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I. INTRODUCTION

Twenty-seven words of a Constitutional provision have generated literally dozens of law review articles and academic commentaries throughout the past decade.[1] In the last five years alone, numerous articles were published on the subject of the Second Amendment.[2] New empirical data released recently indicate that firearms commonly are used for self-protection by law-abiding citizens.[3] Such hard evidence refutes a popular argument of gun control advocates that firearms have no utility but only contribute to violence in the society, as these studies support the conclusion that weapons are in fact predominantly used for self-defense. Thus, proposals to tighten gun controls aimed at disarming large segments of the population are likely to affect the number of prospective victims who would be deprived of an opportunity for self-protection, resulting in an increased social cost.

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1. The Second Amendment provides 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." U.S. CONST. amend. II.

2. To list only some of the recent articles on this subject, *see, e.g.*, Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995); Eric Gorovitz, *California Dreamin': The Myth of State Preemption of Local Firearm Regulation*, 30 U.S.F.L. REV. 395 (1996); Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995); David B. Kopel, et. al., *A Tale of Three Cities: the Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177 (1995); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997); Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just "Gun Shy"?*, 22 CAP. U.L. REV. 641 (1993); Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Gregory Lee Shelton, *In Search of the Lost Amendment: Challenging Federal Firearms Regulation Through the "State Right" Interpretation of the Second Amendment*, 23 FLA. ST. U.L. REV. 105 (1995); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L. J. 1236 (1994); Thomas J. Walsh, *The Limits and Possibilities of Gun Control*, 23 CAP. U.L. REV. 639 (1994).

3. *See, e.g.*, Kleck, *supra* note 2, at 151.

The recent flurry of regulatory activity regarding possession of firearms, at the federal,[4] state, and local levels,[5] warrants close examination of the permissible scope of firearms regulation in the United States. Much of this gun control activity is driven by politics and emotion,[6] and is not necessarily based on scientific evaluation of the utility of gun ownership in this country. Therefore, the recent empirical data regarding actual gun use patterns, which corroborate the view that gun ownership should be encouraged as a policy matter, may result in a rational policy-based approach to gun regulation, compared to the existing patchwork of Second Amendment case law. From a legal standpoint, the analysis of the United States Constitution and the existing federal and state case law lends support to the view that the right to bear arms is a fundamental right guaranteed to individual citizens.

Part II of this Article examines the legal implications of the absence of a governmental duty to protect individual citizens and posits that effective self-defense may be maintained only by an individual himself.

Part III of this Article, while generally relying on the accepted groundwork of scholarship loosely named the "standard model," which argues that the Second Amendment creates an individual right, as opposed to a collective right, to bear arms,[7] sets forth the analytical framework for interpreting the Second Amendment and highlights the lack of clarity in interpretation of the Second Amendment in the United States Supreme Court's jurisprudence. This Article further explores an apparent parallel in the present state of legal thinking regarding the right to bear arms with the evolution of First Amendment jurisprudence which, being indisputably an individual fundamental right, still is subject to regulation by the federal and state governments with respect to the time, place and manner of the exercise of that right.[8] The permissible scope of such reasonable time, place and manner regulation under the First Amendment has been delineated by the Supreme Court over time. An analogous approach is appropriate for the Supreme Court in the case of the Second Amendment, including a clarification that the right to bear arms under the federal Constitution

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4. *See infra* note 28. *See also* Violent Crime Reduction Act of 1997, S. 137, 105th Cong., *reprinted in* TAX NOTES, Feb. 4, 1997, at 24 (proposed legislation by Sen. Moynihan to heavily tax firearm ammunition and to ban certain kinds of ammunition altogether).

5. *See, e.g.*, CONN. GEN. STAT. § 53-202 (1996) (prohibiting possession of certain types of assault weapons); Michael Janofsky, *In Virginia, County Seeks Weapons Ban for Centers*, N.Y. TIMES, March 23, 1997, at A18 (describing gun control proposals in Fairfax county, Virginia).

6. *See, e.g.*, Marvin H. Morse, *Terror in the Pocket: Carrying Concealed*, 43 FED. LAW. 2 (1996) (describing the daily "terror by gunfire" in the United States).

7. *See generally* STEPHEN P. HALBROOK, *That Every Man Be Armed* 7 (2d ed. 1994).

8. *See, e.g.*, Poulos v. New Hampshire, 345 U.S. 395 (1953). *See also* discussion in Part III, *infra*.

is a fundamental right enforceable by individual citizens. The patchwork of case law generated by the lower federal and state courts is further examined in Part IV.

Lastly, Part V of this Article explores the recent legislative changes occurring in many states of the Union as a response to the increased federal regulation of firearms possession, including the phenomenon of the "shall issue" legislation that has liberalized the issuance of concealed weapons in many states for individual self-defense, and which generally makes purchasing a weapon about as easy as obtaining a driver's license. The recent wave of the "shall issue" laws may be viewed as a reaction by the state legislatures to the uncertainty regarding the status of the right to bear arms under federal law.[9]

This Article concludes by arguing that the Second Amendment should be interpreted as protecting a fundamental right of individuals, due to the right of citizens to have access to firearms for personal protection. Statutory and decisional law of some states on the issue of firearm ownership may be a model for a regulatory framework regarding firearms. Should the citizenry, however, wish to restrict the possession of deadly weapons, a Constitutional amendment, rather than confusing and historically inaccurate interpretations of the Second Amendment, appears to offer the most appropriate course of action.

II. THE GOVERNMENT IS NOT BOUND TO PROTECT INDIVIDUAL CITIZENS AND THEREFORE WE ALL HAVE AN INHERENT RIGHT TO SELF-DEFENSE

Generally, American legal theory does not recognize any duty owed by the government to protect particular individuals from harms inflicted by other private individuals, although the government is obligated to protect the population as a whole. In light of the continuing lack of clarity regarding the right of an individual citizen to bear arms for self-protection, such governmental immunity from claims by victims of violent crimes makes a citizen defenseless against violence. At the same time, the individual is uncertain whether arming himself will make him a "criminal" in the eyes of the legal system.

9. As discussed below in Part III, the United States Supreme Court, although indicating in several cases its view that the Second Amendment protects an individual citizen's right to bear firearms, has never addressed this issue directly.

A. No Governmental Duty to Protect

In several reported cases, plaintiffs used the federal civil rights statute[10] to sue the government for failure to protect against various forms of violence. Until very recently, the courts, in most circumstances, uniformly refused to impose a duty to protect on the government or its agents in the absence of an affirmative act undertaken by the government that would place the victim in a position where he would no longer be able to protect himself.

Clearly, one of the most egregious cases of the government's failure to protect was described by the United States Supreme Court eight years ago in *DeShaney v. Winnebago County Department of Social Services*,[11] a case that involved a father's repeated physical abuse of his three-year-old child. State social services personnel had ample evidence that the father was severely beating the child, but took no action despite multiple requests for legal protection. After the continuous beatings rendered the child permanently retarded, the child's guardian brought a lawsuit against the state authorities for failure to protect against a harm which was known to the state. The plaintiff argued that the state placed the child in peril by awarding custody of the child to the father after the child's parents divorced. The plaintiff argued that having performed such an affirmative act, the state should be held liable if later it failed to protect the child from the person to whom it entrusted the child.

The Seventh Circuit was unmoved by this argument when it decided the case on appeal from the district court. In what became one of the most frequently quoted passages regarding a "fundamental principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen,"[12] the federal court observed that "[t]he Due Process Clauses [of the Fifth and Fourteenth Amendments] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual."[13]

The holding in *DeShaney* does indeed reflect the prevailing status of the law at both federal and state levels. Following a number of United States Supreme Court cases,[14] federal and state courts consistently have held that the

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10. 42 U.S.C. § 1983 (1994) provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."

11. DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989).

12. Warren v. District of Columbia, 444 A.2d 1, 6 (D.C. 1981).

13. *DeShaney*, 489 U.S. at 196.

14. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (no constitutional duty for the state to provide services for those within its borders); Harris v. McRae, 448 U.S. 297, 318 (1980) (no obligation to fund abortion or other medical services under Due

government owes no duty to provide police protection to residents within its jurisdiction. The courts found that to place such an affirmative duty on the government would expose it to a whirlwind of claims by victims of crime. As the First Circuit Court of Appeals expressed in a case in which a state government was sued for failure to protect a victim murdered by a prison inmate on furlough, "[w]hat the state has done is fail to provide the victim protection—a failure which, though perhaps wrong in our view, is not a violation of the due process clause any more than is a fireman's nondeliberate error in failing to rescue someone from a burning building."[15]

This "fundamental principle of American law" (*i.e.*, the absence of a general duty to protect citizens) warrants critical re-examination in light of the increasing attempts to limit a citizen's access to firearms for self-protection. The haphazard legislative and judicial activity aimed at restricting the types of arms available to the populace underlines the conclusion that the pervasive influence of the *DeShaney* principle in the contemporary American jurisprudence warrants wider, rather than more restricted, availability of firearms for private protection. If the government effectively disarms the people by restricting access to firearms for personal protection, it should not be shielded from liability to crime victims who, having no alternative means of defending their families and themselves against violence, are compelled to rely on the government for such protection.[16]

B. Government's Monopolization of Means of Self-Defense

In analyzing the case law that discusses the "fundamental principle of American jurisprudence," it is important to remember that, in situations like *DeShaney*, the government did not actively seek to deprive the citizen of any

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Process Clause of the Fifth Amendment); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no obligation to provide adequate housing under the Fourteenth Amendment).

15. Estate of Gilmore v. Buckley, 787 F.2d 714, 720 n.10 (1st Cir. 1986). *See also* Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988) (decision by a city fire department's dispatcher to refuse to send a fire brigade to extinguish a fire which caused a woman's death held not actionable under 42 U.S.C. § 1983).

16. The Seventh Circuit has summarized the current law as holding that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). The "fundamental principle of American jurisprudence" appears to hold ground, notwithstanding some recent indication that at least in the area of domestic violence some courts may be willing to permit victims of domestic violence to sue police departments in cases of refusal to protect. *See, e.g.*, Calloway v. Kinkelaar, 633 N.E.2d 1380 (Ill. App. Ct. 1994) (county officials liable for failing to prevent abduction of a victim although the officials were on notice that the victim had been threatened by the perpetrator), *aff'd*, 659 N.E.2d 1322 (Ill. 1995).

means of protection. The government did fail to act to fend off the harm threatening a particular individual, but, in general, state spousal or child anti-abuse laws are designed to protect individuals who often are dependent on their abusers.[17] For example, a criminal case could have been timely commenced against Joshua DeShaney's father for child abuse. Ultimately, if other attempts to diffuse the situation fail, the victim may leave the area where the perpetrator resides or operates to avoid the confrontation. In the case of gun control laws, however, the individual victim cannot avoid the encounter with the perpetrator because crime and violence are widespread. The change of residence, for example, would only reduce the probability of becoming a victim of a crime, without completely eliminating such danger. Because each encounter with a violent criminal is potentially fatal, reliance on the good will and omnipotence of the government in preventing crime is unwarranted. An individual should be able to defend himself if the need arises, lest waiting for the government to protect result in incurable harm. During the time it takes the police to respond to an emergency call for help, for example, the harm already has been done. The police are primarily a reactive, not a proactive force.

If private individuals have to rely on self-protection, is the purposeful action of the government to deprive citizens of the means to defend themselves actionable under the rationale of *DeShaney* and its progeny? Arguably, restrictive gun control laws that disable people in the face of potentially fatal violent encounters, which are abundant in modern urban life, exceed the governmental inaction that was held to be permissible in *DeShaney*.[18] Such state monopolization of means of protection available to individuals transgresses the scope of permissible regulation in other areas, such as abortion. In self-defense situations, lives of individuals may be at stake because of the immediacy of potential harm and the inadequacy of response by an unarmed citizen facing a criminal attack.[19]

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17. To illustrate, the Illinois Domestic Violence Act, 750 ILL. COMP. STAT. 60/102 (West 1996) states as its purpose, *inter alia*, "recogni[tion of] domestic violence as a serious crime against the individual and society which . . . promotes a pattern of escalating violence which frequently culminates in intra-family homicide . . . ."

18. Cases tend to emphasize the government's lack of purposeful action. *See, e.g.*, Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983) ("It was the claimants' tragic misfortune to be randomly victimized by the depredations of a criminal who was subject, but not subjected, to the effective control of the state."). As empirical data indicate, however, the ability of an individual to resist a criminal attack (for example, by displaying or actually using a firearm) may significantly affect the probability that the potential "victim" will remain unharmed in such an encounter. *See infra* Part V.

19. The well-being of poor women arguably may be threatened by intrusive regulation of abortion, as poor women would not be able to afford to travel to a less restrictive jurisdiction to perform an abortion, while more affluent women would be able to travel to less restrictive states. This interrelationship between governmental regulation and the impact on the well-being of an individual is, however, much more attenuated than with respect to firearms regulation, where governmental restrictions would immediately

Any policy alternative falling short of entrusting private individuals with firearms and promoting reasonable self-reliance would in theory impose an enormous burden on the government to provide comprehensive protection to citizens. In selecting venues to maintain order in society and to protect an individual citizen from private violence, the government may choose to: 1) monopolize the means of armed defense otherwise available to the public; 2) arm every individual and withdraw itself from the business of protecting the public altogether; or 3) maintain a combination of the first two options. If the government were required to monopolize self-defense, prohibiting any means of private self-protection, such monopolization of public security would appear to be an inefficient use of governmental resources, perhaps possible only in a totalitarian state. If, on the other hand, the government were to provide the public the means to arm itself for self-defense, an individual would be more likely to put up resistance, or at least a credible threat of such resistance, if attacked by a criminal. The current gun control laws in many jurisdictions (particularly in large cities where the probability of being victimized is the highest and the firearm controls are the toughest) effectively put citizens at the mercy of criminals while the state asserts its immunity from responsibility for protection of the public. Once again, this Article suggests that the adequate remedy may be a clarification of the legal doctrine treating the right to bear arms as a fundamental right antedating, and yet protected by, the Second Amendment, and enforceable by individual citizens against both the federal and state governments.

III. INTERPRETATION OF THE SECOND AMENDMENT

The Second Amendment has been dubbed one of the most poorly drafted provisions in the United States Constitution.[20] It has been subject to various interpretations. The only proposition that the advocates of differing views about the right to bear arms appear to agree upon is that the language of the Second Amendment does not clearly indicate what is protected under the firearms clause.[21]

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correspond, as the studies detailed *infra* Part V indicate, to an increased threat to life and health.

20. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 644 (1989) ("No one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provisions . . . .").

21. *See, e.g.*, Halbrook, *supra* note 7, at ix (noting that, in light of the unclear language of the firearms clause "the lack of attention to the meaning of the Second Amendment seems inexplicable").

A. Non-Incorporation of the Second Amendment

Whether the Second Amendment, as part of the Bill of Rights, is "incorporated" into the Fourteenth Amendment and, therefore, applies not only to the federal but also to state governments has been hotly debated in the Second Amendment jurisprudence. It has been established that not all of the first ten amendments of the Bill of Rights are applicable to the states,[22] although in the early development of the Fourteenth Amendment a powerful argument was made in favor of the incorporation of all provisions of the Bill of Rights.[23]

In the first half of the nineteenth century, the High Court held that the Fourteenth Amendment did not make the Bill of Rights applicable to the states.[24] Throughout the early case law, the Justices apparently did not see the need to decide the incorporation issue because the Due Process Clause of the Fourteenth Amendment had been read expansively to include various rights and privileges in the general purview of "liberty." Rather, the Court engaged in an extensive analysis of the meaning of "liberty" and the scope of interests protected by the Fourteenth Amendment.[25] In a sense, the dynamics of "selective incorporation" largely have been dictated by expediency rather than a principled doctrinal approach. The incorporation debate regarding the Second Amendment should be analyzed in the context of constitutional thinking regarding the Due Process Clause and the concept of substantive due process in the early years of this century.

Furthermore, because the provisions of the Bill of Rights largely concern criminal justice, historically the Supreme Court did not consider incorporation of those provisions into the Fourteenth Amendment a priority before the era of

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22. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (Eighth Amendment's ban on excessive bails); Benton v. Maryland, 395 U.S. 784, 787 (1969) (Fifth Amendment's prohibition of double jeopardy); Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (noting that the Due Process Clause of the Fourteenth Amendment protects: (1) the First Amendment rights of free speech, press, and religion; (2) the Fourth Amendment rights to be free from unreasonable searches and seizures and to have illegally obtained evidence suppressed at trial; (3) the Fifth Amendment rights to be compensated for property taken by the state and to resist self-incrimination; and (4) the Sixth Amendment rights to a public and speedy jury trial, to counsel, to confront witnesses, and to compulsory process to obtain witnesses); Robinson v. California, 370 U.S. 660 (1962) (freedom from cruel and unusual punishment under the Eighth Amendment).

23. *See, e.g.*, Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting) (arguing that the Bill of Rights should be fully incorporated based on the "original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights").

24. Barron v. Baltimore, 32 U.S. 243, 247 (1833) (amendments to the Constitution are not applicable to the states, but only constrain the federal government).

25. For an example of such expansive use of the substantive due process and the analysis of the meaning of "liberty," see *Powell v. Alabama*, 287 U.S. 45 (1932) (right to counsel in a criminal prosecution).

the expansive use of federal powers to regulate the traditionally state-dominated field of criminal law.[26] Analogously to the creation of the federal statutory criminal law, which preempted to a certain extent the traditional state criminal law, the federal regulation of firearm use has expanded dramatically in the recent decades.[27]

The exclusion of the Second Amendment from incorporation is somewhat illogical given that most of the Bill of Rights provisions have been incorporated within the last hundred years.[28] More importantly, judicial standards for the incorporation of the Bill of Rights provisions in the Fourteenth Amendment clearly warrant full incorporation of the Second Amendment.[29] The current state of the constitutional jurisprudence regarding the right to bear arms closely parallels judicial thinking with respect to First Amendment liberties at the

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26. For example, the exclusion of a coerced confession by a defendant in a state criminal trial was first required through the Fourteenth Amendment in *Brown v. Mississippi*, 297 U.S. 278, 287 (1936), the Self-Incrimination Clause was incorporated in 1964 by *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), and the prohibition against unlawful searches and seizures was made applicable to the states in 1961 by *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

27. Some of the recent examples, starting with the National Firearms Act of 1934, 26 U.S.C. §§ 5841-5871 (1994), include the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3701-3797 (1994); the Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1994); The Firearm Owners' Protection Act of 1986, *amending* 18 U.S.C. §§ 922-930; the Gun-Free School Zone Act of 1990, 18 U.S.C. § 922(q) (1994); the Brady Handgun Violence Prevention Act of 1993, 18 U.S.C. § 922(s) (1994), and the Public Safety and Recreational Firearms Use Protection Act of 1994, *amending* 18 U.S.C. § 922 (1994).

28. *See* Reynolds, *supra* note 2, for a view that the selective incorporation doctrine should not be accepted in the case of the Second Amendment. The Fourteenth Amendment has been held to protect citizens against many forms of state action. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (right to a speedy and public trial); *In re* Oliver, 333 U.S. 257, 273 (1948) (same); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation of opposing witnesses); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (the Fifth Amendment right to be free of compelled self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (the Sixth Amendment right to counsel); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (the Fourth Amendment right to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized); Fiske v. Kansas, 274 U.S. 380 (1927) (the rights of speech and press); Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (the right to compensation for property taken by the state).

29. *See* Quinlan, *supra* note 2, at 672. Quinlan argues that the Second Amendment fully meets the three standards for incorporation enunciated by the Supreme Court, most notably the standard requiring that a particular provision of the Bill of Rights be implicit in the concept of ordered liberty and so rooted in the American tradition and people's conscience as to be regarded fundamental, see *Palko v. Connecticut*, 302 U.S. 319, 324 (1937), and the standard requiring the right at issue to be fundamental to the American scheme of justice, see *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

beginning of this century. To illustrate, in the early nineteenth century the High Court held that the provisions of the Bill of Rights were inapplicable to the state and local governments.[30] In another case, *United States v. Cruikshank*,[31] the Supreme Court ruled that the provisions of the First and Second Amendments were inapplicable to states and, thus, limited only the powers of the federal government.

The incorporation debate regarding the First Amendment attracted public attention in the 1920s when the Justices decided *Gitlow v. New York*, a First Amendment case in which the Supreme Court simply assumed, without explanation, that the Fourteenth Amendment made the right to free speech applicable to the states.[32] Subsequent First Amendment case law gradually developed into what is now known as the contemporary First Amendment jurisprudence, but only after overcoming the contrary view that the Bill of Rights applies to only the federal government.[33] The extension of the First Amendment protection of free speech against state regulation through the Due Process Clause happened largely after the demise of substantive due process in the 1930s and the abandonment by the Court of its expansive interpretation of "liberty" in the Fourteenth Amendment context.[34]

In short, the Supreme Court should provide a definitive ruling incorporating the Second Amendment into the Due Process Clause of the Fourteenth Amendment because the holdings in early pre-incorporation cases such as *Cruikshank* are now inconsistent with modern Fourteenth Amendment jurisprudence. The High Court, which "has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme,"[35] should analyze the history of the constitutional debates accompanying the adoption of the Bill of Rights and, specifically, the Second Amendment.[36]

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30. Barron v. Baltimore, 32 U.S. 243, 247 (1833).

31. United States v. Cruikshank, 92 U.S. 542, 554-55 (1875). *See also* Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 543 (1922) (First Amendment only applies to the federal government).

32. "For present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and liberties protected by the due process clause." Gitlow v. New York, 268 U.S. 652, 666 (1925).

33. *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203, 254 (1963) (Brennan, J., concurring) (observing that the Framers intended the First Amendment to apply only to the federal government, and limitations upon the states with respect to First Amendment guarantees derive from its "incorporation" into the Fourteenth Amendment).

34. *See supra* note 25.

35. Malloy v. Hogan, 378 U.S. 1, 5 (1964).

36. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 221 (1983) (describing "universal belief" of the Founding Fathers in armed citizenry as a guarantee of liberty during the

B. A Fundamental Right

The Second Amendment jurisprudence largely continues in its inchoate state today due to the lack of an authoritative interpretation of its meaning. The right to bear arms should be pronounced a fundamental right and fully incorporated through the Fourteenth Amendment, as has already occurred in the case of the First Amendment. The explosion of crime in the last two decades and the ongoing expansion of the powers of the federal government, which result in a gradual usurpation of the traditional domains of state power,[37] are important reasons necessitating such clarification of the Second Amendment.

A central interpretive issue is raised by the question of whether the Second Amendment provides for a fundamental right, regulation of which is subject to stringent constitutional limitations. The Supreme Court has not ruled definitively on this question so far, although in several cases the Court did indicate that it considered the right to bear arms provided for in the Second Amendment a fundamental right.[38]

The viability of an interpretation of the Second Amendment as a self-enforceable fundamental right was demonstrated in a dissenting opinion in *Quilici v. Village of Morton Grove*,[39] where Judge Coffey of the Seventh Circuit Court of Appeals viewed the right to bear arms as one of the "basic human freedoms." In *Quilici*, a gun owner brought an action against a municipality which enacted an ordinance prohibiting possession of handguns within its borders.[40] The dissent argued that every individual is entitled to self-defense and the protection of "loved ones" and that such right is inherent in the concept of natural law. In addition, Judge Coffey considered the village ordinance invalid because it impermissibly interfered with the individual right to privacy.[41]

Constitutional debates and the adoption of the Bill of Rights).

37. *See, e.g.*, Randy E. Barnett, *Foreword: Guns, Militia and Oklahoma City*, 62 TENN. L. REV. 443, 448 (1995) (showing that the scope of regulation by the federal government has expanded dramatically in recent decades).

38. *See* Lewis v. United States, 445 U.S. 55, 66 (1980) (mentioning in dicta that the right to bear arms was fundamental, together with voting, holding a union office or practicing medicine).

39. Quilici v. Village of Morton Grove, 695 F.2d 261, 271-72 (7th Cir. 1982) (Coffey, J., dissenting), *cert. denied*, 464 U.S. 863 (1983).

40. The majority opinion, which found that the ordinance did not infringe upon the rights protected by the Second Amendment, was criticized by one commentator as displaying a "penchant for inaccuracy." *See* Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 70 (1989).

41. *Quilici*, 695 F.2d at 278.

C. The Second Amendment as a Guarantee of an Individual Right

Although the Supreme Court has not definitively ruled that the Second Amendment protects an individual right to bear arms,[42] legal academia generally has argued that the individual right approach is consistent with the language of the Second Amendment and its interpretations at the time the Bill of Rights was drafted and debated.[43]

Contrasted with the individual right theory is the so-called state right doctrine, which relies on the provisions of Article I, section 8 of the Constitution establishing the power of Congress to call militia and to provide for arming and disciplining of the militia.[44] The proponents of that theory argue that the purpose of the Second Amendment was to guarantee that the federal government would not be able to disarm state militias.[45] Conversely, some early state decisions suggested that the right to bear arms may have been intended only to protect the rights of the states to maintain their military independence from the emerging federal government.[46]

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42. *See infra* Part III.E.

43. *See, e.g.*, Halbrook, *supra* note 7, at 170 (the right to bear arms is the right of the people which should be interpreted as an individual right consistently with other provisions of the Constitution referring to the "people" as private citizens); Kates, *supra* note 36, at 218 (same); Levinson, *supra* note 20, at 645 ("[I]t seems tendentious to reject out of hand the argument that one purpose of the [Second] Amendment was to recognize an individual's right to engage in armed self-defense against criminal conduct.").

44. U.S. CONST. art. I, § 8, cl. 15 sets forth the power of Congress "[t]o provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions." Art. I, § 8, cl. 16 authorizes Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Incidentally, Congress apparently views the Second Amendment as protecting an individual right. The preamble to the Firearm Owners' Protection Act of 1986 states that "[t]he Congress finds that—(1) the rights of citizens—(A) to keep and bear arms under the Second Amendment to the U.S. Constitution [and Fourth, Fifth, Ninth, and Tenth Amendments] require additional protection." *See* Pub. L. No. 99-308 (1986).

45. *See, e.g.*, John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148, 155 (1971) (arguing that the Second Amendment manifests the fear of the states of an oppressive federal power); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L. Q. 961, 984 (1975) (same).

46. *See, e.g.*, United States v. Warin, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976) (only states and state militia members have standing to assert the Second Amendment); State v. Buzzard, 4 ARK. 18, 24-25 (1842) (Second Amendment and its state constitutional analogs guarantee the right of the state to organize its own militia).

An even more extreme variation of the state right reasoning, otherwise known as the collective theory of the Second Amendment, is the interpretation that the constitutional right to arms involves only "the people" as a whole, but not the states or individual citizens.[47] The people's right theory appears even more illogical than the states' right doctrine because "the people," as a legal concept, embraces everyone and no one at the same time. It is hard to imagine that the Constitution would include a constitutional provision which would not be enforceable by anyone.

The Framers may have intended to protect both individual liberty by guaranteeing the right to gun ownership and state sovereignty by ensuring that state militia would have able and "disciplined" members to defend the state in the case of federal encroachment upon privileges of the states.[48]

Many legal scholars consider the Second Amendment as embodying a structural view of the federalist state that differs from the traditional federal-state government dichotomy. It has been argued that the Second Amendment envisions a third "pole," the people, in the federal structure, the task of which is to balance the other two in guarding against the possibility that a tyrannical government may abolish individual liberties of citizens.[49] The preservation of firearms to the citizenry puts pressure on the government to adhere to democratic processes out of fear of a popular uprising should the government degenerate into a tyranny.[50] This "right to a revolution" argument in construing the Second Amendment also is consistent with the inalienable right to bear arms, which was acknowledged by the Supreme Court in one of its early decisions.[51]

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47. That theory was articulated in *Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905), and apparently is dormant at the present time. *See also* Van Alstyne, *supra* note 2, at 1244 (analyzing the Second Amendment as discrediting the early state right approach because under that theory the right to bear arms would be unenforceable by anyone).

48. *See* Halbrook, *supra* note 7, at 89.

49. *See, e.g.*, Levinson, *supra* note 20, at 651 (construing the Second Amendment as epitomizing the republican theory of popular counterbalance to the government). Such argument appears to be supported by other provisions of the Constitution, namely, the Ninth and Tenth Amendments, which envision the "people's power" as a check on the government.

50. *See, e.g.*, Cockrum v. State, 24 TEX. 394, 401 (1859) (Second Amendment is "based on the idea, that the people cannot be effectually oppressed and enslaved, who are not disarmed").

51. In the early Thirteenth Amendment case of *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), Chief Justice Taney twice referred to the right to bear arms as an individual right. He first observed that Negroes were not entitled to the "rights and privileges" of citizens, including the right to "keep and carry arms wherever they went." *Id.* at 416-17. Later in the opinion, the Court noted that "Congress [cannot] deny to the people the right to keep and bear arms." *Id.* at 450.

D. Definition of Militia

The importance of this facet of the private ownership of firearms as one of the "checks and balances" in the Constitution relates to the proper role of "militia" referred to in the Second Amendment. Historical analysis of the Constitution indicates that the term "militia" was understood by the Framers to embrace all white males of certain age who are suitable for military service.[52] Today's military units that are frequently called "militias," established by the federal government (the National Guard) and the states, are of a completely different nature from the "militia" referred to by the Constitution.

It is clear that the current National Guard, which does not embrace all eligible citizens, is not the "well-regulated militia" within the meaning of the Second Amendment, and the United States Supreme Court essentially has recognized this fact.[53] In fact, federal law, as well as most state statutes, recognizes an unorganized militia which is separate from the National Guard, and which is composed of male members between the ages of seventeen to forty-five.[54] Those militias are not covered by the provisions of the law related to the maintenance and training of the National Guard. Commentators are in agreement that the existence of the National Guard does not serve the goals of preserving well-regulated state militias as mandated by the Second Amendment.[55] The present National Guard is a "select militia" which is largely a federal force. Conversely, the Framers wished to establish an all-inclusive popular "genuine militia" of all men capable of bearing arms.[56]

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52. *See, e.g.*, Dowlut, *supra* note 40, 15 at 66 n.44 ("well-regulated militia," understood at the time of adoption of the Bill of Rights to mean a militia which is comprised of people that have had military training).

53. Perpich v. Department of Defense, 496 U.S. 334, 341 (1990) ("militia," as recognized in the Constitution, proved an unreliable fighting force which had to be reformed).

54. *See* 10 U.S.C. § 311 (1994), which provides, *inter alia*, that the classes of militia include the "organized militia" (the National Guard and the Naval Militia), and the "unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia." Significantly, many state statutes now include women within their definition of unorganized state militia. *See* Glenn H. Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1761 n.80 (1995) (citing state constitutional and statutory provisions). *Compare with* First Militia Law, 1 Stat. 271 (1792), which defined militia as all "free able-bodied white male citizens." Clearly, such militia does not exist anymore.

55. *See, e.g.*, Reynolds, *supra* note 54, at 1760 (viewing the National Guard as being different from the well-regulated militia prescribed by the Constitution).

56. *See* Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 13, 20 (1982) (referring to RICHARD HENRY LEE'S, LETTERS OF A FEDERAL FARMER (1787-88), as admonishing against Congress's power to establish a federal militia which would ultimately make state

Thus, the "well-regulated militia" provided for in the Second Amendment is an entity different from the present National Guard. The ranks of loosely defined state militias appear to be the only possible candidates that might be considered for Second Amendment purposes because they include all eligible citizens of the nation. Although the courts have discussed the status of the National Guard with respect to specific state or federal laws,[57] the question of what constitutes a well-regulated militia within the meaning of the Second Amendment requires a thorough examination and understanding of the purpose of the institution of state militias as a guarantee of state power against federal regulation.

In sum, the reading of the Second Amendment that encompasses the protection of a fundamental individual right is reinforced by the plain meaning of the provision because "militia" in the Constitution refers to all people, and the term "arms" includes, at the very least, all weapons that are necessary to the militia service.[58] Moreover, if the militia referred to in the Second Amendment is no longer in existence, or is not active militarily, the right of individual citizens to possess firearms to control the power of the government becomes even more important as an institutional check against governmental power.

E. Supreme Court Jurisprudence

The Supreme Court largely has shied away from expressing a definitive opinion regarding the meaning of the Second Amendment. During the last century, the Court has decided only five cases on Second Amendment grounds, although in several other decisions the Justices, in passing, mentioned their views on the right to bear arms under the U.S. Constitution. So far, the High Court has declined requests to review even complete prohibitions of possession of firearms,[59] but the increasing regulation of the possession of firearms is likely to compel the Court to address the Second Amendment controversy some time in the near future as challenges to the power to regulate firearms asserted by the government grow.

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militias irrelevant).

57. *See, e.g.*, Baker v. State, 156 S.E. 917, 919 (N.C. 1931) (holding that the National Guard is a state organization for purposes of workmen compensation laws). Another early state court decision discussed the delineation of powers among the federal government and the states in matters of military policy. *See* State v. Johnson, 175 N.W. 589 (Wis. 1919) (holding that under the United States and Wisconsin Constitutions, the state may decide certain issues of military policy).

58. *See* Kates, *supra* note 36, at 214 (arguing that the textual analysis of the Second Amendment leaves no ground for asserting that the Constitution does not protect a fundamental individual right to bear arms).

59. *See, e.g.*, Quilici v. Village of Morton Grove, 464 U.S. 863 (1983) (denying certiorari); Burton v. Sills, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969) (dismissed for "want of a substantial federal question").

The first Second Amendment case the Supreme Court decided, *United States v. Cruikshank*,[60] involved an indictment under a Louisiana state law which prohibited interference with the "rights, immunities and privileges" of citizens, including the rights to free speech and to bear arms. The Court in one paragraph summarily dismissed the state's argument that the rights under the federal Constitution were implicated when a group of people "banded together" to harass two African-Americans. Regarding the right to bear arms, the Court observed that "bearing arms for a lawful purpose . . . is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."[61] Further,

> [t]his is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, . . . the "powers which relate to merely municipal legislation."[62]

The observation that the right to bear arms predates the Constitution is based on the natural right theoryk, which supports the view that the right to bear arms was considered fundamental by the *Cruikshank* court.[63]

Furthermore, the view expressed in *Cruikshank* that the Fourteenth Amendment added nothing to the protection of individuals against state infringement of a fundamental right was prevalent in the early Supreme Court jurisprudence. For example, the Court articulated a similar opinion in *Permoli v. New Orleans*, a First Amendment case.[64] More importantly, in 1897 (after *Cruikshank*), the Supreme Court decided its first case in which one of the Bill of Rights provisions was held to be within the Fourteenth Amendment.[65] That treatment of the Fourteenth Amendment has been supplanted by the incorporation doctrine in the context of other Bill of Rights provisions,[66] although the Court has not yet ruled on the application of the Fourteenth

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60. 92 U.S. 542 (1875).

61. *Compare Cruikshank*, 92 U.S. at 542, *with* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822), an early state court decision which stated that the right to bear arms "existed at the adoption of the [state] constitution."

62. *Cruikshank*, 92 U.S. at 553.

63. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (Chase, J.) (principles of natural law embodied in the fundamental rights provisions of the United States Constitution).

64. Permoli v. New Orleans, 44 U.S. (3 How.) 589 (1845) (federal government has no jurisdiction under the Constitution over a city ordinance infringing upon freedom of religion).

65. That first "incorporation" case was Chicago, B. & R.Q. Co. v. Chicago, 166 U.S. 226, 239 (1897) (Fourteenth Amendment prohibits state action taking private property without compensation).

66. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (listing the Bill of Rights provisions incorporated into the Fourteenth Amendment).

Amendment in the context of the right to bear arms. The importance of *Cruikshank*, however, is in its language referring to the "people" and "fellow citizens," which indicates that the Second Amendment guarantees an individual right to bear arms.[67]

In *Presser v. Illinois*,[68] the Supreme Court upheld a conviction of a member of an unorganized militia in Illinois, who, in violation of a state statute, paraded on Chicago streets, "riding on horseback and in command" of a company of people armed with rifles. Although the case has been considered as advancing the state rights doctrine, a close reading of the opinion indicates that the Supreme Court did not pass upon this issue. Rather, the Court's affirmance of the conviction was based on the premise that the Illinois statute in question was a valid exercise of the police power of the state to regulate militia. Indeed, the statute did not prohibit any parades or drilling by unorganized militiamen, it simply required that a license from the governor be obtained prior to the intended military exercise.[69]

The court paid special attention to the provisions of the Illinois Military Code, the statute in question, which defined the "Illinois State Militia" as all able-bodied male citizens of the state between the ages of eighteen and forty-five years, except exempted persons. The Code also set forth a separate "volunteer active militia," a limited number of enlisted personnel. The Court did not view the establishment of such selected militia on active duty as being contrary to the constitutional mandate that all qualified citizens be subject to the militia duty. The existence of two distinct organizations, the volunteer active militia and the general state militia, manifested the difficulty of maintaining adequate military preparedness by the general non-select militia alone, which comprised the able-bodied male population of the age of eighteen to forty-five.[70] In the Court's opinion, "sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns *unless authorized by law*, do not infringe the right of the people to keep and bear arms."[71] It is difficult to see how this language denies substance to the Second Amendment any more than the permissibility of the

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67. In an opinion issued almost 20 years before *Cruikshank*, the Supreme Court construed the phrase "the people" in the Second Amendment as referring to an individual right. *See* Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) and text accompanying note 51.

68. 116 U.S. 252 (1886).

69. *Id.* at 253 ([S]ection 5 of the Illinois Military Code provided that it "shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this state, . . . to associate themselves together . . . , without the license of the governor thereof . . . .").

70. *See* Perpich v. Department of Defense, 496 U.S. 334, 341-45 (1990) (describing the late nineteenth century efforts to maintain uniform state militia and ensure military preparedness).

71. Presser v. Illinois, 116 U.S. 252, 264 (1886) (emphasis supplied).

time, place and manner regulation of the free speech negates the First Amendment.[72] It also is perfectly consistent with dicta in another decision of the United States Supreme Court, *Robertson v. Baldwin*, where the Justices observed that although the codification of the right to bear arms in the Bill of Rights was intended to "embody certain guarantees and immunities which we had inherited from our English ancestors," it "is not infringed by laws prohibiting the carrying of concealed weapons."[73] In other words, the permissibility of regulation of the manner in which firearms are carried, including the bearing of concealed weapons, no more negates the Constitutional right to bear arms than the time, place and manner regulation of the First Amendment liberties diminishes the scope of Constitutional protection of the freedom of speech.

In the third case often mentioned in the nineteenth century saga of the Second Amendment litigation, *Miller v. Texas*,[74] the Supreme Court, without laying out the facts of the case or much discussion, dismissed an appeal on procedural grounds. The Court only mentioned that the case involved a claim that the petitioner was denied the protection of the Second Amendment by a Texas statute which forbade the carrying of weapons. As in *Cruikshank*, the dismissal of the petition apparently reflected the Court's pre-incorporation view that the Fourteenth Amendment did not apply to the states.

Relatively recently (by the standards of the Second Amendment jurisprudence) the Supreme Court, in *United States v. Miller*,[75] sustained a conviction of two individuals who were transporting an unregistered shotgun in interstate commerce in violation of the federal National Firearms Act.[76] Although the decision has been subject to various interpretations,[77] the Court's opinion is, in reality, rather limited and does not indicate the Court's clear view regarding the proper interpretation of the Second Amendment. The crucial part

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72. Regulation of the time, place, and manner of exercising the rights protected by the First Amendment is commonly accepted as valid. *See, e.g.*, Poulos v. New Hampshire, 345 U.S. 395, 408 (1953) (upholding reasonable regulation of time, place, and manner of performing religious services in public parks under the First Amendment). *See also* Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (reasonable regulation of the right to bear arms does not negate constitutional protection of the right).

73. Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897).

74. 153 U.S. 535 (1894).

75. 307 U.S. 174 (1939).

76. Codified at 26 U.S.C. §§ 5841-5871 (1994). The National Firearms Act requires registration of all "firearms" (as defined in the statute), and is not limited to weapons circulating in interstate commerce.

77. *See, e.g.*, Dowlut, *supra* note 40, at 73-74. Dowlut interprets *United States v. Miller*, 307 U.S. 174 (1939), as a case which is consistent with the individual right theory because of the reluctance of the Justices to limit the right to firearms possession only to members of an established militia. Dowlut, *supra* note 40, at 73-74.

of the opinion is contained in the following paragraph:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than 18 inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

It is important to note that the inconclusiveness of the Supreme Court's view regarding the Second Amendment as reflected in *Miller* may stem from several procedural irregularities of the case. Both defendants in *Miller* appeared *pro se*, without counsel. Crucial is the court's emphasis on the absence of any evidence showing that the gun transported by the defendants could be used in connection with militia activities. Such evidence, if produced by the defendants, would have constituted an affirmative defense to the government's charge of the violation of the statute, and the defendants bore the burden of proof on this issue.[78] It is also worth mentioning that the opinion cited, as "some of the more important opinions and comments by writers," state court decisions several of which held that the right to bear arms is an individual right under state constitutional provisions.[79]

The Supreme Court in *Miller* set forth what became known as the "civilized warfare" test,[80] which, in essence, provides that the constitutionally protected firearms include those used by militiamen in "civilized warfare" and not those utilized by ruffians, brawlers, or assassins. Although this is a certain limitation on the scope of constitutional protection under the Second Amendment, it is consistent with the power to regulate the use of weapons to prevent their

78. The Court simply assumed, without evidence to the contrary, that the firearms in issue were unfit for militia purposes. *Miller*, 307 U.S. at 178.

79. *Id.* at 182 n.3. The opinion cites cases which are based on the individual right interpretation of the Second Amendment, including: People v. Brown, 235 N.W. 245 (Mich. 1931) (private individuals may bear any "commonly used" arms); Fife v. State, 31 ARK. 455, 460-61 (1876) (individuals may bear large firearms but not concealable pocket weapons); Aymette v. State, 21 Tenn. (2 Hum.) 158 (1840) ("The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution.").

80. *Miller*, 307 U.S. at 178 (protection of the Second Amendment is limited to firearms used by militia members).

misuse.[81] Most states, as described below, have adopted the civilized warfare test in construing the arms clauses of state constitutions.[82]

In more recent times, the Supreme Court has avoided ruling on the Second Amendment issues, utilizing other Constitutional provisions rather than the right to bear arms in cases where firearm regulation was in issue.[83] In fact, the High Court has been very careful to avoid addressing the issue in situations where reference to the Second Amendment would have supported a decision much stronger than the convoluted argument advanced by the Court before.[84] Yet in the absence of clear guidance from the Supreme Court regarding the scope of the Constitutional protection under the Second Amendment, lower federal courts somewhat hesitantly continue to apply the discredited "collective right"

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81. To illustrate, a number of courts including the U.S. Supreme Court in *Lewis v. United States*, 445 U.S. 55 (1980), upheld prohibitions under the federal and state law on possession of firearms by convicted felons as reasonable regulation of the use of weapons. *See, e.g.*, People v. Blue, 544 P.2d 385 (Colo. 1975); State v. Comeau, 448 N.W.2d 595 (Neb. 1989); State v. Ricehill, 415 N.W.2d 481 (N.D. 1987). It is untenable to argue that somehow such permissible regulation undermines the sanctity of the Second Amendment itself.

82. *See, e.g.*, Seattle v. Montana, 919 P.2d 1218, 1222 (Wash. 1996) ("arms" extends to weapons designed as such, and not to every utensil which might be used to strike a person). *See also* State v. Swanton, 629 P.2d 98, 99 (Ariz. Ct. App. 1981) ("arms" are those weapons used in civilized warfare and not those used by ruffians, brawlers and assassins); Fife v. State, 31 Ark. 455 (1876) ("arms" includes firearms used in militia, not weapons customarily used in private quarrels or brawls such as a pocket pistol); State v. Kerner, 107 S.E. 222, 224 (N.C. 1921) ("arms" includes pistol, but not bowie knife, dirk, dagger, slung shot, loaded cane, or metallic knuckles); People v. Persce, 97 N.E. 877, 877 (N.Y. 1912) ("arms" includes only legitimate weapons of defense and protection, not instruments which are ordinarily used for criminal or improper purposes); State v. Workman, 14 S.E. 9, 11 (W. Va. 1891) ("arms" in a constitutional provision refers to weapons of war used by the militia). *See also infra* Part IV.C.

83. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561-62 (1995) (Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), partially invalidated as exceeding the Commerce Clause, U.S. Const. art. I, § 8, cl. 3)).

84. For example, in *Staples v. United States*, 511 U.S. 600 (1994), the Supreme Court upheld a conviction for possessing an unregistered machine gun where the federal government could not prove beyond a reasonable doubt that the defendant knew the weapon he possessed was a "machine gun" as defined in the statute. Notwithstanding an opportunity to examine the validity of the firearms registration provisions under the Second Amendment, the Court's only reference to the right to bear arms was that "despite their potential for harm, guns generally can be owned in perfect innocence." *Staples*, 511 U.S. at 611. *Compare with United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976), an analogous case involving a conviction for possessing a machine gun which was not registered as required by the National Firearms Act, 26 U.S.C. §§ 5861 and 5871 (1996). In *Warin* the Sixth Circuit set forth a detailed analysis of the Constitutional protection of the right to bear arms and concluded that federal regulation of the firearms possession was not prohibited. *Id.*

approach[85] or avoid ruling on the meaning of the Second Amendment to the extent possible.[86]

Even though the Supreme Court has not addressed the Second Amendment since *Miller*, in several cases it mentioned, in passing, its views on the nature of the right to bear arms, repeatedly noting that it views the Second Amendment as an individual right.[87] The Court rested its conclusion on the construction of the term "the people" in several provisions of the Bill of Rights.[88] Consistent with the views of legal academia that have asserted that "the people" connotes all individual citizens protected under each respective amendment to the Constitution,[89] in a recent decision in *United States v. Verdugo-Urquidez* the Supreme Court confirmed that position in dicta.[90] The statement in *Verdugo* also implies the Court's view that the Second Amendment guarantees a fundamental right. The Justices have indicated their support of this conclusion in the past, repeatedly referring to the firearm clause of the Constitution in the same line as the First Amendment and other guarantees of the Bill of Rights which are uniformly considered to protect individual fundamental rights.[91]

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85. *See, e.g.*, Pencak v. Concealed Weapon Licensing Bd., 872 F. Supp. 410, 413 (E.D. Mich. 1994); Fresno Rifle & Pistol Club, Inc. v. Van de Camp, 746 F. Supp. 1415, 1417 (E.D. Cal. 1990), *aff'd*, 965 F.2d 723 (9th Cir. 1992) (both cases holding that the Second Amendment applies only to the federal government and not to the states). Some federal district courts appear to treat the right to bear arms as no more than a legislative grace. *See, e.g.*, Bemis v. Kelley, 671 F. Supp. 837, 842 (D. Mass. 1987), *aff'd*, 857 F.2d 14 (1st Cir. 1988) ("The right to carry a firearm is regulated by statute in Massachusetts and that right may be revoked for good cause at any time").

86. *See, e.g.*, Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (refusing to discuss the merits of *United States v. Miller*, 307 U.S. 174 (1939)). *Compare with* Love v. Pepersack, 47 F.3d 120, 124 (4th Cir.), *cert. denied*, 116 S. Ct. 64 (1995) ("the [Second] [A]mendment does not confer an absolute individual right to bear any type of firearm").

87. *See infra* notes 90 and 91.

88. *See infra* note 91.

89. *See, e.g.*, Kates, *supra* note 36, at 218 (term "the people" in the First, Second, Fourth, Ninth, and Tenth Amendments connotes individual citizens).

90. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (Fourth Amendment case where the Court interpreted the term "the people" in the Preamble and the First, Second, Fourth, Ninth, and Tenth Amendments as a term of art referring to the same connotation, an individual right).

91. Thus, in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), the Court noted that:

> the full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and

To summarize, the Supreme Court should squarely address the baffling interpretive problems of the Second Amendment to end the continuing controversy and confirm the fundamental nature of the right to bear arms. One observation that emerges from the Court's Second Amendment jurisprudence is that the Justices apparently view the right to bear arms as an individual right because the High Court has never questioned the individual petitioners' standing to assert a Second Amendment right.[92]

IV. STATE REGULATION OF FIREARMS

As in the Second Amendment itself, provisions in state constitutions guaranteeing the right to bear arms largely originated in the Anglo-American common law.[93] Early state constitutions adopted prior to the Civil War contained a version of the right.[94] Most states have adopted statutes regulating the use and possession of firearms, and such statutes typically require that a person wishing to acquire a firearm apply for a license.[95] Until the recent wave of statutes mandating the issuance of a license to qualified individuals, in many jurisdictions the issuance of such licenses was discretionary and numerous news reports indicate that gun permits under those discretionary powers were more readily available to wealthy and well-connected persons rather than to residents

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purposeless restraints.

See also Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992) (quoting the above language from *Ullman*).

92. Conversely, the adoption of the "state right" theory would mandate the dismissal of an individual's claim because only the states, under that doctrine, would be eligible to sue for a violation of the right to bear arms. *Compare with* Cases v. United States, 131 F.2d 916, 921-22 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943) (Second Amendment standing is limited to members of "military organizations" whose possession of firearms advances the militia goals of the Second Amendment). However, *Cases* relied on *United States v. Miller*, 307 U.S. 174 (1939), in which the United States Supreme Court never doubted that the defendants, who were not militia members, had standing to assert a Second Amendment claim. *Id.* at 921.

93. Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976).

94. *See* Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subjects: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91, 119-23 (1989) (describing the adoption of early state constitutions and the Bill of Rights). Halbrook mentions that in four (Pennsylvania, Massachusetts, Vermont and North Carolina) of the eight declaration of rights adopted by the states during the Revolutionary period, the individual right to bear arms was explicitly recognized. *Id.* at 119.

95. *See, e.g.*, N.Y. [PENAL] LAW § 400.00 (1996); 18 PA. CONS. STAT. ANN. § 6109 (West 1996). As discussed above in Part III, the regulation of the right to bear arms by itself does not diminish Constitutional significance thereof. An analogy here may be drawn with the First Amendment under which reasonable regulation of the time, place and manner of exercising First Amendment rights is permissible. *See supra* note 72.

who needed firearms for personal safety.[96] The prevalent trend in recent years, however, is the expansion of state firearms law to grant law-abiding citizens easier access to firearms. Partly in response to the uncertainty regarding the scope of the Second Amendment protection, and to some extent as a reaction to a number of well-publicized cases in which state officials abused their discretionary powers to issue gun permits, some states have amended their constitutional provisions in relation to the right to bear arms, to explicitly provide that the arms clause relates to the personal defense and protection of the state, as well as recreational use, hunting and other lawful purposes.[97] In addition, many states have adopted legislation liberalizing the carrying of concealed weapons, and state courts have become more active in enforcing the right to bear arms under state constitutional and statutory provisions.

A. State Constitutional Provisions

Currently, constitutional provisions in forty-three states explicitly protect, to a varying degree, the right of the populace to bear arms. In seven states, which include California, Iowa, Maryland, Minnesota, New Jersey, New York, and Wisconsin, the state constitutions are silent on the subject.[98] A minority of state constitutions repeat, with some variations, the "well-regulated militia" clause of the federal Constitution.[99] In several state constitutions, the "right to bear arms" clauses specifically mention that the right to firearms exists for the protection of an individual and the state,[100] although, in some states, firearms

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96. *See, e.g.*, Colum Lynch, *Elite in NYC Are Packing Heat*, THE BOSTON GLOBE, Jan. 8, 1993, at 21.

97. For example, the New Mexico Constitution provides that "[n]o law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." N.M. CONST. art. II, § 6. This provision has been held to embrace broader protection of the right to bear arms than the federal counterpart. *See, e.g.*, State v. Dees, 669 P.2d 261 (N.M. Ct. App. 1983) (describing the constitutional amendment of 1971 which explicitly added hunting and recreational uses to the scope of protection under the arms clause of the New Mexico Constitution). *See also infra* notes 99-104.

98. New York Civil Rights Law provides that "[a] well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed." *See* N.Y. [CIV. RIGHTS] LAW § 4 (McKinney 1992). In construing this provision, New York state courts have used the language interpreting the Second Amendment to the United States Constitution. *See, e.g.*, Citizens for a Safer Community v. Rochester, 627 N.Y.S.2d 193, 198 (Sup. Ct. 1994) (language of section 4 of the Civil Rights Law to be interpreted identically with the Second Amendment).

99. *See* ALASKA CONST. art. I, § 19; HAW. CONST. art. I, § 17; N.C. CONST. art I, § 30; S.C. CONST. art. I, § 20; VA. CONST. art. 1, § 13.

100. *See* ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; CONN. CONST. art. I, § 15; FLA. CONST. art. I, § 8; IND. CONST. art. I, § 32; KY. CONST. art. I, § 1; MICH. CONST. art. I, § 6; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI,

owned for certain other purposes also are subject to constitutional protection.[101]

In addition, several state constitutions specifically proclaim that the right to bear arms belongs to an individual, rather than any collective body, such as the state or the people as a whole.[102] Such provisions lend substantial support to the individual theory of the constitutional right to bear arms because those constitutional provisions were adopted after the federal Bill of Rights and, thus, reflect the common understanding of the meaning of the federal Constitution.[103]

An interesting feature of several state constitutions is an express authorization of state legislatures to regulate the carrying of concealed weapons.[104] Tennessee and Texas constitutions further provide that regulation of "wearing of arms" to prevent crime is permissible.[105] Those provisions apparently reflect the fear that concealed weapons may contribute to gun violence,[106] although even this reason was insufficient to constitutionally ban the use of concealed firearms completely.[107] An outburst of state legislation liberalizing the possession of concealed guns is analyzed in detail in Part IV.B, *infra*.

Lastly, several states recently amended their constitutions to enhance protection of the right to bear arms to private citizens. West Virginia added a firearms clause to its constitution in 1986, thus making it more difficult to

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§ 24; TEX. CONST. art. I, § 23; VT. CONST. ch. I, art. 16; WASH. CONST. art. I, § 24; WYO. CONST. art. I, § 24.

101. *See* COLO. CONST. art. II, § 13 (defense of home, person and property, or in aid of the civil power); N.D. CONST. art. I, § 1 (defense of person, family, property and the state, and lawful hunting, recreational and other lawful purposes); OKLA. CONST. art. II, § 26 (defense of home, person or property, or in aid of the civil power); UTAH CONST. art. I, § 6 (defense of the self, family, others, property or state). Massachusetts limits constitutional protection to "common defense." MASS. GEN. LAWS. Ch. 1, § 17 (West 1997). The Delaware, Nebraska, Nevada and New Mexico Constitutions add hunting, recreational use, and all other lawful purposes to the list of protected firearm uses. *See* DEL. CONST. art. I, § 20; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11; N.M. CONST. art. II, § 6.

102. *See* ALASKA CONST. art. I, § 19; ARIZ. CONST. art. II, § 26; CONN. CONST. art. I, § 15; ILL. CONST. art. I, § 22; UTAH CONST. art. I, § 6.

103. *See* Halbrook, *supra* note 7, at 124.

104. *See* COLO. CONST. art. II, § 13; IDAHO CONST. art. I, § 11; LA. CONST. art. I, § 11; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30.

105. *See* TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23.

106. Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983).

107. *See, e.g.*, Schubert v. DeBard, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980) (holding that a concealed weapon permit cannot be denied to a qualified individual upon application under the Indiana Constitution because self-protection is a "proper reason" for issuing a license).

restrict possession and use of firearms by the legislature.[108] In Maine, the firearms clause of the state constitution was amended in 1987 after a public vote whereby the words "for the common defense" were stricken from the text with the intent to establish "for every citizen the individual right to bear arms, as opposed to the collective right to bear arms for the collective defense."[109] Maine's highest court has confirmed that the 1987 amendment established an individual constitutional right to possess and carry weapons, subject to reasonable regulation by the state legislature.[110]

B. Concealed Weapons Legislation

Historically, carrying a concealed firearm, unlike bearing a weapon openly, was a criminal offense in many states, due to the public fear of violence involving deadly weapons.[111] The restrictions on concealed weapons were justified much more readily than the limitations on carrying firearms openly.[112] Recently, however, a strong movement by the majority of the states to legalize the carrying of concealed weapons in public places has developed. Several commentators have suggested that such measures may be a reaction to the increased federal regulation of firearms, particularly the recent adoption of the Brady Handgun Control Act.[113] Other factors include the ambivalence with which federal courts view the controversy surrounding the Second Amendment in light of the absence of definitive pronouncements by the United States Supreme Court,[114] and a reaction to the perceived abuse in the issuance of gun

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108. *See* City of Princeton v. Buckner, 377 S.E.2d 139 (W. Va. 1988) (construing the right to bear arms as enacted in Article III, section 22 of the West Virginia constitution).

109. Until the 1987 amendment, Article I, section 16 of the Maine Constitution provided that "[e]very citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned." ME. CONST. art 1, § 16.

110. State v. Brown, 571 A.2d 816 (Me. 1990) (prohibition of possession of a firearm by a felon falls within the scope of permissible regulation of the individual right to bear arms under the amended Article I, section 16 of the Maine constitution).

111. *See, e.g.*, Nunn v. State, 1 Ga. 243 (1846) (the court, while upholding a restriction on carrying concealed weapons pursuant to a state statute, confirmed that the right to bear arms belongs to an individual).

112. *See, e.g.*, *In re* Brickey, 70 P. 609, 609 (Idaho 1902) (although a state statute prohibiting bearing arms openly violated both the state and federal Constitutions, regulation of concealed weapons was permissible).

113. 18 U.S.C. § 922(s) (1994).

114. *See, e.g.*, Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *rev'd*, 117 S. Ct. 2365 (1997) (provisions of Brady Handgun Violence Prevention Act requiring state law enforcement officers to receive reports from gun dealers regarding prospective handgun sales, and to conduct background checks of prospective purchasers, commandeer state officials to administer a federal program in violation of principles of state sovereignty). In *Mack*, which challenged the federal Brady Handgun Violence

licenses in states and municipalities where the issuing officials still have considerable discretion to reject firearms permit applications.[115]

Prior to 1987, only Georgia, Indiana, Maine, New Hampshire, North Dakota, South Dakota and Washington had statutes that required state officials to issue permits to carry concealed weapons to qualified individuals. In 1987, Florida decided to curtail discretion of state authorities in issuing firearms permits and enacted a so-called "shall carry" law which removed discretion from state officials responsible for the issuance of firearm permits. Many states followed the example.

As of 1996, only seven states in the United States, Illinois,[116] Kansas,[117] Missouri,[118] Nebraska,[119] New Mexico,[120] Ohio,[121] and Wisconsin[122] totally prohibited the carrying of concealed guns. A District of Columbia statute requires that even handguns kept by owners at their homes must be locked up in a separate storage space.[123] Such regulation, of course, nullifies the efficiency of firearms for self-defense for all practical purposes. In twelve states, the carrying of concealed firearms has been legalized, provided a permit or license is issued by the state on a showing of a specific need.[124] The administrative practices of issuing licenses in those states vary greatly, with some counties

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Prevention Act of 1993, 18 U.S.C. § 922(s), as an impermissible regulation of firearms, the Second Amendment was not even discussed because the Supreme Court viewed the Brady Act as premised on the Commerce Clause of the Constitution. *See also* Frank v. United States, 78 F.3d 815 (2d Cir. 1996) (challenge to the Brady Act, 18 U.S.C. § 922(s), which required background checks of potential handgun buyers, by county sheriffs). Both cases were decided on Tenth Amendment grounds.

115. *See, e.g.*, Cramer, *supra* note 2, at 686. *See also* Brevard County v. Bagwell, 388 So. 2d 645, 647 (Fla. Dist. Ct. App. 1980) (county firearm licensing ordinance unconstitutional to the extent county commissioners may consider any factors they desire in processing firearm permit applications).

116. 720 ILL. COMP. STAT. ANN. 5/24-1, 2 (West Supp. 1997).

117. KAN. STAT. ANN. § 21-4201 (1995).

118. MO. REV. STAT. § 571.030 (Supp. 1997).

119. NEB. REV. STAT. § 28-1202 (1995).

120. N.M. STAT. ANN. § 30-7-2 (Michie 1994).

121. OHIO REV. CODE ANN. § 2923.12 (Anderson 1996).

122. WIS. STAT. ANN. § 941.23 (West 1996).

123. D.C. CODE ANN. § 22-3204 (1996). Firearms registered in the district prior to 1976 have been grandfathered.

124. CAL. [PENAL] CODE § 12050 (Supp. 1998); COLO. REV. STAT. § 18-12-105.1 (1997); DEL. CODE ANN. tit. 11, § 1441 (Supp. 1996); HAW. REV. STAT. § 134-9 (Supp. 1996); IOWA CODE ANN. § 724.4 (1997); MD. CODE ANN. § 36E (1996); MASS. GEN. LAWS ch. 269, § 10 (1997); MICH. COMP. LAWS § 28.426 (1997); MINN. STAT. ANN. § 609.66 (1996); N.J. STAT. ANN. §§ 2A:151-41- 2A:151-48 (repealed) 2C:58-2 (1995); N.Y. [PENAL] LAW § 400.00 (McKinney Supp. 1997); R.I. GEN. LAWS § 11-47-11 (Supp. 1997). In Delaware, "shall issue" concealed weapons legislation (Delaware Personal Protection Act of 1996, Del. H.B. 511) was defeated in 1996.

within a particular state being more restrictive in regulating firearms and others being more liberal.[125] The statutes may prescribe specific requirements that would qualify the applicant for such a permit, for example, handling large amounts of cash in a commercial establishment. The burden to establish the requisite need is usually on the applicant and varies depending on the jurisdiction. For example, in New York the burden of showing the need is generally so high that it is very difficult to obtain a concealed gun permit.[126]

The remaining thirty-one states liberally grant a license to carry a concealed weapon, except to such applicants as minors, felons, substance abusers or the mentally disabled, on a showing of a lawful purpose such as self-defense.[127] Within this group, Vermont does not require a license or a permit to carry a concealed firearm at all because the right to bear arms under the Vermont constitution has been broadly interpreted by the state courts.[128] By statute,

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125. *See* Cramer, *supra* note 2, at 710 (describing certain counties in large states such as California and New York which almost completely refuse to issue firearm licenses). *See also* Lott, *supra* note 2, at 8 (stating that respondents to a nation-wide gun use survey uniformly indicated that most populous counties had by far most restrictive practices in the issuance of firearm permits); Sam Howe Verhovek, *States Seek to Let Citizens Carry Concealed Weapons*, N.Y. TIMES, Mar. 6, 1995, at A1, B8 (describing refusal of a judge in Clarke county, Virginia, to issue a gun permit to Oliver North under the pretext that North was not of "good character").

126. *See* Cramer, *supra* note 2, at 684.

127. ALA. CODE § 13A-11-73 (Supp. 1996); ALASKA STAT. § 18.65.700 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-3112 (West Supp. 1997); ARK. CODE ANN. § 12-15-202 (Michie Supp. 1997); CONN. GEN. STAT. ANN. § 53-206 (West 1994); FLA. STAT. ANN. § 790.06 (West Supp. 1998); GA. CODE ANN. § 43-38-10 (1994); IDAHO CODE ANN. § 18-3302 (1997); IND. CODE ANN § 35-47-2-3 (Michie Supp. 1997); KY. REV. STAT. ANN § 237.110 (Michie Supp. 1996) (new statute authorizing liberal grant of permits to carry concealed weapons became effective Oct. 1, 1996); LA. REV. STAT. ANN. § 14:95 (Supp. 1997); ME. REV. STAT. ANN. tit. 25, § 2003 (Supp. 1997); MISS. CODE ANN. § 45-9-101 (Supp. 1997); MONT. CODE ANN. § 45-8-321 (1997); NEV. REV. STAT. § 202.350 (1997); N.H. REV. STAT. ANN. § 159:6 (Supp. 1997); N.C. GEN. STAT. § 14-269 (1996); N.D. CENT. CODE § 62.1-04-03 (1995); OKLA. STAT. ANN. tit. 21, § 1290.3 (West Supp. 1998); OR. REV. STAT. § 166.291 (1995); 18 PA. CONS. STAT. ANN. § 6109 (West Supp. 1997); S.C. CODE ANN. § 23-31-215 (Law. Co-op Supp. 1996); S.D. CODIFIED LAWS § 23-7-8 (Michie 1998); TENN. CODE ANN. § 39-17-1351 (Supp. 1996); TEX. [PENAL] CODE ANN. § 46.02 (West Supp. 1995); UTAH CODE ANN. § 53-5-704 (Supp. 1996); VT. STAT. ANN. tit. 13, § 4003 (1974); VA. CODE ANN. § 18.2-308 (Michie 1996); WASH. REV. CODE ANN. § 9.41.070 (West 1998); W. VA. CODE § 61-7-4 (1997); WYO. STAT. ANN. § 6-8-104 (1997).

128. Chapter I, Article 16 of the Vermont Constitution provides, *inter alia*, that "the people have a right to bear arms for the defense of themselves and the state. . . ." This clause has been interpreted as consistent with carrying concealed firearms in a case in which the Vermont Supreme Court expansively read the right to arms provision of the Vermont Constitution. *See* State v. Rosenthal, 55 A. 610 (Vt. 1903).

Vermont prohibits concealed carrying of a weapon only if the carrying person has "the intent or avowed purpose of injuring a fellow man. . . ."[129]

Even under the new concealed weapons legislation, some statutes apparently allow state officials issuing gun permits a certain degree of discretion, which may lead to arbitrary denials of gun permits. To illustrate, while state authorities in New Hampshire liberally grant licenses to carry firearms, a recent court decision has held that state law does not require the state issuing authorities to continue such liberal practices.[130] Similarly, in Pennsylvania, where a new law generally made the issuance of concealed firearms mandatory to qualified applicants, the police commissioner of Philadelphia retains discretion to deny a permit application to a city resident unless "the applicant is a suitable individual to be licensed."[131] The statute does not provide criteria for determining whether a particular applicant is "suitable."

Two states, Texas and Georgia, recently enacted concealed weapons legislation.[132] News reports indicate that shortly after the enactment, large numbers of residents availed themselves of the liberalized permit application procedures under those statutes.[133] Even though empirical studies estimate that the legalization of concealed firearms may prompt as much as four percent of the population in the state affected to apply for a concealed gun permit,[134] that number is insubstantial compared to the overall adult population in the United States. In any event, the deterrent effect of the concealed firearm laws appears to be considerable due to many criminals' fear that their potential victim might be armed. Overall, the surge in gun ownership due to the enactment of the "shall carry" laws appears to vary from state to state.[135] Studies conducted so far fail to show that measures such as the Georgia legislation, which was enacted to clarify and give full effect to the existing state law regulating the carrying of

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129. VT. STAT. ANN. tit. 13, § 4003 (1991).

130. *See* Conway v. King, 718 F. Supp. 1059, 1061 (D.N.H. 1989) (holding that conferring broad discretion on state officials with respect to firearm licensing does not make state statute unconstitutionally vague).

131. 18 PA. CONS. STAT. ANN. § 6109 (West Supp. 1997). Gun permits issued elsewhere in the state, however, are valid in Philadelphia. 18 PA. CONS. STAT. ANN. § 6109(a) (West Supp. 1997). Thus, the utility of those discretionary powers reserved to the Philadelphia police commissioner appears to be limited.

132. GA. CODE ANN. § 43-38-10 (1994); TEX. [PENAL] CODE ANN. § 46.02 (West Supp. 1998).

133. *See Texas Concealed Weapon Law Finishes First Year*, West's Legal News, Jan. 6, 1997, *available at* 1997 WL 2061. The number of applicants for a concealed gun permit in Texas appears to have rapidly risen after the passage of the concealed firearms statute (to over 1% of adult population), and may be expected to remain at that level. *Id.*

134. *See* Cramer, *supra* note 2, at 679-80.

135. For example, the number of concealed permits in Oregon increased in 1994 by 50%, whereas in Pennsylvania by a mere 16%. *See* Lott, *supra* note 2, at 34. Oregon adopted its concealed firearm permit law in 1990, and Pennsylvania in 1989. *Id.* at 12.

concealed firearms that dates back to the 1830s,[136] may result in wide-spread gun violence which will negate the benefits of increased individual protection to gun permit holders.

Possession or carrying of firearms also may be regulated separately by local or municipal ordinances, particularly in large cities, or by counties.[137] Several states, however, explicitly prohibit counties and municipalities within their boundaries from acting upon matters of firearm regulation.[138] Such regulation may be more restrictive than the applicable state rules.[139] Overall, the additional layer of regulation only adds to the hodgepodge of rules, making compliance with the law more difficult. One of the most restrictive municipal ordinances in the nation is in effect in New York City, where "[t]he possession of a handgun license is a privilege rather than a right."[140] In New York City, the issuance of a license to carry a firearm is in the discretion of the City Police Commissioner. An issued license may be revoked at any time,[141] and the Commissioner's discretion is "uncircumscribed."[142] Although many retail business owners carrying substantial amounts of cash are routinely denied gun permits on the grounds that they fail to show "true need" for a firearm, at the same time there are numerous reports that gun licenses in New York are easily available to the city's high and mighty.[143]

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136. Rachelle R. Green, *Offenses Against Public Order and Safety: Provide for Specific Means of Carrying Concealed Weapons*, 13 GA. ST. U.L. REV. 123, 124 (1996) (the amended law allows carrying firearms in shoulder or belt holster or otherwise concealed on the person's body, and the transporting of loaded weapons in a car by any unlicensed person).

137. *See, e.g.*, COLO. REV. STAT. ANN. § 30-10-523 (West 1997) (authorizing county sheriffs to issue concealed gun permits).

138. *See, e.g.*, KY. REV. STAT. ANN. § 65.870 (Michie 1994). *Compare with* WASH. REV. CODE ANN. § 35.22.280(35) (West Supp. 1997) (municipalities are authorized to enact needed police regulations to punish practices dangerous to public safety, and preserve the public peace).

139. *See, e.g.*, Cramer, *supra* note 2, at 683 (describing, as an example, licensing practices in the state of California and the City of Los Angeles). In the latter jurisdiction, firearm licenses have been issued only in very rare circumstances to well-connected persons. Cramer, *supra* note 2, at 683.

140. Sewell v. City of New York, 583 N.Y.S.2d 255, 258 (N.Y. App. Div. 1992) (citing Caruso v. Ward, 554 N.Y.S.2d 190 (N.Y. App. Div. 1989)).

141. N.Y. [PENAL] LAW § 400.00.11 (McKinney 1989 & Supp. 1997); NEW YORK, N.Y., ADM. CODE § 10-131(a)(1) (1996).

142. *See, e.g.*, *In re* Shapiro, 595 N.Y.S.2d 864, 867 (N.Y. Sup. Ct. 1993), *aff'd*, 607 N.Y.S.2d 320 (N.Y. App. Div. 1994) (unfettered discretion of the Police Commissioner in issuing and revoking gun licenses).

143. *See, e.g.*, Cramer, *supra* note 2, at 684 (listing the names of wealthy and influential individuals who have New York City firearms permits).

C. State Court Decisions

Throughout the years of inactivity of the United States Supreme Court in the area of the Second Amendment, state courts largely have assumed leadership in interpreting the meaning of the right to bear arms and the extent to which such right restricts the power of the federal and state governments to regulate the possession and use of firearms. Many state courts have viewed the right to bear arms enshrined in state constitutions as an individual right, and one court even described it as a "sacred right based upon the experience of the ages."[144]

Generally, state courts have looked to several factors in deciding whether a particular firearms control statute or regulation violates the constitutional right to bear arms.

First, courts invariably engage in analyzing technical characteristics of the firearms sought to be regulated, such as the ability to fire rounds in rapid succession[145] and the propensity to scatter bullets in a wide area.[146] Some courts, however, simply assume that a particular type of weapons is "dangerous," without undertaking an analysis of the technical features of the firearm. For example, the Connecticut supreme court recently stated, without discussion, that "assault weapons pose an increasing risk to the society."[147]

Second, state courts frequently consider the typical uses of the weapons subject to state regulation. Under the prevailing analysis, only weapons that typically are used for self-defense, protection of the state, or other purposes enumerated in the constitutional provisions or sanctioned by the common law, are entitled to protection. For example, in *People v. Brown*, the Michigan Supreme Court observed that constitutional protection is not available for weapons used by "'urban gangsters and rowdies.'"[148] This analysis involves the

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144. State v. Kerner, 107 S.E. 222, 223 (N.C. 1921). *See also* Aymette v. State, 21 Tenn. 152 (1840) ("[F]ree white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution . . . .").

145. *See, e.g.*, Robertson v. City of Denver, 874 P.2d 325, 332 (Colo. 1994) (finding that assault weapons which the city attempted to proscribe were capable of a rapid rate of fire as well as of capacity to fire an inordinately large number of rounds without reloading).

146. *See, e.g.*, State v. Fennell, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989) (upholding the proscription on "weapons of mass death and destruction" defined to include shotguns of certain length).

147. *See, e.g.*, Benjamin v. Bailey, 662 A.2d 1226, 1230, 1235 (Conn. 1995) (evaluating certain "assault weapons," defined, *inter alia*, as "any selective-fire firearm capable of fully automatic, semiautomatic or burst fire at the option of the user" as being dangerous). Apparently, the drafters of the statute felt the ambiguity of that definition, because they also included in the statute a list of specific weapons covered by the legislation. *See* CONN. GEN. STAT. ANN. § 53-202(a) (West 1994).

148. 235 N.W. 245, 247 (Mich. 1931).

application of the civilized warfare test annunciated by the United States Supreme Court in *United States v. Miller*,[149] and subsequently utilized by many state courts.[150]

For example, the "typical use" test was thoughtfully applied by the Washington Supreme Court in *Seattle v. Montana*,[151] where the court considered the constitutionality of a municipal ordinance prohibiting possession of a "dangerous knife," defined in the ordinance as any "fixed-blade" knife or any other knife with a blade more than 3.5 inches in length.[152] The court, noting that the ordinance did not ban, but rather regulated, the possession and carrying of certain knives, considered the knives in question to be outside the state constitution because "any hard object can be used as a weapon, but it would be absurd to give every knife . . . constitutional protection as 'arms'."[153] The court observed that the state constitution valued the right to bear arms "not because arms are valued per se, but only to ensure self-defense or defense of others."[154] Thus, under the court's rationale, a regulation concerning the exercise of the right to bear arms, at a minimum, should not restrict the possession of arms in such a way as to render it meaningless for self-defense of a person. The court viewed "reasonable regulation" as permissible, and such regulation is certainly consonant with the early United States Supreme Court decisions concerning the Second Amendment.[155]

Third, courts typically assess the breadth of the scope of the statute or regulation in issue by comparing the number of firearms subject to regulation or proscription with the number of weapons that are outside the legislation or regulation under review. If the number of weapons in the latter category is far larger than those sought to be restricted, the right to bear arms may not

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149. 307 U.S. 174 (1939). *See supra* Part III.E for a discussion of the "civilized warfare test." Briefly, the United States Supreme Court in *Miller* held that only certain weapons which could be used in militia activities were protected under the Second Amendment. *Id.* at 178.

150. *See, e.g.*, Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972) (legislature may prohibit possession of weapons that are ordinarily used for criminal and improper purposes and which are not among those constituting legitimate weapons of defense and protection); State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139, 148 (W. Va. 1988) (same).

151. 919 P.2d 1218 (Wash. 1996). The court observed, in construing the word "arms" that "[u]nder even the broadest possible construction, the term 'arms' extends only to weapons designed as such, and not to every utensil, instrument, or thing which might be used to strike or injure another person." *Id.* at 1222. The problem with this definition is that it does not clearly define "arms" because many objects, such as a knife, for example, while being designed as a weapon are also in common use for other purposes (*e.g.*, cooking).

152. Seattle, Wa., Municipal Code § 12A.14.010A (1996).

153. *Montana*, 919 P.2d at 1222.

154. *Id.* at 1224.

155. *See, e.g.*, United States v. Miller, 307 U.S. 174 (1939).

necessarily be infringed. For example, regulation (short of a complete ban) of the carrying of concealed weapons was held to be constitutional under the Indiana Constitution because only a relatively small category of firearm use was subject to regulation.[156]

The extent of the "rationality" standard was at issue in *City of Princeton v. Buckner*,[157] a case involving the carrying of a concealed semiautomatic pistol by a drunk driver. The defendant claimed that his right to bear arms, under both the Second Amendment of the United States Constitution and the West Virginia state constitutional provision relating to the right to bear arms, was violated. The state supreme court recognized the right to individual self-defense under both the federal and state constitutions and ruled that the state statute in question impermissibly infringed upon the exercise of that right. The court further proceeded to examine the scope of "reasonable regulation" of the possession of firearms permitted under the state constitution.[158] The Justices agreed with decisions in other states that the right to bear arms is not absolute, noting that the West Virginia constitution was one of the few state constitutions expressly guaranteeing the right to individual self-defense.[159] The significance of *Buckner* lies in its holding that the state cannot rationally prohibit the carrying of all weapons that legitimately may be used for the protection of an individual, based on the acknowledgment by the court that the state constitution, along with its federal counterpart, guarantees an individual right to bear arms.[160]

An appropriate illustration of the degree of scrutiny to which state courts may subject state regulatory schemes aimed at gun ownership is a series of decisions rendered by Oregon state courts. The Oregon Supreme Court decided several cases related to the state constitutional provision guaranteeing the right to bear arms.[161] Relatively recently, in *State v. Delgado*,[162] the court examined

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156. Matthews v. State, 148 N.E.2d 334 (Ind. 1958). *See also* Robertson v. City of Denver, 874 P.2d 325, 333 (Colo. 1994) (statute banning certain assault weapons partially valid because "there are literally hundreds of alternative ways in which citizens may exercise the right to bear arms in self-defense").

157. City of Princeton v. Buckner, 377 S.E.2d 139 (W. Va. 1988).

158. *Id.* Several other courts have conditioned regulation of firearm possession on the "reasonableness" of state statutes. A Michigan court held that possession of a stun gun capable of generating a charge of 50,000 volts could "reasonably" be prohibited by the state because defending the state and individuals did not require such weapons. People v. Smelter, 437 N.W.2d 341 (Mich. Ct. App. 1989).

159. *Buckner*, 377 S.E.2d at 147.

160. *Id.* at 147-49. The *Buckner* Court in its analysis referred to the United States Supreme Court precedent set in *United States v. Miller*, 307 U.S. 174 (1939). The state court's holding that reasonable regulation of the right to arms is permissible is consonant with the U.S. Supreme Court's discussion in *Miller*.

161. Oregon right to bear arms clause provides that "[t]he people shall have the right to keep and bear arms for the defense of themselves and the state, but the military shall be kept in strict subordination to the civil power." OR. CONST. art. I, § 27.

162. State v. Delgado, 692 P.2d 610 (Or. 1984).

a state statute (modeled after the federal Anti-Switchblade Act)[163] which prohibited the possession and carrying of switchblade knives. The court noted that the Oregon constitution contained a broad provision that was intended to insure the right to bear arms not only to an organized militia, but also to private citizens.[164] Based on the constitutional provision, the court examined the state statute, which contained a blanket ban on both possession and carrying of switchblade knives. The Justices carefully considered arguments advanced by the state that the Oregon constitution protected only weapons used for defense. The court rejected such distinction between defensive and offensive weapons, noting that it was "unpersuaded by this distinction that the state urges of 'offensive' and 'defensive' weapons."[165] Instead, the Justices, delving into the history of the manufacture and uses of switchblade knives, concluded that such weapons were of a kind "commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon's constitution was adopted."[166] The court qualified its opinion by referring to an earlier decision, where it stated that individuals do not have an unfettered right to possess or use constitutionally protected arms in any way they please. Such use may be subject to reasonable regulation by the state legislature.[167] Significantly, municipalities in Oregon are not prevented from regulating the use of dangerous weapons on their own, subject to the same constitutional constraints as the state legislation.[168]

Fourth, the last element of the constitutionality analysis allows reasonable regulation by the government of the manner in which firearms are used. Several state court decisions have supported regulation of the use and possession of firearms (including a complete ban thereof) by particular classes of persons, such as convicted felons,[169] or the carrying of weapons into establishments that sell

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163. The Anti-Switchblade Act is codified in 15 U.S.C. §§ 1241-44 (1994).

164. In *State v. Kessler*, 614 P.2d 94 (Or. 1980), the Oregon Supreme Court examined the origins of the arms clause of the state constitution, concluding that the right to bear arms included the use of certain weapons for the defense of person and property. *Id.* at 98 ("[T]he term 'arms' . . . include[s] weapons commonly used for either purpose [personal or military defense], even if a particular weapon is unlikely to be used as a militia weapon . . . .").

165. *Delgado*, 692 P.2d at 612.

166. *Id.*

167. State v. Blocker, 630 P.2d 824, 826 (Or. 1981) (possession of a billy club is constitutionally protected both outside and inside the personal residence, but its use may be subject to regulation).

168. *See* Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315 (Or. Ct. App. 1993), *review denied*, 877 P.2d 1202 (Or. 1994) (holding that municipal ordinance regulating "assault weapons" is constitutional). *Compare with*, KY. REV. STAT. ANN. § 65.870 (Michie 1994) (prohibiting municipalities from enacting firearms regulations).

169. *See, e.g.*, People v. Blue, 544 P.2d 385 (Colo. 1975) (restrictions on firearms possession by convicted felons).

liquor.[170] However, such regulation by state governments is not without limits. One state court aptly has observed that "[t]he constitutional right to bear arms would be illusory, of course, if it could be abrogated on the basis of a mere rational reason for restricting regulation."[171] Thus, courts are likely to hold that firearms regulation is not reasonable and cannot be upheld where the government seeks effectively to ban completely the use or possession of firearms by law-abiding citizens.[172]

The increased scrutiny to which many state courts subject the regulation of the right to bear arms is illustrated in a series of decisions whereby various state statutes and regulations were invalidated. Throughout the years, state courts have stricken more than twenty state regulatory measures as unconstitutional.[173] To a certain extent, the multiplicity of state decisions affirming the right to bear firearms under the applicable state constitutions reflects the lack of authoritative pronouncements on this issue by the United States Supreme Court.

In short, state courts have developed a substantial body of law generally interpreting the right to bear arms under the relevant state constitutional and statutory provisions as belonging to individual citizens. Several courts also have held that such right is a fundamental right predating the applicable state constitutions and reflecting the natural right ideas of the early Republic with respect to bearing firearms. The United States Supreme Court should carefully examine those judicial precedents and follow them in developing Second Amendment jurisprudence.

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170. *See, e.g.*, State v. Dees, 669 P.2d 261 (N.M. Ct. App. 1983) (restrictions on carrying of firearms into businesses that sell liquor to patrons).

171. Benjamin v. Bailey, 662 A.2d 1226 (Conn. 1995) (regulation of assault weapons).

172. *See, e.g.*, *In re* Brickey, 70 P. 609 (Idaho 1902) (statute cannot prohibit carrying of deadly weapons in all forms); State v. McAdams, 714 P.2d 1236, 1237 (Wyo. 1986) (stating that regulation of firearms impermissible "in such a manner that it amounts to the destruction of the right to bear arms"). *Compare with* Quilici v. Village of Morton Grove, 695 F.2d 261, 270-71 (7th Cir. 1982) (local ordinance completely prohibiting firearms not in violation of the Second Amendment).

173. *See, e.g.*, Wilson v. State, 33 Ark. 557 (Ark. 1878); City of Lakewood v. Pillow, 501 P.2d 744 (Colo. 1972); People v. Nakamura, 62 P.2d 246 (Colo. 1936); Junction City v. Mevis, 601 P.2d 1145 (Kan. 1979); Bliss v. Commonwealth, 12 Ky. 90 (Ct. App. 1822); People v. Zerillo, 189 N.W. 927 (Mich. 1922); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. Ct. App. 1971); State v. Kerner, 107 S.E. 222 (N.C. 1921); *In re* Reilly, 31 Ohio Dec. 364 (Ohio Ct. App. 1919).

V. EMPIRICAL DATA REGARDING GUN USE

The issue of gun control is laden with emotions,[174] and very little empirical data have been offered so far to substantiate claims that proliferation of firearms results in increased crime and fatality rates across the country. Many researchers suggest, however, that statistical evidence points in the other direction. For example, several recent publications of nation-wide studies of gun-related homicides support the inference that liberal issuance of concealed firearm permits does not contribute to the increase in gun violence, but may, conversely, have facilitated the recent improvement in overall crime statistics in the United States.[175]

A. Effect of Mandatory Issuance Laws

Because of the great variation of gun licensing laws not only among states but within individual states, generalizations which are abundant in the news media about the crime statistics in different states fail to explain why state-wide crime dynamics do not correspond to the ebb and flow of state gun regulation. This is because, as described above, many counties within those states regulate the possession of firearms on their own, and such regulation may have a profound effect on the state's overall gun ownership.[176]

An extensive study of the effects of "shall issue" concealed firearm laws at the county level in various states between 1977 and 1992 concluded that certain categories of crimes, such as murders, rapes and aggravated assaults, dropped five to seven percent in counties where concealed weapon laws came into effect. If the category of homicides is considered separately from other serious crimes resulting in bodily injury, the reduction in crime, which apparently is attributable

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174. *See, e.g.*, Center to Prevent Handgun Violence, *Firearm Facts*, http://www.handguncontrol.org/protecting/D4/d4firefc.htm.(visited Feb. 2, 1997) (picturing the "horrific levels" of gun related violence in the United States by comparing homicide statistics in major developed countries. With 13,495 deaths in 1992 (last year for which an FBI crime statistics are available), the United States was by far the leader). *See also* Samuel Fields, *Guns, Crime And The Negligent Gun Owner*, 10 N. KY. L. REV. 140 (1983) (advocating gun control because of the allegedly high contribution of negligent gun owners to violent crime).

175. *See, e.g.*, Lott, *supra* note 2, at 1; Cramer, *supra* note 2, at 679; Kleck, *supra* note 2, at 150; David T. Hardy, *Legal Restriction of Firearm Ownership as an Answer to Violent Crime: What Was the Question?*, 6 HAMLINE L. REV. 391 (1983).

176. To illustrate, until recently Fairfax county in Virginia, with a population of over 800,000, had only 10 gun owners with concealed gun permits, although Virginia as a whole has been considered a state liberally issuing gun licenses. *See* Cramer, *supra* note 2, at 695; Lott, *supra* note 2, at 8.

to liberalized issuance of concealed gun permits, is much more dramatic—eight-hundred percent.[177]

Even more significantly, the Lott and Mustard study found that the number of accidental deaths ascribed to the wider availability of firearms in the "shall issue" states did not increase and remains insignificant compared with the overall number of accidental deaths in the United States.[178] According to the National Rifle Association, the number of fatal accidents involving firearms was at an all-time low in 1992, the most recent year for which statistical data are published.[179] These findings refute the concern that easy access to firearms could increase the number of accidental fatalities because the populace is usually perceived as inexperienced in handling firearms.[180] The Lott and Mustard study shows that an increase in accidental deaths due to the passage of concealed firearm laws is statistically insignificant and is vastly outnumbered by other causes of death, even taking into account the negative effects of anti-gun propaganda by gun-control groups, which contributes to popular ignorance and results in more frequent misuse of firearms than would be the case otherwise.[181]

Another important conclusion of several authors is that, in the states liberally issuing concealed firearm permits, property crimes increase substantially and concurrently with the decrease in serious crimes such as murder, rape and aggravated assault, which apparently reflects the reluctance of criminals to encounter armed individuals.[182] Taking into account costs to the national economy of the loss of life and productive workforce,[183] estimates of

177. Lott, *supra* note 2, at 19 (comparing county-level data showing that the enactment of a "shall issue" law affecting the firearms issuance policies by a particular county may result in a 5% to 7% decrease in violent crime).

178. Lott, *supra* note 2, at 19-20 (liberalized issuance of concealed firearms permits affects violent crime rates while not contributing to accidental deaths).

179. *See* National Rifle Association, *Firearms Safety in the U.S. 1995*, http://www.nra.org/research/riasfs.html (visited Feb. 19, 1997) (indicating that firearms accidents accounted for 1.6% of total accidental deaths in the United States in 1992).

180. *See, e.g.*, Daniel W. Webster, et al., *Reducing Firearm Injuries*, Issues Sci. & Tech. 73 (1991) (arguing that availability of firearms increases accidental deaths, and that government, by failing to institute tougher regulation of firearms, ignores the role that gun availability plays in suicides and unintentional shootings which together allegedly constitute almost 60% of all gun related deaths).

181. Lott, *supra* note 2, at 64 (less than one additional death per state).

182. Lott, *supra* note 2, at 24 (overall increase in property crimes of 2.7%). The increase in property crime rates apparently is attributable to the facts that criminals tend to switch to less "dangerous" crimes such as theft where chances of encountering resistance by the victim are much smaller than in a face-to-face confrontations (for example, in an attempted rape) where criminals may perceive the increased risk of the victim being armed and being likely to resist.

183. It could be argued that the people most likely to be affected by murder are young male adults who otherwise would be engaged in productive economic activity.

economic savings from the decrease in violent crime rates run in the billions of dollars annually.[184] Such savings more than fully offset the economic loss attributable to the increase in non-violent property crimes, which amounts to less than one billion dollars per year.

Empirical studies indicate that the liberalization of laws regulating concealed weapons produces a long-term impact on crime dynamics.[185] Because criminals have greater fear of armed resistance in counties where the probability that the victim carries a gun is higher, the deterrent effect of concealed firearm legislation increases over time as more people avail themselves of the opportunity to obtain a gun.[186] Further, studies that surveyed the dynamics of gun ownership in the United States show that the general increase in the number of firearms owned nation-wide by individuals does not result in corresponding surge in the proportion of homicides involving firearms as compared to the overall homicide numbers.[187]

B. Defensive Use of Firearms

Several recent studies describe an interesting, and, so far, largely unnoticed phenomenon related to a substantial use by private citizens in the United States of firearms for personal protection.[188] These studies indicate that legitimate[189] use of weapons for self-defense far outweighs the usage of guns for criminal purposes in this country.[190] Kleck and Gertz estimate the frequency of firearm use for self-defense and protection of the user's household at a surprisingly high number of 2.2 to 2.5 million instances per year.[191] This means, according to the data, that a little less than four percent of U.S. households reported a gun use for

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184. TED R. MILLER, ET AL., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996).

185. *See* Kleck, *supra* note 2, at 166 (use of guns by victims tends to reduce the likelihood of bodily harm due to the fear by criminals of potential armed resistance by the victims).

186. *See* Kleck, *supra* note 2, at 166.

187. Hardy, *supra* note 173, at 394 (although handgun ownership in the United States more than doubled to 52 million units between 1969 and 1980, the rate of domestic homicides involving firearms remained constant at approximately 1.6 homicides per 100,000 population).

188. *See, e.g.*, Kleck, *supra* note 2, at 150 (first nation-wide survey of gun use for self-defense).

189. Legitimate from a policy standpoint advanced by the author, although in some cases possibly violative of the applicable federal, state or local gun control laws and ordinances as discussed in this Article.

190. *Id.* at 164.

191. "Firearm usage" for purposes of that study included not only cases where the user actually shot at the aggressor, but also encounters where it was made known to the aggressor that the victim was armed. *Id.* at 162-63.

self-defense within a five-year period immediately prior to the survey.[192] According to the government statistics for 1992, there were about 850,000 violent crimes committed around the country which involved the use of a firearm.[193]

Upon some reflection, however, the frequency of defensive firearm use should not strike as particularly high, given the widespread private gun ownership in the United States, which is currently estimated at over 220 million units. In fact, Kleck and Gertz conclude in their study that the actual usage, after taking into account unwillingness of many gun owners to admit participating in socially controversial behavior, is likely to be even more widespread.[194] The only important conclusion prompted by these findings is that the potential presence of a firearm serves as a deterrent for criminals, and the wide availability of weapons for private use allows individual citizens to effectively protect themselves. In fact, in many instances, the victim does not have to actually fire the gun for protection because just the theat of doing so normally suffices.[195] Although the subjective nature of the assessment of a particular life-threatening situation by victims makes it almost impossible to quantify the benefits of gun possession as a deterrent, estimates show that, at least in 300,000 cases nationwide annually, there is a high probability of a fatal result if the victim were not armed.[196] This is a tangible benefit of liberalized issuance of gun permits which should not be overlooked.

VI. CONCLUSION

The right to bear arms under the federal Constitution is a fundamental right which antedates the federal Constitution. The importance of the right to bear arms should be underscored by the United States Supreme Court, and any doubts regarding its fundamental nature should be clarified by the Court. State court decisions with respect to state counterparts of the Second Amendment could serve as a useful model for that purpose. The High Court may soon find itself at the cross-roads, compelled to clarify the meaning of the right to bear arms under the Second Amendment.

Undoubtedly, the Second Amendment is a controversial provision in the Constitution, and many may not like its broad guarantee of the right to bear arms to citizens. However, the Constitution, whether one likes it or not, cannot be simply disregarded. Should a majority of the population desire more restrictions

192. *Id.*

193. *Id.* at 169.

194. *Id.*

195. Only 24% of respondents in the Kleck and Gertz nation-wide study reported actually firing the gun to protect themselves. Kleck, *supra* note 2, at 173.

196. Kleck, *supra* note 2, at 177.

on the possession of firearms than currently exist, a constitutional amendment should be undertaken.[197] The United States Supreme Court on several occasions has indicated that such course of action is available.[198] Indeed, an authoritative ruling by the High Court could put to rest the endless polemic regarding the proper scope of the Second Amendment guarantee of firearms possession.

197. *See, e.g.*, T. Markus Fink, *Is the True Meaning of the Second Amendment Really Such a Riddle? Tracing the Historical "Origins of an Anglo-American Right,"* 39 HOW. L.J. 411, 434 (1995) (arguing for a constitutional amendment). *See also* Kopel, *supra* note 2, at 1209 (same).

198. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854, 861 (1992) (overruling a prior Supreme Court decision is possible where appropriate). Historically, several Supreme Court decisions have been reversed through Constitutional amendments. *See, e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (reversed through the Thirteenth, Fourteenth and Fifteenth Amendments); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (initial decision), *reh'g granted*, 158 U.S. 601 (1895) (reversed by the Sixteenth Amendment).