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State v. Fennell: The North Carolina Tradition of Reasonable Regulation of the Right to Bear Arms

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State v. Fennell: The North Carolina Tradition of Reasonable Regulation of the Right to Bear Arms

The right of individual citizens to keep and bear arms has created increasingly tense debate in both political and academic arenas during the past twenty-five years.[1] A focal point of "The Great American Gun War"[2] has been the constitutionality of banning or restricting various weapons.[3] Despite the importance of possible constitutional limitations on a state's authority to restrict a citizen's right to bear arms, the judiciary, especially the federal judiciary, remains reticent on this hotly contested social issue.[4] Since 1968 the North Carolina Supreme Court has not addressed directly the constitutional limits the State may impose on the right to keep and bear arms.[5] In *State v. Fennell*,[6] however, the North Carolina Court of Appeals recently upheld a statute making possession of a sawed-off shotgun illegal.

This Note considers the constitutional right to keep and bear arms in North Carolina. The Note first briefly discusses United States Supreme Court cases holding that no individual right to bear arms exists under the United States Constitution. Next, it examines North Carolina cases holding that an individual right to keep arms does exist under the North Carolina Constitution. The Note also analyzes other states' treatments of the right to bear arms under their various constitutional provisions. Finally, the Note contends that North Carolina courts have concluded properly that the North Carolina Constitution provides for an individual right to bear arms.

On March 3, 1988, three Goldsboro police officers responded to a report of a man carrying a sawed-off shotgun at a community recreation center.[7] The officers spotted Jeffrey Fennell, who matched the description given in the re-

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1. *E.g.*, S. HALBROOK, THAT EVERY MAN BE ARMED IX-X (1984); E. KRUSCHKE, THE RIGHT TO KEEP AND BEAR ARMS 3-4 (1985); Note, *The Individual Right to Bear Arms: An Illusory Public Pacifier?*, 1986 UTAH L. REV. 751, 755.

2. *See* Bruce-Briggs, *The Great American Gun War*, 1976 PUB. INTEREST 37.

3. *See generally* Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW. U.L. REV. 46 (1966) (contending that second amendment does not grant an individual right to bear arms); Jackson, *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189 (1977) (mayor of Atlanta stressing urban problems with firearms); Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206-11 (1983) (surveying the "flip-flop" of liberals and conservatives on the issue of individual liberty regarding the right to bear arms); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983) (arguing that the framers intended the second amendment to convey an individual right).

4. The United States Supreme Court has addressed the second amendment only four times, most recently in 1939. *See infra* notes 24-29 and accompanying text. The Court's silence contrasts sharply with its more active role in other disputed social issues such as abortion, *e.g.*, Roe v. Wade, 410 U.S. 113 (1973); school integration, *e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); and the rights of criminal defendants, *e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961). The Supreme Court's refusal to reconsider its stand on the second amendment in light of the incorporation of other parts of the Bill of Rights since 1939 remains puzzling.

5. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

6. 95 N.C. App. 140, 382 S.E.2d 231 (1989).

7. *Id.* at 141, 382 S.E.2d at 232.

port.[8] Fennell fled toward the front of the center pulling "an object that 'resembled a rifle or a shotgun from his pants,' " as he ran.[9] When the officers found Fennell inside the center a few moments later he possessed neither a weapon nor the jacket he was wearing when he dashed into the recreation center.[10] A search of the area yielded Fennell's jacket with a disassembled sawed-off shotgun in its pockets.[11]

Fennell presented no evidence at his trial in Wayne County Superior Court, which concluded on June 10, 1988.[12] Judge Currin found Fennell guilty of possessing a "weapon of mass death and destruction" in violation of section 14-288.8[13] of the North Carolina General Statutes, and sentenced him to five years imprisonment.[14]

The North Carolina Court of Appeals upheld Jeffrey Fennell's conviction.[15] In Fennell's first assignment of error,[16] the focus of this Note, he claimed that Section 14-288.8 encroached upon his right to bear arms under both the second amendment to the United States Constitution[17] and article I, section 30 of the North Carolina Constitution.[18] The court of appeals noted

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8. *Id.* at 141-42, 382 S.E.2d at 232.

9. *Id.* at 142, 382 S.E.2d at 232.

10. *Id.*

11. *Id.*

12. *Id.* at 141-42, 382 S.E.2d at 231-32.

13. The statute provides:

> (a) Except as otherwise provided in this section, it is unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction. . . .
>
> (c) The term "weapon of mass death and destruction" includes: . . .
>
> (3) Any firearm capable of fully automatic fire, any shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches . . .
>
> (4) Any combination of parts designed or intended for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled . . .
>
> (d) Any person who violates any provision of this section is guilty of a Class I felony.

N.C. GEN. STAT. § 14-288.8 (1986).

14. *Fennell*, 95 N.C. App. at 141, 382 S.E.2d at 231-32.

15. *Id.* at 146, 382 S.E.2d at 234.

16. Fennell also assigned as error the State's failure to prove that the shotgun was operable. *Id.* at 144, 382 S.E.2d at 233. The court held that inoperability constituted an affirmative defense to a violation charged under North Carolina General Statutes § 14-288.8. *Id.* at 144-45, 382 S.E.2d at 233. The court found merely raising the issue of inoperability to be insufficient to shift the burden of proof to the State. *Id.* at 145, 382 S.E.2d at 233-34. The court relied on a previous court of appeals decision upholding a conviction based on a statute forbidding a felon to possess a weapon of mass destruction. *Id. See* State v. Baldwin, 34 N.C. App. 307, 237 S.E.2d 881 (1977) (construing N.C. GEN. STAT. § 14-415.1 (1986)). Fennell also contended the State had charged him under the wrong statute because the sawed-off shotgun was disassembled when found by the officers. *Fennell*, 95 N.C. App. at 146, 382 S.E.2d at 234. The court held that disassembly did not prevent the weapon in question from qualifying as a weapon of mass death and destruction. *Id.*

17. The second amendment provides that "[a] well regulated militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

18. Section 30 reads:

> 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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall jus-

that the second amendment does not guarantee an individual the right to bear arms except in connection with a well-regulated militia.[19] The court acknowledged, however, that North Carolina courts have held that there exists an individual as well as a collective right to bear arms under the North Carolina Constitution.[20] The court rejected the defendant's contention that the State may regulate the possession of firearms only with regard to time, place, and manner,[21] and further rejected the argument that upholding restrictions on the size of weapons would begin the descent down the "slippery slope" towards total prohibition.[22] The court also held that "the State can regulate the length of a particular firearm as long as there is a reasonable purpose for doing so."[23]

Only four United States Supreme Court cases directly address the second amendment.[24] In two nineteenth-century cases the Supreme Court decided that the second amendment only applied against the federal government.[25] This is a view to which modern courts adhere.[26] In the most recent Supreme Court case, the 1939 decision in *United States v. Miller*,[27] the Court held that the second amendment did not protect the possession of a sawed-off shotgun.[28] The *Miller* decision has been interpreted to protect the right to bear arms only in connection with a militia.[29] Many commentators argue that the second amendment should have a broader scope.[30] Criticism of both the *Miller* Court's understand-

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tify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

N.C. CONST. art. I, § 30 (1984).

19. *Fennell*, 95 N.C. App. at 143, 382 S.E.2d at 232. Since the Supreme Court's decision in United States v. Miller, 307 U.S. 174 (1939), state and federal courts have held that the second amendment insures no individual right to bear arms and that it applies only to the federal government. *See infra* notes 25-29 and accompanying text.

20. *Fennell*, 95 N.C. App. at 143, 382 S.E.2d at 233.

21. *Id.* No previous North Carolina case had recognized expressly the distinction between a time, place, and manner restriction and a restriction on a weapon's length. *See infra* notes 76-84 and accompanying text. This Note uses the phrase "time, place, and manner" in a descriptive sense with no intent to invoke first amendment jurisprudence.

22. *Fennell*, 95 N.C. App. at 144, 382 S.E.2d at 233.

23. *Id.*

24. United States v. Miller, 307 U.S. 174 (1939); Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876).

25. In a decision upholding a statute which forbade carrying a pistol on a public street, the Court held that the second amendment had "no reference whatever to proceedings in state courts." Miller v. Texas, 153 U.S. 535, 538 (1894). A prior decision described the second amendment as "one of the amendments that has no other effect than to restrict the powers of the national government." United States v. Cruikshank, 92 U.S. 542, 553 (1876).

26. *See* United States v. Oakes, 564 F.2d 384 (10th Cir. 1977); Galvan v. Superior Court, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969).

27. 307 U.S. 174 (1939).

28. *Id.* at 178.

29. *See, e.g.*, United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); Quilici v. Village of Morton Grove, 532 F. Supp. 1169, 1180 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); State v. Amos, 343 So. 2d 166, 168 (La. 1977); Burton v. Sills, 53 N.J. 86, 100-01, 248 A.2d 521, 528 (1968), *appeal dismissed*, 394 U.S. 812 (1969).

30. *See, e.g.*, S. HALBROOK, *supra* note 1; E. KRUSCHKE, *supra* note 1; Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Kates, *supra* note 3; Lund, *The Second Amendment, Political Liberty, and the Right to Self Preservation*, 39 ALA. L. REV. 103 (1987); Malcolm, *supra* note 3. In addition, the Subcommittee on the

ing of the second amendment[31] and subsequent interpretations of the *Miller* decision by other courts[32] has flourished in scholarly publications.[33] However valid, these criticisms have not garnered majority support among either academicians[34] or lawyers,[35] and the judiciary remains unswayed.[36] Unless the Supreme Court suddenly decides to clarify *Miller* in such a way as to reject fifty years of lower court interpretations, the second amendment is unlikely to protect an individual right to bear arms.

Unlike its federal counterpart, the North Carolina Constitution grants a right to bear arms to the individual.[37] A provision concerning the right to bear arms appeared in the Declaration of Rights[38] attached to the Constitution of 1776.[39] Though the declaration granted an express right only to bear arms "for the defense of the State,"[40] the state supreme court interpreted it in 1843 to grant the right to bear arms "for any lawful purpose."[41] In *State v. Huntley* the North Carolina Supreme Court interpreted the Declaration of Rights to grant individuals both a right to be armed and a duty to exercise that right in a lawful

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Constitution of the Senate Committee on the Judiciary endorsed the view that the second amendment should give an individual right to bear arms. S. SUBCOMM. ON THE CONSTITUTION OF THE S. COMM. ON THE JUDICIARY, 97TH CONG., 2ND SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982).

31. *See* Kates, *supra* note 3, at 247-51.

32. Caplan, *supra* note 30, at 48-49.

33. One commentator, who opts for a middle ground between the collective and individual rights theorists, labels the proliferation of works an "explosion of original research supporting the individual rights approach." Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. L. & POL. 1, 2, n.3 (1987).

34. The individual right camp concedes its minority status. *See* Kates, *supra* note 3, at 206. There are a large number of works arguing for the "traditional" view of the second amendment. *See, e.g.*, G. NEWTON & F. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE (1969); Feller & Gotting, *supra* note 3; Jackson, *supra* note 3; Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI. KENT L. REV. 148 (1971); Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53 (1966); Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975); Note, *The Right to Keep and Bear Arms*, 26 DRAKE L. REV. 423 (1977). Recent articles, however, predominantly favor the individual rights view. *See supra* notes 30 and 33.

35. For a discussion of the American Bar Association and the American Civil Liberties Union positions see Kates, *supra* note 3, at 207 nn.14-15.

36. In the aftermath of *Miller* no court has held the second amendment to guarantee an individual right to bear arms. However, a dissent in *Quilici v. Morton Grove* argued that a total ban on handguns violated the constitutional right to privacy. 695 F.2d 261, 278-80 (7th Cir. 1982) (Coffey, J., dissenting) (relying on privacy rights contained in the fourth and fifth amendments and "the basic human freedom" of owning a gun for protection of the home), *cert. denied*, 464 U.S. 863 (1983).

37. *See* State v. Huntley, 25 N.C. (1 Ired.) 418 (1843) (The *Huntley* decision marked the first consideration of a right to bear arms by a North Carolina court.).

38. These provisions accompanied the North Carolina Constitution of 1776 and were interpreted as binding upon the State although technically they were not part of the constitution. Sanders, *A Brief History of the Constitutions of North Carolina*, in NORTH CAROLINA GOVERNMENT: 1585-1979, 795, 795 (1981).

39. The provision provided:

> That the people have a right to bear arms, for the defense of the State; and as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.

N.C. DEC. OF RIGHTS art. 17 (1776).

40. *Id.*

41. State v. Huntley, 25 N.C. (1 Ired.) 418, 422 (1843).

manner.[42] *Huntley* is the only case in which a North Carolina court examines this original guarantee of the right to bear arms.

The North Carolina Constitution of 1868 adopted the language of the second amendment to the federal Constitution as the first phrase of its provision concerning the right to bear arms.[43] An amendment adopted at the Constitutional Convention of 1875 added language concerning the right of the General Assembly to forbid the carrying of concealed weapons.[44] Since 1875 the constitutional language guaranteeing the right to bear arms has remained unchanged.[45]

State v. Speller,[46] the first case dealing at length with the right to bear arms under the current constitutional language, arose in 1882.[47] In *Speller* the supreme court upheld a conviction based on a statute forbidding public possession of a concealed weapon.[48] The supreme court went beyond mere reliance on the express constitutional language authorizing the legislature to forbid carrying concealed weapons, holding that even in the absence of the express constitutional authorization the legislature could regulate the right to bear arms in the interest of public safety.[49] This language suggests that the right to keep and bear arms has never been considered an unqualified right.

In 1921 the supreme court, in *State v. Kerner*,[50] held unconstitutional a statute which prohibited public possession of an unconcealed pistol without first

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42. *Id.* The court held:

> The bill of rights in this State secures to every man, indeed, the right to "bear arms for the defense of the State." While it secures to him a *right* of which he cannot be deprived, it holds forth the *duty* in execution of which that right is to be exercised. If he employs those arms, which he ought to wield for the safety and protection of his country, to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege with which he has been invested.

Id.

43. The new provision stated:

> 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; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power.

N.C. CONST. art. I, § 24 (1868). The Constitution of 1868 replaced the Constitution of 1776, which had undergone heavy amendment in 1835 and during the Civil War. Sanders, *supra* note 38, at 796. The new Constitution borrowed from its predecessor, the United States Constitution, and the constitutions of other states. *Id.* at 796-97.

44. The amendment provided that "[n]othing herein contained shall justify the practice of carrying concealed weapons, or prevent the legislature from enacting penal statutes against the practice." Sanders, *supra* note 38, at 875.

45. In the Constitution of 1971 the section number of the right to bear arms provision changed to 30. *See supra* note 18 for text of the provision.

46. 86 N.C. 697 (1882).

47. *See id.*

48. *Id.* at 701.

49. *Id.* at 700. The court asked:

> But without any constitutional provision whatever on the subject, can it be doubted that the Legislature might by law *regulate* this right to bear arms—as they do all other rights whether inherent or otherwise—and require it to be exercised in a manner conducive to the peace and safety of the public?

Id.

50. 181 N.C. 574, 107 S.E. 222 (1921).

acquiring a permit.[51] The opinion lauded the virtues of the "sacred right" of the people to arm themselves.[52] The court declared that the class of constitutionally protected "arms" should be determined by reference to those weapons commonly in use at the time the North Carolina Constitution was adopted.[53] The *Kerner* court also discussed examples of regulations it considered reasonable.[54] The court accepted as reasonable a regulation forbidding pistols shorter than a certain length;[55] however, the court considered the regulation requiring a permit an unconstitutional infringement on the right to bear arms because in time of emergency, law-abiding citizens would have no opportunity to acquire permits.[56] The *Kerner* opinion reaffirmed the complementary propositions that the individual possesses a right to bear arms, but that right remains subject to reasonable regulation by the legislature.[57]

State v. Dawson,[58] decided in 1968, was the supreme court's next important case dealing with the right to bear arms.[59] The court recognized that the North Carolina Constitution guaranteed to individuals the right to bear arms.[60] It also pointed out that North Carolina courts consistently held that "the right of indi-

51. *Id.* at 575, 107 S.E. at 223. The statute was a local ordinance applicable only in Forsyth County. *Id.*

52. *Id.* The court stated that the right to bear arms "is a sacred right, based upon the experience of the ages in order that the people may be accustomed to bear arms and ready to use them for the protection of their liberties or their country when occasion serves." *Id.* The court recounted the essential role the people's use of arms played in American history from the Revolution to the conquering of the frontier. *Id.* at 576-77, 107 S.E. at 224. The opinion pointed out that in North Carolina "in 1870, when Kirk's militia was turned loose and the writ of *habeas corpus* was suspended, it would have been fatal if our people had been deprived of the right to bear arms, and had been unable to oppose an effective front to the usurpation." *Id.* at 577, 107 S.E. at 224.

53. *Id.* The court discussed the scope of "arms" protected by the Constitution:

> It does not guarantee on the one hand that the people have the futile right to use submarines and cannon of 100 miles range, nor aeroplanes dropping deadly bombs, nor the use of poisonous gasses, nor on the other hand does it embrace dirks, daggers, slung-shots, and brass knuckles, which may be weapons, but are not, strictly speaking, "arms" borne by the people at large, and which are generally concealed. The practical and safe construction is that which must have been in the minds of those who framed our organic law. The intention was to embrace the "arms," an acquaintance with whose use was necessary for their protection against the usurpation of illegal power—such as rifles, muskets, shotguns, swords, and pistols.

Id. at 577-78, 107 S.E. at 224-25.

54. *Id.* at 578, 107 S.E. at 225 (listing "the carrying of deadly weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror" as reasonable restrictions on the right to bear arms).

55. *Id.*

56. *Id.* at 579, 107 S.E. at 225.

57. Justice Allen, in a succinct concurring opinion joined by Justice Stacy, reasoned that the right to bear arms "is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace." *Id.* at 579, 107 S.E. at 226 (Allen, J., concurring). Because Justice Walker concurred in the result without opinion, there was actually no opinion in which a majority of the court joined. *Id.* at 579, 107 S.E. at 226 (Walker, J., concurring in result).

58. 272 N.C. 535, 159 S.E.2d 1 (1968).

59. Although there have been other cases in which the court mentioned the right to bear arms, none of these cases added much to the understanding of the scope of the right. *See, e.g.*, State v. Cole, 249 N.C. 733, 107 S.E.2d 732 (1959) (upholding incitement to riot conviction of Ku Klux Klan leader who brandished weapons).

60. *Dawson*, 272 N.C. at 546, 159 S.E.2d at 9.

viduals to bear arms is not absolute, but is subject to regulation."[61] *Dawson* dealt in part with the common-law crime of "going armed to the terror of the people,"[62] the same crime charged in *Huntley*.[63]

The *Dawson* court also addressed the question whether the constitutional revision of 1868 changed the right to bear arms in such a way as to abolish the common-law crime charged.[64] The majority held that the right to bear arms remained the same under the North Carolina Constitution of 1868 as it had been under the Constitution of 1776, finding that the 1875 amendment allowing the prohibition of concealed weapons constituted merely an act of extreme caution by the legislature.[65] Based on its holding that the scope of the right to bear arms had not changed, the majority found that the common-law misdemeanor of "going armed to the terror of the people" still existed in North Carolina.[66] Justice Lake, in dissent on this issue, considered the 1875 amendment proof of an absolute right to keep and bear arms under the current constitution.[67] The majority opinion clearly rejected this absolutist reading of the provision, opting instead for a right subject to reasonable regulation.[68]

The North Carolina Supreme Court established a consistent interpretation of the right to bear arms between 1843[69] and 1968.[70] The court held the North Carolina Constitution guaranteed an individual the right to bear arms subject only to reasonable regulation by the legislature. In the cases considering the scope of constitutionally permissible regulations, however, the court dealt only with time, place, and manner restrictions on carrying arms.[71]

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61. *Id.*

62. *Id.* at 549, 159 S.E.2d at 11.

63. 25 N.C. (1 Ired.) 418 (1843).

64. *Dawson*, 272 N.C. at 545-48, 159 S.E.2d at 9-11.

65. The court found that the right to bear arms did not change when the constitution underwent revision:

> Insofar as they affect an individual's right to carry arms, we perceive no difference in the constitutional provision of 1776 and our present constitution. The 1875 addendum stating that the legislature may enact penal statutes against carrying concealed weapons was undoubtedly "a matter of superabundant caution, inserted to prevent a doubt, and that, unexpressed, it would result from the undefined police powers, inherent in all governments, and as essential to their existence as any of the muniments of the bill of rights."

Id. at 548, 159 S.E.2d at 10-11 (quoting Haile v. State, 38 Ark. 564, 567 (1882)).

66. *Id.*, 159 S.E.2d at 11 (inconceivable that the Constitutional Convention intended to legalize acts which had previously been criminal).

67. *Id.* at 552, 159 S.E.2d at 14 (Lake, J., dissenting in part and concurring in part). Justice Lake argued that the Constitution of 1868 expanded the right to bear arms beyond that enjoyed under the Constitution of 1776:

> It appears indisputable that the Convention of 1875 regarded the then established right of the people to keep and bear arms as absolute, so much so that the Legislature could not even forbid the carrying of a concealed weapon without the express authority being granted to it in the Constitution by amendment.

Id. (Lake, J., dissenting in part and concurring in part).

68. *Id.* at 546, 159 S.E.2d at 9.

69. *See* State v. Huntley, 25 N.C. (1 Ired.) 418 (1843).

70. *See* State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

71. *See, e.g., id.* (carrying arms to the terror of the community); State v. Cole, 249 N.C. 733, 107 S.E.2d 732 (1959) (carrying arms to incite riot); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921) (carrying an unconcealed pistol on a public street); State v. Speller, 86 N.C. 697 (1882) (car-

In *Fennell* the court of appeals faced a challenge to a statute which forbade the possession of a weapon that the court conceded was part of a class of arms protected by the North Carolina Constitution.[72] While accepting the proposition that a total ban on shotguns would be unconstitutional, the court found the prohibition on short-barrelled shotguns to be a reasonable regulation because it "bears a fair relation to the preservation of the public peace and safety."[73] This marked the first time a North Carolina court accepted as constitutional a regulation of more than just the time, place, and manner in which an individual may carry weapons in the ratio decidendi of a case.[74] The power to prohibit absolutely possession of certain types of arms is different than the power to regulate the time, place, and manner in which a weapon may be borne. An ability to ban completely the possession of a weapon increases the State's ability to limit arms. However, even though the form of the restriction upheld in *Fennell* differs from those upheld in previous cases, the substance of the *Fennell* court's decision fits within the philosophy of reasonable regulation espoused by prior decisions.

The court of appeals' decision in *Fennell* follows the traditional view of North Carolina courts that the individual has a right to bear arms, but that the right is subject to reasonable regulation by the General Assembly.[75] Although previous cases concerned the regulating of time, place, and manner of "bearing" arms,[76] the court's approval of a regulation prohibiting even "keeping"[77] a type of arms seems to follow the philosophy of earlier decisions. In *State v. Kerner*[78] Chief Justice Clark concluded that prohibition of small pistols would not restrict the right to keep and bear arms unreasonably, provided that possession of other pistols remained lawful.[79] The *Kerner* court held that shotguns, like pistols, fall within the scope of "arms" protected by the North Carolina Constitution.[80] The court of appeals in *Fennell* noted, however, that this regulation did not ban all shotguns,[81] and concluded that section 14-288.8 of the North Carolina General Statutes is constitutional because it limits only those shotguns with barrels less than a specified length.[82] In addition, the court found the ban on sawed-off

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rying a concealed weapon); *Huntley*, 25 N.C. (1 Ired.) 418 (1843) (carrying arms to the terror of the community).

72. *Fennell*, 95 N.C. App. at 143, 382 S.E.2d at 233.

73. *Id.* at 144, 382 S.E.2d at 233.

74. *See supra* note 71 and accompanying text.

75. *See* State v. Cole, 249 N.C. 733, 107 S.E.2d 732 (1959); State v. Roten 86 N.C. 701 (1882); State v. Speller, 86 N.C. 697 (1882).

76. *See supra* note 71 and accompanying text.

77. Although Fennell was arrested in a public place, the statute forbids possession of sawed-off shotguns anywhere in the state. *See supra* note 13.

78. 181 N.C. 574, 107 S.E. 222 (1921).

79. *Id.* at 578, 107 S.E. at 225. The Chief Justice observed:

> It is also but a reasonable regulation, and one which has been adopted in some of the states, to require that a pistol shall not be under a certain length, which if reasonable, will prevent the use of pistols of small size, which are not borne as arms, but which are easily and ordinarily carried concealed.

Id.

80. *Id.* at 577-78, 107 S.E. at 225.

81. *Fennell*, 95 N.C. App. at 143, 382 S.E.2d at 233.

82. *Id.* at 143-44, 382 S.E.2d at 233.

shotguns bore a reasonable relationship to public safety in light of the destructive power and easy concealability of such weapons.[83] The regulation forbidding the possession of sawed-off shotguns appears consistent with both opinions in *Kerner*.[84]

The *Fennell* decision also comports with the reasoning and language in *Dawson*. The *Dawson* court quoted from both opinions in *Kerner*[85] and stressed that the right to bear arms had always been viewed as subject to reasonable regulation.[86] The *Dawson* majority recognized a limited right to bear arms rather than the absolute right to bear arms advocated in Justice Lake's dissent. Justice Lake interpreted the adoption of the 1875 amendment allowing the prohibition of concealed weapons to indicate that the constitution previously had allowed an unlimited right to bear arms.[87] He relied on a portion of Chief Justice Clark's opinion in *Kerner* stating that " '[t]his exception [for concealed weapons] indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further.' "[88] This reliance is unpersuasive at best, and disingenuous at worst, because Chief Justice Clark's opinion also recognized numerous constitutionally sound regulations on the right to bear arms including the prohibition of pistols less than a certain length.[89] Justice Lake's emphasis on one passage suggesting an absolute right while ignoring the tenor and actual holding of the *Kerner* decision makes his assertion of an absolute right to bear arms very unpersuasive. In addition to relying on the entire opinion in *Kerner*, the *Dawson* majority analogized to limitations on the right to free speech to support the proposition that the right to bear arms is not absolute.[90] This emphasis on the limited nature of the right to bear arms supports the *Fennell* court's decision to downplay the distinction between time, place, and manner restrictions and a prohibition of a type of arms. The reasonableness of a restriction should be determinative of its constitutionality because reasonable regulation does not offend the constitution. The *Fennell* court properly relied on substance rather

83. *Id.*

84. The opinions of Chief Justice Clark and of Justice Allen emphasize that regulation of the right to bear arms must be reasonable. *Kerner*, 181 N.C. at 578, 107 S.E. at 225; *id.* at 579, 107 S.E. at 226 (Allen, J., concurring). The Chief Justice's opinion also requires that the people have an effective right to become acquainted with and to bear arms. *Id.* at 579, 107 S.E. at 225. The additional requirement imposed by Justice Allen is that the regulation "bear a fair relation to the preservation of the public peace and safety." *Id.* at 579, 107 S.E. at 226 (Allen, J., concurring).

85. *See* State v. Dawson, 272 N.C. 535, 546, 159 S.E.2d 1, 10 (1968) (citing Chief Justice Clark's opinion); *id.* at 547, 159 S.E.2d at 10 (citing Justice Allen's opinion).

86. *Id.* at 546, 159 S.E.2d at 10.

87. *Id.* at 553, 159 S.E.2d at 14 (Lake, J., dissenting in part and concurring in part).

88. *Id.* (Lake, J., dissenting in part and concurring in part) (quoting *Kerner*, 181 N.C. at 575, 107 S.E. at 223).

89. *Kerner*, 181 N.C. at 578, 107 S.E. at 225.

90. *Dawson*, 272 N.C. at 549, 159 S.E.2d at 11. The majority held:

> The right to keep and bear arms no more gives an individual the right to arm himself in order to prowl the highways or other public places to the terror of the people than the constitutional guaranty of free speech gives him the right to yell "fire" in a crowded theater.

Id.

than form in finding the prohibition of sawed-off shotguns constitutionally acceptable.

The *Fennell* opinion broadens the scope of permissible regulations of the right to bear arms to include limitations on the type of arms individuals may possess. This extension seems eminently logical in light of North Carolina's history of allowing reasonable regulation of the right to bear arms. The decision is unlikely to start North Carolina down the slippery slope toward a total ban on firearms[91] because it is in keeping with the State's tradition of reaching a reasonable balance between the individual's right to bear arms and the State's need to police dangerous weapons. Of course, any regulation would infringe on an absolute right, but the right to bear arms is a limited right.

One of the most frequently proposed gun control measures is a mandatory waiting period between applying for a permit and the actual purchase of a firearm.[92] Because the Ohio Constitution[93] has been interpreted as granting an individual right to bear arms subject to reasonable regulation by the legislature,[94] the treatment of a waiting period requirement by the Ohio Supreme Court[95] may indicate the path North Carolina would follow. The court in *Mosher v. Dayton* found the waiting period imposed "within the police power of a legislative body to enact."[96] A waiting period would appear constitutionally permissible in North Carolina as long as it protected public safety and did not abrogate the right to bear arms by requiring too long a period between application and purchase.[97]

A majority of state constitutions contain a right to bear arms provision.[98] The provisions vary widely in their wording, and state courts vary in the way

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91. *Fennell*, 95 N.C. App. at 144, 382 S.E.2d at 233.

92. Officials at both state and national levels advocate waiting periods which would allow police to verify a person's eligibility to purchase a gun. *See, e.g.*, Kennedy, *The Handgun Crime Control Act of 1981*, 10 N. KY. L. REV. 1, 4 (1982) (text of speech delivered by Senator Edward Kennedy on the Senate floor adapted into article form); Brady, *Congress Didn't Want to See. . .*, N.Y. Times, April 3, 1990, at A23, col. 2 (Op-Ed article on "Brady Bill" which would require a seven day waiting period on handgun purchases, written by James Brady, the bill's namesake, who was disabled in John Hinckley's attempted assassination of President Reagan in 1981); N.Y. Times, March 4, 1990, § 1, at 24, col. 1 (reporting on passage of bill which made California the first state to require a waiting period before the purchase of rifles or shotguns).

93. "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.

94. State v. Schatzler, 48 Ohio Op. 389, 392, 249 N.E.2d 549, 552-53, ("The Ohio constitution accords the right to bear arms. But this right does not prevent the legislature from making such police regulations as may be necessary for the welfare of the public at large concerning the manner in which arms shall be borne and the use thereof."). The *Schatzler* court held that "[t]he right cannot be deprived but it enjoins a duty in execution of which that right is to be exercised." *Id.*

95. Mosher v. Dayton, 48 Ohio St. 2d 243, 358 N.E.2d 940 (1976).

96. *Id.* at 247, 258 N.E.2d at 543.

97. The waiting period would not pose the same problems as the permit requirement in State v. Kerner, 181 N.C. 974, 107 S.E. 222 (1921), because it is unlikely an emergency would allow time to purchase a weapon. *See supra* notes 50-57 and accompanying text.

98. An article published in 1983 lists 39 states which had constitutions with right to bear arms provisions. *See* Dowlut, *supra* note 30, at 102-05. One state which lacked a right to bear arms provision in 1983 has since amended its constitution to protect the right to bear arms. *See* McNeely, *The Right of* Who *to Bear* What, When *and* Where—*West Virginia Firearms Law v. The Right-to-Bear-Arms Amendment*, 89 W. VA. L. REV. 1125 (1987).

they interpret the provisions.[99] Courts have struck down statutes or ordinances restricting the right to bear arms on at least seventeen occasions.[100]

The North Carolina position on the right to bear arms is a workable middleground. It recognizes the historical legitimacy of the right to bear arms as an individual right,[101] yet rejects an absolutist interpretation that would lead to absurd results.[102] An examination of two other states demonstrates the differences between the middle path chosen by North Carolina and the extremes adopted by other states.

The Oregon Constitution provides that "[t]he people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power."[103] The language of the Oregon and North Carolina constitutions differs, but because North Carolina courts find an individual right to bear arms in the North Carolina Constitution,[104] the basis for the right guaranteed is similar. The Oregon courts recognize that the legislature may regulate the time, place, and manner of carrying constitutionally protected arms.[105] The Oregon courts, however, reject attempts to outlaw classes of protected arms.[106]

In *State v. Delgado*[107] the Oregon Supreme Court held that a statute forbidding the possession of a switchblade was inconsistent with the Oregon Constitution.[108] The Oregon court concluded that the class of protected "arms" depended on the types of weapons commonly used for self-defense at the time of the drafting of the Oregon Constitution.[109] The court traced the switchblade's ancestry to the pocketknives commonly carried at the time of the adoption of the

99. Dowlut, *supra* note 30, at 102-05.

100. *Id.* at 100 n.175.

101. *See* Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255 (1985). For a list of works discussing the intent of the framers of the second amendment, see *supra* note 34. Although not drafted contemporaneously with the second amendment, the North Carolina provision on the right to bear arms was based on the second amendment. State v. Dawson, 272 N.C. 535, 545, 159 S.E.2d 1, 9 (1968). The general holding that the second amendment does not apply to the states clearly is not relevant to the provisions in state constitutions because state constitutions are aimed at state governments.

102. "It would be a mockery to say that the Constitution intended to guarantee the right to practice dropping bombs from a flying machine, to operate a cannon throwing missiles perhaps for a hundred miles or more, or to practice in the use of deadly gasses." State v. Kerner, 181 N.C. 574, 576, 107 S.E. 222, 224 (1921).

103. OR. CONST. art. I, § 27.

104. *See supra* note 37 and accompanying text.

105. The Oregon Supreme Court recognized as constitutionally valid "statutes now on the books that concern the manner in which weapons are carried, the intent with which they are carried, the use to which they may not be put and the status of a person that results in forbidding his possessing a weapon." State v. Delgado, 298 Or. 395, 400, 692 P.2d 610, 612 (1984).

106. *See id.* (striking down a statute forbidding possession of a switchblade); State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981) (invalidating law which prohibited possession of a billy club).

107. 298 Or. 395, 692 P.2d 610 (1984).

108. *Id.* at 403, 692 P.2d at 614.

109. *Id.* at 400-01, 692 P.2d at 612. The court set out the proper test for determining a weapon's status as being "whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon's constitution was adopted." *Id.*

Oregon Constitution.[110] The court reasoned that because the legislature lacked the constitutional authority to ban all pocketknives, it could not ban the class of pocketknives known as switchblades.[111] This reasoning stands in stark opposition to *Fennell*'s holding that the legislature may ban an especially dangerous type of shotgun in the interest of public safety even though it could not ban all shotguns.[112] The North Carolina position allowing regulations beyond time, place, and manner restrictions appears more reasonable than Oregon's protection of all weapons traceable to "arms" commonly carried at its constitution's drafting.[113]

At the opposite pole from Oregon, the Illinois courts interpret the Illinois Constitution to grant far less protection to the individual's right to bear arms. The Illinois Constitution provides that "[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."[114] Because North Carolina courts recognize the legislature's power to regulate the right to bear arms to insure the peace and safety of the public,[115] the guarantee of a right to bear arms in Illinois and North Carolina seems similar. In actuality, the courts in the two states interpret the language quite differently. The Illinois Supreme Court in *Kalomidos v. Village of Morton Grove*[116] approved a municipality's total ban on handguns as a valid exercise of police power.[117] The court recognized that handguns were commonly utilized as weapons in Illinois,[118] but decided that a ban on handguns could stand as long as all firearms were not outlawed.[119] A North Carolina court would validate a ban on pistols below a certain size, but would reject a total ban on handguns.[120] The North Carolina courts recognize that unless they closely circumscribe regulations allowing prohibition, the regulations will destroy the right.

The position taken by the North Carolina courts respects the wisdom of the drafters of our constitution on the need for a free people to have access to arms to protect their liberties, while allowing the General Assembly the discretion to protect the public from unreasonable risks. The *Fennell* decision continues the tradition of allowing regulation of arms without abandoning the individual's right to be armed. Of course in a sense any regulation of a right starts us down the slippery slope, but a proper reading of the reasoning in *Fennell* reaffirms that

110. *Id.* at 401-03, 692 P.2d at 613-14.

111. *Id.* at 403, 692 P.2d at 614.

112. *See* State v. Fennell, 95 N.C. App. 140, 144, 382 S.E.2d 231, 233 (1989).

113. *See* Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLINE L. REV. 69, 71 (1986) (criticizing the "lineal descendents" method of determining protected arms).

114. ILL. CONST. art. 1, § 22 (1970).

115. *See supra* notes 85-90 and accompanying text.

116. 103 Ill. 2d 483, 470 N.E.2d 266 (1984) (4-3 decision).

117. *Id.*

118. *Id.* at 498-99, 470 N.E.2d at 273.

119. The court declared the constitutional provision's purpose was "merely to guard against the confiscation of all such arms." *Id.* at 499, 470 N.E.2d at 273.

120. *See* State v. Kerner, 181 N.C. 574, 578, 107 S.E. 222, 225 (1921).

North Carolina courts respect both the individual's right to bear arms, and the need for the State to guard against abuses of that right.

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