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Natural Born Killers: The Assault Weapons Ban of the Crime Bill-- Legitimate Exercise of Congressional Authority to Control Violent Crime or Infringement of a Constitutional Guarantee?

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NATURAL BORN KILLERS:¹ THE ASSAULT WEAPONS BAN OF THE CRIME BILL— LEGITIMATE EXERCISE OF CONGRESSIONAL AUTHORITY TO CONTROL VIOLENT CRIME OR INFRINGEMENT OF A CONSTITUTIONAL GUARANTEE?

The United States has seen a sharp increase in violent crime rates.² Particularly alarming is the rising tide of gun violence in American society.³ Assault weapons are some of the most dangerous⁴ and frequently used firearms in the commission of these crimes.⁵ In an attempt to curb the proliferation of these powerful weapons, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (the "Anti-Crime Act"),⁶ banning nineteen specific brands of assault weapons and copycat models.⁷ Since the Second Amendment⁸ grants the basic right to bear arms, a ques-

¹ *NATURAL BORN KILLERS* (Regency 1994) (portraying lives of couple who go on murdering rampage throughout country and become heroes in process). The title of this Note is derived from a movie written and directed by Oliver Stone. *Id.*; see also *Natural Born Killer*, N.Y. DAILY NEWS, Sept. 2, 1994, at 1 (labeling William Emanuel Tager who used his semiautomatic AK-47 assault rifle to murder Campbell Montgomery in midtown Manhattan, "a natural born killer"); cf. Ginny Holbert, *A Shared Lust For Blood; "Killers" As Guilty As Media*, CHI. SUN TIMES, Sept. 7, 1994, at 49 (stating movie is commentary on glorification of violence in our culture and features at least 52 on screen killings); Robert D. McFadden, *Police Say Murder Suspect Thinks TV Spied On Him*, N.Y. TIMES, Sept. 2, 1994, at B1 (outlining gunman Tager's plan to wreak vengeance on television networks for zapping him with mysterious rays through television).

² HANDGUN CONTROL INC., H.R.4296, QUESTIONS & ANSWERS 3 (1994) [hereinafter HANDGUN CONTROL INC.] (noting significant increase in violent crime rate through years 1986 to 1991).

³ U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: 1992 1 (1993) (noting increase of 4,482 in number of murders committed using firearms within five-year period); Michael R. Rand, *Guns And Crime; Crime Data Brief*, in U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 1 (1994) (noting armed offenders committed record 931,000 violent crimes).

⁴ Keith Bea, "Assault Weapons": *Military-Style Semiautomatic Firearms Facts And Issues*, in CONG. RESEARCH SERV., REPORT FOR CONGRESS 5, 19 (1992) (noting rapid succession capability of assault weapons posing significant societal risks).

⁵ *Id.* at 3 (citing results retrieved by Committee on Ways and Means).

⁶ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

⁷ *Id.* § 110101(b)(A) (listing nineteen specific brands of assault weapons banned).

⁸ U.S. CONST. amend. II. "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." *Id.*

tion arises as to whether such a ban is constitutional. The debate continues about the legality of this approach to address increasing gun violence in American society.⁹ Proponents of the ban argue that the government has a duty to remove these assault weapons from the streets of the United States.¹⁰ In contrast, opponents of assault weapon legislation assert that a ban on these firearms will create serious constitutional problems.¹¹

Part One of this Note focuses on the Second Amendment of the United States Constitution and how it has been interpreted by the judiciary. Part Two details states' attempts at gun control legislation. Part Three discusses federal attempts to curb the rise of violence through gun control measures. Part Four reviews the Anti-Crime Act as a response to the increasing amount of gun violence in America. This Note does not address the possible contributing factors to the growing violent culture, including the reasons behind the proliferation of assault weapons. Rather, the Note provides an analysis of the constitutional validity of the national assault weapons ban, as enacted in the Anti-Crime Act.

I. THE SECOND AMENDMENT OF THE UNITED STATES CONSTITUTION

A. *Historical Background*

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.¹²

⁹ See Tom Diemer, *Assault Weapons Ban Raises Questions*, PLAIN DEALER (Cleveland), May 16, 1994, at A4 (noting assault weapons ban will raise constitutional questions).

¹⁰ Joshua M. Horwitz, *Kelley v. R.G. Industries: A Cause of Action for Assault Weapons*, 15 U. DAYTON L. REV. 125, 132 (1989). Assault weapons are "designed for one purpose only—to efficiently kill people." *Id.* (quoting Darrel W. Stephens, Executive Director of Police Executive Research Forum, Remarks before the United States House of Representatives' Select Committee On Narcotics Abuse And Control: Assault Weapons and Drug Enforcement (Nov. 1, 1989)).

¹¹ See Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 6-7 (1989) (paraphrasing Bush Administration's "Drug Czar," William Bennett, who claimed assault weapons ban would conflict with constitutional provisions); see also *Assault Weapons: Hearings Before the Senate Judiciary Committee*, 103d Cong., 1st Sess., Aug. 3, 1993 [hereinafter *Assault Weapons Hearings*] (testimony of Susan Lawson, Director Federal Affairs, Institute for Legislative Action) (positing that NRA opposes any assault weapons ban as violative of Second Amendment).

¹² U.S. CONST. amend. II.

Prior to the ratification of the United States Constitution, colonists feared a potentially oppressive central government that could employ a strong standing army.¹³ Thus, as a condition of ratification, the colonists insisted that a right to bear arms be included in the Bill of Rights to ensure protection against the federal government via an independent state militia.¹⁴ The militia was to be armed by the government and was primarily intended to

¹³ See THE FEDERALIST No.46, at 297 (James Madison) (Henry C. Lodge ed. 1888) [hereinafter THE FEDERALIST NO. 46] (stating strength of new nation was that federal government would not become too powerful and oppress population due to advantage of being armed).

¹⁴ See Ehrman & Henigan, *supra* note 11, at 25 (noting that discussions of Constitutional Convention, Bill of Rights, and state ratifying conventions focused on need for states and citizens to protect themselves from oppressive federal government). "Anti-Federalists demanded an *express* declaration of the states' right to arm the militia." *Id.* at 29 (paraphrasing 5 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 217 (1836)); see also THE FEDERALIST No.46, *supra* note 13, at 371 (stating James Madison believed citizens of United States need never fear despotic reign similar to that of British rulers due to their possession of arms); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 640 (1989) (emphasizing colonists' interest in protecting local autonomy against federal interferences). Justice McReynolds described the Second Amendment as "assur[ing] the continuation and render[ing] possible the effectiveness of [the Militia]." *Id.* at 654; David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 555 (1991) (arguing militia was precondition for right to bear arms); Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407, 1433 (1992) (arguing original intent of Second Amendment was to provide colonists with personal right to bear arms). "[The Framers] provided the people with the right to keep and bear arms as a check against abuses of Congress' power over the military." *Id.* at 1433. *But see* Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 67 (1983) (arguing Framers intended Second Amendment to guarantee individual right to keep and bear arms for military, public order and self defense purposes); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 217-18 (1983) (asserting right to bear arms is truly individual, even in context of militia). "[B]elieving that a militia . . . was necessary for the protection of a free state, [the Framers] guaranteed the people's right to possess . . . arms." *Id.* at 232. "[T]he possession of arms was the vital prerequisite to the right to resist tyranny." *Id.*

defend the state from invasion.¹⁵ It has been only in this context that the right to bear arms has been protected.¹⁶

¹⁵ See Ehrman & Henigan, *supra* note 11, at 25 (detailing history underlying formation of Bill of Rights in light of time period in which colonists lived).

The modern day militia has two aspects to it: the "organized militia" and the "unorganized militia." See *The Militia Act*, 32 Stat. 775 (1903). The Militia Act (commonly known as the "Dick Act") implemented this distinction for the purpose of improving the efficiency of the National Guard. *Id.*; see also Ehrman & Henigan, *supra* note 11, at 37. The "organized militia", currently vested in the National Guard, is armed by the federal government. *Id.* at 24. The states, however, still retain certain control over the organized militia. *Id.* The militia, armed by the government, could be called on to "quash rebellions, enforce laws, and defend the state from invasion." *Id.* (citing 5 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 495 (1836)).

10 U.S.C. § 311(a) (1993). "Unorganized militia" consists of able bodied men between ages of 17 and 45. *Id.* The federal government arms the unorganized militia only when necessary. See Ehrman & Henigan, *supra* note 11, at 37 ("[T]he National Guard, while viewed today as a 'federal entity,' is still the state militia during those times when it is not in federal service . . . [d]espite its federal pay and its federally owned equipment."); *id.* at 39 (stating it was considered "quite appropriate" for government to arm militia, rather than having members supply their own guns and ammunition). But see Kates, *supra* note 14, at 249 n.193. The author hypothesized that since military arms are drawn from centralized armories, citizens should still have firearms to facilitate militia service. *Id.* This simply means that a citizen of the United States no longer has to supply his own weapons when called into duty since the federal government must supply them when he is called into service. See 32 U.S.C. § 701 (1988) (noting National Guard shall be equipped with the same type of uniforms, arms, and equipment as Army); see also Ehrman & Henigan, *supra* note 11, at 39 (noting no state requires individuals to supply their own weapon for military service). One of the objectives of the Virginia debates was to forbid the new federal government from disarming the state militia. *Id.* at 22; Kates, *supra* note 14, at 214. "The 'militia' was . . . not simply *allowed* to keep their own arms, but affirmatively *required* to do so." *Id.*

¹⁶ See *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (holding that since ban prohibiting switchblades did not impair state militia, it did not violate Second Amendment); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (using plain meaning approach in finding right to bear arms relates to preservation of militia), *cert. denied*, 464 U.S. 863 (1983); *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (interpreting Second Amendment narrowly to guarantee right to bear arms as member of militia); *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981) (denying rural police officer protection under Second Amendment "militia" argument due to prior felony conviction), *aff'd*, 740 F.2d 952 (1st Cir.), *cert. denied*, 469 U.S. 842 (1984); see also Ehrman & Henigan, *supra* note 11, at 29 (arguing that participants in Virginia debates sought explicit right to protect themselves from oppressive central government). "The Virginia debates reveal that the delegates were not concerned with an individual right to carry weapons, outside the context of militia service." *Id.* The only concern at the Virginia debates was the ability of states to "arm and discipline the militia." *Id.* at 31. "There is no mention in the Virginia debates of individuals carrying weapons, or of the need to assure individuals that the federal government would not confiscate their arms." *Id.* Any nonmilitia purpose of arms (i.e. hunting, target shooting, and self-defense) was not discussed during the conventions. *Id.* at 33; Williams, *supra* note 14, at 555 (arguing that without militia, right to bear arms is meaningless); cf. *THE FEDERALIST* No.46, *supra* note 13, at 298 (stating any federal force trying to suppress people would be up against "militia amounting to nearly half a million of citizens with arms in their hands"); William A. Walker, Book Note, 88 MICH. L. REV. 1409, 1414 (1990) (reviewing WARREN FREEDMAN, *THE PRIVILEGE TO KEEP AND BEAR ARMS: THE SECOND AMENDMENT AND ITS INTERPRETATION* (1989)); Dennis A. Henigan, *Shooting Blanks: The NRA Gets More Firepower From the Second Amendment as a Rhetorical Weapon Than as a Barrier to Gun Control Laws*, *THE RECORDER*, Aug. 3, 1992, at 9 (noting Supreme Court interprets Second Amendment only to extent of guaranteeing state militia).

Individuals were not intended to have additional rights within this collective notion, be they actual members or merely eligible candidates of the militia.¹⁷ During the formation of the Second Amendment, several other amendments were proposed which specifically sought to give the right to bear arms to individuals rather than solely to the militia collectively.¹⁸ These proposals were summarily rejected.¹⁹ Thus, it appears that the Second Amendment was created to protect state militias,²⁰ not to secure an individual right to bear arms.²¹

¹⁷ See *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (finding state militia member not protected by Second Amendment for illegal possession of firearm), *cert. denied*, 453 U.S. 926 (1978); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.) (holding enrollment in militia does not confer any right to possess banned weapons), *cert. denied*, 426 U.S. 948 (1976).

¹⁸ Mark Udulutch, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. LAW 19, 26-27 n.47 (1989) (outlining Samuel Adams's & New Hampshire's proposals for Second Amendment which guaranteed individuals right to possess firearms).

¹⁹ *Id.* at 27 (pointing out no proposal advocating individual right to bear arms was adopted at ratifying convention for United States Constitution); see also Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 1001 (1975) (noting that struggle over Second Amendment centered on prevention of federal disarmament of state militia).

²⁰ *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding purpose of Second Amendment is to preserve effectiveness of militia); see also *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (connecting idea of state militia to Second Amendment), *cert. denied*, 464 U.S. 863 (1983); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 168 (Ohio 1993). "[T]he amendment was drafted not with the primary purpose of guaranteeing the rights of individuals to keep and bear arms but, rather, to allow Americans to possess arms to ensure the preservation of a militia." *Id.*; see also ROBERT J. COTTROL, *GUN CONTROL AND THE CONSTITUTION* at xxxiv (1993) (stating Supreme Court views Second Amendment as protection of state militia, not individual right to bear arms); Peter B. Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. REV. 46, 67-70 (1966) (noting Second Amendment intends to protect every state via independent state militia).

²¹ *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (preventing people from organizing with arms so as to threaten minorities); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.) (holding right to possess submachine gun is not guaranteed by Second Amendment), *cert. denied*, 426 U.S. 948 (1976); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (reiterating previous courts' holdings denying individual right to bear arms); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (stating possession of firearm by felon violated federal criminal statute); *Thompson v. Dereta*, 549 F. Supp. 297, 298-99 (D. Utah 1982) (holding deprivation of exemption from federal firearms laws did not deprive plaintiff of any constitutional right), *appeal dismissed*, 709 F.2d 1343 (10th Cir. 1983). There is no single case which has upheld an individual right to bear arms under the Second Amendment outside of the militia context. *Id.* at 299; *City of Cincinnati v. Langan*, 640 N.E.2d 200, 208 (Ohio Ct. App.) (recognizing right to self defense does not include right to bear illegal arms for such purpose), *dismissed*, 638 N.E.2d 87 (1994); *City of East Cleveland v. Scales*, 460 N.E.2d 1126, 1130 (Ohio Ct. App. 1983) (upholding conviction for possession of weapon without owner identification card as required by local ordinance); see also Donald L. Doernberg, "We the People": *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 104-05 (1985) (noting view of right to bear arms as collective rather than individual is reflected by every court to have considered issue specifically); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 62-63 (1989) (quoting from PENNSYLVANIA AND THE FEDERAL CONSTI-

B. Nature of the Right

Although the right to bear arms was enumerated in the Bill of Rights,²² courts have specifically stated that the Constitution is not the source of rights themselves, but merely acts as a safeguard to protect these rights.²³ The right to bear arms actually extends from English common law,²⁴ which itself did not recognize an absolute right to bear arms.²⁵ Therefore, it seems reasonable to infer that the Framers intended such a condition to apply to the same right as enumerated in the United States Constitution.²⁶

TUTION 1787-1788 at 422 (1888), which rejected Pennsylvania's minority proposal for inclusion as part of the Bill of Rights). The Pennsylvania proposal purported to give persons the right to bear arms to defend themselves. Dowlut, *supra*, at 62; Ehrman & Henigan, *supra* note 11, at 40 (stating Second Amendment not designed to give every person right possess arms). "[T]he courts have held, in accordance with *Miller*, that the interest protected by the Second Amendment is the collective and public interest in a viable state militia, not the private interest of individuals in owning firearms for reasons unrelated to the militia." *Id.* at 47; Kates, *supra* note 14, at 206 (noting only a small number of legal scholars endorse view that individuals possess right to bear arms). The Second Amendment does not guarantee the right of any individual against confiscation of arms. *Id.* at 213; see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-2 n.6 (2d ed. 1988) (dismissing any notion of individual right to bear arms); Udulutch, *supra* note 18, at 48 ("[T]here exists no individual right to bear arms."); Williams, *supra* note 14, at 614 (arguing right to bear arms did not belong to individuals but rather to militia collectively); cf. *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (noting possession of weapon bearing reasonable relationship to maintenance of militia would be protected by Second Amendment), *cert. denied*, 319 U.S. 770 (1943).

See also Udulutch, *supra* note 18, at 27 (noting several amendments favoring individual right to bear arms were proposed, but none adopted); Weatherup, *supra* note 19, at 1000-01 (positing that delegates at Constitutional Convention did not intend to secure individual right to bear arms). *But see* *State v. Dawson*, 159 S.E.2d 1, 9 (N.C. 1968). "North Carolina decisions have interpreted our Constitutions as guaranteeing right to bear arms to the people in a collective sense . . . and also to individuals." *Id.*

²² U.S. CONST. amend. II (conferring right to bear arms).

²³ See *United States v. Cruikshank*, 92 U.S. 542, 553 (1886) (stating right to keep and bear arms is not right granted by United States Constitution); *Eckert v. City of Philadelphia*, 477 F.2d 610, 610 (3d Cir.) (same), *cert. denied*, 414 U.S. 839 (1973); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942) (same), *cert. denied*, 319 U.S. 770 (1943).

²⁴ See, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward An Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 320 (1991) (asserting Americans did not create any new rights in Bill of Rights, but merely recognized rights inherited from common law of England).

²⁵ See Ehrman & Henigan, *supra* note 11, at 8 (citing Statute of Northampton, 1388, 2 Edw. 3, ch. 3 (Eng.)). The English Bill of Rights, which was highly influential in the framing of the U.S. Constitution's Bill of Rights, established that the right to bear arms could be regulated by the government. Ehrman & Henigan, *supra*, at 9; see also Martin C. Ashman, *Handgun Control by Local Government* 10 N. Ky. L. Rev. 97, 105 (1982). "There was no attempt in the English Bill of Rights to create an absolute right to bear arms." *Id.* *But see* Ehrman & Henigan, *supra* note 11, at 9 n.23 (asserting laws such as Statute of Northampton prohibit only public bearing of arms, while right to possess arms is unaffected).

²⁶ See Cottrol & Diamond, *supra* note 24, at 322 (quoting English Bill of Rights which granted restricted right to bear arms as far as allowed by law).

In general, if a right is deemed absolute, Congress can make no law limiting that right.²⁷ However, no liberty within the Bill of Rights has been accorded this protection by the courts.²⁸ For example, the First Amendment guarantees of freedom of speech and free exercise of religion have been regulated even though they have been deemed our most fundamental rights.²⁹ Fundamental rights are given the highest position in the hierarchy of values, yet even they must sometimes yield to other considerations.³⁰ With regard to gun control, courts have refused to accord such a classification to the Second Amendment right to bear arms.³¹ Therefore,

²⁷ BLACK'S LAW DICTIONARY 9 (6th ed. 1990). "The true and proper law of nature, immutable in the abstract or in principle, in theory, but not in application; for very often the reason, situation and other circumstances, may vary its exercise and obligation." *Id.*; see also *Near v. Minnesota*, 283 U.S. 697, 707-08 (1931) (stating person cannot be deprived of absolute right).

²⁸ See *United States v. Mandujano*, 425 U.S. 564, 572 (1975) (noting Fifth Amendment right against self-incrimination does not apply in grand jury inquiries); see also *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 24-25 (1885) (noting where two absolute rights converge, invariably, one must yield to other); *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 563 (1830) (noting that however absolute right may be, it still must bear some public burdens).

²⁹ See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992) (noting freedom of speech may be abridged after particularly careful scrutiny of state need); see also *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988) (allowing construction of road through areas used in spiritual activities by Native Americans even though it would "cause serious and irreparable damage to sacred areas which are an integral and necessary part of [their] belief system"); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (recognizing freedom of speech is curtailed when there is immediate threat to public safety); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (denying Mormon's right to practice polygamy even though it is significant tenet of Mormon religion).

³⁰ See *United States v. Warin*, 530 F.2d 103, 107 (6th Cir.) ("even the First Amendment has never been treated as establishing an absolute prohibition against limitations on the rights guaranteed therein"), *cert. denied*, 426 U.S. 948 (1976); see also *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961) (rejecting idea that freedom of speech and association under First and Fourteenth Amendments are "absolutes"); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 170-01 (Ohio 1993). "Neither the federal Bill of Rights nor [Ohio's] Bill of Rights, implicitly or explicitly, guarantees unlimited rights. . . . There are manifold restraints to which every person is necessarily subject for the common good." *Id.*

Since the Second Amendment has been omitted from any discussion of fundamental rights, it can be inferred that the right to bear arms is on a lower tier than these rights which themselves are not absolute. See *Warin*, 530 F.2d at 107 (quoting from *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), which held that First Amendment rights occupy "preferred position" among those guaranteed by Bill of Rights, a position never accorded to Second Amendment rights), *cert. denied*, 426 U.S. 948 (1976).

³¹ *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (asserting ban prohibiting switchblades did not impair state militia, and thus was not violative of Tenth Amendment); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (upholding federal law banning possession of firearm by convicted felons); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (upholding defendant's conviction for receiving firearm transported in interstate commerce), *rev'd on other grounds*, 319 U.S. 463 (1943); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980) (upholding denial of application for permit to carry pistol).

The Second Amendment is unlike other amendments in that it contains its own preamble. See Robert A. O'Hare, Jr. & Jorge Pedreira, Comment, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHN'S L. REV. 179,

the Second Amendment does not protect an absolute right to bear arms.³² Considering the spirit in which the Second Amendment was drafted,³³ coupled with consistent judicial interpretation of the right as neither absolute nor fundamental,³⁴ the right to bear arms historically has been subject to some degree of regulation.³⁵

II. STATE APPROACHES TO GUN CONTROL

The approach to achieving effective gun regulation took a dramatic turn after a massacre in Stockton, California.³⁶ On January 17, 1989, Patrick E. Purdy, a 24-year old drifter, fired 110 rounds from his AK-47³⁷ across an elementary school playground, killing

188 (1992). Interestingly, the preamble is used by both sides of the assault weapons controversy. *Id.*

³² See *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) ("[L]egislative restrictions on the use of firearms . . . [do not] trench upon any constitutionally protected liberties."); *Warin*, 530 F.2d at 107 (stating Second Amendment poses no barrier to congressional firearms regulation); *Kellogg v. City of Gary*, 562 N.E.2d 685, 694 (Ind. 1990) (recognizing Indiana's individual right to bear arms subject to restriction); *Arnold*, 616 N.E.2d at 166-67 (citing cases indicating individuals do not have fundamental right to bear arms under Second Amendment); see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1979) (listing right to bear arms as auxiliary right); *Wagner*, *supra* note 14, at 1447 ("The Supreme Court has found only a limited group of fundamental rights."). *But see id.* at 1449 (citing JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 351 (3d ed. 1986) and indicating Framers considered right to bear arms among most fundamental of all rights).

³³ See Laurel Loomis, *A New Look At Gun Control Legislation: Responding to a Culture of Violence*, 27 BEVERLY HILLS B. ASS'N J. 160, 160 (1993) (claiming American colonists lived in constant conflict with various groups of people, including Native Americans, British, and French).

³⁴ See *supra* notes 30-32 and accompanying text (discussing courts' interpretation of right to bear arms).

³⁵ See *United States v. Warin*, 530 F.2d 103, 107 (6th Cir.) ("Even where the Second Amendment is applicable, it does not constitute an absolute barrier to congressional regulation of firearms."), *cert. denied*, 426 U.S. 948 (1976); *Rice v. United States*, 850 F. Supp. 306, 309 (E.D. Pa. 1994) (dismissing plaintiff's argument that Second Amendment bars congressional regulation of firearms); *State v. LaChapelle*, 451 N.W.2d 689, 690 (Neb. 1990) (stating right to bear arms is not unlimited); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993) (stating right to bear arms is subject to reasonable regulation); *Wagner*, *supra* note 14, at 1457 ("The Second Amendment, however, does not ban all governmental regulation of firearms."). See generally O'Hare & Pedreira, *supra* note 31, at 197 (positing any attempt by N.R.A. to challenge assault weapons ban would be futile).

³⁶ See Carl Ingram, *State's Fight Over Assault Guns May Set Trend In U.S.*, L.A. TIMES, Feb. 12, 1989, at 3. Attorney General John Van de Kamp, in conjunction with other top law enforcement officials, was drafting legislation to ban military assault weapons in California before the slayings occurred in Stockton. *Id.* The shooting increased support for the legislation by California State Senator David A. Roberti and then Assemblyman Mike Roos, making the fight for gun lobbyists more difficult. *Id.*; *Killen, Texas: A Town In Shock; U.S. Mass Murders*, ATLANTA J. AND CONST., Oct. 17, 1991, at A10 (discussing Purdy's killing spree in California).

³⁷ *Schoolyard Gunman Laid To Rest*, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL (Calif.), Jan. 20, 1989, at 1. Purdy entered the Cleveland Elementary School playground wearing combat gear and toting a Chinese-made AK-47, a semiautomatic military rifle. *Id.*

five children and wounding thirty other individuals.³⁸ There was a tremendous public outcry for immediate action.³⁹ Within months, the California legislature passed the Roberti-Roos Assault Weapons Control Act of 1989⁴⁰ which effectively banned the future sale, production, or possession of certain assault weapons within the state.⁴¹ The legislation restricts assault weapons based on their "high rate of fire and capacity for firepower . . ." ⁴² Notwithstanding strong opposition from gun lobbyists,⁴³ it was found that an assault weapon's "function[s] as a legitimate sports or recreational firearm [are] substantially outweighed by the danger that such weapons can be used to kill and injure human beings."⁴⁴ The statewide assault weapons ban was strongly supported by law enforcement groups as well as a majority of the California population.⁴⁵ The legislation has also been upheld by the federal judicial system.⁴⁶

³⁸ *Patrick Purdy's Gun*, WASH. POST, Jan. 19, 1989, at A26 (stating Purdy purchased his AK-47 in Oregon to avoid disclosure of his California criminal record).

³⁹ *California Legislature Passes Law To Ban Assault Guns*, REUTERS, May 18, 1989 [hereinafter *California Legislature Passes Law to Ban Assault Guns*] (noting Stockton tragedy caused public outcry for speedy action); Douglas Jehl, *Debut of Colt's 'Sporter' Revives Assault-Rifle Debate; Firearms: The Maker Says The AR-15 Has Been Stripped of its Paramilitary Features. Gun Control Advocates Call it A Combat Weapon In Disguise*, L.A. TIMES, Apr. 19, 1990, at A18 (noting White House response in addition to public outrage after Stockton massacre); Susan F. Rasky, *Import Ban on Assault Rifles Becomes Permanent*, N.Y. TIMES, July 7, 1989, at A6 (stating public outcry changed President Bush's mind about banning importation of assault weapons).

⁴⁰ CAL. PENAL CODE §§ 12275-12290 (West 1992) (banning sale, production, and possession of military style assault weapons in California).

⁴¹ *See Assault Gun Ban Is Sent to Governor; Compromise Measure Would Make California 1st to Forbid Such Arms*, L.A. TIMES, May 18, 1989, at A1 (discussing final compromise in California Roberti-Roos Bill).

⁴² Roberti-Roos Assault Weapons Control Act of 1989, CAL. PENAL CODE § 12275.5 (West 1990).

⁴³ Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, 514 (1992) (noting despite strong opposition from NRA, assault weapons control legislation has been enacted in several states including California); see Cynthia H. Craft, "Copycat" Gun Ban Survives Critical Vote; *Firearms: Assembly Panel Agrees to Toughen Current Assault Weapons Law by Prohibiting Near-Replicas from Being Made or Sold*, L.A. TIMES, Aug. 26, 1994, at A3 (noting NRA lobbyists and gun group representatives' efforts to defeat bill broadening assault weapons ban in California).

⁴⁴ Roberti-Roos Assault Weapons Control Act of 1989, CAL. PENAL CODE § 12275.5 (West 1990) (employing balancing test as to whether assault weapon function as legitimate sports firearm is substantially outweighed by danger it may be used for murder).

⁴⁵ William D. Murray, *Federal Appeals Court Upholds Ban on Assault Weapons*, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL (Calif.), May 22, 1992 (noting group support for state ban on assault weapons).

⁴⁶ *See Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415, 1419 (E.D. Cal. 1990) (concluding "Constitution had left the question of gun control to the several states" and no federal constitutional provisions had been offended), *aff'd*, 965 F.2d 723 (9th Cir. 1992); see also Murray, *supra* note 45 (noting California's appellate court upheld "hotly debated ban on assault weapons" despite constitutional arguments by NRA).

A. *Application of the Bill of Rights to the States*

As discussed, the right to bear arms, as well as the other rights found in the Bill of Rights, resulted from a mistrust of a strong, potentially oppressive central government.⁴⁷ Accordingly, the Bill of Rights only placed limitations on the power of Congress.⁴⁸ State powers were not affected.⁴⁹ However, in order to protect individual civil rights against encroachment by state government, courts began to apply the Bill of Rights as a bar to state action via incorporation using the Due Process Clause of the Fourteenth Amendment.⁵⁰ For example, a state cannot set up a state religion in violation of the Establishment Clause of the First Amendment due to the Clause's incorporation against the states.⁵¹ The Supreme Court has never explicitly incorporated the Second Amendment to apply against the states.⁵² A minority of the Court once theorized that the Fourteenth Amendment served to incorporate the entire

⁴⁷ See 2 WILLIAM BLACKSTONE, COMMENTARIES 412 (1766) ("[P]revention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . is a reason oftener meant than avowed . . ."); see also Ehrman & Henigan, *supra* note 11, at 33 ("The amendment was to protect the states' ability to maintain effective militia, and to protect against an oppressive federal government."); Maynard H. Jackson, Jr., *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189, 190 n.5 (1977) ("[F]ear of England's standing army was a major grievance of the Colonists, and distrust of the independence of the military characterized the Colonists's [sic] other grievances."); Loomis, *supra* note 33, at 161 (stating one philosophy upon which America was founded was of armed citizenry to fight off oppressive dictatorship).

⁴⁸ See Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1700 (1992) [hereinafter *Incorporation of the Establishment Clause*] (noting Bill of Rights originally applied only against federal government).

⁴⁹ See *Presser v. Illinois*, 116 U.S. 252, 257 (1886) (upholding indictment of Herman Presser for conducting military exercises in streets of Chicago); see also *Miller v. Texas*, 153 U.S. 535, 538 (1894) (rejecting Second and Fourth Amendment challenges because, as part of Bill of Rights, they were not applicable against states).

⁵⁰ See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (interpreting First Amendment Establishment Clause as applying to state legislatures as well as federal government).

⁵¹ See *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (noting Establishment Clause acts as bar to state action by virtue of Fourteenth Amendment); *Everson*, 330 U.S. at 8 (declaring First Amendment to be applicable against states by Fourteenth Amendment).

⁵² See *Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 216 (S.D. Tex. 1982) (preventing Ku Klux Klan from conducting private military training camps); see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 784 (2d ed 1991) (listing Second Amendment as one of rights not incorporated); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2, at 772 (1st ed. 1978) (positing that majority of Supreme Court has never accepted full incorporation of Bill of Rights into Fourteenth Amendment); Book Note, *A Radical Intent*, 101 HARV. L. REV. 869, 872 n.11 (1988) (noting Second Amendment right to bear arms is one never incorporated by Supreme Court); cf. *Kates*, *supra* note 14, at 253 (posing since Supreme Court has only engaged in incorporation after *Miller* decision, due process incorporation of Second Amendment should be strongly considered).

Bill of Rights.⁵³ However, this view of “total incorporation” has never been given legal force by the Court.⁵⁴ Consequently, state restrictions on the possession of various arms, even assault weapons,⁵⁵ cannot offend the Second Amendment and have been upheld by courts of several states.⁵⁶

The Constitution has always been considered a “legal floor” beneath which the laws of the states may not fall.⁵⁷ Thus, when the federal government sets up a minimum standard, under the

⁵³ See *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting) (arguing Fourteenth Amendment should be applied to enforce first eight amendments of Bill of Rights against states).

⁵⁴ See *Adamson v. California*, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring) (stating that out of 43 judges to consider it, only one eccentric exception ever indicated belief that Fourteenth Amendment applied first eight amendments against states); *Palko v. Connecticut*, 302 U.S. 319, 323 (1937) (rejecting broad application of Fourteenth Amendment against entire Bill of Rights); *TRIBE*, *supra* note 52, at 772 (noting that full incorporation of Bill of Rights through Due Process Clause has never been accepted by majority of Supreme Court); Melvin I. Urofsky, *Conflict Among The Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 *DUKE L.J.* 71, 104 (noting that Supreme Court has never applied Black-Douglas view of total incorporation); see also O'Hare & Pedreira, *supra* note 31, at 192 (discussing Supreme Court's rejection of total incorporation); *Incorporation of the Establishment Clause*, *supra* note 48, at 1701 (stating full incorporation has never commanded majority Court opinion).

⁵⁵ See *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415, 1419 (E.D. Cal. 1990) (holding assault weapons ban does not offend any federal constitutional provisions), *aff'd*, 965 F.2d 723 (9th Cir. 1992).

⁵⁶ *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269 (7th Cir. 1982) (upholding village ordinance prohibiting handgun possession), *cert. denied*, 464 U.S. 863 (1983); *Fresno Rifle*, 746 F. Supp. at 1419 (upholding California statute regulating manufacture and transfer of assault weapons); *Crowley Cutlery v. United States*, No. 87 C 8013, 1987 WL 16908, at *1 n.1 (N.D. Ill. September 9, 1987) (permitting ban on importation of switchblades since regulation is not violative of right to bear arms), *aff'd*, 849 F.2d 273 (7th Cir. 1988); *People v. Garcia*, 595 P.2d 228, 230 (Colo. 1979) (upholding prohibition of intoxicated people from possessing firearms); *People v. Blue*, 544 P.2d 385, 390 (Colo. 1975) (stating right to bear arms is not absolute and can be restricted by state); *Sandidge v. United States*, 520 A.2d 1057, 1059 (D.C.) (upholding District of Columbia firearm statute, prohibiting possession of unregistered firearms), *cert. denied*, 484 U.S. 868 (1987); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (upholding ordinance prohibiting possession and sale of assault weapons); *Beaver v. Dayton*, No. 13871, 1993 WL 333641, at *1 (Ohio Ct. App. Aug. 30, 1993) (upholding Dayton's ban of assault weapons); *Hale v. City of Columbus*, 578 N.E.2d 881, 886 (Ohio Ct. App. 1990) (upholding assault weapons ban as valid exercise of state's police power), *cause dismissed*, 569 N.E.2d 513 (Ohio 1991); *cf.* *Springfield Armory v. City of Columbus*, 29 F.3d 250, 254 (6th Cir. 1994) (invalidating Ohio ordinance banning possession of assault weapons due to vagueness, not Second Amendment); *Dowlut*, *supra* note 21, at 79 (citing twenty cases where state arms laws have been found unconstitutional).

⁵⁷ *Arnold*, 616 N.E.2d at 169 (discussing standard provided by United States Constitution as applicable to states); see also Loomis, *supra* note 33, at 168 (stating that any state's waiting period may exceed five days and take precedence over federal waiting period provided that it does not fall below five day minimum); H.R. REP. No. 7, 102d Cong., 1st Sess. § 2 (1991) (discussing House of Representatives view of states already imposing specified waiting period for purchase of handguns, being able to keep such provisions provided that waiting periods are longer than five days).

Supremacy Clause, all states are required to do at least as much as is federally mandated.⁵⁸ However, since the Second Amendment has not been incorporated to restrict the states, if a state chooses to be more restrictive than the federal government, then that is the state's prerogative.⁵⁹ If Congress were to "raise the floor," the states would have to align their regulations with Congress's directive.⁶⁰ For instance, when the federal government raised the minimum wage requirement, all states had to at least meet this minimum standard.⁶¹ Analogizing this to gun control, Congress "raised the floor" in 1986, when machine guns were prohibited from being manufactured or sold to civilians.⁶² As a result, all states are prohibited from allowing the manufacture, transfer, or possession of these guns.⁶³ States are within their realm, however, to impose additional restrictions as deemed appropriate by their respective legislatures.⁶⁴

⁵⁸ See *FERC v. Mississippi*, 456 U.S. 742, 767 (1982) (discussing how cooperative federalism allows states to enact and administer their own way within limits established by federal minimum standards); see also Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993) (discussing concept of legal floor where state courts may not violate United States Supreme Court interpretations of federal law); H. Todd Iveson, *Manufacturer's Liability to Victim's of Handgun Crime: A Common-Law Approach*, 51 FORDHAM L. REV. 771, 775 (1983) (noting Gun Control Act's authority allows for some state action but only that not reserved to Act).

⁵⁹ See Dowlut, *supra* note 21, at 75 (stating that, unlike Congress, state legislatures do not depend upon Constitution for express grant of legislative power).

⁶⁰ See *Moreau v. Klevenhagen*, 113 S. Ct. 1905, 1907-08 (1993) (asserting Congress's power to impose minimum wage and maximum hour requirements under Fair Labor Standards Act); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) (dismissing federal minimum wage requirements as not destructive of state sovereignty); Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles*, 44 FED. COMM. L.J. 1, 30 (1991) (outlining FCC's ability to establish minimum standards for local components of cable regulation); Mary A. Stilts, *The Ever Changing Balance of Power in Interstate Water Pollution: Do Affected States Have Anything to Say After Arkansas v. Oklahoma?*, 50 WASH. & LEE L. REV. 1341, 1341 n.4 (1993) (noting federal Clean Water Act only leaves states autonomy to be more stringent and not less).

⁶¹ *Garcia*, 469 U.S. at 554 (noting lack of state governmental immunity from minimum wage and overtime obligations imposed by Fair Labor Standards Act).

⁶² *Ban Sets Staccato Pace for Machine Gun Sales*, CHI. TRIB., May 29, 1986, at C3 (reporting President Reagan's support for national machine gun ban); Wayne King, *Plinking Away at Federal Gun Control*, N.Y. TIMES, Nov. 16, 1986, at D4 (announcing legislation forbidding future machine gun manufacture for public sale); see also HANDGUN CONTROL INC., *supra* note 2 (outlining current automatic weapons ban). In 1934, Congress also required the registration of all fully-automatic weapons. *Id.*; Wayne King & Warren Weaver Jr., *Washington Talk: Briefing; Gun-Control Struggle*, N.Y. TIMES, Dec. 7, 1986, at 90 (noting ban on further manufacture of machine guns which was passed by Congress).

⁶³ Wayne King & Warren Weaver, Jr., *Washington Talk: Briefing; Split in the Gun Lobby*, N.Y. TIMES, Oct. 12, 1986, at 58 (noting Gun Control Act amendment restricting all machine gun sales and manufacture throughout United States).

⁶⁴ See *Quilici v. Village of Morton Grove*, 695 F.2d 261, 271 (7th Cir. 1982) (upholding local ordinance placing further restrictions with respect to firearms possession), *cert. de-*

B. Judicial Interpretations of State Legislation

In an effort to promote and protect the welfare and safety of their citizenry,⁶⁵ many states, cities, and counties have followed California's lead.⁶⁶ Courts on both the state and federal level have strictly interpreted the Second Amendment to be a protection of the state militia against federal encroachment.⁶⁷ This strict interpretation has allowed some states to enact legislation banning the possession of assault weapons, even though some state constitutions confer a greater right unto their citizens than does the Federal Constitution.⁶⁸ In addition, courts have consistently upheld various prohibitive statutes and ordinances as proper and necessary exercises of police power,⁶⁹ despite the fact that some state

nied, 464 U.S. 863 (1983); *Robertson v. City of Denver*, 874 P.2d 325, 333 (Colo. 1994) (upholding assault weapon ban as within state police powers); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993) (allowing local ban of assault weapons).

⁶⁵ James Stewart & Andrew Alexander, *Assault Weapons Muscling in on the Front Lines of Crime*, ATLANTA J. & CONST., May 21, 1989, at A1 (reporting although assault weapons accounted for approximately one percent of 200 million privately owned firearms in United States, assault weapons were 20 times more likely to be used in crime than conventional firearms); cf. David Freed, *Assault Rifles Are Not Heavily Used In Crimes*, L.A. TIMES, May 20, 1992, at A18 (indicating assault weapons were not prevalent among drug dealers and were involved in less than two percent of fatal shootings investigated by Los Angeles Police Department during 1990 and 1991).

⁶⁶ See *Abrams*, *supra* note 43, at 514 (noting since California banned assault weapons, increasing numbers of jurisdictions have enacted some type of assault weapon control legislation); *O'Hare & Pedreira*, *supra* note 31, at 196-97 (noting 27 cities and counties which enacted assault weapons legislation in 1989 after Stockton massacre); see also *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (upholding local ordinance prohibiting possession of handguns), *cert. denied*, 464 U.S. 863 (1983); cf. *Levinson*, *supra* note 14, at 655 (commenting that determination by Congress denying possession of assault weapons to private citizens would be supported by judiciary); see generally *Wagner*, *supra* note 14, at 1457 (suggesting banning possession of assault weapons may be justified by government's compelling interest).

⁶⁷ *Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("[Second Amendment] has no other effect than to restrict the powers of the National government."); *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942) (upholding federal regulation against interstate shipment of firearms to persons convicted of crimes of violence), *rev'd on other grounds*, 319 U.S. 463 (1943); *Burton v. Sills*, 248 A.2d 521, 530, 531 (N.J. 1968) (upholding New Jersey's gun control law, licensing of manufacturers and wholesalers, as well as issuance of permit and identification cards), *appeal dismissed*, 394 U.S. 812 (1969); see also *Kates*, *supra* note 14, at 211-12 (posing that Second Amendment is viewed by some as responding to U.S. CONST. art. I, § 8, cl. 15, 16 which gives Congress power to call out militia and arm it); *Udulutch*, *supra* note 18, at 32 (asserting federal government is prohibited only by Second Amendment from eliminating state militia's power to arm itself). *But see Nunn v. State*, 1 Ga. 243, 251 (1846) (holding all people have right to bear arms for traditionally lawful purposes).

⁶⁸ *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993) (holding Ohio Constitution conferred upon individuals right to bear arms but did not prohibit ban of assault weapons); see also *Henigan*, *supra* note 16, at 9 (noting lack of incorporation of Second Amendment renders argument against ban nullity).

⁶⁹ See *Robertson v. City of Denver*, 874 P.2d 325, 333 (Colo. 1994) (upholding ordinance banning possession, sale, or manufacture of assault weapons as reasonable exercise of state's police power); *People v. Atencio*, 878 P.2d 147, 150 (Colo. Ct. App. 1994) (concluding

and federal constitutions provide for individual⁷⁰ as well as collective rights to bear arms.⁷¹

For instance, in *Robertson v. City of Denver*,⁷² the Supreme Court of Colorado upheld a city ordinance banning assault weapons despite the state's constitutional right to bear arms.⁷³ Similarly, in *Arnold v. City of Cleveland*,⁷⁴ an ordinance enacted by the Cleveland City Council, banning the possession and sale of assault weapons, was validated as a proper exercise of police power by the Ohio Supreme Court, even in the face of Ohio's constitutional grant of an individual right to bear arms.⁷⁵

State and city initiatives to control assault weapons have the potential to serve the specific needs of these communities since the legislatures have the power and resources necessary to develop customized solutions.⁷⁶ Nevertheless, many states do not impose statutory controls on the manufacture or sale of assault weapons.⁷⁷

As a case in point, New York City has very strict gun control laws which prohibit the "possession or disposition of assault weapons."⁷⁸ However, legislative attempts to enact similar restrictions

Colorado statute limiting right to bear arms for self-defense purpose as protected by Colorado Constitution is valid exercise of state's police power); *Arnold*, 616 N.E.2d at 173 (validating ordinance prohibiting possession and sale of assault weapons within Cleveland).

⁷⁰ See *Arnold*, 616 N.E.2d at 171 (interpreting Ohio constitutional right to bear arms as fundamental, individual right, not absolute right).

⁷¹ See U.S. CONST. amend. II; *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.) (interpreting Second Amendment guarantee as collective rather than individual right), *cert. denied*, 426 U.S. 948 (1976).

⁷² *Robertson*, 874 P.2d at 351.

⁷³ *Id.* at 331-33 (reasoning states may properly exercise their police power by enacting laws to protect public health, safety, and welfare).

⁷⁴ 616 N.E.2d 163 (Ohio 1993).

⁷⁵ *Id.* at 170-71 (reasoning right to bear arms, as provided by Ohio Constitution, is fundamental but not absolute right); see *Beaver v. City of Dayton*, No. 13871, 1993 WL 333641 (Ohio Ct. App. Aug. 30, 1993) (finding Dayton ordinance, identical to Cleveland ordinance in *Arnold*, permissible).

⁷⁶ *California Legislature Passes Law to Ban Assault Guns*, *supra* note 39 (noting state Assembly's plan to outlaw military-style guns in face of local incidence like one in Stockton).

⁷⁷ Udulutch, *supra* note 18, at 43 (noting lack of uniformity in state firearms control laws); see also Shawn G. Kennedy, *Crime Bill Bans the Clip Used in Rifle*, N.Y. TIMES, Sept. 2, 1994, at B2. William Emanuel Tager was arrested for the murder of Campbell Montgomery. *Id.* There was some indication that the semiautomatic rifle used in the murder was purchased in North Carolina, where rifles may be easily purchased without a waiting period. *Id.*

⁷⁸ NEW YORK, N.Y., ADMIN. CODE ch. 3, § 10.303.1(a) (1991). "It shall be unlawful for any person to possess or dispose of any assault weapon within the city of New York . . ." *Id.*; see also OFFICE OF JUSTICE SYS. ANALYSIS, DIV. OF CRIM. JUSTICE SERVICES, ASSAULT WEAPONS AND HOMICIDE IN NEW YORK (1994) [hereinafter ASSAULT WEAPONS AND HOMICIDE IN NEW

statewide in New York have been unsuccessful up to this point,⁷⁹ thus weakening attempts to control and reduce the incidence of violent crimes involving guns and assault weapons within New York City's limits.⁸⁰

III. FEDERAL APPROACH TO GUN CONTROL

Since assault weapon regulations vary,⁸¹ the proliferation of weapons obtained from inadequately regulated or completely unregulated areas undermines attempts to control the destructive power of assault weapons within other communities.⁸² The incongruity and ineffectiveness of gun restrictions among states support Congress's enactment of the Anti-Crime Act as a means of controlling assault weapons from a national perspective.⁸³

The Violent Crime Control and Law Enforcement Act of 1994 is Congress's first ban of assault weapons, but it is not the first time that gun control legislation has made its way through Congress.⁸⁴ The federal government's role in gun control has become increas-

YORK] (examining use of assault weapons in homicides committed in New York City during 1993).

⁷⁹ See ASSAULT WEAPONS AND HOMICIDE IN NEW YORK, *supra* note 78 (1994) (underscoring need for New York regulation of assault weapons in order to decrease their use in violent crimes). Legislation proposed by former Governor Mario Cuomo has been passed by the New York State Assembly but not the state Senate as of yet. *Id.*

⁸⁰ *Assault Weapons as a Public Health Hazard in the United States; American Medical Association Council on Scientific Affairs Report*, 267 JAMA 3067, 3069 (1992) [hereinafter *Assault Weapons as a Public Health Hazard*] (noting lack of state consensus as to control of assault weapons).

⁸¹ See *id.* (discussing state and local enactments regulating assault weapons).

⁸² See THE HONORABLE RUDOLPH W. GUILIANI, MAYOR OF THE CITY OF NEW YORK & WILLIAM J. BRATTON, POLICE COMMISSIONER, POLICE STRATEGY No. 1: GETTING GUNS OFF THE STREETS OF NEW YORK, at 6 (Mar. 7, 1994) (confirming that over 90% of firearms seized in New York City were originally purchased in other states); Markus Boser, *Go Ahead, State, Make Them Pay: An Analysis of Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313, 322 (1992) (concluding absent federal legislation, solutions at state and local levels are likely to be ineffective).

⁸³ See Abrams, *supra* note 43, at 516, 519 (1992) (supporting national ban on assault weapons, with caution, as possible solution to reduce the proliferation of assault weapons in United States); Udulutch, *supra* note 18, at 23, 43, 50-54 (asserting need for increased controls on semiautomatic weapons and proposing federal ban as viable solution); Richard H. Kuh, *The Firearm Explosion: The Bar Has Not Been Silent*, 211 N.Y. L.J., Jan. 2, 1994, at 13 (noting American Bar Association's active support of gun control since 1965 and need for further legislation limiting availability of assault weapons); see also 140 CONG. REC. H3064, 3067, 3072 (1994) (disclosing that during House debate, several representatives urged legislature to follow California's lead and pass national assault weapons ban); 140 CONG. REC. 115, S11,852 (1994) (statement of Sen. Biden citing support for Anti-Crime Act from twelve law enforcement organizations throughout country).

⁸⁴ See Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 1202 (1988) (prohibiting convicted felon from receiving, possessing, or transporting firearms); National Firearms Act of 1934, 26 U.S.C. § 1132 (1988) (barring any transportation of firearms without regulation); Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat.

ingly restrictive as the sophistication of weapons increases⁸⁵ and the effectiveness with which law enforcement officials are able to combat this problem decreases.⁸⁶

A. *The National Firearms Act of 1934*

The National Firearms Act of 1934⁸⁷ (the "Act") was Congress's first venture into gun control.⁸⁸ It was also the source of the controversy that gave the Supreme Court an opportunity to interpret the rights conferred by the Second Amendment.⁸⁹ In *United States v. Miller*,⁹⁰ Jack Miller transported a sawed-off shotgun across interstate lines without registering it pursuant to the Act.⁹¹ The United States District Court for the Western District of Arkansas held that Miller's conviction under the Act could not be sustained, since the Act violated the Second Amendment.⁹² The Supreme Court reversed the lower court's decision and stated that the National Firearms Act did not violate the Constitution.⁹³ Thus, the

1536 (1993) (outlining statutory waiting period permitting chief law enforcement officer to conduct background check).

⁸⁵ See *Robertson v. City of Denver*, 874 P.2d 325, 332 n.16 (Colo. 1994) (quoting J. LEWIS, *THE GUN DIGEST BOOK OF ASSAULT WEAPONS* 48 (2d ed. 1989), which states that assault weapons can deliver large number of shots without needing to stop and slam-in fresh magazine); see also *Addison v. Williams*, 546 So. 2d 220, 227 (La. Ct. App.) (discussing Colt M-16 assault rifle's design which includes ability of bullet to tumble on impact to "increase the killing and maiming capabilities"), *cert. denied*, 550 So. 2d 634 (La. 1989).

⁸⁶ See *George J. Church, The Other Arms Race; America's Streets Become Free-Fire Zones as Police, Criminals and Terrified Citizens Wield More and Ever Deadlier Guns*, *TIME*, Feb. 6, 1989, at 20; see also *Ann Devroy, Clinton Renews His Call For Gun Control Laws*, *WASH. POST*, Sept. 25, 1993, at A4 (discussing President Clinton's awareness of level of weaponry possessed and adverse impact such weapons have on law enforcement officials' effectiveness); *Pierre Thomas & Guy Gugliotta, L.A. Scenes Led to Pleas for Peace—and Call to Arms; California Firearms Sales Surge*, *WASH. POST*, May 18, 1992, at A4 (depicting lawless scene during L.A. riots where merchants brandished shotguns to ward off looters while fire fighters were shot at while trying to quell flames).

⁸⁷ 26 U.S.C. § 5861 (1988) (barring any transportation of firearms without registration).

⁸⁸ See *Loomis*, *supra* note 33, at 162 (noting first ban on handguns was enacted in 1837, but dismissing it as insignificant when compared with later federal government legislation, such as the Gun Control Act of 1968).

⁸⁹ See *Kates*, *supra* note 14, at 250 ("*Miller* is the Supreme Court's first and last extended treatment of the second amendment."); see also *Cottrol & Diamond*, *supra* note 24, at 310 (noting debate over Second Amendment is "constitutional debate that has taken place largely in the absence of a Supreme Court decision"); *Ehrman & Henigan*, *supra* note 11, at 41 ("*Miller* is the Court's only extensive treatment of the meaning of the second amendment.>").

⁹⁰ 307 U.S. 174 (1939) (holding National Firearms Act of 1934, which banned importation of firearm without registering it, to be constitutional).

⁹¹ *Id.* at 175.

⁹² *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark.) (finding National Firearms Act valid), *rev'd*, 307 U.S. 174 (1939).

⁹³ *Miller*, 307 U.S. at 183.

Court held that a provision which placed restrictions on the right to keep and bear arms was constitutional.⁹⁴

B. Omnibus Crime Control and Safe Streets Act of 1968

The Omnibus Crime Control and Safe Streets Act (the "Gun Control Act")⁹⁵ prohibits convicted felons from "receiv[ing], possess[ing] or transport[ing] a firearm."⁹⁶ The Supreme Court, in *Lewis v. United States*, upheld the validity of the Gun Control Act.⁹⁷ Although the Court did not deem this a Second Amendment question, the regulation of the right to bear arms was never challenged.⁹⁸ The only reason the case was before the Court was because Lewis's prior felony conviction was obtained without the presence of counsel.⁹⁹ Notwithstanding the Second Amendment, the Court allowed a denial of any right to bear arms to an entire class of people.¹⁰⁰ It may be inferred from this decision that additional gun regulation, such as a prohibition of assault weapons, may be accomplished through federal legislation.¹⁰¹

Although the Supreme Court has not spoken explicitly on the Gun Control Act in terms of the Second Amendment, United States Courts of Appeals have upheld the validity of the Gun Control Act in the face of Second Amendment challenges.¹⁰² Unless the Supreme Court has held otherwise, the circuit courts' view

⁹⁴ *Id.* at 178; see also *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942) (stating National Firearms Act not violative of Second Amendment), *cert. denied*, 319 U.S. 770 (1943).

⁹⁵ Pub. L. No. 90-351, 82 Stat. 1213 (prohibiting convicted felon from receiving, possessing, or transporting firearms) (codified as amended at 18 U.S.C. § 922(g) (1988 & Supp. V 1993)).

⁹⁶ *Id.*

⁹⁷ 445 U.S. 55, 66 (1980).

⁹⁸ *Id.* at 65 n.8. The Court stated: "[L]egislative restrictions on the use of firearms are neither based upon the constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Id.*

⁹⁹ *Id.* at 55 (noting state felony conviction without presence of counsel is unconstitutional).

¹⁰⁰ *Id.* at 66 (recognizing power of legislature to prohibit activities of felons far more fundamental than right to bear arms).

¹⁰¹ See O'Hare & Pedreira, *supra* note 31, at 197 (positing futility of challenges to assault weapons ban). The authors also noted that for any gun regulation to be effective, it must be done at the federal level. *Id.* at 204; see also Udulutch, *supra* note 18, at 50 (advocating federal assault weapon ban without fear of constitutional offense).

¹⁰² See *Mitchell Arms v. United States*, 7 F.3d 212, 212 (Fed. Cir. 1993) (upholding revocation of importer's permits as valid under Gun Control Act), *cert. denied*, 114 S. Ct. 2100 (1994); *United States v. Walker*, 489 F.2d 1353, 1358 (7th Cir. 1973) (reversing district court which dismissed indictment under Act), *cert. denied*, 415 U.S. 982 (1974); *Brennan v. United States*, 435 F. Supp. 451, 454 (E.D. Mich. 1977) (denying any argument that Act is violative of Second Amendment).

that restrictive legislation does not offend the constitutional notion of the right to bear arms will continue.¹⁰³

C. *Brady Handgun Violence Prevention Act*

The Brady Handgun Violence Prevention Act (the "Brady Act")¹⁰⁴ is the most recent federal gun legislation prior to the passage of the Anti-Crime Act.¹⁰⁵ The Brady Act imposes a five day waiting period before the purchaser of a handgun is allowed to take possession.¹⁰⁶ The Brady Act has two major purposes: the first is to prevent those who have shown a demonstrated propensity toward committing crimes from obtaining a firearm; the second is to deter those who may be considering committing a crime, by mandating a time period in which they can reconsider.¹⁰⁷ The validity of the Brady Act has yet to be determined by the Supreme Court.¹⁰⁸ Lower courts, however, have declined to strike the Brady Act down based on any Second Amendment grounds.¹⁰⁹

Even the strongest opponent of gun control would be likely to acknowledge that the government has a compelling and legitimate interest in protecting the citizenry from gun-related violence.¹¹⁰

¹⁰³ See *United States v. Decker*, 446 F.2d 164, 166 (8th Cir. 1971) (upholding validity of Gun Control Act and rejecting argument that Act was unconstitutionally vague); *United States v. McCutcheon*, 446 F.2d 133, 136 (7th Cir. 1971) ("[Act] was not unconstitutional as an invasion of police powers reserved to the state."); see also Ehrman & Henigan, *supra* note 11, at 7 (stating Second Amendment erects no "real barrier" to federal laws affecting firearms).

¹⁰⁴ Pub. L. No. 103-159, 107 Stat. 1536 (1993).

¹⁰⁵ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

¹⁰⁶ *Id.* (outlining statutory waiting period permitting chief law enforcement officer to conduct background check).

¹⁰⁷ See *Loomis*, *supra* note 33, at 167 (expounding waiting period which permits purchaser to "cool down, if the purchase was made in the heat of passion").

¹⁰⁸ See Cottrol & Diamond, *supra* note 24, at 310 (pointing out Supreme Court has been reluctant to decide any Second Amendment controversies); see also Diemer, *supra* note 9, at 4A (quoting Texas Law School professor Sanford Levinson, who said that he doubted federal courts would "pick a fight" with Congress over assault weapons).

¹⁰⁹ See *Printz v. United States*, 854 F. Supp. 1503, 1519-20 (D. Mont. 1994) (invalidating one clause of Brady Handgun Violence Prevention Act while upholding remainder of Act); see also *Mack v. United States*, 856 F. Supp. 1372, 1383 (D. Ariz. 1994) (denying enforceability of portion of Brady Act while still upholding constitutionality of entire Act); *McGee v. United States*, No. 2:94-CV-67PS, 1994 U.S. Dist. LEXIS 10610, at *17 (S.D. Miss. June 2, 1994) (holding section of Brady Bill unconstitutional).

¹¹⁰ See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519 (1989) (holding protection of human life and health are compelling governmental interests); *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1184-85 (N.D. Ill. 1981) (upholding village ordinance banning possession of handguns), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); see also *Gun South Inc. v. Brady*, 877 F.2d 858, 867 (11th Cir. 1989) "The public interest in avoiding the importation of possible illegal assault rifles which could contribute significantly to this country's violent crime epidemic is clearly substantial." *Id.*; 140 CONG. REC. S12,285, 12,288 (1994) (statement of Ms. Moseley-Braun commenting assault weap-

Handgun regulation, such as the Brady Act, is one step towards reducing the proliferation of violence in the United States of America,¹¹¹ but it is far from adequate.¹¹² Such regulation does not include assault weapons, which are twenty times more likely to be used in a crime than a conventional firearm,¹¹³ and are increasingly becoming the weapons of choice for drug dealers, mass murderers, street gangs, and terrorists.¹¹⁴ It is apparent that ad-

ons serve no other purpose but to kill as many humans as possible); Wagner, *supra* note 14, at 1453-54 (asserting prevention of violent crimes serves as justification in banning of assault weapons).

¹¹¹ See Levinson, *supra* note 14, at 655. The author quoted former Justice Lewis Powell, who noted that since there were over 40,000 murders committed in the United States in 1986, he could not understand why the Second Amendment "should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number of murders in our society." *Id.* But see Kates, *supra* note 14, at 205 n.3 (citing NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, WEAPONS, CRIME AND VIOLENCE IN AMERICA (1981)). The author noted:

It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily available at hand, and thus, that much homicide would not occur were firearms generally less available.

There is no persuasive evidence that supports this view.

Kates, *supra* note 14, at 205.

¹¹² United States v. Warin, 530 F.2d 103, 108 (6th Cir.) ("There can be no question that an organized society which fails to regulate the importation, manufacture and transfer of the highly sophisticated lethal weapons in existence today does so at its peril."), *cert. denied*, 426 U.S. 948 (1976); see also Wendy Kaminer, *Crime and Community; Part 1, THE ATLANTIC*, May 1994, at 111 (saying Brady Act probably will have little effect on gun violence).

¹¹³ Wagner, *supra* note 14, at 1457 n.266 (quoting L. Stanley Chauvin Jr., *Time to Assault Weapons*, A.B.A. J., May 1990, at 8). Assault weapons are twenty times more likely to be used in crimes than conventional firearms. *Id.* Criminals prefer these weapons because they have features such as a large ammunition capacity, rapid fire capability, and ease of concealment. *Id.* at 14; see also Horwitz, *supra* note 10, at 133 (detailing dangers inherent in assault weapons). "[O]ne of [assault weapons] most obvious non-sporting applications is in the criminal area." *Id.*; Udulutch, *supra* note 18, at 133. "[S]emi-automatic weapons . . . have become the weapon of choice for drug gangs in the United States." *Id.* See Church, *supra* note 86, at 23. "Richard Stutman, head of the Drug Enforcement Agency in New York, stated that the rise in the use of semi-automatic weapons parallels the rise in the number of crack-cocaine dealers and that the Drug Enforcement Agency's raids typically result in the seizure of high quality semi-automatic weapons." *Id.*

¹¹⁴ See Udulutch, *supra* note 18, at 53 (stating assault weapons are weapons of choice of street gangs); see also O'Hare & Pedreira, *supra* note 31, at 204-05 (thinking drug dealers could penetrate U.S. borders for millions in illegal profits and will arm themselves accordingly); Roger K. Lowe, *House OKs Assault Weapons Ban; White House Basking in a Dramatic Victory*, COLUM. DISPATCH (Ohio), May 6, 1994, at 1A (quoting Ohio Attorney General Lee Fisher who stated assault weapons were used by most vicious criminals in society); News (CNN television broadcast, May 2, 1994) (quoting President Bill Clinton, who stated assault weapons are weapons of choice for gangs and terrorists); Joseph Mianowany, *The Semiautomatic Battle: The NRA's Waterloo?*, UPI, March 26, 1989, at 1 (pointing to vocal police organizations arguing for assault weapons ban which are guns of choice for drug dealers); *Paying The Bill For Violence*, NAT'L L.J., Jan. 28, 1991, at 13 (stating assault weapons are 25 times more likely to be used in drug crimes).

ditional regulation is necessary to stem this rising tide of gun use.¹¹⁵

IV. VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

A. *The Assault Weapons Ban*

In September of 1994, Congress passed the first comprehensive anticrime legislation in six years,¹¹⁶ described by President Clinton as "the toughest, largest, smartest federal attack on crime in the history of our country."¹¹⁷

The Violent Crime Control and Law Enforcement Act of 1994 (the "Anti-Crime Act")¹¹⁸ includes an assault weapons ban sponsored by California Senator Dianne Feinstein.¹¹⁹ The Feinstein Amendment¹²⁰ to the Anti-Crime Act incorporates a ban of nineteen assault weapons,¹²¹ copycat models,¹²² and large-capac-

¹¹⁵ O'Hare & Pedreira, *supra* note 31, at 204 (noting need for federal intervention by regulating assault weapons).

¹¹⁶ See Ann Devroy & Kenneth J. Cooper, *\$30 Billion Voted to Combat Crime—Clinton Seeks Credit for 'Toughest' Bill*, WASH. POST, July 29, 1994, at A1 (discussing provisions for hiring of 100,000 new police officers, banning certain assault weapons, spreading death penalty to sixty additional crimes, and funding for additional crime prevention and prisons); Daniel Klaidman, *Justice Department Turf Battle Over Crime Bill's \$30B; Politicians Trying to Wrest Control of Purse Strings*, THE RECORDER, Sept. 20, 1994, at 1 (discussing star-spangled signing ceremony of "massive crime bill").

¹¹⁷ Devroy & Cooper, *supra* note 116, at A1. President Clinton addressed voter concern about crime by promoting the Anti-Crime Act at a Justice Department ceremony. *Id.*

¹¹⁸ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

¹¹⁹ 139 CONG. REC. S15,815 (daily ed. Nov. 17, 1993). The Senate adopted the Feinstein Amendment to the 1993 Crime Bill restricting the manufacture, transfer, and possession of certain semiautomatic assault weapons and large capacity ammunition from feeding devices by a vote of 56 to 43 on November 17, 1993. *Id.*; see also George Raine, *Law Officials, Victims Fete Triumphant Sen. Feinstein; Assault Weapon Ban—Her Greatest Legislative Victory*, S.F. EXAMINER, Aug. 27, 1994, at A12 (discussing Senator Feinstein's sponsor of controversial assault weapons ban in Anti-Crime Act).

¹²⁰ Pub. L. No. 103-322, § 110102 (restricting manufacture, transfer, and possession of certain semiautomatic assault weapons); Pub. L. No. 103-322, § 110103 (banning large capacity ammunition feeding devices).

¹²¹ BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ASSAULT WEAPONS PROFILE 1-17 (1994) [hereinafter B ATF, ASSAULT WEAPONS PROFILE]. Assault weapons are large capacity, semiautomatic firearms configured for rapid fire, combat use. *Id.* at 19. The Anti-Crime Act prohibits the future manufacture, transfer, and possession of these nineteen assault weapons: AK's (Norinco, Mitchell, Poly Technologies), M-10, M-11, M-11/9, and M-12, Action Arms UZI and Galil, Beretta AR-70, Colt AR-15, Fabrique Nationale (FN/FAL, FN/LAR, and FNC), Steyr AUG, Intratec (TEC-9, TEC-DC9, and TEC-22), and Street Sweeper/Striker 12 (including USAS 12). *Id.* at 1-17.

¹²² Memorandum from Senator Dianne Feinstein 3 (Aug. 31, 1994) [hereinafter Feinstein Memorandum] (on file with authors). "Copycat models" refers to all semiautomatic assault pistols and rifles with detachable magazine as well as semiautomatic shotguns with two of these assault characteristics: rifles—folding/telescoping stock, protruding pistol grip, bayonet mount, threaded muzzle or flash suppressor, and grenade launcher; pistols—

ity gun clips,¹²³ while carefully exempting over 650 conventional sporting firearms.¹²⁴ The inclusion of "copycat models" in the legislation is essential for the success of this federal ban on assault weapons to ensure that minor alterations in the manufacture of the designated weapons will not slip through an unforeseen loophole.¹²⁵ Many of the guns included in the Anti-Crime Act are already banned from importation into the United States,¹²⁶ but this ban has had little impact since many of the weapons are being legally manufactured in this country.¹²⁷

The vigorous debate over the assault weapons ban has revealed many inconsistent statistical results with regard to the use of assault weapons in violent crimes.¹²⁸ A reason for these inconsisten-

magazine outside grip, threaded muzzle, barrel shroud, unloaded weight of 50 ounces or more, semiautomatic version of automatic weapon; shotguns—folding/telescoping stock, protruding pistol grip, detachable magazine capability, fixed magazine capacity greater than 5 rounds. *Id.*

¹²³ *Gunning for the Crime Bill* . . . , WASH. POST, Aug. 6, 1994, at A18 (noting Anti-Crime Act included provision banning ammunition-feeding devices holding more than ten rounds); see also Kennedy, *supra* note 77, at B2. Brooklyn Congressman Charles E. Schumer stated the importance of outlawing clips that hold more than ten bullets: "If this gunman had chosen to, he could have shot 29 more people without pausing to reload."; *id.* at B2 (noting importation of semiautomatic assault rifle used in killing of stagehand at Rockefeller Center has been illegal since May 1994, but standard ammunition clip used in shooting is banned in Anti-Crime Act of September 1994).

¹²⁴ See BATF, ASSAULT WEAPONS PROFILE, *supra* note 121, at 20 (noting Anti-Crime Act does not threaten law abiding gun owners); Feinstein Memorandum, *supra* note 122, at 1 (expressing her conviction to protect rights of law-abiding citizens to possess weapons for "target, sporting, or other legitimate recreational purposes").

¹²⁵ See Katharine Q. Seelye, *Texas Legislator Seeking to Soften Assault-Arms Ban*, N.Y. TIMES, July 22, 1994, at A18 (noting that deleting "copycat models" from Anti-Crime Act would weaken ban on assault weapons); see also Craft, *supra* note 43, at A3 (discussing bill to broaden California's assault weapons ban to include copycat models to prevent manufacturers from easily circumventing legislation).

¹²⁶ BATF, ASSAULT WEAPONS PROFILE, *supra* note 121, at 1-17. The firearms that are banned in the Anti-Crime Act were banned from being imported into the United States for not meeting the sporting purpose criteria under the Gun Control Act. *Id.* at 19. Prior to the ban, however, hundreds of thousands of these guns had already been imported and presently remain in circulation today. *Id.* at 19.

¹²⁷ See *id.* at 1-17. The following firearms that were banned from importation under the Gun Control Act were being manufactured in the United States prior to the Anti-Crime Act of 1994: approximately 100,000 of the M-10, M-11, M-11/9, and M-12 semi-automatic assault pistols; approximately 400,000 Colt AR-15s. *Id.* Subsequent to the ban on being imported into the United States, the Stetr AUG rifles have been manufactured in limited quantities in the United States. *Id.* Subsequent to the importation ban, the Street Sweeper/Striker 12 (including the USAS 12) assault shotguns have been manufactured in the United States. *Id.*

¹²⁸ See *id.* at 19 (noting although assault weapons account for less than one percent of all firearms in United States, they turn up in eight percent of crime guns traced by Bureau). Compare Charles Laurence, *Clinton Ban on 'Ugly Killing Machines' Angers Gun Lobby; Critics Say the Crime Bill Strikes a Blow Against a Right Rooted in the Wild West*, THE DAILY TELEGRAPH (London), Aug. 29, 1994, at 11 (noting that Handgun Control also reports that assault rifles and semiautomatics are 20 times more likely to be used in crime than other firearms) and Jim Wolf, *Debate Rages in U.S. Over Assault Weapons*, REUTERS, Apr.

cies may be that prior to the Feinstein Amendment, there was no accepted federal definition of an assault weapon.¹²⁹ To remedy this problem, the Anti-Crime Act provides the first and only national statutory definition of an assault weapon.¹³⁰ Since there are no national registration procedures for purchases of assault weapons,¹³¹ it is virtually impossible to ascertain an accurate count of weapons in the United States.¹³² In addition, since classifications of assault weapons vary,¹³³ the incidence of violent crimes involving specific assault weapons is difficult to assess.¹³⁴

17, 1990 (citing *Atlanta Journal*, discussing government study indicating that assault guns are 20 times more likely to be used in crime than conventional firearms) with Eric C. Morgan and David B. Kopel, *The "Assault Weapon" Panic, Political Correctness Takes Aim at the Constitution*, INDEPENDENCE INST., Apr. 10, 1993, at 23 (contending that assault weapons are used in only one percent of gun crime).

¹²⁹ See *Assault Weapons as a Public Health Hazard*, *supra* note 80, at 3068 (suggesting lack of precise definition has been obstacle to successful federal legislation restricting assault weapons).

¹³⁰ See Carl Ingram, *Lungren, Roberti OK Rewriting of '89 Gun Law*, L.A. TIMES, Aug. 29, 1991, at A3 (noting California's legislature overcame major opposition from NRA and enacted nation's first prohibition of high-capacity paramilitary firearms).

¹³¹ See *Assault Weapons as a Public Health Hazard*, *supra* note 80, at 3608 (noting gun manufacturers are not required to release sales figures); HANDGUN CONTROL INC., H.R.4296, QUESTIONS & ANSWERS 1 (1994) (noting assault weapons lawfully possessed prior to Anti-Crime Act's effectiveness may be retained without registration).

¹³² *Assault Weapons as a Public Health Hazard*, *supra* note 80, at 3068 (noting reliable estimates on number of assault weapons owned by private citizens in United States are unavailable); see also Wolf, *supra* note 128 (presenting both sides of the debate over assault weapons).

¹³³ See Wolf, *supra* note 128 (noting lack of precise definition of assault weapon).

¹³⁴ See *id.* (noting actual numbers of deaths and injuries caused by assault weapons are not known since no separate category for assault weapons in FBI's Uniform Crime Reports exists); see also Memorandum from Richard H. Girgenti, New York State Director of Criminal Justice and Commissioner, Division of Criminal Justice Services 1 (June 22, 1994) [hereinafter Memorandum from Richard H. Girgenti] (on file with authors). Legislation proposed in New York State defines assault weapon as "any centerfire semiautomatic rifle, shotgun or pistol capable of having loaded in its magazine and chamber more than six cartridges for a long gun and ten cartridges for a pistol." *Id.* "Also included in the definition [of assault weapons] are makes and models of semiautomatic firearms of military design (and their copies) and semiautomatic weapons with military style characteristics such as flash suppressors, grenade launchers, night sights, barrel jackets or multi-burst trigger activators." *Id.* The definition of an "assault weapon" in the New York State legislation is different from the definition in the Anti-Crime Act of 1994. See ASSAULT WEAPONS AND HOMICIDE IN NEW YORK, *supra* note 78, at 7. Specifically, the researchers concluded that: the assault weapons were involved in at least 16 percent (43 cases) of the 271 homicides where discharged firearms were recovered, and in 25 percent of the 169 homicides where a recovered firearm was positively linked with ballistic evidence from the crime. The majority of these assault weapons were semiautomatic pistols equipped with large-capacity ammunition magazines.

Id.; see also Memorandum from Richard H. Girgenti, *supra*, at 2. "Richard H. Girgenti, Commissioner of DCJS and Governor Cuomo's chief criminal justice advisor said that the 25 percent figure indicates that past claims regarding the use of assault weapons in homicides have underestimated their involvement." *Id.*

Using the weapons identified in the Anti-Crime Act, in April of 1994, an "Assault Weapons profile" released by the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms ("BATF") announced that the nineteen assault weapons targeted in the Anti-Crime Act comprise only one percent of the guns in circulation in the United States.¹³⁵ However, these weapons account for up to eight percent of the guns traced to criminal activity.¹³⁶ These assault weapons are preferred by criminals over law-abiding citizens eight to one, ranking in the top ten of all guns traced to criminal activity.¹³⁷ Consequently, Congress's wholesale ban of these weapons has been deemed as the most appropriate solution to criminal gun use.¹³⁸ The ban has been recognized as such by prominent organizations, including the American Bar Association,¹³⁹ the American Medical Association,¹⁴⁰ and many law enforcement groups.¹⁴¹

¹³⁵ See Laurence, *supra* note 128, at 11 (noting that with two million semiautomatic weapons among 200 million guns in America, some critics believe that assault weapons ban in Crime Bill will have little impact).

¹³⁶ BATF, ASSAULT WEAPONS PROFILE, *supra* note 121, at 19; see also Kenneth J. Cooper, *Crime Bill Negotiators Agree to Ban Some Assault Weapons*, WASH. POST, July 28, 1994, at A14 (noting although military-style weapons like those used at Branch Davidian complex have been used in relatively small percentage of crimes, police still complain of being out-gunned by criminals possessing "rapid-fire weapons").

¹³⁷ See BATF, ASSAULT WEAPONS PROFILE, *supra* note 121, at 19 (supporting need for national assault weapons ban); Cathleen Decker, *Bush Opposes Federal Ban on Assault Rifles; Would Leave Any Restrictions Up to State*, L.A. TIMES, Feb. 17, 1989, at 1 (noting police assessment that semiautomatic firearms "have become tool of choice among drug dealers and gang members across the nation").

¹³⁸ See *infra* notes 139-41 and accompanying text (noting approval of and need for assault weapons ban).

¹³⁹ *Violent Crime Control and Law Enforcement Act: Hearings Before the House Subcommittee on Crime and Criminal Justice*, 103d Cong., 2d Sess., Feb. 22, 1994 (testimony of Randolph N. Stone, Chairperson Criminal Justice Section, American Bar Association pledging ABA's support of comprehensive assault weapons ban); Kuh, *supra* note 83, at 2 (reporting ABA support and urging congressional attention for gun control).

¹⁴⁰ *Assault Weapons as a Public Health Hazard*, *supra* note 80, at 3067 (citing A.M.A. support for legislation restricting sale and private ownership of large-clip, automatic and semiautomatic firearms).

¹⁴¹ *Assault Weapons Hearings*, *supra* note 11 (testimony of Kenneth T. Lyons, National President, International Brotherhood of Police Officers pledging support of largest police union in country for national ban); Bea, *supra* note 4, at 38 (noting law enforcement support for assault weapons control from many organizations); *Clinton-Gore Endorsed By Nation's Largest Police Union*, U.S. NEWSWIRE, Oct. 9, 1992 (reporting support of over 40,000 police officers in International Brotherhood of Police Officers); HANDGUN CONTROL INC., *supra* note 2, at 4 (noting every major national law enforcement organization supports nationwide assault weapons ban, including International Association of Chiefs of Police, National Sheriffs' Association, National Association of Police Organizations, and National Fraternal Order of Police).

B. Challenges to the Assault Weapons Ban

1. Questions of Constitutionality

Gun advocates are concerned that the recent passage of the Brady Handgun Violence Prevention Act¹⁴² is the beginning of a national movement to quash the individual rights purportedly conferred by the Second Amendment.¹⁴³ Proponents of the federal assault weapons ban, however, emphasize that the Anti-Crime Act is restrictive only to weapons with substantial destructive capacity and protective of handgun and sporting weapons ownership.¹⁴⁴ Accordingly, the legislation does not criminalize law-abiding gun owners, by exempting 650 weapons,¹⁴⁵ while eliminating access to military-style weapons which threaten the general population.¹⁴⁶

¹⁴² Pub. L. No. 103-159, 107 Stat. 1536 (1993) (providing waiting period before purchase of hand gun and national criminal background check before transfer of any firearm); THE NATIONAL RIFLE ASSOCIATION, THE NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION FACT SHEET (1994) (declaring N.R.A.'s commitment "to preserving the Second Amendment . . . that guarantees the freedom of law abiding individuals to purchase, possess, and use firearms for legitimate purposes" via lobbying efforts of Institute for Legislative Action (ILA)); NATIONAL RIFLE ASSOCIATION, THE CAMPAIGN TO CRIMINALIZE GUN OWNERSHIP, HOW MEDIA MISINFORMATION THREATENS YOUR RIGHTS, A SPECIAL REPORT TO OWNERS ON MEDIA TREATMENT OF THE SECOND AMENDMENT 2 (1992) [hereinafter THE CAMPAIGN TO CRIMINALIZE GUN OWNERSHIP] (warning public to guard against "national media movement to condemn firearms, to disparage firearm owners, to discredit the Second Amendment, and to ultimately destroy it").

¹⁴³ See Paul Houston, *The NRA Fights Back; On the Defensive Over Assault Weapons, the Gun Lobby is Using Controversial Tactics to Target its Enemies*, L.A. TIMES, July 30, 1989, at 6 (discussing NRA's position and tactics in confronting growing support for assault weapons ban in California); Laurence, *supra* note 128, at 11 (discussing Crime Bill and quoting N.R.A. executive's warning that American people will "get angrier" when full implications of bill are realized); William M. Welch, *NRA Vows its Revenge at the Polls*, U.S.A. TODAY, Aug. 29, 1994, at 5A (noting N.R.A.'s conviction to "mobilize members and pressure lawmakers" to send message to Congress); cf. Wayne King, *A Lesson in Beating Gun Control to the Draw*, N.Y. TIMES (Trenton), May 26, 1991, at D6 (noting more than 90% of Americans supported Brady Handgun Violence Prevention Act).

¹⁴⁴ See BATF, ASSAULT WEAPONS PROFILE, *supra* note 121, at 20.

¹⁴⁵ 140 CONG. REC. H3063, 3091 (1994) (noting Anti-Crime Act exempts hundreds of legitimate hunting and sporting weapons, safeguarding rights of hunters and sportsmen); Sue Kirchhoff, *Suspected Gun Aimed at White House Banned by Law*, REUTERS, Oct. 29, 1994 (noting that Anti-Crime Act exempts owners of 650 sporting guns and weapons).

¹⁴⁶ Bonderman & Henigan, *Paying the Bill for Violence*, NAT'L L.J., Jan. 28, 1991, at 13 (emphasizing tremendous firepower and military combat features of assault weapons and substantial economic and social toll of selling them to general public); *Id.* (asserting that assault weapons satisfy necessary factors to qualify as "abnormally dangerous" exposing community to abnormal risk); see *Banning Assault Weapons: Hearings Before the House Judiciary Crime Committee*, 103d Cong., 2d Sess. 1 (1994) [hereinafter *Hearings Before the House*] (testimony of Jacob Locicero) (testifying magazine capacity contributes to multiple casualties within seconds); *Id.* (citing state laws limiting shelf capacity of hunting shotguns and urging that we protect human beings at least as much as we protect wild animals); Kirchhoff, *supra* note 145 (reporting attack on White House grounds by gunman using assault weapon shot up to 30 bullets).

2. Federal versus State Control

Yet another constitutionally based argument, raised by the opponents of gun control legislation, is grounded within the tenets of the Tenth Amendment.¹⁴⁷ The Tenth Amendment has been invoked to strike down federal legislation that infringed upon areas normally under state control.¹⁴⁸ Through the use of the Commerce Clause,¹⁴⁹ Congress has been able to enact sweeping legislation in areas normally left to the states.¹⁵⁰ Congress has deemed that the interstate flow of weapons brings federal gun legislation within the purview of the Commerce Clause.¹⁵¹ Courts have agreed with Congress's approach, upholding federal gun control legislation in the face of Tenth Amendment challenges.¹⁵² Such court approval indicates that the federal power can be invoked to overcome state control of guns.¹⁵³ Thus, it seems that the Anti-Crime

¹⁴⁷ U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

¹⁴⁸ *Id.* The Tenth Amendment has been used by the Supreme Court to strike down federal legislation seeking to regulate intrastate commerce. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 250-51 (1936) (striking down Bituminous Coal Conservation Act which sought to provide for national minimum wage and maximum hour requirements); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935) (invalidating federal wage and hour requirements).

¹⁴⁹ U.S. CONST. art. I, § 8 (conferring Congress power to regulate commerce among several States).

¹⁵⁰ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (using Commerce Clause to uphold civil rights legislation); *United States v. Darby*, 312 U.S. 100, 126 (1941) (reversing district court decision quashing indictment for violation of Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37-38 (1937) (upholding National Labor Relations Act of 1935 giving NLRB power to enforce orders which sought to end unfair labor practices).

¹⁵¹ See *Dickerson v. United States*, 460 U.S. 103, 105 (1983) (dealing with widespread trafficking of firearms); see also *Barret v. United States*, 423 U.S. 212, 215 (1976) (conceding that Congress has power to regulate interstate trafficking of firearms); *Assault Weapons Hearings*, *supra* note 11 (testimony of Kenneth T. Lyons, National President, International Brotherhood of Police Officers, underscoring need for federal intervention to prevent interstate flow of assault weapons); Suzanne Cavanagh, *Crime Control: The Federal Response*; *Issue Brief*, in CONG. RESEARCH SERV. 1 (1994) (noting congressional and court willingness to view certain crimes as threats to commerce).

¹⁵² See *United States v. Edwards*, 13 F.3d 291, 293 (9th Cir. 1993) (upholding Congress's power to regulate possession of firearms pursuant to Commerce Clause), *petition for cert. filed*, (Mar. 25, 1994); *United States v. Dumas*, 934 F.2d 1387, 1390 (6th Cir. 1990) (giving situation where federal gun laws do not even need to be used in interstate commerce in order to avoid being struck down under Tenth Amendment); *United States v. Alers*, 852 F. Supp. 310, 316 n.9 (D.N.J. 1994) (discussing sentencing guidelines for valid conviction of firearms in interstate commerce), *aff'd*, No. 94-5300, 1994 U.S. App. LEXIS 31674 (3d Cir. Oct. 28, 1994).

¹⁵³ 139 CONG. REC. 156, S15,384 (1993) (statement of Sen. D'Amato, noting due to proliferation of guns in interstate commerce, Congress could use Commerce Clause to take jurisdiction over matter).

Act would withstand constitutional scrutiny under the Tenth Amendment.¹⁵⁴

3. Sporting Purpose versus Public Health and Safety

There has been much debate over the classification of the weapons targeted in the Feinstein Amendment.¹⁵⁵ Gun lobbyists are particularly concerned that the banned firearms are weapons which are widely used for sport and as collectors' items.¹⁵⁶ Proponents of the assault weapons ban emphasize that in view of the inherently dangerous nature of these guns, any sporting purpose is outweighed by concern for public welfare and safety.¹⁵⁷ Indeed, proponents are quick to point out that the firearms targeted in the Anti-Crime Act are powerful military-style guns that are designed and marketed not as sporting shooting weapons, but rather as weapons capable of killing a large number of humans quickly and efficiently.¹⁵⁸

¹⁵⁴ See *Assault Weapons Hearings*, *supra* note 11 (testimony of Jim Florio, former Governor of New Jersey, stating "no individual state's law, no matter how strong, can stop the deadly flow of assault weapons across state lines"). See generally O'Hare & Pedreira, *supra* note 31, at 197 (positing any attempts by N.R.A. to strike down assault weapon legislation which passes would be futile); *Assault Weapons: Hearings Before the House*, *supra* note 146 (testimony of Jacob Locicero, noting Dec. 7, 1993, Long Island massacre was committed by gunman who purchased assault rifle and brought weapon cross-country to New York).

¹⁵⁵ See *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 213 n.2 (3rd Cir.) (defining assault rifles), *cert. denied*, 114 S. Ct. 2100 (1993); *Illinois Sporting Goods Ass'n v. County of Cook*, 845 F. Supp. 582, 587 (N.D. Ill. 1994) (asserting each state must decide which guns are inherently dangerous); *Coalition of New Jersey Sportsmen v. Florio*, 744 F. Supp. 602, 608 (D.N.J. 1990) (rejecting classification of air pellet gun as assault weapon).

¹⁵⁶ See NATIONAL RIFLE ASSOCIATION, TEN MYTHS ABOUT GUN CONTROL 17 (1994) (claiming thousands of sanctioned Highpower Tournaments and National Matches at Camp Perry, Ohio are held for semiautomatic, military, and military-style rifles, including the M1 Garand, Springfield M1A, and the Colt Sporter); CAMPAIGN TO CRIMINALIZE GUN OWNERSHIP, *supra* note 142, at 3 (claiming although semiautomated rifles targeted in Anti-Crime Act have cosmetically military appearance, these weapons are not assault weapons and function identically to the semiautomatic rifles of century ago).

¹⁵⁷ See 140 CONG. REC. S11,446 (1994) (statement of Sen. Boxer); Bea, *supra* note 4, at 5 (commenting on significant risks to society imposed by rapid succession firing capacity of assault weapons); Udulutch, *supra* note 18, at 51 (emphasizing danger of substantial firepower of assault weapons finding its way into wrong hands); *Assault Weapons as a Public Health Hazard*, *supra* note 80, at 3068 (supporting California Attorney General's Office view that danger of semiautomatic assault weapons is not necessarily in frequency of use or volume of weapons but in killing capacity of each weapon); *id.* at 3069 (noting multiple and massive wounds inflicted from assault weapons result in higher mortality rate for victims of gun violence); Katharine Q. Seelye, *House Approves Bill To Prohibit 19 Arms*, N.Y. TIMES, May 6, 1994, at A1 (noting support for Anti-Crime Act from Republicans as well as Democrats based on concerns over possibility of police officers being outgunned).

¹⁵⁸ *Addison v. Williams*, 546 So. 2d 220, 228 (La. Ct. App.) (discussing Colt Industries' advertising promoting use of their Colt AR-15 rifle for purposes of killing human beings), *cert. denied*, 550 So. 2d 634 (La. 1989); BATF, ASSAULT WEAPONS PROFILE, *supra* note 121, at 1-17 (listing weapons targeted to be banned in Anti-Crime Act, which have tremendous

4. Law-Abiding Citizens versus Criminals

Opponents of assault weapons control are also concerned that if these guns are the "weapons of choice" of criminals,¹⁵⁹ a national ban would only deprive law-abiding citizens of the ability to adequately defend themselves in a culture characterized by growing violence.¹⁶⁰ Moreover, opponents allege that the only individuals who would be restricted from obtaining assault weapons by this legislation would be innocent victims rather than criminals.¹⁶¹ In contrast, proponents contend that the right of self-defense is not infringed upon, since the availability of guns per se is not restricted by the Anti-Crime Act.¹⁶² They emphasize that the destructive capacity of an assault weapon is far beyond the capacity needed to adequately protect one's self, family, and home.¹⁶³ Since handguns and several hundred other firearms are not restricted by this legislation, it is submitted that any claim of self-defense does not hinge upon access to assault weapons.¹⁶⁴

firing power and are styled after machine guns and variations of post-World War II military guns); see also King, *supra* note 143, at D6 (quoting National Coalition to Ban Handguns' release describing Uzi as weapon designed to quickly and efficiently kill large number of people); O'Hare & Pedreira, *supra* note 31, at 202 (emphasizing public would be safer if certain types of weapons were made available only to military); Katharine Q. Seelye, *Assault Weapons Ban Allowed to Stay in Anti-crime Measure*, N.Y. TIMES, July 28, 1994, at A12. *But see* Laurence, *supra* note 128, at 11 (noting assault ban critics believe guns targeted in legislation have been selected not because they are more lethal, but simply because they look dangerous).

¹⁵⁹ See BATF, ASSAULT WEAPONS PROFILE, *supra* note 121, at 19 (noting assault weapons are preferred by criminals over law-abiding citizens).

¹⁶⁰ N.R.A. INSTITUTE FOR LEGISLATIVE ACTION, IT CAN HAPPEN TO YOU 7 (1994) (discussing use of firearms for personal security and personal safety measures to prevent becoming victim of crime).

¹⁶¹ See Dowlut, *supra* note 21, at 81-82 (discussing issue of self-defense and self-preservation and reasoning that neither police nor state have duty to protect individuals); cf. BATF, ASSAULT WEAPONS PROFILE, *supra* note 121, at 20 (predicting assault weapons ban will have impact on crime by emphasizing the Anti-Crime Act has been drafted to protect the rights of law abiding gun owners and protect those who own no guns at all).

¹⁶² See BATF, ASSAULT WEAPONS PROFILE, *supra* note 121, at 20 (noting Anti-Crime Act specifically exempts nearly 700 conventional sporting firearms); see also Katharine Q. Seelye, *Accord Reached On Sweeping Bill To Battle Crime*, N.Y. TIMES, July 29, 1994, at A1 (noting Crime Bill contains another gun-related measure protecting rights of hunters and prohibiting anti-hunting protests on federal lands).

¹⁶³ See ASSAULT WEAPONS AND HOMICIDE IN NEW YORK, *supra* note 78, at 1 (1994) (noting many individuals view assault weapons as lacking "legitimate sporting purpose and are unnecessary for self-defense").

¹⁶⁴ 137 CONG. REC. H7995, H8026 (1991) (statement of Rep. Lewis of Georgia, noting assault weapons targeted in Anti-Crime Act are not for sport or self-defense); 140 CONG. REC. H3063, H3083 (1994) (statement of Mrs. Maloney, emphasizing inappropriate self-defense purpose of assault weapons).

V. CONCLUSION

An analysis based on the origins of the Second Amendment and the intent of the Framers reveals that the right to bear arms is a collective right intended to ensure an independent state militia. This is supported by the fact that the judiciary has consistently interpreted the Second Amendment as such, rather than as a right of individuals to bear arms. Additionally, the right has never been accorded absolute or fundamental status in the hierarchy of liberties. Consequently, the right is subject to regulation. In an attempt to address the problem of growing gun-related violence and the proliferation of assault weapons, state legislatures initiated restrictions concerning the manufacture, sale, and possession of assault weapons. State legislative attempts at regulating have been noteworthy for their acceptance by both federal and state courts. Unfortunately, the lack of uniformity in decisions rendered these state regulatory schemes largely ineffective when examined within a national perspective. The federal government has exercised its power and regulated firearms. Such regulation, however, did not include assault weapons. Coupling the inability of the states to properly address the growing abuse of assault weapons with the federal government's compelling and legitimate interest to protect the citizenry, congressional intervention was mandated. Congress has responded with the Violent Crime Control and Law Enforcement Act of 1994. Due to the frequency with which firearms travel in interstate commerce, an exercise of congressional commerce power is justified. This should eviscerate any Tenth Amendment concerns of inappropriate usurpation of state sovereignty. Therefore, it is submitted that the federal ban of assault weapons as incorporated in the Anti-Crime Act of 1994 will not infringe upon Constitutional guarantees and will be upheld by the courts.

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