of Group Tensions* 349 at 352.

<sup>81</sup> At 352-353.

<sup>82</sup> David C Williams “The Militia Movement and Second Amendment Revolution: Conjuring with the People” (1995-1996) 81 *Cornell L Rev* 879 at 880.

<sup>83</sup> At 880.

<sup>84</sup> At 880.

<sup>85</sup> At 881.

<sup>86</sup> At 881.

<sup>87</sup> At 881.

<sup>88</sup> At 881.



militias and that if the government want to oppress the people, they begin by disarming them.<sup>89</sup> Where Professor Williams believes the militia movement are incorrect in their interpretation turns on defining what is the “Body of the People”.<sup>90</sup> As we can see, Professor Williams believes that the militia movement are correct in their understanding that in extreme circumstances, where justified by the “Body of the People”, the Second Amendment provides a right to stage a revolution. This weakens the argument that the Second Amendment provides a right to civil disobedience.

Despite the above references to revolution in respect of the Second Amendment, I argue that historians and scholars are too quick to suggest that the Second Amendment provides a right to revolution. This is due to several reasons, including its pre-Revolutionary origins, but that is not to say this is what the Amendment actually provides. The Second Amendment was inspired heavily by the pre-Revolutionary period, with the Supreme Court, in one case, arguing that the Constitution did not provide the right to peaceably assemble or bear arms for a lawful purpose because these rights had already long existed.<sup>91</sup> The first ten amendments are said to simply embody guaranties and immunities passed down from England.<sup>92</sup> All of this deriving from an encroachment by the English Crown upon liberties of its colonial subjects in the United States, leading eventually to the American Revolution.<sup>93</sup> It is argued that these encroachments are crucial to understanding the historical justifications of the Second Amendment,<sup>94</sup> which suggests heavily that the Second Amendment has connections with revolution, even if it does not specifically provide a right to it. Despite this, the Second Amendment, I argue, provides a right to civil disobedience, not a right to revolution or rebellion. It does this by allowing citizens to arm themselves to protect against oppressive governments. This does not mean that it gives a right to citizens to use firearms to rebel against the government. In many ways, arming citizens who may take no action allows for non-violent ways of protest. The pre-Revolutionary period inspired many Bill of Rights guarantees, but does not limit their application. This is due to the Framers of the Constitution intending for it to safeguard fundamental rights that would outlast any specific abuses which gave rise to the creation of those rights.<sup>95</sup> The same authors

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<sup>89</sup> At 881.

<sup>90</sup> At 882.

<sup>91</sup> Stephen P Halbrook “Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment” (1989) 15 U Dayton L Rev 91 at 93.

<sup>92</sup> At 93.

<sup>93</sup> At 96.

<sup>94</sup> At 96.

<sup>95</sup> At 92.

who argue that the revolutionary background to the Second Amendment is crucial to understanding the purposes for adopting the Amendment admit this point. This means that it is entirely possible for the Second Amendment to provide a right to civil disobedience rather than revolution, as it leaves the American Revolution behind, hoping to avoid a repeat of those events.

### *B The Right to Resist, Civil Disobedience and the Second Amendment*

While not a right explicitly provided for in the United States Constitution, the right to resist also has interesting connections to civil disobedience and the Second Amendment. It is possible that, while not explicitly provided for, the right to resist could be read into the right to bear arms. This section will briefly touch on what the right to resist is, its connection with civil disobedience and its potential legal relationship with the Second Amendment.

The right to resist essentially provides the ability to rise against a government authority, which many constitutions around the world explicitly provide for.<sup>96</sup> Such constitutional provisions are often traced back to the American and French Revolutions.<sup>97</sup> The purpose of such provisions has been said to remind the government that the people are the ultimate rulers and to place limits on the power of governments.<sup>98</sup> These provisions have seen increases in popularity in attempts to retroactively justify past coups.<sup>99</sup> To further define the right, the right to resist allows people to legitimately resist their government, but political theorists generally believe that it can only be exercised in extreme circumstances.<sup>100</sup> Justification for exercising this right is only provided where there is considerable legal alienation and where the law differs substantially from the will of the community.<sup>101</sup> To use this right there must be no alternative path available.

The right to resist relates to civil disobedience in several ways. First, one could argue that the right to resist is what is used when civil disobedience is not enough. Alternatively, you could say that the right to resist is in fact a form of civil disobedience. I will address each argument in turn. Regarding the first argument, some scholars have explicitly distinguished the right to

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<sup>96</sup> Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg “When to Overthrow your Government: The Right to Resist in the World’s Constitutions” (2013) 60 UCLA L Rev 1184 at 1188.

<sup>97</sup> At 1188.

<sup>98</sup> At 1118.

<sup>99</sup> At 1189.

<sup>100</sup> At 1191.

<sup>101</sup> At 1191.

resist from civil disobedience, leaning heavily on the idea that civil disobedience involves non-violent protest, while the right to resist “evokes the language of violence”.<sup>102</sup> The aim of the right to resist is to replace an entire oppressive regime rather than addressing a few particular policies.<sup>103</sup> In this way, the right to resist appears more akin to revolution than to civil disobedience. However, it is important to consider the differing definitions of civil disobedience and the tolerance for some levels of violence provided by the more radical democratic civil disobedience theorists, such as Celikates. In distinguishing the right to resist from civil disobedience, it has been suggested that to invoke the right to resist requires a higher level of abuse.<sup>104</sup>

Candice Delmas speaks not of a right to resist, but of a duty to resist, and relates it directly to civil disobedience. Interestingly, in explaining the duty to resist and when the non-violence requirement of civil disobedience may be misplaced, Delmas refers specifically to an American movement known as the Freedom Riders, who faced obscene violence from those opposed to their movement.<sup>105</sup> This is relevant to the right to resist discussed above, because it provides a case study of where the right has been implemented in the United States and how those involved saw the action they took as being expected of them. The Freedom Riders broke United States laws by riding on buses when integrated buses could be banned from the roads and bus stations could stop Black people from waiting there.<sup>106</sup> The Freedom Riders had trained and committed to non-violence in their movement, but there was so much anti-Black violence at the time that even Martin Luther King Jr refused to partake in any Freedom Rides.<sup>107</sup> Included in these Freedom Rides were some White Freedom Riders and when one was asked about why he thought it was his responsibility he responded by saying “I think it’s every American’s responsibility. I just think that some people are more conscious of their responsibilities than others”.<sup>108</sup> Obviously, if activists see that it is their duty to act in these circumstances, they undoubtedly believe it is also their right to do so. Delmas also explains how several theorists, including Henry Thoreau, Mohandas Gandhi and King, in their own ways, refer to a moral duty to disobey unjust laws.<sup>109</sup> King also said in one speech that “not only do we have a right to be

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<sup>102</sup> At 1192.

<sup>103</sup> At 1192.

<sup>104</sup> At 1192.

<sup>105</sup> Candice Delmas *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York, 2018) at 2-3.

<sup>106</sup> At 2-3.

<sup>107</sup> At 2.

<sup>108</sup> At 4.

<sup>109</sup> At 6.

free, we have a duty to be free”.<sup>110</sup> What this suggests to me is that while the right to resist is not entrenched in the United States Constitution, it is something that United States activists believe to be inherent in their right to freedom and disobedience, which strongly supports a connection between the right to resist and civil disobedience.

The right to resist begs the question of whether it is acceptable to overthrow a government’s authority. This was of profound importance to American Founders, as this question has been suggested to be the underpinning of modern constitutionalism.<sup>111</sup> Much like the debate surrounding the Second Amendment, the right to resist is also sometimes seen as a collective right and sometimes an individual one.<sup>112</sup> The right can be either exercised on behalf of the oppressed, referred to as “radical rebellion”, exercised to resist a change in government sought by the rulers named “conservative rebellion”, or it can be used to secure independence.<sup>113</sup> Important to the above discussion, framing the right to resist in this way supports a connection to revolution and takes the right away from civil disobedience. However, some scholars argue that the right to resist can be differentiated from revolution because it does not excuse every behaviour and requires that proportionality is used in its exercise.<sup>114</sup> Therefore, the right to resist may not be connected to revolution or civil disobedience, but seen as its own paradigm that falls somewhere in the middle. This means that it is likely to have characteristics of both.

If we follow the argument that the right to resist correlates with the right to bear arms, but that the right to resist can be sufficiently distinguished from civil disobedience, then this hinders the argument that the Second Amendment provides a right to civil disobedience. This would more support a link between the Second Amendment and the right to revolution. However, it is possible to argue that the right to resist, while it has similarities to the right to bear arms, is not synonymous with it. That is, the right to resist supports a right to revolution while the right to bear arms supports a right to civil disobedience. It is also arguable that the right to resist is, as mentioned, its own paradigm and thus doesn’t provide a right to revolution either. Regardless, the key takeaway from this is that the Second Amendment does not provide a right to resist.

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<sup>110</sup> At 6.

<sup>111</sup> Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, above n 96, at 1188.

<sup>112</sup> At 1192.

<sup>113</sup> At 1192.

<sup>114</sup> At 1193.

## *V What is the Legal Nexus Between the Second Amendment and Civil Disobedience?*

I have already made some comment about how the background to the Second Amendment relates to civil disobedience, but this section will delve into deeper analysis of the legal nexus between the two. The mainstream liberal accounts of civil disobedience may see that the Second Amendment aligns more with, and even provides a right for, revolution. However, the modern radical democratic approaches to civil disobedience may see that the Second Amendment and its historical justifications more likely provide a right to civil disobedience. I hypothesise that a legal relationship between civil disobedience and the historical justifications of the Second Amendment will be found, but exactly how this occurs is less clear. This is due to the wide range of definitions of civil disobedience and similarly varying historical and modern accounts of the purpose of the Second Amendment and the right it provides. It is further complicated by the changing uses of the Second Amendment by those who choose to invoke this right in recent times. It may be that, in its history, the Second Amendment was created to provide a right to civil disobedience but in modern times it has either changed or it is simply being misused. This will be discussed in section VI of this paper.

To begin, the division between individual and collective rights is no stranger to civil disobedience scholars, who similarly argue between civil disobedience as an individual action or right and those who see it as a collective action and only a right when acted upon collectively. For example, Thoreau focuses heavily on the individual by saying that “The progress from an absolute to a limited monarchy, from a limited monarchy to a democracy, is a progress toward a true respect for the individual” and that “there will never be a really free and enlightened State until the State comes to recognize the individual as a higher and independent power ...”.<sup>115</sup> Arendt, in contrast, took a collective approach to civil disobedience and its justifications. For example, Arendt is careful to distinguish between the conscientious objector and the civil disobedient, suggesting that, for civil disobedience, it is concerted action that springs from a collective agreement which gives the disobedients’ opinions credence and conviction.<sup>116</sup> Regarding the Second Amendment, many have attempted to reconcile the debate by looking at what the Framers of the Constitution actually intended in recognising this right. One such interpretation suggests that the Framers looked not to protect the state or the

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<sup>115</sup> Henry David Thoreau, above n 67, at 39.

<sup>116</sup> Hannah Arendt, above n 59, at 56.

individual but rather the Body of the People, which has qualities of both.<sup>117</sup> It is suggested that the Framers saw the people-in-militia not as a servant of the government but a body that could rise against the state should they become corrupt.<sup>118</sup> The notions of corruption suggest a possible legal relationship between the Second Amendment and civil disobedience, but also leaves room for the same potential relationship with revolution. Regardless, the idea of the Body of the People has clear connections to collective approaches to civil disobedience.

As mentioned, some researchers have concluded that the Second Amendment was intended by the Framers of the Constitution to protect the right to bear arms for “popular resistance to government”.<sup>119</sup> It has been further argued that the right is not one belonging to an individual, rather it is a right of the people as a collective entity.<sup>120</sup> Interestingly, Article I of the Constitution allows Congress to raise an army to resist against insurrection.<sup>121</sup> This creates a tension within the Constitution between the right provided by the Second Amendment and Article I, which essentially provides the government the right to end any attempts at revolt.<sup>122</sup> However, this is a modern assessment of the two articles.<sup>123</sup> Relevantly, Professor Williams states that “the Constitution seeks to ensure that the people may make a revolution but that factions may not make rebellions”.<sup>124</sup> The reference to revolution here potentially weakens the legal nexus between civil disobedience and the Second Amendment. However, the argument in section IV of this paper could be presented to circumvent this. That is, it is possible that what is referred to here as “revolution” is actually civil disobedience and what is referred to as “rebellion” is revolution. Suggesting that the author is mistaking civil disobedience with revolution. On this interpretation, it is arguable that what this author is really saying is that the Constitution seeks to ensure that people may conduct civil disobedience but that they should not make rebellions. The key argument being that, depending on one’s interpretation of these terms, many different meanings can be found and sometimes those meanings do not align with the term that is used. Therefore, the argument supporting the legal nexus between the Second Amendment and civil disobedience can be maintained. On this, just because an author or

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<sup>117</sup> David C Williams, above n 5, at 15.

<sup>118</sup> At 15-16.

<sup>119</sup> At 16.

<sup>120</sup> At 16.

<sup>121</sup> At 16.

<sup>122</sup> At 16.

<sup>123</sup> At 16.

<sup>124</sup> At 16.

historian refers to revolution in respect of the Second Amendment, as many do, does not necessarily mean this is what it provides a right for.

While there is ongoing debate surrounding whether the Second Amendment provides an individual or a collective right, the ideas of “popular resistance” and “citizen militia’s”, whether accepted at law in modern times or not, relate to collective civil disobedience. As mentioned, many civil disobedience theorists see civil disobedience as a tool to be used against political domination and marginalisation. Celikates takes this viewpoint most explicitly. Popular resistance is also a tool to be used against such threats in that the Second Amendment allows a group of citizens to come together to protect against an oppressive government. This is not so relevant to individual actions of civil disobedience but is analogous to collective actions which are supported strongly by radical democratic theorists of civil disobedience. Popular resistance and citizens’ militias are not possible without collective action and, while militia may relate more to revolutionary ideas, resistance is exactly what civil disobedience is, making it link to theorists who champion collective disobedience and thus strengthening the argument that the Second Amendment provides a right to civil disobedience.

The Second Amendment has also been referred to as a check on congressional power under Article I of the Constitution, discussed above.<sup>125</sup> Referring to it as a “check on congressional power” relates to civil disobedience because civil disobedience, as expressed by Celikates, is exactly that. Celikates sees civil disobedience as acts of protest done for a political aim of changing specific laws.<sup>126</sup> Providing a check on government power is synonymous with the idea of acting for a political change of law. The only distinguishing feature is that civil disobedience requires an action, whereas the Second Amendment provides the check on power without the need to act, it is simply there, and it is perhaps the fear of the right being invoked that creates the check. One could then argue that a stronger legal relationship between the Second Amendment and civil disobedience can be found when looking at the ideas behind the Second Amendment rather than looking at the action of it being invoked. However, if one was to exercise their right for the historical purposes, for example by forming an armed citizen militia to resist a corrupt or oppressive government, I believe that it would likely constitute civil disobedience and therefore the two are inextricably linked. This is because resisting

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<sup>125</sup> Patrick J Charles, above n 16.

<sup>126</sup> Robin Celikates, above n 53, at 985.

corrupt and oppressive government regimes, as has been mentioned, is a principal component of civil disobedience.

It is nonetheless important to remember that civil disobedience is intended to address a specific law or set of laws, not to overthrow an entire government. In that sense, the ultimate purpose of an act such as the one described above (i.e., forming a citizen militia to resist a corrupt or oppressive government) must not be to overthrow the entire government but rather to act against specific corrupt or oppressive laws. In sum, what I can see is similar ideas between radical democratic frameworks of civil disobedience, such as Celikates', and the Framers' initial intentions for the Second Amendment, as well as ways in which actions provided by the historical justifications of the Second Amendment can constitute civil disobedience. Therefore, the legal nexus between civil disobedience and the Second Amendment is strengthened.

In addressing the original legal meaning of the Second Amendment provided by Professor Williams, outlined in section II of this paper, we can further strengthen the legal relationship between the Second Amendment and civil disobedience. First, the legal meaning refers to the "Body of the People" which can be linked to ideas of collective civil disobedience. For example, Arendt, as already discussed, and Celikates, see civil disobedience as a collective act of protest, not an individual one. Providing a right to a body of people to resist against a corrupt government could be considered a collective act of protest and thus fits into some radical democratic definitions of civil disobedience. Further, the focus on resisting corrupt government shows that the right is to be invoked for similar reasons that most theorists see civil disobedience as being invoked for. Relevant to this is the illegality requirement of civil disobedience which will be discussed later in respect of both the general argument that the Second Amendment provides a right to civil disobedience and the recent movements against the Second Amendment.

Lastly, Thoreau has been mentioned above as championing an individual right to civil disobedience. Despite this, his ideas, as set out in section III of this paper, have interesting repercussions for the argument supporting a legal nexus between civil disobedience and the Second Amendment. Further, his writing was often done from an American perspective and about the political climate in the United States, given he was American. This makes his thoughts on civil disobedient action highly relevant. Where Thoreau recognises a right to revolution as something recognised by all men, this can be taken as supporting the argument



that the Second Amendment provides a right to civil disobedience. This is because the context in which Thoreau says this is one where he is criticising the American government. Thoreau does not suggest that the right to revolution is one that is provided by the laws of the United States, he is simply saying it is a universally recognised right. Therefore, it is arguable that, for Thoreau, the Second Amendment does not provide the right to rebel or revolt.

However, it is possible that Thoreau simply neglected to address the relevance of the Second Amendment in his arguments and this is why no connection was made. Thoreau's silence on the Second Amendment is, in this respect, interesting. If this was done purposefully, that could suggest that he did not think there was any connection between the Second Amendment and his conception of civil disobedience. However, his silence, even if purposeful, could alternatively support the maintenance of a legal relationship between the Second Amendment and civil disobedience given many see Thoreau to be a revolutionist not a civil disobedient. Consequently, some theorists also see that his ideas in general align more with revolution than civil disobedience. This means that if he did speak on the Second Amendment and said that its justifications fall in line with the justifications of his actions and ideas, then one could argue that the Second Amendment provides a right to revolution rather than civil disobedience.

#### *A Protest Action Providing Support for the Second Amendment*

The Black Panther movement also shows the connections between the Second Amendment and civil disobedience in a way slightly different to how the general historical justifications do. The Black Panthers invoked their right to bear arms to take a stand against police brutality and in doing this indirectly supported the Second Amendment. While Police are not the government, they are an organisation controlled by the government and thus could contribute to a corrupt and oppressive government. Something to note is that the Black Panthers were standing up for minority rights which could mean that they are not considered the "Body of the People". This creates a question of whether the "Body of the People", in respect of the historical and legal meaning of the Second Amendment, refers only to a majority group or whether it can also extend to minority groups experiencing oppression. While the legal meaning provided by Professor Williams does not refer to state and citizen militias, much of the historical research relating to the justifications of the Second Amendment do. Given state militia tend to only involve a minority, we can read into Professor Williams' legal definition, the ability for minority groups to make up the "Body of the People". While not a movement directly in support of the Second Amendment, invoking the Second Amendment as a tactic to strengthen

the Panther's protest action can arguably show the Second Amendment as creating a legal right to civil disobedient action of this nature.

In a similar fashion to the Black Panthers, recent protest action has also arisen where protesters openly carry guns in public.<sup>127</sup> It has been suggested that this both elevates one's voice and silences others.<sup>128</sup> One example is a group of armed protestors gathering outside an election centre in Phoenix challenging a recent election.<sup>129</sup> It was reported that, in June 2022, armed protests around the United States amount to almost a daily occurrence.<sup>130</sup> The specific claims made by armed protesters appear to have several different motivations. For example, a later armed rally which was aimed at stopping transgender medical treatments for minors, with only some rallies pertaining directly to gun rights.<sup>131</sup> These particular purposes are not the focus of this paper, it is only relevant to note the use of openly carrying firearms in protest action. The protests appear to be strongly politically motivated, and this paper is not arguing for the endorsement of these specific protest movements. The key point to be made is that the presence of armed protest movement supports the maintenance of a legal relationship between the Second Amendment and civil disobedience. Further, armed protest action grew significantly in 2020 and it has been reported that, in some states, it is not unusual to see armed protestors at all types of protests, strengthening this argument.<sup>132</sup> It is also relevant to point out that while violence reportedly broke out at many of these armed events, the violence tended not to involve the use of the firearm but rather culminated in fist fights between opposing activist groups.<sup>133</sup> Shootings at these protests are rare.<sup>134</sup> The issue of violence will be addressed further below.

Protests directly in support of the Second Amendment are also prevalent in the United States. One example of this includes a gun rally in which more than 22,000 armed gun-rights activists surrounded Virginia's capitol building in protest of gun-control legislation.<sup>135</sup> This protest was largely peaceful and involved only one arrest of a woman who refused to remove a bandana

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<sup>127</sup> Mike McIntire "At Protests, Guns Are Doing the Talking" *The New York Times* (online ed, 26 November 2022).

<sup>128</sup> Mike McIntire, above n 127.

<sup>129</sup> Mike McIntire, above n 127.

<sup>130</sup> Mike McIntire, above n 127.

<sup>131</sup> Mike McIntire, above n 127.

<sup>132</sup> Mike McIntire, above n 127.

<sup>133</sup> Mike McIntire, above n 127.

<sup>134</sup> Mike McIntire, above n 127.

<sup>135</sup> Brad Brooks "Thousands of armed U.S. gun rights activists join peaceful Virginia rally" *Reuters* (online ed, 21 January 2020).

covering from her face.<sup>136</sup> This contrasts with prior rallies in which violence and unrest has broken out, including one demonstration in 2017 which resulted in the death of a counter-protestor.<sup>137</sup> Returning to the peaceful action in Virginia, while nonviolent, the protest action was illegal due to a ban on weapons being carried on capitol grounds and could easily fall into many of the definitions of civil disobedience previously discussed.<sup>138</sup> Protestors at the rally claimed that Virginia was attempting to infringe on their Second Amendment rights.<sup>139</sup> By arming themselves during this protest, the protestors were both invoking their Second Amendment right and engaging in civil disobedience in support of this right, which strengthens the legal nexus between the two.

### *B What About Violence?*

As has become evident throughout this paper, a right that provides the ability to bear arms undoubtedly raises questions about the use of violence, and whether this exempts it from being considered as providing a right to civil disobedience. Most civil disobedience theorists, such as Cohen and Arendt, explicitly exclude violent protest action from falling under civil disobedience. One theorist who allows for violence in some circumstances is Celikates. Celikates states that “insisting on the necessarily non-violent character of civil forms of contestation is both politically and theoretically problematic”.<sup>140</sup> He qualifies this by discussing how, in some countries, collectively standing in one place or sitting down on the street can count as an act of violent coercion.<sup>141</sup> He goes on to say the same about damage to private property and how this assimilates these offences to serious violations of bodily integrity of real persons.<sup>142</sup> Importantly, Celikates mentions how governments tend to divide protest action up by celebrating some forms as good, while labelling and repressing other forms as violent, uncivil and criminal.<sup>143</sup> Celikates says those described as the latter are often those of marginalised groups.<sup>144</sup> Celikates believes that this kind of labelling is what can reproduce marginalisation and exclusion, which is often racialized and gendered.<sup>145</sup> That is why he concludes with the opinion that “... a fixed category of non-violence proves to be of limited

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<sup>136</sup> Brad Brooks, above n 135.

<sup>137</sup> Brad Brooks, above n 135.

<sup>138</sup> Brad Brooks, above n 135.

<sup>139</sup> Brad Brooks, above n 135.

<sup>140</sup> Robin Celikates, above n 53, at 983.

<sup>141</sup> At 983.

<sup>142</sup> At 983.

<sup>143</sup> At 984.

<sup>144</sup> At 984.

<sup>145</sup> At 984.

use for a philosophical analysis of disobedience informed by its social and political reality”.<sup>146</sup> While this helps to maintain the legal nexus between the Second Amendment and civil disobedience, Celikates only refers to low levels of violence. This makes it harder to connect the two given bearing arms for the purpose of using them to harm others is clearly not a low-level form of violence. However, it is arguable that the right to bear arms is not the same as the right to use them for violent purposes. The historical justifications for providing the right, one may argue, are non-violent.

A further argument that has been suggested is that the right to bear arms actually aims to stop violence. However, it is important to note that there is little empirical evidence to support the argument that carrying weapons decreases violence. In fact, weapon carrying has been found to be positively associated with increases in violent stranger victimisation. Further research would be required to assess the efficacy of these findings and the reasons for them, but that is not the focus of this paper.<sup>147</sup> Despite this, this argument is still relevant because it shows how the Second Amendment does not provide a right to violence, even though the exercise of the Second Amendment in the ways discussed below do not appear to have political or protest components. The theory is that by arming everyone, people are less likely to resort to violent measures to resolve their disputes. Whether or not this is what happens in actuality is questionable, but in theory, this line of thinking supports the argument maintaining the legal nexus between civil disobedience and the Second Amendment, despite the risk of violence.

Across the United States, concealed-carry laws have been passed legalising the carrying of arms in public in what can be considered a self-help strategy by citizens against violence to them.<sup>148</sup> However, such strategies are not universally accepted which is evidenced by heavy political debate, with some seeing the carrying of firearms as a good deterrent of violence, while others strongly disagree.<sup>149</sup> This is due to some research showing the role that weapons often have in criminal offending and the increase of such offending in recent times.<sup>150</sup> However, it has been pointed out that the majority of weapon-owners do not commit violent crime and instead possess firearms for other purposes, such as hunting, sports, gun collection

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<sup>146</sup> At 984.

<sup>147</sup> Pamela Wilcox “Self-Help? Examining the Anti-Crime Effectiveness of Citizen Weapon Possession” (2002) 35 *Sociological Focus* 145 at 160.

<sup>148</sup> At 145.

<sup>149</sup> At 145.

<sup>150</sup> At 147.

and, when including handguns, protection.<sup>151</sup> Multiple theories have been presented to support the argument that possession of weapons may decrease subsequent crime.<sup>152</sup> Some see arming citizens as providing a deterrent,<sup>153</sup> while others argue that it can decrease criminal opportunity by creating a form of guardianship at both the macro and individual levels.<sup>154</sup>

Despite some macro-level support for these theories, the argument that arming citizens decreases crime supports more an individual right to bear arms rather than a collective one, meaning that it may have a closer relationship with the modern usage of the Second Amendment rather than its historical justifications. Regardless, this argument supports the maintenance of a legal relationship between the Second Amendment and civil disobedience by circumventing the issues surrounding violence. Therefore, this argument may still be put forward to dispel the issue of violence when arguing that the Second Amendment provides the right to civil disobedience.

The issue of non-violence in civil disobedience also relates to the earlier discussions of Malcolm X and the Black Panther movement. Firstly, it is arguable that civil disobedience is more effective if the state know that people are armed. This is because they may be less likely to become oppressive knowing the citizens have a defence against oppressive regimes. Further, there are many disagreements in the civil rights sphere about just how ‘peaceful’ civil disobedience should be. We see, for example, that Malcolm X believed that freedom should be obtained by any means necessary, which quite obviously invokes a higher threshold for violence than the likes of Cohen. However, we must remember that such doctrines of freedom bring actions closer to revolution than civil disobedience. The Black Panthers similarly saw that legally arming themselves with guns was crucial to their movements and evidently made them highly effective. For the Panthers, “Armed resistance served as a significant auxiliary to nonviolent protest ...”, regarding non-violence as a pragmatic tactic rather than an imperative.<sup>155</sup> It is likely that the Black Panther movement would not have been so effective if they did not choose to arm themselves. Further, while the movement chose to arm themselves, their early movements focussed on the right to carry firearms and refrained from using them

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<sup>151</sup> At 147.

<sup>152</sup> At 147.

<sup>153</sup> At 147.

<sup>154</sup> At 148-149.

<sup>155</sup> Simon Wendt *The Spirit and the Shotgun: Armed Resistance and the Struggle for Civil Rights* (University Press of Florida, Gainesville, 2007) at 1.

for violent purposes,<sup>156</sup> supporting my above argument that the right to bear arms does not equate to a right to using them for violent purposes. What it did allow them to do was continue to protest when faced with violence and threats from opposing groups.<sup>157</sup> This movement shows clearly how the right to bear arms has been used for civil disobedient action in the United States for similar reasons to those historically suggested by the Framers of the Constitution.

In sum, the issue of violence is somewhat circumvented by several arguments, some coming directly from the civil disobedience theorists and others from authors addressing the Second Amendment. There is significant debate surrounding the non-violence aspect of civil disobedience to the point where some theorists, such as Celikates, argue that some levels of violence may be tolerated in certain circumstances. Malcolm X similarly asks questions about just how peaceful civil disobedience should be. There is also the argument that the right to bear arms does not actually provide a right to use them for violent purposes. This would therefore mean that violence is not an issue. Lastly, there is also the suggestion that arming citizens may actually lower violence.

### *C Illegality and Civil Disobedience*

The illegality requirement and subsequent lack of legal justifications of most civil disobedience definitions is also a potential problem for arguing that the Second Amendment provides a right to civil disobedience. For example, Cohen argues that civil disobedience cannot be given a legal justification and that the law cannot justify the violation of the law.<sup>158</sup> The issue is, how can the Second Amendment, which is a legal right, provide the right to something that is illegal, being civil disobedience. This also brings in issues of punishment as those exercising their Second Amendment right are likely to argue that they cannot be punished for exercising their legal right. Again, Cohen sees the civil disobedient as an actor who breaks the law knowing that it applies to them and is accepting of any punishment received.<sup>159</sup> However, the right to resist and the right to revolution are also rights that can result in “illegal” actions, but are nonetheless legal rights, with the right to resist explicitly provided for in several constitutions, as discussed above. Further, those who protest for their Second Amendment rights, for

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<sup>156</sup> Matthew D Lassiter and the Policing and Social Justice HistoryLab “Black Panther Party in Detroit” (2021) *Detroit Under Fire: Police Violence, Crime Politics, and the Struggle for Racial Justice in the Civil Rights Era* <<https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/black-panther-party/>>.

<sup>157</sup> Simon Wendt, above n 155, at 1.

<sup>158</sup> Carl Cohen, above n 49, at 7.

<sup>159</sup> At 5.

example, those involved in the Virginia capitol protest discussed above, tend to be accepting of their punishment when they begin exercising their right in an illegal manner. Therefore, the issues of illegality and punishment can be dispelled in arguing that the Second Amendment provides a right to civil disobedience.

#### *D How the Second Amendment Provides a Right to Civil Disobedience*

In concluding this section, the historical justifications of the Second Amendment, as outlined above, show how it does not provide a right to revolution or to resist but rather a right to civil disobedience. First, there are strong similarities between the radical democratic conceptions of civil disobedience and their focus on politics, to the driver of the Second Amendment being to protect against a corrupt government. There is also a strong underlying flavour from both aiming to protect against oppression. There are also similarities between the ideas of collective civil disobedience and the Second Amendment, supported by the original legal meaning of the Second Amendment. More specifically, by the concepts of citizen militia and rights provided to the “Body of the People” which underpin the historical justifications. If taking the individual right approach to the Second Amendment, connections can still be made to civil disobedience, particularly to the more classical liberal conceptions such as those of Rawls and Thoreau. These similarities and connections all lead to a conclusion that there is a legal nexus between the Second Amendment and civil disobedience, in that the Second Amendment provides a right to civil disobedience.

#### *VI How Has the Second Amendment Resulted in Civil Disobedience in Recent Times?*

This section will address the recent exercise of the Second Amendment in the United States and how this has led to civil disobedient action directed at its repeal. Civil disobedience against the Second Amendment has increased in recent times due to its consistent and abhorrent misuse. However, there may be some challenges in connecting the significant protest action occurring to specific definitions of civil disobedience since many of the protest actions are lawful. This may either show that there are flaws in the current civil disobedience frameworks, or that the modern movements against the Second Amendment simply cannot fit fully into a civil disobedience definition.

In 2018, a mass walk out was conducted by students across the United States in protests against the senseless killings of their friends and teachers which they bore witness to while attending school.<sup>160</sup> Many of these students walked out in defiance of the school authorities who were unsure how to handle the situation.<sup>161</sup> While the school walk outs may not be considered illegal and thus might not reach some definitions of civil disobedience, we can see clear movement in this direction and discontent with the idea of the Second Amendment. However, the argument against the right to bear arms is not one that is universally accepted in recent times, even amongst students at schools that have been the victim of horrific shootings. One student from Columbine High School did not partake in the walk out and believed that the true issue is not the guns but the people committing the offences.<sup>162</sup> The Second Amendment and its justifications remain as much a political minefield today as it did historically. In some ways, we can see that the Second Amendment has done what it aimed to do, give civil power, but the irony is that the civil power is being used to rebel against the Amendment as opposed to it being used to form citizen militias or for self-defence, which the history books claim was its purpose.

Another recent movement is March For Our Lives, who are a group that were created following the mass shooting at Marjory Stoneman Douglas High School in Florida.<sup>163</sup> The group demand action to be made to change the current gun laws in the United States, as they say that they “cannot allow one more person to be killed by senseless gun violence”.<sup>164</sup> The group say that they were inspired by the Freedom Riders of the 1960s, which were discussed above, and this led them to touring the United States on the “Road To Change”.<sup>165</sup> One of the ways that they are achieving this is through registering new voters.<sup>166</sup> This is unlikely to be able to fit into a clear definition of civil disobedience due to its lawful nature but nonetheless shows action being taken against current gun laws. The group’s policy outlines five reasons they believe are the fuel for the gun violence in the United States. These include gun glorification, armed supremacy, political apathy and corruption, poverty, and the national mental health crisis.<sup>167</sup>

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<sup>160</sup> Vivian Yee and Alan Blinder “National School Walkout: Thousands Protest Against Gun Violence Across the U.S.” *The New York Times* (online ed, 14 March 2018).

<sup>161</sup> Vivian Yee and Alan Blinder, above n 160.

<sup>162</sup> Vivian Yee and Alan Blinder, above n 160.

<sup>163</sup> “Mission & Story” March For Our Lives <<https://marchforourlives.com/mission-story/>>.

<sup>164</sup> Above n 163.

<sup>165</sup> Above n 163.

<sup>166</sup> Above n 163.

<sup>167</sup> “It Ends With Us: A Plan to Reimagine Public Safety” March For Our Lives <<https://marchforourlives.com/policy/>>.



While none of these specifically reference the access to guns as a result of the Second Amendment, gun violence would likely be a much smaller problem without the Second Amendment. Further, several of these drivers of gun violence have underlying similarities to civil disobedience, in particular, political apathy and corruption. March For Our Lives explain this driving force as the “... gradual destruction of the democratic principle that power comes from the people”.<sup>168</sup> They say that the frustration comes from politicians using people for power but voters gaining little in return, it is this which creates apathy because people are not feeling valued or empowered.<sup>169</sup> The political nature of this driving force leads it to connect strongly with civil disobedience, especially the idea of the power of the people. Are the group saying that those who feel this way feel the need to rebel and use gun violence to get their voices heard? If so, this links back to some of the historical justifications of the Second Amendment. It then becomes very political in deciding whether this should be supported. As mentioned, this paper will aim to avoid this kind of political discourse and stick to analysing how these modern movements relate to the Second Amendment and civil disobedience. Regardless of whether one agrees with the right to bear arms or not, this example shows the historical justifications relating to corruption, linking with modern concerns about the drivers of gun violence in the United States and them both having a connection to civil disobedience.

The use of firearms has not been limited to the school setting with a mass shooting occurring on the Las Vegas Strip in 2017, killing 58 people.<sup>170</sup> Mass shootings in the United States have increased in frequency and death toll since 1999.<sup>171</sup> Less well-known are the accidents in which children shoot themselves, or someone else, with unsecured guns.<sup>172</sup> For example, there was a recent incident where a woman was accidentally shot dead by her 2-year-old son who had found the loaded gun on a nearby nightstand.<sup>173</sup> Following this tragedy, Police urged people to keep their guns unloaded or in gun safes to protect themselves from similar outcomes.<sup>174</sup> This example shows that these fears have become a reality faced by many citizens in the United

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<sup>168</sup> Above n 167.

<sup>169</sup> Above n 167.

<sup>170</sup> Christian Ketter “A Second Amendment in Jeopardy of Article V Repeal, and AMFIT, a Legislative Proposal Ensuring the 2<sup>nd</sup> Amendment into the 22<sup>nd</sup> Century: Affordable Mandatory Firearms Insurance and Tax (AMFIT), a Solution to Maintaining the Right to Bear Arms and Promoting the General Welfare” (2019) Wayne L Rev 431 at 434.

<sup>171</sup> At 434.

<sup>172</sup> At 434.

<sup>173</sup> “Ohio woman dies after being accidentally shot by her 2-year-old son” *The New Zealand Herald* (online ed, 22 June 2023).

<sup>174</sup> Above n 173.

States and the more these incidents occur, the larger the discontent for the Second Amendment grows. With such increases in mass shootings and tragic accidents comes concern about the Second Amendment's viability. It also shows how, over time, the uses of the Second Amendment for its historical purposes are becoming less apparent while misuse is becoming more common, leading to calls for the Amendment's repeal. One suggestion to combat this has been to introduce an *Affordable Mandatory Firearms Insurance and Tax* (AMFIT) which is a tax that can be avoided by paying for an insurance policy.<sup>175</sup> Analysis as to whether this modern solution to the issues presented by the Second Amendment fits with the historical justifications is important but will not be explored in this paper. The proponent of this solution sees AMFIT as constitutionally within the United States Supreme case-law which has alluded consistently to the notion of the well-regulated militia.<sup>176</sup>

Arendt supplements these recent concerns by looking at the political nature of civil disobedience.<sup>177</sup> Specifically stating that the two parties in the United States political system tend to represent only the party machines and no one else.<sup>178</sup> She further explains that there is a current danger of rebellion that stems from a “constitutional crisis of the first order”, stating that there are frequent challenges to the Constitution by the administration.<sup>179</sup> However, it is the people rather than the administration that appear to be challenging the Constitution relating to the Second Amendment. This may be a result of what Arendt suggests is a loss of confidence in the constitutional processes.<sup>180</sup> Relevantly, Joe Biden, the current United States President, has backed protests calling for Congress to make changes to gun safety legislation.<sup>181</sup> However, this is not a universal backing from politicians given Republicans are likely to quash any attempts at legal changes.<sup>182</sup> This strong divide on what the laws surrounding the Second Amendment should be shows the beginnings of a constitutional crisis.

Interestingly, in response to gun violence in the United States, some groups have chosen to conduct civil disobedience movements in protest of gun manufacturers and the National Rifle

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<sup>175</sup> Christian Ketter, above n 170, at 432.

<sup>176</sup> At 432-433.

<sup>177</sup> Hannah Arendt, above n 59, at 89.

<sup>178</sup> At 89.

<sup>179</sup> At 89.

<sup>180</sup> At 89.

<sup>181</sup> “March For Our Lives: US rallies for stricter guns laws” *Radio New Zealand* (online ed, 12 June 2022).

<sup>182</sup> Above n 181.

Association (NRA), instead of going directly against the Second Amendment.<sup>183</sup> One of those groups is Gays Against Guns, who decided that they would campaign against gun companies and their supporters following the mass shooting which killed 49 people at a gay nightclub in Orlando.<sup>184</sup> Their campaign trail began with a ‘die-in’ at the BlackRock headquarters.<sup>185</sup> During this ‘die-in’ a group of Gays Against Guns protestors, dressed in T-shirts with their name and holding placards, entered the BlackRock building and laid on the floor in representation of those killed by guns.<sup>186</sup> For context, BlackRock are an investment company who invest in several gun manufacturers, such as Smith & Wesson.<sup>187</sup> Perhaps going after gun manufacturers, investors, and the NRA is a tactic to indirectly address the Second Amendment due to the difficulties of taking down a deeply entrenched right, which not all are in agreement of repealing. Either way, it provides a strong message that citizens of the United States are no longer happy with the status quo, and they are not afraid to break the law in actions of civil disobedience to change it. All of this stemming from a right that was founded on providing citizens the ability to challenge a corrupt government.

The NRA, as mentioned above, are a large and well-established group whose goal, at the time of creation, was to “promote and encourage rifle shooting on a scientific basis”.<sup>188</sup> They refer to themselves in the footer of their website as “America’s longest-standing civil rights organization” and as “proud defenders of history’s patriots and diligent protectors of the Second Amendment”.<sup>189</sup> The NRA were granted a charter by the state of New York in 1871 and from that, the association was founded.<sup>190</sup> Relevantly, the NRA was provided financial backing from the New York State to set up a practice rifle range.<sup>191</sup> Its history was largely associated with the development of shooting as a sport, but this focus has changed over time.<sup>192</sup> In 1949 the NRA began to focus on hunting, and established a hunting education program, which has since spread across the United States and Canada.<sup>193</sup> In the late 1990s and early

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<sup>183</sup> Rupert Neate “Gays Against Guns: civil disobedience campaign to target gun companies” *The Guardian* (online ed, New York, 15 August 2016).

<sup>184</sup> Rupert Neate, above n 183.

<sup>185</sup> Rupert Neate “Gays Against Guns activists begin campaign with ‘die-in’ at BlackRock HQ” *The Guardian* (online ed, New York, 16 August 2016).

<sup>186</sup> Rupert Neate, above n 185.

<sup>187</sup> Rupert Neate, above n 185.

<sup>188</sup> “A Brief History of the NRA” National Rifle Association <<https://home.nra.org/about-the-nra/>>.

<sup>189</sup> Above n 188.

<sup>190</sup> Above n 188.

<sup>191</sup> Above n 188.

<sup>192</sup> Above n 188.

<sup>193</sup> Above n 188.

2000s the focus changed once again to address the mainstream audience, and this is where the emphasis on self-defence and recreational use of firearms came in.<sup>194</sup> In 1990, the NRA established the NRA Foundation, a tax-exempt organisation, in order to raise millions of dollars to provide financial support for firearms-related activities.<sup>195</sup> Today, the NRA is seen as a great political force in the United States and the country's strongest defender of the Second Amendment rights.<sup>196</sup> It is also well-known that NRA members receive discounts from companies such as Visa and MetLife.<sup>197</sup> An important question to ask is, if the strongest defenders of the Second Amendment have so much funding, are they really at risk of succumbing to a corrupt government and thus in need of a right protecting their ability to act in civil disobedience against such corruption? Further, is the group's purpose even related to the historical civil disobedience justifications of the Second Amendment if it is largely related to hunting, sports and recreational use of firearms? While this is not entirely relevant to the issues addressed in this paper, it does help to show how the use of, and support for, the Second Amendment has changed over time.

This section has made clear the changing nature, but continuing connection, between civil disobedience and the Second Amendment in recent times. This is evidenced by significant protest action against the Second Amendment and its misuse. In sum, it would be difficult to argue that there is no connection between civil disobedience and the Second Amendment today, even if the relationship between the two has changed somewhat from the historical justifications and legal nexus discussed above.

#### *A Issue of Illegality*

With most of the recent movements discussed above there is an issue of illegality. As mentioned, most civil disobedience theorists require illegality for a movement to be considered civil disobedience. This is consistent across classical liberal and radical democratic theorists. For example, Cohen requires “an illegal public protest”.<sup>198</sup> Celikates similarly requires an “intentionally unlawful” action.<sup>199</sup> March For Our Lives provides a good example of this issue by touring the United States to register voters who are likely to oppose the loose Second

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<sup>194</sup> Above n 188.

<sup>195</sup> Above n 188.

<sup>196</sup> Above n 188.

<sup>197</sup> Rupert Neate, above n 185.

<sup>198</sup> Carl Cohen, above n 49, at 3.

<sup>199</sup> Robin Celikates, above n 53, at 985.

Amendment gun laws. School walk outs are similarly a good example of the illegality issue. While not illegal, these movements are both still clearly against social norms by spreading the word of their movement and creating discourse against a deeply entrenched right. This may then suggest a problem with the current definitions of civil disobedience, it may be that it is now time to adjust these definitions to allow for actions that are not illegal or contrary to law, but contrary to strongly held social norms. Allowing for actions that are contrary to social norms to be the equivalent of illegal actions, for the purpose of labelling protests as civil disobedience, is desirable. This is because it is the government who decide what is illegal in the first place, meaning that an action that is against social norms may be legal depending on the government at the time. This is particularly relevant to highly debated topics like the Second Amendment, where political parties' views heavily contrast. It is important to include actions against social norms and not just laws because they still hold the underlying purpose of civil disobedience, in that they challenge the status quo. Further, if all forms of protest were legalised, no protest action would fit into any definition of civil disobedience.

### *B Relevance of Recent Action Against the Second Amendment*

It is important to look at the current attitudes towards the Second Amendment. Firstly, because they are intertwined with civil disobedience by way of the protest action laid out above. However, it can also show us how the Second Amendment is, in some ways, both achieving and failing to achieve its historical purposes. What I mean by this is that the Second Amendment is clearly not being used to form people-in-militias in the present day, as was one of its historical purposes, but it is instead being used to exercise an individual right. This exercise of the individual right is often being misused, as is evidenced by the drastic increase in mass shootings against innocent parties. Therefore, the Second Amendment is arguably failing to achieve its historical civil disobedience purposes. The modern disquiet with the Second Amendment's misuse and civil disobedient action in aims of repealing it help to emphasise its current failings.

The ability of protest action to be able to emphasise where political regimes may be failing shows that civil disobedience can be used in more ways than effecting change. I say this because some theorists argue that to use certain justifications for civil disobedience, we must look at whether the disobedient action is likely to be successful in achieving the desired

change.<sup>200</sup> Cohen in particular sees this as relevant in applying his utilitarian justification.<sup>201</sup> Those choosing to conduct civil disobedient action against the Second Amendment would have a hard time showing that it is likely to truly effect change, given the deeply entrenched nature of the United States Constitution. However, I do not see that their actions cannot be justified, even under a utilitarian justification, because they still hold some utility. That is, the disobedient actions, such as the school walk outs, give the ability to spread the message that citizens are not happy with the status quo. While this may not lead to immediate change, it has the ability to lead to change over long periods of time and that, I believe, can be justified. Therefore, analysing the recent civil disobedience surrounding the Second Amendment helps to show the flaws in some theorists' frameworks, particularly relating to the justification of their actions. It also, as mentioned, shows the failings of the Second Amendment despite the purposes that it was created for. It begs the question, has the Second Amendment and its purposes changed over time and thus moved away from a right to civil disobedience? Importantly, it shows a great irony in that the Second Amendment has led to civil disobedience, but not for the purpose that it was historically intended for.

## *VII Conclusion*

In concluding this paper, it has become clear that the historical justifications of the Second Amendment can be seen as providing a right to civil disobedience. This has been proven by showing that both concepts are underpinned by a focus on protecting against corrupt and oppressive regimes. Reference to the original legal meaning of the Second Amendment supported this argument. That is not to say that connecting these two concepts was trouble free, there are clear instances where the historical justifications look to be supporting more of a legal relationship with revolution as opposed to civil disobedience. This is somewhat circumvented by reference to the differing understandings and definitions of both revolution and rebellion, but most importantly it is difficult to argue that someone invoking their right at law rejects the very system that gives them this right. Another problem that is presented is the issue of violence, which is a question that is inevitably raised with a right to bear arms. This is addressed with reference to the differing views on the levels of violence permitted within civil disobedience. The point is also made that the right to bear arms alone does not provide a right to use them for violent purposes and thus it can still be argued that the Second Amendment

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<sup>200</sup> Carl Cohen, above n 49, at 15.

<sup>201</sup> At 15.

provides a right to civil disobedience, without raising the issue of violence. The illegality requirement of most civil disobedience definitions also raised issues but was dealt with by reference to the rights to revolution and resistance. The right to resist also tells us something about civil disobedience and its legal relationship with the Second Amendment. While not a right that exists explicitly in the United States, the right to resist could be read into the Constitution through the arguments underpinning the Second Amendment. Regardless, I find that it is likely that, while there are decent connections between the right to resist, the Second Amendment and civil disobedience, the right to resist is sufficiently distinct from the Second Amendment and civil disobedience. That is, the Second Amendment does not provide a right to resist but rather a right to civil disobedience.

This paper has also shown how the Second Amendment has been invoked by citizens for reasons not connected to the historical justifications, such as in mass shootings, and as a result it has ironically led to civil disobedience movements against the Amendment's very existence. This was supported by the plethora of recent movements discussed in this paper, such as the mass school walk outs and several actions conducted by March For Our Lives and Gays Against Guns. This shows how the context of the Second Amendment has changed significantly from its historical justifications and how, while those justifications may have been that the right is to be invoked to protect against corrupt governments, it is actually being invoked for completely different reasons. It is because of this misuse of the Amendment that we begin to see civil disobedient action against its existence. Looking at the modern context also helps to highlight some of the issues with current civil disobedience conceptions. Particularly the illegality requirement, given many of the actions against the Amendment are not illegal, despite often contradicting social norms and rules.

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