THE REASONABLE RIGHT TO BEAR ARMS

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I. INTRODUCTION

The debate over the meaning of the Second Amendment has focused primarily on a first-order question: does the amendment protect an individual right to bear arms or a collective right of states to maintain militias free from federal interference? At least since the 1939 Supreme Court decision in *United States v. Miller*,[1] the federal courts have tended to read the Second Amendment in accordance with the collective rights approach.[2] In recent years, however, the individual rights view—which claims that the amendment guarantees individuals the "right to possess firearms for personal self-defense and the defense of others"[3]—has gained considerable support among academics and courts alike. While far from fully displacing the collective rights view, the individual rights approach to the Second Amendment is an ascendant challenge to the prevailing collective rights model.[4]

There is, however, a second-order Second Amendment question that may

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1 307 U.S. 174 (1939).

2. *See* United States v. Cole, 276 F. Supp. 2d 146, 149 (D.D.C. 2003) ("The Miller decision was the last time the Supreme Court considered the meaning of the Second Amendment, and for over six decades since, the lower federal courts have uniformly interpreted the decision as holding that the Amendment affords a collective, rather than individual, right associated with the maintenance of a regulated militia.") (internal quotations omitted).

3. Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 FORDHAM L. REV. 573, 587 (2004).

4. *See* Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 237 (2004) ("That the individual right view prevailed definitively is evidenced by the fact that no Second Amendment scholar, no matter how inimical to gun rights, makes the 'collective right' claim any more."); Glenn Harlan Reynolds, *Gun By Gun: After Almost 100 Years of Pretending the Right to Bear Arms Didn't Mean Much, Judges and Scholars Are Changing Their Minds*, LEGAL AFF., May-June 2002, at 19.

be equally important to the future of gun control: assuming that federal courts recognize the individual right to bear arms, what standard of review would apply? Some traction on this question may be gained by looking to the states, where the individual right to bear arms is already widely recognized. Forty-two states have constitutional provisions guaranteeing an individual right to bear arms,[5] and there have been hundreds of cases at the state level challenging all types of gun control. The state constitutional doctrine on the right to bear arms is well developed and remarkably consistent across jurisdictions, providing a valuable window into what a future Second Amendment doctrine might look like.

How does state constitutional doctrine treat the right to bear arms? The most prominent feature of the state law in this area is the uniform application of a deferential "reasonable regulation" standard to laws infringing on the arms right. This standard is extremely deferential to state legislative efforts to control weapons and, under this standard, the vast majority of gun control regulations are upheld. The reasonable regulation standard does have its limits; laws (or their application to specific individuals) found to be arbitrary or to amount to a complete denial of the right to bear arms have been invalidated. Such rulings are rare, however, and state courts use their oversight authority over the arms right sparingly. Judicial review in this area is limited to guarding against extreme, unfair, or nonsensical governmental action relating to guns and does not create any significant hurdles to gun control.

If the federal courts adopt a reasonable regulation standard of judicial review—which state consensus on this point makes likely, though certainly not inevitable—then the triumph of the individual rights view of the Second Amendment will have only a marginal impact on the constitutionality of firearms regulation.

II. THE RULE OF REASON

If we want to imagine what Second Amendment doctrine might look like under an individual rights reading, state constitutional law and the legal doctrine that has developed around this right serve as a useful guide.[6] Nearly

5. David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 823, 846 (2002). For a comprehensive listing of the state constitutional provisions, see Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, *in* THE POLITICAL JUNKIE HANDBOOK (THE DEFINITIVE REFERENCE BOOK ON POLITICS), (Michael Crane ed., 2004), *available at* http://www.law.ucla.edu/volokh/beararms/statecon.htm.

6. David Kopel, one of the leading experts on the Second Amendment, has written several excellent articles examining the state constitutional provisions guaranteeing a right to bear arms. *See* Kopel, *supra* note 5, at 823-27; 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). Kopel uses the state experience to support an individual rights interpretation of the Second Amendment, but does not discuss in depth how the reasonableness standard used at the state level might

every state in the union has a constitutional provision guaranteeing the right to bear arms (forty-four states), and most of those states (forty-two) apply their arms provisions to protect an individual right. Moreover, at the state level, there has been ample litigation creating a well-developed doctrinal infrastructure, with a settled standard of review that is applied nationwide. Although the Second Amendment has been likened to a "constitutional ghost town,"[7] the right to bear arms in state constitutionalism is more like a bustling metropolis.

Within the state constitutional doctrine on the arms right, we find that the state courts universally reject strict scrutiny or any heightened level of review in favor of a standard that requires weapons laws to be only "reasonable regulations" on the arm right. This standard is lax, and the courts uphold the vast majority of firearms legislation. Only a fraction of state gun laws have been invalidated on the basis of the right to bear arms since World War II (the "modern era")—and these cases tend to involve extreme circumstances that render regulation profoundly unfair. Courts have repeatedly upheld the heart of gun control and the broad regulatory power of legislatures.

A. The Standard of Review

In a recent article, constitutional law scholar Erwin Chemerinsky noted that the "assumption in the debate" over the Second Amendment "seems to be that an individual rights approach would mean strict scrutiny . . . when courts appraise the constitutionality of gun control measures."[8] Strict scrutiny, with its presumption of unconstitutionality, is a standard of review traditionally used in areas where courts deem any burdensome legislation to be "immediately suspect."[9]

Yet, with its legislative motivation of public safety, gun control is not inherently suspicious. First, the text of the Second Amendment itself may foresee some measure of burdensome legislation in its recognition of a "well-regulated Militia."[10] To the extent the "militia" is the body of the people who might serve to protect the states,[11] then that body is subject to discipline and training by the legislature; indeed, such regulation is not suspect but, in the

work in the context of the Second Amendment.

7. CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 124 (Harvard University Press 2001).

8. Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 484 (2004).

9. Korematsu v. United States, 323 U.S. 214, 216 (1944).

10. U.S. CONST. amend. II.

11. *See, e.g.*, United States v. Emerson, 270 F.3d 203, 235 (5th Cir. 2001) ("And, 'Militia,' just like 'well-regulated Militia,' likewise was understood to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large."); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1155 (1996).

words of the amendment, "necessary."[12] Second, there has been a long history of weapons regulation and the Framers themselves favored legislation burdening the right to bear arms in order to preserve public safety, suggesting that such laws are not inherently invidious. According to historians Saul Cornell and Nathan DeNino, "a variety of gun regulations were on the books when individual states adopted their arms-bearing provisions and when the Second Amendment was adopted,"[13] and the "robust regulation"[14] of the time included registration requirements, bans on carrying concealed weapons, and loyalty oaths. Third, even individual right-to-bear-arms proponents recognize that some regulation of firearms is necessary[15]—a pragmatic nod to the obvious public dangers of guns.

These reasons alone might support a rejection of strict scrutiny for the arms right. Oliver Wendell Holmes, Jr. famously taught us, however, that "[t]he life of the law has not been logic; it has been experience."[16] The real-world experience of the individual right to bear arms at the state level gives us a relatively reliable indication of the appropriate level of judicial scrutiny. The state courts have already confronted this precise question in the context of their own right-to-bear-arms provisions, and they all answered it in a uniform way: deferential scrutiny. No state's judiciary applies a heightened level of scrutiny, much less strict scrutiny, to arms regulation.

The state courts' practice of applying a deferential "reasonable regulation" standard of review extends back at least to the late nineteenth century. In *State v. Shelby*,[17] decided in 1886, the Missouri Supreme Court upheld a law barring the possession of firearms by individuals under the influence of alcohol against a challenge under the state constitution. While recognizing that the state constitution "secures to the citizen the right to bear arms in the defense of his home, person, and property," the court explained that the "statute is designed to promote personal security, and to check and put down lawlessness, and is thus

12. U.S. CONST. amend. II.

13. Saul Cornell & Nathan DeNino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 502 (2004).

14. *Id*. at 505.

15. *See, e.g.*, Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 257 (1983) ("Recognizing that the amendment guarantees an individual right applicable against both federal and state governments by no means forecloses all gun control options. Gun control advocates must, however, come to grips with the limitations imposed by the amendment . . . ."); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 3 (1996) ("[I]t is inconceivable that the courts would prohibit the government from restricting civilian access to standard military weapons."); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1253 (1994) ("The freedoms of speech and of the press, it has been correctly said, are not absolute. Neither is one's right to keep and bear arms absolute.").

16. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Dover Books 1991) (1881).

17. State v. Shelby, 2 S.W. 468 (Mo. 1886).

in perfect harmony with the constitution."[18] "[W]e are of the opinion the act is but a *reasonable regulation* of the use of . . . arms, and to which the citizen must yield," the court concluded.[19] In the years since *Shelby*, every state's judiciary in which the question has been adjudicated holds that the same standard of review applies—a surprising level of consistency for the diverse array of states (both progressive and conservative) whose constitutions protect the arms right.

Why do state courts apply this reasonable regulation standard? One answer is offered by *Walter v. State*,[20] a 1905 decision of the Ohio Court of Common Pleas. At issue in *Walter* was a state law prohibiting hunting on Sundays, which was challenged as violating Ohio's constitution.[21] Upholding the hunting ban, the court noted that "the right to keep and bear arms is to be enjoyed subject to reasonable regulations and limitations as may be imposed by state law. The right to keep and bear arms does not prevent the legislature from passing laws regulating the manner in which arms shall be used."[22] In explaining this holding, the *Walter* court looked to the history of lawful restrictions on the right. First, the court argued that at common law, "'[t]he offense of going armed with unusual or dangerous weapons, to the terror of the people, has always been indictable.'"[23] "Moreover," the court continued, "the state legislatures of the states have provided many limitations"[24] on this right, including bans on carrying concealed weapons and on carrying arms "concealed or unconcealed, into a court of justice, or into a church, or into a voting place, or within a mile thereof."[25] To the *Walter* court, the constitutional permissibility of any reasonable regulations on the right to bear arms was a function of the long history of gun control.

According to numerous other state courts, the legislative power to regulate arms is an inherent part of the "police power"—or, as the Colorado Supreme Court characterized it, the "state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people."[26] In some state constitutions, the police power to restrict the right to bear arms is explicit in the text.[27] Yet even without such explicit language, courts have held that states have regulatory authority to impose legislative burdens on the right to bear arms.[28]

18. *Id*. at 469.
19. *Id.* (emphasis added).
20. 15 Ohio Dec. 464 (Ohio Com. Pl. 1905).
21. *Id*. at 465.
22. *Id*. at 466.
23. *Id.* (quoting 5 AM. & ENG. ENC. LAW 729 (2d ed.)).
24. *Id*.
25. *Id*.
26. People v. Blue, 544 P.2d 385, 390-91 (Colo. 1975).
27. *See, e.g.*, ILL. CONST. art. I, § 22.
28. *See* Michael D. Ridberg, *The Impact of State Constitutional Right to Bear Arms*

By requiring that regulations be merely "reasonable," the state courts give wide latitude to the legislatures to enact policies to preserve and enhance public safety. As the Illinois Supreme Court described it, the right to bear arms is subject to "substantial infringement in the exercise of the police power."[29] The reasonable regulation standard, like rationality review used elsewhere in constitutional jurisprudence, is shorthand for a considerable degree of judicial deference rather than a set of substantive principles one could identify ex ante. In other words, state courts uphold legislation as reasonable without much discussion of what precisely separates out reasonable from unreasonable regulations. To the extent reasonableness has substantive limits, courts will invalidate a gun law only if it is arbitrary or so restrictive that it "eviscerates,"[30] renders "nugatory,"[31] or results in the effective "destruction"[32] of the right to bear arms.

B. The Practice of Reason and the Breadth of Deference

How does this universally adopted reasonable regulation standard operate in practice, especially with regards to gun control? As one might imagine from the language of the reasonable regulation standard, the courts approach gun control with a great deal of deference and, as a result, almost all gun laws are found to be constitutional. While there has been no comprehensive empirical study of state right-to-bear-arms cases, the consensus in the academic literature is that approximately twenty laws have been invalidated for violating this state constitutional right.[33] But that number is somewhat deceptive; many of those cases were decided in the 1800s and predate the rise of modern constitutional law and principles. Of the hundreds of published state court decisions involving the right to bear arms since World War II, my research uncovered only six published opinions invalidating firearms laws (or their application) on the basis of the right to bear arms.[34] As the courts are fond of pointing out, and in what

Provisions on State Gun Control Legislation, 38 U. CHI. L. REV. 185, 187 (1970) ("[E]ven in the absence of such specific authorization, the judiciary has long recognized that the exigencies of society require limits on the scope of the arms right.").

29. Kalodimos v. Vill. Morton Grove, 470 N.E.2d 266, 278 (Ill. 1984).

30. State v. Hamdan, 665 N.W.2d 785 (Wis. 2003).

31. Trinen v. City of Denver, 53 P.3d 754, 757 (Colo. Ct. App. 2002).

32. State v. Comeau, 448 N.W.2d 595, 598 (Neb. 1989); State v. Dawson, 159 S.E.2d 1, 11 (N.C. 1968); State v. McAdams 714 P.2d 1236, 1237 (Wyo. 1986).

33. *See* David B. Kopel et al., *supra* note 6, at 1180 n.12.

34. This number excludes three Oregon decisions that invalidated complete bans on switchblades and billy clubs. *See* State v. Delgado, 692 P.2d 610 (Or. 1984) (switchblades); State v. Blocker, 630 P.2d 824 (Or. 1981) (possession of billy club in public); State v. Kessler, 614 P.2d 94 (Or. 1980) (possession of a billy club in the home). For decisions upholding restrictions on weapons other than firearms, see State v. Swanton, 629 P.2d 98 (Ariz. Ct. App. 1981) (ban on nunchakus); City of Cleveland Heights v. Allen, No. 41104, 1980 WL 354859 (Ohio App. 8 Dist. 1980) (ban on switchblades); City of Seattle v.

is surely the most repeated phrase (and most obvious understatement) in state right-to-bear-arms cases: "The right to bear arms is not absolute."[35]

The breadth of the deference inherent in the reasonable regulation standard can be illustrated by examining the diverse body of gun control laws that have been subject to litigation yet repeatedly upheld. A brief review of the state case law reveals that the standard is extremely deferential to state legislative efforts to protect public safety, permitting vastly overinclusive and underinclusive laws to survive judicial scrutiny.

i. Felon Possession Bans

Bans on the possession of firearms by convicted felons are among the most common types of gun control regulations. Every state court to rule on a felon possession ban in the modern era—and the cases are numerous—has held that such laws are reasonable.[36] The Georgia Supreme Court succinctly expressed the underlying reasoning of the state courts: the ban seeks "to keep guns out of the hands of those individuals who by their prior conduct had demonstrated that they may not possess a firearm without being a threat to society."[37] Although some state courts rule that felons can be denied the arms right entirely because of the limited scope of the state constitutional provision (e.g., Oregon courts have held that felons are "not entitled to the constitutional guarantee of . . . the right to bear arms"),[38] common practice in other states is to hold that felon possession bans are simply reasonable regulations.[39]

Where felons are excluded from possession by standard rather than scope,

Montana, 919 P.2d 1218 (Wash. 1996) (ban on carrying "dangerous knives," concealed or open).

35. Rohrbaugh v. State, 607 S.E.2d 404, 414 (W.Va. 2004).

36. *See*, *e.g.*, Mason v. State, 103 So. 2d 341 (Ala. 1958); Morgan v. State, 943 P.2d 1208 (Alaska Ct. App. 1997); State v. Rascon, 519 P.2d 37 (Ariz. 1974); *Blue*, 544 P.2d 385; Nelson v. State, 195 So. 2d 853 (Fla. 1967) (per curiam); Landers v. State, 299 S.E.2d 707 (Ga. 1983); Baker v. State, 747 N.E.2d 633 (Ind. Ct. App. 2001); State v. Rupp, 282 N.W.2d 125 (Iowa 1979); Eary v. Commonwealth, 659 S.W.2d 198 (Ky. 1983); State v. Williams, 358 So. 2d 943, 946 (La. 1978); State v. Friel, 508 A.2d 123 (Me. 1986); People v. Swint, 572 N.W.2d 666 (Mich. Ct. App. 1997); State v. Comeau, 448 N.W.2d 595 (Neb. 1989); State v. Smith, 571 A.2d 279 (N.H. 1990)**;** State v. Ricehill, 415 N.W.2d 481 (N.D. 1986); State v. Hirsch, 34 P.3d 1209 (Or. Ct. App. 2001); Shepperd v. State, 586 S.W.2d 500 (Tex. Crim. App. 1979) (old version of the law); Wilson v. State, 44 S.W.3d 602 (Tex. App. 2001) (new version of the law); State v. Willis, 100 P.3d 1218 (Utah 2004)**;** State v. Krantz, 164 P.2d 453 (Wash. 1945); *Rohrbaugh*, 607 S.E.2d 404; Perito v. County of Brooke, 597 S.E.2d 311 (W. Va. 2004) (upholding felon gun ban, even for a felon who has been pardoned); State v. Thomas, 683 N.W.2d 497 (Wis. Ct. App. 2004); Carfield v. State, 649 P.2d 865 (Wyo. 1982). Some of the felon possession bans have also been challenged, unsuccessfully, under the Equal Protection Clause of the federal Constitution. *See*, *e.g.*, People v. Jackson, 646 N.E.2d 1299 (Ill. App. Ct. 1995).

37. *Landers*, 299 S.E.2d at 710.

38. *Hirsch*, 114 P.3d at 1107.

39. *See*, *e.g.*, *Blue*, 544 P.2d at 391; *Rohrbaugh*, 607 S.E.2d at 413-14.

the unanimity of the state courts in upholding the bans is a measure of the extent to which the reasonable regulation test is deferential. Felon possession bans are wildly overinclusive, encompassing within their prohibition non-violent felonies that offer no hint of the potentially violent tendencies of convicted individuals. Perjury, embezzlement, and violation of state securities laws are all examples of felonies without a connection between their commission and the felon's trustworthiness with a gun. Under any form of heightened scrutiny, this vast overinclusiveness would be a constitutional defect that would require narrowing the ban. No law banning felons from exercising the freedom of speech, for example, would survive judicial scrutiny absent a clear connection between the crime and the speech.[40] Indeed, even under a rational basis standard of review, blanket felon possession bans are arguably irrational and arbitrary, at least as applied to some felonies. Yet, state courts uniformly uphold these broad laws as reasonable.

ii. Bans on Particular Types of Firearms

Since the mid-twentieth century, state courts have also uniformly upheld state prohibitions on particular types of guns. The courts of Georgia,[41] Nebraska,[42] North Carolina,[43] and Texas[44] have all found bans on short-barreled and "sawed-off" shotguns to be reasonable, while other state courts have upheld bans on machine guns,[45] stun guns,[46] assault weapons,[47] semi-automatic weapons,[48] and even handguns.[49]

The Georgia sawed-off shotgun case, *Carson v. State*,[50] exemplifies both the reasoning and use of the reasonable regulation standard to evoke a level of judicial scrutiny that demands little public justification. "[T]he question in each [right-to-bear-arms] case," the court explained, is "'whether the particular

40. *Cf.* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991) (invalidating a state law requiring profits from books authored by criminals to be distributed to crime victims).

41. *See* Carson v. State, 247 S.E.2d 68 (Ga. 1978).

42. *See* State v. LaChapelle, 451 N.W.2d 689 (Neb. 1990).

43. *See* State v. Fennell, 382 S.E.2d 231 (N.C. Ct. App. 1989).

44. *See* Ford v. State, 868 S.W.2d 875 (Tex. App. 1993).

45. *See* Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972); Morrison v. State, 339 S.W.2d 529 (Tex. Crim. App. 1960).

46. *See* People v. Smelter, 437 N.W.2d 341 (Mich. Ct. App. 1989).

47. See Robertson v. City and County of Denver, 978 P.2d 156 (Colo. Ct. App. 1999); Benjamin v. Bailey, 662 A.2d 1226 (Conn. 1995); Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993).

48. *See* City of Cincinnati v. Langan, 640 N.E.2d 200 (Ohio Ct. App. 1994).

49. *See Kalodimos*, 470 N.E.2d 266; City of Cleveland v. Turner, No. 36126, 1977 WL 201393 (Ohio App. 8 Dist 1977) (ban on any handgun of a .32 caliber or less and a barrel length less than three inches).

50. *Carson*, 247 S.E.2d at 72 (Ga. 1978).

regulation involved is legitimate and reasonably within the police power, or whether it is arbitrary, and, under the name of regulation, amounts to a deprivation of the constitutional right.'"[51] The ban on sawed-off shotguns was "not arbitrary or unreasonable"[52] because these weapons "are commonly used for criminal purposes."[53] Although such weapons are not exclusively used by criminals (or perhaps even in most instances—the court required no evidence on the matter whatsoever), this overinclusiveness was not fatal. Moreover, the court argued, repeating reasoning commonly found in the state cases, "[t]he Act does not prohibit the bearing of *all* arms;"[54] it only prohibits the ones specifically banned. So long as there were some other weapons available for individuals to possess, the ban on sawed-off shotguns was not constitutionally problematic.

The extent of the deference that the reasonable regulation standard affords is also illuminated in the few cases dealing with prohibitions on another type of firearm: assault weapons. The exact types of weapon covered by this terminology vary; their only unifying characteristic is "a military-style appearance."[55] Critics of these bans note that, "[a]ppearance notwithstanding, 'assault weapons' are functionally indistinguishable from normal-looking guns: they fire only one bullet with each press of the trigger and the bullets they fire are intermediate-sized and less powerful than the bullets from big game rifles."[56] There is a certain illogic behind banning some weapons because of their appearance alone, without regard to the similar public safety threat posed by less military-looking guns. And yet courts uphold these bans, arguing along the lines of the Connecticut Supreme Court, which explained that because assault rifles had been used in criminal activity, and other weapons remained for people to use for self-defense, the ban was reasonable.[57]

Thus, under the reasonable regulation standard, the government is free to ban particular classes of weapons even where the class of weapons poses no unusual danger, so long as some other weapons remain available. As phrased by the Illinois Supreme Court in a decision upholding a municipal ban on handguns, "because arms pose an extraordinary threat to the safety and good order of society, the possession and use of arms is subject to an extraordinary degree of control."[58]

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51. *Id*. (quoting Strickland v. State, 72 S.E. 260, 263 (Ga. 1911)).

52. *Id*. at 73.

53. *Id*.

54. *Id*. (emphasis added).

55. David B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. REV. MICH. ST. UNIV.-DETROIT COLL. L. 171, 180 (1999).

56. *Id.* at 180. *See also* Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability For the Manufacture and Sale of "Assault Weapons,"* 8 STAN. L. & POL'Y REV. 41, 43 (1997).

57. *See* Benjamin v. Bailey, 662 A.2d 1226, 1235 (Conn. 1995).

58. *Kalodimos*, 470 N.E.2d at 269 (internal quotations and citations omitted).

iii. Bans on Concealed Carrying of Firearms Outside of Home or Office

As a testament to the political strength of gun enthusiasts, thirty-eight states currently allow the concealed carrying of firearms.[59] Nevertheless, where concealed carry outside of one's home or business is banned, the state courts uphold such prohibitions under the reasonableness standard.[60] (As discussed below, there is a single modern case invalidating a concealed carry law as applied to a business owner within his place of business, under highly unusual factual circumstances.[61]) Even if the ability to protect oneself from a violent attack on the streets is an important part of the right of self-defense through bearing arms, these cases provide further evidence of the breadth of the deference state courts give to legislatures in regulating weapons. In *Klein v. Leis*, the Ohio Supreme Court upheld a concealed carry ban even though the court explicitly held that "the right to bear arms is fundamental."[62] "Yet, however fundamental and entrenched in the constitutional heritage of our state," the court continued, "the right to bear arms is not absolute."[63] Agreeing that "the right to bear arms is not absolute,"[64] the Colorado Court of Appeals took a different route to the same end point in *Trinen v. Denver*, where it held that "the right to bear arms is not a fundamental right."[65] Despite the disagreement over the "fundamentality" of the arms right, both courts upheld the bans under the language of reasonableness, explaining that the dangers created by concealed carrying of firearms in public easily outweighed the individuals' right to bear arms.[66] Fundamental or not, the arms right is subject to extensive regulation.

iv. Bans on Transportation of Loaded Firearms

State courts uniformly find that state laws prohibiting the transportation of

59. *See* Nicholas J. Johnson, *Testing the States' Rights Second Amendment for Content: A Showdown Between Federal Environmental Closure of Firing Ranges and Protective State Legislation*, 38 IND. L. REV. 689, 709 (2005). *See also* N.R.A.-I.L.A. Fact Sheet, Right to Carry 2005, *available at* http://www.nraila.org/Issues/Fact Sheets/Read.aspx?ID=18 (last visited Dec. 2, 2005).

60. *See* State v. Moerman, 182 Ariz. 255 (Ariz. Ct. App. 1994); Trinen v. City and County of Denver, 53 P.3d 754 (Colo. Ct. App. 2002); State v. Hart, 157 P.2d 72 (Idaho 1945); Klein v. Leis, 795 N.E.2d 633 (Ohio 2003); State v. Cole, 665 N.W.2d 328 (Wis. 2003); State v. McAdams, 714 P.2d 1236 (Wyo. 1986).

61. *See* State v. Hamdan, 665 N.W.2d 785 (Wis. 2003).

62. *Klein*, 795 N.E.2d at 636.

63. *Id.*

64. *Trinen*, 53 P.3d at 757.

65. *Id.*

66. The *Trinen* court used the language of reasonableness, while simultaneously referring to the "rational basis test." *See id*, 53 P.3d at 757.

a loaded firearm are reasonable burdens on the right to bear arms.[67] Some courts adopt the same reasoning behind decisions upholding bans on particular firearms, explaining that a transportation ban "does not elicit a total prohibition against the use and possession of firearms. . . [but] merely regulates their use."[68] According to a Missouri appellate court, "society has a legitimate interest in placing on the possessor of [a firearm] the burden of ascertaining at his peril that it is unloaded before he ventures forth with it in public."[69] Several cases involve bans on vehicular transportation,[70] while others deal with total bans on the carrying of loaded firearms in any circumstance.[71] Regardless, the laws are upheld under deferential scrutiny as means of maintaining public peace and security.

v. Bans on Firearms Possession While Intoxicated

Courts show no hesitation in affirming the constitutionality of bans on possession of firearms by people who are intoxicated. According to *People v. Garcia*,[72] a decision of the Colorado Supreme Court, "[i]t is clearly reasonable for the legislature to regulate the possession of firearms by those who are under the influence of alcohol or drugs. . . . [T]he statute here proscribes only that behavior which can rationally be considered illegitimate, and thus properly prohibited . . . ."[73] It is hardly surprising that courts find that intoxicated people bearing arms pose unusual dangers and uphold prohibitions on such possession as reasonable. A reflection of the state court deference to legislatures, however, may be found in related cases. The courts have upheld the constitutionality of bans on possession of firearms even in places where alcohol is served[74] and where it is sold,[75] regardless of whether the possessor is intoxicated or is even consuming alcohol.

67. *See* People v. Williams, 377 N.E.2d 285 (Ill. 1978) (carrying of a loaded firearm within corporate limits of a city); City of Cape Girardeau v. Joyce, 884 S.W.2d 33 (Mo. Ct. App. 1994) (possession while riding a motorcycle); State v. Boyce, 658 P.2d 577 (Or. Ct. App. 1983) (transportation in vehicle); State v. Duranleau, 260 A.2d 383 (Vt. 1969) (transportation in vehicle); State v. Spencer, 876 P.2d 939 (Wash. Ct. App. 1994) (carrying a firearm in an "alarming manner" applied to loaded weapon on residential street at night); State *ex rel.* W. Va. Div. of Natural Resources v. Cline, 488 S.E.2d 376 (W. Va. 1997) (transportation in vehicle).

68. *Williams*, 377 N.E.2d at 286-87.

69. *City of Cape Girardeau*, 884 S.W.2d at 35 (internal quotations and citations omitted).

70. *See id.* at 34; *Duranleau*, 260 A.2d at 384-85; *Cline*, 488 S.E.2d at 378.

71. *See Spencer*, 876 P.2d at 941; *Williams*, 377 N.E.2d at 286.

72. 595 P.2d 228 (Colo. 1979).

73. *Id*. at 230.

74. *See*, *e.g.*, Second Amendment Found. v. City of Renton, 668 P.2d 596, 598 (Wash. Ct. App. 1983).

75. *See*, *e.g.*, State v. Lake, 918 P.2d 380 (N.M. Ct. App. 1996).

Courts even uphold the application of intoxicated possession bans to individuals who become inebriated in their own homes. In *Gibson v. State*,[76] the defendant argued that applying the intoxicated possession ban within a private home infringed upon both the arms right and the right of privacy.[77] To his argument, we might add that systematic application of this law might mean that only teetotalers would be able to keep firearms at home. Nevertheless, the *Gibson* court cited examples of prior cases involving victims of gun violence within the home and argued that individuals who possess firearms "even in their own homes, pose a significant threat to the health and safety of their family members, their neighbors and themselves."[78] Consequently, the legislature was well within the ambit of its wide authority in imposing this regulation on the right to bear arms.

vi. Penalty Enhancements for Possession of a Firearm During the Commission of a Crime

One is tempted to suspect that courts are willing to uphold almost any type of gun control measure due to the unattractive nature of many of the individuals who challenge such laws: criminals, usually. A violent spouse-beater challenging a felon possession ban or a drunk driver caught with a loaded gun in his car arguing against a ban on transporting a loaded weapon does not gain much sympathy from the courts. Add to this the inherent public safety risks posed by someone engaging in criminal activity with a gun in hand and it is easy to see why courts unanimously uphold penalty enhancements imposed on defendants charged with using a firearm during the commission of a crime.[79] As one court put it in a drug case, "Because of the increased risk of injury or death to private citizens and law enforcement personnel that may result from the combination of drugs and weapons, the state, pursuant to its police powers, may reasonably regulate and sanction such activities."[80] On the basis of reasoning such as this, one would imagine that penalty enhancements for using a firearm during the commission of a crime would survive any level of judicial scrutiny. Certainly, the low-level review of the reasonable regulation standard is easily satisfied.

76. 930 P.2d 1300 (Alaska Ct. App. 1997).

77. *Id*. at 1301.

78. *Id.* at 1302.

79. *See*, *e.g.*, People v. Atencio, 878 P.2d 147 (Colo. Ct. App. 1994); State v. Blanchard, 776 So.2d 1165 (La. 2001); State v. Schelin, 55 P.3d 632 (Wash. 2002) (plurality opinion); State v. Daniel, 391 S.E.2d 90 (W.Va. 1990).

80. *Atencio*, 878 P.2d at 150.

vii. "Shall Issue" Licensing

The breadth of the deference inherent in the reasonable regulation standard is indicated too by the common approach state courts take in dealing with "shall issue" licensing schemes, even where those schemes call upon government officials to make ambiguous judgments about an applicant's character. State courts have upheld licensing laws that permit the licensing authority to accept or reject applicants on the basis of incredibly vague, undefined standards such as whether the applicant is of "good character and reputation"[81] or is a "suitable person"[82] to possess a firearm. Few, if any, other constitutional rights can be lawfully made contingent upon such judgments of government officials. Yet, as the Ohio Supreme Court argued, "[r]easonable gun control legislation is within the police power of a legislative body to enact; any such restriction imposes a restraint or burden upon the individual, but the interest of the governmental unit is, on balance, manifestly paramount."[83] While recognizing the relatively unusual latitude such licensing laws give to government, courts have held that the arms right is nevertheless sufficiently protected so long as the law requires the issuance of a permit to all persons who meet the ambiguous standards and judicial review is available for those denied a license.[84]

C. The Limits of Reason

In thirty-six of the forty-two states with individual right-to-bear-arms provisions, not a single law has been invalidated in a published opinion on the basis of the arms right in the past sixty years. Nevertheless, on a handful of occasions in the post-World War II era, courts have found particular laws to violate the right to bear arms or held specific applications of otherwise valid laws to be unconstitutional. In the forty-two states with individual right-to-bear-arms provisions, only six published opinions have invalidated gun control (or its application to particular individuals) on the basis of the arms right over the past sixty years.

Courts will hold a gun regulation to be unreasonable only in the extreme case where the law is deemed either profoundly unfair in its application to particular individuals, or so restrictive as to nullify, destroy, or render nugatory the underlying right to bear arms. These are overlapping categories, rather than truly distinct bases for invalidation, but they help organize the handful of decisions. By maintaining *some* limits on the regulatory power of states, the

81. *See, e.g.*, Matthews v. State, 148 N.E.2d 334, 336 (Ind. 1958).
82. *See, e.g.*, Mosby v. Devine, 851 A.2d 1031, 1047 (R.I. 2004).
83. Mosher v. City of Dayton, 358 N.E.2d 540, 543 (Ohio 1976).
84. *See, e.g.*, Mosby, 851 A.2d at 1048; *Matthews*, 148 N.E.2d at 337.

reasonable regulation standard allows the courts to play a role in policing government action pertaining to the arms right; it keeps them in the "game." Yet, the infrequency with which the standard is used to invalidate gun laws suggests that the courts' role is relatively minor and only is exercised in extraordinary circumstances.

In two modern-era cases, extremely unfair applications of otherwise valid laws have been held to violate the state constitutional right to bear arms. In *State v. Rupe*,[85] the Washington Supreme Court used its oversight role to reverse a death sentence where evidence was introduced at sentencing that the convict owned a gun to support the inference that he was a threat to the community. The gun was kept at home and was not involved in the underlying crime. "We see *no relation* between the fact that someone collects guns and the issue of whether they deserve the death sentence," the court explained.[86] In *State v. Hamdan*, the Wisconsin Supreme Court overturned the conviction of Munir Hamdan, a liquor and grocery store owner who violated the state ban on concealed possession of a weapon within his place of business.[87] The court explicitly held that the concealed weapons ban was constitutional, but ruled that the facts of Hamdan's case made enforcement of that law against him "unreasonable."[88] Hamdan's store was located in a very high-crime neighborhood of Milwaukee. His store had been the target of four armed robberies in the previous six years and in one of those robberies the assailant held a loaded weapon to Hamdan's head and pulled the trigger (but the gun misfired). During that same time period, two fatal shootings had occurred inside the store.[89] Highlighting these unusual circumstances, the court held that prosecution in these circumstances would be "practically nullifying the right" to self-defense.[90]

In these two decisions, the courts are using their review power under the state constitutions to police against miscarriages of justice. In neither case does the court call into question the constitutionality of gun control. Rather, the courts carve out exceptions from the law for particular individuals based on the unusual circumstances of their cases. The exceptions do not apply broadly, nor do they seriously threaten to grow and impede gun control. In these two decisions, judicial review under the state constitutional guarantee of the right to bear arms is a safety valve to counter governmental overreaching.

Three of the six modern-era decisions invalidating laws or their application on the basis of the state constitutional right to bear arms involve a single type of gun control: blanket bans on the transportation of (even unloaded)

85. State v. Rupe, 683 P.2d 571 (Wash. 1984) (en banc).
86. *Id*. at 597 (emphasis added).
87. *Hamdan*, 665 N.W.2d 785.
88. *Id*. at 790.
89. *Id*. at 791.
90. *Id*. at 809.

firearms.[91] The laws at issue in these cases effectively made it a crime for an individual to transport a gun anywhere, anytime, and for any reason. As the Kansas Supreme Court argued in *Junction City v. Mevis*, under such an ordinance a person "could not lawfully transport a firearm from the place where he purchased it or had it repaired."[92] So an individual had the right to possess a firearm, but if he bought one at a sporting goods store, he could not take it home with him unloaded. Nor could he transport the gun unloaded home from a gunsmith after being repaired. As the Colorado Supreme Court noted in *City of Lakewood v. Pillow*, the ban "would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business."[93] Under a blanket transportation ban, individuals can own a gun but the weapon must never leave home. Indeed, by the terms of the ordinances, an individual who moved residences had to leave the gun behind because the gun could not be packed away unloaded and moved in a van to the new residence.

Certainly, there are valid public safety reasons to keep guns off the streets and many jurisdictions have bans on the transportation of *loaded* weapons. But banning the transportation of even *unloaded* weapons goes a long way to making the right to own a gun chimerical, especially if the ban is applied to any transportation whatsoever. According to a New Mexico decision, *City of Las Vegas v. Moberg*, "[a]s applied to arms, other than those concealed, the ordinance under consideration purports to completely prohibit the 'right to bear arms.'"[94] The irrationality of such a law was illustrated in the Kansas case, where the court suggested that the total transportation ban was not even the result of considered public policy. The law, which was not supposed to apply so broadly, was the victim of sloppy legislative drafting.[95]

One reflection of the amount of deference built into the reasonable regulation standard is that blanket transportation bans applied to unloaded guns have been upheld in an equal number of cases. Two decisions out of Ohio[96] and one from gun-friendly Texas[97] find that transportation bans are reasonable regulations on the right to bear arms because of the countervailing need for public safety.

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91. City of Lakewood v. Pillow, 501 P.2d 744, 745 (Colo. 1972); Junction City v. Mevis, 601 P.2d 1145, 1152 (Kan. 1979); City of Las Vegas v. Moberg, 485 P.2d 737, 738 (N.M. Ct. App. 1971).

92. *Mevis*, 601 P.2d at 1152.

93. *Pillow*, 501 P.2d at 745.

94. *Moberg*, 485 P.2d at 738.

95. *See Mevis*, 601 P.2d at 1150-51 (recognizing that the ban on any transportation appeared to result from the potentially inadvertent omission of a provision in a prior gun control measure).

96. *See* City of Akron v. Dixon, 303 N.E.2d 923 (Ohio Misc. 1972) (upholding law banning carrying of a pistol); State v. Enos, No. 8251, 1977 WL 198812 (Ohio Ct. App. March 23, 1977).

97. *See* Collins v. State, 501 S.W.2d 876 (Tex. Crim. App. 1973) (upholding ban on carrying of a pistol).

The final published decision overturning a law under a state individual right-to-bear-arms provision since the mid-twentieth century is *State ex rel. City of Princeton v. Buckner*.[98] In *Buckner*, the West Virginia Supreme Court overturned a license-to-carry law under the reasonable regulation test,[99] reasoning that because the state constitution guaranteed the right to bear arms for defensive purposes, the state could not require someone seeking to defend his "self, family, home and state" to first obtain state authorization.[100] *Buckner* is clearly an outlier, however, and the courts of at least nine other states have considered the constitutionality of license-to-carry laws and upheld them.[101]

III. CONCLUSION

The state experience indicates that the vast majority of laws burdening the Second Amendment right to bear arms are likely to withstand judicial scrutiny under deferential reasonableness review. Laws that effectively abolish the right to possess a firearm (by, for instance, banning their transportation in all circumstances) or are applied in extraordinary factual circumstances that give rise to a sense of arbitrariness may be called into question. But outside of those narrow areas, an individual right to bear arms does not generally interfere with gun control. The Second Amendment may receive a second look, yet if the federal courts follow the uniform practice of the states in applying the deferential reasonable regulation standard, few laws are likely to run afoul of the individual right the Amendment is read to protect.

Some individual rights proponents seem to recognize this and support the individual rights reading in large part for its symbolic or expressive effect. According to Calvin Massey, "[r]ecognition of a limited individual right to gun possession, however, would allay the fear of gun enthusiasts (or shooters, as they generally prefer to be called) that the ultimate aim of gun control advocates is to stamp out private gun possession."[102] To be sure, if the Second Amendment is interpreted to guarantee an individual right to bear arms, then a move to a British-style society with almost no lawful gun possession would be unconstitutional. Yet, such a move is nowhere near being politically feasible in

98. State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139 (W. Va. 1988).

99. *Id.* at 145 ("The question remains whether the State may reasonably regulate the right of a person to keep and bear arms in this State.").

100. *Id*. at 144-45 (citing W. VA. CONST. art. III, § 22).

101. *See* Davis v. State, 146 So. 2d 892 (Fla. 1962); State v. Mendoza, 920 P.2d 357 (Haw. 1996); *Matthews*, 148 N.E.2d 334; Dozier v. State, 709 N.E.2d 27 (Ind. Ct. App. 1999); *In re* Application of Atkinson, 291 N.W. 2d 396 (Minn. 1980); Heidbrink v. Swope, 170 S.W.3d 13 (Mo. Ct. App. 2005); *Mosher*, 358 N.E.2d 540; State v. Perry, 77 P.3d 313 (Or. 2003); Commonwealth v. Ray, 272 A.2d 275 (Pa. Super. Ct. 1970); *Mosby*, 851 A.2d 1031.

102. Massey, *supra* note 3, at 587; Reynolds, *supra* note 4, at 19.

America anyway. If this is all that gun enthusiasts can expect from a revised Second Amendment, then their victory will be almost entirely symbolic. Reasonable regulations—meaning almost all gun control laws—are likely to remain constitutionally permissible.