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TOWARD A MORE REASONABLE APPROACH TO GUN CONTROL: CANADA AS A MODEL

I. INTRODUCTION*

Gun control legislation has been the focus of great controversy for many decades, in the United States and Canada and, indeed, throughout the civilized world.¹ In recent years, proponents on both sides of the issue have become even more passionate in this heated debate, and for good reason.² Gun control advocates cite statistics as evidence that more stringent regulations are necessary: there were 37,000 firearm-related deaths in the United States in 1990³ and an estimated five nonfatal firearm injuries for each death.⁴ Opponents of gun control rest their argument squarely on the Second Amendment,⁵ which reads “[a] well-regulated

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1. ROBERT J. COTTRILL, *GUN CONTROL AND THE CONSTITUTION: THE COURTS, CONGRESS, AND THE SECOND AMENDMENT*, Volume 1, at ix (Robert J. Cottroll ed., 1993); Gerald W. Grumet, M.D., *America's Health Care Crisis: An Overview from the Trenches*, 3 STAN. L. REV. 42 (1991); U.N. INTERREGIONAL CRIME & JUST. RES. INST., *UNDERSTANDING CRIME: EXPERIENCES OF CRIME AND CRIME CONTROL*, at 300-01, U.N. Pub. No. 49, U.N. Sales No. E.93.III.N.2 (1993) [hereinafter UNITED NATIONS].

2. Grumet, *supra* note 1, at 42. See also *What Is an Assault Weapon?*, WALL ST. J., Aug. 25, 1994, at A12. “The [w]orld’s [g]reatest [d]eliberative [b]ody has tied itself in knots over the crime bill.” *Id.*

3. NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS 94* (1993) [hereinafter ACCIDENT FACTS].

4. G.J. Wintemute, *Firearms as a Cause of Death in the United States, 1920—1982*, 27 AM. ACAD. PEDIATRICS 532, 532-36 (1987), *quoted in* NATIONAL SAFETY COUNCIL, *supra* note 3.

5. Philip Weiss, *A Hoplophobe Among the Gunnies*, N.Y. TIMES, Sept. 11, 1994, § 6 (Magazine), at 66. The Second Amendment issue often sparks a furious reaction from anti-gun control lobbies. *Id.* A leaflet published by the Gun Owners of America, promoting a rally in Washington while the 1994 Crime Bill was being debated, stated succinctly: “Question. What do the following have in common? Clinton, Hitler, CBS, Metzenbaum, ABC, Goebbels, Shumer The attack on the Constitution has nothing

Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁶

This Note aims to further invigorate the gun control debate by drawing on the Canadian experience and attempts to answer two fundamental questions: 1) does gun control work; and 2) can the United States effectively legislate strong gun control measures without compromising its constitutionally-guaranteed civil liberties.

II. WHY COMPARE CANADA WITH THE UNITED STATES?

Canada and the United States "probably resemble each other more than any two nations on earth."⁷ These two countries share a parallel early history of European colonial influence,⁸ similar constitutional and representative democracies,⁹ English common law roots, and many customs.¹⁰

Like their southern neighbors, Canadians have long been attracted to guns.¹¹ In America, however, gun ownership rates are almost double that of Canada,¹² and the rate of firearm-related homicides is nearly seven times greater in the United States.¹³ Arguably, the United States has a more violent culture since it was born of armed revolt,¹⁴ while Canada

to do with crime, or health care, or safety, or the children. It is about an all-out attack on our freedom and rights." *Id.*

6. U.S. CONST. amend. II.

7. Seymour M. Lipset, *Canada and the United States: The Cultural Dimension*, in CANADA AND THE UNITED STATES: ENDURING FRIENDSHIP, PERSISTENT STRESS 109 (1985).

8. KENNETH MCNAUGHT, *THE PENGUIN HISTORY OF CANADA* 20-23 (1988).

9. G.A. Mauser & M. Margolis, *The Politics of Gun Control: Comparing Canadian and American Patterns*, 10 *Environment and Planning C: Government and Policy* 189, 190 (1992).

10. *Id.*

11. CANADA DEPARTMENT OF JUSTICE § 2.0, at 4 (Angus Reid Group, Inc., Sept., 1991). "[O]f the roughly 9.6 million households (1990 figures) in [Canada], around 2.2 million own at least one type of firearm—therefore, it is estimated that nearly one-quarter (23%) of all Canadian households own a firearm." *Id.*

12. *Id.* See also U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, at tbl. 2.59 (showing 43% of U.S. households own guns) [hereinafter BUREAU OF JUSTICE STATISTICS SOURCEBOOK].

13. STATISTICAL BRIEFING NOTE (Can. Dep't of Justice), MISUSE OF DATA INVOLVING FIREARMS Mar. 28, 1994, at 2 [hereinafter STATISTICAL BRIEFING NOTE].

14. DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY* 137-38 (1992).

evolved peaceably, its constitution having been granted by the British.¹⁵ Although there may be some truth to this premise, America's image as a lawless and violent nation may be an unfair characterization. The American Revolution was essentially a defensive response¹⁶ to the antagonistic policy of the British Parliament.¹⁷ As John Adams explained, it was a revolution of considered thought;¹⁸ the issue was sovereignty and it evolved over time, ripening years before a shot was ever fired.¹⁹ He stated:

But what do we mean by the American Revolution? Do we mean the American war? The Revolution was effected long before the war commenced. The Revolution was in the minds and hearts of the people; a change in their religious sentiments, of their duties and obligations . . . *This radical change in the principles, opinions, sentiments, and affections of the people was the real American Revolution.*²⁰ (emphasis in original).

Therefore, with the benefit of John Adams' timely perspective,²¹ it is difficult to conclude that the American Revolution demonstrates an inherently more violent culture in the United States than in Canada.²² Rather, with similar customs, language, and English common law roots, Canada and the United States are far more alike than dissimilar.²³

15. *Id.* at 138.

16. *Id.* The British redcoats fired the "shot heard 'round the world." *Id.* at 313.

17. *Sources and Documents on the Stamp Act Crisis, 1764-1766, in PROLOGUE TO REVOLUTION* 3-4, 22-24, 29-30 (Edmund S. Morgan ed., 1959).

18. BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 160 (1967).

19. *Id.*

20. *Id.* (John Adams to Hezekiah Niles, 1818).

21. *Id.* at 136.

22. KOPEL, *supra* note 14, at 316-17.

23. Mauser & Margolis, *supra* note 9, at 190-91; Lipset, *supra* note 7, at 109; McNAUGHT, *supra* note 8, at 20-23.

III. CANADIAN BACKGROUND

A. Early History

Canada was first settled by Europeans in the sixteenth century²⁴ and fell under French domination in the seventeenth century.²⁵ England won control of Canada in 1763, after victory in the French and Indian War.²⁶ Contrary to American colonial sentiment, Canadians remained loyal to the sovereign power of their new English masters during and after the American Revolution.²⁷

The settlers of New France, as Canada was called under the French, had adapted to a far more authoritarian French regime than the English settlers of the American colonies.²⁸ Guy Carlton, appointed Governor of Canada in 1765, exploited this sociopolitical attitude by permitting the existing culture to survive.²⁹ It was ultimately a masterful, though controversial, political stroke and prevented Canada from being swept into the American Revolution.³⁰ Sensing an impending acceleration of hostilities between the thirteen colonies and England, Carlton submitted a plan that would provide a bevy of cultural and political freedoms to the French-Canadian aristocracy in order to garner their full and loyal support of the Crown.³¹ The Quebec Act of 1774 was expediently passed to cement Canadian loyalties.³²

Perhaps the Canadian colonists remained loyal to the Crown because of their self-interest in resisting continentalism,³³ not wanting to get absorbed into the "gigantic assimilative process of American republican democracy."³⁴ This theory is both plausible and supportive of the Carlton legacy, as the French-Canadians had enjoyed a great deal of cultural

24. MCNAUGHT, *supra* note 8, at 21.

25. *Id.* at 21-24.

26. *Id.* at 43-45.

27. KOPEL, *supra* note 14, at 138.

28. MCNAUGHT, *supra* note 8, at 48.

29. *Id.* at 49.

30. *Id.* at 50.

31. *Id.* at 49.

32. *Id.* at 48-49.

33. *Id.* at 46. Continentalism is the loss of cultural identity to a more powerful and larger sphere of government. *Id.*

34. *Id.*

tolerance under British rule.³⁵ They feared losing that tolerance with absorption into the fabric of what was already a dominant American culture.³⁶

As a result of this loyalty, Canada remained under the complete authority of the United Kingdom until 1867,³⁷ when the British Parliament finally permitted Canada to exercise *domestic* control.³⁸ The colonial status of Canada, however, prevailed until 1982.³⁹

B. Canadian Constitutional Development

Unlike the United States, Canada does not have a singular document that forms a comprehensive written constitution.⁴⁰ Rather, like the United Kingdom, several documents evidence Canada's national *constitution*, or fundamental principles.⁴¹ The British North America Act, 1867⁴² ("B.N.A. Act"), established the Dominion of Canada⁴³ and defined the roles of federal and provincial power,⁴⁴ much as the U.S. Constitution had defined the roles of federal and state authority eighty years earlier.⁴⁵ The B.N.A. Act granted the Canadian Parliament authority over domestic issues,⁴⁶ but ultimate sovereignty remained with the British Crown.⁴⁷

35. *Id.* at 48-50.

36. *Id.* at 46.

37. PETER W. HOGG, READINGS IN THE PHILOSOPHY OF CONSTITUTIONAL LAW 7 (Richard N. Bronaugh et al. eds., 4th ed. 1992).

38. *Id.*

39. *Id.* at 8. The Constitution Act granted complete sovereignty to Canada. *Id.* See also discussion *infra* part III.B.

40. *Id.* at 7; CAN. CONST. (Constitution Act, 1982) ("52.(2) The Constitution of Canada includes (a) the *Canada Acts 1982*, including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b)."). *Id.*

41. HOGG, *supra* note 37, at 7. A constitution need not be a written document as it is in the United States. *Id.* Canada, like the United Kingdom, considers a constitution to be the elemental characteristics that define the essence of a nation. *Id.* Therefore, it is unnecessary for any particular document to express all that is Canada's constitution, and the rights and laws that are enumerated in the several documents that make up the Constitution Act only serve to shed light on Canada's constitution, not define the parameters of it. *Id.*

42. British North America Act, 1867 (Can.) [hereinafter B.N.A. Act].

43. HOGG, *supra* note 37, at 7.

44. *Id.*

45. U.S. CONST. art. I, § 8, amended by U.S. CONST. amend. X.

46. HOGG, *supra* note 37, at 7.

Absent from both the B.N.A. Act and the U.S. Constitution (prior to adoption of the first ten amendments) was anything resembling a bill of rights.⁴⁸ Canada, like the United Kingdom, counted on the legislative process and the rules of common law to protect the civil liberties of its citizens.⁴⁹ Canadians neither possessed a constitutional right to keep and bear arms,⁵⁰ nor were they to possess for nearly a century any of the constitutionally-protected civil liberties associated with a bill of rights.⁵¹

In 1960, Canada finally adopted the Canadian Bill of Rights,⁵² which was enacted as a federal statute and, as a result, only applied to federal law.⁵³ The Constitution Act, 1982 ("Constitution Act"), which represented Canada's complete break with British sovereignty,⁵⁴ included the Canadian Charter of Rights and Freedoms, which was enacted notwithstanding the Canadian Bill of Rights.⁵⁵ By incorporating the rights included in the Charter into the Constitution Act,⁵⁶ they became constitutionally protected and applied to all the laws in Canada, federal as well as provincial.⁵⁷ Although, a right to keep and bear arms is absent from the Constitution Act,⁵⁸ the Canadian constitution contains a supremacy clause over all inferior laws that conflict with it⁵⁹ almost identical in force, if not in form, to its American counterpart.⁶⁰

47. *Id.*

48. *Id.* at 8.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 9.

56. *Id.* at 8.

57. *Id.*

58. CAN. CONST. (Constitution Act, 1982).

59. *Id.* § 52.(1). "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." *Id.*

60. U.S. CONST. art. VI, § 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land" *Id.*

C. Canadian Gun Regulations

Canada has long viewed the issue of gun regulation as a federal responsibility.⁶¹ Perhaps this view is due to the early role the North-West Mounted Police played in providing federal police protection to settlers.⁶² Indeed, Canada enacted its first significant federal gun control law in 1892,⁶³ only a quarter century after the creation of the Dominion of Canada. Under the law, a citizen was required to obtain a permit to carry a pistol unless the citizen had reasonable cause to fear an assault.⁶⁴ Registration was required for all handguns by the 1930s.⁶⁵

Modern Canadian gun laws are primarily contained in Part III of the Canadian Criminal Code;⁶⁶ however, the Special Committee of Privy Council, a cabinet-level committee of the Governor in Council, Canada's federal cabinet, may enact additional regulations which are termed Orders in Council.⁶⁷ The Privy Council's authority is derived directly from Part III of the Canadian Criminal Code.⁶⁸

In 1977, with passage of the Criminal Law Amendment Act,⁶⁹ sweeping new legislation classified firearms into restricted and prohibited classes.⁷⁰ Those weapons that were not enumerated remained unrestricted.⁷¹ Gun owners were required to procure from the local police a Firearms Acquisition Certificate for both restricted and unrestricted firearms, valid for only five years.⁷² Additional limitations circumscribed

61. KOPEL, *supra* note 14, at 141.

62. *Id.* at 140-41.

63. *Id.* at 141.

64. *Id.*

65. *Id.* at 141-42.

66. Letter from Christopher D. Ram, Counsel, Criminal Law Policy Section, Department of Justice, Canada, to author (Sept. 9, 1994) (on file with *New York Law School Journal of International and Comparative Law*).

67. *Id.*

68. *Id.*; Canadian Criminal Code, Part III, § 84(1.2).

69. KOPEL, *supra* note 14, at 142.

70. Canadian Criminal Code, *supra* note 68, § 84(1). Prohibited weapons included silencers, automatic weapons, and sawed-off rifles or shotguns. *Id.* § 84(1)(a),(c),(d). Restricted weapons included handguns, semiautomatic that were not prohibited, and automatic weapons that were previously registered as part of gun collection. *Id.* § 84(1)(a)-(c).

71. *Id.* § 84(1)(b)(i). Those weapons that remained unregistered were limited to rifles with barrel lengths greater than 470mm. *Id.*

72. *Id.* § 106(1), (11).

the immediate availability of guns to potential purchasers. These limitations included a twenty-eight day waiting period,⁷³ provision of two character references to the local police,⁷⁴ and the outright denial of a certificate to applicants deemed a safety risk.⁷⁵

Restricted weapons—those with a barrel length under 18.5 inches,⁷⁶ fully automatic weapons registered before 1978 as part of a gun collection,⁷⁷ and specified semiautomatic military assault weapons restricted by Orders in Council⁷⁸—required a permit. This permit would only be granted if the applicant was intending to use the gun for self-protection,⁷⁹ lawful employment,⁸⁰ gun club membership,⁸¹ or approved target practice.⁸² In addition, all restricted weapons required registration with the local authorities.⁸³ Completely prohibited weapons included sawed-off shotguns,⁸⁴ fully-automatic weapons not purchased or registered before 1978,⁸⁵ and specified assault weapons classified as prohibited by Orders in Council.⁸⁶

In late 1991, Canada passed Bill C-17,⁸⁷ which sharply increased restrictions in several categories. An accessory that lengthens the barrel in any fashion does not change the status of a restricted weapon,⁸⁸ and large capacity cartridge magazines are prohibited.⁸⁹ Furthermore, any automatic weapon that has been converted to a semiautomatic firearm and may be converted back to automatic fire is prohibited unless the owner is

73. *Id.* § 106(1).

74. *Id.* § 106(8).

75. *Id.* § 106(4); *see infra* note 272.

76. *Id.* § 84(1)(b)(i).

77. *Id.* § 84(1)(c).

78. *Id.* § 84(1.2).

79. *Id.* § 110(2)(a).

80. *Id.* § 110(2)(b).

81. *Id.* § 110(2)(c).

82. *Id.* § 110(2)(d).

83. *Id.* § 109(1).

84. *Id.* § 84(1)(d).

85. *Id.* § 84(1)(c).

86. *Id.* § 84(1)(e).

87. Act of Dec. 5, 1991, ch. 40, 1991 S.C. 563 (Can.) [hereinafter 1991 Act]; *see also* KOPEL, *supra* note 14, at 167-68.

88. 1991 Act, *supra* note 87, §§ 84(1)(b), (1.1).

89. *Id.* § 84(1)(f).

a genuine gun collector.⁹⁰ Finally, beginning in 1994, Bill C-17 required that each applicant for a Firearms Acquisition Certificate would have to exhibit competence in the safe handling of the firearm and its basic operation, as well as an understanding of the laws that apply to use of the weapon.⁹¹

D. Canadian Case Law

Because Canada does not provide for the right to keep and bear arms anywhere in its constitutional documents, cases that challenge the federal gun control statutes generally have not reached the Canadian Supreme Court.⁹² The few cases that have reached the Supreme Court did not do so until 1993.⁹³

In *R. v. Hasselwander*,⁹⁴ the question was whether an automatic weapon that had been converted to semiautomatic fire qualified as a restricted or a prohibited firearm. The Supreme Court held that since a fully automatic weapon that had been converted to semiautomatic firing may be easily converted back to automatic fire, it would qualify as a prohibited weapon under the relevant statutes in the Criminal Code.⁹⁵ In *R. v. Creighton*, *R. v. Finlay*, *R. v. Gosset*,⁹⁶ the Supreme Court upheld the constitutionality of section 86(2) of the Criminal Code which provides for strict liability for the negligent use of firearms, notwithstanding the required *mens rea* normally associated with guilt under the Canadian Charter of Rights and Freedoms.⁹⁷ In *R. v. Felawka*,⁹⁸ the Charter of Rights and Freedoms was invoked as a defense against a charge pursuant

90. *Id.* §§ 84(1)(c), (c.1).

91. *Id.* §§ 106(2)(c), (2.2).

92. See Ram, *supra* note 66.

93. *Id.*

94. *R. v. Hasselwander* (1993), 152 N.R. 247 (S.C.C.).

95. *Id.* at 264. See also Canadian Criminal Code, *supra* note 68, § 84(1).

96. *R. v. Gosset* (1993), 157 N.R. 195 (S.C.C) (discussing *R. v. Creighton* (1993), 157 N.R. 1 (S.C.C) and *R. v. Finlay* (1993), 156 N.R. 374 (S.C.C)).

97. *Id.* at 218, 222. See also WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 223 (2d ed. 1986). *Mens rea*, or guilty mind, is generally synonymous with the definition of criminal intent, a prerequisite to guilt except in strict liability offenses. *Id.*; CAN. CONST. (Constitution Act, 1982) Part 1 Schedule B, § 7. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." *Id.*; Canadian Criminal Code, *supra* note 68, § 86(2).

98. *R. v. Felawka* (1993), 159 N.R. 50 (S.C.C).

to section 89 of the Criminal Code which prohibits carrying a concealed weapon.⁹⁹ The Supreme Court held that a firearm as defined in section 2 of the Code is always a weapon;¹⁰⁰ thus, the crime of concealing a weapon, as provided in section 89, requires no other *mens rea* to commit another unlawful act for the firearm to be considered a weapon.¹⁰¹

In 1995, the Canadian Supreme Court is likely to decide in *Queen v. Brown*¹⁰² whether section 85 of the Canadian Criminal Code ("Code"), which provides for consecutive sentences for firearms violations,¹⁰³ violates the Charter of Rights and Freedoms when the consecutive sentences for the firearms violations may add up to a significantly longer prison term than the sentence for the original indictable offense.¹⁰⁴ If the Canadian Supreme Court strictly construes the Criminal Code as it has with similar issues in *Hasselwander*,¹⁰⁵ *Creighton et al.*,¹⁰⁶ and *Felawka*,¹⁰⁷ it should uphold the constitutionality of Section 85 of the Code.

IV. AMERICAN BACKGROUND

A. Early History

The United States struggled with the question of sovereignty from its earliest colonial days.¹⁰⁸ "The colonial towns and counties . . . were largely autonomous [M]ore often than not, they felt themselves to be the *benefactors* rather than the *beneficiaries* of central government" (emphasis added).¹⁰⁹ Thus, while Canadians thrived under English rule, the American colonists struggled with two fundamental dilemmas of sovereignty: who had sovereignty, and more importantly, *who decided*

99. *Id.* at 57. See also Canadian Criminal Code, *supra* note 68, § 89.

100. Canadian Criminal Code, *supra* note 68, § 2; *Felawka*, 4 S.C.R. at 58.

101. *Felawka*, 4 S.C.R. at 58. See also LAFAVE & SCOTT, *supra* note 97, at 223; CAN. CONST. (Constitution Act, 1982) Part 1 Schedule B, § 7; Canadian Criminal Code, *supra* note 68, § 89.

102. *Ram*, *supra* note 66.

103. Canadian Criminal Code, *supra* note 68, § 85(2).

104. See *Ram*, *supra* note 66.

105. *Hasselwander*, *supra* note 94, at 264.

106. *Gosset*, *supra* note 96, at 218, 222.

107. *Felawka*, 4 S.C.R. at 58.

108. BAILYN, *supra* note 18, at 246. See generally PROLOGUE TO REVOLUTION, *supra* note 17, at 3-34.

109. BAILYN, *supra* note 18, at 250.

who had sovereignty?¹¹⁰ The Crown possessed this ultimate sovereignty over the colonies prior to the Revolution,¹¹¹ since the King retained veto power over the colonial legislatures even though he had lost it to his own Parliament in England.¹¹² As a result of English mismanagement and a desire for autonomy, the American colonies drew closer and closer to revolution.¹¹³

B. American Constitutional Development

Unlike later Canadian constitutional development,¹¹⁴ the American colonists were determined to produce a written constitution from the inception of the republic.¹¹⁵ The Framers of the U.S. Constitution reached back to the early Greeks for ancient constitutional principles that served as roadmaps to define sovereignty and a form of government that would best protect the interests of the people.¹¹⁶ These interests included the right to keep and bear arms as protection against potential federal encroachment.¹¹⁷

Those who argue against gun control rely on the Second Amendment to support their claimed constitutional right to keep and bear arms.¹¹⁸ There are many thorough analyses that attempt to explain the Framers' intent in the Bill of Rights with regard to whether the right to keep and bear arms was intended to be *individual* or *collective* in nature,¹¹⁹ that is,

110. Robert Blecker, *Federalism and States Rights 1215-1775, From the Magna Carta to the American Revolution* 120 (1982) (on file with *New York Law School Journal of International & Comparative Law*). In this analysis, Professor Blecker discusses what he terms the object-level and meta-level questions. The object-level question asks who has sovereignty, but the infinitely more critical meta-level question asks who gets to decide. *Id.*

111. J.G.A. POCOCK, *THREE BRITISH REVOLUTIONS* 34 (1980).

112. *Id.*

113. BAILYN, *supra* note 18, at 160. See text accompanying note 20.

114. See discussion, *supra* note 41.

115. Ralph Ketchum, *Introduction to THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 3 (Ralph Ketcham ed., 1986) [hereinafter *THE ANTI-FEDERALIST PAPERS*].

116. *THE FEDERALIST* No. 38, at 232-33 (James Madison) (Clinton Rossiter ed., 1961). See also BAILYN, *supra* note 18, at 161.

117. U.S. CONST. amend. II; *THE FEDERALIST*, No. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

118. Weiss, *supra* note 5, at 66. See also U.S. CONST. amend. II.

119. See generally Michael T. O'Donnell, *The Second Amendment: A Study of Recent*

whether the reference to the militia meant that the right was intended only for use in organized military forces.¹²⁰ However, to find the most plausible definition, one need look no further than the author of the Second Amendment, James Madison.¹²¹

To that end, the authoritative *Federalist Papers*¹²² provide strong evidence of James Madison's intent. In order to both educate and sway a confused public, these published theses of James Madison, Alexander Hamilton, and John Jay framed the intent and the expected results of the constitutional plan.¹²³

The Federalist stands third only to the Declaration of Independence and the Constitution itself among all the sacred writings of American political history . . . one to which, as Thomas Jefferson put it, 'appeal is habitually made by all, and rarely declined or denied by any' as to the 'genuine meaning' of the Constitution.¹²⁴

In *Federalist No. 46*,¹²⁵ Madison discusses how a fear of military tyranny imposed by a strong national government is unfounded because a national army's might could never compare with the collective might of the people.¹²⁶

Besides the advantage of being armed . . . the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the

Trends, 25 U. RICH. L. REV. 501, 503-09; Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, at *9-16; Sanford Levinson, *Comment: The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643-57; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 211-43; Mark Udulutch, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19, 30-4.

120. U.S. CONST. amend. II.

121. THE FEDERALIST, *supra* note 116, at vii; THE ANTI-FEDERALIST PAPERS, *supra* note 115, at 26.

122. THE FEDERALIST, *supra* note 116, at vii.

123. *Id.* at viii-x.

124. *Id.* at vii.

125. *Id.* No. 46, at 299 (Madison).

126. *Id.*

enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.¹²⁷ (emphasis added).

Thus, according to Madison's view, the Second Amendment was indeed intended to address concerns about potential tyrannical encroachment by the federal government, but security against this threat was to be provided through the right to keep and bear arms for use in the *collective*, organized militia.¹²⁸ This view has been supported by the United States Supreme Court.¹²⁹

C. American Gun Regulations

The United States has generally failed to enact firearm restrictions at the federal level.¹³⁰ Whereas Canada enacted its first piece of federal gun control legislation only a quarter century after it attained sovereignty over domestic affairs in 1867,¹³¹ the United States did not bring gun control legislation to the federal level until the 1930s.¹³² The National Firearms Act of 1934,¹³³ enacted under authority of the Commerce Clause of the Constitution,¹³⁴ focused on registration and prohibitive taxing of "gangster-style" weapons, such as sawed-off shotguns, machine guns, and concealable weapons other than pistols or revolvers.¹³⁵ In 1938, Congress

127. *Id.*

128. *Id.*

129. *United States v. Miller*, 26 F. Supp. 1002 (1939). For a further discussion on *Miller* and related cases, see *infra* part IV.D. A *reductio ad absurdum* analysis can be used to lend further support to this conclusion. That is, if the ownership of firearms was intended to be constitutionally protected for the safety of the *individual* against the potential tyranny of the national government, then the intention would have been to permit effective weapons to produce that result, since absent effective weapons, the individual would not be able to protect herself from the perceived threat. The current power of American military might necessitate anti-tank guns, missile launchers, and the like to effectively protect an individual from the national armed services. Obviously, the security of the whole of society would be in serious jeopardy if individuals possessed such weapons; therefore, the absurdity of the result of the *individual* right theory calls into question the soundness of its logic.

130. Grumet, *supra* note 1, at *46.

131. KOPEL, *supra* note 14, at 141.

132. National Firearms Act of 1934 (codified as 26 U.S.C. §§ 5801-58 (1988)).

133. *Id.*

134. U.S. CONST. art. I, § 8, cl. 3.

135. National Firearms Act, *supra* note 132. See also David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585.

enacted the Federal Firearms Act,¹³⁶ adding further restrictions that focused on the licensing of dealers and limitations on the interstate sale of firearms.¹³⁷ It expressly prohibited the interstate sale, shipment, or receipt of firearms by persons under indictment for or convicted of a felony or who were fugitives from justice.¹³⁸

Three decades passed before the next significant federal gun control legislation was enacted.¹³⁹ The Gun Control Act of 1968,¹⁴⁰ which embodied the core regulatory provisions for the next twenty-five years, encompassed Titles IV and VII of the Omnibus Crime Control and Safe Streets Act¹⁴¹ and the Gun Control Act.¹⁴² These laws expanded the definition of dealers who required licensing from those engaged only in "interstate sales," to "all dealers" engaged in the commerce of gun sales.¹⁴³ They also limited purchase by mail.¹⁴⁴ In addition, the new regulations expanded the class of persons prohibited from the sale, shipment, or receipt of firearms to include those who used or were addicted to drugs and those adjudicated mental defectives or committed to mental institutions.¹⁴⁵ Modern federal gun control laws and their amendments have remained codified under Chapter 44, Title 18 of the U.S. Code.¹⁴⁶

Significant amendments to Title 18 occurred in 1986 and 1993.¹⁴⁷ The 1986 amendments expanded the classes of persons prohibited from selling, shipping, or receiving firearms to include illegal aliens, veterans who had received a dishonorable discharge, and persons who had

136. Federal Firearms Act of 1938 (codified as 18 U.S.C. §§ 921-28 (1988)).

137. *Id.*

138. *Id.*

139. Gun Control Act of 1968 (codified as amended at 18 U.S.C. §§ 921-927 (1976)).

140. *Id.*

141. Pub. L. 90-351, Title IV, Sec. 902, June 19, 1968, 82 Stat. 226, added ch. 44 and §§ 921-28.

142. Title VII of Pub. L. 90-351, June 19, 1968, 82 Stat. 236. *See also* Hardy, *supra* note 135, at n.54.

143. Gun Control Act, *supra* note 139, § 921(a)(11).

144. *Id.* § 922(1)(B).

145. *Id.* § 922(g)(3),(4).

146. Hardy, *supra* note 135, n.2. (Part I of Hardy provides an in-depth discussion of American gun control legislative history). *Id.*

147. Firearm Owners' Protection Act, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. §§ 921-927 (1988)) [hereinafter FOPA]; Brady Handgun Violence Prevention Act, 18 U.S.C. § 922 (1993) [hereinafter Brady Act].

renounced their U.S. citizenship.¹⁴⁸ In one respect, regulatory constraints were eased in the 1986 bill, "protect[ing] the right of individuals to travel interstate with their firearms, even if possession of those firearms might be illegal under the laws of the states through which they travelled."¹⁴⁹ The Brady Act was finally enacted in 1993, after several years of controversy, and added a short waiting period to purchasing restrictions.¹⁵⁰ Buyers of firearms were now required to wait five days between purchasing and taking possession of a handgun.¹⁵¹

Congress enacted sweeping new legislation in 1994, further expanding gun control restrictions.¹⁵² The Violent Crime Control and Law Enforcement Act of 1994 ("1994 Crime Act")¹⁵³ covered five broad firearms issues in Title XI: the prohibition of juvenile handgun possession,¹⁵⁴ licensing,¹⁵⁵ domestic violence,¹⁵⁶ penalties,¹⁵⁷ and perhaps the most publicized issue during the political debate, the assault weapon ban.¹⁵⁸

The licensing provision in the 1994 Crime Act required those applicants who must be licensed to submit a photograph and fingerprints with their application.¹⁵⁹ In addition, the domestic violence provision prohibited the sale of firearms to those individuals subject to a court order resulting from a domestic violence complaint.¹⁶⁰ Finally, the assault

148. FOPA, *supra* note 147.

149. COTTRON, *supra* note 1, at xxxii.

150. Brady Act, *supra* note 147.

151. *Id.*

152. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 [hereinafter 1994 Crime Act].

153. *Id.*

154. *Id.* sub. tit. B.

155. *Id.* sub. tit. C.

156. *Id.* sub. tit. D.

157. *Id.* sub. tit. E ("Enhanced Penalties for Use of a Semiautomatic Firearm During a Crime."). *Id.*

158. *Id.* sub. tit. A. See also *What Is an Assault Weapon?*, *supra* note 2, at A12.

159. 1994 Crime Act, *supra* note 152, sub. tit. C. Individuals required to be licensed under 18 U.S.C. § 923(a) (1993) and registered under 26 U.S.C. § 5802 (1993) must include a photograph and fingerprints with their application. *Id.*

160. *Id.* sub. tit. D. The class of persons to whom sale or possession is prohibited expand to include those who are subject to a court order resulting from a threat to the complainant. *Id.*

weapon ban expressly prohibited a wide range of semiautomatic assault rifles and large capacity ammunition feeding devices.¹⁶¹

D. American Case Law

The Supreme Court of the United States, much like the Canadian Supreme Court, has rarely examined the constitutionality of gun regulations.¹⁶² The United States has had only three relevant high court decisions that have examined the federal government's relationship to the Second Amendment,¹⁶³ and only the most recent opinion, *United States v. Miller*,¹⁶⁴ written over half a century ago, responds specifically to federal legislation to regulate firearms.¹⁶⁵ The Supreme Court, like the legal community in general, has largely ignored the constitutional tension created by the Second Amendment.¹⁶⁶

In *Miller*,¹⁶⁷ the Supreme Court held that the National Firearms Act of 1934¹⁶⁸ was neither an unconstitutional invasion of the reserved states' authority guaranteed by the Tenth Amendment, nor did it infringe upon the right to keep and bear arms as protected by the Second Amendment.¹⁶⁹ The Court held that Congress had the right to determine whether certain firearms should be restricted in the interests of national public safety and whether those weapons were appropriate for militia use.¹⁷⁰ This opinion—the only one to focus specifically on the citizen's right to bear

161. *Id.* sub. tit. A. A range of firearms classified as semiautomatic assault weapons, as well as large capacity ammunition feeding devices, are prohibited. *Id.*

162. COTTROL, *supra* note 1, at x.

163. *Id.*

164. *United States v. Miller*, 26 F. Supp. at 1002 (1939).

165. *Id.* See also *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); COTTROL, *supra* note 1, at x, xxii-xxix. Both *Cruikshank* and *Presser* defined the 2nd and 14th Amendments in terms of the limitations they placed on Congress with respect to individuals or state governments infringing on the rights of the law-abiding citizen to keep and bear arms.

166. COTTROL, *supra* note 1, at x; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991). See also Levinson, *supra* note 119, at n.13 (stating "I think it accurate to say that no one recognized by the legal academy as a 'major' writer on constitutional law has designed to turn his or her talents to a full consideration of the [Second] Amendment."). *Id.*

167. *Miller*, 26 F. Supp. at 1002.

168. National Firearms Act, *supra* note 132.

169. *Miller*, 26 F. Supp. at 1003.

170. *Id.*

arms—opted for the *collective* definition versus the *individual* definition of the right to keep and bear arms.¹⁷¹

Although the Supreme Court has not addressed this issue since *Miller*, the District and Circuit Courts have generally taken the *collective* view.¹⁷² This view taken by the federal courts concurs with James Madison's perspective that implied that an organized militia sponsored by local government would sustain civil liberties against the threat of a potentially encroaching and tyrannical federal government.¹⁷³

V. COMPARATIVE STATISTICS

A. Gun Ownership and Regulatory Ideology

Although underreporting and illegal ownership make it difficult to assess total firearm ownership, U.S. data indicate that nearly twice the percentage of U.S. households own guns than do those in Canada.¹⁷⁴ This stark difference may be due to a combination of political and sociological factors, not the least of which are tougher Canadian federal gun control laws¹⁷⁵ and generally more positive attitudes towards gun prohibition by Canadians.¹⁷⁶ Notably, the American model for crime control focuses more on the security of individual liberties and protection of the accused than on the potential for societal disruption due to careless enforcement of criminal laws.¹⁷⁷ Metaphorically, the United States employs a "backstop"

171. *Id.* See also discussion in part IV.B, *supra*; Abrams, *supra* note 119, at *14.

172. Abrams, *supra* note 119, at *14.

173. See *supra* discussion in part IV.B.

174. BUREAU OF JUSTICE STATISTICS SOURCEBOOK, *supra* note 12, tbl. 2.59 (shows 43% of American households reporting firearm ownership); CANADA DEPARTMENT OF JUSTICE, *supra* note 11, tbl. 1 (shows 23% of Canadian households reporting firearm ownership). Note that 1990 data was used to maintain comparability. More recent data are available for the United States, showing 48% of households owning a gun. BUREAU OF JUSTICE STATISTICS SOURCEBOOK, *supra* note 12, tbl. 2.58.

175. See *supra* parts III.C, IV.C.

176. SEYMOUR MARTIN LIPSET, CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA, tbl. 2 (1990) (72% of Canadians favor the prohibition of handgun ownership by civilians, versus only 36% in the United States). *Id.* See also *id.* tbl. 4 (65% of Canadians feel "it is better to live in an orderly society than to allow people so much freedom they can become disruptive," versus only 51% in the United States). *Id.*

177. LIPSET, *supra* note 176, at 110-11.

methodology, requiring ever increasing resources for policing and jails,¹⁷⁸ while the Canadian model draws on its preference for affirmative social order policies and general compliance with tighter laws.¹⁷⁹

These social differences can be seen by examining the number of police personnel and lawyers in each country, assuming a greater number of each represents a greater need for the enforcement of its laws as well as a greater litigiousness. The number of police personnel per 100,000 population—a comparable figure in the U.S. and in Canada in 1971—had declined in Canada by 1985, while nearly doubling in the United States.¹⁸⁰ In 1982, there were 256 lawyers per 100,000 population in the United States versus only 118 in Canada.¹⁸¹ These figures, which show the greater number of resources the United States has committed to law enforcement and litigious behavior, may illustrate the effect of this “backstop” methodology in the United States.

B. *Homicides, Suicides and Accidental Deaths*

Despite the objection of some writers to a correlative relationship between gun ownership and firearm-related death,¹⁸² statistics reveal that such a relationship does exist.¹⁸³ The results of two broad international surveys—the Killias and United Nations surveys¹⁸⁴—show clear, positive correlations between gun ownership and both homicide and suicide rates.¹⁸⁵ Importantly, other means of killing one’s self or another were not used to compensate for lack of firearm availability, since the rates for these other methods were not any greater in those countries with lower rates of gun ownership.¹⁸⁶ In addition, both the Killias and United Nations studies

178. *Id.* at 100.

179. *Id.* at 100-01.

180. *Id.* tbl. 3.

181. *Id.* at 100.

182. See generally KOPEL, *supra* note 14.

183. Martin Killias, *International Correlations Between Gun Ownership and Rates of Homicide and Suicide*, reprinted in 148 CAN. MED. ASSOC. J. 1721 (1993). See also UNITED NATIONS, *supra* note 1, at 300-01.

184. Killias, *supra* note 183, at 1721; UNITED NATIONS, *supra* note 1, at 300-01. Both surveys included Canada, the United States, and much of Europe.

185. Killias, *supra* note 183, at 1721; UNITED NATIONS, *supra* note 1, at 300-01.

186. Killias, *supra* note 183, at 1721; UNITED NATIONS, *supra* note 1, at 300-01.

found an even greater correlation between gun ownership and firearm-related suicide than between gun ownership and homicide.¹⁸⁷

Two studies published in the *New England Journal of Medicine* in 1992 and 1993 also showed positive correlations between keeping a gun in the home and both firearm-related homicide and suicide rates.¹⁸⁸ The adjusted odds ratios were 2.7:1 for homicide and 4.8:1 for suicide,¹⁸⁹ corroborating the data from the Killias and United Nations surveys¹⁹⁰ that gun ownership rates correlate with increased death statistics and figure even more prominently in increased rates of suicide than of homicide.¹⁹¹

Canadian firearm-related homicide and suicide rates are significantly lower than those in the United States.¹⁹²

In a typical year, the United States and Canada *have comparable rates of violent crime when guns are not involved*, but the murder rate with guns is **10** times greater in the U.S., **19** times [greater] for murders with handguns. The rate of gun-related accidental deaths is approximately **4** times higher, gun-related suicides **2** times higher and robberies with guns **3** times higher [in the United States].¹⁹³ (bold in original) (italics added).

It is important to note that since the two nations have “*comparable rates of violent crime when guns are not involved*,”¹⁹⁴ the theory that America’s violent past and revolutionary underpinnings have played the pivotal role in higher violent crime rates¹⁹⁵ is effectively diffused, since, if this were

187. Killias, *supra* note 183, at 1721; UNITED NATIONS, *supra* note 1, at 300-01.

188. Arthur L. Kellerman, M.D., M.P.H., et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084 (1993) [hereinafter Kellerman, *Gun Ownership*]; Arthur L. Kellerman, M.D., M.P.H., et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467 (1992) [hereinafter Kellerman, *Suicide*].

189. Kellerman, *Gun Ownership*, *supra* note 188, at 1084 (1993); Kellerman, *Suicide*, *supra* note 188, at 467.

190. Killias, *supra* note 183, at 1721; UNITED NATIONS, *supra* note 1, at 300-01.

191. See Kellerman, *Gun Ownership*, *supra* note 188, at 1084; Kellerman, *Suicide*, *supra* note 188, at 467; Killias, *supra* note 183, at 10; UNITED NATIONS, *supra* note 1, at 300-01.

192. COALITION FOR GUN CONTROL, MYTHS AND FACTS ON GUN CONTROL 1 (Toronto, Ontario, 1994).

193. *Id.*

194. *Id.*

195. See KOPEL, *supra* note 14, at 137-42.

true, the United States would experience higher rates of non-firearm related crime as well. (emphasis added).

A recent study compared firearm-related homicide rates in Vancouver and Seattle.¹⁹⁶ The two cities were comparable in population, levels of education, average household income, geography, climate and cultural values.¹⁹⁷ Vancouver, however, issued only 4,137 handgun permits from 1984 to 1988, while Seattle issued 15,289 during the same period.¹⁹⁸ This disparity appears to be due to tougher Canadian gun laws, such as a complete ban on concealed weapons and severe restrictions on the ownership of handguns.¹⁹⁹ The rate of firearm-related homicide in Seattle as compared with Vancouver was 4.8:1.²⁰⁰ If one contrasts this firearm-related homicide ratio with only 1.08:1 for those homicides committed without use of a firearm,²⁰¹ it is clear that there is no greater proclivity towards violence in Seattle; rather, it is *gun* violence that is much more prevalent in Seattle than in Vancouver.²⁰²

Canadian firearm-related homicides declined after the passage of tougher Canadian federal gun control regulations became effective in 1978,²⁰³ while U.S. rates continued to increase after passage of its modern gun control laws in 1968.²⁰⁴ Although these divergent trends may seem to undermine any correlative relationship between gun control laws and reduced firearm-related deaths, it is important to note that Canada, as indicated, has enacted *much more restrictive* gun control regulations than the United States has.²⁰⁵

Statistics for accidental deaths demonstrate that currently four percent of all firearm-related deaths in the United States are accidental.²⁰⁶ The

196. Nicholas Dixon, *Why We Should Ban Handguns in the United States*, 12 ST. LOUIS U. PUB. L. REV. 243, 258-62.

197. *Id.* at 258.

198. *Id.* at 259.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* This assumes comparable rates of ownership for unlicensed guns. This assumption is reasonable since Seattle gun owners have approximately 3.7 times the number of *licensed* guns than Vancouver gun owners and approximately 3.4 times the number of *total* guns as measured by "Cook's gun prevalence index". *Id.*

203. STATISTICAL BRIEFING NOTE, *supra* note 13, at 1.

204. BUREAU OF JUSTICE STATISTICS SOURCEBOOK, *supra* note 12, tbl. 3.141.

205. Dixon, *supra* note 196, at 259.

206. ACCIDENT FACTS, *supra* note 3, at 94 (1416 accidental deaths caused by firearms

number of these accidental deaths fluctuated between 2,100 and 3,200 from 1911 to 1967.²⁰⁷ The rate of firearm-related deaths then began a precipitous decline beginning in 1968, the year the Gun Control Act was signed into law.²⁰⁸ This rate has fallen more than fifty percent, from 2,896 deaths in 1967 to only 1,400 in 1992,²⁰⁹ indicating a strong correlation between gun control and accidental firearm-related deaths in the United States.²¹⁰

A correlation between the number of firearm-related accidental deaths and gun control can also be found in Canada.²¹¹ Accidental deaths have declined thirty-four percent since Canada's tougher 1977 gun control laws were enacted, from 877 in 1981-1982 to 581 in 1990-1991.²¹² Accidental firearm-related deaths, therefore, might be the category most affected by tougher gun control laws.²¹³

In light of this data, it is difficult to support arguments based on the premises that gun control only "takes guns out of the hands of law-abiding citizens"²¹⁴ or "guns don't kill, people do."²¹⁵

C. Self-Protection

Inherent in the American view of the right to keep and bear arms is the notion that citizens have the constitutional right to use deadly force to protect themselves, especially in their dwelling.²¹⁶ However, in contrast with the 500,000 violent crimes and 15,377 firearm-related homicides committed in the United States during 1992,²¹⁷ only 308 cases were

were reported in 1990).

207. *Id.* at 31-32.

208. *Id.*; Gun Control Act of 1968, *supra* note 139.

209. ACCIDENT FACTS, *supra* note 3, at 31-32.

210. *Id.*

211. Hospital Morbidity Survey, Statistics Canada, tbl. 13 (unpublished report, on file with *New York Law School Journal of International and Comparative Law*).

212. *Id.*

213. *Id.*; ACCIDENT FACTS, *supra* note 3, at 31-32.

214. Weiss, *supra* note 5, at 69-70.

215. *Id.*

216. See LAFAVE & SCOTT, *supra* note 97, at 466. "Of course, if the defender's reasonable force in protection of his property is met with an attack upon his person, he may then respond by defending himself and then may be entitled to use deadly force." *Id.*

217. CRIME STATE RANKINGS 1994: CRIME IN THE 50 UNITED STATES 285, 291

classified as justifiable homicide by a private citizen using a firearm in self-defense against a felonious perpetrator.²¹⁸ Of course, the instances where firearms were "justifiably" used in self-defense do not account for occasions where the perpetrator was only injured and not killed; however, the statistics also do not account for those instances where the defending citizen was injured or killed while attempting armed self-defense.²¹⁹

A survey measuring deaths of gun owners resulting from both self-protection and having guns in the home was conducted in King's County, Washington from 1978 through 1983 and reported by Dr. Arthur Kellerman in the *New England Journal of Medicine*.²²⁰ The Kellerman study found that of a total of 743 firearm-related deaths, 398 occurred in a residence where a firearm was kept, and only 2 were associated with an intruder being shot while attempting to enter the residence.²²¹ And "[f]or every case of self-protection homicide involving a firearm kept in the home, there were 1.3 accidental deaths, 4.6 criminal homicides, and 37 suicides."²²² Therefore, the justifiable use of firearms for self-protection is a rare occurrence and carries with it much greater associated risks of the death of someone other than the perpetrator.²²³

VI. CONSTITUTIONAL CONSIDERATIONS

A. *The Fundamental Civil Liberty: Security*

Arguably, chief among the civil liberties in the United States is security.²²⁴ The first eight Amendments in the Bill of Rights enumerate individual civil liberties that are to be protected against governmental intrusion.²²⁵ The Ninth Amendment does not limit the protected rights to

(Kathleen O'Leary Morgan et al. eds. 1994).

218. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1992, tbl. 2.16 (1994) [hereinafter UNIFORM CRIME REPORTS].

219. *Id.*

220. Arthur L. Kellerman, M.D., M.P.H., & Donald T. Reay, M.D., *Protection or Peril?*, 314 *NEW ENG. J. MED.* 1557 (1986).

221. *Id.*

222. *Id.*

223. *Id.* See also UNIFORM CRIME REPORTS, *supra* note 218, tbl. 2.16.

224. THE FEDERALIST, No. 37, at 226 (James Madison) (Clinton Rossiter ed., 1961).

225. U.S. CONST. amend. I-VIII.

only those enumerated in the first eight,²²⁶ while the Tenth Amendment deals with sovereignty of the individual and the state in matters where the federal government has not been given enumerated authority.²²⁷ The concern about sovereignty which existed in the late eighteenth century, particularly relating to the risk of federal encroachment on state authority, still exists today.²²⁸ Opponents of gun control argue that restricting firearms will compromise the ability of the local citizenry to defend itself against federal encroachment.²²⁹ However, the Preamble to the U.S. Constitution reflects one of the foremost concerns of the Framers and Ratifiers by positioning domestic tranquility as a primary objective of the new union:²³⁰ "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility"²³¹ In addition, Article IV, Section 4 guarantees the states that the federal government will protect the citizens from domestic violence.²³²

Domestic tranquility may be threatened by the 36,866 firearm-related deaths in the United States each year.²³³ The international studies by Killias and the United Nations²³⁴ show that guns indeed present such a threat to American society due to the positive correlation between gun ownership and both homicide and suicide rates.²³⁵ The results of the Seattle-Vancouver study corroborate this hypothesis.²³⁶ Therefore, a reasonable justification can be made for stronger federal controls based on the data, which indicates a need, as well as the presumption of constitutionality indicated by both the Preamble and Article IV, Section 4.²³⁷

226. U.S. CONST. amend. IX.

227. U.S. CONST. amend. X.

228. See generally THE ANTI-FEDERALIST PAPERS, *supra* note 115, at 1-20. See also THE FEDERALIST Nos. 1, 15 (Alexander Hamilton), No. 14 (James Madison); Weiss, *supra* note 5, at 84.

229. Weiss, *supra* note 5, at 84.

230. U.S. CONST. pmbl.

231. *Id.*

232. U.S. CONST. art. IV, § 4.

233. ACCIDENT FACTS, *supra* note 3, at 94.

234. Killias, *supra* note 183, at 1721; UNITED NATIONS, *supra* note 1, at 300-01.

235. See Killias, *supra* note 183, at 1721; UNITED NATIONS, *supra* note 1, at 300-01.

236. Dixon, *supra* note 196, at 258-62.

237. See Killias, *supra* note 183, at 1721; UNITED NATIONS, *supra* note 1, at 300-01; Dixon, *supra* note 196, at 258-62; U.S. CONST. pmbl., art. IV, § 4.

B. A Federal Approach to Gun Control

Overall, available data indicate a positive correlation between the enactment of modern gun control laws in Canada and the United States in the 1960s and 1970s and a decline in firearm-related deaths due to homicide, suicide and accident.²³⁸ However, strong federal firearm regulations work better than fragmented local gun laws.²³⁹ The fact that the local and state laws differ to such a great degree in the United States, coupled with the ease of interstate commerce and travel, prohibits any effective enforcement of local gun control regulations.²⁴⁰ The State of Florida, for example, amended its constitution in 1990 to require a mandatory three-day waiting period between the time a firearm was purchased and the time the owner could take possession.²⁴¹ Contrast this with the laws of the contiguous state of Georgia, where no application or license is necessary to own or possess a gun, unless one wishes to carry the weapon.²⁴² Enforcing stronger federal laws would put more *teeth* into the regulation of guns by eliminating the inevitable loopholes that exist due to lack of uniformity as a result of the current potpourri of state and local regulations.²⁴³

Modern federal motor vehicle laws can provide a predictive model for the potential success of how much more effective regulations enforced at the federal level can be in the United States.²⁴⁴ In 1966, Congress unanimously passed the Federal Motor Vehicle Safety Act.²⁴⁵ This wide-ranging piece of legislation, codified in Title 23 of the U.S. Code,²⁴⁶ gave federal agencies broad authority to create incentive-based uniform regulations for a variety of motor vehicle issues, including highway

238. STATISTICAL BRIEFING NOTE, *supra* note 13, at 1; ACCIDENT FACTS, *supra* note 3, at 31-32; Hospital Morbidity Survey, *supra* note 211, tbl. 13. Although firearm-related homicide and suicide rates have continued to rise in the United States, arguably due to weak federal laws, they have declined in Canada, and firearm-related accidental deaths have dropped in both countries. *Id.*

239. Killias, *supra* note 183, at 1721; UNITED NATIONS, *supra* note 1, at 300-01.

240. Udulutch, *supra* note 119, at part VI.A. See generally Kates, *supra* note 119.

241. FLA. STAT. ch. 790.0655(1)(a) (1993); FLA CONST. art. I, § 8(b) (1990).

242. GA. CODE ANN., § 16-11-128(a) (Harrison 1994).

243. BUREAU OF JUSTICE STATISTICS SOURCEBOOK, *supra* note 12, tbl. 1.133.

244. Michael J. Trebilcock, *Requiem for Regulators: The Passing of a Counter-Culture?*, 8 YALE J. ON REG. 497, 498 (1991) (reviewing JERRY L. MASHAW, *THE STRUGGLE FOR AUTO SAFETY* (1990)); ACCIDENT FACTS, *supra* note 3, at 33.

245. Trebilcock, *supra* note 244, at 498.

246. Motor Vehicle Safety Act (codified at 23 U.S.C. ch. 1 and 4 (1966)).

design,²⁴⁷ driver education,²⁴⁸ mandatory seat belts,²⁴⁹ and maximum speed limits.²⁵⁰ Economic incentives were created so that if a state failed to comply, federal funds for highway maintenance would be withheld.²⁵¹ The results have been dramatic.²⁵² The post-World War II highway death rates per 100,000 population, which hovered in the low 20s from 1945 through 1963, began to rise before hitting a peak of 27.7 in 1969, just after the new regulations were enacted.²⁵³ The rate then began a precipitous drop to a low of 15.8 in 1992, a 43% decline.²⁵⁴

If similarly incentive-based uniform regulations were adopted in the gun control arena (e.g., if funds to help manage the licensing and registration process were made available to the states contingent upon compliance), state acquiescence might be possible, limiting the need to have the federal bureaucracy directly enforce the laws.²⁵⁵

VII. PROPOSALS

Several reasonable Canadian approaches²⁵⁶ tailored to address American state sovereignty concerns²⁵⁷ and coupled with incentive-based compliance measures comparable to measures the United States has successfully adopted for the safe handling of motor vehicles²⁵⁸ would improve gun control enforcement without denying law-abiding American citizens the fundamental right to own a gun.²⁵⁹

The recommended regulations fall into four broad categories: banned weapons, licensing and education, registration and purchase, and safe handling.

247. 23 U.S.C.A. § 402 (West 1990)

248. *Id.*

249. *Id.* § 153.

250. *Id.* § 154.

251. *Id.* § 659.7.

252. *See* ACCIDENT FACTS, *supra* note 3, at 33.

253. *Id.*

254. *Id.*

255. Motor Vehicle Safety Act, *supra* note 246.

256. *See generally* Canadian Criminal Code, Pt. III, *supra* note 68.

257. U.S. CONST. amend. X (empowers the states with authority for all matters not enumerated to be under federal control or otherwise prohibited by the Constitution).

258. Motor Vehicle Safety Act, *supra* note 246.

259. U.S. CONST. amend. II.

Category 1: all firearms, such as semiautomatic weapons, that are not traditionally used for sport or self-defense should be banned in the United States.²⁶⁰ Although the Violent Crime Control and Law Enforcement Act of 1994²⁶¹ banned a variety of semi-automatic assault weapons, many were not included.²⁶² Available statistics show that while these weapons play a negligible part in the overall number of firearm-related deaths,²⁶³ when they *are* used, their power is formidable. For that reason alone, assault weapons do not belong in the hands of private citizens.²⁶⁴ The owners of forfeited weapons that have become banned may be appropriately compensated for turning in their guns pursuant to Fifth Amendment requirements.²⁶⁵ This compensation may be funded through the imposition of stiff fines for non-compliance.²⁶⁶

Category 2: the licensing and education of each applicant should be mandatory.²⁶⁷ Those applicants who have not taken an authorized firearms course, cannot show an understanding of pertinent regulations, and fail to demonstrate basic competence in the safe handling and operation of a firearm should be denied a license.²⁶⁸ This policy of forcing education on the prospective gun owner would also defeat the key argument of gun control opponents—that regulations infringe on the constitutional right to own a gun²⁶⁹—since it would not remove guns from the homes of law-abiding citizens; rather, it presumably would make use of their guns for self-defense more effective.

Licenses would be denied to those individuals currently not permitted to own a gun under the U.S. Code,²⁷⁰ such as those who are under

260. See Udulutch, *supra* note 119, at 52-53.

261. See 1994 Crime Act, *supra* note 152, at 2000-10.

262. See *What Is an Assault Weapon?*, *supra* note 2.

263. *Id.* "Since police started keeping statistics, we now know that assault weapons are/were used in an underwhelming 0.026 of 1% of crimes in New Jersey," quoting Deputy Police Chief Joseph Constance, of Trenton, New Jersey. *Id.* In addition, the following rates were noted: assault weapons were used in 0.14% of violent crimes in Florida over a three year period from 1987 through 1989, and only 80 of the 16,378 firearms confiscated in New York City in 1988 were assault weapons. *Id.*

264. Udulutch, *supra* note 119, at 53-54.

265. See U.S. CONST. amend. V. ("[N]or shall private property be taken for public use, without just compensation.").

266. See Udulutch, *supra* note 119, at 46.

267. *Id.* at 44-45.

268. See Canadian Criminal Code, *supra* note 68, § 106(2)(c), (2.2).

269. See Weiss, *supra* note 5, at 84.

270. See 18 U.S.C. § 922(d) (1994 Cumulative Annual Pocket Part).

indictment for or who have been convicted of a felony, fugitives, drug addicts, mental defectives, illegal aliens, dishonorably discharged veterans, and those who have renounced their citizenship.²⁷¹ Perhaps, as in Canada, licenses should be denied to the class of people who have experienced recent violent episodes or traumatic events.²⁷² Though this issue would, no doubt, be controversial in the United States, as it may present enforcement problems and encourage discrimination against people with ordinary and possibly temporary personal problems, it deserves careful consideration. In addition, as in Canada, two character references should be provided by the applicant.²⁷³ This requirement might prevent someone who has had violent episodes, but who has not gone through the court system, from obtaining a license.²⁷⁴

The costs associated with the licensing and education process may be partially offset by federal monies provided under an incentive-based

271. 18 U.S.C. § 922(d) (1988).

It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

- (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) is a fugitive from justice;
- (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (4) has been adjudicated as a mental defective or has been committed to any mental institution;
- (5) who, being an alien, is illegally or unlawfully in the United States;
- (6) who has been discharged from the Armed Forces under dishonorable discharge conditions; [or]
- (7) who, having been a citizen of the United States, has renounced his citizenship. *Id.*

272. See Canadian Criminal Code, *supra* note 68, § 106(4)(b), (c), and (d). The Canadian Code calls for two distinct classes of individuals to be denied Firearm Acquisition Certificates not addressed by the U.S. Code: applicants with a recent history of violent behavior or threatening behavior and those where “there is another good and sufficient reason for” denying a certificate. *Id.* Clearly, the latter point leaves a broad range of options open to the certifying officer. Although few people are actually denied Firearm Acquisition Certificates, the authorities are entitled to deny one if, for example, the applicant exhibits suspicious behavior. *Id.*

273. *Id.* § 106(8).

274. See Peter Benesh, *Canada Toughens Gun Laws, Applicants Must Pass Stringent Test*, MIAMI HERALD, Jan. 7, 1994, at 17A.

program,²⁷⁵ but should ultimately be borne by the applicant through licensing fees and payment directly to an authorized instructor.²⁷⁶

Category 3: the purchase of firearms should be subject to a thorough and strictly enforced registration process.²⁷⁷ First, like Canada, there should be a twenty-eight day waiting period instead of the five day waiting period initiated as part of the Brady Act.²⁷⁸ This longer waiting period would allow for legitimate "cooling off" and a realistic period of time for authorities to check on the applicant.²⁷⁹ Second, weapons transferred from one owner to another should have title properly transferred, and the new owner should have to comply with all registration requirements.²⁸⁰ Finally, registrations should be renewed every five years so as to allow the authorities to deny registration to a person who has fallen into one of the prohibited classes in the interim.²⁸¹ The owners of firearms should bear the costs of these programs through a system of fees.²⁸²

Category 4: when licensing, purchase, and registration are complete, the owner of a firearm should be required to handle, use, and transport the weapon with the utmost care.²⁸³ Canada requires a person transporting a handgun in an automobile, for example, to keep it in a locked box in the trunk without bullets.²⁸⁴ This enables the police to fine violators or confiscate weapons, and it may diminish impulsive shootings resulting from highway confrontations. One way to enforce such a policy effectively is to make it financially punitive to ignore, through stiff fines for the first offense and possibly forfeiture for the second.²⁸⁵

275. See discussion *supra* part VI.B.

276. Udulutch, *supra* note 119, at 45.

277. *Id.* at 46.

278. Canadian Criminal Code, *supra* note 68, § 106(1). See also Brady Act, *supra* note 147, § 922(s)(1)(A)(ii).

279. Brady Act, *supra* note 147, § 922(s)(1)(A)(ii).

280. See Udulutch, *supra* note 119, at 46-47. As noted by Udulutch, 19 U.S.C. § 922 and 23 U.S.C. § 5812 have provisions for limiting who may receive title to a firearm and for transferring such title, but there is no provision for investigating the background of the transferee. *Id.*

281. See Canadian Criminal Code, *supra* note 68, § 106(11).

282. Udulutch, *supra* note 119, at 45-47, 49.

283. Storage, Display, Handling and Transportation of Certain Firearms Regulations §§ 4-12 (1993) (Can.)

284. *Id.* §§ 10-12.

285. See Udulutch, *supra* note 119, at 46.

VIII. CONCLUSION

Canadian gun control regulations and the results of those laws can provide an appropriate prescriptive, as well as predictive, model for the United States. There are substantial cultural similarities between the two nations, and Canada has had great success in controlling the rate of firearm-related deaths without compromising fundamental civil liberties. The United States should look to its northern neighbor to adopt those laws and policies that do not offend American constitutional sensibilities yet will save thousands of innocent lives each year.

In addition, U.S. motor vehicle safety laws have shown that strong federal legislation has worked effectively to reduce deaths on the nation's highways. This federal regulation has been accomplished without compromising the fundamental freedom of mobility, although freedom of choice to not wear seat belts or to drive at high speeds is arguably curtailed. If the United States can adopt such wide-ranging legislation for regulation of the automobile and highway system, it is even more appropriate to carefully regulate an instrument as potentially dangerous as the firearm. Finally, by providing the states with compelling incentives to adopt uniform regulations, the role of the federal government in the ultimate execution of these policies can be minimized.

Scott Jacobs

